

NAFR

**HIGH COURT OF CHHATTISGARH, BILASPUR****CRA No. 1420 of 2021**

1. Amit @ Amir Toppo S/o Nayman Toppo, Aged About 28 Years, R/o Village Sarima, Police Station Shankargarh, District Balrampur- Ramanujganj (C.G.).

**---- Appellant  
(In Jail)****Versus**

1. State Of Chhattisgarh, Through Station House Officer, Police Of Police Station Shankargarh, District Balrampur-Ramanujganj (C.G.).

**---- Respondent**


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|----------------------|---|--------------------------------------|
| For Appellant        | : | Mr. Qamrul Aziz, Advocate.           |
| For Respondent/State | : | Mr. Anand Verma, Dy. Govt. Advocate. |

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**Hon'ble Shri Justice Gautam Chourdiya****Judgment On Board****13/12/2021**

- 1) This appeal is filed under Section 374(2) of Code of Criminal Procedure, 1973 against the judgment of conviction and order of sentence dated 25/09/2021 passed by Additional Session Judge Fast Track Special Court (POCSO Act), Ramanjuganj, District Balrampur (C.G.) in Special Session Case (POCSO) No. 12/2019; whereby the appellant stands convicted and sentenced as under:-

| <b>Conviction</b>                              | <b>Sentences</b>                                                                                |
|------------------------------------------------|-------------------------------------------------------------------------------------------------|
| U/s. 363 of Indian Penal Code (in short "IPC") | R.I. for 5 years & fine of Rs. 5,000/- in default of fine additional Imprisonment for 3 months. |

- 2) As per the prosecution case, on 27/06/2018 the prosecutrix below the age of 18 years was abducted/kidnapped by unknown person. Upon inquiry, father of the prosecutrix Sahinder Yadav came to know that she was seen roaming around in the weekly market with the appellant and that the appellant was also

missing since then. Hence, on suspicion he lodged FIR (Ex.P-1) against the appellant on 07/07/2018 for offence under Section 363 of IPC. During investigation Spot Map Ex. P-2 was prepared by the Police and Spot Map Ex. P-3 was prepared by the Patwari. On 26/01/2019 the prosecutrix was recovered from Borvili Mumbai vide recovery panchnama Ex. P-8 and she was identified by her father Sahinder Yadav and mother Sukhmania as their daughter vide identification panchnama Ex. P-4. After obtaining consent of parents of the prosecutrix (Ex. P-5) she was medically examined by Dr. Shashikala Toppo (PW-04) vide Ex. P-6 where she opined that no definite opinion can be given regarding forcible current intercourse and it can be given after chemical and microscopic analysis of the vaginal slides. However, Doctor noticed that she was carrying pregnancy of about 2½ months. Vide Ex. P-9, the appellant was also medically examined and was found capable of performing sexual intercourse. As per Ex. P-2, Dakhilkharij Register of the Primary School of the prosecutrix was seized where her date of birth is mentioned as 25/01/2004. In her statement under Section 164 of Cr.P.C. (Ex. P-14), the prosecutrix stated that she was having affair with the appellant and she willingly went with him to Mumbai where they performed marriage in Judani Temple and as a result of consensual physical relation with the appellant, she got pregnant. She stated that she is willingly to live with the appellant. Statements of the witnesses were recorded and after completing usual investigation, charge sheet was filed against the appellant under Sections 363, 366, 376(n) of IPC and Sections 5(अ) & 6 of Protection of Children from Sexual Offences Act, 2012 (in short "POCSO Act").

- 3) The Trial Court framed charges against the accused/appellant under Sections 363, 366 & 376(2)(N) of IPC and Section 6 of POCSO Act which were denied by him and he prayed for trial.
- 4) The prosecution in support of its case examined as many as 13 witnesses namely PW-01 Sahinder Yadav (Father of the Prosecutrix), PW-02 Lacchuram Bek, PW-03 Sukhmania

(mother of victim), PW-04 Dr. Shashikala Toppo (Medical Officer), PW-05 Sonamati, PW-06 Nayman Toppo, PW-07 Urmila Lehre (Head Constable), PW-08 Dr. Dinesh Kumar Painkara (Medical Officer), PW-09 Sumit Kumar (Patwari), PW-10 Lohraram (Head Master), PW-11 Prosecutrix, PW-12 Neelam Yadav (Constable) and PW-13 Basant Kumar Ekka (Assistant Sub Inspector/I.O.).The statement of the accused was also recorded under Section 313 of Cr.P.C. in which he denied the circumstances appearing against him in the prosecution case, pleaded innocence and false implicated in this case. No any defence witness was examined on his behalf.

- 5) The Trial Court considering the entire evidence on record acquitted the present appellant of the charges under Sections 366, 376(2)(N) of IPC and Section 6 of POCSO Act and convicted and sentenced him only under Section 363 of IPC as mentioned in para 1 of this judgment.
- 6) Learned counsel for the appellant submits that the Trial Court was not justified in holding the appellant guilty under Section 363 of IPC because the ingredients necessary for attracting the said offence are extremely missing in this case. In her statement under Section 164 of Cr.P.C. the prosecutrix has categorically stated that she accompanied the appellant to Mumbai of her own free will, performed marriage with him in the temple and the act of sexual intercourse between them was consensual. The prosecutrix has totally turned hostile. Through as per Dakhilkharij Register of the Primary School, the date of birth of the prosecutrix is 25/01/2004 but there is nothing to show as to on what basis the said entry was made in the register. The parents of the prosecutrix have also not mentioned any specific date of birth of the prosecutrix and stated that they have no knowledge about the same. Thus, there is no specific and cogent evidence regarding date of birth of the prosecutrix proving her to be minor on the date of incident, as such the appellant deserves to be acquitted of the charge under Section 363 of IPC.

- 7) On the other hand, learned counsel for the State supporting the impugned judgment submits that the Trial Court considering the overall evidence available on record has rightly convicted and sentenced the appellant by the impugned judgment which calls for no interference by this Court.
- 8) Heard counsel for the parties and perused the material available on record.
- 9) PW-11 prosecutrix has stated in her deposition that the appellant did nothing to her and even she denied to have given statement under Section 164 of Cr.P.C. She was declared hostile and did not support the prosecution case at all.
- 10) PW-01 Sahinder Yadav, father of the prosecutrix stated that upon being informed by his wife Sukhmania over mobile phone regarding missing of her daughter, he inquired about her in the vicinity and lodged FIR against the appellant as the villagers had seen the appellant accompanying the prosecutrix at the relevant time. Though in para 4 he states that they were informed by the prosecutrix that the appellant had taken her to Mumbai as his wife but in para 13 he admits that the prosecutrix did not inform them that the appellant had taken her to Mumbai and he volunteers that it was Manoj who informed them that the appellant had taken away the prosecutrix. Further in para 14 he admits that the prosecutrix did not inform him as to by whom she got pregnant.
- 11) PW-02 Lacchuram Bek is a hearsay witness. He states that he did not see the appellant taking away the prosecutrix and he came to know about the incident through other persons. He states that the Police recorded his statement about 6-7 months after the incident and that the Police did not inquire anything from him and his statement was recorded by the Police of their own. Likewise, PW-03 Sukhmania, mother of the prosecutrix is also a hearsay witness.
- 12) PW-04 Dr. Shashikala Toppo medically examined the prosecutrix

on 27/01/2019 vide Ex. P-6 and opined that no definite opinion can be given regarding forcible current intercourse and it can be given after chemical and microscopic analysis of the vaginal slides. However, Doctor noticed her carrying pregnancy of about 2½ months.

- 13) PW-05 Sonamati, wife of the appellant states that the appellant eloped with the prosecutrix to Mumbai where they stayed for 8-9 months and that she had a talk with the appellant over phone where he told that he has spoiled the lives of both and he would keep both of them.
- 14) PW-06 Nayman Toppo, father of the appellant is also a hearsay witness and states that he is making statement before the Court at the instance of the Police.
- 15) PW-07 Urmila Lehre, Head Constable has proved recovery panchnama vide Ex. P-8 of the prosecutrix.
- 16) PW-08 Dr. Dinesh Kumar Painkara medically examined the appellant vide Ex. P-9 and found him capable of performing sexual intercourse.
- 17) PW-09 Sumit Kumar, Patwari has proved the spot map vide Ex. P-3 prepared by him. PW-10 Lohraram, Head Master of the Primary School has proved the Dakhilkharij Register Ex. P-11, Ex. P-12 and Ex. P-11C where the date of birth of the prosecutrix is mentioned as 25/01/2004. PW-12 Neelam Yadav, Constable has proved seizure memo Ex. P-13 whereby the underwear of the prosecutrix worn at the time of incident was seized. PW-13 Basant Kumar Ekka, Investigator Officer has supported the prosecution.
- 18) Close scrutiny of the evidence makes it clear that PW-01 Sahinder Yadav & PW-03 Sukhmania, parents of the prosecutrix as also PW-02 Lacchuram Bek, father-in-law of the appellant, are hearsay witness who came to know about kidnapping of the prosecutrix by the appellant through villagers. According to PW-

01 Sahinder Yadav he was informed by Manoj about kidnapping of the prosecutrix by the appellant but said Manoj has not been examined by the prosecution. Even Manoj has not been cited as a witness in the charge sheet. In this case the prosecutrix has totally turned hostile and not supported the prosecution case. In her statement under Section 164 of Cr.P.C., she has stated that she went to Mumbai with the appellant as she was having affair with him and there they performed marriage in Temple and she had physical relation with him of her own free will as a result of which she got pregnant.

- 19) So far as age of the prosecutrix concerned, PW-01 Sahinder Yadav, father of the prosecutrix states that he has no knowledge about the date of birth of the prosecutrix and he did not submit any document regarding her date of birth at the time of her admission in the School. PW-03 Sukhmania, mother of the prosecutrix has stated that the prosecutrix is aged 15 years but in cross-examination she admits that her eldest daughter is 22 years old and the prosecutrix is her second daughter. She admits that she has no knowledge about exact date of birth of the prosecutrix and they roughly recorded her date of birth in School and did not submit any document regarding her date of birth.
- 20) Though in the Dakhilkharij Register the date of birth is mentioned as 25/01/2004, but on what basis the said date was entered in the register has not been disclosed by the Head Master PW-10 Lohraram. This witness admits in para 5 that in the year 2004 while admitting the children in School the villagers used to misrepresent true age of their children by reducing it so that they could get the benefit in services in future. Thus, there is no specific evidence adduced by the prosecution regarding the age of the prosecutrix to prove that she was below 18 years on the date of incident. In the Dakhilkharij Register the date of birth of the prosecutrix is mentioned as 25/01/2004 but on what basis the said date was entered in the register, there is no evidence to this effect. In these circumstances, the Trial Court was not

justified in holding the prosecutrix below the age of 18 years.

- 21) On the same set of evidence, the Trial Court has acquitted the appellant of the charges under Sections 366, 376(2)(N) of IPC and Section 6 of POCSO Act and therefore considering the overall evidence on record, in particular the evidence of the prosecutrix, it is crystal clear that the prosecutrix had accompanied the appellant of her own free will as there was affair between them and no act of kidnapping was committed by the appellant making him liable for conviction under Section 363 of IPC.
- 22) In the result, the appeal is **allowed**. The impugned judgment holding the appellant guilty under Section 363 of IPC is hereby set aside and he is acquitted of the said charge. He is reported to be in jail, therefore he be set at liberty forthwith if not required to be detained in connection with any other offence.

**-Sd/-**  
**(Gautam Chourdiya)**  
**Judge**

Chandrakant