

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No.965 of 1991

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(SB: Hon'ble Mr. T.P. SHARMA, J)

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Gabrel

Vs.

The State of Madhya Pradesh

POST FOR PRONOUNCEMENT OF THE JUDGMENT ON 30/6/2010

Sd/-  
T.P. Sharma  
Judge



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HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No.965 of 1991

Appellant

Gobrel son of Budhram Ekka, aged about 24 years, resident of Mudapara, Police Station Pathalgaon, District Raigarh.

*Versus*

Respondent

The State of Madhya Pradesh through the Police Station Pathalgaon, District Raigarh.

(Criminal appeal under Section 374 of Cr.P.C.)

SB: Hon'ble Mr. T.P. Sharma, J.

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Present:-

Miss Sharmila Shinghai, counsel for the appellant.

Mr. Sushil Dubey, Govt. Advocate for the State/respondent.

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JUDGMENT

(Delivered on 30<sup>th</sup> June, 2010)

1. Challenge in this appeal is to the judgment of conviction & order of sentence dated 3.10.1991 passed by the 1<sup>st</sup> Additional Sessions Judge, Raigarh, in Sessions Trial No.160/90, whereby & whereunder learned 1<sup>st</sup> Additional Sessions Judge after holding the appellant guilty for the offence punishable under Sections 363, 366A & 376 of the Indian Penal Code sentenced him to undergo rigorous imprisonment for three years, rigorous imprisonment for three years and rigorous imprisonment for five years.
2. Conviction is challenged on the ground that the trial Court has not considered the age of the prosecutrix and the fact that she is a consenting party and thereby committed illegality.
3. Case of the prosecution, in brief, is that the prosecutrix (PW-1) (name not mentioned) was aged about 15 years on 6.7.90. On 6.7.90 while the prosecutrix was coming from market at about 12 at noon the



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appellant caught hold her and committed rape with her, he threatened the prosecutrix and took her with him to Raigarh and committed intercourse regularly with her without her will and consent and as a result of such intercourse, she conceived and gave birth of child. Her father Sukhna (PW-2) lodged the F.I.R. vide Ex.P/2 relating to kidnap and abduction of his daughter. On 25.7.90, the prosecutrix was recovered from the house of the appellant vide Ex.P/10. She was sent for medical examination. She was examined by Dr.Smt.Lata Sameul vide Ex.P/19A and found that she was having pregnancy of about three months. Her x-ray was conducted by Dr.M.D.Joshi (PW-6) vide Ex.P/6 and her age was opined between 16  $\frac{1}{2}$  to 18 years. Document relating to age of the prosecutrix was seized vide Ex.P/3 and was given in Supurdnama vide Ex.P/4. Document relating to age of the prosecutrix was also seized vide Ex.P/5. The accused/appellant was examined by Dr.G.K.Verma (PW-7) and was found capable for committing sexual intercourse. Document relating to age of the prosecutrix Ex.P/12 was also seized from Christian Missionary vide Ex.P/11. Admission register of the prosecutrix was seized vide Ex.P/13 and copy is Ex.P/14A. Copy of transfer certificate is Ex.P/15A. Spot map was prepared vide Ex.P/18.

4. Statements of the witnesses were recorded under Section 161 of the Code of Criminal Procedure, 1973 (in short 'the Code') and after completion of investigation, charge-sheet, was filed before the Judicial Magistrate First Class, Dharamjaigarh, who in turn committed the case to the Court of Sessions, Raigarh, from where learned 1<sup>st</sup> Additional Sessions Judge, Raigarh received the case on transfer for trial.
5. In order to prove the guilt of the accused/appellant, the prosecution has examined as many as 17 witnesses. The accused/appellant was examined under Section 313 of the Code where he denied the

circumstances appearing against him and claimed innocence and false implication in the crime in question. The appellant has taken specific defence that the prosecutrix whose age was more than 18 years on the date of the alleged incident herself has left her parental house and went to the house of the appellant, she resided with the appellant as his wife, she has lodged the report against her father Ex.D/1 and executed affidavit vide Ex.D/2. The appellant has also examined defence witness Ratiram in support of his evidence.

6. After providing opportunity of hearing to the parties, learned 1<sup>st</sup> Additional Sessions Judge, Raigarh has convicted & sentenced the appellant as aforementioned.
7. I have heard learned counsel for the parties, perused the judgment impugned and record of the trial Court.
8. Learned counsel for the appellant vehemently argued that in the present case the appellant has not disputed the relation with the complainant/prosecutrix. The prosecutrix herself has left her parental house and went to the house of the appellant and resided with him as his wife. When her father lodged the report against the prosecutrix, then she also lodged the report against her father vide Ex.D/1 to police station Pathalgaon. She has also executed the agreement which shows that she has married with the appellant. On the date of incident, the age of the prosecutrix was not below 16 years, but at that time she was more than 18 years. The prosecution has not proved the fact that at the time of incident age of the prosecutrix was below 18 years.
9. Learned counsel placed reliance in the matter of **State of Himachal Pradesh v. Suresh Kumar alias Chhotu<sup>1</sup>** in which the Apex Court has held that in case, the age of the prosecutrix was not found below 16



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years and she was a consenting party, offence under Sections 363, 366 & 376 of the Indian Penal Code not made out. Learned counsel further placed reliance in the matter of Shyam and another v. State of Maharashtra<sup>2</sup> in which the Apex Court has held that in case, the prosecutrix not putting up struggle or raising alarm at the time of alleged abduction and prosecutrix appears to be willing party to go with accused on her own, then culpability of accused not established and conviction not sustainable.

10. On the other hand, learned State counsel supported the judgment impugned and argued that by adducing cogent and reliable evidence the prosecution has proved the case that age of the prosecutrix was below 16 years on the date of commission of the offence, therefore, question of will and consent is immaterial. The prosecutrix was found in the house of the appellant and she has been subjected intercourse by the appellant. The prosecution has proved its case beyond all shadow of doubt and the trial Court has rightly convicted & sentenced the appellant for the offence punishable under Sections 363, 366A & 376 of the Indian Penal Code.
11. In order to appreciate the arguments advanced on behalf of the parties, I have examined the material available on record.
12. As regards the question of age of the prosecutrix, while examining the prosecutrix (PW-1) on 27.5.1991, the Court has assessed her age as 15 years. Sukhna (PW-2), father of the prosecutrix, has also deposed in his evidence that age of the prosecutrix is 15 years and at that time she was studying in class-VI. Document relating to school certificate has been seized. Rajesh (PW-3), brother of the prosecutrix, has also deposed in his evidence that age of the prosecutrix is 15 years. As per the evidence of Dr.M.D.Joshi (PW-6) and x-ray report, her age was between 16  $\frac{1}{2}$  to 18 years and variation



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of 3 years not possible. The prosecution has also examined Satyanand (PW-12), Headmaster Sukra Ram (PW-13) and Headmaster Pancham Lal Namdeo (PW-14) and documents relating to age i.e. Exs.P/14A and P/15A which reveal the date of birth of the prosecutrix as 10.4.1975. Headmaster Pancham Lal Namdeo (PW-14) has admitted in para 5 of his cross-examination that he has not recorded the age of the prosecutrix in Ex.P/14A and date of birth of the prosecutrix was recorded on the basis of certificate of 5<sup>th</sup> Board which shows that Ex.P/14A is secondary evidence and date of birth was recorded on the basis of board certificate. The prosecution has not collected the said document. The prosecution has also examined Markush Kujur (PW-10) and Silwanush Beag (PW-11), Father of Catholic Ashram, Pattalgaon relating to seizure of Ex.P/12 vide seizure memo Ex.P/11. As per evidence of Silwanush Beag (PW-11), Ex.P/12 is prepared by this witness which reveals that date of birth of the prosecutrix is 15.4.1972. Investigating officer R.P.Pandey (PW-15) has deposed in his evidence that he has seized document relating to age of the prosecutrix from S.K.Beag vide Ex.P/11. In para 9 of his cross-examination, he has specifically admitted that he has not voluntarily written date of birth of the prosecutrix as 15.4.1992 and register No.72/229 which finds place in Ex.P/10.

13. Sukhna (PW-2) has deposed in para 5 of his evidence that at the age of 6 years, the prosecutrix was admitted in school. He has further deposed in para 9 of his evidence that he has never intimated date of birth of his daughter to church. As per Ex.P/12 date of birth of the prosecutrix is 15.4.1972 and as per secondary evidence Exs.P/14A and P/15A, date of birth of the prosecutrix is 10.4.1975. She was admitted in school at the age of 6 years. As per evidence of the prosecutrix (PW-1), at the time of incident she was studying in class-VI and the incident took place in July, 1990.



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14. If this evidence is considered, then the age of the prosecutrix on the date of incident would be 6 years (on the date of admission in school + 6 years because she was studying in class-VI = 12 years), but as per school document on the date of incident her age was 15 years and 3 months. The aforesaid evidences are contradictory to each other. The prosecution has collected the document relating to age i.e. Ex.P/12. As per Ex.P/12, her date of birth is 15.4.1972 and on the date of incident her age was about more than 18 years.
15. In case of marginal age or in case of rape and offence with the person below the age of 16 years, the prosecution is required to prove the fact by adducing cogent evidence that on the date of incident the prosecutrix was minor i.e. below the age of 16 years and not above the age of 16 years. Reason best known, therefore, the prosecution has not filed primary document relating to age like birth register (kotwari panji and primary school register), but relied upon the secondary evidence and also relied upon Ex.P/12. Dr.M.D.Joshi (PW-6) has also examined the prosecutrix. As per his evidence, age determined on the basis of radiological test is between  $16 \frac{1}{2}$  to 18 years with variation of 3 years on each side.
16. In these circumstances, it is difficult to hold that on the date of incident age of the prosecutrix was below 16 years. The evidences of the prosecutrix (PW-1), defence witness Ratiram (DW-1) and Ex.D/2 affidavit are sufficient for drawing inference that the present appellant has committed sexual intercourse with the prosecutrix on the pretext of marriage, they were residing at Raigarh and she conceived and gave birth.
17. Sukhna (PW-2), father of the prosecutrix, himself has admitted in para 7 of his cross-examination that his daughter herself used to say that she will marry with the accused. Ex.D/1 report lodged by the prosecutrix against her father. Ex.D/2 affidavit also reveals that the



prosecutrix was a consenting party, she was residing with the appellant as a wife and she had married with the appellant which finds support by the evidence of Ratiram (DW-1).

18. In case of rape, abduction and kidnap, the prosecution is required to prove the fact that without any will and consent the accused has committed intercourse with the prosecutrix whose age is below 16 years. The prosecutrix is also required to prove the fact that the accused has kidnapped and abducted the prosecutrix from the parental shelter and from custody of her parents, but the evidences of the prosecutrix, Sukhna (PW-2), report Ex.D/1 and affidavit Ex.D/2 reveal that the prosecutrix herself has left her parental shelter and had gone with the accused and married with the accused. The accused has not committed any sexual intercourse on the pretext of marriage with the prosecutrix and subsequently, he has not cheated her, but has committed sexual intercourse as his wife.
19. As held by the Apex Court in the matter of Suresh Kumar alias Chhotu (supra), accompanying of prosecutrix with accused who is above 16 years is not a offence of kidnapping or abduction and factum of consent can be safely inferred. Para 13 of the said judgment reads as under:-

"13. We find that the High Court was justified in its conclusions about the prosecutrix having accompanied the accused on her own and being a consenting party to the sexual acts. As rightly contended by learned counsel for the State, if the age of the prosecutrix was below 16 years, the consent would be of no consequence. But the High Court's findings as regards the age of the prosecutrix cannot be said to be without any basis. The High Court has analysed the oral evidence and the documentary evidence to come to a conclusion that the date of birth of the prosecutrix as claimed by the prosecution has not been established. That being so, we find no merit in this appeal which is accordingly dismissed."



20. While dealing with the same question, the Apex Court in the matter of Shyam and another (supra) has held that in the absence of any struggle or alarm at the time of taking the prosecutrix by the accused, willingness of the accused may be inferred.
21. In the present case, no such struggle or alarm has been raised by the prosecutrix, she was residing with the accused, she has lodged report against her father and has executed affidavit, but when report was lodged by her father, then the entire scenario of the case was turned.
22. In this case, considering the case of will, consent and age of the prosecutrix, the act of the appellant does not fall within the admit of the offence punishable under Sections 363, 366A & 376 of the Indian Penal Code.
23. While convicting the appellant under Sections 363, 366A & 376 of the Indian Penal Code learned 1<sup>st</sup> Additional Sessions Judge, Raigarh has not considered the evidence relating to absence of presence of will and consent, living of the prosecutrix with the accused without any resistance, lodging of report to the police where ample opportunity was available to her at police station and thereby committed illegality.
24. For the foregoing reasons, conviction & sentence of the appellant are not sustainable under the law. Consequently, the appeal is allowed. Conviction & sentence of the appellant under Sections 363, 366A & 376 of the Indian Penal Code are hereby set aside. He be set at liberty at once.

Sd/-  
T.P. Sharma  
Judge