
(2012) 03 CHH CK 0034
In the Chhattisgarh High Court
Case No : Criminal Appeal No. 2611 of 1997

Bhagbali

APPELLANT

Vs

State of Madhya Pradesh (Now Chhattisgarh)

RESPONDENT

Date of Decision : 30-03-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Penal Code, 1860 (IPC) — Section 363, 366, 376, 376(1)

Citation : (2012) 3 CGBCLJ 90 : (2012) 3 Crimes 445

Hon'ble Judges : Gulam Minhajuddin, J

Bench : Division Bench

Advocate : R.K. Jain, for the Appellant; Ajit Singh, Panel Lawyer for the State, for the Respondent

Final Decision : Allowed

Judgement

G. Minhajuddin, J.—This is a jail appeal preferred by the appellant against the judgment of conviction and order of sentence dated 5.11.1997 passed by the Additional Sessions Judge, Baloda Bazar, Distt Raipur, in S.T. No. 11/97, convicting the appellant under Sections 363 and 366 of the Indian Penal Code and sentencing him to undergo RI for 3 years, to pay a fine of Rs. 1,000 and in default thereof, to undergo additional RI for 6 months on both counts. In addition thereto, the appellant has been convicted u/s 376(1) of the IPC and sentenced to undergo RI for 7 years, to pay a fine of Rs. 5,000, in default thereof, to undergo additional RI for 1 year. All the sentences have been directed to run concurrently. Case of the prosecution, in brief, is that on 3.6.1996, the prosecutrix (PW 4), aged about 15 years, had gone to market alongwith her mother Khorbahrinbai (PW 2). Khorbahrinbai (PW 2) asked the prosecutrix to bring bidi from the appellant whereupon the prosecutrix brought bidi from the appellant and gave it to her mother. Thereafter, the prosecutrix having informed her mother Khorbahrinbai (PW 2) that the appellant is calling her, went to the appellant. However, even after waiting for one hour, when the prosecutrix did not return, Khorbahrinbai (PW 2) returned home, assuming that the prosecutrix might have

stayed somewhere with her acquaintances. When the prosecutrix did not return in the night, she was searched in the village, enquiry was made from the relatives as also in Village Tohdi of the appellant, but she could not be traced. Thereafter, a report (Ex. P2) was lodged in Police Station Bhatapara (Rural) on 23.6.1996 by Bisalik Nishad (PW 3), father of the prosecutrix, against the appellant with the allegation that the appellant has eloped with the prosecutrix on the enticement of marriage. The FIR was registered by PW 9 Krishna Pandey, the then Station House Officer, and thereafter, the investigation was commenced.

2. Krishna Pandey (PW 9), the SHO, having obtained permission from the Sub-Divisional Magistrate for medical examination of private part of the prosecutrix, sent the prosecutrix to Dr. Smt. Reeta Chaba (PW 1), who, after medical examination, gave the report of Ex. P1. The appellant was also got medically examined by Dr. Rajesh Awasthi (PW 5) and his medical report is Ex. P6. Birth certificate of the prosecutrix was seized from Sukhdas, Kotwar (PW 8) as per Ex. P7. During investigation, statements of Khorbahrinbai, Bali Kenwat, the prosecutrix, Pardeshi and Teejkunwar were recorded by the investigating officer Krishna Pandey (PW 9). After completing investigation, charge sheet was filed against the appellant for the offence punishable under Sections 363, 366 and 376 of the IPC before the Additional Chief Judicial Magistrate, Balouda Bazar, who, in turn, committed the same to the Court of Sessions Judge, Raipur, from where it was received on transfer by the Additional Sessions Judge for trial.

3. On charges under Sections 363, 366 and 376 being framed and read over to the appellant, the appellant denied the charges. The prosecution in order to prove guilt of the appellant examined as many as 9 witnesses. On being examined u/s 313 of Cr.P.C., the appellant denied the circumstances appearing in evidence against him, pleaded innocence and false implication.

4. However, learned trial Court after hearing counsel for the respective parties and considering the material available on record, by the impugned judgment convicted and sentenced the appellant, as mentioned above.

5. Heard learned counsel for the parties, perused the record of the trial Court as well as the impugned judgment.

6. The question to be decided in this appeal is--Whether the appellant is guilty of removing the prosecutrix (PW 4), who was said to be less than 16 years of age on the date of incident, from the custody of her lawful guardian, without the consent of such guardian, with an intent to commit illicit sexual intercourse with her against her will and without her consent?

7. As per the prosecution case, the prosecutrix (PW 4) was under 16 years of age on the date of incident i.e. 3.6.1996 and the appellant with intent to commit illicit sexual intercourse with her had removed her from the custody of her lawful guardian--father Bisaliram without his consent and had taken her to various places, lastly to Delhi, and had committed sexual intercourse with her, against her will and without her consent.

8. In respect of the incident, the prosecutrix (PW 4) has stated that on the date of incident i.e. 3.6.1996, she had gone to market of Village-Sarega alongwith her mother Khorbahrinbai (PW 2) and on the direction of her mother, she had given money to the appellant for bringing Bidi on which the appellant had brought Bidi and the same was handed over by the prosecutrix to her mother. Thereafter, the prosecutrix (PW 4) after telling her mother that the appellant has called her had gone away. The statement of the prosecutrix (PW 4) finds corroboration from the statement of her mother Khorbahrinbai (PW 2), who has stated that after handing over Bidi to her, the prosecutrix (PW 4) had gone away saying that the appellant has called her and after that, the prosecutrix did not return and therefore, after waiting for some time she (PW 2) returned back to her home. She has further stated that on being enquired by her husband Bisaliram (PW 3), she told him that her daughter (prosecutrix) had gone to the appellant and as she did not return even after a considerable time, she (PW 2) had come back.

9. The prosecutrix (PW 4) has stated that the appellant first took her towards Badi and after that to his sister's house where they stayed at the night and from there the appellant had taken her to Bilaspur against her wishes by intimating her and thereafter, from Bilaspur she was taken to Delhi by train. She has further stated that she remained at Delhi for about 15 days at the house of the appellant's daughter and son-in-law and during this period, the appellant committed sexual intercourse with her 4-5 times against her will and without her consent and whenever she used to refuse to submit to sexual intercourse, the appellant used to threaten her that he will kill her. She has further stated that after remaining for some days alongwith the appellant at the house of his daughter and son-in-law, the appellant was driven away by the neighbours and after that, they remained at Delhi for about 8 days and returned back alongwith Bali (PW 7), who is brother of the appellant, to his village and thereafter, Bali (PW 7) informed her (prosecutrix) parents, on which her father Bisaliram (PW 3) came alongwith police and she was taken back.

10. The incident has been shown to be of 3.6.1996. As per prosecution case, the prosecutrix was less than 16 years of age on the date of incident. From the statement of the prosecutrix as well as her parents i.e. mother Khorbahrinbai (PW 2) and father Bisaliram (PW 3), it is found that they are illiterate and not in a position to tell the date, month or year of birth of the prosecutrix. From the evidence adduced, it is found that after taking permission of the SDM and obtaining consent of Bisaliram (PW 3), father of the prosecutrix, that the prosecutrix was got medically examined by Dr. Smt. Reeta Chaba (PW 1). Dr. Smt. Reeta Chaba (PW 1) has stated that after examining the prosecutrix (PW 4), she had given the report EX. P1 and has also advised for ossification test for ascertaining the age of the prosecutrix. From the statement of this doctor (PW 1) and her report Ex. P1, it is found that on medical examination, no external or internal injury was found on the body of the prosecutrix, her vagina was admitting two fingers easily, there was an old rupture of hymen and she was habituated to sexual intercourse.

11. From the statement of Krishna Pandey, IO (PW 9), it is found that although Dr. Smt. Reeta Chaba (PW 1) had advised for ossification test for determining the age of the prosecutrix, but the same was not got done by the investigating officer. As such, regarding age of the prosecutrix, the only evidence available on record is the statement of Kotwar Sukhdas (PW 8) and Krishna Pandey, IO (PW 9), according to whom, the Kotwar register was seized on 16.8.1996 by him from Kotwar Sukhdas (PW 8) vide Ex. P7, in which date of birth of the prosecutrix as per statement of Kotwar Sukhdas (PW 8) has been recorded as 23.7.1981. Kotwar Sukhdas (PW 8) has nowhere stated that as to on whose information he had recorded the date of birth of the prosecutrix in the Kotwar register. Copy of the entries of Kotwar register is neither available on record, nor the original Kotwar register was produced by Kotwar Sukhdas (PW 8) on the date when his statement was recorded. Khorbahrinbai (PW 2) and Bisaliram (PW 3), parents of the deceased, have nowhere stated that they had got the date of birth of their daughter/prosecutrix recorded in the Kotwar register. As such, the date of birth i.e. 23.7.1981 as recorded in the Kotwar register by Kotwar Sukhdas (PW 8) cannot be relied upon for the purpose of ascertaining the age of the prosecutrix on the date of incident i.e. 3.6.1996.

12. For the offences under Sections 363 and 366 of the IPC, the burden of proving that the prosecutrix was below 18 years of age on the date of incident and that with intent to commit illicit sexual intercourse, she was removed out of the custody of her lawful guardian, without the consent of such guardian, is on the prosecution. For the purpose of Section 376 of the IPC, the burden of proving that the prosecutrix was below 16 years of age and the accused had committed sexual intercourse with her, is on the prosecution. However, from perusal of the evidence available on record, it is evident that the prosecution has not been successful in proving that on the date of incident i.e. 3.6.1996, the prosecutrix (PW 4) was, either below 18 years or 16 years of age.

13. So far as removal of the prosecutrix (PW 4) from the custody of her lawful guardian without the guardian's consent with intent to commit illicit sexual intercourse with her by the appellant is concerned, from the statement of the prosecutrix (PW 4) it is found that she had accompanied the appellant firstly to the house of the appellant's sister, where they stayed at night and from there, she proceeded to Bilaspur alongwith the appellant and thereafter, by train they left for Delhi and remained there for about 15 days at the house of appellant's daughter and son-in-law. From the statement of the prosecutrix (PW 4), it is found that on way as well as during her stay at various places, she had met a number of persons, including police personnel at Bilaspur railway station, but it is no point of time, she had complained to anyone that she is being taken forcibly under threat by the appellant and the appellant is committing sexual intercourse with her against her wishes and without her consent. She has stated that whenever she used to resist or refuse to submit to sexual intercourse, the appellant used to threaten her that he will kill her. However, in this regard there are material omissions in her diary statement (Ex. D2) recorded u/s 161 of

Cr.P.C., with which she has been confronted during her cross-examination and the said omissions have been duly proved by Krishna Pandey. IO (PW 9). In addition to this, Khorbahrinbai (PW 2), mother of the prosecutrix, has stated in para-3 of her statement that when her daughter/prosecutrix returned after about 20-22 days, she had only told her that the appellant had taken her saying that they will go to Badi. This witness (PW 2) has specifically stated in para-3 of her statement that except this, her daughter/prosecutrix had not told her anything else. Bisaliram (PW 3), father of the prosecutrix, has also not stated anything that after return his daughter/prosecutrix had told her that under threat, the appellant had taken her and during stay, he used to commit sexual intercourse with her against her will and without her consent. Thus, from the overall conduct of the prosecutrix during her stay with the appellant for a period of about 20-22 days, it is found that she had voluntarily accompanied the appellant and sexual intercourse, if any, was committed with her, then for that she was a consenting party.

14. For the reasons stated above, I am of the opinion that on the basis of evidence available on record, the prosecution has not been able to prove that the appellant is guilty of the offence punishable under Sections 363, 366 and 376 of the IPC and as such, the impugned judgment of the trial Court convicting and sentencing the appellant under the aforesaid sections is liable to be set aside. In the result, the appeal is allowed. The impugned judgment of the trial Court is set aside. The appellant is acquitted of the charges under Sections 363, 366 and 376 of the IPC. He is on bail, therefore, his bail bonds are cancelled and he is set at liberty. The fine amount, if deposited, shall be refunded to the appellant.