

(2023) 08 CHH CK 0001
In the Chhattisgarh High Court
Case No : Criminal Appeal No. 1294 Of 2003

Santosh Yadav

APPELLANT

Vs

State Of Chhattisgarh

RESPONDENT

Date of Decision : 02-08-2023

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 313, 437A
Indian Penal Code, 1860 — Section 34, 361, 366, 368, 376, 493
Evidence Act, 1872 — Section 35

Citation : (2023) 08 CHH CK 0001

Hon'ble Judges : Sanjay Kumar Jaiswal, J

Bench : Single Bench

Advocate : Manoj Paranjpe, Prasoon Agrawal, Sanjay Pathak

Final Decision : Allowed

Judgement

1. The present appeal arises out of the impugned judgment of conviction and order of sentence dated 29.11.2003 passed by the learned Sessions Judge, Durg, District Durg (C.G.), in Sessions Trial No.102 of 2003 whereby, the learned Sessions Judge, convicted the appellants and sentenced them as under : -

Name of appellant

Conviction

Sentence

Appellant No.1 Santosh Yadav

under Section 363 of Indian Penal Code, 1860.

Rigorous imprisonment for 2 years and fine of Rs.50/-, in default of payment of fine amount, additional rigorous imprisonment for 1 month.

Appellant No.2 Chhotu @ Jai Singh

under Section 363/34 of Indian Penal Code, 1860.

Rigorous imprisonment for 2 years and fine of Rs.50/-, in default of payment of fine amount, additional rigorous imprisonment for 1 month.

2. The case of the prosecution is that on 31.01.2003, on the pretext of marriage, appellant No.1-Santosh Yadav took the minor prosecutrix (PW-4) in a train from Durg Railway Station to the house of co-accused -Sagar at Tatanagar, in which appellant No. 2-Chhotu @ Jai Singh assisted him, where appellant Santosh Yadav repeatedly committed sexual intercourse with the prosecutrix for 12 days. Later on, the appellant Santosh Yadav brought the prosecutrix back to Durg and missing report of prosecutrix was lodged. Thereafter, the Police lodged the First Information Report, investigated the matter and charged sheet was filed against the appellants.

3. In order to prove its case, prosecution has examined as many as 14 witnesses. The appellants adjured their guilt and in their statements recorded under section 313 of Cr.P.C. they stated that they are innocent and have been falsely implicated in the case. In defence, accused persons were examined only one witness.

4. The trial Court acquitted the co-accused Sagar Yadav for the offence punishable under Section 368 of IPC considering the evidence presented by the parties. Appellant Santosh Yadav was acquitted for the offence punishable under Sections 376 and 493 of IPC. Both the appellants were acquitted for the offence punishable under Section 366/34 of IPC and both of them were convicted and sentenced as shown in paragraph-1 of the judgment, against which, this appeal has been presented.

5. Learned counsel for the appellant submits that prosecutrix (PW-4) was not taken away by instigation of the appellants and she left the house from her own free will. He further submits that prosecution has failed to establish that prosecutrix was below 18 years of age on the date of occurrence, hence, offence of kidnapping is not made out. To buttress his submission, he placed reliance in case of S. Varadarajan v. State of Madras reported in AIR 1965 SC 942.

6. Per contra, learned counsel for the State opposes the appeal and supported the impugned judgment. He submits that finding of trial Court is based on proper appreciation of marshelling of evidence and the same is not liable to be interfered with while invoking the jurisdiction of appeal.

7. I have heard learned counsel appearing for both the parties and considered their rival submissions made herein-above and also went through the records with utmost circumspection.

8. First of all, if we look at the statement of prosecutrix (PW-4), she stated that when she returning from tuition due to stomach pain, appellant Santosh and Chhotu met her near railway gate, then, they asked her to walk with them and she came to Durg railway station with them. She left with appellant Santosh to Tata by train at 11.30 AM, where she stayed at Sagar's house for about 12 days.

She returned back to Titurdih, Durg with appellant Santosh. Appellant Santosh and his father took her to Chikhli in same night and from where, she came back to her village. During this period, several times, appellant committed sexual intercourse with her. She did not told the incident to anybody. Her date of birth was 27.06.1986 and at the time of incident, she was studying at Class-IX.

9. In cross-examination, prosecutrix has admitted the suggestion that appellant Santosh is her neighbour, they both were having love affair, they used to meet secretly and wrote love letters to each other. She further admitted that she received a marriage proposal from another place, which she had told to appellant Santosh. Then, after meeting with appellants Santosh and Chhotu, she decided that when she returned back from tuition, they would go together. She also kept a pair of clothes with her. On the date of incident, she had given her cycle to appellant Chhotu and then they went to railway station via road from railway gate, where appellant Chhotu booked the train ticket. There are two squares in between where policemen were lived and there is always a crowd, but she did not tell anything to anybody. The train came after an hour. She did not tell anything to people present in platform of railway station or to policemen. They reached Tata after 24 hours. She neither told anything to TTE or passengers nor did she try to run. They went to Sagar's house, where his sister and girls were present, where, she stayed well. She has also admitted that appellant Santosh had physical relationship with her consent. She went Tata with Santosh from her own free will and came back with Santosh from her own free will.

10. In case of S. Varadarajan (supra), the Hon'ble Supreme Court while dealing with the issue of taking a minor without permission or consent of the parents, observed in paragraphs No. 9 and 10 as follows :-

"9. It must, however, be borne in mind that there is a distinction between "taking" and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstances can the two be regarded as meaning the same thing for the purposes of Section 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.

10. It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. In our opinion, if evidence to establish one of those things is lacking it would not be legitimate to infer that the accused is guilty of taking the

minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. No doubt, the part played by the accused could be regarded as facilitating the fulfillment of the intention of the girl. That part, in our opinion, falls short of an inducement to the minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to "taking".

11. Considering the statement of prosecutrix in the light of above precedent, it is crystal clear that prosecutrix has been a consenting party. No coercion was done with her. As per pre-arranged plan with appellants, she returned early on the pretext of tuition and went to railway station voluntarily. Thus, it is apparent from her entire statement that she has been a consenting party. No separate effort has been made by appellants to take her from her home or from custody of her guardian.

12. If the prosecutrix is consenting party, then offence of kidnapping from lawful guardianship under Section 363 of IPC would be made out when the prosecutrix was below 18 years of age. Now, it is to be seen whether the finding arrived at by the trial Court that prosecutrix was below 18 years of age on the date of occurrence, has been justified or not ?

13. In this regard, perusal of the record would show that father of prosecutrix is said to have been died. The date of birth of child is definitely and naturally known to parents in a better way. The date of birth of child is based on information given by parents / guardians or they can give information based on the date recorded in school or other institutions. In the instant case, Smt. Manju (PW-5), mother of prosecutrix has failed to state the year of birth of her daughter. She stated that date of birth of prosecutrix is July, 27 on the basis of memory. On the basis of other evidence presented by prosecution, i.e., admission register of school, in which, her date of birth is recorded as 27.06.1986. It is apparent from the record that mother of prosecutrix has stated the date of birth according to her memory, but instead of 'June', she mentioned the month as 'July'. From the above, it can be said that mother of prosecutrix Smt. Manju (PW-5) has failed to give exact date of birth of prosecutrix.

14. In this regard, ossification test has also been conducted to determine the age of prosecutrix. Dr. A.K. Sahu (PW-7) after examining X-ray plate No.2027 of prosecutrix, gave its report vide Ex.P/11. On the basis of X-ray examination of her right wrist, elbow and waist, he has ascertained the age of prosecutrix to be 16 years. In cross-examination, he has accepted the suggestion that according to Modi's Jurisprudence, there can be a decrease or increase of two years in age on the basis of food and living conditions. Thus, looking to the opinion of Dr. AK Sahu (PW-7), age of prosecutrix was about 14 to 18 years. Thus, on the basis of said investigation report, it does not come to a definite conclusion that age of prosecutrix was less than 18 years on the date of alleged incident.

15. To ascertain and prove the age of prosecutrix, police has seized admission register of the school. Rajkumar Gupta (PW-12), who was Accountant of Tularam Arya Girls Higher Secondary School, Durg has presented the school's admission register vide Ex.P/16, in which, at Sl.No.10916, date of birth of prosecutrix is recorded as 27.06.1986. The prosecutrix herself has stated the same date of birth in her statement, which shows that she has stated the date of birth only on the basis of date mentioned in school. According to Ex.P/16,, she was admitted in class VIII at Tularam Arya Girls Higher Secondary School, Durg. Rajkumar Gupta is Accountant of school and he is not a Teacher. In cross-examination, he has admitted that admission register is maintained by Teachers of school. He has also admitted that he cannot state that who made the said entry in school admission register. He admitted that date of birth was entered in school admission register on the basis of transfer certificate of prosecutrix. Thus, it is clear that said admission register does not belong to primary school of prosecutrix. The Teacher or Headmaster, who entered the date of birth of prosecutrix has not been examined and no such document has been produced, on the basis of which, her date of birth was recorded in school admission register.

16. Mother of prosecutrix Smt. Manju (PW-5) has stated in her cross-examination that she herself had gone to enroll the prosecutrix in school and at the time of admission in Primary School, Kasaridih, she had taken the birth certificate from Kotwar of village Anda Risama. The birth certificate was not produced before the Court on behalf of her or on behalf of the school. Rajkumar Gupta (PW-12), who produced the school admission register, has not stated that date of birth has been mentioned in school admission register on the basis of entry in Kotwari register.

17. The Hon'ble Supreme Court in case of Alamelu and Another v. State represented by Inspector of Police reported in (2011) 2 SCC 385, observed as follows :-

"40. The transfer certificate has been issued by a government school and has been duly signed by the Headmaster. Therefore, it would be admissible in evidence under Section 35 of the Evidence Act, 1872. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the girl in the absence of the material on the basis of which the age was recorded. The date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined."

18. Considering the facts and circumstances of the instant case in the light of above judicial precedent, school admission register (Ex.P/16) proved by Rajkumar Gupta (PW-12) is admissible in evidence under Section 35 of the Indian Evidence Act, 1872. But, it is not a primary school register. The enrolling mother herself has not given the correct month of birth of prosecutrix and is unable to give the year of birth. The Accountant Rajkumar Gupta (PW-12), who presented the school admission register has not made entry himself in the

register and statement of person, who is making entry in it, has not been examined. The school admission register is not of Primary School, but is of Higher Secondary School, in which, date of birth has been entered on the basis of transfer certificate. According to mother of prosecutrix Smt. Manju (PW-5), Kotwari register has not been produced. According to ossification test, age of prosecutrix may be 18 years.

19. Taking overall facts and circumstances of the case in the light of above case laws, it is proved that prosecution has failed to establish its case beyond reasonable doubt and conclusive evidence that age of prosecutrix was less than 18 years at the time of occurrence, is not proved.

20. From the analysis of above-mentioned evidence, it is apparent that prosecutrix is consenting party to the incident and as such, offence of kidnapping under Section 363 of IPC is not made out. Therefore, finding of trial Court in this regard, is not found to be sustainable in the eyes of law.

21. In the result, the appeal is allowed. The judgment of conviction and order of sentence is set-aside. The appellants are acquitted of the charges framed against them under Sections 363 and 363/34 of IPC by giving benefit of doubt. The appellants have been stated to be on bail, they need not surrender before the trial Court. However, their bail bonds shall remain in force for a period of six months in view of provision contained in Section 437-A of CrPC. If there is no need to appear in the Superior Court, they will be deemed free from bail bonds. If the appellants have deposited the imposed fine amount, the same shall be returned to them.

22. Record of the trial Court be sent back along with a copy of this judgment forthwith for information and necessary compliance.