
(2012) 02 CHH CK 0024
In the Chhattisgarh High Court
Case No : Acquittal Appeal No. 156 of 2010

State of Chhattisgarh

APPELLANT

Vs

Omkar Prasad and Another

RESPONDENT

Date of Decision : 03-02-2012

Acts Referred:

Penal Code, 1860 (IPC) — Section 361, 363, 366, 376, 376(1)

Citation : (2012) 2 CGBCLJ 442

Hon'ble Judges : I.M. Quddusi, J;Gulam Minhajuddin, J

Bench : Full Bench

Advocate : Vinay Harit, Deputy A.G, for the Appellant; Shivendu Pandya, for the Respondent

Final Decision : Dismissed

Judgement

I.M. Quddusi, J.—This appeal has been filed against the judgment and order dated 31.01.2008 passed by the Addl. Sessions Judge, Khairagarh, District Rajnandgaon, in Sessions Trial No. 86/2007 acquitting the respondents) of the charges for the offence punishable u/s 363, 366 & 376(1) & Section 506 (Part-II) of Indian Penal Code. The prosecution story is that one Thakurram has filed a missing report in Police Station Bakarkatta stating that his daughter Duleswari was missing since morning of 07.02.2005. The police received the information that accused Omkar Prasad, son of Shivram enticed away the prosecutrix and kept her in Baloda. On the basis of the said information, the prosecutrix was recovered from the possession of Omkar Prasad. During investigation the statements of prosecutrix and other witnesses were recorded. The police registered offence against the accused for the offence punishable under sections 363, 366, 376 and 506 Part-II IPC OIL the basis of statement of prosecutrix that accused Omkar Prasad allured her that he would keep her as his wife and committed forcible sexual intercourse with her. The site map of the incident was prepared and the prosecutrix was sent to a lady doctor for medical examination. After completing the investigation, the charge sheet was filed in the Court of

Judicial Magistrate First Class, Khairagarh from where the matter was committed to the Court of Sessions, Rajnandgaon.

2. So as to hold the accused/respondents guilty, prosecution has examined 21 witnesses. The accused denied charges leveled against them and pleaded their innocence.

3. The learned Sessions Court having regard to the facts situation, evidence on record and after hearing the learned counsel for the parties acquitted the respondents of the aforesaid charges.

4. Dr. Leela Ramteke (P.W. 10) has stated in her evidence that no external injury was found and on internal examination, she found that the vagina of prosecutrix is patulous and easily admits two fingers, hymen was ruptured and tag of old granulation was present. She has also stated that the prosecutrix was habituated to intercourse.

5. The prosecutrix was examined as P.W. 1. She has stated in her evidence that 7-8 months prior to the incident, she asked with his sister had gone to work in a brick kiln and when they were returning, the accused met her on the way and asked her to meet him in the noon. Thereafter her sister Phuleshwari scolded her why you met with him. On the next day at 10.00 a.m. when she had gone to burial ground to ease, the accused met her there and told her let us flee". He further told her that he will keep her as his wife and she was afraid of his threatening, but she did not tell this thing to any one in her house. On that day, in the night at about 9.00 p.m., she had gone to Bajar Chowk where the accused again met her and told that he will keep her like his wife and let us flee. Thereafter, accused took her to Khairagarh by bus. Then she was taken to Rajnandgaon and from Rajnandgan to Balod where they stayed in the house of aunt (Mousi) of accused Omkar Prasad. Then accused brought her to village Jarahi where she was kept for two days. Thereafter, she was brought to Umradah where she was kept in his uncle's house for 15 days. After celebrating Holi festival, she was brought back to village Jarahi where co-accused Shivram father of accused advised the prosecutrix to tell her age as 20 years, otherwise his son Omkar would go to Jail. Thereafter, co-accused Shivram took her to an advocate where her signatures were obtained. Thereafter, co-accused Shivram took her to the temple of goddess Jhalmala where he got her married with his son Omkar and kept both the prosecutrix and his son in a rented house at Balod, where the accused treated her as his wife and committed forcible sexual intercourse with her. She has further stated that while she was staying with the accused in Balod, her father came there along-with police and then she was brought to the police station Bakarkatta and she was medically examined.

The prosecutrix in her cross-examination has admitted that building work was going on in their village under the supervision of her father and she and accused Omkar both were working and earning there and her father used to get annoyed on observing chit-chat between the accused and prosecutrix. She has further

admitted that even after completing the building work, a dam work was undertaken by the Government where also the accused and prosecutrix were working. She has also admitted that she did not complain against the accused before Patel, Kotwar and police station Bakarkatta, regarding taking away and threatening by the accused and even when she was taken from Khairagarh to Rajnandgan and Rajnandgaon to Balod by Bus, she had neither complained nor had raised any hue and cry against Omkar in the bus before the other passengers. She has admitted that she stayed in the house of an aunt (Mausi) who belongs to her community and further the owner in whose house they stayed in Balod, is also not the relative of accused and he was relative of prosecutrix. She has also admitted that the person in whose house she stayed for 15 days along-with accused in village Umardah, was also not the relative of accused but he belongs to her community and her relative. She has also admitted that when she was staying in villages Balod, Jarahi etc., the accused did not remain in the house and was doing work for livelihood. She has also admitted that when he was not in the house, she alone used to stay in the house and never complained to the neighbors or surrounding people about her being taken away by the accused. She has gone to Rajnandgaon Court where the advocate asked complete details about her age, education etc., before reading over the contents of Ex. P-4 & P-5 and signing those documents by her. She has further clearly admitted that when she appeared in Rajnandgaon court for signing affidavit and consent papers, she has not complained anything in the presence of advocate and others that co-accused Shivram had threatened her and brought her there.

6. From the evidence of prosecutrix, it reveals that in examination-in-chief she has stated that the accused has taken her away and committed forcible sexual intercourse and her signatures were obtained before an advocate in the Rajnandgaon Court but on the contrary she has admitted in her cross examination that she voluntarily accompanied the accused Omkar Prasad and did not raise any hue and cry against the respondents, marriage was performed in a temple and she has signed the documents in the presence of advocate after reading over the contents to her. Thus the perusal of the evidence of prosecutrix shows that she is consenting party and has voluntarily accompanied the accused.

7. In *S. Varadarajan Vs. State of Madras*, Hon'ble the Supreme Court held that "taking" or "enticing away" a minor out of the keeping of a lawful guardianship is an essential ingredient of the offence of kidnapping. Even where the minor girl is under the control or guardianship of his father, she still continues to be in the lawful guardianship of the former. But when the girl (who though a minor had attained the age of discretion and is on the verge of attaining majority) herself talks to the accused to meet her at a certain place, and goes with him and the accused takes her to various places and ultimately there is no suggestion that this was done by force or blandishment or anything like that on the part of the accused but it is clear from the evidence that the insistence of marriage came from both sides, the accused by complying with her wishes can by no stretch of

imagination be said to have "taken" her out of the keeping of her lawful guardianship, that is the father. It has been further held that the fact of her accompanying the accused all along is quite consistent with her own desire. Under these circumstances no inference can be drawn that the accused is guilty of taking away the girl out of the keeping of her father. There is a distinction between "taking" and allowing a minor to accompany a person. The two expressions are not synonymous though it cannot be laid down that in no conceivable circumstances can the two be regarded as meaning the same thing for the purposes of Section 361 IPC where the minor leaves her father's protection knowing and having capacity to know the full import of what she is doing, voluntarily joins the accused person, the accused cannot be said to have taken her away from the keeping of her lawful guardian.

8. At this stage, learned State Counsel submits that according to the opinion of Dr. Leela Ramteke (Ex. P-22), the age of prosecutrix was in between 13 to 15 years. We are of the opinion that variation of 3 years is possible, therefore, even if it is presumed that the prosecutrix was 16 years, no offence can be said to have been committed as she had attained the age of discretion and was on the verge of attaining majority and thus she was a consenting party. For the aforesaid reasons, we are of the opinion that the judgment of acquittal passed by the court below being based on due appreciation of evidence on record has been fully justified and we do not find any good ground warranting interference in the said judgment. The appeal fails and is dismissed.