

(2023) 12 CHH CK 0006
In the Chhattisgarh High Court
Case No : Criminal Appeal No.798 Of 2023

Yakub Khan

APPELLANT

Vs

State Of Chhattisgarh

RESPONDENT

Date of Decision : 04-12-2023

Acts Referred:

Indian Penal Code, 1860 — Section 34, 323, 342, 360, 361, 362, 363, 365, 366A, 375, 376(2)(n), 506
Code Of Criminal Procedure, 1973 — Section 164, 313, 374(2), 437A
Protection of Children from Sexual Offences Act, 2012 — Section 6, 29, 35
Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 — Section 3(1)(12), 3(2)(v)

Citation : (2023) 12 CHH CK 0006

Hon'ble Judges : Ramesh Sinha, CJ; Ravindra Kumar Agrawal, J

Bench : Division Bench

Advocate : Dharmesh Shrivastava, Pawan Kesharwani

Final Decision : Allowed

Judgement

Ramesh Sinha, CJ

1. This criminal appeal under Section 374(2) of the Code of Criminal Procedure, 1973, is directed against the judgment dated 24.03.2023 passed by the Additional Sessions Judge F.T.S.C. (POSCO), Korba, District – Korba (C.G.), in Special Case (POCSO) Case No.45/2021, whereby the learned Additional Sessions Judge has convicted the appellant for offences punishable under Sections 365 and 376(2)(n) of the Indian Penal Code (hereinafter called as 'IPC') and sentenced to undergo RI for 7 years and fine of Rs.500/-, in default of payment of fine to further undergo RI for 6 months and imprisonment for life (which means imprisonment for the remainder of his natural life) and fine of Rs.500/-, in default of payment of fine to further undergo RI for six months.

2. Case of the prosecution, in brief, is that the victim / prosecutrix (PW-1) lodged the FIR (Ex.P-21) on 22.10.2018 at Police Station Kotwali stating inter-alia that

on 19.10.2018 at about 10 P.M. she was returning back to her house alongwith her grand mother (PW-3) and other children, it is alleged that her grandmother was walking in front of them and they were walking behind her, then only friend of her uncle i.e. accused came there and told her that her uncle is calling her and on refusal by the prosecutrix, he caught her hand and get her sit on his back in a motor-cycle and took her to the house of Pappu situated at Atal Awas, Kharmora and kept her in a room and thereafter against will and consent of the prosecutrix, he committed forcibly intercourse twice on false pretext of marriage. It is further alleged that next night also, the accused/appellant committed forcibly intercourse against her will so many times. It is also alleged that on 21.10.2018 wife of the accused / appellant, brother and sister-in-law came there and abused her by filthy language and thereafter assaulted her, due to which, she sustained injuries over face and back of the body. It is further alleged that later on at about 10 A.M. uncle of the prosecutrix alongwith his friend came there and took the prosecutrix to the house. On the basis of the FIR, an offence bearing Crime No.813/2018 was registered for the offences punishable under Sections 363, 366-A, 376, 323, 342, 506/34 of the IPC, Section 6 of Protection of Children from Sexual Offences Act, 2012 and Section 3(1)(12), 3(2)(v) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 by Raghunandan Prasad Sharma and investigation was initiated.

3. During the course of investigation, police sent the prosecutrix to Primary Health Centre, Korba for primary examination and received two slides in a sealed envelope. Statements of the witnesses were recorded and the accused / appellant and other co-accused persons were arrested and articles were seized. Statement of the prosecutrix under Section 164 CrPC (Ex.P-3) was recorded before the learned Judicial Magistrate First Class, Korba, District – Korba (C.G.). After completion of the entire investigation, charge-sheet was filed before the Special Judge (SC/ST Act), Korba for trial. The accused/appellant abjured the guilt and entered into defence.

4. In order to bring home the offence, the prosecution examined as many as 15 prosecution witnesses and exhibited 22 documents Exs.P-1 to P-22. Statement of the accused/appellant was recorded under Section 313 of the CrPC in which he denied guilt. However, he examined none in his defence but exhibited Ex.D-1 in his support.

5. The trial Court upon appreciation of oral and documentary evidence available on record, by its judgment dated 24.03.2023, convicted him for offences under Sections 365 and 376(2)(n) of the IPC and sentenced as aforementioned, against which, this criminal appeal has been preferred by the appellant herein.

6. Mr.Dharmesh Shrivastava, learned counsel for the appellant would submit that the learned trial Court erred in convicting the appellant because as per the prosecution case itself the prosecutrix / victim minor girl went with the appellant without any noise or shout for help and she has clearly stated in her statement that she was roaming with the appellant in his motor-cycle. This, it is clear that

the prosecutrix / victim was a consenting party for physical relationship. Therefore, the act of the present appellant is not amounting to commission of offence of rape under Section 376(2)(n) of the IPC and as such, he is entitled to be acquitted from all the charges. The learned trial Court erred in holding that the present appellant has committed offence under Sections 365 and 376(2)(n) of the IPC as the parties are major and the act between the parties does not attract the ingredient of the offence of rape, therefore, the present appellant is entitled to be acquitted, which is also supported and corroborated by the evidence of Dr.Rashmi Singh (PW-9) who clearly stated that there was no any injury on private part of the prosecutrix / victim. He further submits that the statement of the victim minor girl and her medical report shows that no rape was committed by the present appellant. Thus, it is clear that the present appellant has been falsely implicated in crime in question and there is delay also in lodging the FIR against the present appellant, therefore, the learned trial Court erred in convicting the present appellant in the aforesaid charges. The victim girl was aged about more than 18 years on the date of incident and she was a consenting party and there is no role attributed by the present appellant in crime in question as physical relationship as alleged was made between the parties with their free will and consent. As such, the criminal appeal deserves to be allowed and the the judgment impugned deserves to be set aside. He would rely upon the judgments of the Supreme Court in the matters of Manak Chand alias Mani v. State of Haryana reported in 2023 SCC OnLine SC 1397, P. Yuvaprakash v. State Rep. By Inspector of Police reported in 2023 SCC OnLine SC 846, Maheshwar Tigga v. State of Jharkhand reported in (2020) 10 SCC 108, Sat Parkash v. State of Haryana and another reported in (2015) 16 SCC 475 and Jarnail Singh v. State of Haryana reported in (2013) 7 SCC 263.

7. On the other hand, Mr.Pawan Shrivastava, learned Panel Lawyer appearing for the respondent/State, would support the impugned judgment and submit that the prosecution has proved its case beyond reasonable doubt that the prosecutrix was minor on the date of commission of offence and the trial Court has rightly convicted and sentenced the appellant for offences punishable under Sections 365 and 376(2)(n) of the IPC. As such, the appeal deserves to be dismissed.

8. We have heard learned counsel for the parties, considered their rival submissions made hereinabove and also went through the records with utmost circumspection.

9. The first question for consideration would be, whether the trial Court is justified in convicting the appellant for offence under Section 365 of the IPC ?

10. Section 365 of the IPC reads as under :-

“365. Kidnapping or abducting with intent secretly and wrongfully to confine person.-Whoever kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined, shall be punished with imprisonment of

either description for a term which may extend to seven years, and shall also be liable to fine.”

11. The essence of the offence under Section 365 of the IPC embodies an aggravated form of offence of kidnapping as defined in Sections 360 and 361 and of abduction as defined in Section 362 IPC. Section 365 is attracted when the kidnapping or abduction is committed with intent to secretly and wrongfully confine the victim. Section 365 of the IPC lays down that where a person was abducted in order to that he might be held to ransom by his abductors, it was held that this section is applicable. The prosecution must prove:

(i) Kidnapping or abduction by the accused.

(ii) The accused thereby intended that the person kidnapped or abducted should be kept in wrongful or secret confinement.

12. To prove the ingredients of Section 365 of the IPC, it is essential that there should be abduction, if no abduction is there; the offence under Section 365 of the IPC is not made out. To prove charge of wrongful confinement, proof of actual physical restriction is not essential. It is sufficient if the evidence shows that such an impression was produced in the mind of the accused as to create a reasonable apprehension in the mind of the victim. The intention can be inferred from the subsequent acts and conduct of the kidnapper or abductor.

13. In the present case, the prosecutrix/victim has been examined as PW-1. The prosecutrix/victim in para 4 of her evidence has stated that while the accused held her locked, he came back drunk the next night and had brought water with him, mixed something in it and made her drink it even after she refused. She started feeling dizzy after drinking water. That day also the accused raped her. The accused kept her locked in the room on third night. Both the female accused were present in the court, the name of one is Yasmin Khan and she does not know the name of other, but she recognize her by face. In para 12 of her cross-examination, she stated that it is correct that Pappu Gupta was with his wife and child in the house of Atal Awas Kharmora where she went. She further stated that it is incorrect that there is one room at Atal Awas. This witness himself said that there are two rooms. Yakub Khan used to visit her grandparents house regularly. She has stated that it is correct that on the date of the incident, she along with accused Yakub Khan kept roaming in Transport Nagar, Korba throughout the night. It is also correct that she and accused Yakub Khan had consumed liquor while stopping at Transport Nagar. She has also stated that her house Sitamani is close to the place where the accused was taking her. It is correct that after wandering throughout the day, they returned to Atal Awas Kharmora.

14. In view of the foregoing discussion and considering the evidence of the prosecutrix (PW-1), we are of the opinion that the charge under Section 365 of the IPC is not made out and the trial Court in convicting the appellant for offence under Section 365 IPC has committed grave legal error.

15. The next question for consideration would be whether the prosecution has been able to bring home the offence under Sections 376 (2) (n) of the IPC beyond reasonable doubt against the appellant herein.

16. Dr.Rashmi Singh (PW-9) has stated in para 6 of her cross-examination that it is correct that there were no injury marks nor redness in and around the victim's vagina. She further stated that no opinion can be given regarding as to when sexual intercourse took place with the victim.

17. (PW-5) Uncle of the victim girl has clearly stated in para 14 of his cross-examination that the appellant was not present on the spot when they reached there to take the victim back and further submitted that no offence of assault or quarrel with the victim was committed by the family members of the appellant/co-accused persons. Smt.Malti Gupta (PW-4) is the witness whose house was used for crime by the appellant and she did not support the prosecution case and turned hostile. Vinod Gupta (PW-6), husband of Smt.Malti Gupta (PW-4) has also turned hostile and did not support the prosecution case. Both have denied that the appellant took the victim girl to their house and clearly stated that the appellant came to their house at about 8.00-8.30 P.M. and after taking dinner he left the house.

18. PW-7 Sister of the victim has stated that time of incident was at about 10 P.M. and her sister did not go anywhere before 10 P.M. whereas Vinod Gupta (PW-6) and Smt.Malti Gupta (PW-4) have submitted that Yakub Khan came to their house at about 8.00-8.30 P.M. alone.

19. In the matter of Manak Chand (supra), the Supreme Court has held in para 12 that the evidence, as to the age or even rape has not been examined properly by the Trial Court as well as the High Court. Courts must examine each evidence with open mind dispassionately as an accused is to be presumed innocent till proved guilty. In our adversarial system of criminal jurisprudence, the guiding principle shall always be the Blackstone ratio which holds that it is better that ten guilty persons escape than one innocent be punished. The Supreme Court further observed in para 19 that as to the factum of rape itself, we are not meet the ingredients of Rape as defined under Section 375 of the IPC, as we do not find any evidence which may suggest that the appellant, even though had sexual intercourse with the prosecutrix, it was against her will or without her consent.

20. In the matter of Sat Parkash (supra), the Supreme Court has observed as under:-

"7. The question which arises hereinafter is, whether rape was committed by the appellant on the deceased Sushila. A mere act of sexual intercourse would have established rape at the hands of the appellant against Sushila, on account of the fact, that she was a minor on the date of incident (on 7-6-1992), on account of the fact, that her date of birth was admittedly 5-11-1976. The High Court arrived at the finding that there was no material on the record of this case on the basis

of which it could be concluded that sexual intercourse was committed on the deceased Sushila. Thus viewed, we are satisfied that the charge of Section 376 of the Penal Code would not have survived against the appellant and that he was rightly acquitted thereof.”

21. The provisions of the Protection of Children from Sexual Offences Act, 2012 (for short ‘POCSO Act’) are stringent in nature. Even there is a statutory presumption under Section 29 of the POCSO Act. Since the enactment is stringent in nature, the degree of proof is more strict. The prosecution is under bounden duty to prove the age of the prosecutrix to show that at the time of the incident, the prosecutrix was “Child” within the meaning of provisions of the POCSO Act. The burden is on the prosecution to prove that the age of the prosecutrix, on the date of occurrence, was less than 18 years.

22. As per the prosecution case, the victim was aged about 16 years 9 months and 4 days on the date of incident i.e. 19.10.2018 as per dakhil kharij register.

23. Kumari Uma Kaiwartya (PW-8), Head Mistress of Govt. Primary School, Sitamani, Korba has stated in para-4 of her cross-examination that there is correction by deleting the earlier name mentioned as student, but she was unable to explain the reason as to why earlier name was deleted and also unable to state that who has committed the correction as she is not author of the document.

24. How dakhil kharij register is treated to be relevant came up for consideration before the Hon’ble Supreme Court in Babloo Pasi v. State of Jharkhand and another (2008) 13 SCC 133 wherein it has been held as under:-

“22. It is well settled that it is neither feasible nor desirable to lay down an abstract formula to determine the age of a person. The date of birth is to be determined on the basis of material on record and on appreciation of evidence adduced by the parties. The medical evidence as to the age of a person, though a very useful guiding factor, is not conclusive and has to be considered along with other cogent evidence.

28. It is trite that to render a document admissible under Section 35, three conditions have to be satisfied, namely:

(i) entry that is relied on must be one in a public or other official book, register or record; (ii) it must be an entry stating a fact in issue or a relevant fact, and (iii) it must be made by a public servant in discharge of his official duties, or in performance of his duty especially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded. (See: Birad Mal Singhvi Vs. Anand Purohit (1997) 4 SCC 241)”.

25. It is to be noted that in offences as grave as this, approximation of age

cannot take the place of exact date of birth to convict the appellant.

26. The Supreme Court in the matter of Sunil v. State of Haryana (2010) 1 SCC 742 has held as under:-

"26. Bishan, PW 8, the father of the prosecutrix has also not been able to give correct date of birth of the prosecutrix. In his statement he clearly stated that he is giving an approximate date without any basis or record. In a criminal case, the conviction of the appellant cannot be based on an approximate date which is not supported by any record. It would be quite unsafe to base conviction on an approximate date.

34. On consideration of the totality of the facts and circumstances of this case, it would be unsafe to convict the appellant when there are so many infirmities, holes and lacunas in the prosecution version. The appellant is clearly entitled to benefit of doubt and consequently the appeal filed by the appellant deserves to be allowed. The appellant is directed to be released forthwith, if not required in any case."

27. The Supreme Court in the matter of State of Madhya Pradesh v. Munna @ Shambhoo Nath Criminal Appeal No.658 of 2011(decided on 18.9.2015) has held as under:-

"9.....Further, the mother of the prosecutrix also was not able to give the exact age of the prosecutrix. No question was also asked to the prosecutrix by the prosecution about her age. Taking into account all these facts, the High Court correctly came to the conclusion that the prosecution has totally failed to prove beyond reasonable doubt that the girl was less than 16 years of age at the time of the incident. Therefore, the High Court presumed that the girl was more than 16 years of age and was competent to give her consent.

11. In view of the evidence on record and the rationale in the aforementioned cases, we are of a considered view that the prosecution has totally failed to prove beyond reasonable doubt that the girl was less than 16 years of age at the time of the incident. Therefore, it can be held that the girl was more than 16 years of age and she was competent to give her consent as held by the High Court. Hence, in the present case, the question of rape does not arise as consensual intercourse has been proved."

28. Applying the principle of law laid down by the Supreme Court in the above-stated judgments (supra) to the facts of the present case, it is quite vivid that only the prosecutrix knowing her date of birth devoid of even a single corroborative testimony or document is not admissible in the eyes of law. It is well settled principle that admission register / dakhil kharij in itself is a weak piece of evidence with no probative value. Hence, it is essential to substantiate it with other material records or by the examination of the author of such document or examination of the person who is expected to have special knowledge about it. In the present case, the totality of facts stated above leaves

room for ample doubt with regard to the exact date of birth of the prosecutrix. In such a circumstance, the benefit of doubt must naturally go in favour of the accused. It is difficult to believe that a serious event like unconsented sexual intercourse which allegedly took place over 3 days continuously is an event that the prosecutrix herself conveniently forgot. This shows that the testimony of the prosecutrix is not creditworthy and she was a consenting party but was tutored to give statement against the appellant.

29. Considering the evidence of Dr.Rashmi Singh (PW-9) coupled with unreliable testimony of the prosecutrix herself and her family members creates a serious lacuna in the prosecution story, the benefit of which should be granted to the appellant. On the basis of material available on record and evidence collected by the prosecution, it cannot be held that the prosecution has been able to bring home the offences under Sections 365 and 376(2)(n) of the IPC beyond reasonable doubt as evidence brought on record is not sufficient to bring home the offences against the appellant / accused herein.

30. As a fallout and consequence of the aforesaid legal analysis, the criminal appeal filed by appellant-Yakub Khan is allowed. Impugned judgment dated 24.03.2023 passed by the Additional Sessions Judge F.T.S.C. (POSCO), Korba, District – Korba (C.G.), in Special Case (POCSO) Case No.45/2021 convicting and sentencing the appellant for offences under Sections 365 & 376(2)(n) of the IPC is hereby set aside. The accused / appellant is acquitted of the said charges levelled against him. He is in jail. He shall be set at liberty forthwith if no longer required in any other criminal case.

31. The appellant is directed to file personal bond and two sureties in the like amount to the satisfaction of the Court concerned in compliance with Section 437-A of the Code of Criminal Procedure, 1973.

32. Let a copy of this judgment and the original record be transmitted to the trial court concerned forthwith for necessary information and compliance.