



2025:CGHC:16015

AFR**HIGH COURT OF CHHATTISGARH AT BILASPUR****Criminal Appeal No. 1806 of 2019**

Tarun Sen S/o Ashok Sen Aged About 19 Years R/o Ward No. 8, Dak Bangla, Awaspara, Police Station Gariyaband Chhattisgarh, District : Raipur, Chhattisgarh

...Appellant**versus**

State Of Chhattisgarh Through The Magistrate, Raipur District Raipur Chhattisgarh, District : Raipur, Chhattisgarh

... Respondent

For Appellant : Mr. Anurag Khatri, Advocate
For Respondent : Mr. Rishabh Singh Deo, Panel lawyer

Hon'ble Justice Shri Arvind Kumar Verma, Judge**Order on Board****04.04.2025**

1. With the consent of both the parties the matter is heard finally.
2. This criminal appeal filed under Section 374(2) of Criminal Procedure Code, 1973 has been preferred by the appellant against the judgment of conviction and order of sentence dated 27.09.2019 passed in Special Case No. 27/2018 by the learned Special Judge (Atrocities), Raipur Chhattisgarh, whereby the appellant has been convicted and sentences as under:-

<u>Conviction</u>	<u>Sentence</u>
Under Section 376(2)(n) of IPC	R.I for 10 years and fine of Rs. 2000/- in default of payment of fine 03 month additional R.I.
Under Section 06 of Protection of Children from Sexual Offences Act, 2012	R.I for 10 years and fine of Rs. 2000/- in default of payment of fine 03 month additional R.I.
Both the sentences have been directed to run concurrently.	

3. The prosecution case, in brief, is that father of the victim has lodged a report on 12.07.2018 stating that on 08.07.2018 her daughter at around 12'o clock has gone from her house telling that she is going to her grand mother's house. But after some time when he went to see her there she was not there and thereafter he searched for her in the neighborhood, but he could not find her. On further searching her friend Kajal Nagesh told her that she has seen her going along with the accused appellant. Thereafter it came to the knowledge that the accuse appellant is also missing from the same day. Based upon these circumstances the father of the victim has a suspicious that the accused appellant has allured her daughter. On 18.07.2018 the victim was recovered from the possession of the appellant from

Durg.

4. Prosecution in order to prove its case examined total 14 witnesses. Statement of appellant was also recorded under Section 313 of CrPC in which he denied of all incriminating evidences appearing against him, pleaded innocence and false implication. However, in support of him none was examined.
5. After hearing the counsel for the parties and appreciating the evidences available on record, the trial court vide impugned judgment dated 27.09.2019 convicted and sentenced the accused appellant in the manner as described above of this judgment. Hence this appeal.
6. Learned counsel for the appellant submits that the impugned judgment dated 27.09.2019 is perverse, erroneous, contrary to law, facts and circumstances of the case. The victim has herself stated in her examination that she is above 18 years of age, moreover there are no valid documentary evidences which could ascertain that the age of the victim at the time of incident was below 18. The material prosecution witnesses have not supported the case of prosecution and they turned hostile. There are major

contradictions and omissions in the case diary statement recorded Under Section 161 of Cr.P.c. as well as court statement, which cannot be relied upon. Therefore he prays to set aside the impugned judgment dated 27.09.2019 and the appellant may be acquitted from all the charges leveled against him in the interest of justice.

7. On the other hand, learned counsel for the State opposes the prayer made by the learned counsel for the appellant and supports the impugned judgment passed by the concerned Trial Court. He stated that prosecutrix was a minor girl aged less than 18 years on the date of incident . As such, even if there was affair between the appellant and the prosecutrix, the act committed by the appellant makes him liable for conviction under the above mentioned sections. So, the impugned judgment is strictly in accordance with law and the present appeal is liable to be dismissed.
8. I have heard learned counsel for both the parties at length, and perused the record with utmost circumspection.
9. **Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015** provides for presumption and determination of age. The same reads as under :1.

“94. Presumption and determination of age-

(1) Where, it is obvious to the Committee or the Board, based on the appearance of the brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.

(2). In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake process of age determination, by seeking evidence by obtaining-

(i) The date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) The birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the above, age shall be determined by an ossification test or any other latest medical age determination test conduct on the orders of the Committee or the Board:

Provided such age determination test conducted on the order the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person.

10. In order to consider the age of prosecutrix, this Court has to examine the evidence/material placed on record by the prosecution. The prosecution has mainly relied upon the Dakhil Kharij Register (Ex. P-17) wherein the date of birth of

prosecutrix is mentioned as 10.04.2001. There is no any documentary evidence available on record that only on the basis of 1st class mark-sheet her date of birth of prosecutrix is marked and also no Kotwari Register has been produced. Even the ossification test of the prosecutrix has not been done. There is no legally admissible evidence with regard to the age of the prosecutrix that on the date of incident she was minor and less than 18 years of age. In absence of examination of author of the School Admission and Discharge Register, the same cannot be taken into consideration to determine the age of the prosecutrix. School admission and discharge register is a weak type of evidence. There is no any kotwari register or ossification report, produced by the prosecution to determine her actual age on the date of incident, that she was below 18 years of age.

11. Prosecutrix PW-01 in her statement has stated that her date of birth in the Dakhil Kharij Register has been wrongly mentioned as 10.04.2001 instead her actual date of birth is 10.04.2000.
12. In case of **Alamelu and Another Vs. State**, represented by

Inspector of Police, 2011(2)SCC-385, the Hon'ble Supreme Court has held that the transfer certificate which is issued by government school and is duly signed by the Headmaster 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 prosecutrix in the absence of any material on the basis of which the age was recorded. The Hon'ble Supreme court held that 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.

13. In paragraphs 40,42,43,44 and 48 of its judgment in *Alamelu* (Supra), the Supreme Court has observed as under :

“40.Undoubtedly, the transfer certificate, Ex.P16 indicates that the girl's date of birth was 15th June, 1977. Therefore, even according to the aforesaid certificate, she would be above 16 years of age (16 years 1 month and 16 days) on the date of the alleged incident, i.e., 31st July, 1993. 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 Indian Evidence Act. 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.-

42. Considering the manner in which the facts recorded in a document may be proved, this Court in the case of *Birad Mal Singhvi Vs. Anand Purohit*¹, observed as follows:-

"The date of birth mentioned in the scholars' register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined....Merely because the documents Exs. 8, 9, 10, 11, and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exs. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents. Since the truth of the fact, namely, the date of birth of Hukmi Chand and Suraj Prakash Joshi was in issue, mere proof of the documents as produced by the aforesaid two witnesses does not furnish evidence of the truth of the facts or contents of the documents. The truth or otherwise of the facts in issue, namely, the date of birth of the two candidates as mentioned in the documents could be proved by admissible evidence i.e. by the evidence of those persons who could vouchsafe for the truth of the facts in issue. No evidence of any such kind was produced by the respondent to prove the truth of the facts, namely, the date of birth of Hukmi Chand and of Suraj Prakash Joshi. In the circumstances the dates of birth as mentioned in the aforesaid documents 1988 (Supp) SCC 604 have no probative value and the dates of birth as mentioned therein could not be accepted."

43. The same proposition of law is reiterated by this Court in the case of *Narbada Devi Gupta Vs. Birendra Kumar Jaiswal*, where this Court observed as follows:-

"The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the "evidence of those persons who

can vouchsafe for the truth of the facts in issue".

44. In our opinion, the aforesaid burden of proof has not been discharged by the prosecution. The father says nothing about the transfer certificate in his evidence. The Headmaster has not been examined at all. Therefore, the entry in the transfer certificate can not be relied upon to definitely fix the age of the girl.

48. We may further notice that even with reference to Section 35 of the Indian Evidence Act, a public document has to be tested by applying the same standard in civil as well as criminal proceedings. In this context, it would be appropriate to notice the observations made by this Court in the case of *Ravinder Singh Gorkhi Vs. State of U.P.*⁴ held as follows:-

"The age of a person as recorded in the school register or otherwise may be used for various purposes, namely, for obtaining admission; for obtaining an appointment; for contesting election; registration of marriage; obtaining a separate unit under the ceiling laws; and even for the purpose of litigating before a civil forum e.g. necessity of being represented in a court of law by a guardian or where a suit is filed on the ground that the plaintiff being a minor he was not appropriately represented therein or any transaction made on his behalf was void as he was a minor. A court of law for the purpose of determining the age of a (2006) 5 SCC 584 party to the lis, having regard to the provisions of Section 35 of the Evidence Act will have to apply the same standard. No different standard can be applied in case of an accused as in a case of abduction or rape, or similar offence where the victim or the prosecutrix although might have consented with the accused, if on the basis of the entries made in the register maintained by the school, a judgment of conviction is recorded, the accused would be deprived of his constitutional right under Article 21 of the Constitution, as in that case the accused may unjustly be convicted."

14. From the perusal of the statements of prosecutrix , her father as well as other prosecution witnesses and after

considering the evidence collected by the prosecution, I find that no clinching and legally admissible evidence has been brought by the prosecution to prove the fact that the prosecutrix was minor and less than 18 years of age on the date of incident, despite the fact that the Trial Court in the impugned judgment has held the prosecutrix minor. Accordingly, this Court finds it appropriate to set aside the findings given by the trial Court that on the date of incident, the victim was minor as the same has not been proved by the prosecution by leading cogent and clinching evidence.

15. PW-01 the prosecutrix in her statement has stated that in the year 2018 the accused appellant used to work as a waiter in a hotel at that time the accused appellant gave her a mobile phone through which they both used to talk to each other. She also stated that she in a phone call told the accused appellant that she will not remain in Gariyaband, he should take her from here. The accused appellant denied taking her with him upon which the prosecutrix told him that if he will not take her with him, she will commit suicide. Thereafter on 06.07.2018 accused appellant came to Gariyaband and took her with him. They both stayed in some hotel of Kumhari

where they developed physical relationship and on 18.07.2018 her uncle and Police came to take her to Gariyaband.

16. Close scrutiny of the evidence led by the prosecution would make it clear that the prosecutrix has nowhere disclosed that at any point of time, the appellant has committed any forceful sexual intercourse with her rather it was a mutual consent for physical relation. She has stated that she herself went with him and remained with him for some days. Her uncle and police only took her to her home and lodged an FIR. This shows that she is a consenting party and even the Doctor PW-09 in her deposition has stated that she did not found any external and internal injury on the body of the victim as well as on her private part. The secondary sexual organs were fully developed and the prosecutrix was habitual of sexual intercourse.
17. Thus, considering the entire facts and circumstances of the case particularly, the evidence with regard to the age and conduct of the prosecutrix, this Court is of the opinion that the age of the prosecutrix is not verified and not proved by the prosecution that prosecutrix was minor at the time of

incident and she was a consenting party and also it is a case of elopement. Therefore, in the above facts and circumstances of the case, aforementioned sections would not be made out against the appellant.

18. **The appeal is allowed accordingly.** The judgment of conviction and order of sentence is hereby set aside. Appellant stands acquitted of all the charges levelled against him. The appellant is reported to be in jail. He is released forthwith, if not required in any other case.
19. The Trial Court Record(TCR) along with a copy of this Judgment be sent back immediately to the trial court concerned for compliance and necessary action.

sd/-

(Arvind Kumar Verma)
Judge