

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR
Criminal Appeal No. 1382 of 1998

- Gudda @ Nabi Ullah, S/o Hasan Ali, aged 31 years, R/o village – Ketka (Baspara), present Address : Masjidpara, Surajpur, P.S. Surajpur, Distt. Sarguja (M.P.)

---- Appellant

Versus

- The State of M.P. through Police Station – Surajpur, District – Sarguja (M.P.) (Now State of CG).

---- Respondent

For Appellant : Mr. Vineet Kumar Pandey, Advocate
For Respondent : Mr. Mahesh Mishra, Panel Lawyer

Hon'ble Shri Justice Inder Singh Uboweja

CAV JUDGMENT

Delivered on : 06-08-2015

- 1) The appellant has preferred this appeal assailing the judgment of conviction and order of sentence dated 09.05.1998 passed by the Additional Sessions Judge, Surajpur, District Sarguja in Sessions Trial No. 163/97, whereby & whereunder the trial Court after holding the appellant guilty for commission of rape and trespass the house of the prosecutrix, convicted him under Sections 376(1) and 450 of the IPC and sentenced him to undergo R.I. for seven years and to pay fine of Rs.2,000/-, in default of payment of fine to undergo additional R.I. for six months and to undergo R.I. for five years and to fine of Rs.1,000/-, in default of payment of fine to undergo additional R.I. for three months. Both sentences were directed to run concurrently.

- 2) Conviction is impugned on the ground that without there being an iota of evidence, the trial Court has convicted and sentenced the appellant as aforementioned and thereby committed illegality.
- 3) As per case of prosecution on 22.01.1997 at about 11.00 a.m., the appellant entered the house of the prosecutrix and committed sexual intercourse upon her. At that time her mother and father were not present at home. It was alleged that just after completion of the said offence, mother of the prosecutrix namely Indira Bai (PW-2) came to her house and saw the appellant running away from her house, after the said incident. First Information Report (Ex.P-1) was lodged in the police station, Surajpur and the prosecutrix was sent for medical examination to Community Health Centre, Surajpur vide Ex.P-6/A, where lady Dr. Pratibha Jain (PW-5) examined the prosecutrix and found her hymen intact and no injury was found on her private part or over external body. She has not given any definite opinion regarding commission of sexual intercourse. Doctor prepared slide of vaginal swab and handed over to the concerned constable which was seized vide Ex.P-17. For ascertaining the age of the prosecutrix, radiological test and X-ray were conducted vide Exs. P-10 and P-11. Spot map was prepared vide Ex.P-13. Accused was taken into custody vide Ex.P-15. He was also sent for medical examination to Community Health Centre, Surajpur vide Ex.P-14, where Dr.

K.N. Sharma (PW-10) examined him who gave his opinion that the accused was able to perform sexual intercourse. His underwear was seized vide Ex.P-9. Seized articles were sent for chemical examination to Forensic Science Laboratory, Sagar vide Ex.P-18 and report thereof has been received vide Ex.P-19.

- 4) During the course of investigation, statements of witnesses were recorded under Section 161 of the Code of Criminal Procedure, 1973 (for short, 'the Code'). After completion of investigation, charge sheet was filed before the Court of Judicial Magistrate First Class, Surajpur for the offence punishable under Sections 450 and 376 (1) of the IPC, who in turn committed the case to the Court of Sessions Judge, Sarguja, from where learned Additional Sessions Judge received the case on transfer for trial.
- 5) In order to prove the guilt of the accused/appellant, the prosecution examined as many as ten witnesses to support its case. Accused was examined under Section 313 of the Code, in which he denied the circumstances appearing against him and pleaded innocence and false implication in crime in question. Accused also examined 06 defence witnesses namely Sher Mohammad (DW-1), Hasan Ali (DW-2), Shiv Shanker (DW-3), Victor Lakra (DW-4), Rajeshwar Prasad (DW-5) and Shiv Shanker (DW-6) to support his case.

- 6) After providing opportunity of hearing to the parties, learned Additional Sessions Judge convicted and sentenced the appellant as aforementioned.
- 7) I have heard learned counsel for both the parties and perused the judgment impugned and record of trial Court.
- 8) Learned counsel appearing for the appellant vehemently argued that conviction of the appellant is substantially based on the evidence of prosecutrix and her mother, Indira Bai (PW-2), but their statements are shaky and unreliable. Entire prosecution is patently false as it has failed to establish the fact that prosecutrix was minor on the date of incident and has also not proved that the prosecutrix was subjected to rape by the appellant. He further submits that even the medical report issued by the Doctor who examined the prosecutrix does not support the case of the prosecution and there is no evidence to connect the appellant with the crime in question. Therefore, in absence of cogent and clinching evidence conviction and sentence of the appellant is not sustainable under the law and the appellant deserves to be acquitted from the charges.
- 9) *Per contra*, learned Panel Lawyer for the State opposing the appeal submits that the prosecution proved its case beyond shadow of doubt. Evidence of the prosecutrix and Indira Bai (PW-2) is sufficient to prove guilt of the accused/appellant.

Therefore, the appellant does not deserve to be acquitted from the charges.

- 10) In order to appreciate the arguments advanced on behalf of the parties, I have to examine the evidence adduced on behalf of the prosecution.
- 11) In the present case, for proving age of the prosecutrix, Investigating Officer has seized School Dakhil Kharij Register, which was not properly proved by the author of the entry level registration. One Fahmida (PW-6) was examined, who stated that she has given the certificate (Ex.P-8) on the basis of Dakhil Kharij Register, therefore, it is clear from her evidence that she was not author of entry register. Prosecution has not proved that who has admitted the prosecutrix in school and who has disclosed her date of birth and also who has made entry of her birth in the said register. Since the certificate (Ex.P-8) was not properly proved, it cannot be made basis for proving the age of the prosecutrix. Prosecution has proved ossification report by adducing the evidence of Dr. Mukesh Jain (PW-8). According to him, age of the prosecutrix on the date of examination was between 14 to 16 years, therefore, it cannot be ruled out that age of the prosecutrix may be 18 years on the date of incident because two years margin could be taken from the ossification report. Thus, prosecution has failed to prove that on the date of incident prosecutrix was a minor girl.

- 12) Prosecutrix (PW-1) stated in her deposition that on the date of incident at about 11.00 a.m., when her mother and father had gone outside, she was alone in her house and was cleaning utensils, at that time the accused came there and caught hold her hand and dragged into room, thereafter he forcibly overthrew her on bed, removed her clothes and penetrated his organ into her private part, whereupon she was raising loudly cry continuously, she was beaten many times by him, he also gagged her neck and after threatening her to kill if she told about the incident to her mother he fled away from her house. After sometime her mother, Indira Bai (PW-2) came to house to whom she narrated about the incident. In the cross-examination, prosecutrix (PW-1) has admitted that she was cleaning utensils in the courtyard of her house. She also admitted that it was the market day of her village when the incident took place and huge people were visiting near her house as her house is situated near the market. She also admitted that some other houses are also situated adjacent to her house. She further stated that accused had made physical relation with her for about ½ hour, her bangles were broken and she sustained injury over hand.
- 13) On consideration of the statement of the prosecutrix and her medical report, it is clear that testimony of the prosecutrix is not clinching, trustworthy and reliable because medical report clearly shows that no injury of bangles was seen in the hand of

the prosecutrix on her body and neither internal nor external injury was noticed by the Doctor. Dr. Pratibha Jain (PW-5) has clearly opined that hymen of the prosecutrix was found intact and she has not given any definite opinion regarding sexual intercourse with the prosecutrix. In her cross-examination, she clearly admitted that any penetration was not done in private part of the prosecutrix. It is also clear that place of incident was near the market and incident day was market day of that village and huge people came there and they were moving near by incident place. If prosecutrix raised alarm at any time then some body would have heard her noise and rescued her. It clearly shows that she neither raised any alarm at any time nor attempted to resist herself from the accused and has also not tried to attract attention of people by any act, therefore, statement of the prosecutrix about sexual intercourse is not reliable, cogent and trustworthy.

- 14) Another prime witness of the prosecution is mother of the prosecutrix, Indira Bai (PW-2), who stated that when she returned back from market she saw accused running away from next door of her house, but prosecutrix (PW-1) herself clearly stated that after incident accused had fled away from her house and after sometime her mother came to house then she narrated the incident to her mother. Therefore, it is clear that mother of the prosecutrix is not stating truth, her statement is

concocted and unnatural, therefore, her testimony becomes doubtful and unreliable.

- 15) Upon considering the entire evidence, it goes to show that prosecution has failed to prove the fact that the prosecutrix was below the age of 16 years on the date of incident and has also failed to prove that the appellant has committed house trespass by entering her house and commission of rape, thereby the appellant committed offence punishable under Sections 450 & 376(1) of the IPC. Taking into consideration all the facts and circumstances of the case, I am of the considered opinion that the trial Court while convicting and sentencing the appellant under Sections 450 & 376(1) of the IPC, has not considered all the relevant aspects of the matter and thereby committed the illegality.
- 16) In the result, the appeal filed by the appellant is allowed. Conviction and sentence of the appellant under Sections 450 and 376 (1) of the IPC are hereby set aside. He is acquitted of the charges for commission of offence under Sections 450 and 376 (1) of the IPC framed against him.
- 17) It is stated that the appellant is on bail, his bail bond shall continue for a further period of 6 months in view of Section 437A of the Code.

Sd/-
(I.S.Uboweja)
JUDGE