

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR
Criminal Appeal No. 152 of 2002

- Parmeshwar, S/o Shri Heerachandra, aged about 24 years, Occupation – Agriculturist, R/o. Village – Panki, P.S. Bhaiyathan, District – Surguja (C.G.)

---- Appellant

Versus

- State of Chhattisgarh, Through : P.S. Bhaiyathan, District – Surguja (C.G.)

---- Respondent

For Appellant	:	Mr. Ashok Kumar Shukla, Advocate
For Respondent	:	Mr. Mahesh Mishra, Panel Lawyer.

Hon'ble Shri Justice Inder Singh Uboweja

CAV JUDGMENT

Delivered on : 14-09-2015

- 1) Challenge in this appeal is to the judgment of conviction and order of sentence dated 18.01.2002 passed by the Sixth Additional Sessions Judge (FTC) Surajpur in Sessions Trial No.367/99, whereby and whereunder the trial Court after holding the appellant guilty for commission of rape convicted him under Section 376 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.
- 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) The facts, briefly stated, are as under :-

3.1) On 23.04.1999, prosecutrix (PW-2) lodged an FIR (Ex.P-2) in the police station, Jhilmili, District – Surguja against the appellant and after completion of investigation, police filed the charge sheet under Section 354 of the IPC against the accused/appellant on 28.05.1999. Subsequently, police station Jhilmili received complaint of the prosecutrix through Superintendent of Police, then registered offence under Section 376 (1) of the IPC against accused and after further investigation additional challan under Section 376 (1) of the IPC was filed.

3.2) Story of the prosecution, in brief, is that on the date of incident prosecutrix (PW-2) had gone for ease in the nearby field at about 1.00 p.m. where accused/appellant came behind her and caught hold of her, overthrew on surface, damaged her clothes, committed rape on her and also threatened her. When accused was fleeing away from the spot, then she raised alarm and on hearing the sound, her brother, Munna (PW-6) came there, but accused fled away from the spot.

3.3) The prosecutrix was sent for medical examination to Government Hospital, Ambikapur vide Ex.P-3A, where lady Dr. Shipra Shrivastava (PW-4) examined her and did not find any injury on her private part or over external part. She opined that intercourse might have been tried, but she has not given any definite opinion regarding recent commission of sexual

intercourse. She prepared slide of vaginal swab and handed over to the concerned constable. For determination of age of the prosecutrix, she was sent to Radiologist for X-ray. Her report is marked as Ex.P-3. Radiologist, after taking X-ray of the prosecutrix has opined that the age of the prosecutrix is between 14 to 16 years.

3.4) Spot map was prepared vide Ex.P-7. Clothes of the prosecutrix were seized vide Ex.P-5. Pubic hair of the accused/appellant was seized vide Ex.P-4. Seized articles were sent for chemical examination to Forensic Science Laboratory, Sagar vide Ex.P-11 and a report thereof has been received vide Ex.P-12.

- 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, who in turn committed the case to the Court of Sessions, Ambikapur from where learned Additional Sessions Judge, Surajpur 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. Defence has also examined three witnesses namely Mukutdhari (DW-1), Lotan Ram (DW-2) and Suresh Kumar Agrawal (DW-3).

- 6) After providing opportunity of hearing to the parties, learned Sixth Additional Sessions Judge (FTC), Surajpur has passed the judgment of conviction under Section 376 of the IPC and awarded sentence as aforementioned, hence this appeal.
- 7) I have heard learned counsel for both the parties and perused the judgment impugned including record of trial Court.
- 8) Mr. Ashok Kumar Shukla, learned counsel appearing for the appellant vehemently argued that case of the prosecution is not reliable because firstly, they have presented challan under Section 354 of the IPC against the accused/appellant and thereafter, after taking additional statement of the prosecutrix again challan was filed under Section 376(1) of the IPC. He also submits that evidence of the prosecutrix is not reliable and trustworthy, the entire story is patently false and fabricated, medical evidence is not supporting the prosecution story. Thus, the prosecution has failed to prove its case beyond reasonable doubt.
- 9) *Per contra*, learned Panel Lawyer for the State opposed the appeal and submitted that the prosecution has proved its case beyond shadow of doubt. Evidence of prosecutrix (PW-2) and

Munna (PW-6) 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, it not disputed that initially prosecution has filed a challan against the accused under Section 354 of the IPC on the basis of complaint made by the prosecutrix (PW-2) and again after some days of incident after taking additional evidence of the prosecutrix, they have filed additional challan under Section 376 of the IPC against the same accused because of this development, it is necessary for this Court to scrutinize the case very cautiously and minutely.
- 12) Prosecutrix (PW-2) stated that at about 1.00 p.m., she had gone to ease, accused/appellant came surprisingly from back and gagged her mouth and dragged her in a well, thereafter he committed rape on her and also damaged her clothes. When accused stated fleeing from the spot she shouted, then her brother Munna (PW-6) came there, but the accused fled away from the spot. The record of the court below shows and it is an admitted fact that firstly prosecutrix had reported the incident of molestation, which was registered under Section 354 of the IPC against the accused and it was investigated and challan was

filed punishable under Section 354 of the IPC, thereafter, after taking additional complaint and re-investigation on same facts again filed challan under Section 376(1) of the IPC which is fully unfair, unjustified and unreliable of prosecutrix herself and also for prosecution agency. Prosecutrix has firstly reported the incident on 23.05.1999 vide Ex.P-2 and her police / diary statement was recorded on 24.05.1999. In both the documents she has not mentioned the incident of rape, therefore, subsequent complaint and subsequent additional statement cannot help to prosecution because they have not justified how and why the prosecutrix has changed her statement. The court statement of the prosecutrix is totally unreliable, untrustworthy, unimpeachable in respect of her prior First Information Report (Ex.P-2) and prior diary statement, therefore, her evidence is shaky and discreditable in regard to the incident.

- 13) Munna (PW-6), brother of the prosecutrix, has stated that after hearing of sound "*kudo-kudo*" he reached near the well, he saw accused fleeing by keeping knife in his hand. He tried to catch him, but could not catch him. Prosecutrix never stated that she has made sound of "*kudo-kudo*" and police has not seized any knife from the accused, therefore, his statement does not inspire confidence and is not trustworthy. He is also an interested witness. It was surprising that what he was doing near the well when the alleged incident took place according to prosecution story.

- 14) Dr. Shipra Shrivastava (PW-4) had examined the prosecutrix on 31.05.1999 and according to prosecution the incident had taken place on 23.05.1999. Her examination report is Ex.P-3. Doctor has given opinion that it may be said that attempt of sex was done, but she has not given clear opinion that rape was done by some body. Therefore, medical evidence does not show that the prosecutrix was subjected to rape or not. FSL report shows that human spermatozoa was present in vaginal swab, but it cannot be said that it was related to the appellant.
- 15) In a rape case – the testimony of the prosecutrix must be reliable and inspired confidence, it should be worthy of credit and it should not suffer from basis infirmity and the probability factors should also not render it untrustworthy of credence. The medical evidence & FSL as have come in the present case completely belies the testimony of the prosecutrix and renders entire prosecution case doubtful.
- 16) As the testimony of the prosecutrix itself was not reliable and is also not supported by medical and FSL reports, I am unable to uphold the finding of guilt recorded by learned trial Court on the basis of testimonies of the prosecutrix (PW-1) and her brother Munna (PW-6). The impugned judgment of conviction and order of sentence recorded by the trial Court cannot be sustained under the law, therefore, interference is called for by this court.

- 17) In the result, the appeal is allowed. Conviction and sentence of the appellant under Section 376 IPC are hereby set aside. He is acquitted of the charges framed against him.
- 18) 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