

BEFORE THE HON'BLE HIGH COURT OF CHHATTISGARH
AT BILASPUR (C.G.)

Criminal Appeal No. 588 of 2012

APPELLANT

(In Jail)

: Krishna Kumar @ Guddu @
Mirauniha Sidar S/o Bethiyar
Sidar, aged about 30 years, R/o
Mirauni, Police Station-Chandrapur,
District-Janjgir-Champa (C.G.)

.R. No. 588/12
Presented by Shri. Hari Shankar Patel
dated 16/7/12

VERSUS

RESPONDENT

: The State of Chhattisgarh,
through the Station House Officer,
Police Station Chandrapur (wrongly
mentioned as Incharge Arakshi
Kendra Baradwar), District-Janjgir-
Champa (C.G.)

CRIMINAL APPEAL UNDER SECTION 374(2) OF CRIMINAL
PROCEDURE CODE 1973

1/3/15

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HIGH COURT OF CHHATTISGARH, BILASPUR

CRIMINAL APPEAL No. 588 of 2012

1. KRISHNA KUMAR @ GUDDU @ MIRAUNIHA SIDAR

---- Appellant (in jail)

Versus

1. STATE OF CHHATTISGARH

---- Respondent

Memo of Appeal Under Section 374 (2) of the Code of Criminal Procedure,
1973

For appellant : Mrs. Savita Tiwari, Advocate
For Respondent/State : Mr. Sumit Jhanwar, P.L.

Hon'ble Shri Justice T. P. Sharma
Hon'ble Shri Justice Inder Singh Uboweja, JJ.

JUDGMENT

Judgment dictated on Board by Hon'ble Mr. Justice T.P.Sharma

27.02.2015

Challenge in this appeal is to the judgment of conviction and order of sentence dated 02.07.2012 passed by the 2nd Additional Sessions Judge, Sakti, Sessions Division Janjgir in Sessions Trial No. 120/2011 whereby and whereunder the trial Court after holding the appellant guilty for commission of rape on a girl of mentally retarded and imbecile, convicted the appellant under Section 376 of the I.P.C. and sentenced him to life imprisonment with fine of Rs.1000/-, in default to undergo further RI for one month.

2. Conviction is impugned on the ground that without there being any iota of evidence against the appellant, the Court below has convicted and sentenced the appellant as aforesaid and thereby committed illegality.

3. As per case of the prosecution, P.W.3 prosecutrix (name not mentionable) is a girl aged 25 years. She is residing with her widowed mother Smt. Guruwari Bai (P.W.2) and brother Manbodh (P.W.7). On 09.05.2011 at about 8.00 pm while prosecutrix was all alone present in her house, the appellant took her to a field and committed intercourse with her. Mother of the prosecutrix Smt. Gurwari Bai (P.W.2) and brother Manbodh (P.W.7) called her and when the prosecutrix did not reply then they made search of her and reached the spot where they saw the incident of intercourse by the appellant with the prosecutrix. Thereafter, the appellant fled from the spot. Prosecutrix informed the incident of rape to them. Mother of the prosecutrix informed the incident to villagers and went to Police Station Chandrapur and lodged F.I.R. vide Ex.P.6

4. After obtaining consent, prosecutrix was examined by P.W.5 Dr. (Smt.) Shashikala Miri vide Ex.P.2. She noticed that she was physically and mentally undeveloped and non-cooperative, secondary sexual characters are not well developed, hymen was ruptured and vagina admitted two fingers. She did not notice any injury externally. Bleeding from vagina. Appellant was taken into custody and he was also examined by Dr. N.P.Mishra (P.W.9) vide Ex.P.3. He noticed the absence of smegma of glans penis, secondary sexual characters are well developed and he is capable of committing intercourse.

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5. Undergarment of the appellant was seized vide Ex.P.5. Spot map was prepared vide Ex.P.10. Slides of vagina and smear taken by the Doctor and undergarment of the prosecutrix were seized vide Ex.P.15. Slide relating to the appellant was also seized vide Ex.P.12. Seized articles were sent for examination to F.S.L. vide Ex.P.16.

6. Statements of witnesses under Section 161 of the Code of Criminal Procedure, 1973 (for short 'the Code) were recorded.

7. After completion of investigation, charge sheet was filed before the J.M.F.C. Dabhra, who in turn committed the case to the Sessions Judge, Janjgir-Champa. The learned Additional Sessions Judge received the case on transfer for its trial.

8. In order to prove the guilt of the appellant, prosecution examined as many as 12 witnesses. The accused person was examined under Section 313 of the Code in which he denied the circumstances appearing against him and innocence and false implication in crime in question was claimed.

9. After providing an opportunity of hearing to the parties, the learned Additional Sessions Judge convicted and sentenced the appellants as aforementioned.

10. We have heard the learned counsel for the parties and perused the record of trial Court and the judgment impugned.

11. Mrs. Savita Tiwari, learned counsel appearing for the appellant, vehemently argued that conviction of the appellant is based on the

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evidence of P.W.3 prosecutrix, who is a girl of mentally retarded and her evidence cannot be the basis for conviction of the appellant. Her evidence does not does not support from the evidence of P.W.5 Dr. Smt. Shashikala Miri. As per her evidence, prosecutrix is not competent for intercourse. Lastly, learned counsel submitted that both the parties have entered into compromise.

Learned counsel for the appellant placed reliance in the matter of **Sukhwinder Singh vs. State of Punjab, 2000 SCC (Cri) 1204** and **Phul Singh vs. State of Haryana, 1980 Cri.L.J. 8 (SC)**, in which, the Supreme Court imposed jail sentence under Section 376 of the I.P.C. but reduced the same on the ground of compromise.

12. On the other hand, Mr. Sumit Jhanwar, learned Panel Lawyer for the State opposed the appeal and submitted that the evidence of P.W.2 Guruwari Bai, P.W.3 Prosecutrix and P.W.7 Manboth is sufficient for proving the guilt of the appellant, who has committed rape on a girl of mentally retarded and was not in a position to give consent. Therefore, by convicting and sentencing the appellant, the trial Court has not committed any illegality.

13. In order to appreciate the arguments advanced on behalf of the parties, we have to examine the evidence adduced on behalf of the prosecution.

14. As per evidence of P.W.2 Prosecutrix, she is a girl of mentally retarded, the appellant took her from her house to a field where he was committing intercourse, at the same time her mother P.W.2 Guruwari Bai



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and P.W.7 Manbodh started efforts to search her by calling her whereupon she replied and upon hearing her reply, they reached the spot where they saw her with the appellant. P.W.2 Guruwari Bai, mother of the prosecutrix has deposed in detail that the prosecutrix is a girl of mentally retarded. She was not present in her house whereupon she along with her son P.W.7 Manbodh went in search of the prosecutrix. They were calling the prosecutrix and heard the answer of the prosecutrix. They immediately rushed towards the place of the incident where they saw the prosecutrix is lying on the field, the appellant was also present near prosecutrix. He was wearing his full pant and thereafter he fled from the spot. Upon being asked, prosecutrix told her that appellant has committed intercourse with her. P.W.7 Manbodh corroborated the evidence of P.W.2 Guruwari Bai. The defence has cross-examined these witnesses at length but these witnesses have deposed in their cross-examination that they went in search of the prosecutrix and were calling her, then they heard the reply of the prosecutrix, upon which they immediately rushed towards the spot where they saw that the appellant has committed intercourse with the prosecutrix. P.W.5 Dr. Smt. Shashikala Miri while examining the prosecutrix vide Ex.P.2 noticed that on account of state of unmindful she was physically and mentally undeveloped, therefore, she was not competent to participate in the intercourse but intercourse could be committed upon her by other person. Evidence of P.W.2 Guruwari Bai, P.W.3 Prosecutrix and P.W.5 Dr. Smt. Shashikala Mir and P.W.7 Manbodh revealed that the appellant has taken the prosecutrix from her house to field and has committed intercourse with her. Their evidence inspire confidence and trustworthy and we do not find any ground to disbelieve their evidence. Their evidence is sufficient for

drawing interference that the appellant has committed intercourse with the prosecutrix, who is mentally retarded and is not in a position to give consent, which shows that the appellant committed intercourse with the prosecutrix without her consent and thereby the offence committed is punishable under Section 376 of the I.P.C.

15. We have perused the compromise filed by the parties. Offence committed under Section 376 of the I.P.C. is not compoundable. In the case of **Sukhwinder Singh v. State of Punjab** (supra), the prosecutrix is aged 16 years and was consenting party, but, in the present case, the prosecutrix is neither consenting party nor is in a position to give her consent. Therefore, the above case is distinguishable on grounds of facts. In the case of **Phul Singh v. State of Haryana** (supra), the prosecutrix has forgiven the appellant/accused, but, in the present case the prosecutrix being mentally retarded girl, is not in a position to forgive the appellant. Therefore, the said case is also distinguishable to the facts of the present case.

16. The appellant has committed rape with the prosecutrix, who is a girl of mentally retarded. After appreciating the evidence available on record, the trial Court has convicted the appellant under Section 376 of the I.P.C. and sentenced him to life imprisonment with fine of Rs.1000/-.

17. Considering the facts and circumstances of the case and the alleged compromise by the parents of the prosecutrix, the sentence imposed upon the appellant is required consideration.



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18. Consequently, the appeal is partly allowed. Conviction of the appellant under Section 376 of the I.P.C. is hereby maintained. However, so far as the sentence of life imprisonment imposed upon the appellant is concerned, the same is reduced to 10 years RI. Accordingly, the appellant is sentenced to 10 years RI with fine of 1000/-, in default to further undergo one month RI.

Sd/-
T.P. Sharma
Judge

Sd/-
Inder Singh Uboweja
Judge

Anjani

N A.F.R