

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 560 of 2001**

Baliram @ Kamlesh Sharma S/o Goverdhan Prasad Sharma, aged 35 years, resident of Kapsada Thana Kumhari, District Durg (CG).

---- **Appellant**

Versus

The State of Chhattisgarh Through the District Magistrate, Raipur (CG).

---- **Respondent**

For petitioner

Shri Aditya Khare, Advocate from Legal Aid Department.

For respondent/State

Ms. M. Asha, Panel Lawyer.

Hon'ble Shri Justice P. Sam Koshy**Judgment on Board****07/12/2016**

1. The appellant stands convicted under Section 376 IPC and has been sentenced to undergo RI for 7 years with fine of Rs.10,000/- with default stipulation vide judgment dated 27.06.2001 passed by the 7th Additional Sessions Judge, Raipur in Sessions Trial No. 228 of 2000.
2. The prosecution story in short is that, an FIR was lodged by the PW-2-victim on 26.04.2000 alleging that the present appellant along with Sunder Lal Dewangan is said to have visited the village where the prosecutrix and her family were living. There the appellant projected himself to be an unmarried man and in the process, the father of the prosecutrix is said to have proposed the prosecutrix to be married with him. They had agreed that marriage would be conducted after sometime. Thereafter, the appellant used to visit the house of prosecutrix frequently. Some time later, the appellant is said to have, on

the pretext of they would be getting marriage, had a physical relationship with the prosecutrix and in due course of time also took a house on rent near the house of the prosecutrix where the prosecutrix went and stayed along with the appellant for about 8 months during which time they stayed together as Husband and Wife and he on numerous occasions committed sexual intercourse with her.

3. All of sudden on 25.04.2000 a lady along with two children came to the house of the appellant where the prosecutrix was also present and she had informed to everyone that the appellant is her Husband and he is the father of her two children accompanying with her. The said lady also said that in the past also, the appellant had done similar act of marrying another lady at Rajnandgoan projecting himself to be a bachelor. Thus, being cheated by the appellant, the prosecutrix was forced to file FIR requesting for proper action against him.
4. Upon FIR being filed, the matter was investigated and in due course of time, charge sheet was also filed and the matter was put to trial before the 7th Additional Sessions Judge, Raipur in Sessions Trial No.228 of 2000.
5. During the course of trial, the prosecution has examined 7 witnesses, whereas there was no examination on behalf of defence.
6. Vide judgment impugned dated 27.06.2001, the court below reached to the conclusion that offence under Section 376 stands established against the appellant and accordingly convicted and sentenced him as aforementioned in paragraph one of this judgment, leading to filing of this appeal.

7. Learned counsel appearing for the appellant has submitted that the court below has wrongly appreciated the evidence which have come on record and have convicted the appellant in a mechanical manner only relying upon the statement of the prosecutrix. According to him, the prosecution has failed to establish commission of offence under Section 376 IPC. The act alleged against the appellant even if it is accepted in toto, then also it would not fall under any of the ingredients envisaged under Section 375 IPC which defines rape. According to him, the court below has failed to appreciate certain vital factors which are required for bringing home the offence under Section 376 IPC. It is a case where the prosecutrix, PW-2, is an unmarried lady aged about 26 years. A plain reading of FIR which was lodged on 26.04.2000 and also her deposition, it would clearly reflect that it was a case where the prosecutrix had voluntarily and willingly had maintained physical relationship with the appellant and that there was no element of any force, coercion or threat on the part of the appellant. According to appellant, the statement of prosecutrix itself reflects that she had subjected herself to physical relationship with a hope that sooner or later the appellant would marry her.
8. Referring to statement of prosecutrix, it was submitted that firstly there is long delay in filing of FIR and secondly the statement clearly reflects that there was a consensual physical relationship between the appellant and the prosecutrix. Further, counsel for the appellant led much emphasis on the fact that statement of PW-3, Smt. Saraswati Sharma, and PW-4, Ajay Tiwari, by which it clearly reflects that the prosecutrix

had been voluntarily and willingly staying with the appellant and was having continuous physical relationship for a period of 8 months in the past without any sort of objection, reservation or apprehension. Therefore, under any stretch of imagination it cannot be brought within the ambit of rape as defined under Section 375 IPC. He further emphasized on the fact that the witness examined during the course of evidence also would reveal that there was an illegal and illicit relationship between the appellant and the prosecutrix. That, it is only when the original wife of the appellant had visited the house of the appellant and found him in company of the prosecutrix, the entire action for lodging FIR came otherwise, the prosecutrix would not have lodged any complaint nor was there any grievance on the part of the appellant in so far as maintaining physical relationship with the prosecutrix. Thus, the appellant prayed for setting aside the judgment of conviction and also prayed for an order of acquittal in favour of the appellant.

9. State counsel on the other hand opposing the appeal submitted that it is a case where the offence levelled against the appellant is serious and therefore, the judgment does not warrant any interference. According to him, the evidence which have come on record clearly suggest that the appellant initially cheated the prosecutrix and her family members by projecting himself to a bachelor. That, further accepting the proposal of marrying the prosecutrix and on the pretext of marrying the prosecutrix, the appellant is said to have taken advantage of his position and had physical relationship with the prosecutrix for a considerable period of time. According to him, the evidence shows that financial condition of

the prosecutrix were not well and they were finding it difficult for marrying the prosecutrix because of not having sufficient financial strength. Therefore, the present appellant proposed to perform court marriage with the prosecutrix so as to avoid incurring unnecessary burden of marriage expenses. Thus, has taken advantage of financial condition of the family of the prosecutrix.

10. Likewise, the appellant had cheated the prosecutrix and her family members inasmuch as in not disclosing his marital status and his actual background and by fraud and cheating he had committed sexual intercourse with the prosecutrix. Therefore, it can easily be brought within the ambit of definition of rape under the provisions of IPC. Thus, the appellant having initially provided false information to the family members of the prosecutrix then on the basis of false statement and assurance of marriage took advantage of position of the family condition of the prosecutrix and ravished her and also played mischief with the prosecutrix. Thus, prayed for rejection of the appeal.
11. Having considered the rival contentions put forth on either side and on perusal of record what is relevant at this juncture to appreciate is whether in the given facts and circumstances of the case, the conviction of the appellant under Section 376 IPC is proper, legal and justified or not.
12. For better assessment of the case, it would be relevant at this juncture to refer to the definition of rape as is defined under Section 375 IPC, which reads as under :

“375. Rape.—A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman

under circumstances falling under any of the six following descriptions:—

(First) — Against her will.

(Secondly) — Without her consent.

(Thirdly) — With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

(Fourthly) — With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

(Fifthly) — With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

(Sixthly) — With or without her consent, when she is under sixteen years of age. Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.”

13. After perusal of said provisions of law, now we may go into the facts of the case as has come up before the court during the course of trial. Certain admitted facts would also be relevant to be mentioned at this juncture which would further facilitate in better appreciation of the facts.

14. FIR in the instant case was lodged on 26.04.2000. The date of incident i.e. commission of alleged offence was since about 8 months time prior to the date of lodging of FIR. The prosecutrix in the instant case is PW-2 who undisputedly is over 25 years of age which by itself clearly reflects that she is grown up matured girl. Another aspect which cannot be brushed aside is the fact that the prosecutrix was staying along with her entire family. It is also not a case of the prosecution that the appellant at any point of time is said to have coerced, threatened or used force in any manner on the prosecutrix for the purpose of having sexual relationship. Further, from the deposition of the prosecutrix, it clearly reflects that she have voluntarily on the hope of sooner or later getting married to the appellant, conceded in having sexual relation with the

appellant. Both in FIR as well as in her deposition, she has categorically accepted the fact that the appellant is said to have had sexual relationship with her much before the date on which the appellant had applied vermilion (Sindoor) on her forehead.

- 15.** So far as the allegation of appellant exploiting the prosecutrix on the pretext of marriage is concerned, the same would not be acceptable for the reason that it is beyond anybody's apprehension that even if the appellant had accepted the proposal of marrying prosecutrix, the prosecutrix could go and start living with the appellant for eight months together before marriage. It is also hard to accept the fact that even if there was an assurance of marriage given by the appellant could be a ground for permitting the prosecutrix to let the appellant or her would be husband to have physical relationship much before he tied in nuptial knot. However, a perusal of record, particularly the deposition of the prosecutrix both in FIR and in court statement it would clearly reveal that it was not a case where the appellant is said to have had one night or occasional physical relationship. Her deposition clearly reflects that they used to have physical relationship almost every night when she used to go to the house of the appellant every night and would come back next morning.
- 16.** What is also necessary to take note is the fact that in her deposition, the prosecutrix herself has accepted the fact that she used to visit the house of the appellant every night and used to come back in the morning to her parental home. All these facts are acts which would clearly suggest that there was a consensual relationship on the part of

the appellant as well prosecutrix.

17. Now considering the age of the prosecutrix if we look into the conduct of the prosecutrix to the extent of voluntary having physical relationship, and if we compare this fact with the definition of rape as is defined under Section 375 IPC, this court has no hesitation in reaching to the conclusion that the act of the appellant does not fall within the definition of rape as it does not fit in any of the conditions enumerated therein.
18. For the foregoing reasons, this court has no hesitation in reaching to the conclusion that the conviction of the appellant under Section 376 IPC is not proper, legal and justified. Therefore, the same is set aside/quashed.
19. Accordingly, the appeal is allowed. Judgment of conviction dated 27.06.2001 is set aside. The appellant is acquitted of the charges under Section 376 IPC. The appellant is in bail. The bail bond of the Appellant shall remain in operation for a period of six months from today in view of provision contained in Section 437-A Cr.P.C.

Sd/-
(P. Sam Koshy)
Judge