

HIGH COURT OF CHHATTISGARH, BILASPUR**Hon'ble Shri Justice Rajendra Chandra Singh Samant****CRA No. 436 of 2000**

Lalher Bada

Versus

The State of Madhya Pradesh (now Chhattisgarh)

CAV JUDGMENTPost for 08 /11/2016

**Sd/-
R.C.S. Samant
Judge**

07/11/2016

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 436 of 2000****Judgment Reserved on 04/10/2016****Judgment Delivered on 08 /11/2016**

- Lalher Bada, S/o Ram Sai, aged 30 years, Occupation Agriculturist, R/o Parsodi Khurd, P.S. Darima, Distt. Surguja (M.P.) (now Chhattisgarh)

---- Appellant**Versus**

- The State of Madhya Pradesh (now Chhattisgarh), Through Station House Officer, Police Station, Darima, Distt. Surguja (C.G.)

---- Respondent

For Appellant :	Smt. Savita Tiwari, Advocate
For Respondent/State :	Ms. M. Asha, Panel Lawyer

Hon'ble Shri Justice Rajendra Chandra Singh Samant**C A V Judgment**

1. This appeal has been preferred against the judgment of conviction and order and sentence passed by First Additional Sessions Judge, Ambikapur, District Surguja in Sessions Trial No. 317/99 on 25/01/2000, whereby the appellant was convicted under Sections 363, 366 and 376 (1) of Indian Penal Code and sentenced to undergo rigorous imprisonment of five years, five years and ten years respectively with direction that the sentences shall run concurrently.

2. The case of prosecution in brief is that prosecutrix (PW-2) was aged about 13 years on the date of incident i.e. on 25/09/99,

on this date prosecutrix (PW-2) went towards the fields to answer the call of nature and was coming back, at that time appellant caught her and gagged her mouth with her Orhani and showing a knife and he threatened that he will split her stomach if she raises alarm, thereafter appellant took her to a school nearby and forcefully unclothed her and forcefully committed sexual intercourse with her. Appellant kept her in that school till 3.00 a.m. in the night and in the meanwhile he had intercourse with her for three times. After this appellant threatened she should not speak of this incident. Prosecutrix came back to her residence and immediately narrated about the incident to her brother Indrakumar (PW-4) and Anil Kumar and also her mother Gulabi Bai (PW-5). FIR (Ex.P/3) was lodged in Police Station, Darima, District Surguja on 26/09/99 at about 17.30 hours showing the reason for delay that father of the prosecutrix was out of village and on his coming back she has come to lodge the report. Case was registered against the appellant, on completion of investigation charge-sheet was filed against the appellant for prosecution under Sections 363, 366 and 376(1) of IPC.

3. The appellant was charged as charge-sheeted on his denial of charge, the trial was conducted and the impugned judgment was passed in which the appellant was held guilty, convicted and sentenced as mentioned above.

4. This appeal has been brought on the grounds that conviction of accused is not based on the reliable evidence of the

prosecution. There had been solitary evidence of prosecutrix (PW-2) which is not corroborated by the statement of any other witnesses. The contents of FIR that the appellant intended to marry the prosecutrix has not been stated by any witnesses. Conviction has been based on imaginary grounds, there had been delay of lodging FIR which is not explained in the prosecution evidence and FIR is not believable. Story of prosecution is improbable, hence prayed that this appeal be allowed and appellant be acquitted from the charges.

5. On behalf of the appellant it has been submitted that prosecutrix was not a minor on the date of incident and the case had been of consent. Uncorroborated testimony of prosecutrix is not believable it should have been discarded, hence the appellant is entitled to acquittal.

6. Counsel for the State argued that the prosecution has proved its case with evidence beyond reasonable doubt, hence the judgment of the trial Court should be maintained.

7. The question before this Court is whether the evidence led by the prosecution had been sufficient and beyond reasonable doubt to prove the charge against the appellant for which the evidence before the trial court is perused and finding is arrived at in this appeal.

8. Prosecutrix (PW-2) has stated that on the date of incident she went out to answer the call of nature towards the fields and

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was coming back. At that time appellant came near her and using her Orhani gagged her mouth and then showing a knife he threatened that if she raises any alarm he would split her stomach. Thereafter appellant took her to a school nearby and forcefully unclothed her and forcefully committed intercourse with her. In that place appellant-accused committed rape with her thrice. This witness was in restraint kept till 3.00 a.m. in the night during which rape was committed with her for three times. Thereafter this witness was released by the accused-appellant with threat that if she speak anything about the incident he will put Vermilion (Sindur). Soon after this prosecutrix (PW-2) narrated about the incident to Patel Dharamdev she also told about the incident to her brothers Indrakumar and Anil after which she lodged report (Ex.P/3) in the Police Station. She has stated that she is aged about 13 years.

9. In cross-examination prosecutrix (PW-2) has remained firm on her statement. She has admitted that she could not raise any alarm when appellant was forcefully taking her to a school and she did not go to school, herself on the contrary the appellant-accused dragged her to school where she was forcefully raped her in varanda of the school. Appellant-accused had intercourse with her for the first time after which both remain sitting in the varanda 2-3 hours, after which appellant-accused again had sexual intercourse with the prosecutrix. Similarly accused had intercourse with prosecutrix for three times. During the commission of offence appellant-accused first removed his undergarment and then he

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removed the undergarment of the prosecutrix. After the completion of the intercourse appellant-accused and the prosecutrix both had put on their undergarments. She has further admitted that after the intercourse for third time appellant-accused simply said he wants to go and went away from the spot. After which prosecutrix did not go to her residence but went to house of Dharmdev. On arriving there she did not have any talk in Dharamdev and went to the place where the wife of Dharamdev was sleeping and slept with her. She did not have any talk with wife of Dharamdev at night. She has stated that Dharamdev Patel informed in her residence about her presence in his house after which her mother and brother came to the residence of Dharamdev. She has denied that she narrated about the incident to her brother Inder Kumar, Anil Kumar and mother at the night of incident after 3.00 a.m. and denied she recorded such statement in (Ex. P/3). Further on suggestion of the defence she has admitted that she did not try to scratch the appellant using her nails, neither she tried to bite him with her teeth. She has admitted that appellant-accused dragged her to school even then she had no injury or scratches on her legs, though she denies that she was a consenting party in the intercourse.

10. Inder Kumar (PW-4) has stated that his sister prosecutrix (PW-2) went to answer the call of nature in the evening at 7.00 p.m. but she did not come back. Next morning Dharamdev Patel informed that the prosecutrix (PW-2) was in his house. On going there prosecutrix informed them about the incident. Gulabi Bai

(PW-5) is mother of the prosecutrix who has given statement in the same manner. Shiv Bachan Ram (PW-3) is father of the prosecutrix who states that on the date of incident he was out of village. On the next day he came at about 9 – 10 a.m. in the morning. He was informed about the incident by Inder Kumar (PW-4) but prosecutrix did not speak anything to him she just said she want to go police station to lodge report. Dharamdev (PW-8) has stated that prosecutrix came to her house on the night of incident and she did not say anything to them. On the next morning after the mother and brother came to his house prosecutrix narrated the incident to them in presence of this witness.

11. In this way the prosecution evidence has been presented whereby prosecutrix (PW-2) has narrated whole story which came to the knowledge of her brother Inder Kumar (PW-4), mother Gulabi Bai (PW-5) and Dharamdev (PW-8) in the morning after the date of incident. Shiv Bachan Ram (PW-3) was informed about this incident and he took prosecutrix along with him for the lodging of FIR.

12. For corroboration of this statement of prosecutrix she was examined by Dr.(Smt.) Pratibha Rajul Jain (PW-7) proving her report (Ex.P/9) she has stated that there was no sign of injury on the body of the prosecutrix. Hymen was torn at 1 o'clock position and on touching it it was bleeding associated with pain. From the secretion of vagina two slides were prepared which were sealed

and given to constable. Vagina admitted only one finger with difficulty as it was painful. She has opined that intercourse had taken place with the prosecutrix. She advised for X-ray examination regarding age of the prosecutrix. Her statement in examination in chief has not been challenged in any manner, on the contrary hypothetical questions were put to this witness to which she has answered which is of no consequence without evidence to support hypothesis. Dr. M.K. Jain (PW-9) who has conducted X-ray examination of the prosecutrix (PW-2) reported on (Ex.P/10) that radiological age of the prosecutrix is 14 – 16 years and he has remained firm in and cross-examination as well. Assistant Sub Inspector S.C. Shukla (PW-10) has stated about the investigation procedure. Head Constable Augustus Toppo (PW-11) has assisted in the investigation.

13. Head Master Sukhdev (PW-1) has stated that as per the admission register of primary school Parsodikhurd the date of birth of prosecutrix was recorded as 20/12/1985 on the basis of this register entry certificate (Ex.P/1) was given by this witness. This statement has remained unrebutted. He admitted that register of Kotwar was not called to examine the date of birth of prosecutrix before entering her date of birth in school register. It was the burden of defence to bring evidence on record regarding age of the prosecutrix had been more than 18 years on the date of incident.

14. After close scrutiny and consideration on the evidence led

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by the prosecution in the trial Court, it is concluded that the story of prosecutrix (PW-2) is wholly reliable looking to her examination in chief and cross-examination it shows that she was forced to go with the appellant-accused and this fact is established that appellant-accused had sexual intercourse with prosecutrix thrice on the eventful night. This statement of prosecutrix is supported by the medical report and evidence of Dr. (Smt.) Pratibha Rajul Jain (PW-7) according to which the presence of fresh tear in the vagina of prosecutrix along with bleeding associated with pain. It suggests that prosecutrix was subjected to sexual intercourse. Other witness though hearsay have supported as they came to know about the incident soon after.

15. The grounds in this appeal, that the conviction of accused is based on solitary witness hence unbelievable, is not acceptable. In this kind of offence one cannot expect to find independent eye witness. The ground in appeal that prosecutrix had no injury of her body and neither her cloth were torn suggest consent this ground has been considered and allowed with reservation and its effect will be considered after the finding on age of the prosecutrix is given in this judgment.

16. There are some contradiction in FIR in which prosecutrix recorded that she told about incident to her brother and mother on the night of the incident itself whereas she has denied it in her statement before the Court. This contradiction cannot be considered as having any material consequences, it is only the

time of narration and information to the brothers and mother of the prosecutrix which becomes disputed due to this contradiction and there is no denial that prosecutrix informed her brothers and mother about the incident. This contradiction is in no way harmful to the case of prosecution specifically for the reason that the information and narration by the prosecutrix about the incident remained consistent through out, while informing the witnesses and while recording of FIR (Ex. P/3). Further her statement is medically supported due to which this ground in appeal also has no force.

17. Non-examination of wife of Dharamdev is not fatal in any way, the delay in lodging FIR is properly explained as per the evidence on record, which shows that prosecutrix (PW-2) did not go to her own residence after the incident, instead she went to the house of Dharamdev. In the morning next day she made up a decision and thereafter she informed her brothers and mother about the incident and willingly went to the police station for lodging report.

18. Now the only question whether this incident can be considered as based on consent of prosecutrix. For this ground the finding on age of the prosecutrix is essential. The trial Court has in its judgment has accepted the version of prosecution that prosecutrix was below the age of 16 years on the date of incident.

19. Counsel for the appellant has relied on the judgment of Apex Court in ***Jaya Mala Vs. Home Secretary, Jammu & Kashmir***

and others, reported in **AIR 1982 SC 1297** in which it was held that opinion of doctor on the basis of that the margin of error in age ascertained by radiological examination is two years on either side.

20. In this case the date of birth of prosecutrix has been proved on the basis of admission register from the school to be 20/12/1985 and on the basis of which on 25/09/1999 the date of incident prosecutrix was aged below 14 years. Dr. (Smt.) Pratibha Rajul Jain (PW-7) has not given any opinion in her report (Ex.P/9) and has advosed for radiological examinatiion to confirm the age of prosecutrix. Dr. M.K. Jain (PW-9) has opined that the age of prosecutrix was between 14-16 years as per his report (Ex. P/2), he has also admitted that according to the opinion about age by radiological examination has margin of error of two years on the either side. This witness has not opined the age of the prosecutrix clearly to be either 14 or 16 years, hence on which side margin could be added is not clear from the report given by this doctor. On the other hand the age of prosecutrix on the basis of school record is established which has not been disputed by the defence and neither any reason has been given, why the evidence of age of prosecutrix on the basis of school record should be disbelieved. No evidence has been led by the defence to rebut or contradict the evidence of prosecution in this respect. For these reasons the evidence of prosecution had been sufficient to come to a conclusion that prosecutrix was below the age of 14 years on the date of incident. Hence the ground of consent raised by appellant

is immaterial. Hence the finding of the trial Court in this aspect is correct which cannot be interfered with on the basis of grounds taken and argument presented by the appellant's side. The cases cited by the appellant does not help in any way.

21. After the discussions made above, it is concluded that the judgment of conviction and sentenced passed by the learned trial Court has no infirmity, the grounds taken in this appeal to challenge this impugned judgment have no force. Hence, this appeal is dismissed. The appellant is on bail. His bail bonds are cancelled and he be arrested forthwith to serve out the remaining sentence imposed upon him.

Sd/-

(Rajendra Chandra Singh Samant)
JUDGE