

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 934 of 2009**

Puran Singh S/o Dukalu Ram Gondh, aged about 25 years, R/o Sakin Talesar, Thana Gariyaband, District Raipur, (Chhattisgarh).

---- Appellant**Versus**

State of Chhattisgarh, through Police Station Gariyaband, District Raipur, Chhattisgarh.

---- Respondent

For Appellant	: Shri Vinod Deshmukh, Advocate.
For Respondent	: Shri Ravindra Agrawal, Panel Lawyer.

Hon'ble Shri Deepak Gupta, Chief Justice**Judgment on Board****25/11/2016**

1. This appeal by the convicted Accused/Appellant is directed against the judgment dated 29.08.2009 delivered by the learned Additional Sessions Judge, Gariyaband, District Raipur, in Sessions Trial No. 16 of 2009 whereby he convicted the Accused/Appellant for having committed an offence punishable under Section 376 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for 10 years and to pay fine of Rs. 100/-. In default of payment of fine, the Appellant was required to undergo further simple imprisonment for 10 days.

2. The prosecution story, briefly stated is that in the night intervening 26/27.02.2009, the prosecutrix who was aged about 14 years, had gone to attend a wedding. When she was coming back from the wedding, the Accused-Appellant accosted her, he forcibly took her near a Peepal tree and there he committed rape upon her. The prosecutrix came back home and informed her parents. Thereafter, a meeting of the village elders was called. In this meeting, the Accused-Appellant denied that he had raped the prosecutrix. Thereafter, the

complaint was filed and FIR (Exhibit P/1) was lodged. The prosecutrix was subjected to medical examination and after medical examination and carrying out other investigation, the police filed a report under Section 173 CrPC against the Accused-Appellant and charged him of having committed an offence of rape. He denied the charges and prayed for trial. After the trial, the Accused-Appellant has been held guilty and has been convicted and sentenced, as aforesaid. Hence, this appeal.

3. Obviously, in a case of this nature, there is very little likelihood of there being any eyewitness. The law is well settled that in case of rape, conviction can be maintained even on the basis of sole testimony of the prosecutrix. However, there is an important caveat which is that the testimony of the prosecutrix must inspire confidence and the Court must be sure that the statement of the prosecutrix is reliable and that intrinsic reliance can be placed on the same. Even though the testimony of the prosecutrix is not required to be corroborated, but if her statement itself is not believable, then the Accused cannot be convicted.

4. In this case, the prosecutrix appeared in the Court as PW-1. Though, she got her age recorded as 15 years which would mean that she was aged about 14 years on the date of incident. She also stated that she did not know her age. In the examination-in-chief, she has stated that she was returning from a wedding all alone and then the Accused-Appellant caught hold of her and took her to the field of Heeralal where he raped her. She also stated that after she was raped, she came home and informed her parents. A meeting of the village elders was called and thereafter, the complaint was filed. In cross-examination, the prosecutrix has admitted that she had gone to attend the wedding alongwith her friends. Her brother, Veer Singh was also present. The Accused-Appellant was dancing in the house where the marriage was being solemnized. She has admitted the suggestion that she and her friends were laughing loudly and her

brother had objected to her laughing in that manner. She also admitted that Veer Singh had asked the Accused-Appellant to ensure that the girls behave properly and thereafter, when she and her friends again laughed, the Accused-Appellant slapped the prosecutrix and her friend. She further states that thereafter, she came home and informed her parents about the fact that she had been slapped by the Accused-Appellant. However, this fact does not find mention either in the FIR or in the statement recorded under Section 161 CrPC.

5. The medical examination does not reveal any injury on the person of the prosecutrix. The medical report also reveals that she was habituated to sexual intercourse. The Doctor (PW-8), in her statement has also clearly stated that though there was evidence of sexual intercourse, but it could not be stated that the sexual intercourse had taken place immediately prior to the examination.

6. To prove the age of the prosecutrix, the prosecution has firstly relied on the statement of the parents of the prosecutrix. Their statements are totally unreliable. The prosecutrix herself states that she does not know her age. As far as statement of father (PW-2) is concerned, he states that the prosecutrix was 13 ½ years on the date of incident but in the latter part of the statement, he has stated that he was married 35 years ago and after two years of his marriage, his son Veer Singh was born and 1 ½ years thereafter, the prosecutrix was born which would mean that the prosecutrix was aged about 31 years, which is not at all correct. The mother has also not given any clear indication regarding age of the prosecutrix. The prosecution has also relied on the statement of Gendram Thakur (PW-4), Head Master, who has produced the records of the school which shows that the date of birth of the prosecutrix, as per the school record, is 23.03.1993 which means that on the date of occurrence, the prosecutrix was aged about 15 years and 11 months. However, this witness further states that he has no knowledge about the date of birth and he had recorded the same on the basis of

information given by a lady working in the Anganbadi Centre. The primary proof of age is the entry in the Register of Births and Deaths. That register has not been produced. The entry in the school record is relevant but to rely on the school record, it must also be shown on what basis the entry in the school record was made. In this case, there is no proof of the same.

7. The medical evidence, especially the ossification test shows that the skeletal age of the prosecutrix is about 16 years. It is well settled law that this age is not certain. The report of the ossification test depends on various factors including the community to which the person belongs, class or society to which the person belongs, whether the person belongs to a society where enough food is available for proper growth. In any event, it is settled law that in such cases, there can be variation of two years on either sides. Similar statement has been given by the Doctor (PW-8). Therefore, in this case, the benefit will have to be given to the Accused-Appellant and the age will have to be taken as more than 16 years.

8. Next comes the question as to whether the prosecutrix was a consenting party to the act of sexual intercourse or not. In fact, there is no clear cut evidence of sexual intercourse. The possibility of the Accused-Appellant being falsely implicated cannot be ruled out because both the prosecutrix and her father in their statements have admitted that there was a long enmity between the father of the prosecutrix and the Accused-Appellant. The plea of enmity is a double edged sword. Though, it may be a ground for false implication of the Accused, it can equally be a motive for committing a crime. The prosecutrix, as per the medical evidence was a well built girl of 16 years of age. It is also on record that she was habitual to sex. She was missing from the house till 3 am in the morning and the family members have not said a word that they were searching for their daughter who had not returned till 3 am. There are no marks of injuries, external or internal

on the person of the prosecutrix. There is no evidence of any struggle, whatsoever. It is more than obvious that the act of sex, if any, was consensual in nature. Therefore, no case of rape is made out. Thus, I am of the considered view that the learned trial court gravely erred in convicting the Accused only on the basis of testimony of the prosecutrix.

9. As held by me above, the conviction can be maintained on the sole testimony of the prosecutrix, but the testimony must inspire confidence and appear to be truthful. In this case, this does not appear to be a such case.

10. The judgment dated 29.08.2009 of the learned Sessions Judge, Gariyaband, in Sessions Trial No. 16 of 2009 convicting the Appellant under Section 376 IPC is set aside and the Accused-Appellant is acquitted of the charge. The Accused/Appellant is in jail. He be set at liberty forthwith unless required in any other case.

11. The appeal is allowed.

Sd/-
(Deepak Gupta)
CHIEF JUSTICE