

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 726 of 2014**

Sagar Markam, s/o Tilakchand, aged about 21 years, R/o village Udidgaon, P.S. Makdi, Civil & Revenue District Kondagaon, Chhattisgarh.

---- Appellant (in Jail)**versus**

State of Madhya Pradesh (now Chhattisgarh) through P.S. Makdi, District Kondagaon, Chhattisgarh.

---- Respondent

For the Appellant : Shri Ashok Dixit, Advocate.
For the Respondent/ State: Shri R.K. Jaiswal, Panel Lawyer.

Hon'ble Shri Justice Rajendra Chandra Singh Samant**Judgment on Board****09.12.2016**

1. This appeal has been preferred against the judgment of conviction and order of sentence dated 6.5.2016, passed by the Learned Additional Sessions Judge, Kondagaon, District Kondagaon, Chhattisgarh in Sessions Trial No. 190 of 2012, whereby and whereunder the learned Additional Sessions Judge has convicted the appellant/ accused under Section 376 of the Indian Penal Code (for short 'the IPC') and sentenced to undergo RI for 7 years and to pay fine of Rs.5,000/-, in default of payment of fine, to further undergo RI for six months.

2. The case of the prosecution, in brief, is that the prosecutrix (PW-3) had been to a marriage ceremony on 18.5.2011, at about 10:00 pm in Village Udidgaon, the appellant beckoned and called the prosecutrix, she responded and went with the appellant. The appellant caught hold of the

prosecutrix and forcefully took her into a jungle. By pushing her down on the ground and disrobing her, he forcefully committed sexual intercourse with her. At this time, Roop Singh (PW-8), brother of the prosecutrix, and Kishnu (PW-7) arrived at the spot, the prosecutrix informed them about the incident and also intimated to her father on the same day. Her father called a meeting of elders of the village on 19.5.2011. The prosecutrix narrated the incident in the meeting before Man Singh Netam, Sukhman Netam and others. On 23.5.2011, a written report was presented in Police Station Makdi. On the basis of which, First Information Report was registered against the appellant under Section 376 of the IPC. The prosecutrix was medically examined. The vaginal slides of the prosecutrix were prepared by the doctor and were seized vide Ex. P/1. On advice of the examining doctor, ossification test of the prosecutrix was conducted vide Ex. P/6. Spot map was prepared by Patwari Shyamlal (PW-9) vide Ex. P/8. The appellant/accused was also medically examined. Seized articles were sent for forensic examination and a report was obtained which is present on record as Ex. P/18. Statements of the witnesses were recorded and on completion of the investigation, the appellant was charge-sheeted. The appellant was charged for the offence under Section 376 of the IPC to which he denied. The prosecution examined as many as 10 witnesses. The defence did not examine any witness. On being examined under Section 313 of the Cr.P.C., denying all the incriminating evidence against him, the appellant pleaded innocence and false implication. After giving opportunity of hearing and leading evidence to the prosecution and the defence, the impugned judgment has been passed by which the appellant has been convicted and sentenced as mentioned above. Hence, this appeal.

3. The grounds of the appeal are that the trial Court has failed to appreciate the prosecution evidence in proper perspective. The prosecutrix (PW-3) had been a consenting party and her age at the time of incident was more than 18 years. On these grounds, no case is made out against the appellant. There are many contradictions, omissions and improvements in the statements of the prosecution witnesses, which affect the reliability of the prosecution evidence. For these reasons, the appellant is entitled for benefit of doubt and it is prayed that the impugned judgment may be set aside.

4. Learned counsel for the appellant submits that on perusal of the statement of the prosecutrix (PW-3), it appears that she was a consenting party. There had been material contradictions and omissions in the statements of the prosecutrix. The medical report does not support the version of the prosecutrix. The ossification test report though mentions the age of the prosecutrix between 12 – 15 years, a margin of three years is applicable in this case as per admissions made by Dr. Govind Singh (PW-6) in his cross-examination. Apart from that, the statements of other witnesses also do not support the case of the prosecution. Hence, the appellant is entitled for benefit of doubt.

5. Learned State counsel opposed the grounds and arguments submitted on behalf of the appellant. The question before this court is whether on the basis of evidence produced by the prosecution a case under Section 376 of the IPC is made out against the appellant.

6. I have heard learned counsel for the parties and perused the evidence led before the trial court.

7. The prosecutrix (PW-3) in her deposition has stated that at the time of incident, the appellant took her towards the Mahua tree and forcefully raped her. On raising alarm, Roop Singh (PW-8), brother of the prosecutrix and Kishnu (PW-7) arrived at the spot. Both of them caught hold the accused and took him to the village where a meeting was called in which the appellant said that he did not commit any rape, on the contrary he said that he had sexual intercourse with the consent of the prosecutrix. The persons present in the meeting were not convinced with the narration of the prosecutrix. For this reason, she submitted a written report (Ex. P/2) in police station on the basis of which the FIR (Ex. P/3) was recorded. In cross-examination, she denied about having any affair with the appellant and she was confronted with her previous statement in the written report (Ex. P/2), according to which, the arrival of her brothers was not due to raising alarm by her. Hence, her statement in court that her brothers arrived on her raising alarm is an improved statement. Further, she admitted that the appellant offered to keep her as his wife which she accepted and resided in the residence of the appellant but on the next day her parents brought her back.

8. Kishnu Ram (PW-7) stated that he and Roop Singh (PW-8) were on their way to marriage ceremony at about 10:00 pm. At that time, they saw that the prosecutrix (PW-3) and appellant were sitting below a Mahua tree. On seeing them, Roop Singh (PW-8) slapped his sister and took her home. This witness has not supported the prosecution case in the matter of charge against the appellant. In cross-examination by defence, he admitted that in the village meeting the appellant offered that he would marry the prosecutrix (PW-3) and had taken her to his residence. Roop Singh (PW-8) also made

similar statement that alongwith Kishnu (PW-7) he saw that the prosecutrix and the appellant were sitting near a Mahua tree then Roop Singh (PW-8) caught hold her sister and took her home. Later on, it was told by the prosecutrix that the appellant had forcefully committed rape with her. In cross-examination, this witness admitted that there had been love affair between the prosecutrix and the appellant. He admitted that when he saw both of them they were doing nothing and just sitting at that place.

9. Man Singh Netam (PW-1), father of the prosecutrix alleged that the appellant raped his daughter. Sukhman Netam (PW-2) is also the witness of the same meeting and has stated similarly. Gopiram (PW-4) stated that on the date of incident, he informed the father of the prosecutrix that the appellant has raped his daughter on the basis of which, he called a meeting of the elders in the village. In the meeting, a compromise was suggested by the elders but the appellant and his family members did not agree for the compromise. For this reason, a report was lodged. In cross-examination, Man Singh Netam (PW-1), father of the prosecutrix also admitted that he came to know about the love affair of his daughter in the meeting and he also admitted that on the suggestion of the persons present in the meeting his daughter had gone to the house of the appellant after the meeting. Later on, he brought his daughter back.

10. On perusing and considering the evidence led by the prosecution, it is clear that the prosecutrix (PW-3) though submitted that the appellant committed rape with her has improved her statement by stating that on raising alarm her brother and others came at the spot at the time of incident. There is again an improvement in statement compared to the written

report (Ex. P/2) presented by her in the police station which mentions that after the incident when she was on her way to home she met with Roop Singh (PW-8) and Kishnu (PW-7) and told them about the incident. Kishnu (PW-7) and Roop Singh (PW-8) have stated differently that they saw the appellant and prosecutrix sitting below a tree and objecting to it the brother of the prosecutrix Roop Singh (PW-8) forcefully took his sister to his residence. The witnesses of the meeting have stated that an attempt for compromise was made between both the parties to which the prosecutrix and her family agreed initially but later they withdrew from the compromise and opted to lodge a report against the appellant. The medical evidence does not support the case of the prosecutrix. Dr. Kumud Kunwar (PW-5) examined the prosecutrix (PW-3) and found no injury on her private parts or body. Her report is Ex. P/5.

11. After considering the whole evidence of the prosecution, the picture revealed is that the prosecutrix and the appellant had some affair between them prior to the incident. On the date of incident, as per the allegation of the prosecutrix, even if it is believed, the appellant had sexual intercourse with the prosecutrix. The story of forceful sexual intercourse without consent and willingness does not seem to be acceptable. On the basis of the statements of the witnesses themselves, Kishnu (PW-7) and Roop Singh (PW-8) arrived at the spot, but they did not see any doubtful happening in their presence between the appellant and the prosecutrix. Hence, the arguments submitted on behalf of the appellant have substance and it is found that the prosecution has not successfully established its case that it was a case of forceful sexual intercourse with the prosecutrix without her willingness and consent.

12. The age of the prosecutrix on the date of incident had been relevant on this point. The finding given by the trial court is that the age of the prosecutrix was more than 16 years on the date of incident. The incident took place on 18.5.2011. On that date, the law regarding rape was different before the Amendment Act 13 of 2013 which came into force with effect from 3.2.2013. Under the then definition of rape, a man having sexual intercourse with a woman with or without her consent when she was under age of 16 years was regarded as rape. After the amendment being effective from 3.2.2013, the scenario has changed and the age in respect of consent has been raised to 18 years. Hence, the substantive law in force at the time of incident was that the age in respect of consenting rape was 16 years and the finding given by the trial court in this respect that the prosecutrix was above 16 years of age is not under challenge. Hence, the consent theory brought by the appellant is again supported as, according to law in force at that time, the prosecutrix was competent for giving consent for sexual intercourse.

11. For the aforementioned reasons and after due consideration it is found that the impugned judgment of conviction and sentence passed against the appellant is not based on legally admissible evidence and, therefore, the same is liable to be and is accordingly set aside. Consequently, the appeal is allowed. The appellant/accused is acquitted of the charge framed against him. He be set at liberty forthwith if not required in any other case.

Sd/-

(Rajendra Chandra Singh Samant)
Judge