

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 2972 of 1998

Judgment reserved on : 08.12. 2016

Judgment delivered on : .01.2017

Banshilal, Aged about 28 years, S/o. Shri² Makhan Chandrakar, R/o. Mararkali- Bahara, Police Station – Mahasamund, Tahsil Mahasamund, District Raipur (M.P.) (Now Chhattisgarh)

---- Appellant

Versus

State of Madhya Pradesh, (Now Chhattisgarh), through Police Station - Mahasamund, Tahsil- Mahasamund, District - Raipur (M.P.) (Now Chhattisgarh)

---- Respondent

For Appellant : Smt. Indira Tripathi, Advocate

For Respondent/ State : Shri Sanjeev Pandey, Govt. Advocate

Hon'ble Shri Justice Anil Kumar Shukla

C A V Judgement

1. Challenge in this appeal is to the judgment of conviction and order of sentence dated 12.11.1998 passed by the learned Second Additional Sessions Judge Mahasamund in Sessions Trial No. 486/1996, whereby learned Second Additional Sessions Judge convicted the appellant for the

offence punishable under Section 376(1) of the Indian Penal Code (for short 'IPC') and sentenced him to undergo rigorous imprisonment for seven years and to pay fine of Rs. 3,000/- in default of payment of fine, to further undergo additional simple imprisonment for five months.

2. The conviction is impugned on the ground that without there being a cogent evidence against the appellant the learned trial Court has convicted and sentenced the appellant as aforementioned and thereby committed an illegality.

3. As per the case of the prosecution, the prosecutrix (PW-1) was a resident of Village Charouda. In the intervening night of 08/09.10.1995, the prosecutrix (PW-1) had gone along with Samrin Bai to see dance. During the dance, Samrin Bai took the prosecutrix (PW-1) towards Jangal Naka for discharging urine, where the appellant was already present. Samrin Bai caught hold the hands of the prosecutrix (PW-1) and took her inside a room of the Naka and called the appellant. Thereafter, the appellant and Akhil came there. Akhil stood up on the stairs of the Naka and the appellant caught hold the hands of the prosecutrix (PW-1), gagged her mouth and took her inside a room. The prosecutrix (PW-1) tried to get rid of the possession of the appellant but the appellant made her lie down on the floor and committed forcible sexual intercourse with her. On her screaming, Bhuvneshwar (PW-3), Pannu (PW-4) and Vishnu (PW-5) came there on seeing them, the

appellant fled of from there. Vishnu (PW-5) beat the prosecutrix (PW-1). While committing forcible sexual intercourse by the appellant, bangles of the prosecutrix (PW-1) had broken and her ear ring had been removed from the ear. Akhil and Samrin Bai fled from there by jumping the wall. Samrin Bai is sister of Pannu (PW-4). The prosecutrix (PW-1) returned her home and informed about the incident to her father. Since the incident had taken place at about 2 O'clock in the night, therefore, she went to lodge a report in the next morning on 09.10.1995. Before lodging the report in the police Station, a meeting was called in the village in which the prosecutrix (PW-1) had narrated the incident. The prosecutrix (PW-1) lodged First Information Report (Ex.P-1). The prosecutrix (PW-1) was sent for medical examination. Dr. Amita Jha (PW-8) examined the prosecutrix (PW-1) and gave her report vide (Ex.P-8). The appellant was also sent for medical examination. Dr. Pardal (PW-11) examined the appellant and gave his report vide (Ex.P-11). Investigation was conducted by Sub-Inspector B.N. Shukla (PW-12). During the investigation statement of the witnesses were recorded under Section 161 Cr.P.C. After completion of the investigation, the appellant was charge-sheeted for the offence punishable under Section 376(1) IPC. The appellant denied the guilt and pleaded innocence. Trial was conducted. The prosecution examined as many as 12 witnesses. The appellant was

examined under Section 313 Cr.P.C. He did not examine any witness in his defence. The trial Court, after affording opportunity of hearing and leading evidence to the parties, passed the impugned judgment convicting and sentencing the appellant as mentioned above. Hence, this appeal.

4. Smt. Indira Tripathi, learned counsel for the appellant argued that the trial Court has not properly appreciated the evidence available on record. The independent witnesses have not supported the case of the prosecution. The statements of the witnesses recorded before the Court below are of the interested witnesses. She further argued that the FIR had been lodged belatedly by the prosecutrix and the medical evidence also does not support the case of the prosecution. The conduct of the prosecutrix (PW-1) discloses that she was a consenting party. Therefore, it is not safe to rely upon the sole testimony of the prosecutrix (PW-1) for convicting the appellant. Hence, she prayed that the appellant be acquitted of the charge framed against him.

5. On the contrary, Shri Sanjeev Pandey, learned Govt. Advocate for the State/respondent, opposed the above arguments and supported the impugned judgment passed by the learned Additional Sessions Judge.

6. I have heard learned counsel for the parties at length and have also perused the record with utmost circumspection.

7. The questions arising for consideration before this Court are that-

(i) Whether the Accused-Appellant has committed sexual intercourse upon the prosecutrix (PW-1) without her consent ?

(ii) Whether the conviction of the Appellant-Accused is proper or not ?

8. To hold the appellant guilty, the prosecution examined the prosecutrix (PW-1), Motiram (PW-2), Bhuvneshwar (PW-3), Pannu (PW-4), Vishnu (PW-5), Hariram (PW-6) and Nammulal (PW-7), who are the eye-witnesses of the incident and Dr. Smt. Amita Jha (PW-8), Jhaduram Sahu (PW-9), Assistant Sub Inspector C.P. Mishra (PW-10), Dr. R. K. Pardal (PW-11) and Assistant Sub Inspector B.N. Shukla (PW-12). The appellant did not examine any witness in his defence.

9. As far as the age of the prosecutrix (PW-1) is concerned, she has stated in her deposition that she was 20 years old on the date of incident, whereas in the FIR, the age of the prosecutrix (PW-1) was mentioned as 18 years. Therefore, it is clear that on the date of incident, the age of the prosecutrix (PW-1) was above 16 years.

10. The prosecutrix (PW-1) deposed that on the date of incident, after 8 O'clock, she had gone along with Samrin Bai to see the dance programme in the village. During the dance, she went

with Samrin Bai for discharging urine towards Jangal Naka situated at a distance of 1½ -2 *Farlangs*. After reaching Jangal Naka, Samrin Bai called accused/ appellant and told the appellant that the prosecutrix (PW-1) has reached there. Having heard the voice of Samrin Bai, the appellant alongwith other person reached there. The appellant caught hold the hands of the prosecutrix and took her inside the room. Samrin Bai went with other person Akhil inside the other room. The Prosecutrix (PW-1) further deposed that the appellant gagged her mouth and committed sexual intercourse with her. At that time, Bhuvneshwar (PW-3), Pannu (PW-4) and Vishnu (PW-5) came there and they made the appellant flee from the spot. Vishnu (PW-5) caught hairs of the prosecutrix (PW-1) and beat her. Thereafter, they took out the prosecutrix (PW-1) from the Naka.

11. The prosecutrix (PW-1) further deposed that while committing forcible sexual intercourse by the appellant, two of her bangles had broken and her ear ring had been removed from the ear. She further deposed that on seeing Vishnu (PW-5) beating her, Akhil and Samrin Bai fled from the spot. Vishnu (PW-5) tried to catch them. She also deposed that Pannu (PW-4) left her and went towards Samrin Bai, as she is his sister. The prosecutrix (PW-1) further deposed that when she returned home, Bhuvneshwar (PW-3), Pannu (PW-4) and Vishnu (PW-5) informed her father about the incident and she

also narrated the incident to her father. The prosecutrix (PW-1) further deposed that a Panchayat meeting was called for regarding the incident.

12. Motiram (PW-1), father of the prosecutrix (PW-1) deposed that he had told about the incident to the villagers and thereafter, decided to report the matter to the police.

13. Hariram (PW-6), a villager of the same village, who was the witness to the incident, turned hostile.

14. Jhaduram Sahu (PW-9), who is also a villager of the same village, deposed that he knew the daughter of Motiram (PW-2). At about 2 o'clock Motiram (PW-2) came to him alongwith 7-8 persons of the village and called him near Durga chowk of the village, where Buvneshwar told him that he and two other persons had caught the appellant with the prosecutrix (PW-1) in a room. Motiram (PW-2) said that he had no need to ask from the appellant about the incident and he lodged a report against him. In his cross-examination, Jhaduram Sahu (PW-9) has narrated the incident and denied that in the Panchayat meeting the prosecutrix (PW-1) was not present. This witness also turned hostile.

15. The prosecutrix (PW-1) deposed that appellant committed sexual intercourse with her and at that time Bhuvneshwar (PW-3) and Vishnu (PW-5) were present there. Vishnu (PW- 5) and Pannu (PW-4) committed *marpeet* with her. But, in the Court statement, Bhuvneshwar (PW-3), Pannu (PW-4) and

Vishnu (PW-5) have not supported the case of the prosecution and all of them have turned hostile. Statement of Samrin Bai was not recorded in the Court.

16. Dr. Smt. Amita Jha (PW-8) deposed that she conducted medical examination of the prosecutrix (PW-1) and gave her report vide (Ex.P. 8), wherein it is clearly stated by her that she did not find any injury on the private part of the prosecutrix (PW-1). The doctor has further clarified in her cross-examination that the prosecutrix (PW-1) was habitual to sexual intercourse. Thus, the medical evidence has not supported the case of the prosecution.

17. The Investigating Officer Assistant Sub Inspector C.P. Mishra (PW-10) and Assistant Sub Inspector B.N. Shukla (PW-12) have not supported the case of the prosecution. Both these witnesses have deposed that the prosecutrix (PW-1) was caught red handed with the appellant in a room. The appellant had not committed forceful sexual intercourse with her.

18. After minute and careful examination of the evidence of the prosecutrix (PW-1), Bhuvneshwar (PW-3), Pannu (PW-4) and Vishnu (PW-5), it reveals that the prosecutrix (PW-1) was a consenting party to the commission of sexual intercourse with her. Therefore, the conviction of the appellant cannot be based on the evidence of the prosecutrix (PW-1).

19. On the basis of the aforesaid discussion, I am of the considered view that the learned trial Court has committed an

error in convicting the appellant for the offence punishable under Section 376 (1) IPC. Hence, the impugned judgment of conviction and sentence is not sustainable.

20. In the result, the appeal is allowed. The impugned judgment convicting and sentencing the appellant for the offence under section 376(1) of IPC is set aside. The appellant is acquitted of the charge framed against him.

21. It is reported that the appellant is on bail. His bail bonds are not discharged at this stage and the same shall remain operative for a further period of six months from today in terms of Section 437-A of the Cr.P.C.

Sd/-
(Anil Kumar Shukla)
Judge