

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 1232 of 2002****Judgment Reserved on 29.03.2017****Judgment Delivered on 11.05.2017**

Nar Singh Patel, son of Gajanan Patel, aged about 24 years, resident of village Mukta, Police Station Dabhra, District Janjgir-Champa, Chhattisgarh.

---- Appellant (in Jail)**Versus**

State of Chhattisgarh through its District Magistrate, Janjgir-Champa, District Janjgir Champa, Chhattisgarh.

---- Respondent

For the Appellant	:	Shri Manish Dutt, Senior Advocate with Shri K. Rohan, Advocate.
For the Respondent/ State	:	Shri Rahul Tamaskar, Panel Lawyer.

Hon'ble Shri Justice Pritinker Diwaker**Hon'ble Shri Justice Rajendra Chandra Singh Samant****CAV JUDGMENT****Per R.C.S. Samant, J.**

1. This appeal has been preferred against the judgment of conviction and order of sentence dated 11.11.2002, passed by the Learned Special Judge under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short 'the SC & ST Act, 1989'), Bilaspur, District Bilaspur, Chhattisgarh, in Special Case No. 51 of 2001, whereby and whereunder the Learned Special Judge has convicted the appellant under Section 376(2)(g) of the Indian Penal Code (for short 'IPC') and sentenced to undergo RI for 10 years and to pay fine of Rs.500/- and under Sections 3(2) (v) and 3(i)(xi) of the SC & ST Act, 1989 and sentenced him to undergo

imprisonment for life and RI for six months and to pay fine of Rs.500/- and Rs.200/-, respectively with default stipulation.

2. The case of the prosecution, in brief, is that the prosecutrix (PW-1) is a member of scheduled caste – Ganda and on the date of incident, she was aged about 13-14 years. On 23.11.2000, when the prosecutrix (PW-1) was grazing goats in Reghakhar, the appellant and acquitted co-accused Chandra Kumar Patel, son of Mohanlal Patel came there, forcibly disrobed her and Nar Singh committed forcible sexual intercourse with her. She raised alarm but nobody was present nearby. Thereafter, co-accused Chandra Kumar Patel also forcibly raped her and the appellant caught hold her hands to help in commission of this offence. Deeprai (PW-2), father of the prosecutrix was informed about this incident by Kalawati, daughter of Reshamlal (PW-3) that the prosecutrix (PW-1) was raped by the appellant and the co-accused. After making enquiry and being confirmed by the prosecutrix (PW-1) about the incident, Deeprai (PW-2) lodged the First Information Report Ex. P/3 in Police Station Dabhra on 29.11.2000.

3. During investigation, the prosecutrix was examined by Dr. Anita Shrivastava (PW-4) who opined in her report vide Ex. P/8 that the prosecutrix (PW-1) may have been subjected to sexual intercourse. She clarified her opinion and confirmed the same vide Ex. P/9. Slides prepared from the vaginal smear were seized vide Ex. P/12. The spot map Ex. P/1 was prepared by the Patwari on request received from police station, Dabhra vide Exs. P/1 and P/2. Investigation was done with respect to proof of age of the prosecutrix by seizing and collecting the transfer certificate and the entries in the school register. On the basis of which, it was revealed that the

date of birth of the prosecutrix (PW-1) was 8.9.1986. According to which, her age was below 16 years on the date of incident. Statements of the witnesses were recorded under Section 161 of the Code of Criminal Procedure, 1973 (for short 'the Code'). After completion of investigation, the appellant and the co-accused were charge-sheeted.

4. The appellant and co-accused were charged under Section 376(2)(g) of the IPC and Sections 3(2)(v) and 3(i)(xi) of the SC & ST Act, 1989. The appellant and the co-accused denied the charges framed against them and prayed for trial. The prosecution examined as many as 14 witnesses and the defence examined two witnesses. On being examined under Section 313 of the Cr.P.C., denying all the incriminating evidence against them, the appellants 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 co-accused Chandra Kumar Patel has been acquitted of all the charges but the appellant has been convicted and sentenced as mentioned above. Hence, this appeal.

5. The grounds in this appeal are that the impugned judgment is erroneous, illegal and contrary to law, facts and circumstances of the case. There are many contradictions, omissions and improvements in the statements of the prosecution witnesses, which affect the reliability of the prosecution evidence. The evidence of Fatkan Bai (PW-7) has not been properly appreciated by the trial court. The witnesses of the spot Parmanand (PW-9) and Kartikram (PW-10) have not supported the case of the prosecution. Hence, for these reasons, the appellant is entitled for acquittal and it is prayed that the impugned judgment may be set aside.

6. Learned counsel for the appellants submits that the prosecutrix (PW-1) made allegations against the appellant and the co-accused Chandra Kumar Patel, on the basis of which the case was investigated and the appellant and the co-accused were charge-sheeted. The prosecutrix (PW-1) while deposing before the court has clearly omitted to state anything against the co-accused Chandra Kumar Patel, by stating that the accused Chandra Kumar Patel, who was present in the court, is not the same person who was present at the time of commission of offence. Challenging the statement of PW-1, the prosecution has declared her hostile and cross-examined her. Thus conduct of prosecutrix (PW-1) makes her as unreliable witness. Deeprai (PW-2) and Rashamlal (PW-3) are hearsay witnesses whereas the witnesses present on the spot Parmanand (PW-9) and Karthikram (PW-10) have not supported the case of the prosecution. Kalawati who informed Deeprai (PW-2) about the incident has not been examined. Looking to the admissions made by her in cross-examination, the medical report and the evidence of Dr. Anita Shrivastava (PW-4) cannot be regarded as conclusive.

7. Learned counsel for the appellant also submits that the charge-sheet was filed in absence of the appellant who was shown as absconding. In the meanwhile, co-accused Chandra Kumar Patel was charged and most of the witnesses were examined in his trial. The appellant was arrested and produced before the court on 11.7.2001. Thereafter, charges were framed against him on 20.8.2001 and the trial was conducted in which the witnesses were recalled. Fresh and complete examination-in-chief of the recalled witnesses Kamla Bai (PW-1), Deeprai (PW-2), Reshamlal (PW-3), Dr. Anita Shrivastava (PW-4) and Mahadev Prasad Sidar (PW-5) were not recorded by the trial court. On the contrary, a brief re-examination was done in an

introductory manner and these witnesses were confronted to cross-examination by counsel for the appellant before the trial court.

8. Learned counsel for the appellant submits that the procedure adopted by the trial court in the trial with respect to appellant - Nar Singh is totally in violation of Section 273 of the Code of Civil Procedure. It is further submitted that the witnesses above-mentioned were examined by the prosecution covering every detail of their previous statement under Section 161 of the Cr.P.C. in absence of appellant - Nar Singh. After the appearance of appellant – Nar Singh, in compliance of Section 273 of the Cr.P.C. these witnesses were required to be examined at length by the prosecution in the same manner as they were examined for the trial of co-accused Chandra Kumar Patel. This not being the case herein the trial against appellant Nar Singh stands negated as appellant Nar Singh was neither present during the recording of examination-in-chief of these witnesses nor he was represented by any counsel. Reliance has been placed on the judgment of the Apex Court in **State of Maharashtra vs. Dr. Praful B. Desai** reported in **(2003) 4 SCC 601**, in the judgment of M.P. High Court in **State of Madhya Pradesh vs. Budhram Kunkuram Satnami** reported in **1995 (0) MPLJ 906**, in the judgment of State of Maharashtra in **Mrs. Meenaz Moloobhay vs. State of Maharashtra** reported in **2000 CriLJ 3998**, in the judgment of State of Gujarat in **State of Gujarat vs. Hanu Dharsi Vaghri** reported in **2008 CriLJ 2221**, in the judgment of the High Court of Madhya Pradesh dated 5.5.1988 in Criminal Appeal No. 345 of 1988 (**Daryav Singh vs. State of Madhya Pradesh**) and in the judgment of High Court of Madhya Pradesh in the case of **State of M.P. vs. Budhram** reported in **1995 MPLJ 906**. The principle laid down in the judgments above-mentioned is that the compliance of

Section 273 of the Cr.P.C. is mandatory. All the evidence has to be taken in presence of the accused during the course of trial or in case when his personal attendance is dispensed with, in presence of his pleader and any trial conducted in violation of Section 273 of the Cr.P.C. stands vitiated. It is on the basis of the statements of examination-in-chief of the above-mentioned witnesses, the appellant has been convicted and sentenced in this case which is erroneous and bad in law. In these grounds, it is prayed that the conviction of the appellant be set aside.

9. In view of the submissions made, the question of legality of the trial conducted is examined. In this regard, Sections 273 and 465 of the Cr.P.C. are relevant, which are as under:

'273. Evidence to be taken in presence of accused.—Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader.'

'465. Finding or sentence when reversible by reason of error, omission or irregularity.—(1) Subject to the provisions hereinabove contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.'

10. Reliance has also been placed on the judgment of the Apex Court in the case of **Central Bureau of Investigation versus Abu Salem Ansari**, Date of Decision: 06 February 2009 reported in **2011 (4) SCC 426** in which it was observed in paragraphs 4, 5 and 6 as follows:

'4. Section 299 Cr.P.C. reads as under:

'299. Record of evidence in absence of accused.—(1) If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try or commit for trial such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions and any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

(2) If it appears that an offence punishable with death or imprisonment for life has been committed by some person or persons unknown, the High Court or the Sessions Judge may direct that any Magistrate of the first class shall hold

an inquiry and examine any witnesses who can give evidence concerning the offence and any depositions so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits on India.'

'5. As regards the first respondent, Sub-section (1) of Section 299 would apply as he, an accused person, was absconding, his case is already split up and has to undergo the trial. Obviously, the evidence adduced in the earlier trial cannot be used against the first respondent except as provided in Sub-section (1) of Section 299 Cr.P.C. In the circumstances of the absconding accused appears again, the prosecution witnesses have to be examined afresh. But, if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience, the prosecution would be justified in relying on the evidence already on record taken in the earlier trial in the absence of the absconding accused.

6. In the present case, Sub-section (2) of Section 299 Cr.P.C. has no application. Therefore, we make it clear that the prosecution may rely on the earlier evidence recorded in the earlier trial against the first respondent subject to establishment of existence of any of the conditions precedent as described in first part of Section 299 Cr.P.C.'

11. This view was reiterated in the judgment of the Apex Court in the case of **Central Bureau of Investigation versus Mustafa Ahmed Dossa**, Date of Decision: 22 February 2011 reported in **2011 (4) SCC 418**.

12. In the judgment of the Apex Court in the case of **Mohd. Hussain v. State (Govt. of NCT of Delhi)** reported in **2012 9 SCC 408**, in which it was observed that:

'A de novo trial or retrial of the accused should be ordered by the appellate court in exceptional and rare cases and only when in the opinion of the appellate court such course becomes indispensable to avert failure of justice. This power cannot be used to allow the prosecution to improve upon its case or fill up the lacuna. A retrial is not the second trial; it is continuation of the same trial and same prosecution.... the appeal court must closely keep in view that while protecting the right of an accused to fair trial and due process, the people who seek protection of law do not lose hope in legal system and the interests of the society are not altogether overlooked.'

13. The error and irregularity of the proceedings in this trial has whether resulted in failure of justice, needs examination. When the appellant/accused gave his appearance, the witnesses above-mentioned were recalled. The prosecution did not take any pain to re-examine these witnesses. The examination-in-chief of these witnesses were recorded in presence of co-accused Chandra Kumar Patel only. Although, the order-sheet discloses that counsel for the appellant never raised any objection as to the witnesses not being examined afresh by the prosecution. Even then, technically and legally, it appears that in conducting the trial after appearance of the appellant, the provision under Section 273 of the Cr.P.C. was to be followed. In view of the settled principle in this respect by the Apex Court and the M.P. High Court, it is apparent that the trial conducted with respect to appellant Nar Singh cannot be considered as fair trial on account of error, irregularity and noncompliance of the mandatory provisions of law.

14. Under the aforesaid circumstances and on the basis of the reasons mentioned hereinabove, the conviction and sentence in the impugned judgment is not sustainable. On the technical and legal ground, the appeal is allowed and the impugned judgment against the appellant is set aside. Invoking the powers of the appellate court under Section 386 of the Cr.P.C. part (b)(i) alongwith inherent powers of Section 482 of the Cr.P.C. the case is remanded back to the trial court with a direction that the appellant/ accused be re-tried on the charges framed against him. The evidence of the witnesses above-mentioned be recorded in compliance with Section 273 of the Cr.P.C. The witnesses who were examined in presence of the appellant accused need not be examined again. On completion of recording of evidence, the case against the appellant/ accused be decided by the trial court afresh. The appellant/ accused is directed to remain present before the trial court on **28.06.2017**. The bail bonds shall remain operative till retrial of the appellant/ accused is concluded by the trial court. Copy of this judgment be circulated for guidance of subordinate trial courts.

Sd/-

(Pritinker Diwaker)
Judge

Sd/-

(R.C.S. Samant)
Judge