

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 674 of 2011

Bhupendra Kumar S/o Parasram Kosariya, aged about 24 years,
R/o Village Charoda Poice Station Pallari, District Raipur (C.G.)

---- Appellant

Versus

State of Chhattisgarh : through District Magistrate, Raipur, District
Raipur (C.G.)

---- Respondent

For appellant - Shri Sunil Sahu, Advocate.
For State – Shri Sangarsh Pandey, Dy.G.A.

Hon'ble Shri Justice Goutam Bhaduri

Order

29/06/2017

1. Instant appeal is against the judgement dated 20th July, 2011 whereby the appellant has been convicted by the Court of First Additional Sessions Judge, Baloda-Bazar in Sessions Trial No.105/2011 and the appellant has been convicted under Sections 363, 366, 342 and 376 of IPC.
2. Brief facts of the prosecution case is that on 7/06/2009 at about 5.30 the victim who was studying in class-9th had gone to answer call of nature at her village Charoda towards the field. The appellant who was present there came there caught hold of the victim tied her hands with the scarf and tied her mouth also. Thereafter, dragged her walking to village Semariya. Thereafter at Semariya he snatched a bicycle from a boy and thereafter took prosecutrix forcefully in such bicycle to village Saloni to her sister's place named Sunita. Thereafter, prosecutrix was kept in captivity and on 8/06/2009 and 9/06/2009 appellant forcefully committed rape. It is

further case of the prosecution that she was kept in captivity and she was not allowed to go out. Thereafter father of the prosecutrix Samokhan and uncle Motilal came to the house of the sister of the appellant and rescued her. Thereafter, report was made on 13/06/2009. After investigation charge sheet was filed under sections 342, 363, 366, 376 and 506-B of IPC. During course of trial the appellant abjured his guilt and claimed to be tried. During course of trial prosecution examined victim/prosecutrix as PW-1, one Raj Kumar Jangade resident of Saloni as PW-2, Motilal Ratre as PW-3, Dr. Anita Tiwari as PW-4, Dr. F.R. Nirala as PW-5, Indra Kumar Paikra Patwari PW-6, Raj Kumar PW-7, Samokhan father of the victim as PW-8, Netram Navrange as PW-9, IO Anup Nag as PW-10, Brij Bai as PW-11 & Sunita as PW-12. The trial court after evaluating the evidence convicted the appellant as aforesaid. Therefore, this instant appeal.

3. Learned counsel for the appellant would submit that in the instant case the victim/prosecutrix was a consenting party. She of her own had went alongwith the appellant and age of the prosecutrix has not been proved properly by the prosecution. She remained in the house of the sister of the appellant of her own will for considerable period which would show that she was a consenting party, therefore conviction under Section 376 IPC cannot be sustained. It is further submitted that the appellant is in jail since 27/03/2010 and prior to that he already remained in jail for about 9 months. Therefore, he has suffered sentence of 6 years and 8 months. He submits that with respect to the conviction under Sections 342, 363 & 366 of IPC, the appellant has already suffered jail sentence, therefore he does not want to press the appeal against such conviction and confined his argument to conviction which is continuing under Section 376 IPC and submitted that under the circumstances, the appellant may be acquitted of

the charges thereof.

4. Learned State counsel opposes the prayer and would submit that order is well merited which do not call for any interference.

5. Facts as would show that the appellant has suffered jail sentence approximately 6 years and 8 months and had suffered jail sentence for conviction made under sections 342, 363 and 366 IPC. The counsel for the appellant do not press his appeal on said conviction on the ground that appellant has already suffered the sentence. Therefore, court is also of the opinion it would be purely academic in nature to go in such finding of fact about conviction as it has been admitted by the appellant and he do not want to contest the appeal on such conviction, as such the merits of this appeal are considered with respect to section 376 IPC alone wherein RI for 10 years and Rs.1000/- fine has been imposed.

6. In order to appreciate conviction under Section 376 IPC statement of PW-1 is examined. She has stated that her date of birth is 5/10/1992 and stated that on 10/06/2009 while she went to answer call of nature, appellant came there caught hold of her tied her hand with scarf and closed her mouth also with scarf dragged her from village Charoda to Semariya by walking. Thereafter, when they reached Semariya he snatched the bicycle from a boy and made her to sit in front rod of the bicycle and took her to Saloni which is house of her sister Pancho Bai. In para 19 of her statement she stated that Pancho Bai and Sunita are one and same. It is also stated that Pancho Baid had seen her in tied condition. Said witness Sunita has been examined in this case as PW-12. She stated that her cousin brother came with a girl and she was kept in the house for 2 days. Thereafter, mother and father of the girl came and took away the girl. She further stated that the girl wanted to marry the appellant.

7. The statement of prosecutrix at para 13 would show that she stated that her mouth was tied with scarf and accused had placed knot on the back side of the head. Report Ex.P-1 which is FIR and Ex.D-1 the statement under Section 161 of Cr.P.C. However, material omission of such facts are absent in police statement as tying the knot to close the mouth is absent. Apart from that it is stated that while her mouth was being tied she tried to bite the appellant but could not do it. It is further stated that she was dragged from the village to the main road. Further prosecutrix admits the fact that while she was at place Semariya village, while she was being dragged few persons were there in the hotel but they could not see her. It is further stated that while the appellant was holding prosecutrix he snatched the bicycle from other boy while boy tried to run away with the bicycle and stated boy with the bicycle tried to help out the victim but he pushed him aside. Further in para 10 of the statement it is stated that from Semariya to Saloni distance is 10 kms and people also move in the road. Therefore, statement of the prosecutrix that she was dragged and hands and mouth were tied appears to be little doubtful for such long distance of 10 kms on bicycle. Prosecutrix if was not consenting party could have raised alarm and could have called people for her help at Semariya also. So the inference can be drawn also.

8. Trial court while convicting the appellant in this case has relied upon statement of the prosecutrix that her date of birth was 5/10/1992 which is proved by article-A which is photo copy of the marksheet. Entire perusal of the order sheet do not show that such photo copy of the mark sheet was tallied with the original and only photo copy was marked. Further para 25 of the statement of the prosecutrix admits the fact that at the time of incident she was more than 16 years. Therefore, doubt looms large over age of the prosecutrix since on the date of the incident as per

definition of rape under Section 375 IPC sixthly clause age was specified to be 16 years at the relevant time. Therefore in order to sustain conviction under Section 376 IPC it would be necessary for the prosecution to prove actual age of the prosecutrix it could not have been based on the photo copy of the mark sheet and without any corroborative evidence thereof. The statement of prosecutrix cannot be ignored wherein she herself has admitted the fact that on the date of incident she was more than 16 years. With respect to the stay of the prosecutrix at village Saloni para 20-21 onwards of the statement would show that she stated that she was kept in the captivity in the house which is adjacent to the lane wherein people used to move. Therefore prosecutrix if she wanted to resist to flee away from the place and if she was kept in captivity she could have easily called people for help for her rescue. PW-2 Rajkumar the prosecution witness also stated the fact when the girl was brought to the house her hands and mouth were not tied and statement of the prosecutrix also do not inspire confidence that for distance of 10 kms she could have been forced to sit in the front rod of the bicycle and was forcefully taken.

9. Considering the totality of this case, in the opinion of this court, doubt has been created as to the age of the prosecutrix whether on the date of incident she was below 16 years or not. Consequently, benefit of doubt has to lean in favour of the appellant for age. With respect to the fact that whether the prosecutrix was a consenting party or not, if the entire statement of the witnesses are considered together, it would show that while she was in the house of accused she did not try to flee away and despite fact that she could have resisted stayed there would show that she was a consenting party for the incident. In a result, the conviction made by court below cannot be sustained. Accordingly, the judgement dated 20th July, 2011 passed by the court below for conviction u/s 376 of

IPC is set aside. The appellant is acquitted of the charges under Section 376 IPC and since the appellant has already suffered the conviction u/s 342, 363 & 366 of IPC no further detention in jail is called for. He is directed to be set at liberty forthwith if not required in any other case.

10. In the result, appeal is allowed.

Sd/-

(Goutam Bhaduri)

JUDGE