

**AFR**

**HIGH COURT OF CHHATTISGARH, BILASPUR**

**CRA No. 646 of 2013**

1. Baliram @ Lakhan Gond S/o Late Phool Singh Gond, aged 50 years, R/o Village Khargahni, Police Station Kota, District Bilaspur (C.G.)

**---- Appellant**

**Versus**

1. State of Chhattisgarh through Station House Officer, Police Station Kota, District Bilaspur (C.G.) Civil, Revenue District Bilaspur C.G.

**---- Respondent**

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For Appellant – Smt. Smriti Shrivastava and Shri S.P.Sahu, Advocates.  
For Respondent – Shri Sumit Jhanwar, Panel Lawyer.

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**Hon'ble Shri Justice Chandra Bhushan Bajpai**

**Judgment on Board**

**20-02-2017**

1. Challenge in this appeal is to the judgment of conviction and order of sentence dated 13-01-2012 passed by the Sessions Judge, Bilaspur, C.G. in Sessions Trial No.27/11 whereby and whereunder the learned trial Judge after holding the appellant guilty for committing gang rape with the prosecutrix (PW-3) (name not mentioned), convicted him under Section 376(2)(g) of the Indian Penal Code, 1860 (in short 'the IPC') and sentenced the appellant to undergo R.I. for 10 years and also to pay fine of Rs.1000/-, in default of payment of fine, to further undergo additional simple imprisonment for three months with a direction that as the appellant/accused is in custody since 12-10-2010 till date of the judgment, the said period be set off.
2. Conviction is impugned on the ground that without there being any iota of evidence the Court below convicted and sentenced the appellant as aforementioned and thereby committed illegality.
3. As per the case of the prosecution, the prosecutrix (PW-3) reached to the police station Kota on 10<sup>th</sup> October, 2010 and lodged the FIR (Ex.-P/7) on 8.35 p.m. against the present appellant and two other co-accused (absconding and in the final report before the criminal court under Section 173 of the Code of

Criminal Procedure, 1973 (in short 'the Code') it is mentioned that against those other co-accused Arun Yadav and Ajay Yadav investigation is going on and separate supplementary charge sheet shall be filed against those absconding accused persons). As per the report of the prosecutrix (PW-3), Kota police registered the crime No. 414/10 under Section 376/34 of the IPC. In the said FIR, the prosecutrix stated that when she was returning with her husband Vishnu Yadav at about 4.00 p.m. near Laripara one Arun Yadav and Ajay Yadav met and both offered the prosecutrix that they will take her to her village Khargahni when the said offer was opposed by her husband, Ajay Yadav caught hold her husband and Arun Yadav kept her in the cycle and took her to Mahamaya Talab and thereafter committed sexual intercourse, Ajay Yadav also reached and committed sexual intercourse and thereafter they left her near betel shop of the present appellant. The present appellant also committed sexual intercourse. All the act committed by the aforementioned three persons were against her will and consent. Thereafter, one Niranjana Das (PW-1) reached to the spot. The prosecutrix (PW-3) informed him the act committed by the accused persons. Thereafter, her husband also reached to the spot, she informed him the incident. Thereafter she along with her husband and Niranjana Das (PW-1) went to the police station and lodged the FIR. After registration of the FIR and after consent obtained by the prosecutrix and her husband, Kota police sent the prosecutrix for medical examination. Doctor Smt. Sumit Raj (PW-6) examined the prosecutrix and noticed that mental condition of the prosecutrix was not correct to some extent, also noticed a few abrasions at the back, hymen ruptured, two fingers were easily admitting in the vagina, bleeding present, she prepared two slides from the vaginal swab, also noticed abrasion small in size present on left side of perinium, noticed bleeding coming out from the private part and as per the prosecutrix menstrual cycle came on 10-10-2010. She gave her report Ex.-P/13. As per said report, no definite opinion can be given for the recent intercourse and being a married woman the prosecutrix was habituated to intercourse. The

accused/appellant was arrested on 11<sup>th</sup> October, 2010, he was also sent for necessary examination. Doctor S.K.Jaiswal though not examined before the trial Court, after examination of the accused gave opinion regarding the capability of the accused/appellant to perform intercourse. The prosecutrix was also sent for further examination regarding her psychological fitness. Doctor Sujit Kumar Naik (PW-7) noticed that the prosecutrix is clinically having mental retardation without any behavioral abnormality and gave report Ex.-P/14. Spot map was also prepared. Clothes of the prosecutrix and accused were seized and sent for chemical analysis. As the other two co-accused were not traceable, Kota police after investigation filed the charge sheet before the Judicial Magistrate First Class, Kota, C.G. with a note that after due investigation supplementary charge sheet will be filed against co-accused Arun Yadav and Ajay Yadav. The Judicial Magistrate First Class, Kota registered the case as Criminal Case No.869/2010 and vide order dated 13-01-2011 committed the matter for trial to the Court of Sessions. The learned Sessions Judge received the case on committal and framed the charges against the present accused/appellant under Section 376 (2) (g) of the IPC.

4. In order to prove guilt of the accused/appellant, the prosecution examined 8 witnesses. The statement of the accused/appellant was recorded under Section 313 of the Code wherein he denied the circumstances appearing against him, pleaded innocence and false implication in crime in question.

5. After affording opportunity of hearing to the parties, the learned Sessions Judge convicted and sentenced the appellant as aforementioned.

6. I have heard learned counsel for the parties and perused the judgment impugned and record of the trial Court.

7. Learned counsel for the appellant vehemently argued that as per the FIR Ex.-P/7 and statement of the prosecutrix (PW-3), the prosecution failed to prove the accused/appellant committed offence under Section 376(2)(g) of the IPC. As per the FIR and her statement, it appears that at the best the accused/appellant

may be convicted under Section 376 (1) of the IPC as the present accused/appellant had not acted anything in furtherance of common intention of other absconded accused; as per the facts, when the present accused/appellant found the prosecutrix near his betel shop he independently took the prosecutrix near Nala and committed rape, with this, as there was no any act in furtherance along with absconded accused, at the best the present accused/appellant may be convicted under Section 376(1) of the IPC; as his act was independent and in absence of any act of common intention or in furtherance of any common intention, benefit of doubt may be given to the present accused/appellant so far as ingredients required to prove for gang rape. The present accused/appellant was the first offender, he is in jail since 6 years, 4 months and 9 days till date. He will not commit any offence in future, he was aged about 50 to 55 years at the time of incident, presently he is within the age span of about 60 years. His case may be considered accordingly and the sentence awarded may be considered in the light of the evidence adduced by the prosecution against the present appellant. Learned counsel would further submit that though the husband of the prosecutrix was present at the time of initial abduction of the prosecutrix by the other absconded co-accused and also the husband of the prosecutrix got her near the spot and he accompanied her wife to the police station for lodging the FIR, with this, he was an important witness, but though cited in the list of witnesses, the prosecution had not examined the husband of the prosecutrix. Also Niranjana Das (PW-1) reached inside the plantation of the forest department near the prosecutrix, he had not supported the prosecution's story in entirety, turned hostile by the prosecution. With this, the benefit of doubt regarding the act of gang rape may be granted to the accused/appellant and after perusal of the entire evidence including the statement of the prosecutrix and the medical corroboration in report Ex.-P/13 and the statement of Doctor Smt. Sumit Raj (PW-6), learned counsel is not contesting the instant criminal appeal for commission of

rape over the prosecutrix, though learned counsel for the appellant submitted the argument as the factum of gang rape is not proved.

8. Per contra, learned counsel for the respondent/State opposed the argument advanced on behalf of the appellant and would submit that looking to the entire chain of circumstances, it cannot be said that the accused/appellant is not accused of gang rape as rape with the prosecutrix were committed in a series, initially two absconded accused forcibly took the prosecutrix with them and committed rape, thereafter, when the prosecutrix was left by those absconded accused persons the present accused/appellant also committed rape by taking the prosecutrix inside the plantation and also looking to the mental condition of the prosecutrix as she was clinically retarded though not abnormal, it appears that the prosecutrix had not appropriate thought of process to make attempt to resist the act, looking to the earlier fact of rape it hardly left with no option with the prosecutrix to resist third act of rape committed by the accused/appellant. With this, it is submitted that the prosecution duly proved the act of gang rape. The Court below accordingly hold the appellant guilty and sentenced. With this, the appeal may be dismissed on both counts.

9. In order to appreciate the arguments advanced on behalf of the parties, I have perused the evidence adduced by the prosecution.

10. As learned counsel for the appellant is not initially disputing the act of rape by the accused/appellant with the prosecutrix, but she is contesting the appeal as the factum of gang rape is not proved. Even after perusal of the statement of the prosecutrix (PW-3) and Doctor Smt. Sumit Raj (PW-6), the prosecution had proved successfully that in light of report of Doctor Sujit Kumar Naik (PW-7), the prosecutrix is mentally retarded though she was not abnormal and looking to the entire state of mind of the prosecutrix on a subsequent event the accused/appellant found her near his shop and to satisfy lust the accused/appellant took the prosecutrix to a nearby Nala and committed sexual intercourse, the rape and the said act cannot be held as act with consent looking

to the mental status of the prosecutrix. With this, prosecution proved the case against the accused/appellant that on the given date and time the accused/appellant committed rape with the prosecutrix.

11. Now, remaining part of the question for consideration is whether the accused/appellant is guilty of gang rape or is guilty of rape. For this, after perusal of the FIR (Ex.-P/7), it appears that the absconded accused after their role left the prosecutrix near the shop of the accused/appellant and thereafter the accused/appellant also took the prosecutrix with him inside the forest plantation and committed rape. The prosecutrix (PW-3) also in her statement not said anything to demonstrate that the entire act committed by all the three was an act in furtherance of common intention. The act of other two is not subject matter of present criminal appeal. This Court has to appreciate the matter for the present accused/appellant only and on careful examination of the FIR (Ex.-P/7) and the statement of the prosecutrix, it appears that coincidently as the other left the prosecutrix near the shop of the appellant and thereafter their role had finished, it is not the case that they handed over the prosecutrix to the present accused/appellant and when the role of other two were complete simply by leaving the prosecutrix near the shop and also there was no any common meeting of mind or anything to demonstrate the common intention of the present accused/appellant along with other absconded accused, at the best it is proved that when coincidently the accused/appellant noticed the presence of the prosecutrix all alone, on account of lust he availed the opportunity available to him suddenly and committed rape on the prosecutrix, but this act in absence of any connection of common intention in furtherance of any act along with the other absconded accused cannot be held constitution of gang rape under the law and as such ingredients required for conviction for the offence of gang rape are not present in the matter against the present accused/appellant. Therefore, I am in agreement with the argument advanced on behalf of the appellant that the present is not a case where the accused/appellant is guilty for committing gang

rape, on the other hand, the prosecution duly proved that the accused/appellant committed rape on the prosecutrix.

12. Also looking to the period already undergone of 6 years 4 months and 9 days till date and as per legal provision prior to the amendment for Section 376, w.e.f. 03-02-2013, the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years in a case of Section 376(1) of the IPC, in the present case, after consideration of the entire material, period already undergone by the accused/appellant would serve the ends of justice for the act committed by him.

13. Consequently, the appeal filed by the appellant is hereby allowed in part. Instead of Section 376(2)(g) of the IPC, the accused/appellant is convicted for lesser offence, i.e., under Section 376(1) of the IPC and instead of R.I. for 10 years, the accused/appellant is sentenced to the period already undergone by him. Fine amount awarded to the accused/appellant is hereby affirmed. Authorities are directed to release the accused/appellant from jail if he is not required in any other case after depositing the fine amount. If fine amount is not deposited, then the authorities are directed to serve the appellant default sentence as mentioned in para 25 of the judgment of the Court below.

14. The appeal allowed in part.

Sd/-  
(Chandra Bhushan Bajpai)  
JUDGE