

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No.1086 of 2013**

Omudas S/o Mohandas Manikpuri, Aged 19 years, R/o village
Dhobanpuri, PS Gurur, District Durg (CG)

---- Appellant**Versus**

State Of Chhattisgarh Through Station House Officer, Police
Station Gurur, Revenue District Durg(CG) Civil District Durg

---- Respondent

For Appellant	: Ms. Laxmin Tondey, Advocate
For State/ Respondent	: Smt. Shobha Kashyap, Dy. G.A.

HON'BLE SHRI JUSTICE CHANDRA BHUSHAN BAJPAI**JUDGMENT****09/01/2017**

1. Challenge in this appeal is to the judgment of conviction and order of sentence dated 19.4.2012 passed by the Additional Sessions Judge, Balod, District Durg(CG) in ST No.76/2011, whereby and whereunder the learned trial Judge after holding the appellant guilty for wrongful confinement of the prosecutrix PW3 (name not mentioned) aged about 8 years and attempt for sexual intercourse without consent and will, convicted him under Sections 342, 376 read with Section 511 IPC and sentenced for R.I. for 1 year, R.I. for 7 years and to pay fine of Rs.100/-, in default of payment of fine to undergo R.I. for 3 months with a direction to run both the sentences concurrently. Further directed that the period of

detention from 15.2.2011 till the date of judgment shall be set off under Section 428 Cr.P.C.

2. The conviction is impugned on the ground that without there being any iota of evidence, the Court below has convicted and sentenced the appellant as aforementioned and thereby committed illegality.

3. As per case of the prosecution on 14.2.2011 at about 4.00 pm, the accused/appellant had taken the prosecutrix PW3 aged about 8 years along with him in a room of the first floor and after removing her clothes put his genital to the genital of the prosecutrix and attempted commit intercourse. The mother of the prosecutrix noticed her absence and on being asked the prosecutrix narrated the entire story to her. Her mother along with the prosecutrix went to police station Gurur and in the same night later lodged the FIR against the accused/ appellant. Police had registered the case as Crime No.56/11 under Sections 376 read with Section 511 IPC and investigated the matter, prepared spot map. Also seized the underwear of the prosecutrix from her mother. During investigation, the accused/appellant was sent for medical examination. PW2, Dr. T.R. Thakur, noticed no injury but for the scratch of 6 cm over the right hand and opined that the accused/appellant was capable of committing intercourse. Dr. T.R. Thakur also examined the underwear of the prosecutrix and referred for chemical analysis. During investigation, statements of the witnesses were recorded

under Section 161 Cr.P.C. After completion of investigation, charge sheet was filed before the Judicial Magistrate First Class, Balod, who registered the case as Cr. Case No. 101/11 and committed the same to the Court of Sessions vide order dated 27.4.2011. The learned Additional Sessions Judge, received the case on transfer and conducted trial. During trial the appellant was charged for the offence under Sections 342, 376 read with Section 511 IPC.

4. In order to prove the guilt of the appellant, prosecution examined as many as 6 witnesses. Statement of the appellant was recorded under Section 313 Cr.P.C. in which he denied the circumstances appearing against him, pleaded innocence and false implication in the crime in question.

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

6. I have heard learned counsel for the parties at length and perused the record of the Sessions Trial.

7. Learned Counsel for the appellant vehemently argued that she is not assailing the appeal on conviction part, instead she is confining her arguments on the quantum part only. Learned counsel would submit that till date the accused/appellant had remained in jail for 5 years, 11 months and 27 days. At the time of incident, the appellant was aged about 19 years only. He has not having

appropriate financial support to prefer the appeal, therefore, the appeal has been filed after 498 days of its limitation with the help of High Court Legal Aid Committee and as per provisions of Section 376 (a) IPC prior to the amendment w.e.f. 3.2.2013, as substituted by Criminal Amendment Act 2013, the Court may award minimum R.I. for 7 years for a term which may extend to 10 years and shall also be liable for fine. And also as per law prevailing at the time of incident, for adequate and special reasons to be mentioned in the Court, the Court may impose a sentence of imprisonment for a term not less than 7 years. Learned counsel would submit that as per provisions of Section 511 IPC the Court may award sentence that may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence. In the present case, looking to the tender age of the accused/appellant as he was just 19 years of age, the punishment of 10 years for the offence under Section 376 (1) would be sufficient and if we consider this fact then one-half of the said imprisonment may be given with the aid of Section 511 IPC and as the accused/appellant had already served the sentence for 5 years, 11 months and 27 days till date, the period already undergone may serve the purpose. She prayed that as the court below appreciated to run both the sentences concurrently, looking to the entire period of detention, appeal may be allowed and the appellant may be sentenced for the period already undergone by him. She further argued that as the prosecutrix was not examined by any lady doctor

who examined the exact condition of the prosecutrix and any other mark occurred during the incident, goes to show that the case of the prosecution was not even proved for the offence under Section 376 read with Section 511 IPC.

8. Per contra, learned Counsel for the State has opposed the arguments advanced on behalf of the appellant and would submit the accused/appellant had attempted to commit rape over 8 years aged prosecutrix. Though the lady doctor has examined the prosecutrix but the prosecution had failed to examine the lady doctor. The MLC report given by the doctor is not admissible but looking to the entire evidence, especially, the story as narrated by the prosecutrix, the sentence awarded by the trial Court may not be termed as excessive hence, the appeal may be dismissed on both the counts.

9. In order to appreciate the arguments, I have heard Learned Counsel for the parties, perused the judgment impugned and record of the Court below.

10. Though the prosecutrix was sent for medical examination, but the lady doctor who conducted the examination was not examined. With this, the MLC report cannot be taken as the evidence against the prosecutrix and same cannot be read against the accused/appellant. The court has to evaluate the other evidence available. On perusal of the oral evidence of the prosecutrix, this court is of the opinion that the conviction of the accused/appellant

under Sections 342, 376 read with Section 511 IPC is well founded and even in the absence of MLC report, the conviction cannot be said as without any base. Also the learned counsel is assailing the appeal on conviction part. In the considered opinion of this Court, the prosecution has duly proved the commission of offence under Sections 342, 376 read with Section 511 IPC, hence, the conviction is hereby affirmed. So far as fine sentence of Rs.100/- is concerned, the same cannot be termed as excessive. Consequently, the fine sentence awarded is also hereby affirmed including the default part. The appellant was sentenced to 7 years R.I. for the principal offence and on perusal of the provisions prevailing at the time of incident, it appears that looking to the age of 19 years and other facts, if he committed rape, R.I. for 10 years, would have been sufficient for him and if the rape is not proved the accused/appellant is guilty for the offence under Section 376 read with Section 511 IPC which speaks for one-half of the imprisonment. With the above factual position as the appellant had already remained in jail for 5 years 11 months and 27 days till date, the period already undergone would serve the purpose.

11. Consequently, the appeal filed by the appellant is hereby allowed in part. Conviction of the appellant under Sections 342, 376 read with Section 511 IPC is hereby affirmed. Fine sentence of Rs.100/- is also affirmed. So far as substantive jail sentence for the offence 376 read with Section 511 is concerned for R.I. for 7 years is concerned, the same is reduced for the period already undergone

along with a direction that the substantive jail sentence awarded in both the penal offences may run concurrently. The accused/appellant is directed to set free from the jail if not required in any other offence after realization of the fine amount. If the fine amount is not deposited, then the authorities concerned are directed to serve the default sentence. If the fine amount is deposited, then the appellant be released forthwith.

12. Consequently, the criminal appeal filed by the appellant is allowed in part.

13. Copy of the judgment may be filed before the concerned trial Court on behalf of the appellant for compliance. Registrar (Judl) is directed to send the copy of the judgment immediately to the trial Court for compliance.

Sd/

(Chandra Bhushan Bajpai)
JUDGE