

**HIGH COURT OF CHHATTISGARH, BILASPUR**

**Criminal Appeal No.3445 of 1999**

Judgment Reserved on : 20.11.2017

Judgment Delivered on : 16.1.2018

Nand Kumar Mehar, S/o Sarjoram Mehar, aged about 25 years, R/o Village Bhatbhera, Police Station Suhela, District Raipur, (MP) (now Chhattisgarh)

**---- Appellant**

**versus**

State of Madhya Pradesh (now Chhattisgarh) through Police Station Suhela, District Raipur

**--- Respondent**

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For Appellant : Shri Anil Gulati, Advocate  
For Respondent/State : Smt. Smita Ghai, Panel Lawyer  
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**Hon'ble Shri Justice Arvind Singh Chandel**

**C.A.V. JUDGMENT**

1. This appeal is directed against the judgment dated 15.12.1999 passed by the 2<sup>nd</sup> Additional Sessions Judge, Baloda-Bazar, District Raipur in Sessions Trial No.409 of 1997 convicting and sentencing the Appellant as under:

| <u>Conviction</u>                          | <u>Sentence</u>                                                                 |
|--------------------------------------------|---------------------------------------------------------------------------------|
| Under Section 376 of the Indian Penal Code | Rigorous Imprisonment for 7 years and fine of Rs.500/- with default stipulation |
| Under Section 342 of the Indian Penal Code | Rigorous Imprisonment for 6 months                                              |

2. Facts, in brief, are that on 2.8.1997 at about 9:00 p.m., Dukhitram (PW13), father of the prosecutrix and his wife Mangtinbai (PW15) saw that the prosecutrix (PW12) was not present at home. 8 days

prior to the date of incident, they had come to know that there was a love affair between the Appellant and the prosecutrix. Therefore, they went to the house of Appellant for search of the prosecutrix. The room of the Appellant was closed from outside. When they heard the sound of bangles from inside, they opened the door and saw that the prosecutrix was present inside the room. The prosecutrix, aged about 15 years, told them that the Appellant with an enticement that he will marry her called her there and ran out of the house after closing the door of the room from outside. She also told that there was a love affair between her and the Appellant and a physical relationship had also developed between them during the last 15 days. On 3.8.1997 at about 3:45 a.m., First Information Report (Ex.P15) was lodged by Dukhitram (PW13). The prosecutrix was medically examined by Dr. Rita Vava (PW10). Her report is Ex.P10 in which she has stated that the prosecutrix was habitual to sexual intercourse, there was no internal or external injury and vagina of the prosecutrix was easily admitting two fingers. The Appellant was also examined by Dr. Rajesh Awasthi (PW7). His report is Ex.P7 in which he has stated that the Appellant was capable to commit sexual intercourse. Kotwari Book (Article 3) relating to the date of birth of the prosecutrix was seized vide Ex.P3. Statements of the prosecutrix and other witnesses were recorded under Section 161 Cr.P.C. On completion of the investigation, a charge-sheet was filed against the Appellant for offences punishable under Sections 363, 366A, 342 and 376 of the Indian Penal Code. Charges were framed against him under Sections 342 and 376(1) of the Indian Penal Code.

3. To rope in the Appellant, the prosecution examined as many as 18

witnesses. Statement of the Appellant was also recorded under Section 313 Cr.P.C. in which he denied the circumstances appearing against him, pleaded innocence and false implication. 2 witnesses were examined in defence of the Appellant.

4. After Trial, the Trial Court convicted and sentenced the Appellant as mentioned in the first paragraph of this judgment. Hence, this appeal.
5. Learned Counsel appearing for the Appellant argued that there are material contradictions and omissions in the evidence of the prosecution witnesses. It was argued that in the Court statement, the prosecutrix has stated that on the date of incident she was sexually intercoursed by the Appellant, but it was not mentioned in her case diary statement. There is nothing on record to show that on the date of incident a forcible sexual intercourse was committed with the prosecutrix by the Appellant. It was argued that there was a love affair between the Appellant and the prosecutrix. The prosecutrix was a consenting party. At the time of occurrence, she was aged more than 16 years. There is no legally admissible evidence to show that the prosecutrix was aged below 16 years. Therefore, no offence under Section 376 IPC is made out against the Appellant.
6. Per contra, Learned Counsel appearing for the State, supporting the impugned judgment, argued that from the entries made in the Kotwari Book (Article 3) and other evidence on record, it is proved that the age of the prosecutrix, on the date of occurrence, was below 16 years. Therefore, even if she was a consenting party, the same does not matter.

7. I have heard Learned Counsel appearing for the parties and perused the record with due care.
8. Kallu Agrawal (PW1) is the witness before whom underwear of the Appellant was seized vide Ex.P1. Ramkumar (PW2) is brother of the Appellant, who has stated that the police had seized two letters (Articles 1 and 2) vide Ex.P2 from possession of the Appellant. Asharam (PW3) is the witness before whom Kotwari Book (Article 3) was seized from Kotwar Khedudas vide Ex.P3. Patwari Narsingh (PW4) has stated that on 11.8.1997 he had gone to the spot and prepared a spot map (Ex.P4). Nandlal (PW5) is the witness of seizure memo (Ex.P6). Khedudas (PW6) is the Village Kotwar. He has stated that police had seized Kotwari Book (Article 3) vide Ex.P3. He has further sated that on Page 27 of Article 3, the date of birth of the prosecutrix is mentioned as 21.5.1983. He has admitted that name of the person who recorded the said entries in Article 3 is not mentioned therein. He has further admitted that on which date the said information was received is also not mentioned in Article 3.
9. Dr. Rajesh Awasthi (PW7) examined the Appellant. His report is (Ex.P7) in which he has stated that the Appellant was capable of committing sexual intercourse. Constable Balmukund (PW8) is the witness who had taken the Appellant for medical examination. Constable Sharatchandra (PW9) is the witness who had taken the prosecutrix for medical examination. Dr. Rita Vava (PW10) examined the prosecutrix on 3.8.1997. Her report is Ex.P10 in which she has stated that the prosecutrix was habitual to sexual intercourse, there was no internal or external injury and vagina of

the prosecutrix was easily admitting two fingers. She has further reported that no definite opinion could be given regarding recent sexual intercourse with the prosecutrix. She has deposed that she had advised for ossification test of the prosecutrix for determination of her age. But, from the record, it appears that no ossification test of the prosecutrix was offered or conducted by the prosecution.

10. Ramkhilawan (PW11) has stated that at about 10-11 p.m. of the said night, father of the prosecutrix along with one boy came to him and informed him that the Appellant had hidden his daughter (the prosecutrix) at his house. He has not further supported the case of the prosecution and has been declared hostile.
11. The prosecutrix (PW12) has stated that on the date of incident in the night, she was going to watch TV at the house of Chainu. On the way, the Appellant took her forcibly to his house where nobody was residing and there he committed rape with her and thereafter ran away from there after closing the door from outside. She has further stated that her father and one Radhe came there and opened the door of the room and took out her. Then she told them about the incident. She also told about the incident to her mother on reaching home and thereafter the report was lodged in the police station. In her cross-examination, she denied about existence of any love affair between her and the Appellant and writing of any letter to the Appellant. Sexual intercourse was committed by the Appellant with her on the date of incident itself is not mentioned in her case diary statement (Ex.D1). In paragraph 3 of her cross-examination, she has categorically stated that the Appellant never committed sexual intercourse with her before the

date of incident. In her cross-examination in paragraph 5, she has categorically stated that she had not stated in her case diary statement (Ex.D1) that there had been any physical relationship between her and the Appellant.

12. Dukhitram (PW13), father of the prosecutrix, has stated that in the night, the prosecutrix (his daughter) was not present at home. Therefore, he and Radhe (PW14) had gone out for her search. The prosecutrix was found in the house of the Appellant and the door of the room of the Appellant was closed from outside. The prosecutrix told them that the Appellant had covered her face and forcibly took her to his house and after committing forcible sexual intercourse with her, he ran away from his house after closing the room from outside. But, in his case diary statement (Ex.D2) and the FIR (Ex.P15), it is not mentioned that the prosecutrix told him that on the date of incident itself the Appellant committed forcible sexual intercourse with her.
13. Radhe (PW14), cousin of the prosecutrix, has stated that on the date of incident, he along with the father of the prosecutrix had gone out for search of the prosecutrix and she was found in the house of the Appellant. At that time, she had told that the Appellant had forcibly brought her to his house.
14. Mangtinbai (PW15), mother of the prosecutrix, has stated that her husband Dukhitram (PW13) and Radhe (PW14) had taken back the prosecutrix and they had told that the Appellant had committed rape with the prosecutrix.
15. Station House Officer R.P. Sharma (PW16) has stated that he

seized Kotwari Book (Article 3) vide Ex.P1 and on 21.8.1997 he seized letters (Articles 1 and 2) vide Ex.P2 from possession of Ramkumar son of Sarjuram.

16. Assistant Sub-Inspector Shoukat Ali (PW18) is the witness who investigated the offence in question. He has supported the case of the prosecution.
17. A minute scrutiny of the evidence adduced by the prosecution makes it clear that on the date of incident, the age of the prosecutrix was certainly below 16 years. From the evidence, it is also clear that on the date of incident, the prosecutrix was found in the room of the Appellant and it is also established that the Appellant is the person who had closed the prosecutrix in the room of his house from outside and ran away. According to the prosecution story, the FIR (Ex.P15), the diary statements (Ex.D1 and D2), the statements of the prosecutrix and her father, there was a love affair between the prosecutrix and the Appellant and 15 days prior to the date of occurrence, physical relationship had also taken place between the prosecutrix and the Appellant. But, in the Court statements, the prosecutrix and her father have denied about the fact of love affair and the prosecutrix has categorically stated that no physical relationship was developed between her and the Appellant prior to the date of incident nor was there any love affair between them. As per the Court statements of the prosecutrix and her father, the prosecutrix was sexually intercoursed by the Appellant on the date of incident itself. But, this fact is not mentioned in her and her father's case diary statements (Ex.D1 and D2) nor is it mentioned in the FIR (Ex.P15). Thus, it is clear

that both the prosecutrix and her father have improved their statements in the Court. From the evidence on record, it is not proved beyond doubt that there was any physical relationship between the Appellant and the prosecutrix prior to the date of incident. The allegation that on the date of incident the Appellant committed forcible sexual intercourse with the prosecutrix appears to have been developed by the prosecutrix and her father during their examination in the Court.

18. Thus, the offence under Section 376 IPC is not proved beyond doubt and only the offence under Section 342 IPC is proved. Therefore, the Appellant is acquitted of the charge framed under Section 376 IPC and the conviction imposed upon him under Section 342 IPC is affirmed. Imposition of sentence of rigorous imprisonment for 6 months for the offence under Section 342 IPC appears to be just and proper and the same is, therefore, affirmed.
19. Consequently, the appeal is allowed in part to the extent indicated above.
20. Record of the Court below be sent back along with a copy of this judgment forthwith for information and necessary compliance.

Sd/-  
(**Arvind Singh Chandel**)  
**JUDGE**