

HIGH COURT OF CHHATTISGARH, BILASPUR

ACQA No. 50 of 2009

State Of Chhattisgarh, through Station House Officer, P.S. Kunda,
Outpost-Pandatarai, District Kabirdham (Kwardha) (C.G.)

---- Appellant

Versus

Raju Chandravanshi S/o Gajpati Chandravanshi, Aged about 20
years, R/o Vill. Dhobghatti, Thana Kunda, Outpost Pandatarai,
District Kabirdham(C.G.)

---- Respondent

For Appellant	:- Mr. Satish Gupta, Govt Advocate
For Respondent	:- Mr. Surfaraz Khan, Advocate

Hon'ble Shri Justice Prashant Kumar Mishra
Hon'ble Shri Justice Ram Prasanna Sharma

Judgment on Board By
Prashant Kumar Mishra, J.

23.01.2018

1. The State has assailed the impugned judgment whereby the trial Court has acquitted the accused from the charges under Section 376(2)(g) of the Indian Penal Code.
2. The respondent, along with co-accused Chhabi Kenwat (Juvenile), is said to have committed forcible sexual intercourse, amounting to gang rape, with the prosecutrix at about 6.00 pm on 26.09.2005, for which FIR was lodged by the prosecutrix herself at about 9.00 am on 27.09.2005 vide Ex.P-1.

3. The prosecutrix and the respondent are the residents of the same village and locality. At about 6.00 pm on the date of incident the prosecutrix was brooming in-front of her house. At that point of time Raju Chandravanshi and Chhabi Kenwat (juvenile) caught her and took her to the house of Chhabi Kenwat which is about 10 steps away from the place where the prosecutrix was brooming. After entering the house of Chhabi Kenwat respondent made her to lie down on the floor; Chhabi Kenwat gagged her mouth and respondent committed sexual intercourse with her, while Chhabi Kenwat went out and was keeping vigil. When Raju Chandravanshi completed act of sexual intercourse, the prosecutrix screamed on which her brother Rajendra entered the house of Chhabi Kenwat and took her to his house.
4. The medical opinion regarding sexual intercourse is not definite, as mentioned in the medial report Ex.P-12, however, semen was found in the vaginal smear and underwear of the prosecutrix as well as the respondent.
5. Based upon the statement of the prosecution witnesses and the report of ossification test conducted by the Radiologist (PW-6) Dr. Sanjay Kumar and proved vide Ex.P-5 and Ex.P-6, the prosecutrix was found to be aged about 15-17 years. In the statement of PW-3 Nandram, father of the prosecutrix and PW-1 (Prosecutrix) as well as PW-2 Mongra Bai, mother of the prosecutrix, there is variation regarding age of the prosecutrix.

6. The trial Court has found her age to be more than 16 years on the date of occurrence. The trial Court has also found that the prosecutrix appears to be a consenting party, therefore, the offence of committing gang rape is not established against the respondent.
7. Assailing the judgment Shri Satish Gupta, learned State counsel would argue that in view of provision under Section 114(A) of the Evidence Act, there is presumption of absence of consent when the prosecutrix states that she has not consented for such sexual intercourse, therefore, in view of the statement of the prosecutrix the trial Court should have convicted the respondent. Shri Gupta would place reliance in the matter of **State of Rajasthan v. Roshan Khan, (2014) 2 SCC 476** and he would read the entire evidence *in-extenso*.
8. Per contra, Shri Surfaraj Khan, learned counsel for the respondent would vehemently argue that from the statement of the prosecutrix itself it would clearly appear that she was a consenting party and since there is enough evidence to conclude that she was more than 16 years of the age on the date of incident, the impugned judgment rendered by the trial Court is not required to be interfered with.
9. We shall first address the issue concerning the age of the prosecutrix. In the report of radiologist Ex.P-6 the following observations have been made.

“ Olecranon process fused
aged of fusion 15 years.

Lower end of radius-ulna not fused
age of fusion 17-18.

iliac-crest appear but not fused
age of appearance is 14 years,
age of fusion of 18-19 years”.

Radiologist, therefore, opined that the age of the prosecutrix is about 15-17 years.

10. In para-5 of her statement, PW-1 prosecutrix would state that her elder brother Rajendra is aged about 29 years and, thereafter, brother Bisen is aged about 25-26 years and then brother Prakash would be aged about 20 years. She was born after Prakash but nobody has informed her about her age. PW-2 Mongra Bai, the mother of the prosecutrix, would state in paragraph-5 that Rajendra is eldest son aged about 26-27. Bisen is 1.5 years younger to Rajendra, thereafter, Prakash is 1.5 years younger and, thereafter, the prosecutrix is 1.5 years younger to Prakash. Similar is the statement of PW-3 Nandram who is the father of the prosecutrix. In para-3 of his cross-examination he would state that as per the oral statement of the prosecutrix, her approximate age on the date of incident would be about 20 years. Thus, on the basis of the above statements, the prosecutrix would be aged about 19-20 years.
11. It is settled law that the approximate age calculated by radiologist upon ossification test would vary two years either

side. As per the oral statement of the witnesses, prosecutrix would be aged about 19-20 years, therefore, in any case, the prosecutrix is more than 16 years of the age on the date of incident. There is no documentary evidence regarding the age of prosecutrix in the nature of Mark-sheet, Dakhil Register and Kotwari Register etc., therefore she cannot be treated to be less than 16 years of age on the basis of evidence available on record, as discussed above.

12. We shall now advert to the circumstances and the evidence which lead to the incident. The prosecutrix has given vivid step by step narration of the events which had taken place at 6.00 pm at the time of occurrence. This is mentioned in para 6 and 7 of her cross-examination. According to the prosecutrix, there are three rooms in the house of the Chhabi Kenwat. The lane (*Gali*) is frequently visited by visitors but at that time there was no movement of any person. The accused hold one hand of her and took her to the house of Chhabi and laid her on the floor. She further says that the distance from the lane to the room, where they had gone, would be 10 steps or arms. After laying her down, Raju Chandravanshi undressed and Chhabi Kenwat went out to keep vigil. Raju Chandravanshi also undressed her and committed sexual intercourse which lasted for about 3 minutes. Raju Chandravanshi immediately put on the lungi and hide himself and then she put on her clothes. She would further state that after hearing the voice of her brother Rajendra, Raju hide behind Kothar and when Raju heard her brother coming he

got separated from her. She would further state that when her brother reached near the door Raju separated from her, thereafter, Rajendra entered and hold her hands and took her to their house without scolding her.

13. Since, Rajendra immediately entered the house on hearing the scream raised by the prosecutrix, it would be important to read the statement of Rajendra viz-a-viz statement of the prosecutrix. PW-4 Rajendra would state that upon hearing the scream he went to Chhabi's house, where initially Chhabi stopped him from entering the house but he insisted and entered the house and saw that her sister was lying on the floor. Rajendra would not state at this time that the prosecutrix was lying naked on the floor. He says that Raju hide himself in the adjoining room.
14. Thus, a conjoint reading of both the statements would make it apparent that the prosecutrix had accompanied the accused without raising any protest or demur and that after entering the house of Chhabi process of getting undressed began but she did not raise any protest and allowed sexual intercourse to occur. It is not her statement that she was forcibly taken to the house of Chhabi Kenwat.
15. In our considered opinion, the evidence of the prosecutrix itself would suggest that she was a consenting party to the entire act of sexual intercourse. Presumption under Section 114(A) of the Evidence Act would apply where the prosecutrix speaks of absence of consent and the same is duly corroborated by

attending circumstances. In a case, where the evidence would itself suggest that she was not a consenting party mere statement that she did not consent would not be sufficient to apply presumption under Section 114(A) of the Evidence Act. (See **Jogi Dan and others vs. State of Rajasthan 2004 CrLJ 1726** and **Jamnalal @ Chimman Dhimar vs. State of Madhya Pradesh 2002 (1) MPHT 229**). Holding otherwise would mean that despite abundance of evidence explicitly suggesting presence of consent would also have to be treated to be a case of absence of consent, merely because the prosecutrix has stated later on that she did not consent for sexual intercourse. It is also important to note that the prosecutrix was medically examined on the next day of the date of incident, yet the medical officer could not accord any definite opinion about commission of rape.

16. In view of above discussion, we are not persuaded to draw any different conclusion than one recorded by the trial Court , therefore, we find no substance in this acquittal appeal preferred by the State. The acquittal appeal fails and is hereby dismissed.

Sd/-
Judge
Prashant Kumar Mishra

Sd/-
Judge
Ram Prasanna Sharma