

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.1298 of 2000

Judgment Reserved on : 4.7.2018

Judgment Delivered on : 3.10.2018

- 1. Genwa Giri, S/o Bishun Giri, aged about 28 years, occupation agriculture, R/o Village Jheradih, P.S. Batauli, District Surguja, M.P. (now Chhattisgarh)
- 2. Tibhu Nath Giri, S/o Bishun Giri, aged about 21 years, occupation agiructure, R/o Village Jheradih, P.S. Batauli, District Surguja, M.P. (now Chhattisgarh) ----- **His appeal has abated vide order dated 2.4.2018**

---- Appellants

versus

The State of Madhya Pradesh (now Chhattisgarh), through Police Station Batauli, District Surguja

--- Respondent

For Appellants	:	Shri A.K. Prasad, Advocate
For Respondent/State	:	Shri Ramakant Pandey, Panel Lawyer

Hon'ble Shri Justice Arvind Singh Chandel

C.A.V. JUDGMENT

- 1. This appeal is directed against the judgment dated 1.5.2000 passed by the 2nd Additional Sessions Judge, Ambikapur, Surguja in Sessions Trial No.329 of 1998 convicting and sentencing each of the Appellants as under:

<u>Conviction</u>	<u>Sentence</u>
Under Section 363 of the Indian Penal Code	Rigorous Imprisonment for 3 years
Under Section 366 of the Indian Penal Code	Rigorous Imprisonment for 3 years
Under Section 376(2)(g) of the Indian Penal Code	Rigorous Imprisonment for 10 years and fine of Rs.200/- with default stipulation

2. During pendency of the instant appeal, Appellant No.2, Tibhu Nath Giri died and, therefore, as per order dated 2.4.2018, the appeal, so far as it relates to him, has abated.
3. Prosecution case, in brief, is that on 6.9.1998, the prosecutrix (PW7), a girl aged about 16 years, lodged First Information Report (Ex.P8). In the FIR (Ex.P8), it is alleged that 7 months prior to lodging of the FIR, when she was alone at her house at Village Jheradih, both the Appellants came to the house. Appellant Tibhu Nath Giri knocked the door of the house. She opened the door. Both the Appellants lifted her up and after gagging her mouth took her to Village Jivri. On being shouted, they gagged her mouth and beat and threatened her of life. Thereafter, both of them committed rape with her and thereafter Appellant Genwa Giri left her with Appellant Tibhu Nath Giri. Appellant Tibhu Nath Giri kept her with him and continued to commit rape with her. On being refused by her, he threatened her of life. On getting opportunity, she came out of his clutches and lodged the FIR (Ex.P8). She was medically examined by Dr. Kshipra Shrivastava (PW9) on 8.9.1998. Her report is Ex.P11 in which she did not find any injury on the body of the prosecutrix nor on her private part. She reported that vagina of the prosecutrix was easily admitting two fingers. She found the prosecutrix to be habitual to sexual intercourse. She was unable to give any definite opinion regarding recent sexual intercourse with the prosecutrix. For determination of age of the prosecutrix, she advised for radiological test. Radiological test of the prosecutrix was done by Dr. M.K. Jain (PW8). His report is Ex.P9 in which he opined that age of the prosecutrix was between 17 to 19 years. Statements of witnesses were recorded under Section 161 of the

Code of Criminal Procedure. On completion of the investigation, a charge-sheet was filed against the Appellants for offence punishable under Sections 363, 366 and 376(2)(g) of the Indian Penal Code. Charges were framed against them under Sections 363, 366 and 376(2)(g) of the Indian Penal Code.

4. To rope in the Appellants, the prosecution examined as many as 11 witnesses. Statements of the Appellants/accused were also recorded under Section 313 Cr.P.C. in which they denied the guilt and pleaded innocence. No witness has been examined in their defence.
5. After Trial, the Trial Court convicted and sentenced the Appellants as mentioned in the first paragraph of this judgment. Hence, this appeal.
6. Learned Counsel appearing for Appellant Genwa Giri argued that the Appellant has been falsely implicated in the case. There is no documentary evidence or any other evidence regarding age of the prosecutrix to show that she was below 16 years of age on the date of alleged incident. As per the ossification test report (Ex.P9), she was between 17 to 19 years of age with variation of 2 years on both sides. Thus, it is clear that on the date of incident, the prosecutrix was above 16 years of age. It was further argued that the statement of the prosecutrix is unnatural. She was having a love relation with deceased Appellant Tibhu Nath Giri. She had gone along with him at her own will. FIR was lodged after 7 months of the incident by the prosecutrix herself and that too under pressure of her parents. There is no explanation for the delay caused in lodging the FIR. The prosecutrix had gone out of her

house at her own will, but no report of her missing/abduction was made by her parents. It was further submitted that since the prosecutrix had gone out of her house at her own will, she did not tell about the incident to her parents nor did she tell to her brother. Since she was a consenting party, her age was above 16 years and she had left her house with deceased Appellant Tibhu Nath Giri at her own will, no offence is made out against present Appellant Genwa Giri.

7. On the contrary, Learned Counsel appearing for the State supported the impugned judgment of conviction and sentence.
8. I have heard Learned Counsel appearing for the parties and perused the record minutely.
9. The prosecutrix (PW7), in her Court statement, has not stated anything about her date of birth. Even her parents or brother have also not been examined before the Trial Court on this point. Kunti (PW4), who is sister of the prosecutrix, has also not stated anything regarding age of the prosecutrix. Anup Giri (PW5) is uncle of the prosecutrix. He has also not stated anything in this regard. As per the ossification test report (Ex.P9), on the date of incident, age of the prosecutrix was between 17 to 19 years. 2 years' variation in her age on both sides is admissible in law. Apart from the radiological test report (Ex.P9), no oral or documentary evidence is available on record with regard to her age. Thus, on the date of incident, she was certainly above 18 years of age.
10. The prosecutrix (PW7), in her Court statement, has stated that at the time of incident, she had gone to the house of her sister Kunti (PW4) at Village Namnakala. In the night, between 3:00 a.m. and

5:00 a.m., she was present at the house along with children only. At that time, both the Appellants came to the house. Door of the house was knocked. She opened the door. As soon as she opened the door, the Appellants showed her a knife, gagged her mouth and took her to Village Dorna. There, both the Appellants committed rape with her. First, Appellant Tibhu Nath Giri committed rape with her and thereafter Appellant Genwa Giri committed the rape. They kept her at Village Dorna for 2 days. Thereafter, they took her to Village Jivri where they kept her for about 7 months. There also, they committed rape with her. Thereafter, on the pretext of attending the call of nature, she ran out from there and came to her uncle and told him and her sister about the incident and thereafter she lodged the FIR (Ex.P8). In her cross-examination, she has stated that she did not know any of the Appellants from before the incident nor did she see them ever from before. She has further stated that at Village Dorna, sister and brother-in-law of Appellant Tibhu Nath Giri were residing and she was kept there for about 2 days. She has further stated that she was taken to Village Dorna on her legs. From Village Dorna to Village Jivri, she was taken by Appellant Tibhu Nath Giri. At Village Jivri, brother and sister-in-law of Appellant Tibhu Nath Giri were residing. At their house, she was kept for about 7 months. She has further stated that due to fear, she did not disclose about the incident at Village Jivri. She has also admitted the fact that after leaving home by her, her parents did not make any report of her missing and when she returned home, even at that time, she did not disclose about the incident to her parents or brother.

11. Kunti (PW4), sister of the prosecutrix, has only stated that the

Appellants had taken the prosecutrix away with them. She has further stated that she was not aware of the place where the prosecutrix was taken. The prosecutrix had returned home after 7 months and she has also stated that after the return, the prosecutrix had told her that her marriage was performed in a Court.

12. Anup Giri (PW5), who is uncle of the prosecutrix, has deposed that the prosecutrix, after her return, had told him that the Appellants had abducted her and they had also committed rape with her.
13. The prosecutrix was medically examined by Dr. Kshipra Shrivastava (PW9) on 8.9.1998. She has stated that her report is Ex.P11 in which she did not find any injury on the body of the prosecutrix nor on her private part. She reported that vagina of the prosecutrix was easily admitting two fingers. She found the prosecutrix to be habitual to sexual intercourse. She was unable to give any definite opinion regarding recent sexual intercourse with the prosecutrix. For determination of age of the prosecutrix, she advised for radiological test. Radiological test of the prosecutrix was done by Dr. M.K. Jain (PW8). His report is Ex.P9 in which he opined that age of the prosecutrix was between 17 to 19 years.
14. Both the Appellants were medically examined by Dr. Roopsingh Parihar (PW3). He has deposed that his reports are Ex.P4 and P5 in which he found that both the Appellants were capable to perform sexual intercourse.
15. Assistant Sub-Inspector S.S. Patel (PW11) is the Investigating Officer of the offence in question. He investigated into the offence.

- 16.** On minute examination of the above evidence, it is clear that on the relevant date, the prosecutrix (PW7) was above 18 years of age. As stated by her, she was abducted by the Appellants and she was also gang raped by them for about 7 months. But, the story put-forth by her, being highly improbable and untrustworthy, does not inspire confidence of this Court. According to her, after her abduction, both the Appellants took her from Village Jheradih to Village Dorna on her legs. On the way, she did not raise any alarm. At Village Dorna, she resided with sister and brother-in-law of Appellant Tibhu Nath Giri for 2 days. But there also, she did not disclose them anything about the incident or to any other villager. Thereafter, she resided at Village Jivri with Appellant Tibhu Nath Giri, his brother and the brother's wife for about 7 months. There also, she did not tell them anything about the incident nor did she disclose the incident to any other villager. Had she been missing or abducted, her parents or her sister Kunti (PW4) would have lodged a report of her missing or abduction. But, no such report was made for about 7 months. Even after her return to home, the prosecutrix did not tell her sister Kunti (PW4) or her parents about the incident. It is the deposition of Kunti (PW4), sister of the prosecutrix that after the return, the prosecutrix had told her that her marriage was performed in a Court. Thus, it seems that the prosecutrix left home at her own will. There is nothing on record to establish that the prosecutrix was abducted by the Appellants or she was raped by them. The whole prosecution story appears to be suspicious. Therefore, in my considered view, the offence alleged against Appellant Genwa Giri under Sections 363, 366 and 376(2)(g) of the Indian Penal Code is not made out.

17. Consequently, the appeal is allowed. The impugned judgment of conviction and sentence is set aside. Appellant Genwa Giri is acquitted of the charges framed under Sections 363, 366 and 376(2)(g) of the Indian Penal Code.
18. It is reported that the Appellant is on bail. His bail bonds shall continue for a further period of six months from today in terms of the provisions contained in Section 437A of the Code of Criminal Procedure.
19. 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