

NAFR

**HIGH COURT OF CHHATTISGARH, BILASPUR****CRA No. 1106 of 2003****Judgment reserved on 13-4-2018****Judgment delivered on 30-4-2018**

Ramesh Sahu, aged about 18 years, S/o Parau Ram Sahu,  
Resident of Kholi Para Gobra- Navapara (Rajim) District Raipur  
(CG)

**---- Appellant****Versus**

State Of Chhattisgarh Through Police Station Gobra Navapara,  
District Raipur(CG)

**---- Respondent**

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For Appellant : Shri Y.C. Sharma, Advocate

For State/ Respondent : Shri Arvind Dubey, Panel Lawyer

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**HON'BLE SHRI JUSTICE RAM PRASANNA SHARMA****CAV Judgment**

1. Challenge in this appeal is to the judgment of conviction and order of sentence dated 22<sup>nd</sup> August, 2003 rendered by the 3<sup>rd</sup> Additional Sessions Judge, Raipur, Sessions Division Raipur (CG) in ST No.152/2003, wherein the said Court has convicted the appellant for commission of offence under Section 376 (1) r/w Section 511 of the IPC for attempting to commit rape on the prosecutrix (PW4) and sentenced to undergo R.I. for 5 years and fine of Rs.1,000/- with default stipulation.

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. In the present case, prosecutrix is PW4. As per case of the prosecution, the prosecutrix is aged about 6 years and she was playing out of her house on the date of incident i.e. 18.3.2003 at about 3.00 pm. The appellant allured and give her a 5 rupee coin and thereafter took her to a barn of one Kamlesh and committed forceful sexual intercourse with her. Though the charges were framed under Sections 376 (1) and 377 IPC against the appellant, but he was convicted for attempt to commit rape.

4. To substantiate the charge, prosecution has examined as many as 10 witnesses. The prosecutrix (PW4) is firm on her statement right from the day of incident. She deposed before the trial Court that it was the appellant who committed intercourse with her. Version of the victim is supported by the versions of Ramshila (PW3), who is mother of the prosecutrix, Devsharan(PW2), Nanhu(PW1) and Babulal (PW5), who were neighbours of the prosecutrix and were informed just after the incident. Date of incident is 18.3.2003 at about 3.00 pm and FIR was lodged just after the incident on 18.3.2003 by the mother of the prosecutrix, in which, name of the appellant and his act is clearly mentioned. All the witnesses have been subjected to searching cross-examination, but nothing could be elicited in favour of the appellant.

5. True it is that Dr.(Smt.) Anita Yadu (PW7) who has examined the prosecutrix, found her hymen intact and has not found any injury on the body of the victim. Looking to the statement of the medical expert, the trial Court opined that the offence of rape is not established but, offence of attempting to commit rape is clearly established.

6. It is contented on behalf of the appellant that the prosecutrix is a child witness and she was tutored before making statement therefore, conviction cannot be based on her testimony under Section 118 of the Indian Evidence Act, 1872.

7. On the other hand, learned counsel for the State submits that the finding arrived at by the trial Court is based on proper marshalling of the evidence.

8. I have heard learned counsel for the parties and perused the record.

9. Under Section 118 of the India Evidence, 1872, a child can be competent witness. Before admitting or recording the statement of a child, the court must satisfy itself that :

1. The witness understands the questions, and
2. Ascertain in the best way it can, whether from the extent of his intellectual capacity and understanding he is able to give rational account of what he has seen, heard or done on a particular occasion.

10. In this context, it is relevant to rely on a decision of this Court reported in **State of Madhya Pradesh v. Ramesh and another- (2011) 4 SCC 786** wherein it is laid down as to how the evidence of a child witness should be assessed. Paragraphs 7,11 and 14 which are relevant for our purpose, are as under :

“7. In *Rameshwar v. State of Rajasthan* this Court examined the provisions of Section 5 of the Oaths Act, 1873 and Section 118 of the Evidence Act, 1872 and held that (AIR p.55, para 7) every witness is competent to

depose unless the court considers that he is prevented from understanding the question put to him, or from giving rational answers by reason of tender age, extreme old age, disease whether of body or mind or any other cause of the same kind. There is always competency in fact unless the court considers otherwise.

11. In case the deposition of a child witness inspires confidence of the Court and there is no embellishment or improvement therein, the Court may rely upon her evidence. Prosecutrix (PW4) was examined first by the trial Court regarding her competency to depose and only thereafter had recorded her statement. Her statement was also recorded under Section 161 Cr.P.C. by the Investigating Officer on the date of incident in which she firmly stated that it was the appellant who committed rape on her. While deposing before the Court she is stable on her statement and looking to her entire evidence there is no scope to say that any part of her statement is outcome of tutoring.

12. Looking to her evidence it can be inferred that she is able to discern between right and wrong and there is nothing in her cross-examination to indicate that a child cannot differentiate between right and wrong. She fully understood the implication of what she was stating and sanctity of giving evidence and the import of the questions that were being put to her.

13. In this regard it has been held by the Hon'ble Apex Court in case titled as **State of UP Vs. Krishan Mastar, AIR 2010 SC 3071** that :

“There is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to

abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in the future. In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the Court, his deposition does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill will against any person. Therefore, there must be something on record to satisfy the Court that something had gone wrong between the date of incident and recording evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of a serious nature”.

**14.** Looking to the version of the prosecutrix (PW4) and other witnesses to whom the incident was immediately informed, there is nothing against the credibility of the prosecutrix and her evidence is found reliable. It is contended on behalf of the appellant that the trial Court had ignored the medical evidence of Dr.(Smt.) Anita Yadu (PW7) and as per her statement, no sign of forcible intercourse was found, therefore, the verdict of the trial Court is not sustainable. In the view of this, the trial Court has given due weightage to the version of this medical expert and on the basis of her statement the Court had recorded the finding of guilt for attempting rape and not for committing rape. No other appeal has been filed against the finding of acquittal for commission of offence under Sections 376(1) and 377 IPC and the finding arrived at by the trial Court for attempting to commit rape on the prosecutrix is based on the evidence of reliable witnesses. The act of the appellant was actuated by an intention to go further and to achieve a definite end, but there is nothing on record that offence of attempting

to commit rape is not established. The finding arrived at by the trial Court is not liable to be interfered with invoking jurisdiction of appeal. The conviction of the appellant for attempting to commit rape under Section 511 IPC is hereby affirmed.

**Heard on the point of sentence:**

**15.** The trial Court has awarded sentence of R.I. for 5 years, which cannot be termed as harsh, unreasonable or disproportionate looking to the onslaught of a child of 6 years and sentence part is not liable to be disturbed.

**16.** The appeal being devoid of substance, is liable to be and is hereby dismissed.

**17.** It is reported that the appellant is on bail and his bail bonds are cancelled. The trial Court will prepare super-session warrant and issue warrant of arrest against the appellant and after his arrest, he be sent back to the concerned jail for serving out the remaining part of the jail sentence.

Sd/

**(Ram Prasanna Sharma)**  
**JUDGE**