

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 948 of 2014

- Shankar Yadav S/o Kartik Yadav Aged About 37 Years R/o Village Bashi P.O. Karaundi, Ps Rajendra Gram, Distt. Anuppur (M.P.) Present Address House Of Ganeshiya Bai, Beside Primary School Risali Basti, Ps Nevai, Distt. Durg C.G.

---- Appellant

Versus

- State Of Chhattisgarh Through The Incharge, Arakshi Kendra Nevai Distt. Durg C.G.

---- Respondent

For Appellant	:	Smt. Fouzia Mirza, Advocate
For Respondent/State	:	Shri Adil Minhaj, P.L.

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Sanjay Agrawal

Order On Board By Pritinker Diwaker, J.

10/01/2018

This appeal has been preferred against the judgment and order dated 18.09.14 passed by Special Judge {under Protection of Children from Sexual offence Act, and Additional Sessions Judge (FTC)}, Durg in Sessions Trial No. 179/2013 convicting the accused/appellant for the offence punishable under Section 506 Part II IPC and Section 6 of the Protection of Children from sexual offences Act) and sentencing him to undergo RI for three years with fine of Rs 1,000/- u/s. 506 Part II and to undergo imprisonment for life with fine of Rs. 5,000/- u/s. 6 with default stipulation.

2. In the present case prosecutrix (PW-1) is the daughter of accused/appellant. On 11.04.13 a written complaint Ex.P-1 was lodged

by the prosecutrix alleging that accused/appellant who is her father used to sexually harass her on several occasions in absence of her mother. She has stated that on 06.04.2013, when she was all alone in the house, accused/appellant removed her clothes and then forcibly committed sexual intercourse. She has stated that she was also threatened for life by the accused/appellant. Based on this written complaint, FIR Ex.P-2 was registered on 11.04.13 against the appellant under Sections 376, 354 & 506 IPC, Section 23 of the Juvenile Justice Act and Section 4 of the Protection of Children from Sexual Offences Act. Prosecutrix was medically examined on 12.04.13 vide Ex.P-17 by Dr. Mamta Gendre (PW-8) and it has been opined that recent sexual intercourse was done; prosecutrix was adolescent and not habitual. For age determination she was further referred to district hospital, Durg. Accused/appellant was also medically examined by Dr.M.K. Singh and he opined that the appellant was capable of performing sexual intercourse. While framing the charge, trial Judge has framed charge against the appellant for violation of Section 5(l) and (n) of the Protection of Children from Sexual Offences Act and Section 506 Part II IPC.

3. So as to prove the guilt of the accused/appellant, prosecution has examined 10 witnesses. Statement of the accused/appellant was also recorded under Section 313 of the Code of Criminal Procedure in which, he denied the charge levelled against him and pleaded his innocence and false implication in the case.

4. After hearing the parties, learned trial Court has convicted and sentenced the accused/appellant as mentioned in para-1. Hence the present appeal.

5. Contention of Smt. Mirza, counsel for the appellant is as under:

- i) that the prosecutrix (PW-1) who is the main witness has not supported the prosecution case and has been declared hostile.
- ii) that once the prosecutrix has turned hostile there remains nothing in the case irrespective of the fact whether the medical report of the prosecutrix supports the prosecution case or not.
- iii) that in relation to evidence of Ganeshia Yadav (PW-4) and Amrika Yadav (PW-5) it has been argued that in absence of positive statement of the prosecutrix, their evidence is inadmissible.
- iv) that the appellant is in jail since 12.04.13.

6. On the other hand supporting the impugned judgment it has been argued by the State counsel that the conviction of the appellant is in accordance with law and there is no infirmity in the same.

7. Prosecutrix (PW-1) has stated that the accused/appellant is her father however she was never subjected to physical relation by the appellant as mentioned in the written report and also in the FIR. She has stated that though her signature is there on the FIR but she never made any complaint against him. After being declared hostile she was subjected to lengthy examination by the prosecution but she remained firm and has reiterated that she was never subjected to physical relation by the appellant and that she never lodged any report against him. Seizure witness Munna Lal (PW-2) has also turned hostile. Anita Yadav (PW-3) mother of the prosecutrix has also turned hostile. Ganeshiya Yadav (PW-4) is the landlord in whose house, accused/appellant was living on rent, has stated that on the date when the report was lodged by the prosecutrix she informed him that she was being subjected to

physical relation by the appellant (father). Almost similar statement has been made by Amrika Yadav (PW-5) who has stated that after giving some intoxicating substance the appellant used to commit rape on her. Hemant Kumar Rawte (PW-6) is the teacher who has proved the age of the prosecutrix. Dr.M.K.Singh (PW-7) examined the appellant vide Ex.P-15 and has stated that he was capable of performing sexual intercourse. Dr. Mamta Gendre (PW-8) had medically examined the prosecutrix vide Ex.P-17 and has stated that the vaginal slides have been prepared and sent for FSL however as per FSL report on record, spermatozoa has not been found on the vaginal slides and under garments. Kamlesh Singh Rajput (PW-9) is the patwari who prepared spot map Ex.P-20. Santosh Singh (PW-10) is the Investigating Officer who had duly supported the prosecution case.

8. Close scrutiny of the evidence makes it clear that though the prosecutrix had lodged the written report against the appellant but in the court she has not supported the prosecution case at all and has turned hostile. It is not only the prosecutrix who had turned hostile but her mother (PW-3) has also not supported the prosecution case and has turned hostile. It is an unfortunate case where the prosecutrix has turned hostile and has not supported the prosecution case but law has to take its own course. We find it difficult to convict the appellant merely on the moral ground because law requires clinching, cogent and convincing evidence before the court to record a finding that the accused and only the accused was the author of the crime. If the contents of the written complaint are seen along with the medical report, certainly the accused could have been convicted but if the evidence of the prosecutrix in the court is seen, we find our hands tight to convict the appellant on that basis. Though Ganeshia (PW-4) and

Amrika Yadav (PW-5) have stated that they were told by the prosecutrix about the commission of the offence by the appellant but in absence of the court statement of the prosecutrix supporting her written report, their statement also would be termed as hearsay witnesses and their evidence would be inadmissible under the law.

9. Unfortunately it is a case where the criminal will remain unpunished because the prosecutrix and her mother turned hostile however, in the facts and circumstances of the case, we are helpless and have been left with no other option but to acquit the appellant.

10. Thus, after taking all the facts and circumstances into consideration we do not find ourselves in conformity with the findings arrived at by the Learned trial court. Accordingly, the appeal filed by the appellant is allowed and the judgment impugned convicting and sentencing the appellant as mentioned above is set aside. He is acquitted of the charges levelled against him. Accordingly the appeal is allowed. Appellant is in jail he be set at liberty forthwith unless required to be in custody in connection with any other case.

Sd/-
(Pritinker Diwaker)
Judge

Sd/-
(Sanjay Agrawal)
Judge