

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 1204 of 1999**

1. Mahadev son of Tiharu Chandra, aged 35 years,
2. Biharilal son of Manthir Chandra, aged 25 years.

Both resident of village Kanaideeh, Police Station
Malkharouda, District Bilaspur. (C.G.)

---- Appellants**Versus**

- State of Madhya Pradesh (Now Chhattisgarh)

---- Respondent**And****CRA No. 1434 of 1999**

- Manoj Kumar, s/o Laxman Singh Gond, aged about 29 years, Resident of village Kanaidih, Police Station :
Maalkharauda, District Champa - Janjgir (C.G.)

---- Appellant**Versus**

- State of Madhya Pradesh (Now Chhattisgarh) Through :
The Station House Officer, Maalkharauda, District
Champa-Janjgir (C.G.)

---- Respondent

For Appellants	-	Shri Rahil Kochar, Advocate.
For Respondent	-	Shri Vikash Shrivastava, P.L.

Hon'ble Smt. Justice Rajani Dubey**Judgment On Board****17/05/2019**

As these two appeals arise out of the common judgment
dated 17.04.1999 passed by Additional Sessions Judge, Sakti,

District Bilaspur (Now Janjgir- Champa), in S.T. No.369/1999, while acquitting appellant Manoj Kumar in Cr.A. No. 1434/1999 under Section 376 IPC, convicted the accused/appellants under Sections 363 and 366 IPC & sentenced them to undergo R.I. for three years with fine of Rs.1,000/- and R.I. for five years with fine of Rs.2,000/-, plus default stipulation respectively, they are being disposed of by this common judgment.

02. Prosecution story in brief is that on 19.11.1997, at about 9.00 AM, when prosecutrix (PW/1) was going to Malkharoda school, on the way, accused/appellants Mahadev and Biharilal in Cr.A.No.1204/1999 met her, allured her and forced her to run away with appellant Manoj Kumar to Delhi, and thereafter, accused/appellants Mahadev and Biharilal offered Rs.500/- to prosecutrix and then she ran away with appellant Manoj Kumar to Delhi. Further case of the prosecution is that a day prior to the incident, accused/appellants Mahadev and Biharilal, in Cr.A. No. 1204/1999, had given '*Jalebi*' to prosecutrix to eat and after consuming it she got hypnotized. When the prosecutrix did not return to her house, the father of the prosecutrix reported the matter to police. During her stay at Delhi, appellant Manoj Kumar committed sexual intercourse with her thrice and, thereafter, they came to Sakti to his uncle's house, where on 14.12.1997, the prosecutrix along with appellant Manoj Kumar were caught by the police and then, after investigation, offence under Section 363, 366 and 376 read with Section 34 IPC was registered against the

accused/appellants. The prosecutrix was medically examined vide Ex.P/14 on 18.12.1997 by Dr. (Mrs.) C.K. Singh (PW/15) and opined that no definite opinion can be given regarding rape. Prosecutrix is habitual to intercourse, for confirmation of age, she was referred to radiologist.

03. Accused Manoj Kumar in Cr.A.No.1434/1999 was also medically examined by Dr. R.D. Gupta (PW/16) on 18.12.1997 vide Ex.P/17 who found him capable of performing sexual intercourse. In the incident, clothes of appellant Manoj Kumar and prosecutrix were seized and the same were subjected to chemical examination, and as per FSL report (Ex.P/26), spermatozoa was found on the *salwar* of the prosecutrix. After filing of the charge sheet, the trial Court framed charges under Sections 363/34, 366/34 and 376 IPC against appellant Manoj Kumar and under Sections 363/34, 366/34 and 376/34 IPC against appellant Mahadev and Biharilal.

04. So as to hold the accused/appellants guilty, the prosecution examined as many as 23 witnesses. Statements of the accused/appellants were also recorded under Section 313 of Cr.P.C. in which they denied the circumstances appearing against them in the prosecution case, pleaded innocence and false implication. That apart, five defence witnesses namely Sahani Ram (DW/1), Jeevanlal Bhaskar (DW/2), Krishna Prasad (DW/3), Budhram (DW/4) and Pratap Singh (DW/5) were also examined by the defence to substantiate its case.

05. The trial Court after hearing counsel for the respective

parties and considering the material available on record, while acquitting appellant Manoj Kumar under Section 376 IPC, has convicted and sentenced the accused/appellants as mentioned in para-1 of this judgment. Hence, this appeal.

06. Learned counsel for the appellants submits as under:

- That the accused/appellants have been falsely implicated in the crime in question.
- That the statement of the Prosecutrix (PW/1) does not inspire confidence of this Court.
- That prosecutrix never protested or resisted while she was being subjected to forcible sexual intercourse. This conduct of the prosecutrix shows that she has falsely implicated the accused/appellants.
- That once the appellants have been acquitted by the learned trial Court of the offence under Section 376 IPC, therefore, there is no question of convicting them under Section 363 and 366 IPC.
- That the age of the prosecutrix has not been proved to be less than 18 years.
- The Court below has completely ignored the evidence of defence witnesses.
- In support of his argument, he placed reliance on the decisions of the Apex Court passed in the matter of **Rajoo & Ors. V. State of M.P.** reported in **AIR 2009 SC 858**, **Naravan @ Naran V. State of Rajasthan** reported in **2007 SAR (Criminal) 579** and decision of this Court

passed in the matter of **Lalit Kumar V. State of C.G.**
reported in **2011(4) C.G.L.J. 355.**

07. On the other hand, supporting the impugned judgment it has been argued by the State counsel that the conviction of the accused/appellants is strictly in accordance with law and there is no infirmity in the same. He submits that there is absolutely no evidence on record as to why the prosecutrix would falsely implicate the accused persons.

08. We have heard learned counsel for the parties and perused the material available on record.

09. Prosecutrix (PW/1) has stated that on the date of incident, when she was going to school, accused/appellants Mahadev and Biharilal met her on the way and told her to run away with Manoj Kumar, to which she denied. On the next day, they again met her and gave 'jalebi' to eat, thereafter, she mesmerized and only uttering appellant Manoj's name. She has also stated that thereafter, accused/appellants Mahadev and Biharilal gave her Rs.500/- and they (prosecutrix and appellant Manoj Kumar) went to Pappankala at Delhi. She has further stated that appellant Manoj Kumar committed forcible sexual intercourse with her 2-3 times on the pretext of marriage. After staying for 15-16 days at Delhi, they came back to Sakti and stayed in the house of Pratap Singh, the uncle of the appellant. Appellant's uncle was saying to parents of the appellant that appellant and the prosecutrix has come and, thereafter, both of them reached Malkharoda police station. She was medically examined, her

chocolaty and pink colour salwar were seized by the police and spot map was prepared by the Patwari. Her x-ray was also taken. This witness, in para 21, has stated that after eating jalebi, she met first time with appellant Manoj Kumar near village pond situated between Chikhli and Malkharod. In para 22, she admits that she would go with appellant on 19.11.1997. In para 32, she also went on to state that after forcible intercourse, she did not suffer any injury and when she used to catch the hair of appellant to save herself, appellant also did not suffer any injury. Further, in para 51 of her cross-examination, she states that she never disclosed to police about the threat given by the accused persons, and for the first time, she is disclosing before the Court. In para 54, she admits that her name is not recorded in Kanaidih School and her name was not taken during recording of attendance.

10. Ratna Bai (PW/2) and Bharatlal (PW/3), parents of the prosecutrix, have stated as has been stated by the prosecutrix. These witnesses have not stated anything specific regarding date of birth of the prosecutrix.

11. Kruparam (PW/5) is the witness to Supurdnama of prosecution made under Ex.P/5.

12. Tirathram (PW/6) is the neighbour of prosecutrix, who had met the prosecutrix near bus stand. He has stated that he asked the prosecutrix as to where she was going, to which she replied that she is going to Korba for preparing some documents. This witness, in para 9 of his cross-examination,

has stated that when he asked the prosecutrix, she did not seem to be under fear. He also states that the prosecutrix was not looking like that she was hypnotized after consuming something.

13. Santosh Kumar Chandra (PW/7) is the witness to arrest memo of accused/appellants made under Ex.P/6 and P/7.

14. Shrawan Kumar (PW/14) - Constable, had taken the prosecutrix to Govt. Hospital, Sakti, for medical examination vide Ex.P/13 and P/14.

15. Dr. (Smt.) C.K. Singh (PW/15) is the witness who examined the prosecutrix and noticed that secondary sexual characters of the prosecutrix were fully developed, no external or internal injury was found, old hymen was torn and her vagina was easily admitting two fingers. This witness has opined that no definite opinion can be given regarding commission of rape. The prosecutrix was habitual for sexual intercourse. For confirmation of age, the prosecutrix was referred to radiologist.

16. Dr. R.D. Gupta (PW/16) examined the appellant Manoj Kumar vide Ex.P/17 and opined that the appellant was capable of performing sexual intercourse.

17. Dr. R. Jitpure (PW/19) is the Assistant Surgeon and radiologist. He has stated that he did x-ray of the prosecutrix and opined that the prosecutrix was between 17-18 years of age. He has proved his report made under Ex.P/27-B. He has further stated that the age may differ from person to person on the basis of the biological distinctive features and the

environment in which one is born and brought up, and according to which, three years can be added or subtracted. On addition, the age of the prosecutrix comes to 21 years and on subtraction, it comes to 14-15 years.

18. B.P. Yadav (PW/17) is the Investigating Officer who has duly supported the prosecution case.

19. Close scrutiny of the evidence, in particular the statement of the prosecutrix (PW/1), makes it clear that on the date of incident, the prosecutrix of her own accompanied appellant Manoj Kumar (in Cr.A.No.1434/1999) to Delhi, where they had sexual intercourse on number of occasion. From her statement, it also appears that she was a consenting party to the act of appellant Manoj Kumar. So far as the age of the prosecutrix is concerned, there is no legally admissible evidence on record to show that the prosecutrix, on the date of incident, was minor. The doctor conducting x-ray of the prosecutrix has opined that the prosecutrix was between 17-18 years of age, and stated that there may be three years' difference in radiological age. On addition of three years, the age of the prosecutrix comes to 21 years and on subtraction, it comes to 14-15 years. It is also well-settled principle that in criminal cases, if two views are possible on evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused, should be adopted. Once this Court has held the prosecutrix to be major, and the trial Court, after considering the evidence adduced by the prosecution, acquitted the appellants of the charge under

Section 376 IPC, therefore, question for convicting them under Section 366 IPC does not arise.

20. Thus, from the aforesaid discussion and the evidence on record, this Court is of the opinion that the findings recorded by the Court below appear to be beyond proper appreciation of the evidence adduced by the prosecution which cannot have affirmation from this Court. Since, the prosecution has failed on all fronts to prove its case beyond the shadow of reasonable doubt, the benefit, of course, has to go to the accused/appellants. The appeals are thus allowed, judgment impugned is hereby set aside and the accused/appellants stand acquitted of the charges levelled against them. The accused/appellants are on bail, their bail bonds shall stand discharged.

21. Appeals are thus allowed.

Sd/-

(Rajani Dubey)
Judge