

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No.382 of 2002**

Rambaran Sahu, son of Sohan Sahu, aged 34 years, occupation agriculturist, resident of Village Barahmpur, P.S. Premnagar, District Surguja, Chhattisgarh

---- Appellant

versus

The State of Chhattisgarh

--- Respondent

For Appellant : Shri Neeraj Mehta and Shri Shashi Kumar Kushwaha,
Advocates
For Respondent : Shri Shubham Verma, Panel Lawyer

Hon'ble Shri Justice Arvind Singh Chandel

Judgment on Board

22.10.2019

1. The instant appeal has been preferred against the judgment dated 11.3.2002 passed by 5th Additional Sessions Judge (FTC), Surajpur, District Surguja in Sessions Trial No.358 of 1998 convicting and sentencing the Appellant as under:

<u>Conviction</u>	<u>Sentence</u>
Under Section 376 of the Indian Penal Code	Rigorous Imprisonment for 7 years

2. Case of the prosecution, in brief, is that on the relevant date age of the prosecutrix (PW1) was about 15 years. Allegedly, on 4.8.1998 at about 8 a.m., the prosecutrix was throwing away cowdung from the cattle house. The Appellant entered there, caught her, removed her under garment and committed sexual intercourse with her. Since the Appellant gagged her mouth with a handkerchief, she could not raise any voice. At that time, her mother reached

there and on shouting of her mother people reached there. Thereafter, First Information Report (Ex.P1) was lodged by the prosecutrix on 5.8.1998. The prosecutrix was medically examined by Dr. Sushma Shrivastava (not examined). With regard to age of the prosecutrix, her ossification test was conducted by Dr. M.K. Jain (PW12). She gave her report (Ex.P9) in which she opined age of the prosecutrix to be between 16 and 18 years. School transfer certificate (Ex.P10) was also seized. According to the entries of the transfer certificate (Ex.P10), date of birth of the prosecutrix is 25.4.1983. 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 Appellant for offence punishable under Sections 376 and 450 of the Indian Penal Code. Charge was framed against him under Section 376(1) of the Indian Penal Code.

3. In support of its case, the prosecution examined as many as 14 witnesses. In examination under Section 313 of the Code of Criminal Procedure, the Appellant denied the guilt and pleaded innocence. 1 witness has been examined in his defence.
4. On completion of the trial, the Trial Court convicted and sentenced the Appellant as mentioned in the first paragraph of this judgment. Hence, this appeal.
5. Learned Counsel appearing for the Appellant submits that without there being sufficient evidence on record the Appellant has been wrongly convicted by the Trial Court. From the statement of the prosecutrix, it is well established that she was a consenting party to the alleged act done with her. Since her mother saw her with the

Appellant in a compromising position, the report was lodged. It is further submitted that there is no clinching evidence on record on the basis of which it could be said that on the relevant date age of the prosecutrix was below 16 years. Since she was a consenting party and her age was above 16 years, no offence is made out.

6. Learned Counsel appearing for the State opposes the above submission and supports the impugned judgment of conviction and sentence.
7. I have heard Learned Counsel appearing for the parties and perused the record with due care.
8. First, I shall examine the evidence available on record with regard to age of the prosecutrix. The statement of the prosecutrix (PW1) was recorded by the Trial Court on 26.7.2001, i.e., after 3 years of the alleged incident. She has not stated anything regarding her date of birth. In the deposition sheet, apparent age of the prosecutrix is recorded as 22 years. In her Court statement, Fulmati (PW6), mother of the prosecutrix has also not stated anything regarding date of birth or age of the prosecutrix. Father of the prosecutrix has not been examined by the prosecution. Ossification test of the prosecutrix was conducted by Dr. M.K. Jain (PW12). In her report (Ex.P9), she has opined age of the prosecutrix to be between 16 and 18 years. As per the entries of the school transfer certificate (Ex.P10), date of birth of the prosecutrix is 25.4.1983. Umashankar Dubey (PW13), Headmaster has stated that entries in the transfer certificate (Ex.P10) were made on the basis of the entries made in the school admission register. But, who got recorded the said entries in the school

admission register has not been stated by this witness. Therefore, from the evidence available on record, it is not established that on the date of incident, age of the prosecutrix was below 16 years. As observed by the Trial Court while recording the apparent age of the prosecutrix in the deposition sheet and as opined by Dr. M.K. Jain (PW12), it seems that on the date of incident the prosecutrix was aged more than 18 years.

9. As regards the incident, the prosecutrix (PW1) has stated that at the time of incident, she was throwing away cowdung from the cattle house. At that time, the Appellant came there. He caught her and tried to pull her away. On this, she caught a pole then he caused her to fall down. Thereafter, he tried to remove her underwear and when she tried to shout, he put a handkerchief in her mouth. He threatened her that if she shouts, he will throttle her neck. Thereafter, he committed sexual intercourse with her. At that time, her mother reached there, she saw them and shouted. On this, the Appellant fled from there. Thereafter, the matter was reported. In her cross-examination, the prosecutrix has admitted that when the Appellant was committing sexual intercourse with her, her mother reached there at that time itself. She has further admitted that when the Appellant was committing sexual intercourse with her, at that time, he had not said her about throttling her neck nor did he threaten her. She has further admitted that she did not suffer any injury during the period of commission of sexual intercourse and the Appellant committed sexual intercourse with her for about ½ hour. She has further admitted that when she saw her mother, due to shame and guilty feeling, she started weeping.

- 10.** Fulmati (PW6), mother of the prosecutrix has stated that at the time of incident, she had gone to the cattle house for serving grass to goats. At that time, she saw there that the Appellant was committing sexual intercourse with the prosecutrix. She also saw that a handkerchief was put in the mouth of the prosecutrix. In her cross-examination, Fulmati has also admitted that when she reached the spot, having seen her, the prosecutrix shouted.
- 11.** Ramesh Kumar (PW10), younger brother of the prosecutrix has stated that at the time of incident he was present at home. Having heard the shouts of the prosecutrix, he went to the spot. At that time, he saw that the Appellant had mounted over the prosecutrix. In paragraph 4 of his cross-examination, he has admitted the fact that all these facts were stated by him to the police also, but these facts are not mentioned in his case diary statement.
- 12.** On a minute examination of the above evidence, it is clear that though the prosecutrix has stated that the Appellant had committed forcible sexual intercourse with her, her statement is not reliable because she herself has admitted that she did not suffer any injury during the period of commission of the alleged offence nor did the Appellant gave her any threat during that period. From the statements of the prosecutrix and her mother, it is also established that the prosecutrix shouted only after her mother reached at the spot. The prosecutrix herself has admitted that on seeing her mother at the spot, she started weeping due to shame and guilty feeling. Though Ramesh Kumar (PW10), younger brother of the prosecutrix has stated that having heard the shouts of the prosecutrix he went to the spot and there he saw that the Appellant had mounted over the prosecutrix, this statement of the witness is

not reliable because as stated by the prosecutrix and her mother, the Appellant had put a handkerchief in the mouth of the prosecutrix and, therefore, the prosecutrix could not shout. Therefore, the statement of Ramesh Kumar (PW10) that he reached at the spot having heard the shouts of the prosecutrix is not acceptable.

13. On considering the aforestated evidence, it is established that on the date of incident, the prosecutrix was above 18 years of age. It seems that she was a consenting party to the act done with her by the Appellant. The prosecutrix shouted only after her mother reached at the spot and saw her in a compromising position with the Appellant. In these circumstances, no offence under Section 376 of the Indian Penal Code is proved against the Appellant.
14. Consequently, the appeal is allowed. The impugned judgment of conviction and sentence is set aside. The Appellant is acquitted of the charge framed against him.
15. 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