

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No.1863 of 1999**

Budhi @ Anuklal, S/o. Budhwa Uraon, aged 28 years, R/o. Village Losga (Devmodupara) Police Station Lakhanpur, Distt. Surguja (MP) (Now Chhattisgarh)

---- Appellant**Versus**

State of Madhya Pradesh (Now State of Chhattisgarh)

---- Respondent

 For the appellant : Shri Jitendra Shrivastava, Advocate
 For the Respondent/State: Smt. Shubha Shrivastava, Panel
 Lawyer

Hon'ble Shri Justice Ram Prasanna Sharma**Judgment on Board****09.12.2019**

1. The appeal is preferred against judgment dated 09.7.1999 passed by Sessions Judge, Surguja (Ambikapur) in Session Trial No.222/1998 wherein the said Court convicted the appellant for the commission of offence under Section 376(1) of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for ten years and to pay fine of Rs.2,000/- with default stipulation.

2. As per the version of the prosecution, prosecutrix was a married lady and on the date of incident, i.e. 10.4.1998 at about 1.00 pm when she was near the Mahua tree, the appellant committed rape with her. On her shouting, husband of the prosecutrix reached there and on seeing him the appellant fled away from there. The matter was reported and investigated and

the appellants was charge sheeted and convicted as mentioned above.

3. Learned counsel for the appellant submits as under:

(i) The prosecutrix was not examined before the trial Court, therefore, opportunity of cross-examination of the prosecutrix was not available to the appellant.

(ii) In absence of statement of the prosecutrix, there is no evidence to connect the appellant with the crime in question.

(iii) Evidential value of the other witnesses is supportive in nature but the fact remains that in absence of statement of the prosecutrix, the finding could not be arrived at against the appellant.

(iv) The trial Court has not evaluated the evidence in its right perspective, therefore, the finding arrived at by the trial Court is not sustainable.

4. On the other hand, learned counsel for the State supporting the impugned judgment would submit that the finding of the trial Court is based on proper marshaling of the evidence and the same is not liable to be interfered with while invoking the jurisdiction of the appeal.

5. I have heard learned counsel for the parties and perused the judgment impugned.

6. Case of the prosecution is based on the statement of Bidur (PW-1), husband of the prosecutrix. As per the version of this witness, on hearing the cries of his wife, he reached to the spot and saw the appellant committing sexual intercourse with his wife.

As per FIR (Ex-P/7), age of the prosecutrix is 20 years. Admittedly, the prosecutrix was major on the date of incident. An opportunity of cross-examination of the prosecutrix was not available to the appellant because she died before her examination before the trial Court. As the defence side had not been provided opportunity to cross-examine the prosecutrix, the appellant had no occasion to establish the consent on the part of the prosecutrix. In absence of cross-examination of the prosecutrix, the appellant is deprived of opportunity to establish his case before the trial Court. The trial Court recorded finding on the basis of the statement of the husband of the prosecutrix but the facts remains that the husband is not the victim of the case. It was the prosecutrix who was the victim in the case and in absence of her cross-examination, finding recorded on commission of sexual intercourse without her consent is not sustainable.

7. True it is that FIR was lodged by the prosecutrix but declaration made in the FIR is not related to cause of her death as mentioned under Section 32 of the Indian Evidence Act, 1872 (for short 'the Act 1872'), therefore, the same cannot be treated as dying declaration. As per Section 32(1) of the Act 1872, when the statement is made by the prosecutrix as to the cause of her death, or as to any of the circumstances of the transaction which resulted in her death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not at the time when they

were made, under expectation of death, and whatever may be nature of the proceedings in which the cause of her death comes into question. In the present case, cause of death is not in question and only the offence of rape is in question, therefore, FIR lodged by the prosecutrix is not admissible as dying declaration.

8. Version of the husband of the prosecutrix is supportive in nature, but he cannot be cross examined by the appellant side on the point of consent for maintaining physical relation. Therefore, the entire evidence is not sufficient to bring home the guilt of the appellant. Finding arrived at by the trial Court is not sustainable.

9. Resultantly, the appeal is allowed. Conviction and sentence passed by the trial Court against the appellant is hereby set aside and he is acquitted of the charges under Section 376 (1) IPC. The appellant is reported to be on bail. His bail bonds shall continue for further period of six months from today in terms of Section 437A of the Code of Criminal Procedure, 1973.

**Sd/-
(Ram Prasanna Sharma)
JUDGE**