

AFR**HIGH COURT OF CHHATTISGARH, BILASPUR****Reserved on 3-4-2019****Pronounced on 5- 4-2019****CRA No. 395 of 2001**

Achhelal son of Dwarika Prasad Jaiswal, aged about 35 years,
R/o.Purani Basti, Darri, PS Darri, Distt. Korba (CG)

---- Appellant**Versus**

State of Chhattisgarh through District Magistrate, Korba (CG)

---- Respondent

For appellant	:	Ms. Seema Singh and Mr. A.K. Yadav, Adv.
For State	:	Ms. M. Asha, Panel Lawyer.

Hon'ble Shri Sharad Kumar Gupta, J**C.A.V. JUDGMENT**

1. Challenge in this appeal is levied to the judgment of conviction and order of sentence dated 25-4-2001 passed by the Additional Sessions Judge, Korba, Distt. Korba, CG in ST No. 544/1998 whereby and whereunder he has convicted and sentenced the appellant as under :-

Conviction u/S.	Sentence RI.	Fine	In default of payment of fine
450, IPC	7 Years	Rs. 500/-	2 months SI
376, IPC	7 Years	Rs. 500/-	2 months SI

Both the jail sentences have been directed to run concurrently.

2. In brief, the prosecution story is that at the time of alleged incident prosecutrix was 27 years old. She was resident of Purani Basti, Darri. On 24-11-1998 in the night she slept in her house along with her minor daughter Ku. Archna aged 7 years and minor son Ashish aged 5 years. Her husband was not present in the house. At about 1 am neighbour- appellant entered in her house, overpowered her, she shouted, he pressed her mouth and committed forcible sexual intercourse with her. Meanwhile, her daughter Archna woke up and asked him to leave her mother. Thereafter, he ran away from the spot. In the morning she narrated the incident to neighbour Brahaspati Bai and by telephone to his brother Bajrang. On 25-11-1998 at about 9.05

am she lodged an FIR in PS Darri. After completion of the investigation, a charge sheet was filed against him for the offences punishable under Sections 450 and 376, of the Indian Penal Code (in brevity 'IPC'). The trial Court framed the charges against him under Sections 450 and 376 of the IPC. He abjured the charges and faced the trial. To bring home the charges against him, the prosecution examined as many as 10 witnesses. He examined one witness in his defence. After conclusion of trial, the trial Court convicted and sentenced him as mentioned above.

3. Being aggrieved by the aforesaid judgment of conviction and order of sentences, the appellant has preferred this criminal appeal.

4. Counsel for the appellant submits that the appellant has been falsely implicated. No rape has been committed by him with the prosecutrix. Trial Court has not properly appreciated the evidence available on record in proper perspective. The evidence of the prosecutrix is not supported by medical report. She was the consenting party. Her daughter is a tutored witness. The FIR is delayed and no reasonable explanation has been given by the prosecution. Therefore, the impugned judgment of conviction and order of sentences may be set aside and he may be acquitted of the charges.

5. On the other hand, the Panel Lawyer appearing for the State supported the impugned judgment and submitted that the trial Court has rightly convicted and sentenced the appellant. Hence the appeal may be dismissed.

6. As per the alleged MLC report Ex. P-4, P.W. 4 Dr. Smt. R. Dahariya had examined prosecutrix and found that no any external injury was present on the upper part of her body, no any injury was present on her both thighs and external genitalia, no injury was present on her vaginal canal. She opined that prosecutrix was habitual of sexual intercourse, no definite opinion can be given about recent act.

7. There is no such evidence on record on strength of which it can be said that Ex. P-4 is not believable. Thus, this Court believes on Ex. P-4.

8. As per the alleged MLC report Ex. P-6, P.W. 5 Dr. A.K. Tiwari had examined appellant and found there was no external injury on his body. He opined that he was able to perform sexual intercourse.

9. There is no such evidence on record on strength of which it can

be said that Ex. P-6 is not believable. Thus, this Court believes on Ex. P-6.

10. P.W. 2 Prosecutrix says in para 1 and 2 of her statement of given on oath that she slept in her house in the night along with her daughter Archna and son Ashish. At about 1.30 am appellant entered in her house, pressed her mouth and committed sexual intercourse with her. When she slightly shouted her daughter woke up and she also raised alarm.

11. P.W. 9 Archna Agrawal says in para 1, 3, 5, 6 of her statement given on oath that in the night appellant entered in her house, climbed over her mother after removing his pant and underwear, her mother had shouted, she woke up, he was inserting his private part and shaking his waist.

12. D.W. 1 Ramasare says in para 2, 3, 4, 5 and 6 of his statement given on oath that prosecutrix was taking grocery from the grocery shop of appellant on credit. Appellant had demanded the amount of Rs. 1,000/- due on prosecutrix. She and her husband abused him. She threatened that she will implicate him in a criminal case. At the time of alleged incident, he was present in his house which is adjacent to house of prosecutrix, she had not heard any sound or shouting or knocking, opening the door of her house. In another room of the house of prosecutrix, one Basanti was residing, some women employees who had come for election duty stayed in front of the house of prosecutrix in a primary school. She had not stated alleged incident to him or Basanti or women employees.

13. Counsel for the appellant placed reliance on a decision of Hon'ble Supreme Court in **Munna -v- Sate of M.P.** [(2014) 10 SCC 254] para 11 of which is relevant and quoted below :-

“11. Thus, while absence of injuries or absence of raising alarm or delay in FIR may not by itself be enough to disbelieve the version of prosecutrix in view of the statutory presumption under Section 114-A of the Evidence Act but if such statement has inherent infirmities, creating doubt about its veracity, the same may not be acted upon. We are conscious of the sensitivity with which heinous offence under Section 376 IPC has to be treated but in the present case the circumstances taken as a whole

create doubt about the correctness of the prosecution version. We are, thus, of the opinion that a case is made out for giving benefit of doubt to the accused.”

14. Hon'ble Supreme Court in the matter of **Radhu Vs. State of M.P.** [(2007)12, SCC 57], laid down following judicial precedent :-

“A finding of guilt in a case of rape, can be based on the uncorroborated evidence of the prosecutrix and her testimony should not be rejected on the basis of minor discrepancies and contradictions. Absence of injuries on the private parts of the victim will not by itself falsified the case of rape, nor can be construed as evidence of consent nor the opinion of a doctor that there was no evidence of any sexual intercourse or rape, sufficient to disbelieve the victim. However courts should , at the same time, bear in mind that false charges of rape are not uncommon, and there are some rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case.”

15. Hon'ble Supreme Court in the matter of **Raju and others -v- State of MP** [(2009) 3 SCC(Cri) 751], held that testimony of the prosecutrix is believable on a par with that of an injured witness, her testimony cannot always be presumed to be gospel truth. Possibility of exaggeration or embellishment or false implication where several persons are accused cannot be ruled out. Possibility of immoral past of prosecutrix based on evidence can be considered.

16. In the matter of **Mohd. Ali -v- State of UP** [2015 (7) SCC 272], Hon'ble Supreme Court observed in para 30 as under :-

“30. True it is, the grammar of law permits that the testimony of a prosecutrix can be accepted without any corroboration without material particulars, for she has to be placed on a higher pedestal than an injured witness, but, a pregnant one, when a court, on studied scrutiny of the evidence finds it difficult to accept the version of the prosecutrix, because it is not unrepachable, there is requirement for search of such direct or circumstantial

evidence which would lend assurance to her testimony.”

17. P.W. 2 prosecutrix says in para 31 during her cross-examination that she was not in conscious condition thus she did not bite the appellant by teeth, did not snatch by nails, did not push him, did not beat him by legs. There is no such material available on record on strength of which it can be said that such explanation is not natural. Moreover, in such a situation it is natural human conduct that prosecutrix gets disturbed and deviated. Thus, not offering physical resistance by the prosecutrix does not amount that she was allegedly a “free consenting party”.

18. As per Ex. P-4 no injury was found on the body of prosecutrix. Looking to the aforesaid judicial precedent laid down by Hon'ble Supreme Court in the matter of **Radhu** (supra) and in the matter of **Munna** (supra), this Court finds that in the absence of injury as opined by P.W. 4 Dr. Smt. R. Dahariya, it cannot be said that prosecutrix was allegedly “ free consenting party”.

19. P.W.-2 prosecutrix says in para 24 during her cross-examination that she had not narrated incident to her neighbours, members of locality, employees who had come for conducting the election, immediately because she was upset. There is no such material available on the record on strength of which it can be said that the said explanation is not normal and natural. Thus, not informing the alleged incident to the neighbours, members of locality, the employees does not give rise to the presumption that she was allegedly “free consenting party”.

20. In the matter of **Balwant Singh Vs State of Punjab** [(1987) 2 SCC 27] Hon'ble Supreme Court has laid down the following judicial precedent-

“Defence case that the father of prosecutrix falsely implicated the accused persons on the ground of litigation and enmity cannot be accepted as it is absurd that on account of litigation father of prosecutrix would falsely involve his daughter in case of rape by the appellant”.

21. In the case in hand, appellant failed to prove any documentary evidence to the effect that prosecutrix had allegedly taken grocery of such amount on credit from his shop. Moreover, he had not lodged any

report in any police station alleging that on account of demand of due amount regarding grocery, she and her husband had threatened him to falsely implicate in criminal case. Moreover, it is absurd that on account of due amount the prosecutrix would falsely involve appellant in rape case. In these circumstances, the aforesaid judicial precedent laid down by Hon'ble Supreme Court in the matter of **Balwant Singh** (supra) is applicable in favour of prosecution case and against the appellant's case.

22. In the matter of **State of Madhya Pradesh Vs Ramesh** [(2011) 4 SCC 786] Hon'ble Supreme Court has laid down following judicial precedent-

“In case deposition of a child witness inspires confidence, the Court may rely upon his evidence”

23. In the matter of **Gul Singh alias Gulia -v- State of M.P.** [2014 SCC OnLine SC 719] Hon'ble Supreme Court has laid down following judicial precedent-

“Evidence of child witness cannot be rejected unless the same is tutored or unless the same is unreliable.

24. There is no such material available on record on strength of which it can be said that P.W. 9 Archana Agrawal is a tutored witness and she had made aforesaid statement merely because she was in grip of her mother- prosecutrix who had asked her to say like that. There is no material available on record on the strength of which it can be said that the aforesaid testimony of P.W. 9 Archana Agrawal is not reliable or does not inspire the confidence. Thus, the aforesaid judicial precedents laid down by the Hon'ble Supreme Court in the matters of **State of Madhay Pradesh -v- Ramesh** (supra) & **Gul Singh alias Gulia** (supra) are applicable in favour of prosecution case and applicable against the appellant's case.

25. There is no such omission and contradiction have been dealt during the cross-examination of P.W.-2 Prosecutrix & P.W.-9 Archana Agrawal which can adversely affect the testimony of P.W. 2 Prosecutrix given in para 1 and 2 and testimony of P.W. 9 Archana Agrawal given in para 1, 3, 5 and 6 of their statements.

26. In the matter of **State of H.P. -v- Shree Kant Shekari** [2004(8) SCC 153], Hon'ble Supreme Court has held in para 18 as under :-

“18. The unusual circumstances satisfactorily explained the delay in lodging of the first information report. In any event, delay per se is not a mitigating circumstance for the accused when accusations of rape are involved. Delay in lodging the first information report cannot be used as a ritualistic formula for discarding the prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered, the court is to only see whether it is satisfactory or not. In case if the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is a relevant factor. On the other hand, satisfactory explanation of the delay is weighty enough to reject the plea of false implication or vulnerability of the prosecution case. As the factual scenario shows, the victim was totally unaware of the catastrophe which had befallen her. That being so, the mere delay in lodging of the first information report does not in any way render the prosecution version brittle. These aspects were highlighted in *Tulshidas Kanolkar v. State of Goa* [(2003) 8 SCC 590 : 2004 SCC (Cri) 44] .”

27. The relevant portion of para-13 of **Puran Chand -v- State of H.P.** [(2014) 5 SCC 689] wherein the Hon'ble Supreme Court has made some observation is quoted below :-

“13.The delay in lodging the FIR has been clearly explained by the prosecution relating the circumstance and the witnesses supporting the same have stood the test of scrutiny of the cross-examination as a result of which the version of the victim girl cannot be doubted. The delay in lodging the FIR thus stands fully explained.”

28. In alleged FIR Ex. P-3 it has been mentioned that the appellant entered in the house of prosecutrix, pressed her mouth, committed sexual intercourse with her.

29. The alleged incident took place on 25.11.1998 at about 1.00 a.m. Ex. P-3 was lodged on 25.11.1998 at about 9.05 a.m. In Ex. P-3 the distance from village Darri to Police Station, Darri is mentioned as 1 k.m. There is no such material available on record on the strength of

which it can be said that the said distance is not believable. Thus, this Court believes that the distance is 1 km. Moreover, it is alleged that at the time of alleged incident nobody was present in the house of prosecutrix except two minor children. Moreover, it is also natural that she was allegedly upset on account of such incident. In these circumstances, this Court finds that delay in lodging Ex. P-3 is satisfactory and convincing. Thus, looking to the aforesaid judicial precedents laid down by Hon'ble Supreme Court in the matters of **Shree Kant Shekari** (supra), **Puran Chand** (supra) and **Munna** (supra), this Court finds that delay in lodging Ex. P-3 is not fatal to the prosecution case.

30. There is no such evidence on record on the strength of which it can be said that Ex. P-3 is fabricated or concocted to falsely implicate the appellant in alleged offences.

31. This has been earlier decided that prosecutrix was not a free consenting party. After the appreciation of the evidence discussed hereinbefore, this Court finds that aforesaid statements of para No.1 and 2 of P.W. 2 prosecutrix, paras No.1, 3, 5 and 6 of P.W. 9 Archana Agrawal are simple, natural, and normal. Thus, on the basis of aforesaid judicial precedents laid down by Hon'ble Supreme Court in the matters of **Radhu** (supra), **Mohd. Ali** (supra), **Raju and others** (supra) and **Munna** (supra), this Court finds that this Court can act upon aforesaid sole testimony of para 1 and 2 of P.W. 2 Prosecutrix. Thus, appellant does not get any help from the aforesaid judicial precedent laid down by Hon'ble Supreme Court in the matter of **Munna** (supra).

32. In the case in hand, the aforesaid statement of para 1 & 2 of prosecutrix gets corroboration from the aforesaid statement of para 1, 3, 5 and 6 of P.W.-2 Archana Agrawal and Ex. P-6.

33. After the appreciation of the evidence discussed herebefore, this Court believes on para 1 & 2 of statement of P.W. 2 Prosecutrix, para 1, 3, 5 & 6 of P.W. 9 Archana Agrawal and disbelieves aforesaid statement of D.W. 1 Ramasre in the reference that allegedly prosecutrix had falsely implicated the appellant on account of demanding due amount regarding grocery, he had not allegedly committed forcible sexual intercourse with her.

34. After the appreciation of the evidence discussed herebefore this

Court finds that prosecution has succeeded to prove beyond reasonable doubt that appellant had committed house trespass in order to commit rape with prosecutrix which is punishable with imprisonment for life, and committed rape with prosecutrix which are punishable under Section 450, 376 of the IPC respectively. Thus, this Court affirms the judgment of conviction passed by the trial Court.

35. As regards sentences awarded to the appellant for offence punishable under Sections 450 and 376(1) of the IPC, considering the facts and circumstances of the case, they appear to be just and proper, and do not call for any interference. Hence, this Court also affirms the sentences regarding Sections 450 and 376, IPC.

36. The appeal being devoid of merit deserves to be and is hereby dismissed.

37. The appellant is reported to be on bail. His bail and bonds are cancelled. He is directed to surrender immediately before the trial Court for undergoing the remaining part of sentences. The trial Court is also directed to take the appellant in custody immediately for undergoing the remaining part of sentences.

Sd/-
(Sharad Kumar Gupta)
Judge