

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 259 of 2010

Order reserved on 28.06.2019.

Order delivered on 29/08/2019

Mahesh @ Guddu Yadav, S/o. Chutum Yadav, Aged about 22 years, Occupation Labourer, R/o. Village Navapara, Tahsil Bagicha, District Jashpur (C.G.)

---- Appellant

Versus

State of Chhattisgarh, Through Police Station, Grih Bagicha, District Jashpur (C.G.)

---- Respondent

For Appellant : Mr. J.K. Saxena, Advocate

For Respondent : Mr. Aman Kesharwani, Panel Lawyer

Hon'ble Smt. Justice Vimla Singh Kapoor

It is alleged by the prosecutrix (PW-1) that on 18.06.2009 at about 4.00 AM, when she had gone to ease herself, the accused/appellant met her on the way and on the pretext of marriage took her to several places by bus. She is alleged to have remained in the company of accused/appellant for about 6 days and during this period she was also subjected to repeated sexual intercourse against her will and without her consent. Ultimately on 24.06.2009 they both got back to Bagicha and after meeting her father she disclosed the entire incident to him which led to lodgment of report Ex.P-1 and other procedural necessities such as medical examination of the prosecutrix and the accused/appellant were also undertaken and after completion of investigation *challan* was filed against the accused/appellant under Sections 363, 366, 376(1) IPC followed by framing of charge accordingly.

2. Learned Court below vide judgment impugned dated 06.03.2010 held the accused/appellant guilty under Sections 376 (1), 363 and 366 IPC with imposition of sentence of RI for 7 years, 3 years and 3 years respectively on each count coupled with fine of Rs.100/- plus default clause.

3. Counsel for the accused/appellant submits that though the evidence on record does not conclusively go to show that the accused/appellant had taken away the prosecutrix *per force* and subjected her to repeated sexual intercourse but yet the Court below has held him guilty for the offences described above which is erroneous and off the record. He further submits that even the prosecutrix did not remain firm to her stand taken once and has gone astray while deposing the things differently on different occasions. Even the medical evidence, according to counsel for the appellant does not stand by the version of the prosecutrix. The totality of the submission taken on behalf of the accused/appellant is that the judgment under challenge is not based on proper appreciation of the evidence of the witnesses and, therefore, is not sustainable in law.

4. State counsel however supports the judgment impugned and submits that the findings recorded by the Court below convicting and sentencing the accused/appellant as mentioned above are based on the proper appreciation of the evidence on record and, therefore, no illegality or infirmity is traceable in the same worth interference in this appeal.

5. The prosecutrix (PW-1) herself has stated that on the date of incident in wee hours when she had gone to answer the call of nature, the accused/appellant met her and on the promise of marriage took to several places by bus and subjected her to forcible sexual intercourse all along repeatedly. She herself has stated that she met number of people including fellow passengers in the bus while accompanying the appellant but it becomes highly unnatural on her part that she did not make

even a whisper of the act of the accused/appellant to them. Even at the place where they both stayed together she must have come across number of people but her act of keeping mum throughout speaks something else favouring the accused/appellant. Had she really been taken *per force*, there was ample opportunity for her to disclose the same to the fellow passengers and the people she might have come across all along but she did not do that and kept moving here and there without any resistance. The prosecutrix (PW-1) has held herself to be minor on the date of incident, the prosecution did not produce any clinching evidence to fortify this stand of her. Though the Kotwar(PW-8) has mentioned the age of the prosecutrix as 29.04.1994 yet the person namely Dhajaram at whose instance he had made such entry, has not been examined by the prosecution. Furthermore, another un-exhibited document being the certificate of the primary school issued in the year 2008-09 discloses another date of birth of the prosecutrix being 13.05.1993. If this certificate is taken to be correct, of course she cannot be said to be minor on the date of incident. It creates doubt in the mind of this Court as to which of these two dates of births has to be relied upon to determine the correct age of the prosecutrix. Even otherwise, the certificate given by the Kotwar mentions the name of mother of the prosecutrix as Kewli Bai, whereas in the un-exhibited document issued by the school her mother name is mentioned as Ruptara. Thus the identity of the prosecutrix itself is doubtful. Though the doctor (PW-4) had recommended for conducting the ossification test for determination of the exact age of the prosecutrix at the relevant time yet there is no such report on record. More importantly, the prosecutrix in her evidence has stated that she was not sure as to by whom the report was lodged and that she had put her signature thereon after being asked by the police. This statement of the prosecutrix creates doubt as to the genuineness of the FIR also. The medical evidence also shows that there was no injury

on the body of the prosecutrix; her secondary sexual characters were fully developed; hymen was old torn; two fingers easily entered her vagina and that she was habitual to sexual intercourse. The doctor (PW-4) medically examining the prosecutrix has further clarified that no definite opinion regarding the recent sexual intercourse with the prosecutrix could be given. Furthermore, the incident had taken place on 18.06.2009 whereas the report to that effect was lodged on 24.06.2009 i.e. with an inordinate delay of about a week for which no satisfactory explanation has been offered by the prosecution. Moreover, the incident is said to be of wee hours but it is surprising as to how the appellant knew that at that particular time the prosecutrix would come out for answering the call of nature. On the contrary, it speaks about the preplanned program on the part of the two, and for that only the accused was waiting for her to move ahead.

6. Thus the overall appraisal of the evidence makes it explicitly clear that the prosecutrix moved in the company of the accused out of her own sweet-will and the sexual intercourse also went on all along at her own volition. Being so, the Court below cannot be said to be justified while passing the judgment impugned as the evidence of the witnesses has not been taken care of in its proper perspective. In this view of the matter, the accused/appellant is entitled to receive benefit of doubt and having been extended the same he stands acquitted of charges levelled against him.

7. Appeal thus stands allowed by setting aside the judgment impugned. Since he is already on bail, no order to set him free etc. needs to be passed.

Sd/-
(Vimla Singh Kapoor)
JUDGE