

AFR**HIGH COURT OF CHHATTISGARH, BILASPUR****Reserved on 16 -4-2019****Pronounced on 25- 4-2019****CRA No. 1267 of 1999**

(Arising out of judgment of conviction and order of sentences dated 22-04-1999 passed by the 2nd Additional Sessions Judge, Ambikapur – Sarguja (MP) (now in CG) in ST No. 16/1998).

Shriram Urav son of Kendaram Urav, aged 30 years, by caste Urav, Cultivator, Resident of village Ghutarapara, Police Station Batoli, Distt. Sarguja (Ambikapur) (MP)(now CG)

---- Appellant**Versus**

State of Madhya Pradesh (now Chhattisgarh)

---- Respondent

For Appellant	:	Mr. Manoj Mishra, Adv.
For State	:	Mr. S.R.J. Jaiswal, 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 sentences dated 22-04-1999 passed by the 2nd Additional Sessions Judge, Ambikapur – Sarguja (MP) (now in CG) in ST No. 16/1998 whereby and whereunder he has convicted and sentenced the appellant as under :-

Conviction u/S.	Sentence RI.	Fine	In default of payment of fine
363, IPC	3 Years	-	-
366, IPC	5 Years	-	-
376, IPC	7 Years	Rs.200/-	R.I. for 2 years

All 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 15 years old. She was resident of village Sarmana-Bhandardand. On 27-10-1997 prosecutrix was returning back from her uncle's house to village Bhandardand. On the way at about 11 am at Tongri, the appellant met her and asked her to come with him otherwise he will assault her by stone. He forcefully took her by pulling to the house of his sister co-accused Kaloti @ Kalawati. Next day, he

took her in the house of his related uncle co-accused Aamir Sai at Mainpat. He committed repeatedly sexual intercourse with her at Mainpat. On 02-11-1997 she fled away and reached in her parental house. On 05-11-1997 she lodged an FIR against him at Police Station Batouli. After completion of the investigation, a charge sheet was filed against him and co-accused Kaloti @ Kalawati and Amir Sai for the offences punishable under Sections 363, 366, 368, 376 & 506 of the Indian Penal Code (in brevity 'IPC'). The trial Court framed the charges against him under Sections 363, 366, 376 of the IPC and co-accused Kaloti @ Kalawati and Amir Sai for the offence punishable under Section 368 of IPC. They abjured the charges and faced the trial. To bring home the charges against them, the prosecution examined total 7 witnesses. They did not examine any witness in their defence. After conclusion of trial, the trial Court convicted and sentenced the appellant as mentioned above. However, the trial Court acquitted co-accused Kaloti @ Kalawati & Amir Sai for the offence punishable under Section 368 of IPC.

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 prosecution failed to prove that at the time of alleged incident, she was below 16 years of age. 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. First and foremost question for adjudication before this Court is as to whether prosecutrix was below 16 years of age on 27-10-1997.

7. P.W.-3 Lakheshwar, who is the father of prosecutrix says in para 5 in his statement given on oath on 23-04-1998 that now the age of

prosecutrix is 15 years. He got written the date of birth of prosecutrix in school as 07-08-1982.

8. As per alleged certificate Ex. P-12 the date of birth of prosecutrix is 07-08-1982.

9. As per alleged photocopy of *Dhakil Kharij Register* Ex.P-13-C, the date of birth of prosecutrix is 07-08-1982.

10. There is no such evidence on record on the strength of which it can be said that the aforesaid statement of P.W.-3 Lakheshwar is not simple, not natural, not normal. Moreover, it gets support from Ex. P-12 & Ex. P-13-C. Thus, this Court believes on the aforesaid statement of P.W.-3 Lakheshwar.

11. After the appreciation of the evidence discussed herebefore, this Court finds that prosecution has succeeded to prove that on 27-10-1997, prosecutrix was below 16 years of age.

12. Now second question for consideration before this Court is as to whether appellant had kidnapped prosecutrix with intent that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse and he had committed rape with her.

13. As per the alleged MLC report Ex. P-9, P.W. 5 Dr. Smt. Chhipra Shrivastava had examined prosecutrix and found that no external injury was present on her body, her hymen was old ruptured and healed, no injury was present over her private part. She opined that prosecutrix was habitual to intercourse thus no definite opinion can be given about recent intercourse.

14. There is no such evidence on record on strength of which it can be said that Ex. P-9 is not believable. Thus, this Court believes on Ex. P-9.

15. As per alleged seizure Ex.P-3, P.W.-7 Sub Inspector B.S. Khuntiya had seized one underwear from the possession of the prosecutrix.

16. There is no such evidence on record on strength of which it can be said that Ex. P-3 is not believable. Thus, this Court believes on Ex. P-3.

17. As per alleged seizure Ex. P-14, P.W.-7 Sub Inspector B.S. Khuntiya had seized one underwear from the possession of the appellant.

18. There is no such evidence on record on strength of which it can be said that Ex. P-14 is not believable. Thus, this Court believes on Ex. P-14.

19. As per alleged seizure Ex. P-20, P.W.-7 Sub Inspector B.S. Khuntiya had seized two slides in one sealed packet from constable Suresh Prasad.

20. There is no such evidence on record on strength of which it can be said that Ex. P-20 is not believable. Thus, this Court believes on Ex. P-20.

21. As per alleged RFSL report report Ex. P-25, on Article A underwear of prosecutrix, Article B underwear of appellant, Article C-1 and C-2 slides of prosecutrix, sperm and semen were present.

22. There is no such evidence on record on strength of which it can be said that Ex. P-25 is not believable. Thus, this Court believes on Ex. P-25.

23. P.W.-1 prosecutrix says in paras 2 and 4 of her statement of given on oath that when she was returning back to her house from the house of her uncle, on the way, appellant took her in the house of his sister by pulling. Thereafter, he took her at Mainpat and committed sexual intercourse with her.

24. P.W.-3 Lakheshwar says in paras 1 and 3 of his statement, that prosecutrix had told that appellant took her forcibly by pulling, he had committed repeatedly sexual intercourse with her.

25. In the matter of **State of H.P. -v- Shree Kant Shekari** [2004(8) SCC 153]), the Hon'ble Supreme Court has dealt with the false implication, the relevant portion of para 22 which reads as under :-

“22. “..... In any event no girl of a tender age and her parents would like to jeopardise her entire future by falsely implicating a person alleging forcible sexual intercourse”

26. In the matter of **Puran Chand -v- State of H.P.** [(2014) 5 SCC 689] Hon'ble supreme Court has dealt with the false implication, the

relevant portion of para 14 is as under :-

“14.....In fact, we are prone to infer with reason that if the prosecution had an intention of really planting a false story of rape, it is highly improbable that they would have created a story having a huge time gap between the date of incident and the date of lodgment of the FIR leaving the scope for weakening the prosecution case. If it were a well thought out concocted story so as to lodge a false case, obviously the prosecution would not have taken the risk of giving a time gap of more than 20 days between the incident and the lodgement of the FIR. This clinching circumstantial evidence demolishes the defence version and inspires much confidence in what has been stated by the victim girl.”

27. There is no such evidence on record on strength of which it can be said that P.W.-1 prosecutrix had lodged alleged FIR Ex. P-1, she had stated aforesaid statement of para 2 and 4, and P.W.-3 Lakheshwar had stated aforesaid statement of para 1 and 3, only because there was allegedly animosity between family of the prosecutrix and appellant on account of any reason.

28. There is no such evidence on record on strength of which it can be said that P.W.1 prosecutrix had lodged alleged FIR Ex. P-1, she had stated aforesaid statement of para 2 and 4, and P.W. 3 Lakheshwar had stated aforesaid statement of para 1 and 3, only because that there was allegedly love affair between prosecutrix and appellant.

29. In the case in hand, the prosecutrix is a tender aged girl. Looking to the aforesaid facts and circumstances of the case, and, looking to the aforesaid judicial precedents laid down by Hon'ble Supreme Court in the matters of **Shree Kant Shekari** (supra) and **Puran Chand** (supra), this Court finds that there is no possibility of false implication of the appellant in the case in hand.

30. 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.”

31. Hon'ble Supreme Court in the matter of **Munna -v- State of M.P.** [(2014) 10 SCC 254] observed in para 11 as under :-

“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.”

32. Looking to the aforesaid judicial precedents laid down by Hon'ble Supreme Court in the matter of **Radhu** (supra), and **Munna** (Supra), this Court finds that in the absence of injury on body of the prosecutrix, due to aforesaid opinion given in Ex. P-9, the aforesaid statement of para 2 and 4 of prosecutrix, para 1 and 3 of P.W. 3 Lakheshwar cannot be disbelieved.

33. In Ex. P-1 it has been mentioned that appellant had threatened prosecutrix that he will assault her by stone. He had also given threatening to beat her. On 2-11-1997 she had fled away from Mainpat. P.W. 1 Prosecutrix says in para 2 and 5 that appellant had threatened her to assault by stone, she had fled away. She says in para 15 that appellant had threatened her that if she will narrate the incident to

anyone then he will beat him. P.W. 3 Lakheshwar says in para 2 that prosecutrix had told him that appellant had given threatening to beat her, she had fled away from Mainpat. There is no such material available on record on strength of which it can be said that, said facts mentioned in Ex. P-1, said statement of para 2, 5 and 15 of P.W. 1 Prosecutrix, said statement of para 2 of P.W. 3 Lakheshwar are not simple, not natural and not normal. Thus, this Court finds that said facts mentioned in Ex. P-1, said statement of para 2, 5 and 15 of P.W. 1 Prosecutrix, said statement of para 2 of P.W. 3 Lakheshwar are simple, normal and natural. Moreover, prosecutrix was tender aged girl, appellant was allegedly in a position to dominate her wish and will. In these circumstances this Court finds that due to non-alarming by her, not complaining to any other person, it cannot be said that prosecutrix was allegedly not taken by appellant.

34. In Ex. P-1 it has been mentioned that when prosecutrix was returning back appellant met her on the way, he took her by pulling. He had committed repeatedly sexual intercourse with her in Mainpat.

35. In the matter of **Shree Kant Shekari** [supra], 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] .”

36. The relevant portion of para-13 in **Puran Chand** (supra) wherein the hon'ble Supreme Court has observed as under :-

“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.”

37. Ex. P-1 was lodged on 05.11.1997 on 9th day of alleged incident 27.10.1997.

38. This has been earlier decided that aforesaid facts mentioned in Ex. P-1, aforesaid statement of para 2, 5 and 15 of P.W. 1 Prosecutrix, para 2 of aforesaid statement of P.W. 3 Lakheshwar are simple, normal and natural. Moreover. It has been observed earlier that Prosecutrix was a tender aged girl, the appellant was in a position to allegedly dominate her wish and will. These circumstances are just and sufficient for causing inordinate delay in lodging Ex. P-1. Thus, this Court finds that the inordinate delay in lodging Ex. P-1 has been sufficiently explained by the prosecution. Thus, looking to the judicial precedents in the matters of **Shree Kant Shekari** (supra), **Puran Chand** (supra), and **Munna** (supra), this Court finds that the inordinate delay in lodging Ex. P-1 is not fatal to the prosecution case.

39. Looking to the above-mentioned facts and circumstances, this Court finds that Ex. P-1 is normal, natural, simple and is not concocted, not fabricated, regarding aforesaid facts.

40. No material omissions and contradictions have been dealt by appellant during the cross-examination of P.W.-1 prosecutrix and P.W. 3 Lakheshwar which may adversely affect the aforesaid testimony of para 2 and 4 of P.W. 1 prosecutrix, Para 1 and 3 of P.W.-3 Lakheshwar.

41. There is no such material available on record on strength of which it can be said that aforesaid statement of para 2 and 4 of prosecutrix, para 1 and 3 of P.W.-3 Lakheshwar are not simple, not

natural, not normal, thus, this Court finds that aforesaid statement of para 2 and 4 of prosecutrix, para 1 and 3 of P.W. 3 Lakheshwar are simple, natural and normal.

42. As per the provisions of Section 375 of the IPC, Sixthly [as per the Criminal Law (Amendment) Act, 2013 came into force on 3rd day of February, 2013] a man is guilty of the offence of rape who commits sexual intercourse with or without consent of the prosecutrix who is under 18 years of age. Before this amendment for the offence of rape the age of prosecutrix was below 16 years.

43. In the matter of **Harpal singh -v- State of Himanchal Pradesh** [(1981) 1 SCC 560], which was a matter of sexual intercourse with a girl below 16 years of age, Hon'ble Supreme Court held that consent of girl below 16 years of age for sexual intercourse is of no consequence. The fact that no injury was detected on the private part of the girl and that she was found to have been used to sexual intercourse is immaterial.

44. In **Shree Kant Shekari** (supra), Hon'ble Supreme Court while dealing the sexual intercourse with minor girl has observed in para 14 of which the relevant portion is extracted herebelow :-

“14.Therefore, on the date of occurrence and even when the FIR was lodged on 20-11-1993 she was about 14 years of age. Therefore, the question of consent was really of no consequence”

45. This has been earlier decided that on 27.10.1997 prosecutrix was below 16 years of age. Thus looking to the above-mentioned judicial precedents laid down by the Hon'ble Supreme Court in **Harpal Singh** (supra) and **Shree Kant Shekari** (supra), this Court finds that the question of consent of the prosecutrix does not arise in the case in hand regarding the offence punishable under Section 376, IPC.

46. 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.

47. 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.”

48. This has been earlier decided that aforesaid statement of para 2 and 4 of prosecutrix, aforesaid statement of Para 1 and 3 of P.W.-3 Lakheshwar 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)**, **Mohammad Ali (supra)**, **Raju and others (supra)** and **Munna (supra)** this court finds that this Court can act upon aforesaid sole testimony of prosecutrix.

49. In the case in hand, the aforesaid testimony of prosecutrix gets corroboration from Ex. P-1, Ex. P-3, Ex. P-9, Ex. P-14, Ex. P-20 and Ex. P-25.

50. After the appreciation of the evidence discussed herebefore this Court believes on aforesaid testimony of para 2 and 4 of P.W. 1 prosecutrix, aforesaid statement of Para 1 and 3 of P.W. 3 Lakheshwar.

51. After the appreciation of the evidence discussed herebefore, this Court finds that prosecution succeeded to prove beyond reasonable doubt the charges punishable under sections 363, 366 and 376 of the IPC against the appellant. Thus, trial Court did not commit any illegality in convicting the appellant as aforesaid. Hence, aforesaid conviction is affirmed.

52. The ingredients of Section 363 IPC are included in the ingredients of Section 366 IPC. In other words Section 366, IPC includes the provisions of Section 363, IPC. Thus, appellant cannot be sentenced in both Sections. Thus trial Court committed illegality in sentencing appellant for the offence punishable under Section 363 IPC

because trial Court had already sentenced him for the offence punishable under Section 366 IPC. Thus his conviction for the offence punishable under Section 363 IPC is hereby set aside.

53. The sentences for the offences punishable under Sections 366 and 376 IPC are just and sufficient thus the sentences for the offences punishable under Section 366 and 376 IPC, awarded by trial Court are affirmed.

54. Appeal is partly allowed.

55. Appellant is reported to be on bail. His bail and bonds are canceled. He is directed to surrender immediately before the trial Court for undergoing 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