

AFR**HIGH COURT OF CHHATTISGARH, BILASPUR****Reserved on 22-02-2019****Pronounced on 19-3-2019****CRA No. 1497 of 1999**

(Arising out of judgment of conviction and order of sentence dated 07-05-1999 passed by the Special Judge SC/ST (Prevention of Atrocities) Act, Sarguja, Ambikapur, in Special Criminal Case No. 105/1998)

Samsuddin Ansari, son of Jakira Ansari, aged about 23 years, occupation Student, R/o. Village Bhagwatpur, P.S. Shankergarh, Distt. Sarguja (CG)

---- Appellant**Versus**

State of Madhya Pradesh (now in Chhattisgarh) through PS Ambikapur, Distt. Sarguja (MP)(Now CG)

---- Respondent

For appellant : Shri Hemant Agrawal on behalf of Shri S.C. Verma, Adv.

For State : Shri Vikram Dixit, Govt. Advocate

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 07-05-1999 passed by the Special Judge SC/ST (Prevention of Atrocities) Act, Sarguja, Ambikapur, in Special Criminal Case No. 105/1998 whereby and whereunder it has convicted and sentenced the appellant as under :-

Conviction u/S.	Sentence RI	Fine Rs.	In default of payment of fine
376(1) IPC	7 Years	2,000/-	SI for 1 $\frac{3}{4}$ years.

2. In brief, the prosecution story is that at the time of alleged incident prosecutrix was about 14 years old. She was resident of village Chiraighat. She was a member of Scheduled Tribe, she was a weak minded girl. On 29.06.1998, prosecutrix was going to Shankargarh market along with her mother Likhnbai. On the way prosecutrix sit down due to dizziness. Appellant was going towards Durgapur by motorcycle. Mother of the prosecutrix asked him to take prosecutrix and drop her in their house. He took her in Chiraighat forest and at about 13:30 hrs committed rape with her. Thereafter when he was brining her to leave her to her parents' house, on the way, Indradev Singh and Mangal Sai, father of the prosecutrix

Gurudayal Kanwar met him. He admitted before them that he had committed wrong with her and started shivering and ran away by the motorcycle. Prosecutrix narrated incident to them. Gurudayal Kanwar lodged report in police station Shankargarh on very day at 14:45 hours. After completion of the investigation, a charge sheet was filed against him for the offence punishable under Section 376 of the Indian Penal Code (in brevity 'IPC') and Section 3(i)(xii) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 (hereafter called as 'the SCST Act'). The trial Court framed the charges against him under Section 376(1) of the IPC and Section 3(i)(xii) and 3(ii)(v) of the SC/ST Act. He abjured the charges and faced the trial. To bring home the charges against him, the prosecution examined as many as 15 witnesses. He examined two witness in his defence. After conclusion of trial, the trial Court acquitted him of the offences punishable under Section 3(i)(xii) and 3(ii)(v) of the SCST Act however convicted and sentenced him as mentioned above.

3. Being aggrieved by the aforesaid judgment of conviction and order of sentence, 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 testimony of the prosecutrix is not corroborated by medical evidence. At the time of alleged incident prosecutrix was more than 16 years of age and she was allegedly consenting party. Therefore, the impugned judgment of conviction and order of sentence may be set aside and he may be acquitted of the charge.

5. On the other hand, the State counsel 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. The trial Court has given finding that at the time of the alleged incident the age of the prosecutrix was more than 15 years.

7. As per the alleged MLC report Ex. P-9, P.W. 6 Dr. Josef Lakda had examined the appellant and opined that he was capable to perform sexual intercourse.

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

9. As per the alleged seizure Ex. P-3, P.W. 9 Sub Inspector R.N. Singh had seized one underwear from the possession of P.W. 2 Gurudayal Kanwar.

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

11. As per the alleged seizure Ex. P-9 (wrongly exhibited as Ex. P-9 already marked), P.W. 9 Sub Inspector R.N. Singh had seized slides from constable Anil Sarkar.

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

13. As per the alleged RFSL report dated 23-12-1998, on the underwear of the prosecutrix marked as Article 'B', slides marked as Article 'C', sperms and spermatozoa were found.

14. There is no such evidence on record on the strength of which it can be said that aforesaid RFSL report is not believable. Thus, this Court believes on said RFSL report.

15. P.W. 1 Prosecutrix says in para 3 of her statement given on oath that her mind is upset.

16. P.W. 2 Gurudayal says in para 4 of his statement given on oath that at that time the mind of the prosecutrix was slightly not good.

17. P.W. 3 Likhani Bai who is mother of the prosecutrix says in para 9 during her cross-examination that at the time of alleged incident the mental condition of the prosecutrix was not well.

18. D.W. 1 Shafik says in para 5 of his statement given on oath that mental condition of the prosecutrix was not well.

19. D.W. 2 Kayamuddin says in para 4 of his statement given on oath that prosecutrix is feeble minded.

20. There is no such evidence on record on the strength of which it can be said that aforesaid statements of P.W. 1 Prosecutrix, P.W. 2

Gurudayal, P.W. 3 Likhani Bai are not believable in the reference that at the time of alleged incident prosecutrix was weak minded girl. Moreover appellant has given the suggestion to P.W. 8 Indradev Singh during his cross examination in para 15 that during the Summer the mental condition of prosecutrix was not well. Moreover this reference gets support from aforesaid statements of D.W. 1 Safik, D.W. 2 Kayamuddin. Thus, this Court finds that at the time of alleged incident, prosecutrix was weak minded girl.

21. P.W. 1 Prosecutrix says in para 3 that on the way of market, she was dizzy, she sat on the motorcycle of appellant, she had impression that he is taking her to her aunt's house. He took her in the forest and committed sexual intercourse with her.

22. P.W. 2 Gurudayal says in para 4, 5, 6 and 7 that prosecutrix and her mother had gone to market. P.W 3 Likhani Bai had told him that prosecutrix expressed that she is feeling dizziness, on her request appellant took her on his motorcycle to leave her in their house. During search of the prosecutrix, he saw that appellant was coming from the forest along with the prosecutrix in the motorcycle, appellant was shivering and ran away. Prosecutrix had told that appellant had taken her in jungle and committed rape with her.

23. P.W. 3 Likhani Bai says in para 3, 9 and 10 that she and prosecutrix had gone to market, prosecutrix had sat on the road. She had asked appellant to leave prosecutrix in their house, prosecutrix sat on his motorcycle, later on she came to know that appellant had taken prosecutrix to forest and committed sexual intercourse with her.

24. P.W. 8 Indradev Singh who is cousin brother of the prosecutrix says in para 4 and 5 of his statement given on oath that during the search of the prosecutrix it was found that appellant was coming along with her on the motorcycle. Seeing him he shivered and after alighting prosecutrix he ran away.

25. D.W. 1 Safik says in para 7 that prosecutrix was not competent to identify any one or say about the conduct of any one. She had the sexual relations with bus drivers.

26. D.W. 2 Kayamuddin says in para 5 that she had the sexual relation with drivers and helpers of many buses which were operated

in that area.

27. Counsel for the appellant placed reliance in **Chinta Ram Yadav Vs. State of M.P.** (2017)1 C.G.L.J. 95 wherein single bench of this Court observed as under:-

“Place of incident is stated to be a rough surface but even then the prosecutrix did not receive even a single injury on his body. All this is indicative of the fact that no resistance was made by the prosecutrix at all and the sexual intercourse between the two was consensual....”

28. Hon'ble Supreme Court in the matter of **Radhu Vs. State of M.P.** (2008)2, S.C.C. 207, 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.”

29. In the matter of **Raju and others -v- State of MP** [(2009) 3 SCC(Cri) 751)], wherein Hon'ble Supreme Court has 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.

30. 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.”

31. P.W. 2 Gurudayal says in para 7 that they had got removed the underwear of the prosecutrix and examined it. This witness did not say that he had himself got removed the underwear of the prosecutrix. Thus, from the said statement of para 7 of this witness, the testimony of aforesaid statements of para 4, 5, 6 and 7 of this witness is not adversely affected in any manner.

32. As per alleged MLC report Ex. P-7, P.W. 5 Dr. J. Kujur had examined prosecutrix and found that there was no external injury on her body. No injury was present in her genital area. But looking to the aforesaid judicial precedent laid down by Hon'ble Supreme Court in the matter of **Radhu** (supra), this Court finds that in the absence of injury as opined by P.W. 5 Dr. J. Kujur, it cannot be said that prosecutrix was 'free consenting party' and appellant does not get any help from the aforesaid judicial precedent laid down by this Court in the matter of **Chinta Ram Yadav** (supra).

33. P.W 5 Dr. J. Kujur had not opined regarding recent sexual intercourse with prosecutrix but as per Ex. P-7 she opined that for the confirmation of sexual intercourse chemical examination of pubic hair and vaginal smear slide had to be done, thus not giving opinion by P.W. 5 Dr. J. Kujur regarding recent sexual intercourse does not affect prosecution case regarding sexual intercourse.

34. No material omissions and contradictions have been dealt during the cross-examination of P.W. 1 Prosecutrix, P.W. 2 Gurudayal, P.W. 3 Likhani Bai, P.W. 8 Indradev Singh which can affect trustworthiness of aforesaid statements of para 3 of prosecutrix, para 4, 5, 6 and 7 of P.W. 2 Gurudayal and aforesaid statements of P.W. 3 Likhani Bai and P.W. 8 Indradev singh.

35. As per the alleged FIR Ex. P-2 appellant had committed forcible

sexual intercourse with prosecutrix after taking her to forest, during search of the prosecutrix, the appellant was found along with prosecutrix on the motorcycle, he was shivering and ran away. Ex. P-1 has been lodged on very day promptly at about 14:45 hour.

36. There is no such evidence on record on the strength of which it can be said that Ex. P-2 is fabricated or concocted to falsely implicate the appellant in alleged offence.

37. This has been earlier decided that prosecutrix was weak minded girl, thus her sitting on appellant's motorcycle, allegedly not offering resistance by her during intercourse, not shouting during returning to her house, does not mean that prosecutrix was allegedly ' free consensual party'.

38. There is no such evidence on record on strength of which it can be said that aforesaid statements of P.W. 1 prosecutrix, para 4, 5, 6 and 7 of P.W. 2 Gurudayal and aforesaid statements of P.W. 3 Likhani Bai, P.W. 8 Indradev Singh are not simple, not natural, and not normal. Thus, on the basis of aforesaid judicial precedents laid down by Hon'ble Supreme court in the matter of **Radhu** (supra), **Mohd. Ali** (supra) and **Raju and others** (supra), this Court finds that this Court can act upon aforesaid sole testimony of P.W. 1 Prosecutrix.

39. In the case in hand, the aforesaid statement of P.W. 1 prosecutrix gets corroboration from the aforesaid statement of para 4, 5, 6 and 7 of P.W. 2 Gurudayal, and aforesaid statements P.W. 3 Likhani Bai, P.W. 8 Indradev Singh, MLC report Ex. P-9, Ex.P-3, and said RFSL report.

40. After the appreciation of the evidence discussed herebefore this Court believes on aforesaid statement of P.W. 1 Prosecutrix, para 4, 5, 6 and 7 of P.W. 2 Gurudayal and aforesaid statements of P.W. 3 Likhani Bai and P.W. 8 Indradev Singh and disbelieves aforesaid statements of D.W. 1 Shafik and D.W. 2 Kayamuddin in the reference that appellant had not committed forcible sexual intercourse with prosecutrix.

41. After the appreciation of the evidence discussed herebefore this Court finds that prosecution has succeeded to prove beyond reasonable doubt that appellant had committed rape with prosecutrix which is punishable under Section 376(1) of the IPC. Thus, this Court

affirms the judgment of conviction passed by the trial Court.

42. As regards sentence awarded to the appellant for offence punishable under Sections 376(1) of the IPC, considering the facts and circumstances of the case, it appears to be just and proper, and does not call for any interference. Hence, this Court also affirms the sentence regarding Section 376(1), IPC.

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

44. 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 sentence. The trial Court is also directed to take the appellant in custody immediately for undergoing the remaining part of sentence.

Sd/-
(Sharad Kumar Gupta)
Judge