

AFR**HIGH COURT OF CHHATTISGARH, BILASPUR****Reserved on 30-01-2019****Pronounced on 20-2-2019****CRA No. 790 of 2002**

Lelu alias Lain Kumar son of Itwari aged about 23 years, occupation village Secretary, R/o. Bhatgaon Police Station Bagbahara, Tah. and District Mahasamund (CG)

---- Appellant**Versus**

State of Chhattisgarh

---- Respondent

For appellant	:	Shri Rahil Kochar, 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 18-7-2002 passed by the 1st Additional Sessions Judge, Mahasamund, CG in ST No. 86/2002 whereby and whereunder he has convicted and sentenced the appellant as under :-

Conviction u/S.	Sentence RI.	Fine	In default of payment of fine
376(1) IPC	7 Years	Rs. 5,000/-	1 year RI

2. In brief, the prosecution story is that at the time of alleged incident prosecutrix was 13 years old. She was a resident of village Bhatgaon. On 05-12-2001 at about 9:00 pm she had gone outside in the lane for toilet. She had sat for toilet. Appellant reached there caught hold her, pressed her mouth and took her to nearby barn of her grandfather Kishun. He committed forcible sexual intercourse with her. Brijlal and her grand father reached there. Appellant fled away from the spot. Being night and there was no means to go to police station thus she went on 06-12-2001 to police station Bagbehra and lodged an FIR

about 10:45 am. 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'). The trial Court framed the charge against him under Section 376(1) of the IPC. He abjured the charge and faced the trial. To bring home the charge against him, the prosecution examined as many as 8 witnesses. He examined two witnesses 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 sentence, the appellant has preferred this criminal appeal.

4. Shri Rahil Kochar, counsel for the appellant submits that the appellant has been falsely implicated. No rape has been committed by the appellant 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 with medical evidence. At the time of alleged incident prosecutrix was more than 16 years of age and she was allegedly a consenting party. Therefore, the impugned judgment of conviction and order of sentence may be set aside and the appellant may be acquitted of the charge.

5. On the other hand, Ms. M. Asha, 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 consideration before this Court is as to whether on 05-12-2001 prosecutrix was below 16 years of age.

7. As per the alleged certificate Ex. P-7, the date of birth of prosecutrix was 10-10-1986 as per the school register.

8. As per the true copy of school register Ex.P-8(C), the date of birth of prosecutrix is 10-10-1986 which was got entered by her father at the time of her admission in class 1 on 09-07-1993.

9. As per the true copy of the Dakhil Kharij register Ex. P-9(C), the date of birth of prosecutrix is 10-10-1986, she was admitted in class 1 on 09-07-1993.

10. In **Birad Mal Singhvi v. Anand Purohit {AIR 1988 SC 1796}** the Hon'ble Supreme Court observed in paras-14 and 15 as under:

“14.....If the entry in the scholar's register regarding date of birth is made in the basis of information given by parents, the entry would have evidentiary value but if it is given by a stranger or by someone else who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value. Merely because the documents Exs. 8, 9, 10, 11 and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exs. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents.

15. To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record, secondly, it must be an entry stating a fact in issue or relevant fact, and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding to the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded.”

11. In **Babloo Pasi v. State of Jharkhand and Another (2008 AIR SCW 7332)**, Hon'ble Supreme Court in para 22 observed as under:-

“**22.** Insofar as the Board is concerned, it is evident that it has mechanically accepted the entry in Voters List as conclusive without appreciating its probative value in terms of the provisions of Section 35 of the Indian Evidence Act, 1872. Section 35 of the said Act lays down that an entry in any public or other official book, register, record, stating a fact in issue or relevant fact made by a public servant in the discharge of his official duty especially enjoined by the law of the country is itself a relevant fact. It is trite that to render a document admissible under Section 35, three conditions have to be satisfied, namely: (i) entry that is relied on must be one in a public or other official book, register or record; (ii) it must be an entry stating a fact in issue or a relevant fact, and (iii) it must be made by a public servant in discharge of his official duties, or in performance of his duty especially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded.”

12. It would be manifest to refer para-25 of the judgment of the Supreme Court in **Sunil v. State of Haryana [2010 (1) SCC 742]** which is extracted as under:-

“**25.** The prosecution also failed to produce any Admission Form of the school which would have been primary evidence regarding the age of the prosecutrix. The School Leaving Certificate produced by the prosecution was also procured on 12.9.1996, six days after the incident and three days after the arrest of the appellant. As per that certificate also, she joined the school in the middle of the session and left the school in the middle of the session. The attendance in the school of 100 days is also not reliable. The prosecutrix was admitted in the school by Ashok Kumar, her brother. The said Ashok Kumar was not examined. The alleged School Leaving Certificate on the basis of which the age was entered in the school was not produced.”

13. *In Alamelu and another Vs. State represented by Inspector of*

Police, [(2011) 2 SCC 385], the Supreme Court held :

“9. that the transfer certificate which is issued by a government school and is duly signed by Headmaster would be admissible in evidence u/s 35 of the Evidence Act, 1872. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the prosecutrix in the absence of the material on the basis of which the age was recorded. The date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined.”

14. In the case in hand P.W. 1 prosecutrix, P.W. 2 Kishun do not say clearly and strongly the exact date of birth of prosecutrix and reasons thereof.

15. In the case in hand P.W. 3 Taturam Nag headmaster Primary School, Bhatgaon says in para 1 of his statement given on oath that he is posted as in-charge headmaster at Primary School, Bhatgaon since August, 1996. He says in para 2 during his cross examination that at the time of the admission of prosecutrix he was not posted at that school. Prosecution failed to examine her father namely Gaitan Satnami or any person who had special means of knowledge of the aforesaid date of birth of prosecutrix which he / she had informed at the time of her admission to concerned authority. The prosecution also failed to examine concerned authority which had written the aforesaid date of birth in the declaration form, school register and Dakhil Kharij register. Prosecution failed to give any explanation for not doing so.

16. Looking to the aforesaid facts and circumstances of the case, judicial precedents laid down by Hon”ble Supreme court in **Birad Mal Singhvi** (Surpa), **Babloo Pasi** (Supra), **Sunil** (Supra), **Alamelu** (Supra) this court finds that from Ex. P-7, Ex. P-8(C) and Ex. P-9(C), the prosecution does not get any help in the reference that on 05-12-

2001 prosecutrix was below 16 years of age.

17. As per the alleged report of radiologist P.W. 7 Dr. Kamal Kumar Gajbhiye, Ex. P-15 prosecutrix was 14-15 years old.

18. In **Jaya Mala v. Home Secretary, Government of Jammu and Kashmire And Others** [AIR 1982 SC 1297] the Hon'ble Supreme Court has observed that margin of error in age ascertained by radiological examination is two years on either side.

19. Looking to the judicial precedent laid down by Hon'ble Supreme Court in **Jaya Mala** (supra) this Court finds that on the basis of Ex. P-15 it cannot be said that at the time of alleged incident prosecutrix was below 16 years of age.

20. After the appreciation of the evidence discussed herebefore this Court finds that the prosecution has failed to prove that on 05-12-2001 the age of prosecutrix was below 16 years.

21. Now second question before me for consideration is as to whether appellant had committed rape with the prosecutrix.

22. As per the MLC report Ex. P-10, P.W. 4 Dr. Asha Mishra had examined prosecutrix and found no injury on her body, no injury was found on inner side of her private part. She opined that prosecutrix was habitual for sexual intercourse, there was no sign of recent vaginal penetration.

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

24. As per the alleged MLC report Ex. P-13, P.W. 5 Dr. C.S. Mishra had examined appellant. He opined that on the examination of appellant there was nothing to say that he cannot perform sexual

intercourse. He was able to perform sexual intercourse.

25. There is no such evidence on record on strength of which it can be said that Ex. P-13 is not believable. Thus, this Court believes on Ex. P-13.

26. P.W. 1 Prosecutrix says in para 1 of her statement given on oath that she had gone for toilet near the barn in the night. Appellant reached there pressed her mouth, took her in the barn and committed forcible sexual intercourse with her.

27. P.W. 2 Kishun says in para 2 of his statement given on oath that Birij had come in his house and told him to accompany him to barn. He had gone in the barn situated beside his house. He had seen that the appellant was committing sexual intercourse with prosecutrix.

28. P.W. 6 Brijlal says in para 2 of his statement given on oath that near the barn of PW. 2 Kishun he had seen that appellant was committing *bura kaam* with prosecutrix. He called Kishun (P.W. 2). He and P.W. 2 Kishun went to barn of P.W. 2 Kishun and saw the incident.

29. D.W. 1 Kushiya Bai village Kotwar says in para 3 and 4 of her statement given on oath that prosecutrix had told that appellant had not touched her, she had stated that appellant had committed rape on account of fear. A meeting was held where she stated nothing.

30. D.W. 2 Budhiyar says in para 1 of his statement given on oath that there was a dispute between the appellant, father of the prosecutrix and Kishun since back 10 to 12 years regarding land and property.

31. Counsel for the appellant placed reliance on a decision of Hon'ble Supreme Court in the matter of **Naravan @ Naran -v- State of Rajasthan** (2007) SAR (Criminal) 579, wherein it is held that if the evidence of prosecutrix is full of material contradiction, there is no

corroboration, she did not state that she offered any resistance, no injury was on her private part, then prosecution failed to establish charge punishable under Section 376, IPC.

32. Counsel for the appellant placed reliance on a decision of Hon'ble Supreme Court in the matter of **Radhu Vs. State of M.P.** [(2008)2, S.C.C. 207], wherein following judicial precedent has been laid down:-

“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.”

33. Counsel for the appellant placed reliance on a decision of Hon'ble Supreme Court 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.

34. Counsel for the appellant placed reliance on the decisions of this Court in the matters of **Balla @ Balkumar -v- State of Chhattisgarh**

dated 30-1-2018 passed in CRA No. 602/2001, and **Sanjay Kumar Nayak -v- State of Chhattisgarh** [2017(2) CGLJ 579] wherein it is held that when the prosecutrix was more than 16 years of age and she was a consenting party, then no offence is made out against accused.

35. Counsel for the appellant further placed reliance on a decision of the coordinate bench of this Court in the matter of **Farsuram -v- State of Chhattisgarh** dated 16-11-2009 passed in CRA No. 895/2005 wherein it is laid down that if the sole testimony of the prosecutrix does not inspire confidence and does not appear to be natural and trustworthy, then conviction and sentence cannot be upheld.

36. 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.”

37. P.W. 1 prosecutrix says in para 20 during her cross-examination that it was dark in the place of incident. P.W. 2 Kishun says in para 7 during his cross-examination that there was dark in the lane.

38. P.W. 1 Prosecutrix further says in para 20 that despite of darkness, a person could be identified clearly. P.W. 6 Brijlal says in para 5 and 8 during his cross-examination that he had identified appellant because he is resident of his village. Moreover, on behalf of appellant it was not suggested to P.W. 2 Kishun that he could not identify the culprit, as there was dark. Thus, appellant does not get any help from

the aforesaid statements of para 20 of P.W. 1 Prosecutrix, Para 7 of P.W. 2 Kishun.

39. P.W. 1 Prosecutrix says in para 13 that injuries were caused on her back. There was bleeding from her private part. P.W. 2 Kishun says in para 10 that there was bleeding from the private part of prosecutrix. Though these facts are not supported by Ex. P-10, 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. 4 Dr. Asha Mishra, it cannot be said that prosecutrix was 'consenting party'.

40. P.W. 1 prosecutrix says in para 17 that nobody has committed sexual intercourse with her prior to alleged incident. This statement of the prosecutrix does not get corroboration from Ex. P-10, but looking to the aforesaid judicial precedent laid down by Hon'ble Supreme Court in the matter of **Radhu** (supra), this Court finds that though P.W. 4 Dr. Asha Mishra opined that she was habitual for sexual intercourse, it cannot be said that prosecutrix was 'consenting party'.

41. Though as per Ex. P-10, P.W. 4 Dr. Asha Mishra did not find the sign of recent sexual intercourse, but looking to the aforesaid judicial precedent laid down by Hon'ble Supreme Court in the matter of **Radhu** (supra) this Court finds that, this circumstance is not sufficient to falsify the aforesaid statement of para 1 of P.W. 1 prosecutrix in the reference of alleged sexual intercourse.

42. P.W. 1 prosecutrix says in para 14 that the family of the appellant did not go to her house.

43. 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 jeopardies her entire future by falsely implicating a person alleging forcible sexual intercourse”

44. There is no such evidence on record on strength of which it can be said that P.W. 1 Prosecutrix, P.W. 2 Kishun, had stated aforesaid statements regarding alleged sexual intercourse only on account of alleged animosity present between P.W. 2 Kishun and the appellant, knowing that appellant had not committed alleged offence. Thus, looking to this circumstance and aforesaid judicial precedent laid down by Hon'ble Supreme Court in the matter of **Shree Kant Shekari** (supra), this Court finds that appellant does not get any help from the aforesaid statement of Para 14 of P.W. 1 prosecutrix and aforesaid statement of D.W. 2 Budhiyar.

45. There is no such evidence on record on strength of which it can be said that P.W. 6 Brijlal had stated aforesaid statement of para 2, merely because he was allegedly interested with P.W. 2 Kishun on account of any reason or he was allegedly prejudiced with appellant due to any reason.

46. No material omissions and contradictions have been dealt during the cross-examination of P.W. 1 Prosecutrix, P.W. 2 Kishun, P.W. 6 Brijlal which can adversely affect the testimony of aforesaid statements of para 1 of prosecutrix, para 2 of Kishun and P.W. 6 Brijlal.

47. As per the alleged FIR Ex. P-1 appellant had committed forcible sexual intercourse with her after pressing her mouth. Ex. P-1 has been lodged on next day at 10.40 am. Reason for delay has been mentioned in Ex. P-1 that it was night and no means was available to reach police station.

48. 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] .”

49. The relevant portion of para-13 in **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.”

50. There is no material available on record on strength of which it can be said that aforesaid explanation for delay is not natural, not normal. Moreover, in Ex. P-1 the distance from the village Bhatgaon to

P.S. Bagbahara is mentioned as 15 km. There is no material available on record on strength of which it can be said that said distance is not correct. In these circumstances, this Court finds that delay in lodging Ex. P-1 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) and **Puran Chand** (supra), this Court finds that delay in lodging Ex. P-1 is not fatal to the prosecution case.

51. There is no such evidence on record on the strength of which it can be said that Ex. P-1 is fabricated or concocted to falsely implicate the appellant in alleged offence.

52. Committing allegedly 'bura kam' or act removing the underwear of prosecutrix, means that allegedly sexual intercourse was committed with the prosecutrix.

53. This has been earlier decided that prosecutrix was not a consenting party. After the appreciation of the evidence discussed hereinbefore this Court finds that aforesaid statements of para 1 of prosecutrix, para 2 of P.W. 2 Kishun and P.W. 6 Brijlal are simple, natural, and 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. Thus, appellant does not get any help from the aforesaid judicial precedents laid down by Hon'ble Supreme Court in **Naravan alias Naran** (supra), and by coordinate Bench of this Court in **Balla alias Bal Kumar** (supra), *in Farsuram* (supra) and *in Sanjay Kumar Nayak* (supra).

54. In the case in hand, the aforesaid statement of para 1 of

prosecutrix gets corroboration from the aforesaid statement of para 2 of P.W. 2 Kishun, and P.W. 6 Brijlal, Ex. P-1 and Ex. P-13.

55. After the appreciation of the evidence discussed herebefore this Court believes on para 1 of statement of P.W. 1 Prosecutrix, para 2 of P.W. 2 Kishun and P.W. 6 Brijlal and disbelieves aforesaid statements of D.W. 1 Kushiyo Bai, as it is not simple, not natural and not normal and not probable.

56. 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.

57. 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.

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

59. 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