

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment Reserved on : 31/01/2019****Judgment Delivered on : 07/02/2019****Criminal Appeal No. 829 of 2016**

Anup Roy S/o Bhavanand Roy, aged about 22 years, R/o Durgukondal, P.S. Durgukondal, District Kanker, Chhattisgarh.

---- Appellant**Versus**

State Of Chhattisgarh through police station Durgukondal, District Kanker, Chhattisgarh.

---- Respondent**AND****Criminal Appeal No. 413 of 2018**

Neeraj Soni @ Nadu, at present aged about 27 years, S/o Ajay Kumar, R/o Awaspara, Thana Durgukondal, U.B. Kanker, Chhattisgarh.

---- Appellant**Versus**

State Of Chhattisgarh through Police Station Durgukondal, District Kanker, Chhattisgarh.

---- Respondent

For the Appellants	:	Shri Vinod Deshmukh and Shri Parag Kotecha, Advocates.
For Respondent/ State	:	Ms. Madhunisha Singh, P.L.

Hon'ble Shri Justice Rajendra Chandra Singh Samant**CAV JUDGMENT**

(1) Challenge in these appeals is to the judgment of conviction and order of sentence dated 25.5.2016 passed by Learned Special Judge (Atrocities), South Bastar, Kanker, District Kanker, Chhattisgarh in Special Case No. 13 of 2014 whereby and whereunder the learned

Special Judge has convicted the appellants for the offence under Sections 376(2)(g) and 366 of the Indian Penal Code and Section 4 of the Protection of Children from Sexual Offences Act, 2012 and sentenced them to undergo rigorous imprisonment for 10 years, 7 years and 7 years and to pay fine of Rs.5,000/-, Rs.5,000/- and Rs.5,000/-, in default of payment of fine, to further undergo RI for 3 months to each of the appellant, respectively with a direction to run all the sentences concurrently.

(2) Conviction is impugned on the ground that without there being any iota of evidence, the trial Court has convicted and sentenced the appellants as aforementioned and thereby committed illegality.

(3) The case of the prosecution, in brief, is that the prosecutrix (PW-1) aged about 15 years is a member of Scheduled Tribe and the appellants are of general caste. It is alleged that on 10.6.2014, when the prosecutrix (PW-1) had been to urinate, both the appellants threatened her at the point of knife, took her to a lonely place and then gang-raped her. FIR was lodged vide Ex. P/1 and the offences were registered against the appellants on the basis of the complaint filed on 12.6.2014 vide Ex.P/1A, the offences of Atrocities Act and POCSO Act were also registered against the appellants. The investigation was carried out and the seizure of caste certificate and the documents regarding date of birth of the prosecutrix (PW-1) were seized. The prosecutrix was medically examined and her undergarments were also seized. At the instance of the appellants, seizure of knife and clothes were made. The appellants

were also medically examined. The seized clothes and other articles were sent for FSL examination and according to the FSL report vide Ex. P/26, presence of spermatozoa was spotted and reported.

(4) Statements of the witnesses were recorded under Section 161 of the Code of Criminal Procedure, 1973 (for short 'the Code'). The investigation was carried out and on completion of the same, the charge-sheet was filed before the concerned Court.

(5) During trial, the Court below framed the charges under Sections 376(2)(g) and 366 of the IPC, Section 4 of the Protection of Children from Sexual Offences Act, 2012 and Section 3(2)(5) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The appellants denied the charges and prayed for trial. The prosecution examined as many as 11 witnesses to prove the guilt of the appellants. No witness was examined in defence. Statements of the appellants were recorded under Section 313 of the Cr.P.C. wherein the appellants denied the circumstances appearing against them and pleaded innocence and false implication in the crime in question.

(6) After affording opportunity of hearing to both the parties, learned trial Judge convicted and sentenced the appellants in both the cases as aforementioned.

(7) I have heard learned counsel for the parties, perused the judgment impugned and records of the Court below.

(8) Learned counsel appearing on behalf of the appellants submit that the statements of the prosecution witnesses were not reliable and trustworthy. The prosecutrix (PW-1) had herself admitted in her cross-examination that she is not the scribe of the written complaint Ex.P/1A and she was not aware of the names of the appellants at the time of incident. She also admitted that her clothes were torn, she did not suffer any injury and also admission has been made by her that she had not narrated about the incident to the police which shows that the statement of the prosecutrix had been highly doubtful which should not be relied upon. Further, the evidence of examining doctor Dr. Smt. Preeti Singh (PW-6) also makes the statement of the prosecutrix highly doubtful for the reason that according to her report Ex. P/12 no definite opinion had been given regarding sexual assault with the prosecutrix. It is further submitted that the prosecution has failed to prove that the prosecutrix was below 18 years on the date of incident for the reason that Ramlal (PW-2), father of the prosecutrix (PW-1) has admitted in his cross-examination that the prosecutrix (PW-1) was born about more than 25 years before the date his deposition was recorded and there is no other evidence present to prove the date of birth or age of the prosecutrix (PW-1). Hence, it is prayed that on these grounds, the appeals may be allowed and the appellants in both the cases may be acquitted of the charges framed against them.

(9) Reliance has been placed on the judgments of Supreme Court in the cases of **Alamelu and Another vs. State represented by Inspector of Police** reported in **(2011) AIR (SCW) 650** and **Jinish Lal Sah vs. State of Bihar** reported in **(2003) AIR (SC) 2081**. It is further submitted that in the case of **Banshi Shikari vs. State of Chhattisgarh** in **Criminal Appeal No. 97 of 2012** decided on **9.9.2017** similar finding has been given in this respect that the prosecution has to prove its case beyond reasonable doubt that the age of the prosecutrix was below 18 years.

(10) On the point of reliability of evidence of the prosecutrix and other witnesses, reliance has been placed on the judgment of Supreme Court in the case of **Dilip and Another vs. State of M.P.** reported in **(2001) AIR (SC) 3049** and the judgments of this High Court in **Tiharu and Another vs. State of Chhattisgarh** reported in **(2006) 3 CGLJ 173**, **Lala @ Krishan Kumar and Others vs. State of Madhya Pradesh** reported in **(2012) 3 CGLRW 396** and **Chandra Kumar Chanuram and Others vs. State of Chhattisgarh** reported in **(2009) CriLJ 434**. The reliance has also been placed on the judgment of Supreme Court in the case of **Phul Singh vs. State of Haryana** reported in **(1980) AIR (SC) 249** regarding the direction for leniency in sentencing the accused in case he is not a habitual offender.

(11) Per contra, learned counsel for the Respondent/ State opposed the prayer and submissions. It is submitted that the prosecution has proved its case beyond reasonable doubt. The minor discrepancies that

have been pointed out in the statement of the prosecutrix (PW-1) are not material in any sense to discredit her statement against the appellants which has remained otherwise un-contradicted. The witnesses to whom the prosecutrix narrated about the incident have clearly supported the prosecution case. It is a case of gang rape, hence, the minority or consent of the prosecutrix is of no concern because in such a case the consent is not a factor. It is also submitted that examining doctor had failed to give a definite opinion cannot be regarded as no opinion. It is only because the doctor could not come to any conclusion. According to the medical examination report, there are findings of physical abuse with the prosecutrix and rest depends upon the evidence of fact which has been clearly provided by the prosecutrix herself. Hence, no case is made out for acquittal and the appeal be dismissed.

(12) In order to appreciate the arguments advanced on behalf of the parties, I have perused the evidence adduced by the prosecution.

(13) The prosecutrix (PW-1) has stated that her age is 15 years and her date of birth according to the mark-sheet is 22.8.1999. She stated about the incident that on the date, time and place of incident she was put under threat and taken on the point of knife to a lonely place in the fields where both the appellants raped her. Later on, the appellants had kept the prosecutrix in confinement in their own house where the family members of appellant – Anup Roy in Cr.A. No. 829 of 2016 were also present. When she was released from confinement she came to her house and narrated the incident to her brother and other family

members. Thereafter, upon the information given by her, FIR Ex. P/1 was lodged and a separate written complaint Ex. P/1A was also given by her. In cross-examination, her admission is that she is not the scribe of Ex. P/1A. The written complaint was not given by the prosecutrix by itself does not falsify her statement that she was the informant. This admission shows that she did not know the name of the appellants at the time of incident, but the identification is not an issue, as she knew the appellants, but she was not aware of their names. Therefore, the identification of the appellants in this case is not at all disputed and from the other statement given by the prosecutrix and the witnesses it appears that she does not know the names of the appellants but she was acquainted with them. Apart from that, there is no other statement made by her in her cross-examination which cannot be regarded as material to contradict her statement against the appellants and also no question was put to her in cross-examination regarding her date of birth not being 22.8.1999 and her age not being 15 years. Some questions have been put to her regarding age difference with her brother and sisters, however, the answers given are vague and on that basis, no inference can be drawn. Therefore, after scrutiny of her evidence it has appeared that the statement of the prosecutrix against the appellants is totally uncontradicted.

(14) Ramlal (PW-2) has stated that on the date of incident the prosecutrix had been to learn tailoring and thereafter, she went missing. She was found on the next day and brought to home. On enquiry, she stated about the incident that had taken place with her. In cross-

examination, his statement has remained unrebutted. Jagdish (PW-3), Pratap Gavde (PW-4) and Radhelal Nareti (PW-5) have also supported the statement given by Ramlal (PW-2).

(15) Ramlal (PW-2) who is father of the prosecutrix neither made any statement regarding her age in his examination-in-chief nor there is any clear suggestion in his cross-examination or admission admitted by him that the prosecutrix could have been of age more than 18 years. Neither any witness has been examined on the point of age of the prosecutrix nor any opinion was given by Dr. Smt. Preeti Singh (PW-6) regarding her age. On the contrary, she had advised for radiology examination which has not been done but no question was put to her in her cross-examination regarding the age of the prosecutrix. The only evidence on this point is that Tarkeshwar Patel (PW-9), the Investigating Officer made seizure of one mark-sheet and caste certificate vide Ex.P/4 but the mark-sheet itself was not exhibited or proved.

(16) After overall examination of all the evidence present regarding the age of the prosecutrix, it can be said that the prosecutrix herself has given the evidence regarding the age which has remained unrebutted and unchallenged in her cross-examination. Though, there is lapse of prosecution to bring further evidence on this point, but there is nothing else to suggest or make out that the age of the prosecutrix could have been more than 18 years on the date of incident. It was the burden of defence to bring evidence on this respect or cross-examine the witnesses at length on this point. Though, there are lapses in the

investigation that the radiology examination of the prosecutrix was not done and the specific proof regarding the age and date of birth of the prosecutrix has not been brought, but because of the unchallenged statement of the prosecutrix herself, these lapses cannot be considered to have overcome and that there is nothing else present to hold against the statement given by the prosecutrix (PW-1).

(17) Dr. Smt. Preeti Singh (PW-6) has stated that on examining the private parts of the prosecutrix she did not find any injury present externally but on internal examination, she found redness and tear in the introitus. Vaginal slides were prepared for FSL examination. She was reported vide report Ex. P/12 that only one finger was getting admitted in the private part of the prosecutrix with pain. No opinion were be given by her regarding sexual intercourse, however, there are symptoms of sexual assault present.

(18) According to the medical evidence present, it is clearly made out that the prosecutrix was sexually abused and it is for that reason that one tear had been found in her introitus with inflammation. The definition of rape under Section 375 of the IPC is that if a person penetrates his penis to any extent, into the vagina, mouth, urethra etc that shall amount to offence of rape. Therefore, there is no such necessity that the penetration should have been to the full extent. The offence of rape had been committed with the prosecutrix, is thus found.

(19) After scrutiny of the evidence of the prosecutrix and the other witnesses, it has been found that it were the appellants who had committed this offence. The case laws cited on behalf of the appellants do not give any help as all the judgments speak on the basis of the facts found in those cases.

(20) After due consideration of all the grounds raised and the submissions made by the appellants in both the cases, no case is made out for acquittal of the appellants.

(21) Accordingly, the appeals are dismissed.

Sd/-

(Rajendra Chandra Singh Samant)
JUDGE