

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 1177 of 2013**

- Shobharam @ Lala Chouhan, S/o . Bhagau Chouhan, aged about 20 Years, R/o. Village Arsipali, P.S. Kotararoad, Civil & Rev. District- Raigarh, Chhattisgarh

---- Appellant**Versus**

- State of Chhattisgarh, Through-P.S. Kotararoad, Civil & Rev. District- Raigarh, Chhattisgarh

---- Respondent

For the Appellant : Mr. Rajesh Ranjan Sinha, Advocate.
For the State/Respondent : Mr. Lav Sharma, Panel Lawyer.

Hon'ble Shri Justice Rajendra Chandra Singh Samant**Judgment on board****18/04/2019**

1. This appeal has been preferred against the judgment of conviction and order of sentence dated 22.11.2013 passed by the learned Additional Sessions Judge (F.T.C.), Raigarh, District-Raigarh (CG) in Sessions Trial No.69/2013, convicting accused/appellant under Sections 376 (1) & 354 of Indian Penal Code (for short 'IPC') and sentencing him to undergo R.I. for 10 years with fine of Rs.25,000/-, & RI for one year with fine of Rs.1000/-, plus default stipulations.

2. The prosecution case, in brief, is this that on 29.1.2013 when the prosecutrix had been to the fields for grazing cattle, at about 12:00 in the noon, the appellant by use of force dragged her to a place near to a bore-well, then after disrobing her forcefully inserted his finger into her private part and then committed rape with her. The prosecutrix PW-1 came back to her house crying, informed her mother about the incident and thereafter consumed some poisonous substance because of which she was admitted in the hospital for treatment. Dr. Rupendra Patel PW-6 gave information to the police regarding consumption of poison by the prosecutrix PW-1 and on that basis information was recorded. Dying declaration (ExP-1) of prosecutrix was recorded by the Executive Magistrate PW-3 Awanti Gupta. On the basis of statement given by prosecutrix PW-1 unnumbered FIR Ex.P.16 was lodged against the appellant. After registering offence, the case was investigated and on completion of investigation, charge-sheet was filed against the appellant.
3. Appellant was charged with offences punishable under Sections 376 (1) & 354 of IPC. Appellant denied charges framed against him and prayed for trial. On completion of prosecution evidence, the appellant was examined under Section 313 of CrPC in which he denied all the incriminating evidence appearing against him in the prosecution case, pleaded innocence and false implication. No witness has been examined in defence.
4. On completion of trial, the impugned judgment has been passed in which appellant stands convicted and sentenced in the manner as

mentioned herein-above.

5. It is submitted by learned counsel for appellant that the appellant has been convicted without there being any material in the prosecution evidence establishing his guilt beyond reasonable doubt. It was clear case of prosecution that the appellant had only fingered in the private part of the prosecutrix which does not amount to offence under Section 376(1) of IPC and at the most , the offence that could have been made out against appellant is under Section 354 of IPC. The appellant is in jail since 31.1.2013, therefore, it is prayed that the appellant be acquitted of charge under Section 376(1) of IPC.
6. Learned counsel for the State opposes the submissions made in this respect. It is submitted that the prosecutrix PW-1 has clearly made statement before the Court that she was raped by the appellant, therefore, no case is made out for acquittal.
7. I have heard learned counsel for the parties and perused the record of the trial Court including the impugned judgment.
8. The question that requires determination in this appeal is whether on the basis of evidence available on record the prosecution has been able to establish guilt of accused/appellant beyond reasonable doubt ?
9. Prosecutrix PW-1 has stated that on the date of incident the appellant came near to her and after making proposition of love to her, he forcibly pinned her down and disrobed her and thereafter committed

offence of rape with her. She has stated that she came back to her house and narrated the entire incident to her mother. She has stated that she was so depressed due to incident of rape that she consumed poisonous substance as a result of which she was admitted in the hospital where her statement was recorded by Executive Magistrate vide Ex.P-1. In cross-examination, she has denied that she was consenting party as she had love affair with appellant. On being questioned by the defence counsel, she has stated that she had disclosed to police and Executive Magistrate both that the appellant had committed forceful sexual intercourse with her and if it is not written in FIR and her dying declaration, which is now a previous statement, she cannot give any explanation about it.

10. Executive Magistrate PW-3 Awanti Gupta has stated that she recorded dying declaration ExP-1 in which the prosecutrix stated that after disrobing her, the appellant by force inserted his finger into her private part. Her statement remained intact in her cross-examination.
11. Inspector Mamta Ali PW-9 is the scribe of FIR Ex.P-16 and done investigation.
12. On the basis of statement of Executive Magistrate Awanti Gupta PW-3, it is clearly established that the prosecutrix PW-1 has improved her statement before the Court. Deposition of PW-2 Meghmati, mother of prosecutrix, is based on the information given to her by her daughter i.e prosecutrix PW-1, therefore, the whole prosecution rests upon the statement of prosecutrix PW-1, who has

not been found reliable with respect to statement made by her regarding the offence of rape committed with her by the appellant. Dr. Smt. Ratna Meshram (PW-10), who had medically examined the prosecutrix on 30.1.2013, did not find any redness, pain or injury in the private part of prosecutrix PW-1. On the contrary, she has opined vide her report ExP-26 that prosecutrix was habitual to sexual intercourse.

13. Taking into consideration all the evidence regarding commission of offence of rape brought on record by prosecutrix PW-1, I am of this opinion that prosecution has utterly failed to prove by leading cogent and reliable evidence that the offence of rape was committed with prosecutrix PW-1. On the other hand, the act for which the appellant was prosecuted did not amount to rape on the date of incident because the provision under Section 375 of IPC, as it was existing on that date, provides that rape means sexual intercourse. The definition of rape, however, has been changed in the subsequent amendments which have been made effective from 3.2.2013, but this amendment is with respect to substantive law, which cannot be given retrospective effect. Hence, for this reason, the appellant cannot be held liable for the offence of rape on the basis of subsequent amendments. Thus, taking into consideration other part of evidence of prosecutrix, which is reliable, that she was forced, manhandled and disrobed by the appellant, it can be safely held that conviction of appellant under Section 354 of IPC is based on proper appreciation of evidence led by the prosecution and therefore the same does not

warrant interference by this Court in exercise of appellate jurisdiction.

14. For the foregoing discussions, the appeal is allowed in part.

Conviction and sentence of the appellant under Section 376(1) of IPC are hereby set aside and he is acquitted of that charge.

However, conviction and sentence of appellant under Section 354 of IPC is maintained. As the appellant has already undergone the sentence imposed upon him for this offence and also paid fine amount, therefore, he be set free forthwith if not required to be detained in connection with any other case.

Sd/-
(Rajendra Chandra Singh Samant)
Judge

Nisha