

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 1098 of 2013**

- Yadav Sao @ Khageshwar Sao, S/o Shri Parthav Sao, aged about - 21 years, R/o village Jampali, Post - Jalgad, Police Station - Sariya, Civil and Revenue District Raigarh (C.G.)

---- Appellant**Versus**

- State of Chhattisgarh Through : District Magistrate, Raigarh, Through - Police Station Baramkela, Civil and Revenue District Raigarh (C.G.)

---- Respondent

For Appellant : Shri Roop Naik and Alok Kumar
Dewangan, Advocate.
For Respondent/State : Shri Subhash Yadav, Dy.G.A.

**D.B. : Hon'ble Shri Justice Manindra Mohan Shrivastava &
Hon'ble Smt Justice Rajani Dubey**

Judgment On Board**05.03.2019****Per Rajani Dubey, J**

01. This appeal is directed against the impugned judgment of conviction and order of sentence dated 26.08.2013 passed by Additional Sessions Judge, Sarangarh, District Raigarh, in Sessions Trial No.15/2012 whereby and whereunder, the appellant has been held guilty of commission of offence and sentence him as described below.

Conviction	Sentence
Under Section 376 IPC	Life imprisonment and fine of Rs.10,000/-, in default of payment of fine amount, to further undergo S.I. for one year.

Under Section 323 IPC	R.I. for 1 year and fine of Rs.500/-, in default of payment of fine 2 months additional S.I.
Under Section 506 (B) IPC	R.I. for 3 years and fine of Rs.1000/-, in default of payment of fine 6 months additional S.I.

02. The Prosecutrix (PW/5), on 27.02.2012, lodged a written report in the police station stating therein that on 26.02.2012 she along with her parents had come to village Kapartuna in her uncle's house (फूफा) to attend marriage function. When she was playing along with her friend Babita in the courtyard of his uncle, Yadav Sao, the appellant, came and took her to nearby school and told her to call Rupa Sahu to which she refused. Thereafter, at 9.00 PM, the appellant removed his and her clothes, laid her down and committed rape on her. At that time, she raised her cries but the appellant threatened her that she would be killed and the appellant satiated his lust for about 10.15 minutes. After the incident, she (the Prosecutrix) informed her parents and uncle about the incident. On 27.02.2013 at about 9.15 PM, prosecutrix (PW/5) was medically examined by Dr. (Smt.) J. Tripathi (PW/6) who gave her report in Ex.P/6 and opinion was given that the girl has not undergone sexual intercourse. Further opinion was also given that it is difficult to say whether the Prosecutrix was subjected to rape or not. Investigation eventually culminated in filing of the charge sheet against the appellant for alleged commission of offences under Sections 376, 323 and 506(B) IPC, and accordingly charges were framed by the trial Court against the appellant.

03. So as to hold the accused/appellant guilty, the prosecution examined as many as 18 witnesses. Statement of the

accused/appellant was also recorded under Section 313 of Cr.P.C. in which he denied the circumstances appearing against him in the prosecution case, pleaded innocence and false implication. Relying upon the evidence led by the prosecution, learned trial Court held the appellant guilty of commission of offences.

04. Learned counsel for the appellant assailed correctness and validity of the impugned judgment of conviction and order of sentence on the submissions that there has been unexplained delay in lodging the FIR, the medical report does not support the case of the prosecution and the appellant has not committed rape on prosecutrix. Further submission of learned counsel for the appellant is that the trial Court has failed to consider the statement of Dr. (Smt.) J. Tripathi (PW/6) who medically examined the prosecutrix and gave her report stating therein that the prosecutrix was not subjected to sexual intercourse and no definite opinion could be given regarding commission of rape. That apart, the learned trial Court has wrongly appreciated the statement of the prosecution witnesses including that of the Prosecutrix (PW/5). According to the learned counsel for the appellant, the Prosecutrix's evidence that because of the appellant's threat, she could not immediately call anybody for help, is highly improbable.

05. On the other hand, learned counsel for the State, supporting the impugned judgment of conviction and order of sentence, submits that the conviction of the appellant is strictly in accordance with law and there is no illegality or infirmity warranting any interference by this Court.

06. We have heard learned counsel for the parties and perused the record.

07. Sukhdev (PW/1) and Ghashiram (PW/2) are the witnesses of seizure of clothes (cafree) made under Ex.P/1, and Chakradhar (PW/3) is the witness to seizure of vaginal smear of the prosecutrix, made under Ex.P/2. Out of these, Chakradhar (PW/3) turned hostile.

08. The evidence, on the basis of which foundation of conviction of the appellant was made, is the Prosecutrix (PW/5), who has stated in her evidence before the Court that on the date of incident, appellant came to her and asked her to accompany him for 'Paan' (*betel*), then she went along with him for consuming 'Paan'. Thereafter, the appellant told her to go to see *barati* and then to temple, but the appellant took her to field, removed her and his clothes and committed rape on her. She has further stated that when she cried, the appellant threatened her of dire consequences. She has also stated that the appellant dragged her as a result of which, she sustained injury on her back. She has also stated that she narrated the incident to her parents and uncle and, thereafter, on the next day, she lodged a report in the police station in Ex.P/4. In her cross-examination, but for minor contradiction, she remained firm and what has transpired from her cross-examination is that she was subjected to sexual assault by the appellant.

09. Dr. (Smt.) J. Tripathi (PW/6) medically examined the prosecutrix and prepared her report in Ex.P/6. While examining, she noticed in all 24 teeth, two linear abrasion of 2 cm x .5 cm and one linear abrasion of

.5 cm x .5 cm on back side. The Doctor has also noticed that the prosecutrix was in pain but her hymen was intact. In para 6, this witness has specifically stated that no sexual intercourse was done with the prosecutrix and it is very difficult to say whether rape was committed with her or not ? In cross-examination, she has stated that there was no necessity for preparation of slide as one finger was not easily inserted. This witness also went on to state that no violent injury was seen near private part of the prosecutrix.

From the evidence of this witness, it is evident that no penetration was done as the hymen was intact.

10. Hari Sao (PW/8) is the father of the Prosecutrix. He has stated that on the date of incident at 9.00 PM, when he was in the house of Sitoo Sao, at the same time, one boy came and informed that the Prosecutrix is crying. At the relevant time, the prosecutrix was in the house of Ghasiram Sao. Thereafter, he (this witness), along with his wife reached the house of Ghasiram Sao where Prosecutrix narrated the incident to them and the manner in which she was subjected to sexual assault. This witness, in para 9 of his cross-examination, has stated that his wife Suryakanti informed him about the incident and not the Prosecutrix.

11. Sukranti Sao (PW/18), mother of the Prosecutrix, has made similar statement as has been made by Hari Sao (PW/8), father of the Prosecutrix.

12. Ku. Babita (PW/10) is the child witness. The trial Court, after satisfying itself whether the child witness is able to answer the

questions rationally, has examined her. She has stated that she knew the prosecutrix. On being asked as to where the Prosecutrix was taken by the appellant, this witness, by indicating towards the appellant, has stated that the appellant had taken prosecutrix towards the field on the pretext that he would give her “churmur” (salty eatable) and biscuit. She has also stated that the appellant had also offered “churmur” (salty eatable) and biscuit to her, but she denied.

In her cross-examination, nothing could be elicited to discredit her testimony especially on the point that the appellant had not taken the prosecutrix towards the field.

13. Shivilal Sahu (PW/11) is the village Sarpanch and witness to seizure of clothes of the prosecutrix made under Ex.P/12. In his cross-examination, this witness admits that he had gone to the place of incident and seizure was effected therefrom.

14. Sitoo Sao (PW/12) is the witness in whose house, the marriage function was going on. He has stated that on the date of incident at about 8.00 PM, the prosecutrix came to his house weeping, and upon being inquired, she narrated the incident to her parents as to the manner in which the appellant took her to the field and committed rape on her. This witness has been declared hostile.

15. Dr. D. Behara (PW/13) has medically examined the appellant and gave his report in Ex.P/13 and opinion was given that the appellant was found capable of performing sexual intercourse.

16. I. Tirkey (PW/17) is the Investigating Officer who has duly supported the prosecution case.

17. From the evidence of these witnesses, in particular, the evidence of Prosecutrix (PW/5), one thing is crystal clear that the appellant, after alluring the prosecutrix, took her along with him to nearby field on the pretext that he would give 'Paan' (betel), chocolate and biscuit to her, and satiated his lust.

18. The question which arises for consideration by this Court as to whether the Prosecutrix (PW/5) was subjected to rape or not.

In a case of rape or sexual assault, though, the Prosecutrix's evidence alone can form the foundation of conviction, but the evidence on record, in particular the medical evidence and the facts of the present case clearly indicates that no forcible sexual intercourse was done. Prosecutrix (PW/5) stated that the accused rubbed his genetic organ against her private part. She did not disclose the fact that penetration was done with her. Prosecutrix's mother Sukranti (PW/18) has also stated, as narrated by her (Prosecutrix), that the accused rubbed his genetic organ against her daughter's private part and laid upon her. Prosecutrix's version is also corroborated from medical evidence of Dr. (Smt.) J. Tripathi (PW/6) who has stated that prosecutrix's hymen was intact. She further opined that 'the girl has not undergone sexual intercourse, but whether she was subjected to rape or not, is difficult to say'. Thus, the evidence of prosecutrix (PW/5) as also Doctor (PW/6) did not specifically refer to penetration, but the F.S.L. report indicates that sperms were found in the vaginal slide of prosecutrix. From the aforesaid evidence and the material, it is established that the accused/appellant satiated his lust and did not do any penetration.

19. The Supreme Court, in the matter of **Aman Kumar and Another v. State of Haryana**, reported in **(2004) 4 SCC 379**, held in para 11 as under:-

“**11.** In order to find an accused guilty of an attempt with intent to commit a rape, court has to be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part. Indecent assaults are often magnified into attempts at rape. In order to come to a conclusion that the conduct of the accused was indicative of a determination to gratify his passion at all events, and in spite of all resistance, materials must exist. Surrounding circumstances many times throw beacon light on that aspect.

20. In view of the aforesaid judicial pronouncement of the Supreme Court, in the instant case also, it is clear that the accused/appellant only gratified his passion upon the prosecutrix and being so he is held guilty for attempting to commit rape and his act comes within the purview of Section 376/511 IPC.

21. In the result, the appeal is partly allowed. Conviction of the appellant under Section 376 IPC is set aside and he is convicted under Section 376/511 IPC and is sentenced to undergo R.I. for seven years. The conviction of the appellant under Sections 323 and 506(B) IPC is maintained.

Sd/-

(Manindra Mohan Shrivastava)
Judge

Sd/-

(Rajani Dubey)
Judge