

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No.1066 of 2014**

- Trinath S/o Gonduram Aged About 20 Years R/o Piplawand Jamguda Para Ps Bhanpuri, Rev. And Civil Distt. Bastar C.G. , Chhattisgarh

---- Appellant**Versus**

- State Of Chhattisgarh Through Ps Bhanpuri Distt. Bastar C.G. , Chhattisgarh

---- Respondent

For Appellant	:	Shri Sandeep Dubey, Advocate
For Respondent/State	:	Shri Neeraj Mehta, Panel Lawyer

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

Order on Board**Per Manindra Mohan Shrivastava, J.****05-03-2019**

1. This appeal is directed against the impugned judgment of conviction and order of sentence dated 10-09-2014 passed by the Additional Sessions Judge, (FTC), Bastar at Jagdalpur in Sessions Trial No.16/2014, whereby and whereunder the appellant has been held guilty for commission of offence under Section 363/34, 366/34 and 376(2)(g) of IPC and sentenced him, as described below-

Section-363/34 IPC	R.I. for five years and fine of Rs.200/-, in default of payment of fine, additional R.I. for one month.
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Section-366/34 IPC	R.I. for seven years and fine of Rs.200/-, in default of payment of fine, additional R.I. for one month.
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Section-376(2) R.I. for twelve years and fine of Rs.500/-, in
(g) IPC default of payment of fine, additional R.I. for two
month.

2. The prosecution story, as unfolded from the impugned judgment and records of the case is that the appellant and co-accused Masiya committed rape on the prosecutrix, PW-1 on 14-02-2011, in respect of which, FIR was lodged on 16-02-2011 by the prosecutrix. After arrest of the present appellant, the trial was conducted against him and as other co-accused Masiya remained absconded, trial against the present appellant was concluded and the learned trial Court, vide its judgment of conviction and order of sentence dated 10-09-2014, convicted the appellant for commission of offence and sentenced him, as stated hereinabove.

Later on, co-accused Masiya was also arrested. The records of the case speak that the Masiya was, however, acquitted by the trial Court vide its judgment dated 22-02-2017, because, after his arrest, when the prosecutrix was re-examined, she did not involve Masiya in the alleged commission of offence. Be that as it may, the appellant was convicted in view of the evidence of the prosecutrix.

3. Assailing correctness and validity of the impugned judgment of conviction and order of sentence, learned counsel for the appellant argued that the evidence of the prosecutrix is extremely doubtful and it appears to be a clear case of consent of the prosecutrix, because the incident is said to have been committed on the side of the road and there were nearby houses and residents and it would be wholly improbable that the prosecutrix would not cry for help or resist the criminal overt act being committed on her by the appellant. He would next argue that in the present case, FIR was not promptly lodged by the

prosecutrix. Though, the incident is said to have been committed, later in the evening (night) on 14-02-2011, the FIR was lodged in the police station, as late as, on 16-02-2011 at 12.30 hours. This has not been explained by the prosecution, and therefore, the credibility of the entire prosecution case becomes highly doubtful. Learned counsel for the appellant would further argue that the evidence of Gangoram, PW-2 that he himself witnessed the commission of offence of rape at the spot, is a false statement, because according to the prosecutrix, PW-1, only Bukli had arrived at the spot and not Gangoram. He would next submit that material omissions from the diary statement, which have been elicited in the cross-examination of the prosecutrix, further renders the prosecution case highly doubtful. Learned counsel for the appellant also argued that under no circumstance, case of gang rape is made out, because this prosecutrix, at the later stage of trial, did not involve the co-accused Masiya in the commission of offence of rape with the result that the co-accused Masiya was acquitted, therefore, conviction of the present appellant-Trinath under Section 376(2)(g) of IPC could not be sustained under the law.

4. On the other hand, learned State counsel would support the impugned judgment of conviction and order of sentence by submitting that the prosecutrix clearly stated regarding she having been subjected to forcible sexual intercourse by the appellant. The prosecution evidence, particularly that of Dr. Smt. S. Dhruv, PW-13 proves that the prosecutrix had sustained number of injuries on her body and the doctor also opined that she was subjected to sexual intercourse. He would next argue that the prosecution has also come out with the evidence that the clothes of the prosecutrix were torn. Learned State counsel would further argue that the prosecutrix, on the basis of ossification test, is found to be around 16 years of age.

5. We have heard learned counsel for the parties and perused the records.

6. In the FIR lodged at the instance of the prosecutrix, there is an allegation of commission of offence of rape on her, wherein it has been stated that she had gone to attend *Mela* (fest) along with her friends Sukdeyi and Gomati and when, at about 12 AM in the night, she went to respond to call of nature towards open field, at that time, the appellant and the co-accused had come and tried to catch hold of Sukdeyi, but her friend Sukhdeyi escaped and ran away. Thereafter, she was subjected to rape by the appellant and the co-accused Masiya. The prosecutrix has also stated that she cried for help, but no body heard her voice.

The prosecutrix, in her evidence before the Court, has stated that in the night of fest, which she had gone to attend, along with her friend-Sukdeyi, she was taken to the field and rape was committed on her by the appellant and co-accused Masiya. According to her, she was subjected to rape at three different places. According to her, when she was being subjected to rape, she was weeping and upon hearing voice, her sister Bukli came and upon seeing her, the appellant ran away from the spot. The prosecutrix informed Gango, husband of the sister, about the incident, thereafter, Gango went to the house of the prosecutrix to inform about the incident and after that, mother and brother of the prosecutrix had come to the house of Bukli. There, the prosecutrix narrated the entire incident to them. According to the prosecutrix, on the next day, she had gone to the police station and report was lodged regarding commission of offence of rape by Trinath and Masiya. The prosecutrix has stated that she was examined by the doctor. In her cross-examination, she has stated that the report was lodged after three days. She admits that some thing was done to her by Masiya, but at the same time, she denied suggestion that nothing was done by the appellant-Trinath and omission has been elicited that while committing rape on her, handkerchief was thrust in her mouth and other fact elicited is that place

of incident is nearby the public road and houses of Somari Bai, Hungo Ram, Basuram and Sadharam were situated nearby.

7. Gango Ram, PW-2, has stated that when, after attending fest, he was going towards his house, he heard someone crying and when he went to see, he saw that it was the prosecutrix, who was being subjected to rape by the appellant Trinath and thereafter, Trinath ran away. In his cross-examination, he says that incident occurred about 4:00 am in the morning. The suggestion that he has not seen the incident, has been denied.

8. Sukli Bai, PW-10, the another important prosecution witness, who is the wife of Gango Ram, PW 2, has also stated that while she was going on the road along with her husband, she heard that someone was crying and when she approached the spot, she saw that the prosecutrix was caught hold of by the appellant-Trinath and he was committing sexual intercourse with the prosecutrix and having seen them, he ran away from the spot.

9. There is evidence of Sukmati, PW-4, mother of the prosecutrix and it appears that she has deposed, on the basis of what was informed to her by the prosecutrix.

10. Sukdeyi, PW 5, one, who is said to have gone along with the prosecutrix to attend fest, has stated that in the night at about 12 a.m., when prosecutrix had gone to respond to call of nature, a little away from the place of fest, at that time, Trinath had come along with his friend Masiya. She along with another friend Gomti came back, but the prosecutrix was taken away by Trinath and Masiya. She has also stated that an attempt was made to catch hold of her, but somehow she escaped and ran away.

11. In the light of the submission made by the learned counsel for the appellant that the present is a case of consent, we have analyzed the evidence on record. The prosecutrix appears to be aged 15 to 16 years, which is based

on the evidence of Dr. A. Naidu, PW-9. His evidence regarding stage of fusion of different joints, proves that fusion, which are found present in the body, upon completion of 16 to 17 years of age, were not present and fusion of bones was commensurate with the age below 16 years.

The doubt, if any, with regard to the prosecutrix being consensual to sexual intercourse on the basis that there was some delay in lodging of report and that sexual intercourse was committed on the side of the road in the night, is cleared, in view of emphatic evidence of Dr. Smt. S. Dhruv, PW-13, who examined the prosecutrix and found number of injuries on her body, as below:-

3. "बाह्य परीक्षण करने पर शरीर में निम्नलिखित चोटें पायी गयी :-

1. पीठ में दायीं ओर लंबर रीजन में मल्टीपल साईज के निशान थे सभी 1 से 0मी0 लंबाई के थे ।
2. बायें पैर के उपरी सतह पर छोटे-छोटे खरोंच ।
4. सभी चोटें कोई हार्ड एवं ब्लंट आब्जेक्ट से आयी हुयी एवं मेरे परीक्षण के 48 घण्टे के भीतर की थी ।"

Dr. Smt. S. Dhruv, PW-13 further deposed that the prosecutrix was subjected to sexual intercourse, though she cannot definitely state the time, when prosecutrix was subjected to sexual intercourse. The evidence of Dr. Smt. S. Dhruv, PW-13 has remained intact. From the records, we also see that this doctor was examined under Section 299 of Cr.P.C. by the Magistrate on 17-05-2012. During trial, when the case was listed before the Trial Court on 11-07-2014, learned counsel for the accused-appellant stated that they are not inclined to cross-examine the doctor. If that be so, the evidence of Dr. Smt. S. Dhruv, PW-13 remained uncontroverted. We are unable to accept this submission that even in the consensual sex, this injury could be caused. No opportunity was availed by putting this doctor to cross-examination by the

accused. In any case, the story of consensual sex will be of no help to the appellant, because the prosecutrix was certainly minor, which is clear from the evidence of Dr. A. Naidu, PW 9, who has proved the ossification test, indicating that the prosecutrix could be some where between 15 to 16 years of age.

12. However, we find that the co-accused has been acquitted, because in this very trial, at a later stage, when Masiya was arrested and the prosecutrix was re-examined, she has not involved Masiya in the incident, but her evidence only involved the present appellant Trinath. Therefore, in these circumstances, though, we are inclined to uphold that the appellant guilty of commission of offence of rape, but conviction of the appellant under Section 376(2)(g) of IPC cannot be sustained and to that extent, the appeal has to be allowed and is accordingly allowed. The appellant stands convicted under Section 376 of IPC and looking to the age of prosecutrix as also the age of the appellant, we are inclined to impose sentence of 8 years on the appellant. The appeal is accordingly partly allowed. Conviction and sentence ordered under other sections of the IPC to the appellant by the trial Court is not interfered with.

SD/-
(Manindra Mohan Shrivastava)
Judge

SD/-
(Rajani Dubey)
Judge