

NAFR

**HIGH COURT OF CHHATTISGARH, BILASPUR****Judgment Reserved on : 09.05.2019****Judgment Delivered on : 17/06/2019****CRA No. 275 of 2014**

- Anuj Uikey S/o Uttam Uikey, Aged About 22 Years, Occupation – Student, R/o Plot No. 2 Ashish Nagar (West) P.S. Newai, Civil and Revenue Distt. Durg C.G. , Chhattisgarh

**---- Appellant****Versus**

- State of Chhattisgarh Through District Magistrate, Durg, Distt. Durg C.G. , Chhattisgarh

**--- Respondent**


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For Appellant : Shri J.K. Shastri, Advocate.

For Respondent/State: Shri H.S. Ahluwalia, Deputy Advocate General.

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**Hon'ble Shri Justice Rajendra Chandra Singh Samant****CAV Judgment****17/06/2019**

1. This appeal has been preferred against judgment dated 28-02-2014 passed in Special S.T. No.12/2013 by the Special Judge [under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (in short 'the SC/ST Act')], Durg, District Durg, C.G. convicting the appellant under Section 376(1) of the IPC and sentencing him with R.I. for 10 years along with fine of Rs.5000/- with default stipulation.
2. The case of the prosecution, in brief, is this, that on 07-10-2012 the prosecutrix was on her way home when the appellant came in a Swift car bearing registration No.CG 07 MB 1394 along with two other boys, the appellant requested the prosecutrix to go for a ride and accommodated her in the back seat. After car was

driven for some time, the appellant then started teasing the prosecutrix and when she opposed, by use of force on her the appellant committed offence of rape with her. The prosecutrix got afraid from this incident and she narrated about it to her parents after two days on 09-10-2012. The FIR Ex.-P/2 was lodged in P.S. Newai. The case was investigated and after completion of the investigation charge sheet was filed.

3. The appellant and one another co-accused Pranjal Sharma were charged under Section 363, 366/366(A), 376(2)(g) of the IPC and Section 3(2)(5) of the SC/ST Act, to which they denied and prayed for trial. Another co-accused Ajitesh Mishra has remained in absconsion.
4. On completion of the prosecution evidence, the appellant and another co-accused Pranjal Sharma were examined under Section 313 of the Cr.P.C. in which they denied all the incriminating evidence against them, pleaded innocence and false implication. No witness was examined in defence.
5. On completion of the trial, the impugned judgment has been passed in which co-accused Pranjal Sharma has been acquitted from the charges against him, whereas, the appellant has been convicted and sentenced as aforementioned.
6. It is submitted by learned counsel for the appellant that the appellant has been erroneously convicted by the trial Court without there being any evidence of prosecution beyond reasonable doubt. The fact is disclosed in the evidence of the

prosecutrix (PW-2) herself, that she had willingly taken a seat in the car with the appellant to go for drive, which shows that she had no objection to the activities of the appellant, therefore, it was not an offence of rape. The prosecution has not proved that the prosecutrix (PW-2) was minor on the date of incident. It is further submitted that Doctor Shail Khare (PW-1) has examined the prosecutrix on 11-10-2012 and has opined vide her report Ex.-P/1, that only attempt for sexual intercourse was made upon the prosecutrix. Therefore, according to this medical report, no rape was committed with the prosecutrix, hence, the conviction against the appellant is bad in law. Therefore, it is prayed that the appeal may be allowed and the appellant may be acquitted from the charge. In the alternative, it is prayed that if this Court is not convinced to acquit the appellant, then his sentence of imprisonment may be reduced to the period already undergone by him in jail.

7. Learned counsel for the State/respondent opposes the grounds raised in the appeal and the submission made in this respect and submits, that the prosecution has proved its case beyond reasonable doubt. The finding of the Court below that the prosecutrix was subjected to rape is based on the statement given by the prosecutrix (PW-2) herself, whereas, the evidence of Doctor Shail Khare (PW-1) is only an opinion evidence, therefore, in such a case of presence of direct evidence, the opinion evidence cannot be relied upon. Apart from that, according to the

Modi's Jurisprudence it is not a hard and fast rule that hymen will break in every case, if there is flexibility in the hymen in that case it may remain intact even if the intercourse has taken place. Therefore, the direct evidence in this case is of much more value. Therefore, no case is made out for acquittal and no case is made out for reduction of sentence.

8. Heard learned counsel for the parties and perused the record of the trial Court.
9. The prosecutrix (PW-2) has stated, that her date of birth is 05-05-1998 and her statement has remained unrebutted and unchallenged in her cross-examination.
10. Anita Khes (PW-3) is mother of the prosecutrix, who has also stated that date of birth of her daughter is 05-05-1998. In cross-examination, she has reiterated the same statement and her statement could not be rebutted in defence. Adverse suggestions given in defence had been denied by her.
11. Vinay Shrivastava (PW-10) is a Registrar of birth and death and he has on the basis of Register of birth and death has stated that date of birth of a female child was recorded in register by George S. and Anita on 25-06-1998 and the date of birth was 05-05-1998. This evidence is only suggestive, whereas, there is evidence with exactness given by Anita Khes (PW-3) who is mother of the prosecutrix regarding the exact date of birth of her daughter and she being the mother of the prosecutrix, has authority to make such statement, therefore, there is no reason to

disbelieve that the date of birth of the prosecutrix is 05-05-1998 and on the basis of this date of birth, on the date of incident, i.e., 07-10-2012 the prosecutrix was only 14 years and 5 months. Hence, the prosecution has successfully proved that the prosecutrix (PW-2) was minor on the date of incident. Therefore, the statement made by the appellant's counsel on this point is without any substance.

12. The prosecutrix (PW-2) has very clearly made statement before the Court that after she got seated in the car, then the appellant firstly teased her and despite her resistance and objection he raped her. She has explained what is meaning of rape very clearly. Her statement has remained unrebutted in cross-examination and there is no such suggestion given in defence that the appellant had only attempted to commit rape with her, on the contrary, she has answered to the question of defence counsel that the appellant has made her lie down in the backseat, then disrobed her and then inserted his penis to her vagina. Thus, she has elaborated the incident of forceful sexual intercourse, which confirms that it was the incident of rape.
13. Doctor Shail Khare (PW-1) examined the prosecutrix and did not find an external injury, however, she found injury on the private part in the form of redness and swelling. She found the hymen intact and there was no bleeding, but, the victim did not allow for internal examination because she was suffering from pain. She has opined that attempt to rape has been made vide her report

Ex.-P/1.

14. The doctor can only give opinion on the basis of the symptoms present on physical body of a person. The doctor is not a witness of incident itself, therefore, in such cases, if there is direct evidence present such direct evidence shall be given more weight compared to the evidence of opinion. Medical evidence is only corroborative evidence, which cannot substitute direct evidence. In the matter of **Solanki Chimanbhai Ukabhai vs State Of Gujarat**, reported in AIR 1983 SC 484, it was held, that only because of some inconsistency between medical evidence and evidence of victim or eye-witnesses, the testimony of eye-witness/victim cannot be thrown away. Therefore, just because that the doctor has opined in a different manner it cannot be held that the statement of the prosecutrix (PW-2) has been falsified, further, she has made statement giving all the details of the incident of rape that was committed with her. Therefore, after over all consideration and closely scrutinizing all the evidence present, I do not find any fault with the order of conviction and the length of sentence imposed upon the appellant.
15. Consequently, the appeal filed by the appellant is dismissed.

Sd/-  
(**Rajendra Chandra Singh Samant**)  
Judge