

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 849 of 2008****Judgment Reserved on 02/01/2020****Judgment delivered on 19/05/2020**

Jumerat Khan S/o Akbar Khan, Aged about 33 years R/o Village Taralim, PS-Berla, Distt. Durg (C.G.).

--- Appellant**Versus**

State of Chhattisgarh through Police Station Civil Line, Raipur, Distt. Raipur(C.G.).

---- Respondent

For Appellant	:	Mr. Goutam Khetrapal, Advocate
For Respondent	:	Mrs. Smriti Shrivastava, PL

Hon'ble Shri Justice Arvind Singh Chandel**CAV Judgment**

1. This appeal is directed against the judgment dated 09/09/2008 passed in S.T. No. 27/2008 by the Tenth Additional Sessions Judge, (FTC), Raipur, whereby the Appellant has been convicted under Section 376 of the Indian Penal Code and sentenced to undergo RI for 7 years and to pay fine of Rs. 1000/- with default stipulation.
2. Facts of the case are that the age of the Prosecutrix (not examined) was about 17 years at the relevant time. According to the case of the prosecution, the Prosecutrix was lunatic. Mother of the Prosecutrix Roshan Aara (PW1) made a report on 05/10/2007 with the averments that her daughter (Prosecutrix) aged about 17 years is mentally retarded girl and is not able to speak properly. She had taken the Prosecutrix to Nagpur

for treatment. After returning from there, she visited to Raipur to meet their relatives. After returning from there at about 8:00 in the night she reached at Pandri Bus stand for catching a bus, but she came to know that there was no bus available at that time, and the next bus was available at about 5:00 in the morning. Thereafter, she decided to stay in the waiting room of the bus-stand. She made her daughter lie down beside her and she sat there. During this period, one person (Appellant) came there and stared them frequently. After one hour, the Appellant along with his friend came there with a mosquito coil and sat beside her daughter. He started to make acquaintance with them and said he is also Musalman. He also told that since they are Musalman, therefore, in this manner she is her sister and as such he is maternal uncle of her daughter. In this way, he collected all the information about them. The Appellant also introduced his friend as Sabbir. They asked them to accompany for meal, but she refused to go. Thereafter, the Appellant and his friend went away from there. After 1- 1 ½ hours, the Appellant again came there with his bed-sheet and slept there. After some time, his friend Sabbir went away from the spot asking the Appellant to leave, but the Appellant remain stayed there. At about 3:30 in the night, when people started coming to bus stand, she felt relaxed. Later on, she got fall in sleep. When she got-up and saw that the nearby light had gone off and her daughter was not there, she made hue and cry. Listening her noise, people assemble there and made search for her daughter. One person came there and told that her daughter is standing in between two buses. When she reached there and saw, her daughter was not wearing Salwar. In the meantime, some persons switched on the light and they found that the Salwar of the Prosecutrix was lying on the bed-

sheet of the Appellant. On being asked, the Appellant accepted his mistake and thereafter he fled away from the spot. The matter was reported by Roshan Aara (PW1). On the basis of said report, offence has been registered. Statement of the Witnesses were recorded under Section 161 of the Cr.P.C. The Prosecutrix was examined by Dr. Anusuiya Dutt (PW7). Her report is Ex.P-12. After completion of investigation, a charge-sheet has been filed. Trial Court framed the charges. As many as 12 prosecution witnesses have been examined. Statement of the Appellant has been recorded, wherein he has pleaded his innocence and false implication in the matter. No defence witness has been examined.

3. After trial, the trial Court has convicted and sentenced the Appellant as mentioned in paragraph one of this judgment. Hence, this appeal.
4. Learned counsel appearing on behalf of the Appellant has submitted that the Trial Court has wrongly convicted the Appellant without there being any clinching and sufficient evidence available on record. It is further submitted that according to the prosecution case, the Prosecutrix was mentally retarded and on these reasons the Prosecutrix had not been examined before the trial Court, but there is no evidence available on record on the basis of which it can be said that the Prosecutrix was mentally retarded. There is no medical opinion or any medical report produced in this regard. It is further submitted that the Prosecutrix has been cited as prosecution witness, but instead thereof she has not been examined. Referring to the explanation of Section 118 of the Indian Evidence Act, 1872, it has been argued that a lunatic is not incompetent to testify, unless he/she is prevented by his/her lunacy from understanding the questions put to

him/her and giving rational answers to them. In this view of the matter unless the trial Judge had, after examining the prosecutrix, recorded a finding satisfying himself that the prosecutrix was, due to her lunacy prevented from understanding the questions put to her and giving rational answers to them, the non-examination of the prosecutrix would be fatal to the prosecution. It is further submitted that in her Court statement Roshan Aara (PW1) has deposed that when the police officials asked from the prosecutrix, she had told them her neck was pressed, her mouth was closed and she was fallen down on the floor. She further deposed that when the police officials had confronted the Appellant along with five persons and asked the Prosecutrix to identify then the Prosecutrix indicated towards the Appellant, but the above statement is not mentioned in her diary statement Ex.D-1. Thus, she enlarged her statement, therefore, her statement is not reliable. It is further submitted that the trial Court has convicted the Appellant only on the ground that the Salwar of the Prosecutrix was found on the bed-sheet belonging to the Appellant, but from the evidence available on record, it is clear that when the Salwar was found at that time, the Appellant was sleeping, therefore, there is a possibility that someone had put the Salwar on his bed-sheet, thus, only this ground, the conviction cannot be sustained.

5. Learned counsel appearing on behalf of the State opposes the same and supported the judgment of conviction passed by the trial Court.
6. I have heard learned counsel for the parties and perused the record minutely.
7. Firstly, I am going to examine whether the Prosecutrix was mentally

retarded or not at the time of incident.

8. In this case, the prosecution has not examined the Prosecutrix before the trial Court though she was cited as prosecution witness. In her court statement Roshan Aara (PW1), mother of the Prosecutrix has deposed that the Prosecutrix was mentally retarded and she is unable to speak and understand properly. Apart from this witness, other witnesses namely Bhagat Soni (PW3), Yusuf Ali (PW4) and Ramjaan (PW10) who met with the Prosecutrix, have stated nothing in this regard in their Court statement. If these witnesses felt that the Prosecutrix was mentally retarded, then they would have mentioned this fact in their Court statements. Moreover, Dr. Anusuiya Dutt (PW7) who examined the Prosecutrix on 05/10/2007 has deposed that at the time of examination, the general condition of the Prosecutrix was general. The Prosecutrix was looking mental sick, therefore, she referred her for further examination to psychological department, but there is no document submitted in this regard by the prosecution whether she was examined or not. If the Prosecutrix is not examined in the Psychological department inspite of opinion given by Dr. Anusuiya Dutt (PW7) then it is fatal for the prosecution case. And, if examination is done and no report has been produced, still it is fatal for the prosecution case. From perusal of the entire record of the trial Court, it is established that the Prosecutrix did not appear before the trial Court and there is no finding recorded by the trial Court that the Prosecutrix was mentally retarded or lunatic. The trial Judge as per Section 118 of the Indian Evidence Act, 1872 has not raised any question before the Prosecutrix, therefore, from the entire material available on record, the Prosecutrix has failed to establish that the Prosecutrix was mentally

retarded or lunatic.

9. With regard to the incident Roshan Aara (PW1), mother of the Prosecutrix has deposed according to the case of the prosecution. According to this witness, at about 3-3:15 am, when she woke up and saw that the Prosecutrix was not there, then she made cry. Thereafter, in the light she saw that the Salwar of the Prosecutrix was lying on the bed-sheet of the Appellant and the Prosecutrix was not there. This witness has further deposed that later on she came to know that the Prosecutrix was standing behind the vehicle then she and Appellant went there and saw the Prosecutrix was standing between the buses. She asked the Prosecutrix, but she did not tell anything. This witness has further deposed that when the police officials after reaching there took them to the police station, where the police officials asked the Prosecutrix, then she told that her neck was pressed, her mouth was closed and she was fallen down on the floor. Thereafter, the police official confronted the Appellant along with five persons, then the Prosecutrix indicated towards the Appellant, but this fact is not mentioned in the diary statement (Ex.D-1) and also not in the FIR. From the statement of other witnesses, it is only established that when these witnesses reached there at that time, the Prosecutrix was only standing on the spot without wearing her Salwar and the Appellant was also standing there. Later on, the Salwar of the Prosecutrix was found on the bed of the Appellant.
10. On minute examination of above evidence, it makes clear that firstly When Roshan Aara (PW1) woke up the Prosecutrix was not there and later on she was found between the two buses. She was not wearing her Salwar.

At that time, many people came there, but what was happened with the Prosecutrix, she did not tell neither to her mother nor to anyone. Though as per the statement of Roshan Aara (PW1), mother of the Prosecutrix when the Prosecutrix was found at that time she was not wearing Salwar and her Salwar was lying on the bed of the Appellant, from the statement of this witness itself it is established that at that time the Appellant was sleeping. Therefore, a possibility that someone had put the Salwar on the bed of the Appellant while he was sleeping cannot be denied and only recovery of the Salwar from the bed of the Appellant can not hold him guilty. Apart from this, Roshan Aara (PW1) has deposed that the Prosecutrix has identified the Appellant in the police station, but this fact is not mentioned in her diary statement and FIR. None of the other witnesses have deposed like this. Therefore, without examining the Prosecutrix only on the basis of the statement of her mother, it would not be safe to guilt the Appellant as there is no material available on record which shows that the Prosecutrix was mentally retarded at the time of incident, therefore, her non examination is fatal to the case of the prosecution.

11. Looking to the above facts and evidence available on record, in my considered opinion, the alleged offence is not proved against the Appellant and the Appellant is entitled to get benefit of doubt.
12. In the result the appeal is allowed. The Appellant is acquitted from the charge framed against him.
13. It is reported that the Appellant is on bail. His bail bond is not discharged at this stage and the same shall remain operative for further period of six months in view of Section 437-A of the Cr.P.C.

14. Records of the court below along with the copy of this judgment be sent back forthwith for necessary compliance and action.

Sd/-
(Arvind Singh Chandel)
Judge

Rahul