

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 907 of 2008**

- Dewadhee @ Devvadhee Mahkool, son of Jogoram, aged about 22 years, R/o Village Nawagaon, Tahsil Dharamjaigarh (not mentioned in cause title) P.S. Gharghora, District Raigarh, C.G.

----Appellant**Versus**

- State of Chhattisgarh, Through P.S. A.J.K. Raigarh, District Raigarh, C.G.

---- Respondent

For Appellant	Shri A.N. Bhakta, Advocate.
For Respondent/State	Shri Vimlesh Bajpai, Government Advocate.

Hon'ble Shri Justice Gautam Chourdiya
Judgment on Board

18/09/2020

1. The appeal is heard through Video Conferencing.
2. This appeal arises out of the judgment of conviction and order of sentence dated 23.09.2008 passed by the Special Judge Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (henceforth 'the Act, 1989'), Raigarh, District Raigarh, C.G. in Special Case No.05/08, whereby the appellant stands convicted and sentenced as under:-

Conviction	Sentence

Under Section 3 (1) (xii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989	Rigorous imprisonment for three years and fine of Rs.10,000/-, in default of payment of fine amount to further undergo rigorous imprisonment for six months.
---	--

3. Case of the prosecution, in brief, is that on 02.05.2007, at about 4:00 pm, prosecutrix, aged about 19 years, was alone at her home, at that time accused/appellant entered her home and forcibly committed sexual intercourse with her saying that he would marry her and threatened her that if she would disclose the incident, he would kill her. Thereafter, both accused and prosecutrix left the home and went to Tehsil Gharghoda, District Raigarh, where they lived together on rent in the home of PW-4 Gowri Shankar Nishad for a period of about two months. During that period both appellant and prosecutrix entered into a marriage agreement by executing affidavits. But on 17.07.2007, appellant left the company of the prosecutrix, ditched her and fled away from there and then in the month of September i.e. 15.09.2007, prosecutrix went to the police station Dharamjaigarh, Raigarh and lodged the FIR Ex.P-1 against the accused/appellant which was registered on zero number and transferred to the concerned police station, Raigarh where it was registered under Crime No.28/07 vide Ex.P-8. Prosecutrix was sent for medical examination and PW-6 Dr. Smt. Ratnamanik Meshram examined her and gave her

report vide Ex.P-7:-

On External Examination :-

Secondary sexual character well developed.

No external injury found all over the body.

3rd molar absent.

On Internal Examination

No internal Injury.

No any tenderness.

No redness.

No any injury at valva, vagina.

Vagina admits two fingers easily old tags of hymen present.

Uterus normal size.

According to her opinion, prosecutrix is habitual to sexual intercourse, no definite opinion can be given regarding the rape, hence slides prepared for presence of sperm. Clinically her age was 18-21 years and for confirmation of age she was referred to Radiologist.

4. During Investigation, Article-A and Article-B (agreements executed by both the parties) were seized vide Ex.P-2. Transfer Certificate of the prosecutrix was seized vide Ex.P-3. Spot Map Ex.P-4 was prepared by Investigating Officer. Accused/appellant was arrested on 16.09.2007 vide Ex.P-11. Accused/appellant was also examined by PW-11 Dr. B.L. Bhagat and found to be capable of performing sexual

intercourse vide Ex. P-10. Prepared slides of prosecutrix and accused were seized vide Exs.P-5 & 6 respectively. After recording statements of the witnesses, charge sheet was filed against the accused/appellant under Sections 376, 506 and 450 of IPC and Section 3 (1)(xii) of the Act.

5. The trial Court framed charges under Sections 376 and 450 of IPC and Section 3 (1) (xii) of the Act against the accused/appellant which were denied by him and he prayed for trial. The prosecution examined 12 witnesses i.e. PW-1 Prosecutrix, PW-2 Balaram, PW-3 Duryodhan Bhagat, PW-4 Gowri Shankar Nisad, PW-5 Mohanram Prajapati, PW-6 Dr. Smt. Ratnamanik Meshram, PW-7 Kanahiya Lal Tiwari, PW-8 Kishor Chandra Behra, PW-9 Madhosingh Thakur, PW-10 F.J. Tigga, PW-11 Dr. B.L. Bhagat and PW-12 B.M. Puri. Statement of the accused/appellant was recorded under Section 313 Cr.P.C. in which he denied the incriminating circumstances appearing against him in the prosecution case, pleaded innocence and false implication. However, no defence witness was examined by him.
6. The trial Court after hearing counsel for the parties and considering the material available on record, convicted and sentenced the accused/appellant as mentioned above.
7. Learned counsel for the appellant submits that in this case FIR Ex.P-1 was lodged at belated stage. In absence of

proper explanation therefor, the prosecution story becomes doubtful. He also submits that prosecution has utterly failed to prove the main ingredients of the offence under Section 3 (1) (xii) of the Act. He further submits that in this case prosecutrix was a major girl, aged about 19 years, on the date of incident and she was having a love affair with the accused for a long time prior to the incident. He also submits that prosecutrix herself left her home and was living with the accused/appellant. Therefore, learned Special Judge acquitted the appellant under Sections 376 and 450 of IPC and on the same set of evidence, the appellant cannot be convicted under Section 3 (1) (xii) of the Act, 1989. Therefore, the impugned judgment of conviction and order of sentence deserves to be set aside and the appellant be acquitted of the said charge.

8. On the other hand, supporting the impugned judgment learned counsel for the State submits that conviction and sentence of the accused/appellant are strictly in accordance with law and there is no illegality or infirmity in the same warranting interference by this Court.
9. In this case, no counter appeal has been filed by the State against the acquittal of the accused/appellant under Sections 376 and 450 of IPC.
10. Heard learned counsel for the parties and perused the

material available on record.

11. In this case, the age prosecutrix was 19 years and this fact is also mentioned in Articles-A & B (agreements executed by the appellant and prosecutrix) and Article- C (Transfer Certificate of the prosecutrix) where her date of birth was mentioned as 16th July, 1988. So, it is clear that on the date of incident prosecutrix was above 18 years of age and it is not disputed by both the parties.
12. PW-1 Prosecutrix stated in her deposition that on the date of incident she was alone at her home, at that time accused/appellant entered her home and committed sexual intercourse with her saying that he would marry her and threatened her by saying that if she would disclose the incident, he would kill her. She also stated that on 14.05.2007, she left her home and went to Tehsil Gharghoda, District Raigarh with appellant, where they lived together in a rented house for a period of about two months and there the appellant also made physical relations with her on regular basis. During that period both appellant and prosecutrix entered into a marriage agreement by executing affidavits. But thereafter the appellant left the company of the prosecutrix and fled away from there and then in the month of September, she went to the police station and lodged the FIR against the accused/appellant.
13. However, as per case diary statement of prosecutrix

(Ex.D-1), she stated that she was having love affair with the accused/appellant 3-4 months prior to recording of her statement and both loved each other and agreed to marry, therefore, they left the home and entered into a marriage agreement by executing affidavits. She also stated that her father reached her home where she and appellant were living and took away her from there and then the appellant married another girl. In para 8 of her cross-examination, she has stated that she did inform the police while giving statement of Ex.D-1 that the appellant caught her from behind and committed rape with her. However, there is no such mention in her diary statement. Further, in her deposition the prosecutrix has nowhere stated that she raised any cry or alarm resisting the act of the appellant at any point of time. Rather, from her evidence, it is clear that she left her home without intimating anybody about the same.

14. PW-2 Balram, father of the prosecutrix, stated in para 2 of his deposition that about 9-10 months ago in night, prosecutrix left his home and after searching for 6-7 days, he found that her daughter was living with appellant in Gharghoda. Then, he went to Gharghoda and met them where prosecutrix and appellant told him that they were living happily and they have also executed affidavits for their marriage. Then, he returned from Gharghoda to his home.
15. However, in his case diary statement Ex.D-2, PW-2 Balaram

has stated that there was love affair between the appellant and his daughter/prosecutrix, three-four months prior to recording of his statement, the appellant along with the prosecutrix eloped and started living in Gharghoda. Since the appellant was of other caste, due to fear of being defamed in the society, he went to Gharghoda and advised them to live separately and brought his daughter back to his home.

16. PW-3 Duryodhan also stated in his deposition that appellant kept the prosecutrix at village Gharghoda and both were living there together. After receiving this information, her father went there and brought her back to his home. Thereafter, appellant absconded from that place. But in his case diary statement Ex.D-3 he stated that the prosecutrix and the appellant loved each other and agreed to marry, however, since they belonged to different caste, there was dispute between the appellant and prosecutrix's father.

17. PW-4 Gowri Shankar Nishad is the Landlord of house where prosecutrix and appellant were living on rent at Gharghoda. He stated that the rent of his house was Rs.300/- per month and father of the prosecutrix had paid the rent of his house.

18. PW-5 Mohanram Prajapati is the witness of seizure of slides vide Ex.P-5.

19. PW-6 Dr. Smt. Ratnamanik Meshram medically examined the prosecutrix vide Ex.P-7 and gave her report as mentioned in the preceding paragraph. She has duly proved the said

report.

20. PW-7 Kanahiya Lal Tiwari is the Head Constable, who registered the numbered FIR Ex.P-8 and duly proved the same. PW-8 Kishore Chandra Behra is the Constable, who seized the slides vide Ex.P-5.

21. PW-9 Madhosingh Thakur is the witness of seizure vide Exs. P-5 and P-6.

22. PW-11 Dr. Shri B.L. Bhagat medically examined the accused/appellant vide Ex.P-10 and gave his report as mentioned in the preceding paragraph. He has duly proved the said report.

23. PW-12 B.M. Puri is the Retired Deputy Superintendent of Police, who investigated the case.

24. Clause (xii) of sub-section (1) of section 3 of the Act, 1989 reads thus:

“3. Punishments for offences of atrocities.—(I) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,

xxxxxxxxxx

(xii) being in a position to dominate the will of a woman belonging to a Scheduled Caste or a Scheduled Tribe and uses that position to exploit her sexually to which she would not have otherwise agreed;”

25. So far as, the conviction of the appellant under **section 3(1) (xii) under the Act, 1989** is concerned, it is suffice to say that mere the victim happened to be a girl belonging to a

Scheduled Caste or a Scheduled Tribe does not attract the provision of the Act, 1989. Apart from the fact that the prosecutrix belongs to Gond caste; there is no other material on record to arrive at a finding that the appellant committed an offence under section 3(1)(xii) of the Act, 1989. For such an offence, it must be proved that the accused was in a position to dominate the will of a woman belonging to a Scheduled Caste or a Scheduled Tribe and used that position to exploit her sexually to which she would not have otherwise agreed.

26. In the matter of ***Madan Lal Vs. State of C.G.*** reported in ***2007 (1) C.G.L.J. 435***, this Court while dealing with the identical issue held as under:-

“Penal Code, 1860, S.376 and Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, S.3(1)(xii) – Promise of marriage – Prosecution case is that prosecutrix aged 15 years was subjected to sexual intercourse by this appellant for many times saying that he would marry her and she became pregnant then reported in the police station – From the evidence of the doctor and other evidence it was established that the prosecutrix was not below the age of 16 years on the dates of occurrence and from the conduct and statement of the prosecutrix her consent has been established – Appeal was allowed holding that appellant cannot be convicted only because the prosecutrix belongs to *Gond* caste.”

27. In the present case, it does not appear that the appellant was in a dominating position; rather the evidence of

prosecutrix would show that she consented for commission of sexual intercourse for many times on account of the fact that both had to marry with each other and she also did not raise alarm on the date of incident or at any point of time. If a girl gives consent for repeated sexual intercourse upto a long duration, an offence under section 3(1)(xii) of the Act, 1989 could not be made out on the ground that the girl happened to be a member of Scheduled Caste or a Scheduled Tribe by chance because it was her own will for commission of sexual intercourse, may be on account of love or the reason to marry with the appellant. In this case, prosecutrix and appellant were having love affair prior to the date of incident and they entered into a marriage agreement by executing affidavits. Further, looking to the contradictions and omissions in the case diary statements Exs. D-1, D-2 and D-3 of the (PW-1) Prosecutrix, (PW-2) Balram, father of the prosecutrix and (PW-3) Duryodhan respectively as compared to their Court statements and the judgment in the matter of *Madan Lal (supra)*, it is clear that prosecution has utterly failed to prove the guilt against the appellant. Therefore, the conviction of the appellant under section 3(1)(xii) of the Act, 1989 cannot be sustained.

28. In the result, the appeal is allowed. Conviction and sentence awarded to the appellant under Section 3 (1) (xii) of the Act are set aside. The appellant is acquitted of the aforesaid

charge.

29. The appellant is reported to be on bail, therefore, his bail bonds shall continue for a period of six months from today in view of provisions of Section 437-A of Cr.PC.

Sd/-
Gautam Chourdiya
Judge

Akhilesh