

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 1022 of 2002****Order Reserved on 02/12/2019****Order delivered on 27/02/2020**

Sonu alias Sona S/o Govind Gond, aged about 20 years R/o Kaling Nagar
Gudiyari, Raipur (C.G.)

--- Appellant**Versus**

State of Chhattisgarh Through Police Station Gudiyari, Raipur (C.G.).

---- Respondent**AND****Criminal Appeal No. 455 of 2003**

Rupu @ Rupchand S/o Naresh Sahu, aged about 20 years R/o Bharatnagar,
Gudiyari, Raipur (C.G.)

--- Appellant**Versus**

State of Chhattisgarh, through Police Station- Gudiyari, Raipur (C.G.).

---- Respondent

For Appellant (In CRA No. 1022/2002)	:	Mr. C.K. Narang, Advocate
For Appellant (In CRA No. 455/2003)	:	Mr. Shashi Kumar Kushwah, Advocate
For Respondent	:	Ms. Smriti Shrivastava, PL

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

1. Since both the appeals arise out of same judgment passed in same crime number, therefore, they are being disposed of by this common judgment.
2. These appeals have been filed against the Judgment dated 27/08/2002

passed in S.T. No. 130/2001 by the First Additional Sessions Judge, Raipur, whereby the Appellants have been convicted under Section 376 (2) (g) of the IPC and sentenced to undergo RI for 10 years and to pay fine of Rs. 1000/- with default stipulation.

3. Facts of the case are that the Deceased/Prosecutrix was aged about 20 years. On 12/10/2000 at about 9:00-9:30 pm, she had gone to watch video film near Bharat Nagar, Kali Mandir. After watching the film at about 11:00 pm, when she was returning and reached near the house of Heerachand, some persons came and closed her mouth. They took her near the field of one Pathan. Thereafter, the Appellants committed rape with her. In any manner, she escaped from there and returned to her house. On the next day i.e. on 13/10/2000 at about 10:00 am, she tried to commit suicide by pouring kerosene oil on herself and setting herself on fire. She was taken to the Medical College Hospital, Raipur in burned condition, where she was medically examined by the doctors. In hospital itself, as per statement given by the Deceased/Prosecutrix, Dehati Nalsi was written vide Ex.P.-16. Thereafter, on the basis of said Dehati Nalsi, numbered FIR has been registered. During the treatment, dying declaration of the Prosecutrix was also recorded by Nayab Tahsildar Pranav Singh (PW18) vide Ex.P.-25. Both in Dehati Nalsi and dying declaration, the Prosecutrix has named Appellants and made allegations against them. During course of treatment, the Prosecutrix/Deceased died due to burn injuries. The postmortem of the dead body was conducted by Dr. Sanjay Kumar Dau (PW16). His report is Ex.P-22. Statement of witnesses were recorded under Section 161 of the Cr.P.C. After completion of investigation, the prosecution filed a charge-sheet against the Appellants as well as acquitted

accused Manish. The trial Court framed the charges against all the accused for the offence punishable under Sections 306 and 376 (2)(g) of the IPC. As many as 18 prosecution witnesses have been examined. Statement of the Appellants under Section 313 of the Cr.P.C was recorded, wherein they have pleaded their innocence and false implication in the matter.

4. After completion of trial, the trial Court has acquitted co-accused Manish from all the charges. The trial Court also acquitted the Appellants from the offence punishable under Section 306 of the IPC, however, they have been convicted and sentenced as mentioned in paragraph one of this judgment. Hence, these appeals.
5. Learned counsel appearing on behalf of the Appellants have submitted that the trial Court has wrongly convicted the Appellants without there being any clinching evidence available on record. It has been further submitted that the medical report of the Prosecutrix/Deceased does not support the case of the prosecution. According to the medical report, there was no injury found on the private part of the Prosecutrix and according to the statement of Dr. Smt. C.M. Pandey (PW12), no definite opinion regarding rape was given, therefore, in absence of any corroborating evidence, offence of rape is not sustainable. It has been further submitted that the alleged dying declaration is not in accordance with law and it becomes doubtful because in the dying declaration, time, signature of the Prosecutrix and her thumb impression are not there, however, in the Dehati Nalsi which was also recorded on the same day, thumb impression was affixed, therefore, the dying declaration is suspicious and doubtful. It has been further submitted that Dehati Nalsi too is doubtful because Dr. C.M. Pandey (PW12) has

categorically stated that the Prosecutrix sustained 30% burn injuries, she was in unconscious condition and her both hands were burned then how she was able to affix her thumb impression in Dehati Nalsi. Therefore, Dehati Nalsi is also doubtful. It has been further submitted that after the incident of burning, the Prosecutrix was firstly met with Sheela Bai (PW2) and Malti Bai (PW3), but she never disclosed the name of the Appellants to the said witnesses. In these circumstances, later on at the time of recording the Dehati Nalsi and dying declaration, how she disclosed the name of the Appellants is suspicious, therefore, the finding of the trial Court is not sustainable and the Appellants are entitled to get acquittal.

6. Per contra, State counsel opposes the prayed made by the counsel for the Appellants and supported the impugned judgment.
7. I have heard counsel for the parties and perused the records minutely.
8. Both Sheela Bai (PW2) and Malti Bai (PW3) only saw the Deceased/Prosecutrix on the date of incident. It was heard by them the Prosecutrix had burned, then they had gone to her house and saw the Prosecutrix in burned condition. The Prosecutrix was talking. According to Sheela Bai (PW2), the Prosecutrix told her in the night that 7-8 people had raped with her in the field, but she did not disclose the name of anyone. Both the above witnesses have not supported the further case of the prosecution and have been declared hostile. From the statement of Sheela Bai (PW2) and Malti Bai (PW3), it is established that they met with the Prosecutrix in her house and saw her in burned condition and at that time, the Prosecutrix was alive and talking. As stated by Sheela Bai (PW2), the Prosecutrix had told her that she was raped in the night.

Santosh (PW5) also deposed that after the incident of burning, he came to know that some people had done wrong thing with the Prosecutrix before the burning incident. This witness was also declared hostile. Anita Das (PW4), mother of the Prosecutrix deposed that the Prosecutrix was married and her husband had left her, therefore, she was residing with her. According to this witness, on the date of incident she had gone to the village of her sister and when she returned, she came to know that her daughter (Prosecutrix) has burned. This witness has also deposed that when she reached to the hospital to see her daughter, she was talking and weeping. On the next day she asked the Prosecutrix about the incident and the Prosecutrix told her that in the night when she was returning after watching the film then some people caught hold her and took her towards the field. She also told that the Appellants had committed rape with her. In para 5 of her cross-examination, this witness has deposed that the Prosecutrix had told about 10-12 persons and she does not know the remaining persons. Ku. Priti (PW6), sister of the Prosecutrix has deposed that the Prosecutrix was admitted in the hospital and when she met with her, at that time the Prosecutrix told her that when she had gone to watch the film, both the Appellants had committed rape with her. In para 5 of her cross-examination, she has categorically stated that at that time when her mother came to the hospital, the Prosecutrix was in conscious condition. Gayabati Bai (PW7) has not supported the case of the prosecution and has been declared hostile.

9. Dr. A.A. Saifi (PW8) and Dr. R.K. Tiwari (PW13) are the witnesses who medically examined the Appellants Roop Sahu and Sonu, respectively. According to the statement of the above doctors, it was found that the

Appellants were capable to perform sexual intercourse.

10. ASI K.L. Sinha (PW10) has recorded the Dehati Nalsi vide Ex.P-16. He deposed that on 13/10/2000 after getting information that the Prosecutrix has burned, he reached to the hospital and saw that the Prosecutrix was admitted in hospital. As instructed by the Prosecutrix, he recorded the Dehati Nalsi and taken her thumb impression. After returning to the police station, numbered FIR has been registered.
11. Dr. Smt. C. M. Pandey (PW12) has examined the Prosecutrix on 13/10/2000. According to this witness, there was no injury found in the private part of the Prosecutrix and two fingers were easily going inside. She further deposed that the Prosecutrix was burned about 30%. She has not given definite opinion regarding recent intercourse.
12. A.S. Khan (PW14) is the witness who investigated the matter. Dr. Sanjay Kumar Dau (PW16) conducted the postmortem of the dead body of the Deceased/Prosecutrix on 17/10/2000. His report is Ex.P-22. According to this witness also, the Prosecutrix was burned about 30%. As per external examination conducted by him, palm of the Deceased was not burned.
13. Dr. Pranav Singh (PW18) is the witness who recorded the dying declaration of the Prosecutrix on 13/10/2000 at Medical College, Raipur. According to this witness, before recording the dying declaration, he obtained certificate from Dr. Bhojraj Mohnani regarding capability of the Prosecutrix for recording her statement. In her dying declaration Ex.P-25, it was stated by the Prosecutrix that she previously knowing the Appellants and she also stated that both the Appellants had committed rape with her. In para 7, this witness has categorically stated that at the time of recording

the dying declaration, none of the relative of the Prosecutrix was present there. In para 9, this witness has further categorically stated that the Prosecutrix was properly replying to the questions asked by him, therefore, as per the opinion given by this witness, she was capable to give her statement. According to this witness, since the Prosecutrix was in burning condition, therefore, she was not capable to sign the dying declaration and therefore, her sign was not taken in the dying declaration.

14. On minute examination of above evidence, it is established that the rape was committed with the Prosecutrix. Though as per the medical report, no definite opinion regarding rape was given, since the Prosecutrix was a married lady, therefore, if there is no injury in per private part as she was habitual of sexual intercourse, only on this basis it cannot be said that rape has not been committed with her. From the statement of Sheela Bai (PW2) who is neighbor of the Prosecutrix, it is well established that immediately after the incident when she met with the Prosecutrix, the Prosecutrix told her that in the night she was raped. The above statement of this witness has not rebutted. Moreover, immediate after the incident, ASI K.L. Sinha (PW10) recorded the Dehati Nalsi vide Ex.P.-16, wherein the Prosecutrix had mentioned the names of both the Appellants. From the statement of Dr. Smt. C.M. Pandey (PW12), it is also well established that on 13/10/2000 itself, she had medically examined the Prosecutrix. Meaning thereby, the Prosecutrix was in conscious condition and there is no reason to disbelieve that Dehati Nalsi Ex.P-16 was not written on the instruction of the Prosecutrix. Apart from this, there is no evidence available on record, on the basis of which it can be said that the Prosecutrix and ASI K.L. Sinha (PW10) were having any previous enmity with the Appellants. In these

circumstances, it cannot be said that false and fabricated Dehati Nalsi has been prepared mentioning the names of the Appellants by ASI K.L. Sinha (PW10). On 13/10/2000 itself, the dying declaration of the Prosecutrix was recorded by Pranav Singh (PW18), wherein the Prosecutrix had mentioned the names of the Appellants. Though in the dying declaration Ex.P-25, there is no sign of the Prosecutrix, only on this count dying declaration cannot be made suspicious. According to the statement of Pranav Singh (PW18), the Prosecutrix was in burning condition, therefore, she was not able to sign and thus she had not signed. From the statement of Dr. Sanjay Kumar Dadu (PW16) who conducted the postmortem of the Prosecutrix/Deceased, it is also well established that at the time of external examination, no burn injuries was found in palm of the Prosecutrix/Deceased, therefore, the argument advanced by the counsel for the Appellants that Palm of the Prosecutrix was in burning condition and she was not able to make thumb impression, is not sustainable. Apart from this, Anita (PW4), mother of the Prosecutrix and Ku. Priti (PW6) sister of the Prosecutrix have also stated that when they talked with the Prosecutrix in the hospital at that time the Prosecutrix told them that the Appellants committed rape with her.

15. Looking to the above evidence available on record, in my considered opinion, the trial Court has rightly convicted the Appellants.
16. Consequently, I do not find any merit in these appeals. The Appeals are dismissed.

Sd/-
(Arvind Singh Chandel)
Judge