

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment Reserved on 13/08/2021****Judgment Delivered on 24/09/2021****CRA No. 1178 of 2002**

- Vishwanath Yadav S/o Kashiram Yadav aged about 22 years, Occupation- Private Work, R/o Kardoni, P.S. Dhaurpur, District-Surguja, Chhattisgarh.

---- Appellant**Versus**

- State of Chhattisgarh, Through : Police Station- A.J.K. Ambikapur, District-Surguja, Chhattisgarh.

---- Respondent

For Appellant	:	Mr. A. K. Prasad, Adv.
For State/Respondent	:	Mr. Sameer Sharma, Dy. G.A.

Hon'ble Smt. Justice Rajani Dubey**C A V Order****Date : 24/09/2021**

1. The present appeal arises out of the impugned judgment of conviction and order of sentence dated 28.10.2002 passed by the learned Special Judge (Atrocities), Ambikapur, District-Surguja (C.G.), in Special Sessions Trial No. 171/2000 whereby, the learned Special Judge (Atrocities), Ambikapur convicted the appellant and sentenced him as under :-

S. No.	Conviction	Sentence
1.	U/s 376 of IPC	R.I. for 7 years and fine of Rs. 5000/- in default of fine additional R. I. for 6 months.

2. Brief facts of the case are that on 27.05.1998 at about 10:30 a.m., the prosecutrix aged about 14 years, lodged an FIR against the appellant alleging therein that on 21.05.1998, her parents and family members were busy in marriage function of neighbour Devsay and she was all alone at her house. It is alleged that appellant Vishwanath came at house and demanded water. When prosecutrix gave water to the appellant, he caught

hold of her hands, dragged her to nearby field and committed forcible sexual intercourse with the prosecutrix. It has been further alleged that when Vishwanath was dragging her to the field, at that time, Rajkumar Uraon and Ajay Kumar Uraon saw him, and after some time when her brother Parmeshwar Prasad came there, he caught the appellant while he was trying to flee from the spot. Thereafter, her brother called the relatives of the appellant, and after some time, uncle of the appellant namely Bhola Yadav came there, brother of the prosecutrix narrated whole incident to him. Thereafter, an FIR Ex. P-12 was lodged against the appellant under Sections 376 of IPC and 3(1)(12) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act.

3. Permission letter for medical examination of the prosecutrix was obtained from the Sub-Divisional Officer vide Ex.P/14. Consent letter of father of the prosecutrix regarding medical examination was also obtained and on 27.05.1998 the prosecutrix was medically examined by Dr. Pratibha Rajul Jain (PW/7) vide Ex.P/4 who found no internal or external injuries and opined that the prosecutrix is habitual of sexual intercourse but no opinion could be given regarding recent sexual intercourse. Definite opinion could be given after chemical and microscopic examination of vaginal slides. For determination of age of the prosecutrix, x-ray was advised by the Doctor. X-ray of prosecutrix was done by Dr. S.K. Jain (PW/8) who gave his report vide Ex.P/6 opining the prosecutrix to be of 14 years old. The appellant was also medically examined by Dr. N.K. Pandey (PW/1), who gave his report vide Ex. P/1 and found the appellant capable for performing intercourse. Clothes of the prosecutrix were seized vide Ex.P/3. Seized articles were sent for chemical examination to FSL vide Ex.P/10 and, according to FSL report (Ex.P/11), no stain of sperm was found on the clothes of the prosecutrix. However, present of human sperm on the vaginal slides was confirmed. After completion of investigation charge-sheet was filed before concerned Court under Sections 376 of IPC and 3(1)(XII) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act and charges were framed under Sections 376 of IPC and 3(2)(5) and 3(1)(XII) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act.

4. So as to hold the accused/appellant guilty, the prosecution has examined as many as 12 witnesses. Accused also examined one defence witness in his defence. Statement of the accused/appellant was also recorded under Section 313 of the Cr.P.C. in which he denied the

circumstances appearing against him and pleaded innocence and false implication in the case.

5. Upon consideration of oral and documentary evidence the trial Court acquitted the appellant under Section 3(2)(5) and 3(1)(XII) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act and held that the prosecution has established the guilt of the accused under Section 376 of IPC and sentenced him as mentioned above.

6. Learned counsel for the appellant submits that impugned judgment of conviction and sentence is contrary to law and facts available on record. He further submits that there was hardly any reliable evidence on record to warrant the conviction of the appellant under Section 376 of IPC. The prosecution has failed to prove the guilt of the appellant beyond all reasonable doubts. He also submits that the important witness of the case i.e. prosecutrix could not be examined before the trial Court as she left for heavenly abode prior to the commencement of the trial and in absence of examination of the prosecutrix, it was not justified for the Court below to convict the appellant under Section 376 of IPC. The learned trial Court relying upon the statement of Parmeshwar (PW-2), who is the real brother of the prosecutrix, convicted the appellant, but his statement suffers from contradictions and omissions on material points. He also submits that the radiologist opined that age of the prosecutrix was about 14 years. It is well settled principle that in radiological test error of 3 years on both side is natural, in light of this legal position, the opinion regarding age of the prosecutrix is irrelevant. He next submits that the learned trial Court did not appreciate this fact that there is a delay in the FIR. The medical report as also FSL report do not support the case of the prosecution. He lastly submits that the prosecution story seems to be false and the judgment is based upon conjunctures and surmises as there is no reliable evidence against the appellant, therefore, conviction of appellant is liable to be set aside.

7. On the other hand State counsel supporting the impugned judgment of conviction and order of sentence, submitted that the trial Court has not committed any error of law. It is in strictly in accordance with law and no interference is called for.

8. Heard counsel for both the parties and perused the material available on record including the impugned judgment.

9. In this case, prosecutrix did not appear before learned trial Court because she died before commencement of trial. Bhola Yadav (PW-4), Rajkumar (PW-5), Mahesh (PW-6), Babulal (PW-11) and Anjay Kumar (PW-12) did not support the case of the prosecution and declared hostile. There is only brother of the prosecutrix Parmeshwar Prasad (PW-2) who supported the case of the prosecution and he has stated in para 4 of his statement :- *"After hearing Prosecutrix's cries, he went there and saw that she was crying and the accused had opened his pant. Prosecutrix narrated him the incident that she has been humiliated by Vishwanath".* This witness, in paras 11, 13, 21, 22 and 30 of cross-examination, admits as under :

11. *"It is true that water flows from the upper field to the lower field, but the water was stopped by Vishwanath's father by tying a ridge, because there was a dispute regarding the drainage of water."*

13. *"There is no relationship between the family members of Vishwanath and his family. He denied the suggestion that there is a cordial relationship between Vishwanath's and his family."*

21. *"It is true that he had told in his police statement that he hit the accused Vishwanath with his belt and called his uncle Bhola."*

22. *"It is true that the report of incident was lodged at police station after a week of the incident"*

30. *"It is true that his parents were at home when the accused was dragging the prosecutrix."*

10. Nirmal (PW-3) who is also a brother of the prosecutrix stated in his statement in para-13 and 17 that :-

13. *"When he reached the place of incident, Vishwanath and Parmeshwar were there. Prosecutrix came back to home. Soon after the incident, Bhola Yadav, uncle of the appellant, came there whom he (this witness) handed over the appellant."*

17. *"He narrated the incident which he heard something and seen."*

11. In this case, prosecutrix was not examined before the learned trial Court and other independent witnesses turned hostile and not supported the case of the prosecution. Therefore, the statement of Parmeshwar (PW-2) is very important but he admitted in his statement that they lodged the FIR after one week of the incident. It is clear from FIR (Ex.P/12) that date of incident is 21.05.1998 and FIR was lodged on 27.05.1998 i.e. after six days. The reason for delayed FIR has been explained by Parmeshwar (PW-2) that as the appellant person having criminal background, therefore, delay in lodging the FIR has been occurred. Dr. Smt. Pratibha Rajul Jain (PW-7) who examined the prosecutrix gave her report (Ex. P-4) and stated that she did not find any injury on body of prosecutrix and opined that the prosecutrix was habitual for sexual intercourse. This witness has also stated that definite opinion can not be given regarding recent sexual intercourse. This witness examined the prosecutrix after seven days of incident i.e. on 27.05.1998, and found no internal or external injuries. She stated in her cross-examination that no sign/symptom was available at the time of examination of the prosecutrix.

12. In this case, it is relevant to note here that the prosecution case is that the prosecutrix was dragged by the appellant to a nearby field and committed sexual intercourse. It is obvious that when a person is dragged on rough area then he may sustain some injury on his/her body, but in this instant case, according to Dr. Jain (PW-7), no injury was noticed on the body of the prosecutrix which create suspicion in the case.

13. The law is also well settled on the point that when the FIR of the incidence is belated and the delay is not explained properly, the FIR itself as also the case of the prosecution becomes doubtful and the accused becomes entitled for the benefit of doubt. In this case, FIR is delayed by 7 days and no plausible reason has been explained for delay. In the matter of **Om Prakash Vs. State of U.P.** reported in **AIR 2009 SC 944**, Hon'ble the Apex Court held in para 15, which reads thus :-

15. Delay in lodging the First Information Report has a great importance in a case of this nature. Enmity between the parties stands admitted. The prosecution case proceeded on the basis that immediately after occurrence and after shifting the dead body under a shed, the informant got the First Information Report scribed by Ganga Sahai and immediately thereafter proceeded on foot to the Police Station. If this part of the story is correct, the prosecution's case would not be subject to much doubt. But if the scribe of the First Information Report was

residing in a separate village which is 10 kms. away from the place of occurrence, and it was at that place the FIR was scribed whereafter PW1 arrived at the Police Station, it would impossible for him to reach by 4.30 in the morning. The prosecution did not examine the scribe of the First Information Report although his son has been examined as an eye-witness. If he was residing at the relevant time in the village where the incident had taken place, it was expected that either he had witnessed the occurrence or had reached the place of occurrence immediately after the accused fled away. The prosecution, therefore, should have made attempts to clarify this anomaly.

14. As per doctor's report, no external or internal injuries were found on the body of the prosecutrix and Dr. Jain (PW/7) also opined that no definite opinion can be given about recent sexual intercourse as she was accustomed to sexual intercourse. There are material omissions and contradictions found in the statement of PW-2 and PW-3 and no independent witness has supported the case of the prosecution. More important point is that prosecutrix was not examined before the learned trial Court, therefore, the testimony of brother of prosecutrix, in the like nature, cannot be relied upon and liable to be rejected.

15. In view of the above facts and circumstances of the case, the conviction slapped by the learned trial Court is not based on proper appreciation of oral and documentary evidence, therefore, the impugned judgment of conviction and order of sentence dated 28.10.2002 is set aside. The appeal is allowed. The accused/appellant is acquitted of the charge levelled against him. As the appellant is on bail, he need not surrender and his bail bonds and sureties stand discharged. Fine amount, if any, paid be returned to the appellant.

Sd/-
(Rajani Dubey)
JUDGE