

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment Reserved on: 13/04/2017****Judgement Delivered on: 31 /05/2017****Criminal Appeal No. 2327 of 1998**

Inshar Ali, S/o Imdad Ali, Musalman, Aged about 28 years, R/o Village Nawagarh, P.S. Ambikapur, District Surguja (M.P.) (Now C.G.)

--- Appellant**Versus**

State of M.P. Through P.S. Ambikapur, District Surguja (M.P.) (Now C.G.)

---- Respondent

For Appellant	:-	Shri Shakti Raj Sinha, Advocate.
For Respondent/State	:-	Shri Ravindra Agrawal, P.L.

SB: Hon'ble Shri Justice Rajendra Chandra Singh Samant**(C.A.V.) Judgement**

1. This appeal has been preferred against the judgement of conviction and order of sentence dated 14-09-1998 passed by Second Additional Sessions Judge, Ambikapur, Surguja in S.T. No.373 of 1997 whereby and whereunder the learned Additional Sessions Judge has convicted the appellant for offence punishable under Sections 363, 366 and 376 (2) (g) of IPC and sentenced to undergo RI for 5 years with fine of Rs.500/-, under Section 366 of IPC and sentenced to undergo RI for 5 years with fine of Rs.500/- and under Section 376 (2)(g) of the IPC and sentenced to undergo RI for 10 years with fine of Rs.10,000/- respectively with default stipulations.

2. The case of the prosecution, in brief, is that prosecutrix (PW-2) is resident of village Bakalo and was working as labourer for her livelihood. On 13-10-1990, after doing labour work, prosecutrix (PW-2) was on her way to village and she took lift on cycle of Bisun (PW-3). While they were proceeding

towards her village, in the evening at about 5-00 O' clock, the appellant with acquitted co-accused persons intercepted them in the middle of the road and by using force, prosecutrix (PW-2) was taken by the appellant with the help of acquitted co-accused persons on a bicycle to village Shrigarh, where she was confined and during night time, the appellant committed forceful sexual intercourse with her twice without her willingness and consent. The appellant gave Rs.80/- to the prosecutrix (PW-2) and released her from confinement in the morning. After reaching her village, she narrated about the incident to her parents. FIR (Ex. P-3) was lodged by prosecutrix (PW-2) in Police Station Ambikapur.

3. During the investigation, medico legal examination of the prosecutrix was conducted by Dr. Smt. S.P. Jaiswal (PW-1) vide Ex. P-1. Clothes worn by the prosecutrix at that time were seized and sent for chemical examination to FSL. The appellant was also medically examined vide Ex. P-24. Age of the prosecutrix as informed was 16 years. Radiological test of prosecutrix (PW-2) was conducted by Dr. M.K. Jain (PW-6) and according to report of Radiologist, age of the prosecutrix was between 14 to 16 years. Statements of the witnesses were recorded under Section 161 of Cr.P.C. and after completing other investigative procedures, the appellant and acquitted accused persons were charged.

4. The appellant was charged under Section 363, 366 and 376(2)(g) of the IPC. Acquitted co-accused persons were charged under Section 376(2)(g)/34 of the IPC. On denial of charges, prosecution examined as many as seven witnesses. On examination under Section 313 of the Cr.P.C., the appellant and co-accused persons denied all the incriminating circumstances appearing against them, pleaded innocence and false implication in the crime in question

and no evidence was led by them. The impugned judgement was passed in which co-accused persons were acquitted of all the charges whereas the appellant was convicted by the trial Court as mentioned above.

5. The grounds in appeal are that the trial Court has passed erroneous judgement of conviction against the appellant without there being any basis of reliable evidence of the prosecution. Trial Court has wrongly recorded that the age of prosecutrix was below 16 years. The version of prosecutrix has not been supported by the medical evidence. Statement of prosecutrix (PW-2) is not reliable. The witnesses Bajru (PW-4) and Indermani (PW-5) have turned hostile. Hence, the appellant was entitled for acquittal.

6. It is submitted by learned counsel for the appellant that the age of prosecutrix (PW-2) as opined by radiologist was between 14 to 16 years and adding the margin of error of 3 years, the age of prosecutrix could have been determined as more than 18 years, which is in favour of the appellant/accused, as more than one view is possible on the basis of this report. There had been no specific documentary proof regarding the age of prosecutrix. Statement of prosecutrix is unreliable for the reason that on her medical examination, no injuries were found on the body and private part and that it was also reported by doctor Smt. S.P. Jaiswal (PW-1) that prosecutrix (married) was habitual of sexual intercourse. Further, there is no report of FSL examination to confirm the factum of sexual intercourse committed with the prosecutrix (PW-2) on record. For these reasons, the appellant was entitled for acquittal.

7. State counsel has opposed the grounds raised in this appeal and arguments submitted by learned counsel for the appellant and submitted that the prosecution case is proved beyond reasonable doubt and there is no scope for interference in the impugned judgement.

8. I have heard learned counsel for the parties, perused the judgement impugned and record of the Court below.

9. Considering the grounds raised in the appeal and arguments submitted from both sides, the question for determination before this Court is whether the conviction against the appellant is supported by the evidence of prosecution beyond all reasonable doubt?

10. Prosecutrix (PW-2) has stated in her evidence, that when she was on her way to village, she took lift on cycle of Bisun (PW-3) and while they were proceeding towards her village in the evening at about 5-00 O' clock, the appellant with acquitted co-accused persons intercepted them in the middle of the road, abducted her and put her in confinement in village Shrigarh for whole night and committed rape with her. When the appellant released her from his confinement in the morning at about 7 – 8 a.m., she met with her family members and went to Police Station Ambikapur to lodge report. Prosecutrix (PW-2) did not identify the co-accused persons but her identification regarding the appellant was very clear and unrebutted in her cross-examination. Further, she has explained in cross-examination that she was with the appellant during whole night till 8-00 a.m. in the next day morning, for this reason, she was able to identify him. There is no other statement in her cross-examination to suggest that prosecutrix willingly submitted and consented to sexual intercourse with the appellant. Hence, her statement stands proved in this respect that the appellant abducted her, confined and committed sexual intercourse with her against her will and without her consent.

11. Bisun (PW-3) has partly supported and corroborated the statement of the prosecutrix (PW-2), stating that in his presence, appellant abducted prosecutrix (PW-2) with the help of co-accused persons and took her towards

the village of Shrigarh. This witness has not followed them. This statement in cross-examination is totally unchallenged. Bajru (PW-4) has not supported the case of prosecution and declared hostile. In the morning, Indermani (PW-5) was informed about the incident by prosecutrix (PW-2).

12. No defence has raised by the appellant that prosecutrix accompanied him on her own free will and wilfully stayed with him for the whole night and further submitted to sexual intercourse by her own free will with consent. No question has been put to the witnesses of incident in this respect. Under these circumstances, the statement of prosecutrix (PW-2) is unchallenged, that the appellant is the person who abducted and raped her. Medical evidence (Ex. P-1) though states that no injury was found on the body and private part of the prosecutrix, but the same itself does not falsify the case of prosecution. There are many factors which may become a reason to surrender to the will of the rapist, which may be to secure herself from suffering injury. This is a case of unchallenged evidence of the prosecution. The only question which arises in this case is whether the conviction of appellant under Section 376(2)(g) of the IPC is a correct finding by the trial Court?

13. The trial Court has held in the impugned judgement that the offence under Section 376(2)(g)/34 of IPC is not proved against the co-accused persons, whereas a contrary finding has been given against the appellant that the appellant succeeded to abduct and rape of prosecutrix with the help of other persons. There being no identification of co-accused persons by the prosecutrix (PW-2), they have been acquitted of all the charges. Further, there is no statement of prosecutrix that 3 other persons were through out in the company of appellant till commission of offence of confinement and rape.

Hence, on the basis of this evidence, the appellant could have been convicted only for the offence of rape simplicitor under Section 376 (1) of IPC.

14. Explanation (1) of 376 2 (g) of IPC provides that where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of sub-section. The evidence of prosecutrix does not satisfy the requirement of Section 376(2)(g) of IPC.

15. On the basis of reasons aforementioned, the impugned judgement can be partially interfered only with respect to conviction. Hence, this appeal is allowed in part. The conviction of appellant is modified herewith and the appellant's conviction under Section 363 and 366 by the trial Court is up-held, but the conviction under Section 376 (2)(g) is set aside. In place of this, the appellant is convicted under Section 376(1) (Old law prior to amendment) of IPC. The sentence awarded to appellant under Section 363 and 366 of IPC by the trial Court is upheld and appellant is sentenced with RI for 7 years with fine of Rs.10,000/- as it is the minimum of sentence provided for this offence and in default of payment of fine, the appellant shall be required to further undergo RI for one year.

Sd/-
(Rajendra Chandra Singh Samant)
Judge