



2025:CGHC:7365

AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

CRA No. 891 of 2019

Judgment reserved on 19.11.2024

Judgment delivered on 10.02.2025

Gorakhnath Sharma S/o Devcharan Sharma Aged About 40 Years R/o Arun Kiran Stores, Metguda, Jagdalpur, District Bastar Chhattisgarh, District : Bastar(Jagdalpur), Chhattisgarh

... Appellant

versus

State of Chhattisgarh Through Station House Officer, Police Station Bodhghat, District Bastar Chhattisgarh., District : Bastar(Jagdalpur), Chhattisgarh

... Respondent

For the Appellant : Mr. Raj Kumar Pali, Advocate

Respondent/State : Mr. Pramod Shrivastava, Dy. GA

Hon'ble Shri Justice Narendra Kumar Vyas
CAV Judgment

1. This Criminal Appeal under Section 374 (2) of CrPC has been filed against the judgment of conviction and order of sentence dated 11.02.2019 passed by Additional Sessions Judge (FTC) Bastar Jagdalpur in Sessions Trial No. 32 of 2018, by which the appellant has been convicted under Sections

377, 376 and 304 of the IPC and has been sentenced to undergo rigorous imprisonment for 10 years to pay fine of Rs. 1000/-, in default of payment of fine to undergo additional RI for one year under Section 377 IPC, RI for 10 years to pay fine of Rs. 1000/- in default of payment of fine to undergo additional RI for one month under Section 376 IPC and RI for 10 years to pay fine of Rs. 1000/- in default of payment of fine to undergo additional RI for one month under Section 304 IPC with a direction to run the sentences concurrently.

2. The prosecution case, in brief, is that the appellant was the husband of the victim who was working as driver. On 11.12.2017 in the night the appellant committed unnatural sex with the victim against her will and thereafter he left her there and went to work. It is alleged that the appellant inserted his hand in the anus of the victim due to which the victim complained pain and narrated the incident to his sister and neighbours, subsequently she was admitted to Maharani Hospital for treatment from where a report was made to police Station Bodhghan and offence under Section 377 IPC under Crime No. 419/17 was registered against the appellant. Dying declaration of the victim was recorded before the Magistrate on 11.12.2017 wherein she has made a statement that due to forceful sexual intercourse by her husband she became ill. The same statement has been recorded in subsequent statement also. The victim during treatment died

in the hospital on 11.12.2017 thereafter merg intimation No. 61/17 under Section 174 CrPC was also registered and offence under Section 304 of the IPC was also added and the appellant was arrested on 11.12.2017. On completion of usual formalities, challan was filed before the Court on 09.03.2018. Learned Sessions Judge on hearing the parties and after appreciation of evidence and material on record convicted the appellant as mentioned above.

3. In order to bring home the guilt of the appellant, the prosecution has examined as many as 16 witnesses, Kalawati Sharma (PW-1), Taraknath Sharma (PW-2), Dr. Kolaskar Shashikant (PW-3), Indu Sharma (PW-4), Lalita Taram (PW-5), Smt. Archana Dhurandhar (PW-6), Priti Vishwakarma (PW-7), Kanchan Vishwakarma (PW-8), Dr. Rajgupta (PW-9), T.P. Pandey (PW-10), R.P. Baghel (PW-11), Dr. Khileshwar Sahu (PW-12), Kumkum Sahu (PW-13), Ketanram Kashyap (PW-14), Parmanand Bhoyar (PW-15), Surendra Baghel (PW-16). The accused did not examine any witness in his support only statement of the accused was recorded under Section 313 CrPC.
4. The victim was admitted in the hospital where her dying declaration (Ex.P-29) was recorded by the Executive Magistrate R.P. Baghel (Ex.P-11) and merg intimation (Ex.P-29) under Section 174 CrPC was recorded wherein she stated that due to unnatural sexual act committed by her husband,

she became ill and also stated that she cannot explain how she was injured and she has to give any further information.

The prosecution witnesses (PW-1) Kalawati Sharma, (PW-2) Taraknath Sharma were examined before the Court, they have turned hostile and have not supported the case of the prosecution.

5. Dr. Kolaskar Shashikant (PW-3) who has conducted the postmortem of the deceased was examined before the Court wherein he has stated that two perforations on rectum were present, 1st perforation is present on anterior side of rectum approximately 1 cm above the pelvic floor and 2nd perforation is present on left side of rectum about 2 cm above the pelvic floor. He opined that the cause of death was due to peritonitis and rectal perforation and duration of death on 11/12/2017 at 9.00AM and proved his report under (Ex.P-9).
6. R.P. Baghel (PW-11) the Executive Magistrate who has recorded the dying declaration of the deceased at Maharani Hospital Jagdalpur has stated before the Court that he has not recollected the name of the doctor in whose presence dying declaration was recorded. He has also admitted that he has not mentioned in the dying declaration Ex.P-29 that deceased has informed him that her husband has committed unnatural sexual act with her which caused injuries. He has also admitted that he has given statement other than dying declaration. He has voluntarily stated that the deceased has

informed him that her husband has done forceful unnatural sexual act with her but the same has not been mentioned in the dying declaration.

7. Kumkum (PW-13) deposed in her deposition that the victim called her at 7 AM in the morning and stated regarding pain in her stomach thereafter she called the other relative and took the victim to Maharani Hospital for treatment and her condition was serious.
8. Learned trial Court after appreciating evidence, material on record has convicted appellant for commission of offence under Sections 377, 376 and 304 of the IPC and sentenced him to undergo RI for 10 years with default stipulation. Learned trial Court while convicting the appellant has relied upon the dying declaration of the deceased and recorded its finding that the deceased stated that due to forceful physical relationship she became ill and it has proved that due to forceful physical relationship she became ill. Being aggrieved with the judgment of conviction and order of sentence of the trial Court the appellant has preferred this appeal before this Court.
9. Learned counsel appearing for the appellant submits that there is no legally admissible evidence available on record against the appellant and only on the statement of victim, appellant has been convicted for the aforesaid offence. He also submits that no cogent evidence is available on record

for holding the appellant guilty. He also submits that the statement of the accused was recorded under Section 313 CrPC wherein he denied incriminating circumstances appearing against him. He would further submit that the trial Court has not considered the statements of (PW-1) Kalawati Sharma and (PW-2) Taraknath Sharma wherein they have admitted in their court statements that the victim was suffering from piles soon after her first delivery, on account of which there used to be bleeding from her anus and pain in abdomen. He has also stated that the learned trial Court has relied upon the dying declaration of the deceased which is itself doubtful and corroboration with the statement of the doctor PW-3 is also illegal. The trial Court has also recorded its perverse finding that the appellant has inserted his hand in the anus of the deceased and committed rape causing pain in abdomen and blood was oozing from anus of the deceased. Therefore, the impugned judgment of conviction and order of sentence deserves to be set aside and the appellant be acquitted of the said charges.

10. On the other hand, learned counsel for the State supporting the impugned judgment submits that the prosecution has brought home the offence against the appellant and has proved the case beyond reasonable doubt, thus the appellant has rightly been convicted and sentenced for the aforesaid offence. He would further submit that the findings and the

approach of the trial court in this regard being based on proper appreciation of the evidence are in conformity with law, the same does not require any interference at this stage either for acquittal to the appellant or modifying his awarded conviction and sentence and would pray for dismissal of this appeal. Learned counsel for the State also opposes the submission and would submit that from the evidence produced before the trial Court, it is quite vivid that the appellant has attempted to commit rape, therefore, he has rightly been charged and sentenced, thus, he would pray for dismissal of the appeal.

11. I have heard learned counsel for the parties and perused the record.
12. From the above submissions made by the parties and the record of the trial Court, the points for determination for this Court are:-
 - (i) whether offence under Sections 376 and 377 of the IPC is attracted looking to the present facts and circumstances of the case when the accused and the victim are the husband and wife ?.
 - (ii) Whether in the present facts and circumstances of the case offence under Section 304 IPC is attracted and the finding of conviction by the trial court for conviction of offence under Section 304 is sustainable or not ?
13. To appreciate the point No. 1 it is expedient for this Court to attract Sections 375, 376 and 377 of the IPC which read as under:-

Section 375- penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions:

*First.*Against her will.

*Secondly.*Without her consent.

*Thirdly.*With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

*Fourthly.*With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

*Fifthly.*With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

*Sixthly.*With or without her consent, when she is under eighteen years of age.

*Seventhly.*When she is unable to communicate consent.

*Explanation 1.*For the purposes of this section, "vagina" shall also include labia majora.

*Explanation 2.*Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1. A medical procedure or intervention shall not constitute rape.

Exception 2. Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

Section 376- Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which ¹ [shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine].

(2) Whoever,—

(a) being a police officer, commits rape—

(i) within the limits of the police station to which such police officer is appointed; or

(ii) in the premises of any station house; or

(iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

(b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

(c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or

(d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or

(e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g) commits rape during communal or sectarian violence; or

(h) commits rape on a woman knowing her to be pregnant; or

(j) commits rape, on a woman incapable of giving consent; or

(k) being in a position of control or dominance over a woman, commits rape on such woman; or

(l) commits rape on a woman suffering from mental or physical disability; or

(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

(n) commits rape repeatedly on the same woman,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Explanation.—For the purposes of this sub-section,—

(a) "armed forces" means the naval, military and air forces and includes any member of the Armed Forces constituted under any law for the time being in force, including the paramilitary forces and any auxiliary forces that are under the control of the Central Government or the State Government;

(b) "hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation;

(c) "police officer" shall have the same meaning as assigned to the expression "police" under the Police Act, 1861 (5 of 1861);

(d) "women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or an institution called by any other name, which is established and maintained for the reception and care of women or children.

[(3) Whoever, commits rape on a woman under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty

years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this subsection shall be paid to the victim.

Section 377 - Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with ¹ [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. *Explanation*.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

14. From perusal of Section 375, 376 and 377 IPC it is quite vivid that in view of amended definition of Section 375 IPC, offence under Section 377 IPC between husband and wife has no place and, as such rape cannot be made out. It is pertinent to mention here that in the amendment in Section 375 IPC in the year 2013, Exception- 2 has been provided which speaks that sexual intercourse or sexual acts by a man with his own wife is not a rape and therefore if any unnatural sex as defined under section 377 is committed by the husband with his wife, then it can also not be treated to be an offence. It is quite vivid that Section 377 i.e. unnatural sex is not well-equipped and offender is not defined therein but body parts are well defined, which are also included in Section 375 i.e. carnal intercourse against the order of nature. while considering the constitutionality of Section 377 IPC

criminalizes 'carnal intercourse against the order of nature' which among other things has been interpreted to include oral and anal sex. Obviously, Section 377 of IPC is not well-equipped as unnatural offence has also not been defined anywhere. The five-judge Bench of the Hon'ble Supreme Court in *Navtej Singh Johar* while testing the constitutionality of said provision has held that some parts of Section 377 are unconstitutional and finally held that if unnatural offence is done with consent then offence of Section 377 IPC is not made out.

15. Considering the said legal position and in the light of amended definition of Section 375 and the relationship for which exception provided for not taking consent i.e. between husband & wife and not making offence of Section 376, it is quite vivid that the definition of rape as provided under Section 375 includes penetration of penis in the parts of the body i.e. vagina, urethra or anus of a woman for which consent is not required then unnatural sex cannot be made as unnatural offence between husband and wife, as such apparently, there is repugnancy in these two situations in the light of definition of Section 375 and unnatural offence of Section 377. It is also well settled principle of law that if the provisions of latter enactment are so inconsistent or repugnant to the provisions of an earlier one then the two cannot stand together and earlier is abrogated by the latter.

Thus, it is quite clear that at the same time, as per the definition of Section 375 of IPC, the offender is classified as a 'man'. Here in the present case, the appellant is a 'husband' and victim is a 'woman' and here she is a 'wife' and parts of the body which are used for carnal intercourse are also common, therefore, the offence between husband and wife cannot be made out under Section 375 IPC as per the repeal made by way of amendment and in view of repugnancy between both the sections. It is quite vivid that when everything is repealed under Section 375 of IPC then how offence under Section 377 of IPC would be attracted if it is committed between husband and wife. The Hon'ble Supreme Court in the case of **Navtej Singh Johar and others vs. Union of India through Secretary, Ministry of law and justice 2018(10) SCC 1** has considered the provisions of Section 375, 376 and 377 and held as under:

“268.11. A cursory reading of both Section 375 and 377 IPC reveals that although the former section gives due recognition to the absence of "wilful and informed consent" for an act to be termed as rape, per contra, Section 377 does not contain any such qualification embodying in itself the absence of "wilful and informed consent" to criminalise carnal intercourse which consequently results in criminalising even voluntary carnal intercourse between homosexuals, heterosexuals, bisexuals and transgenders. Section 375 IPC, after the coming into force of the Criminal Law (Amendment) Act, 2013 has not used the words "subject to any other provision of the IPC". This indicates that Section 375 IPC is not subject to Section 377 IPC.

268.12. The expression "against the order of nature" has neither been defined in Section 377 IPC nor in any

other provision of the IPC. The connotation given to the expression by various judicial pronouncements includes all sexual acts which are not intended for the purpose of procreation. Therefore, if coitus is not performed for procreation only, it does not per se make it "against the order of nature."

16. Thus, it is quite vivid, that if the age of wife is not below age of 15 years then any sexual intercourse or sexual act by the husband with her wife cannot be termed as rape under the circumstances, as such absence of consent of wife for unnatural act loses its importance, therefore, this Court is of the considered opinion that the offence under Section 376 and 377 of the IPC against the appellant is not made out. Even otherwise, from the alleged dying declaration which has lost its sanctity in view of evidence of person who has written the dying declaration of the deceased. The careful scrutiny of the dying declaration by this Court itself the same cannot be found to be sufficient for recording of the conviction as there is no corroboration from other evidence, as such there is doubt over the correctness of the dying declaration. The Hon'ble Supreme Court in the case of **Naeem vs. State of Uttar Pradesh in Criminal Appeal No. 1978 of 2022** reported in 2024 INC169 decided on 05.05.2024 has held as under in paragraph 6 and 7:-

"6 Undisputedly, in the present case, the conviction is based solely on the dying declaration (Ext. Ka-6). The law with regard to conviction on the sole basis of dying declaration has been considered by this Court in a catena of judgments. After considering the earlier judgments, this Court, in the case of *Atbir vs. Government of NCT of Delhi*, has laid down certain

factors to be taken into consideration while resting the conviction on the basis of dying declaration. It will be apposite to refer to para (22) of the said judgment, which reads thus:

“22. The analysis of the above decisions clearly shows that:

(i) Dying declaration can be the sole basis of conviction if it inspires the full confidence of the court.

(ii) The court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.

(iii) Where the court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.

(iv) It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

(v) Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.

(vi) A dying declaration which suffers from infirmity such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.

(vii) Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.

(viii) Even if it is a brief statement, it is not to be discarded.

(ix) When the eyewitness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.

(x) If after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration.”

7. It can thus be seen that this Court has clearly held that dying declaration can be the sole basis of the conviction if it inspires the full confidence of the court. The Court is required to satisfy itself that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination. It has further been held that, where the Court is satisfied about the dying declaration being true and voluntary, it can base its conviction without any further corroboration. It has further been held that there cannot be an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. It has been held that the rule requiring corroboration is merely a rule of prudence. The Court has observed that if after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration.

17. So far as Section 304 IPC is concerned, learned trial Court has not recorded any finding how the offence under Section 304 of the IPC is attracted to the present facts of the case and proved by the prosecution, still it has convicted the appellant under Section 304 IPC which is nothing but perversity and patent illegality which is deserve to be interfered by this Court while exercising Appellate Court power under Section 386 of the CrPC as the finding of conviction is based on no evidence or on perverse findings. Accordingly, conviction of the appellant under Section 304 IPC deserves to be quashed and it is quashed.
18. Considering the law laid down by the Hon'ble Supreme Court in case of Naeem (supra), material and evidence on record the impugned order of conviction dated 15.05.2019 in

criminal case No. 32 of 2018 passed by learned Additional Sessions Judge FTC Bastar deserves to be set aside and is hereby set aside.

19. Accordingly, the appeal is allowed. The accused is acquitted of the charges levelled against him under Section 376, 377 and 304 of the IPC. It is reported that the appellant is in jail, he be released forthwith, if not required in any other case. It is made clear that fine amount, if any deposited by refunded to the appellant.

Sd/-

(Narendra Kumar Vyas)
Judge

Santosh