

**HIGH COURT OF CHHATTISGARH, BILASPUR****CRA No. 1758 of 1998**

1. Shriram Shymle S/o Hiraram Gond, age 31 years, Occupation Service, (Constable) R/o Mayapur, Ambikapur, District Sarguja, MP (now CG).

---- Appellant

**Versus**

1. State Of MP (now CG) through : P.S. Chandini, District Sarguja

---- Respondent

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| For Appellant.  | - | Mr. Shakti Raj Sinha, Advocate. |
| For Respondent. | - | Mr. Adil Minhaj, PL             |

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**Hon'ble Shri Justice Pritinker Diwaker****Judgment On Board****17/11/2015**

This appeal is directed against the judgment and order dated 24.7.1998 passed by Additional Sessions Judge Surajpur in Sessions Trial No. 100/1991 convicting the accused/appellant under Sections 376 (1) and 450 IPC and sentencing him to undergo rigorous imprisonment for seven years + fine of Rs. 2000/- and rigorous imprisonment for three years + fine of Rs. 500/-, respectively.

2. Facts of the case in brief are that on 30.4.1990 a written report Ex. P-2 was lodged by the prosecutrix (PW-2) alleging that on the previous night i.e. 29.4.1990 when she was sleeping in her house along with her niece and her husband had been out on patrolling duty, the accused/appellant entered therein, gagged her mouth, asked her to keep quiet under the threat of life and in spite of protest being raised,

committed forcible sexual intercourse with her. It is alleged that while indulging in sex, the accused/appellant drew his mouth nearer to her cheek and then she could sense the foul smell of wine emanating therefrom. It is further alleged that after the act was over, the accused/appellant again reminded her of keeping quiet and saying so he went away from the back door. Thereupon, she is alleged to have raised cries and on hearing which her niece woke up and entire incident was narrated to her. Meanwhile, her husband returned home and she disclosed the entire incident to him also. Based on this written report, FIR Ex. P-3 was registered against the accused/appellant under Sections 376 and 456 IPC and the prosecutrix was medically examined vide Ex. P-10. After completion of investigation, charge sheet was filed by the police for the same offence followed by framing of charge by the Court below.

3. To hold the accused/appellant guilty, prosecution has examined 14 witnesses in support of its case. Statement of the accused/appellant was also recorded under Section 313 of the Code of Criminal Procedure in which he denied the charge levelled against him and pleaded his innocence and false implication in the case.

4. After hearing the parties, the trial Court has convicted and sentenced the accused/appellant as mentioned above in paragraph No.1 of this judgment.

5. Counsel for the accused/appellant submits that present appears to be a case of consent as according to the statement of the prosecutrix at the relevant time she was sleeping in her house along with her niece aged about 15 years but no hue and cry was raised by her. He submits that had any alarm been raised by the prosecutrix, her

niece sleeping nearby would have woken up and come to her rescue. According to the counsel for the accused/appellant, the prosecutrix is said to have been sleeping in her house by bolting the door from inside and if it was so, there was no chance for the accused/appellant to have gained entry thereto and committed the crime as alleged by her. According to him, the version of the prosecutrix that she allowed the appellant to have sex with her being under the impression that it was her husband but after she sensed the liquor smell emanating from his mouth she realized that it was someone else, is highly improbable. Counsel for the accused/appellant submits that the physical relation made between the accused and the prosecutrix appears to be consensual and the possibility of taking recourse to the lodgment of report after being seen in compromising position by her niece and husband cannot be given a complete go-bye.

6. On the other hand, counsel for the respondent/State supports the judgment impugned and submits that the findings recorded by the Court below convicting the accused/appellant under Sections 376 and 450 IPC are strictly in accordance with law and there is no infirmity in the same.

7. Heard counsel for the parties and perused the evidence on record.

8. Prosecutrix (PW-2) has stated in her evidence that on the date of incident at about 9.30 PM her husband – an employee of police department had been out on patrolling duty and when she was sleeping in her house along with her niece Prema Bai (PW-3), at about 11-11.30 in the night the accused/appellant came there and started touching her body and till then she remained under the impression that it was her husband but as soon as she sensed the smell of wine, she

came to know that it was some other person as her husband never took liquor. The prosecutrix has then stated that the accused/appellant asked her not to raise cry or else he would finish her and after gagging her mouth he committed forcible sexual intercourse with her and also tore her blouse. She went on to state that as soon as the accused removed his hand from her mouth, she raised an alarm on hearing which her niece woke up and then the accused left the spot. Apart from the husband of the prosecutrix, other persons of the vicinity are also stated to have rushed to the spot on hearing her cries, and then she narrated the entire incident to her husband as well. In cross-examination, she has stated that after her husband left for his workplace, she used to remain in the house after bolting the door from inside and switching on the light; and on the date of incident also she had done so. According to this witness, on the date of incident when the accused/appellant switched off the light after gaining the entry to her house and started touching her, she woke up and after being threatened of life she was subjected to forcible sexual intercourse by him. Describing the manner in which she was subjected to rape, the prosecutrix has stated that during that act except raising cries, she did not make any physical resistance like kicking, biting or nail-scratching the accused as a mark of protest. In paragraph 18 she has admitted that the door bolted from inside cannot be opened by a person present outside and it can be opened from inside only.

9. Premavati (PW-3) – the niece of the prosecutrix has stated that on the date of incident after hearing the cries of her aunt (prosecutrix) she woke up and saw the accused getting out of the house. According to this witness, previously also the accused used to visit her house though occasionally. Mirabai (PW-6) has stated that on

the date of incident niece of the prosecutrix came to her and informed that her aunt was not well and thereupon when she came to her house, the prosecutrix informed her that the accused/appellant had entered her house from the back door. Jainath Bhagat (PW-8) is the husband of the prosecutrix who has stated in his evidence that on the date of incident at about 11-12 in the night he was in the police outpost adjacent to his house and after hearing the cries "*bachao bachao*" he rushed home and tried to open the door but did not succeed in doing so as the door was shut from inside. After a while, on door being opened by his niece when he got in, the prosecutrix informed him about being subjected to bad work by the accused/appellant. Thereafter, he came out and informed the people of neighborhood about the incident. Dinesh Prasad (PW-9) – has stated that husband of the prosecutrix took him to his house where he came to know about the entire incident of rape. Dr. (Smt.) S. Shrivastava (PW-11) is the witness who medically examined the prosecutrix and gave her report Ex. P-10 stating that she did not find any injury on her body, her hymen was old torn, no pain was complained of, she was habitual to sexual intercourse and no opinion regarding rape could be given by her. She has further stated that in rape victim, injury on the thigh is necessarily to be found. Shambhunath Tiwari (PW-12) is the witness who recorded FIR Ex. P-3 on the basis of written report Ex. P-2 lodged by the prosecutrix.

10. Having gone through the written report (Ex.P-2) lodged by the prosecutrix and the FIR (Ex.P-3) registered on the basis of it and her deposition recorded in the Court, makes one thing clear that her stand at all the places is not consistent. According to her, on the date of incident while her husband was on night patrolling duty, she was

sleeping in the house along with her niece by bolting the door from inside as usual and keeping the light on and at that time the accused/appellant came there, started touching her body parts, and after switching off the light made physical relations with her, which she did not oppose being under the impression that the person having sex was her husband and it is after she sensed the foul smell of liquor emanating from his mouth, she raised cries but her mouth was gagged by him and she was asked to keep quiet under the threat of life. All this appears to be a very unnatural and improbable creation at the hands of the prosecutrix. The material available on record goes to suggest that it was a case of consent and after being seen in a compromising position by her niece and the husband, the prosecutrix did not find the way out to avoid her exposure as a promiscuous woman has taken the recourse of a false report. It is very strange that the cries said to have been raised by the prosecutrix did not fall in the ears of her 15 year old niece sleeping nearby which could wake her up and come to her rescue and it implies that no cries were raised during the act of sex. That apart, if the mouth of the prosecutrix was gagged as stated, she could have resisted the act of the accused by biting, kicking, nail-scratching etc. but she has not done anything like that which is apparent from her evidence itself where she has stated that except raising cries she did not make any physical protest. Even the doctor medically examining the prosecutrix did not notice any injury on her body showing an effort made to resist the act of the accused. What is very surprising is that the accused is said to have gained entry in the house in spite of the door being bolted from inside which even the prosecutrix has denied its possibility. Thus the entire material being viewed from every angle does not suggest the subjection of the

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prosecutrix to rape rather all this has happened consensually but having been seen entangled with each other by her husband and the niece, a bogus story has been fabricated to cover-up her promiscuity.

11. Trial Court has thus gone wrong in appreciating the evidence and slapping the conviction on the appellant as shown above. Findings recorded by the Court below are not in consonance with the evidence of the witnesses and being so they are made to go. Judgment impugned is thus set aside by allowing the appeal. Appellant is acquitted of the charges levelled against him. Since he is already on bail, no order regarding his release etc. is necessary.

Sd/-  
Pritinker Diwaker

Jyotishi