

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 938 of 1999**

- Lokesh Kumar @ Guddu

---- Appellant**Versus**

- The State of Madhya Pradesh (now CG)

---- Respondent

For appellant : Mr. Prateek Sharma and Ms. Sunita Jain, Advocates.
 For Respondent/State : Mr. Akhilesh Mishra, Panel Lawyer.

Hon'ble Shri Justice Chandra Bhushan Bajpai**Judgment****13/03/2015**

1. Challenge in this appeal is to the judgment of conviction and order of sentence dated 30-3-1999 passed by the 2nd Additional Sessions Judge, Baloda Bazar, Distt. Raipur in Sessions Trial No. 244/1998 whereby and whereunder learned trial Court after holding the appellant guilty of committing house trespass in order to commit offence punishable with imprisonment of life and for committing rape with the prosecutrix P.W. 1 (name not mentioned), convicted him under Sections 450 and 376 of the Indian Penal Code, 1860 (in brevity 'Code') and sentenced him to undergo RI for 5 years and 10 years and to pay a fine of Rs. 500/- and Rs. 1,000/-, and in default of payment of fine to further undergo SI for 3 months and 6 months respectively with a direction to run both the substantive jail sentences concurrently.
2. Conviction is impugned on the ground that without there being an iota of evidence, learned Court below has convicted and sentenced the appellant as aforementioned and thereby committed illegality.
3. As per case of the prosecution, on 5-6-1998 at about 11.10 am,

prosecutrix P.W. 1 reached to the police station Kasdol and lodged FIR Ex. P-1 as Crime No. 77/1998 under Sections 450 and 376 of the IPC against the appellant stating that her husband runs a grocery shop in his house. On 2-6-1998 at about 4 pm when she was all alone in her house, appellant came and asked for cigarette. Since the cigarette was out of stock, she bolted the door of the shop and came in her room. Then the appellant came inside the room and forcibly caught her. After removing her cloths committed rape against her will and consent and threatened her that if she discloses it to others, he will kill her. At this moment, her husband came and on seeing him, the appellant tried to hide himself but her husband noticed him and beat him. Thereafter the appellant ran away who is witnessed by P.W. 9 Phooldas Kotwar. Thereafter she narrated entire incident to her husband. Since the appellant was son of a politician and a gunda element, on account of fear she went to her mother P.W. 5 Puratan Bai at Korba and narrated the incident to her. On 4-6-1998 she returned to Kasdol along with her husband. Her husband told about the incident to his father Hariram (P.W. 4) and uncle Shriram (P.W. 3). After recording FIR lodged by prosecutrix, police started investigation. The prosecutrix was sent for medical examination. P.W. 7 Dr. Smt. Raje Devdhar examined the prosecutrix and noticed 4 to 5 marks of abrasion at lateral aspect of middle of left forearm, one was slight deep. No bleeding was noticed. Colour of abrasion was reddish. Besides this no external or internal injury was noticed by the doctor as she was habituated to sexual intercourse. Doctor opined that no definite opinion can be given about rape. The doctor also referred the cloths to FSL

for chemical examination. She gave her report vide Ex. P-8. The Investigating Officer P.W. 13 Prithvi Dubey prepared the spot map vide Ex. P-2. Patwari prepared spot map vide Ex. P-3. Cloth containing mark of stains was seized from the prosecutrix vide Ex. P-4. The appellant was arrested vide arrest memo Ex. P-7. His undergarment was seized vide Ex. P-6. Appellant was sent for medical examination. P.W. 15 Dr. Y.K. Sharma examined the appellant and noticed two abrasions, two swelling over left forearm, right forearm and at knee caused by hard and blunt object. As per doctor's report the appellant was capable of doing intercourse. The doctor also examined undergarment of the appellant and referred for chemical examination vide Ex. P-9. The articles seized were sent for chemical examination to FSL, Raipur. Presence of semen stain and human spermatozoa was not found in the articles sent for chemical analysis. Only the presence of blood was noticed in the cloths seized from the prosecutrix. Statement of witnesses were recorded under Section 161 of the Code of Criminal Procedure, 1973 (in brevity 'Code'). After completion of investigation charge sheet was filed before the Additional Chief Judicial Magistrate, Baloda Bazar on 13-6-1998 who in turn committed the case to the Court of Session, Raipur. Learned Additional Sessions Judge, Baloda Bazar received the case on transfer and conducted trial. Appellant was charged for the offence under Sections 450 and 376 of IPC. He denied the charges and prayed for trial.

4. During trial, prosecution examined as many as 15 witnesses to prove guilt of the appellant. Statement of the appellant was recorded under Section 313 of the Code in which he abjured his guilt, pleaded innocence and false implication in the crime in question.
5. Appellant also examined defence witnesses D.W. 1 Jankidevi, D.W. 2

Jagatram, D.W. 3 Fagudas and D.W. 4 Lateldas. As per defence witnesses, application for water connection was denied by mother of the appellant, also as instigated by some other people, the appellant was falsely implicated. On 2-6-1998, the appellant was present at Bhurkunda PS Masturi.

6. After hearing both the parties, learned trial Court convicted and sentenced the appellant as aforementioned.
7. I have heard learned counsel for the parties and perused the record of the trial Court including impugned judgment.
8. Learned counsel for the appellant vehemently argued that FIR was lodged after 3 days of the crime. Reason for delay is not satisfactorily explained. The place of incident is about 1 km away from Kasdol police station even then report was lodged after three days. There is no medical corroboration by P.W. 7 Raje Devdhar as there was no external or internal injury except 4 to 5 minor abrasions for which no period of receiving those injuries is assessed. When the examination was conducted after three days, it may not be said that those abrasions came during incident. She further argued that prosecution P.W. 1 is a married lady having three children. As per P.W. 3 Shriram, she is second wife of her husband. There are variations in the statement of prosecutrix and her husband P.W. 2. As per P.W. 2 Radheshyam in para 1 when he returned from market he saw the appellant in a hidden condition in his house and his wife the prosecutrix was in front of the house. On the other hand as per prosecutrix in para 1 when her husband entered into the house, the appellant made attempt to hide himself and he was noticed by her husband. Her husband attempted to catch him but the appellant escaped. This is a major contradiction in both the witnesses. He also argued that prosecutrix did not make any alarm when appellant entered her house. P.W. 3 Shriram and P.W. 4 Hariram resided at

Kasdol itself and if she lodged report as per advice of these two persons then why instead of contacting with them on 2-6-1998 itself they proceeded to Korba for meeting mother of the prosecutrix and thereafter when they returned on 4-6-1998 after taking advice of P.W. 3 Shriram and P.W. 4 Hariram they lodged the report. It all goes to show that the delay is not satisfactorily explained and it is fatal for the prosecution. The prosecutrix admitted in para 3 that she had not lodged any report of her own. She lodged the report as per advice of mother-in-law and father-in-law and if they did not advise so, she would not have lodged any report. It goes to show that the act was not committed against the will and consent. Why a married lady will leave this question to her mother-in-law and father-in-law. At the most she can take advice of her husband who reached to the spot immediately after commission of the offence. Learned counsel further submits that as per para 2 of her cross-examination when she was in the room, the shop was closed. The appellant called for Cigarette thereafter she entered into the shop, since the cigarette was out of stock she closed the shop and returned to her room. The appellant entered into the room after a while. This contradiction appearing in her police statement Ex. D-1 makes the conduct and case suspicious.

9. Learned counsel further submitted that as per entire prosecution story, the appellant committed rape with prosecutrix in standing position. Looking to the facts and circumstances of the case, it is an improbable story and does not inspire confidence. Learned counsel also submitted that she was threatened after commission of crime and not before rape. If she was not threatened at the time of incident why she had not called others or shouted. She also submitted that as per para 2 of her cross-examination, prosecutrix did not intend to lodge report due to her prestige but as appellant lodged

report, she also lodged report. In the present case there is no fact whether the appellant lodged any report against the prosecutrix of any sort. As per para 3 of the statement of prosecutrix, when her husband came the appellant told him that police is in search of him that is why he had entered into the house. On the other hand, P.W. 2 Radheshyam does not support the above fact rather specially stated that he had not asked the appellant as to why he is hiding. It also shows the suspicious conduct of the prosecutrix. P.W. 4 father-in-law of the prosecutrix turned hostile, not supported the prosecution story. P.W. 3 Shriram also not said anything that the prosecutrix or her husband had taken any advice from him. P.W. 9 is village kotwar Phuldas who saw the appellant after the incident. This witness also has not supported the prosecution story and turned hostile. Learned counsel further submitted that this witness though accepted presence of the appellant outside the house of P.W. 2 Radheshyam but Radheshyam or the prosecutrix not informed him regarding incident of rape.

10. Regarding delay, learned counsel submitted that the reason assigned for delay in lodging FIR is fear and bad character of the appellant, but none of the prosecution witnesses has said anything regarding any criminal history of the appellant. The investigating officer also has not collected any material in this regard during investigation. In absence of any material regarding past criminal activities of the appellant, the reason of delay in lodging FIR does not appear to be plausible. In a normal course of conduct, the couple has to discuss at the most with their father who resided with them and immediately reach to the police station which is only one km away in hardly few minutes distance. Learned counsel further submitted that if there is no eye-witness, the statement of the prosecutrix has to be examined with great care. In the present case, above facts and circumstances and evidence do not prove

that the offence is committed against will and consent or the appellant trespassed for the offence. Hence the appeal may be allowed and the appellant may be acquitted of the charges.

11. Per contra, learned counsel for the State opposing the appeal argued that there is no reason to disbelieve the prosecutrix. Prosecutrix will not stake her prestige only because of denial of water connection. She was a married lady and was all alone in the room. The appellant committed rape with house trespass. Reaction on an act defers from person to person. On account of fear as the appellant was son of an influential politician they had taken a decision to leave for Korba and after taking advice they returned and after conversation with P.W. 4 Hariram and other family members they lodged the report. Looking to status of the appellant in the society, fear may not be held improbable. Hence as per the statement of the prosecutrix supported by statement of her husband, prosecution proved its case beyond probable doubt. Hence the appeal may be dismissed.

12. In order to appreciate the arguments advanced on behalf of the parties, I have perused the evidence adduced by the parties.

13. So far as plea that the appellant was not present at the time of incident as per defence witness is concerned, looking to the entire evidence, presence of the appellant on the spot may not be held as doubtful. Learned counsel also submitted that the appellant's case is based on consent and will. His presence was also noticed by P.W. 2 husband and also by P.W. 9 Phooldas Kotwar.

14. Now coming to the question whether there was consent or the offence was committed against the will and consent of the prosecutrix. For this, indisputably, there is delay of three days and the reason assigned is fear of the appellant and his mother being criminal and influential. Uncle and father

of P.W. 2 Radheshyam were residing in the same village, police station is only one km away from their house. Husband of the prosecutrix runs a grocery shop which goes to show their proper status in the village. It cannot be held that they are hand to mouth and very poor person and they may come under any influence particularly when rape is committed with a member of their family. Going to Korba to mother of the prosecutrix makes the case suspicious. In a normal reaction, the prosecutrix along with her husband would immediately reach to the house of P.W. 4 Hariram for informing him regarding the incident and for his suggestion what to do. P.W. 9 Phuldas Kotwar though not said anything directly but as per his evidence, there was dispute between the appellant and P.W. 2 Radheshyam. P.W. 2 Radheshyam did not inform him anything at the moment and P.W. 2 Radheshyam beat his wife by stick so that she may go to her parental house. It goes to show that P.W. 2 Radheshyam was not convinced with the prosecutrix and it was in his mind that the prosecutrix consented. That is why when P.W. 2 Radheshyam came to house he saw her wife standing outside, the appellant was present in his house in hidden condition. On the other hand, prosecutrix deposed that when her husband reached inside the house, the appellant started making attempt to hide himself which was noticed by the husband. This shows that prosecutrix had not attempted for protest, not shouted, not resisted. As per her evidence, she was threatened after commission of the crime. Before this if she was not threatened then she was free to call for help, shout etc. It is also worthwhile to note that when her husband came and if a person commits rape against her will and consent is hidden inside the house, it should be the normal reaction that the lady should have informed him immediately that this act is committed and the person is inside the house but looking to the entire conduct, it speaks for different fact. Also as per statement of the prosecutrix, upon the advice of

father-in-law and mother-in-law, she made a report otherwise should would not have lodged report and since the appellant lodged report she also lodged report which goes to show that she was not willing party for lodging the report. In a normal conduct if rape is committed against will and consent, then there is no question of others' advice for report. It is worthy to mention that the appellant is a neighbour of prosecutrix and he used to call her as Bhabhi. They were known to each other since 12 to 13 years as per para 3 of cross-examination. Also the fact deposed by the prosecutrix that when husband asked to appellant as to how he is in hidden condition in his house then the appellant told that police is in search of him that is why he had hidden himself in the house of P.W. 2 Radheshyam but this fact was categorically denied by PW 2 Radheshyam which goes to show that whatever prosecutrix was deposing is not corroborated by her husband. For the sake of presumption if this was the answer of the appellant it goes to show that he was not a person with criminal record or *dada* type personality because if he is hiding himself in the house of P.W. 2 Radheshyam as police was in search of him and if he committed rape with prosecutrix then it would be very favourable for the prosecutrix and her husband to immediately inform police that they are in search of appellant and appellant has committed this act of rape. It goes to show that the submission made by the prosecutrix during her cross-examination does not inspire confidence that she was subjected to intercourse against her consent and will. Also the alleged procedure of rape stated by prosecutrix seems to be improbable.

15. When incident of rape is not witnessed by anybody then it shall be the duty of the Court to examine minutely so that every conduct and there subsequent effect may be valued.

16. Argument of learned counsel for the appellant has great force that this is

not a case of rape against will and consent. Looking to the entire facts and evidence, it would not be safe to hold conviction of the appellant under Sections 450 and 376 of the IPC. The appellant deserves to be acquitted as prosecution has not proved its case beyond all probable doubt.

17. Consequently, appeal filed by the appellant is hereby allowed. The judgment of conviction under Sections 450 and 376 of IPC and order of sentence is set aside. The appellant is acquitted of all the charges. Fine amount if paid be refunded.

18. It is stated that the appellant is on bail. His bail bond shall continue for a further period of six months as per provisions of Section 437-A of IPC.

JUDGE

Pathak