

Single Bench

IN THE HIGH COURT OF CHHATTISGARH AT BILASPUR

CRIMINAL APPEAL NO. 1055 / 2012

Appellant

:

Duleshwar S/o Parasram Teli

(In Jail since 07.08.09)

Aged about 25 years, Occupation - Driver

R/o Village - Kas-hi, Thana - Dondi Lohara,

District - Durg-(C.G.)

.R.No.

Presented by Shri

dated

C.A. 1055/12
S. Rao
22.11.12

Versus

Respondent

:

State of Chhattisgarh

Through - Arakshi Kendra, Thana - Dondi

Lohara, District - Durg-(C.G.)

CRIMINAL APPEAL U/S 374 (2) OF THE CODE OF CRIMINAL

PROCEDURE

(39) AFR

HIGH COURT OF CHHATTISGARH : BILASPUR

SB : HON'BLE SHRI MANINDRA MOHAN SHRIVASTAVA, J.

Criminal Appeal No.1055 of 2012

APPELLANT

Duleshwar

Versus

RESPONDENT

State of Chhattisgarh

Present:

Shri Srinivas Rao, counsel for the appellant.

Shri Vinod Tekam, Panel Lawyer for the State.

J U D G M E N T

(Delivered on 19th February, 2015)

1. This criminal appeal is directed against the judgment of conviction and order of sentence dated 29th September, 2010 passed by learned Special Judge (S.C.& S.T. Act), Durg in Special Case No.43/2009, whereby and whereunder, the appellant has been held guilty of commission of offence under Sections 451, 450 and 376 (1) of the IPC and sentenced as under:

Conviction	Sentence
U/s. 451 of the IPC	R.I. for 1 year and fine of Rs.2000/-, in default of payment of fine, additional R.I. for 1 month
U/s. 450 of the IPC	R.I. for 7 years and fine of Rs.2000/-, in default of payment of fine, additional R.I. for 6 months
U/s. 376 (1) of the IPC	R.I. for 7 years and fine of Rs.2000/-, in default of payment of fine, additional R.I. for 6 months

2. Prosecution case is that on 1.8.2009 at about 4:15 p.m. in the evening, the appellant caught hold of the prosecutrix (P.W.6) in the house of her friend Ku. Aasin (P.W.7) and committed rape on her and when her maternal grandmother Dulourin Bai (P.W.8) returned from her maternal house, this fact was informed to her by the prosecutrix, a minor and, thereafter, Dulourin Bai along with *Kotwar* took the matter to the family members of the appellant and finally FIR in Ex.P-9 was lodged in the police station on 6.8.2009 at 12:50 hrs. against the appellant alleging commission of offence under Section 451 and 376 of the IPC and Section 3 (1) 12 of the IPC. The prosecutrix as well as appellant were subjected to medical examination. Their wearing apparel was seized. Diary statements were recorded. Seized articles were sent to Forensic Science Laboratory (FSL) for chemical analysis. As it came out during investigation, that the prosecutrix belongs to *halba* tribe, her caste certificate was also collected. It is said that prosecutrix was a minor. Birth certificate was also collected during investigation and charge sheet was filed in the Court of Special Judge, alleging commission of offence alleged as described above. Appellant abjured guilt. He was subjected to trial. In order to prove its case, the prosecution examined as many as 16 witnesses. The appellant was examined in connection with incriminating circumstances and evidence appearing against him in the prosecution evidence. The appellant denied and stated that he has been falsely implicated in the offence. No defence witness was examined.
3. Relying upon the evidence led by the prosecution particularly, the testimony of prosecutrix, learned trial Court held the appellant guilty of commission offence alleged against him and sentenced him as described above.

Assailing correctness and validity of the impugned judgment of conviction and order of sentence, learned counsel for the appellant argues that the prosecution story is highly doubtful and smacks of false implication of the appellant. He submits that the evidence of prosecutrix (P.W.6) suffers from serious contradictions and

omissions. The narration of story of she having been subjected to rape in the house of her friend is highly improbable and does not inspire confidence. It is next contended that the prosecutrix has given contradictory statement with regard to her conduct at the time when she was allegedly subjected to rape. Her conduct of not calling for any help though, the incident is said to have been committed in the house of her friend, shows that the prosecutrix is either telling lie or it was a case of consent. The evidence of prosecutrix is in serious contradiction with the testimony of her friend Ku. Aasin (P.W.7), who has stated that their hands were tied and mouth was gagged with a cloth, whereas prosecutrix (P.W.6) has denied suggestion that she was tied by any rope or any other article. This clearly shows that the prosecutrix has falsely implicated the appellant in the incident. He next submits that there is unexplained delay of 5 days in lodging FIR. The incident is alleged to have happened on 1.8.2009, whereas FIR was lodged on 6.8.2009 and the explanation offered by Dulourin Bai (P.W.8) does not, at all, satisfactorily explain such delay. The prosecutrix, as per the evidence of doctor, has been stated to be habitual to sexual intercourse. Thus, the prosecutrix herself being an unchaste girl, is not worthy of reliance and false implication cannot be ruled out.

5. On the other hand, learned counsel for the State submits that the prosecutrix was a minor girl aged 14 years. She has clearly deposed in her evidence that when she had gone to house of her friend Aasin, the appellant took her inside the house and committed rape on her. He submits that the suggestion that it can be a case of consent between the appellant and prosecutrix is inconsequential as the prosecutrix was minor on the date of commission of offence. Learned counsel for the State further submits that the prosecutrix has not stated that in the course of sexual intercourse, she had received any injury or was dealt with in a manner giving rise to certain injury. It is not necessary that in order to convict, the ocular testimony must, in all cases find supports from medical evidence. It is next contended

that evidence of Dulourin Bai (P.W.8) explains the delay that on the date of incident, she was not in the village and when she came back after 4 days from her matrimonial house, the incident was informed. It is next contended that the prosecutrix having stated regarding commission of rape on her, the other contradictions relating to the tying of her hands by rope, does not impeach the credibility of prosecution case because the girl was a minor one. In support of his submissions, learned counsel for the State relies upon the judgment of the Supreme Court in the case of **Puran Chand Vs. State of Himachal Pradesh**¹.

6. FIR in Ex.P-9 has been proved by Investigating Officer B.L. Negi (P.W.14) who has stated that on 6.8.2009 at about 12:30 hrs. on the report of prosecutrix, FIR was registered against the appellant and he has proved his signature in the FIR. He has also produced and proved the information given in Ex.P-17 sent to the Magistrate in compliance of the provision contained in Section 154 of the Cr.P.C.. Prosecutrix (P.W.6) has also deposed that she had gone to the police station along with her maternal grand-mother and lodged the report in Ex.P-9. She has proved her signature.
7. Prosecutrix (P.W.6) has stated that she was born in the year 1995 which has remained un-controverted in her cross-examination. Dr. B.K. Cladius (P.W.3) has deposed that the girl was approximately aged 12 years and upon examination of growth and development, he opined that the secondary sexual character were not fully developed and the prosecutrix appears to be approximately 12 years of age. Udal Singh (P.W.5) who is *Kotwar* of the village had proved the seizure of caste certificate and birth certificate. The birth certificate which was produced as Article 'B' during trial, records the date of birth of the prosecutrix as 10.9.1995. The evidence with regard to the age of the prosecutrix has not been controverted. Therefore, from the certificate of birth, it is revealed that on the date of incident, the prosecutrix was less than 15 years of age and minor.

¹ (2014) 5 SCC 689

8. Looking to the age of the prosecutrix and that she did not understand the meaning and import of oath, she was examined without administering oath. The prosecutrix has stated in para-3 of her evidence that her friend Aasin had called her in her house and when she was in her house, the appellant came in and asked for a glass of water. When Aasin brought water, he refused to take and stated that he would accept water only from prosecutrix. Thereafter, he caught hold of her hands and took her inside the house, removed clothes of and of his own, started kissing her, she was made to lie down on the floor and then he committed rape on her. She has further stated the appellant committed rape on her for about 10 minutes and thereafter at about 5:00 O'clock, the appellant left the house and threatened her that if she discloses to anybody, she would be killed. She has further deposed that her maternal grandmother was informed regarding incident, whereafter, her maternal grandmother went to the house of the appellant to tell regarding the incident. Then along with Kotwar and her maternal grandmother, she lodged report in the police station. She has proved her signature in FIR (Ex.P-9). She has denied suggestion that on the date of incident, mother and father of Aasin (P.W.7) were in the house. She has also stated that she had gone to police station on more than one occasion. She has also denied suggestion that appellant did not commit any act with her and that she is telling lie upon being tutored. A contradiction has been pointed out controverting the prosecutrix with her diary statement (Ex.D-1) that she had not stated that Aasin had called her in her house. The other contradiction which has been pointed out to impeach the credibility of the statement of the prosecutrix is that the prosecutrix has admitted that her hands were not tied and has stated that this was not stated by her to the police and she does know how this statement was recorded in Ex.D-1. She has also admitted that at the time of incident, she had cried for help but at that time, there was nobody in the house.

9. Aasin (P.W.7), who is the friend of the prosecutrix, has stated that the prosecutrix was subjected to rape by the appellant.
10. Learned counsel for the appellant vehemently submitted that while the prosecutrix (P.W.6) has stated that at the time when she was subjected to rape, she was not tied up by the appellant, her friend Aasin (P.W.7) has stated that she and prosecutrix both were tied up by the appellant. This being a serious contradiction in the case of the prosecution, speaks of the conduct of the prosecutrix and renders improbable the story of the prosecutrix having been subjected to rape.

Upon careful and close scrutiny of the evidence of these two witnesses and contradictions pointed out in the cross-examination, in the considered opinion of this Court, it does not cause dent to the reliability of the evidence of prosecutrix with regard to she being subjected to sexual intercourse. Such a contradiction might be relevant in a case where the accused has come out with the story that it was the consent of the prosecutrix. The prosecutrix in the case, as has been examined hereinabove, was less than 15 years of age on the date of incident. Therefore, this contradiction does not altogether demolish the case of the prosecution with regard to the prosecutrix being subjected to rape because in para-3 of her evidence, it is deposed that she was subjected to sexual intercourse by the appellant.

11. Dulourin Bai (P.W.8) has stated in her evidence that on the date of incident, she had gone to village- Manki for performing *pooja*. In para-6 of her cross-examination, she has stated that she has gone to village- Manki on Friday and then returned on Tuesday. That means she return on the fourth day from the date of incident. Thus, this prove that the prosecutrix, who was a minor, got the occasion to first inform her maternal-grand mother only on the fourth day of the incident when she returned. Dulourin Bai has further stated that after she came to know, she had gone to the house of the appellant and told his mother that her son had committed wrong and that she

would lodge report. She went to Sarpanch & Kotwar and then lodged report in the police station. Thus, the aforesaid evidence explains the delay which was caused in lodging FIR. It has to be noted that the prosecutrix was a minor girl, aged less than 15 years. Her maternal grand mother was not there in the house. There is no evidence to show that there were other members in the house who could have taken the prosecutrix for lodging report. The explanation, in the above context, constitutes a reasonable explanation for delay. Only on that ground, the case of the prosecution cannot be said to be fatal.

12. In a rape case, the prosecutrix remains worried about her future. She remains in traumatic state of mind. The family of the victim generally shows reluctance to go to the police station because of society's attitude towards such a woman. It casts doubts and shame upon her rather than comfort and sympathise with her. Family remains concern about its honour and reputation of the prosecutrix. After only having a cool thought, it is possible for the family to lodge a complaint in sexual offences (*please see- Karnel Singh Vs. State of M.P., AIR 1995 SC 2472; and State of Punjab Vs. Gurmit Singh & Ors, AIR 1996 SC 1393*)
13. While there is consistency in the judicial opinion in plethora of decisions that ordinarily the delay in filing FIR is to be looked in favour of the accused unless satisfactorily explained by the prosecution, in cases of sexual offence, their Lordships in the Supreme Court have held that a different approach is required to be adopted while testing the credibility and veracity of allegation of commission of sexual offence, including rape.

In the case of **Satypal Vs. State of Haryana**², their Lordships in the Supreme Court, while dealing with the aspect of delay in a case involving commission of offence under Section 376 of the IPC, observed as under:

² AIR 2009 SC 2190

"20. This Court can take judicial notice of the fact that ordinarily the family of the victim would not intend to get a stigma attached to the victim. Delay in lodging the first information report in a case of this nature is a normal phenomenon.".....

In yet another decision in the case of **State of Himachal Pradesh Vs. Prem Singh**³, it was held :

"6. So far as the delay in lodging the FIR is concerned, the delay in a case of sexual assault, cannot be equated with the case involving other offences. There are several factors which weigh in the mind of the prosecutrix and her family members before coming to the police station to lodge a complaint. In a tradition-bound society prevalent in India, more particularly rural areas, it would be quite unsafe to throw out the prosecution case merely on the ground that there is some delay in lodging the FIR. In that score, learned counsel for the appellant is right that the High Court has lost sight of this vital distinction."

14. Applying the aforesaid principles, the delay, in the facts and circumstances of the present case is not fatal, having been duly explained from evidence of Dulourin Bai (P.W.8) and the circumstances that the prosecutrix was a minor girl, less than 15 years of age being a tribal.
15. The submission of learned counsel for the appellant that the medical evidence does not support the ocular testimony of prosecutrix, is fallacious in law. If the evidence of the prosecutrix inspires confidence, the conviction can rest only on the testimony of the prosecutrix and it is not an invariable rule that it must necessarily

³ Air 2009 SC 1010



find support from the medical evidence. The prosecutrix has not stated in her evidence that she was either dragged or she received any injury due to any assault or any other reasons which has not been supported from the medical evidence.

16. In view of the above consideration, the conviction of the appellant does not warrant any interference.

17. The appeal is therefore dismissed.

Praveen

Sd/-
Manindra Mohan Shrivastava
Judge

CHHATTISGARH HIGH COURT

