

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 790 of 2011

1. Tazim Khustar Ansari S/o Mohd. Dildar Musalman, R/o Village Nawapara Khurd, P.S. Ramanuj Nagar, Distt.-Surguja, C.G.

**---- Appellant
(In Jail)**

Versus

1. State of Chhattisgarh, through Police Station- AJAK Surajpur, Police Distt. Surajpur, Distt. Sarguja (CG)

---- Respondent

For Appellant
For Respondent.

Shri Vivek Bhakta, Advocate.
Shri Adil Minhaj, Panel Lawyer.

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Inder Singh Uboweja

Judgement on Board

Per P. Diwaker, J

13/08/2015

1. This appeal arises out of the judgment of conviction and order of sentence dated 23.9.2011 passed by the Special Judge, Surguja (Ambikapur) in Special Sessions Trial No.97/2009 convicting the accused/appellant under Section 376 of the Indian Penal Code (for short 'the IPC') read with Section 3 (2) (v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short 'the Act of 1989') sentencing him to undergo rigorous imprisonment for life & fine of Rs.2,000/-, in default to undergo additional RI for 06 months.
2. As per prosecution case, on 3.4.2009 at about 6.45 p.m. the prosecutrix, a married tribal lady of about 22 years, lodged FIR (Ex.P-1) alleging therein that on that date at about 4.00 p.m. when she was all alone in her house as her husband and brother-in-law had gone to their work

place, the accused/appellant came and finding her all alone caught hold her hand, took her forcibly inside the room, lie her down on the ground and committed forcible sexual intercourse with her. Based on this report, numbered FIR (Ex.P-1A) was registered against the accused/appellant under Section 376 of the IPC and Section 3 (1) (xii) of the Act of 1989. The prosecutrix was medically examined by Dr. Rajshri Singhai (PW-4) on 4.4.2009 vide Ex.P-9. The accused/appellant was also medically examined vide Ex.P-11 by Dr. H.P. Singh (PW-5).

3. After completion of investigation, charge sheet was filed against the accused/appellant for the offence punishable under Section 376 of the IPC & Section 3 (1) (xii) of the Act of 1989, however, the Court below framed charges under Section 376 of the IPC read with Section 3 (2) (v) of the Act of 1989 against him.
4. In order to convict the accused/appellant, the prosecution examined 10 witnesses in all. Statement of the accused/appellant was recorded under Section 313 of Cr.P.C. in which he denied the circumstances appearing against him in the prosecution case and pleaded innocence & false implication. He has examined Ramesh (DW-1) in his defence.
5. The trial Court after hearing counsel for the respective parties and considering the material available on record, by the impugned judgment convicted and sentenced the accused/appellant as mentioned in para-1 of this judgment.
6. Learned counsel for the accused/appellant submits that:
 - (i) present appears to be a case of consent where the prosecutrix and the accused/appellant were found in compromising position by Abir Singh (PW-3), brother-in-law of the prosecutrix, and therefore a false report has been lodged against the accused/appellant.

- (ii) It is prosecution case that incident occurred on a rough ground but there was no external injury of any kind whatsoever either on the body of the prosecutrix or that of the accused, which is suggestive of the fact that there was no struggle or resistance on the part of the prosecutrix and the sexual intercourse was not forcible.
 - (iii) Even if the entire prosecution case is taken on its face value, the offence under Section 3 (2) (v) of the Act of 1989 is not made out because nowhere the prosecutrix or her husband has stated that she was subjected to rape by the accused on the ground of her being a member of scheduled tribe community.
7. On the other hand, supporting the impugned judgment learned counsel for the State submits that conviction of the accused/appellant is strictly in accordance with law and there is no illegality or infirmity in the same warranting interference by this Court. He further submits that caste of the prosecutrix has been duly proved by the prosecution and thus his conviction under Section 3 (2) (v) of the Act of 1989 is also in accordance with law.
8. We have heard learned counsel for the parties and perused the material available on record.
9. The prosecutrix (PW-2) has stated in her statement that she knew the accused/appellant, he resides near to her house. She has further stated that on the date of incident the accused came to her and after satisfying that she is all alone, caught hold her hand, took her inside the house, threw her on the floor and started removing her underwear. When she protested the act of accused, he gagged her mouth and thereafter committed forcible sexual intercourse with her. She has further stated that meanwhile her brother-in-law Abir Singh (PW-3) came and on

hearing his voice, the accused/appellant fled from the spot. She has narrated the incident to her brother-in-law who called her husband & other villagers and thereafter report was lodged. In the cross-examination she has admitted the fact that she knew the accused from her childhood and they are almost of some age. She has further stated that she was married to Genda Singh four years back and after marriage, her husband and brother-in-law had come to her house and living with her. Even after four years' of marriage, she is not having any issue. She has further stated that her husband and brother-in-law used to leave for their work place in the morning and come back in the evening. She has further stated that her house is surrounded by number of houses. She has further stated that when the accused dragged her, her bangles got broken, but she did not receive any injury. She has admitted that door of her house was not bolted from inside by the accused/appellant. She has further stated that she did not sustain any injury and the accused took about five minutes to complete the offence. In Para-24 she has admitted the fact that though her husband had not seen the incident but her brother-in-law (PW-2) had seen the incident as he reached the place of occurrence.

10. Abir Singh (PW-2) is brother-in-law of the prosecutrix. He has stated that at about 3.00 p.m. he came to his house to have his lunch and shouted at the prosecutrix from outside but she did not open the door and it is after he raised his voice loudly for the second time, the door was opened by the prosecutrix and then she informed that the accused had mounted on her after upturning her clothes, however on hearing his voice he ran away towards forest. He has further stated that he tried to call the accused/appellant but he did not come. Thereafter he called his

brother (PW-1) and narrated the entire incident to him. In the cross-examination this witness has stated that he saw the accused/appellant running away carrying underwear in his hand.

11. Genda Singh (PW-1) is the husband of the prosecutrix. He has stated that at about 4.00 p.m. when he returned home from his workplace, he was informed by the prosecutrix that accused/appellant has committed rape with her after throwing her on the ground.
12. Dr. (Smt.) Rajshir Singh (PW-4) has medically examined the prosecutrix vide Ex.P-9. She has noticed two scratch marks on the forearm of the prosecutrix caused as a result of friction on the rough surface. She has opined that the prosecutrix is habitual to sexual intercourse and recent sexual intercourse was performed within 24 to 36 hours.
13. Dr. H.P. Singh (PW-5) has medically examined the accused/appellant and opined that he is capable of performing sexual intercourse.
14. Naresh Kumar Singh (PW-6) is the Patwari who prepared the spot map (Ex.P-12). Assistant Sub-Inspector Kamleshwar Sai Paikra (PW-7) & Constable Sukhram (PW-10) have helped in the investigation.
15. Budhiyaro Bai (PW-9), sister of the prosecutrix, has not supported the prosecution case and turned hostile.
16. Megha Tembhurkar (PW-9) is the investigating officer who has duly supported the prosecution case. This witness has also seized caste certificate of the prosecutrix.
17. To ascertain veracity of the version of the prosecution, recapitulation of evidence particularly that of the prosecutrix appears to be the need of the hour. It is the case of the prosecution itself that at the relevant time the prosecutrix was sitting outside her house, accused/appellant approached her and inquired as to who else was present there at that

time. On being told by the prosecutrix that she was all alone, he dragged her inside, made her lie down on the ground and while he was trying to remove her clothes, she is said to have raised her cries but the accused/appellant gagged her mouth and committed forcible sexual intercourse with her. It has come in evidence that the accused/appellant did not tie hands or legs of the prosecutrix, aged about 22 years, even then while being subjected to sexual intercourse she offered no resistance by biting or scratching the accused/appellant. It is surprising that she did not raise cries though had the opportunity as her mouth was not gagged by any means, which indicates that alleged intercourse was a peaceful affair. Furthermore, it is not the case of the prosecution that she was subjected to sexual intercourse by putting her or any person in whom she was interested in fear of death or hurt.

This apart, there is evidence on record that while the sexual intercourse was going on between the accused and the prosecutrix, her brother-in-law Abir Singh (PW-2) suddenly came over there, tried to get the door opened by shouting aloud but the door was not opened for the first time and it was opened only after he gave a much louder voice for the second time. Prosecution case further goes to show that as soon as her brother-in-law Abir Singh (PW-2) got the door opened, the accused/appellant left the spot and while fleeing this witness had seen him doing so. Thus the possibility of the prosecutrix making out a false case of rape against the accused/appellant on sudden approach of her brother-in-law Abir Singh (PW-2) cannot be also ruled out. The prosecution has not collected any other material leading to an irresistible conclusion that the accused/appellant established sexual relation with the prosecutrix against her will and without her consent. Accordingly the

benefit of doubt should go to the accused.

18. As regards applicability of Section 3 (2) (v) of the Act of 1989, it is necessary to quote the relevant portion of this section which reads thus;-

“(2) Whoever, not being a member of scheduled caste or scheduled tribe-

(v) commits any offence under the Indian Penal Code punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a scheduled caste or a scheduled tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine.”

Thus, to attract the provisions of Section 3 (2) (v) of the Act of 1989, the *sine qua non* is that the victim should be a person who belongs to a scheduled caste or a scheduled tribe and that the offence under the Indian Penal Code is committed against such person on the basis that such a person belongs to a scheduled caste or a scheduled tribe. In the present case, there is no evidence at all to the effect that the accused/appellant committed the offence alleged against him with the prosecutrix with intent to belittle her as she belongs to scheduled tribe category. In absence of such ingredients, merely because the prosecutrix happens to be member of scheduled tribe automatically the offence under Section 3 (2) (v) of the Act of 1989 is not made out against the accused/appellant.

19. Thus, having examined the entire evidence in the light of legal provisions, this Court has no hesitation to say that the prosecution has utterly failed to prove its case beyond reasonable doubt and further the Court below was also not justified in making assessment of the evidence

while recording its finding. Of course, in the circumstances the benefit of doubt has to go to the appellant. Ordered thus.

20. To sum-up, the appeal is allowed. Judgment impugned is set aside and the accused/appellant is acquitted of the charges levelled against him by extending him benefit of doubt. Record shows that the accused/appellant is inside, therefore, he is directed to be released forthwith if not required in any other case.

Sd/-
(Pritinker Diwaker)
Judge

Sd/-
(I.S. Uboweja)
Judge

roshan/-