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HIGH COURT OF CHHATTISGARH, BILASPUR

Cr. Appeal No. 529 of 2001

Kishor Albert & another

Versus

State of Chhattisgarh & another

Post for pronouncement of the judgment on 30/6/2016

Sd/-
Pritinker Diwaker
Judge

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 529 of 2001**

1. Kishor Albert, aged 32 years, S/o Ganga Ram Christian.
2. Smt. Parveen Bai, aged 25 years, wife of Kishor Albert.

Both residents of Chunabhatti, Gudhiyari, Raipur, P.S. Gudhiyari, Raipur,
District Raipur (Chhattisgarh)

---- Appellants (In Jail Custody)**Versus**

1. State Of Chhattisgarh, through Police Station, Gudhiyari, Raipur.
2. Kunti Bai Kavar, D/o Late Rajaram Kavar, aged 15 years, through her natural guardian Smt. Agrotin Bai, resident of Chunabhatti, Gudhiyari, Raipur,

---- Respondents/Prosecution

For Appellants:
For Respondent:

Sushri Sangeeta Mishra, Advocate.
Shri Ashish Shukla, Government Advocate

Hon'ble Shri Justice Pritinker Diwaker**C A V Judgment****30.../06/2016**

1. Challenge in this appeal is to the judgment of conviction and order of sentence dated 23.2.2001 passed by the Special Judge, Raipur in Special Sessions Trial No.10/2000 convicting the accused/appellant No.1 under Section 376 of the Indian Penal Code (for short 'the IPC') & accused/appellant No.2 under Section 376 r/w Section 114 of IPC and sentencing each of them to undergo R.I. for 10 years and fine of Rs.5000/-.
2. As per prosecution case, the prosecutrix (PW-1), aged about 14-15 years, was working as maid-servant in the house of accused/appellants. In the

night of 25.12.1999 as the husband of accused/appellant No.2 i.e. accused/appellant No.1, was on night duty, the accused/appellant No.2 asked the prosecutrix to stay with her whole night on the pretext that she had already obtained permission of her mother in this regard. In the night at about 12.30 a.m. while she was sleeping, she felt some removing her clothes and then she woke up and saw that accused/appellant No.1 is removing her Salwaar and her wife (accused/appellant No.2) had caught hold of her both the hands. Accused/appellant No.1 was having knife in his hands. Accused/appellant No.1 after removing her clothes committed forcible sexual intercourse with her in the presence of accused/appellant No.2. Next morning the prosecutrix returned home but did not disclose the incident to anyone as she was threatened by accused/appellants. However, 2-3 days thereafter she disclosed the incident to her neighbourers, who in turn informed her parents and after deliberation, a decision was taken to lodge report against the accused/appellants. Accordingly, FIR (Ex.P-1) was lodged on 1.10.2000 based on which offence under Sections 376 (2) (g) IPC and Section 3 (1) (xii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The prosecutrix was sent for medical examination which was conducted by Dr. (Smt.) A. Bose (PW-13) on 2.1.2000 vide Ex.P-12A and she opined that no opinion regarding recent sexual intercourse could be given. She has advised for radiological test of the prosecutrix. Accused/appellant No.1 was also medically examined by Dr. N.S. Gupta (PW-10) who gave his report of Ex.P-10 opining him to be fully capable of having sexual intercourse.

3. On completion of investigation, charge sheet was filed against accused/appellant for the offence punishable under Section 376 (2) (g)

IPC & Section 3 (1) (xii) of the Act, 1989, however, the trial Court has framed the charges under Section 376 IPC & Section 3 (2) (v) of the Act, 1989 against accused/appellant No.1 and under Section 376/114 IPC against accused/appellant No.2.

4. The prosecution in order to bring home the charge levelled against accused/appellants examined 14 witnesses. Statements of accused/appellants were recorded under Section 313 of Cr.P.C. in which they abjured their guilt and pleaded innocence & false implication.
5. After hearing counsel for the parties and considering the material available on record, the trial Court by the impugned judgment, while acquitting the accused/appellants of the charge under Section 3 (2) (v) of the Act, 1989, convicted & sentenced them as described above.
6. Learned counsel for accused/appellants submits that;
 - a highly improbable story has been put forth by the prosecutrix that she was subjected to rape by accused/appellant No.1 in presence of his wife i.e. accused/appellant No.2.
7. Smt. Agrotin Bai (PW-3) is the mother of the prosecutrix. She has stated that the prosecutrix was working as maid-servant in the house of accused/appellants. On the date of incident the prosecutrix fell asleep at the house of accused/appellants. After 2-3 days the ladies of locality told her that accused/appellant No.1 had committed rape with the prosecutrix. She has further stated that at the instance of the people of locality, she along with the prosecutrix went to the police station where the prosecutrix had lodged the report against the accused/appellants. She has admitted that the prosecutrix did not disclose anything to her of her own. In the cross-examination this witness has stated that after the incident, the prosecutrix had refused to go to the house of accused/appellants to work



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and when she asked the reason for not going to the house of accused/appellant to work as domestic help, the prosecutrix did not say anything and simply refused to go there.

- there is inordinate delay of six days in lodging the report and the prosecution has not offered satisfactory explanation for such delay.
 - The medical evidence does not support the prosecution case as the doctor medically examining the prosecutrix had not noticed any external or internal injury on the body of prosecutrix including her private part and opined that no definite opinion regarding recent sexual intercourse could be given.
 - According to the prosecutrix, the written report was prepared by Santosh Yadu (PW-2) in the police station itself and thereafter the same was given to the police, whereas according to investigating officer, the prosecutrix came with written report.
 - Conduct of the prosecutrix was very unnatural where even she did not disclose the incident to her mother who came to know about the incident through her neighbours. Apart from this, there are many contradictions in the statement of the prosecutrix which go to show that an entirely false story has been created to implicate the accused/appellants in the case in hand.
 - Appellant No.2 being the woman cannot be charged for commission of offence of rape.
8. On the other hand, supporting the impugned judgment learned counsel for the State submits that present is the case where accused/appellant No.1 had committed rape on the prosecutrix, aged about 14 to 15 years, with the help of accused/appellant No.2 and therefore their conviction is strictly in accordance with law and there is no infirmity in the same. The

prosecutrix (PW-1) has categorically stated as to in what manner she was ravished by accused/appellant No.1, as well as the act of appellant No.2. Delay in lodging the FIR has been satisfactorily explained by the prosecutrix wherein she has stated that on account of shame and threat extended by appellants, she could not lodge the report in time. He further submits that even if the medical evidence does not support the prosecution case, it will not make any difference. Plea of false implication on account of not vacating the tenanted accommodation by them has not been established by the defence by adducing cogent evidence. Most importantly, no question was put to the prosecutrix regarding this defence by the appellants. He further submits that if it is found that conviction of accused/appellant No.2 under Section 376 IPC is not proper, she can certainly be convicted under Section 114 IPC.

9. I have heard learned counsel for the parties and perused the material available on record.
10. The prosecutrix (PW-1) has stated that on the fateful night at the request of accused/appellant No.2, she stayed in her house. When she was sleeping, somebody caught hold of her and therefore she woke up. She saw that accused/appellant No.2 had caught hold of her both hands and thereafter she tied her both hands from a piece of cloth. At that time there was pitch-dark. Accused/appellant No.1 removed her Salwaar and committed forcible sexual intercourse with her and after committing rape, he fell asleep. She has further stated that accused/appellant No.2 did not allow her to go to her home and bolted the door and therefore she asleep with the daughter of accused/appellants. She has further stated that next morning she returned her house and after taking bath went to the house of Mohan Singh to work. However, she has not disclosed the incident to



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her parents. After 2-3 days of the incident, she informed about the incident to her friend Monica and when she did nothing about it, then she narrated the entire incident to her parents and all the people in the locality. Thereafter the matter was reported to the police. She has further stated that written report was lodged in the police station and the same was prepared by Sunil (PW-2). In the cross-examination she has stated that she has reiterated the things told by her in the examination-in-chief. There are minor contradictions in the Court statement of this witness from that of her diary statement that they seems to be of insignificant.

11. Sunil Yadu (PW-2), who was the then Corporator of the area, has stated that he has prepared the written report (Ex.P-1) in the manner as was told by the prosecutrix. In the cross-examination also this witness has stated the same thing as in the examination-in-chief.
12. Smt. Usha Yadav (PW-4) appears to be the neighbour of the prosecutrix in whose presence the incident was disclosed to other people of the locality.
13. Smt. Ratna Bai (PW-5), Smt. Vimla Bai (PW-6), Smt. Saraswati Bai (PW-7) & Smt. Pushpa Bai (PW-8) are the neighbourers of the prosecutrix to whom incident was disclosed by the prosecutrix.
14. Amrit Das (PW-9) is the witness of seizure memos (Ex.P-7 & Ex.P-8) by which a knife & underwear was seized from accused/appellant No.1.
15. Dr. N.S. Gupta (PW-10) is the doctor who medically examined the accused/appellant No.1 vide Ex.P-9 and opined that he was able to do sexual intercourse with opposite sex.
16. Shoaib Ahmed Khan (PW-11) is the investigating officer and he has duly supported the prosecution case.
17. Dr. K.L. Sinha (PW-12) is the Assistant Sub Inspector who did the part of

the investigation.

18. Dr. (Smt.) A. Bose is the witness who medically examined the prosecutrix vide Ex.P-12A. According to this witness, she did not notice any mark of injury over the body including private parts, pubic hair scanty and vagina was easily admitting two fingers. No definite opinion regarding recent sexual intercourse could be given by this witness. She has advised for ossification test for confirmation of age.
19. Dr. R.P. Singh (PW-14) who conducted the radiological examination of the prosecutrix has stated vide report Ex.P-19 that her age at the relevant time was between 14 and 15 years but this age is not decisive and there may be variation of two years on either side.
20. Accused/appellant No.1 examined himself as DW-1 and stated that the prosecutrix was maid-servant in his house. On the date of incident none has come to his house to work. On 1.1.2000 when he was in the press, people of vicinity came there, assaulted him and thereafter took him and his wife to the police station on the ground that he has committed rape with the prosecutrix, but nothing like that was done by him. He has further stated that since he was not vacating the tenanted house, his landlord had threatened him that he would implicate him and therefore he feels that it is his landlord who had falsely implicated him in the crime in question. In the cross-examination he has stated that he does not have any animosity with the prosecutrix.
21. In the present case conviction of accused/appellant is based on the sole testimony of the prosecutrix and the core question before this Court for determination is as to whether the evidence of prosecutrix inspires confidence or the same is tainted with suspicion of falsity.
22. Minute scrutiny of material available on record clearly reveals that the

prosecutrix has categorically stated in her Court statement that on the date of incident, accused/appellant No.2 asked her to stay at her house in the night on the pretext of her husband (accused/appellant No.1) being out at the relevant time. The prosecutrix agreed to accused/appellant No.2 and slept in her house. While she was sleeping, she felt someone removing her clothes and then she woke up and saw that accused/appellant No.2 had caught hold of her both hands, accused/appellant No.1 is removing her Salwar and thereafter he committed sexual intercourse with her against her wishes. She has further stated that after commission of bad work, when she began to leave for her home, accused/appellant No.2 did not let her to go to her home and therefore she slept with the daughter of accused/appellants on the bed. The fact that the prosecutrix stayed at the house of accused/appellants in the fateful night is established from the statement of Agrotin Bai (PW-2), mother of prosecutrix, who has stated that accused/appellant No.2 had informed her that the prosecutrix would stay at her house in the night. This witness has further stated that her daughter returned in the morning and told her that now onwards she will not go to the house of accused/appellants to work. She asked the reason but she did not tell anything. This witness is the mother of the prosecutrix and would not ordinarily subscribe to a false story of sexual assault involving her own daughter and thereby putting at stake the reputation of the family and jeopardizing the future of her daughter. This apart, no reason has been proved, not even suggested by the defence during the course of cross-examination of the prosecutrix or Agrotin Bai (PW-2) as to why they would falsely implicate the accused/appellants roping them in false charge of rape.

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True it is that medical evidence or report of FSL do not support the case of the prosecution. That obviously is on account of the fact that the clothes had been washed and prosecutrix & appellant No.1 had taken bath after the occurrence. The prosecutrix was examined after six days of the incident. In these circumstances if no incriminating evidence was found by the Chemical Analyst or the doctor, that is not surprising.

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. It often happens that such victims do not complain against such illegal acts immediately because of factors like fear or shame or uncertainties but the reactions of their parents or husbands in case of married girls or women and the adverse consequence which, they apprehend, would follow because of disclosure of such acts. In the present case also, it has come in the evidence that due to fear the prosecutrix did not inform her parents about the crime committed on her. However, after some days when the accused/appellant again asked for sexual favour from her as was done earlier, she decided to disclose the crime committed on her and accordingly the report was lodged. Thus, in the facts and circumstances of case, the delay caused on the part of the prosecutrix in no way be held fatal to the prosecution.

23. Upon an evaluation of evidence available on record, this Court is satisfied to hold that the prosecutrix (PW-2) is a witness of truth. Her testimony inspires confidence and the trial Court has rightly held that sexual assault amounting to rape was committed on her by accused/appellant No.1.

24. As regards the submission of counsel for accused/appellants that accused/appellant No.2 cannot be convicted & sentenced under Section 376/114 IPC, from the evidence on record it is apparent that accused/

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appellant No.2 on the pretext of her husband being out at the relevant time, asked the prosecutrix to stay whole night at her house and when she agreed to accused/appellant No.2, the accused/appellant No.1 appeared before the prosecutrix all of a sudden and committed forcible sexual intercourse with her and at the time when offence of rape was being committed by accused/appellant No.1, the accused/appellant No.2 was holding both the hands of the prosecutrix. Thus, it is apparent that accused/appellant No.2 has actively facilitated the commission of crime by accused/appellant No.1 being personally present there and therefore she is liable to be convicted under Section 114 IPC and not under Section 376/114 IPC merely because she being a lady cannot execute the offence.

25. For the foregoing reasons, the appeal is allowed in part. Conviction and sentence of accused/appellant No.1 under Section 376 IPC are hereby confirmed. Conviction of accused/appellant No.2 is altered from Section 376/114 IPC to Section 114 IPC, however, sentence of RI for 10 years awarded by the trial Court is maintained in view of the fact that the offence abetted was the one punishable under Section 376 IPC for which R.I. for 10 years has been awarded by the trial Court to the main accused i.e. accused/appellant No.1.

Sd/-

(Pritinker Diwaker)
JUDGE