

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 640 of 2010

1. Nijam Ali S/o Majid Ali (Majil Ali mentioned in impugned order), aged about 33 years R/o Basin, Outpost- Devkar, Police Station Saja, Distt. Durg Chhattisgarh.

---- Appellant (in custody)

Versus

1. State of Chhattisgarh Through: District Magistrate, Durg District- Durg (CG)

---- Respondent

And

CRA No. 621 Of 2010

1. Hamid Ali, S/o Samim Ali, aged about 37 years.
2. Sewakram Patel S/o Sawantram Patel, aged about 53 years.

Both residents of village Basin, Police Chowki Devkar, Police Station Saja, Distt.-Durg (CG)

**---- Appellants
(in Jail)**

Vs

1. State Of Chhattisgarh Through The Station House Officer, Police Chowki Devkar, Police Station Saja, Distt.-Durg (CG)

---- Respondent

For Appellants:	Shri Keshav Dewangan, Advocate in Cr.A. No.640/10. Shri Malay Shrivastava, Advocate in Cr.A. No.621/10.
For Respondent:	Shri Vivek Sharma, Government Advocate.

Hon'ble Shri Justice Pritinker Diwaker

Judgement

22/03/2016

1. As these two criminal appeals arise out of the common judgment dated 26.8.2010 passed by the Additional Sessions Judge, Bemetara in

Sessions Trial No.12/2010, they are being disposed of by this common judgment.

2. Appellant Nijam Ali has been convicted under Sections 376, 450 & 506(B) of the Indian Penal Code (for short "the IPC") and sentenced to undergo R.I. for 10 years & fine of Rs.1,000/-; R.I. for 5 years & fine of Rs.500/- and R.I. for 1 year & fine of Rs.200/-, with default stipulations respectively. Appellants Hamid Ali & Sewakram have been convicted under Sections 450 & 506 (B) of the IPC and each has been sentenced to undergo R.I. for 5 years & fine of Rs.500/- and R.I. for 1 year & fine of Rs.200/-, with default stipulations respectively.
3. Brief facts of the case are that on 3.9.2009 the prosecutrix (PW-1), a married woman of 31 years age, was sleeping in her house with her four years old daughter. Her husband had gone to Somni for his treatment and her mother-in-law of the prosecutrix had gone to Bhilai. At about 11.00 p.m. in the night the accused persons knocked the door of the house of prosecutrix and being asked, they replied that they are her brothers whereupon she opened the door. The accused persons came inside the room, caught hold of her arm, gagged her mouth and threatened her for life as a result of which she got frightened. Thereafter they knocked her down on the floor, accused Sewakram gagged her mouth and accused Nijam Ali committed rape with her after upturning her saree and petticoat. While she was being subjected to intercourse, accused Hamid was standing there. After committing rape with her, the accused persons again threatened her that if she disclosed the incident to anyone, she would be killed. Thereafter they fled away from the spot. In the morning the prosecutrix along with her brother Guljaar Ali went to the police outpost Devkar and lodged the report. Unnumbered FIR (Ex.P-1) was registered against the accused persons on 4.9.2009 at 8.15

a.m. in the Police Outpost Devkar and thereafter numbered FIR (Ex.P-11) was registered at Police Station Saja on the same day. After obtaining consent, the prosecutrix was sent for medical examination which was conducted by Dr. Ruby Markaam (PW-12) on 4.9.2009 vide Ex.P-12, who noticed linear scratch mark on both forearm and that her vagina was easily admitting two fingers. She has referred the prosecutrix to the Gynaecologist. On 8.9.2009 the prosecutrix was examined by Gynaecologist Dr. Rekha Gupta (PW-14) vide Ex.P-20 and opined that no definite opinion can be given about the recent sexual intercourse. Petticoat & blouse of the prosecutrix were seized vide Ex.P-5. Likewise, underwear of accused/appellant was seized vide Ex.P-7. Broken bangles of the prosecutrix were seized from the spot vide Ex.P-6. Accused/appellant-Nizam Ali was also medically examined by Dr. B.P. Mahobia (PW-6) who gave his report of Ex.P-9 opining him to be fully capable of having sexual intercourse. Seized clothing & vaginal slides of prosecutrix and underwear of accused/appellant Nizam Ali were sent to the Forensic Science Laboratory for chemical examination from where report of Ex.P-19 has been received confirming presence of spermatozoa on the petticoat & vaginal slides of prosecutrix and underwear of accused/appellant.

4. On completion of investigation, charge sheet was filed against the accused/appellants. The prosecution in order to bring home the charges levelled against accused/appellants examined 14 witnesses in all. Statements of the accused/appellants were recorded under Section 313 of Cr.P.C. in which they abjured their guilt and pleaded innocence & false implication. They have examined six witnesses in their defence.
5. After hearing counsel for the parties and considering the material available on record, the trial Court by the impugned judgment, convicted

& sentenced the accused/appellants as described above.

6. Counsel for accused/appellant Nizam Ali submits that he is not pressing this appeal so far as it relates to conviction part of the impugned judgment and would confine his argument to the sentence part thereof only. He submits that the incident has taken place more than six years back and since then the appellant is in jail, therefore, the sentence imposed on him may be reduced to RI for 7 years which is the minimum sentenced provided under Section 376 of IPC.
7. Counsel for accused/appellants in Criminal Appeal No.621/10 submits that accused/appellant Sewakram has already completed his entire sentence and has been released from jail. He further submits that he is not pressing this appeal so far as it relates to conviction part of the impugned judgment as also sentence part of accused/appellant Sewakram. However, he would confine his argument to the sentence part of accused/appellant Hamid Ali only and in this regard he submits that even if the entire case is taken as it is against accused/appellant Hamid Ali, he is liable to be convicted under Section 448 of the IPC and not under Section 450 & 506 Part-II of the IPC as has been done by the trial Court. He further submits that if this Court reaches to the conclusion that his conviction under Sections 450 & 506 Part-II is proper and needs no interference then the sentence imposed on him under Section 450 IPC may be reduced to the period already undergone by him.
8. On the other hand, supporting the impugned judgment counsel for the State submits that conviction of accused/appellants is strictly in accordance with law and there is no illegality or infirmity in the same. He further submits that the sentences awarded by the trial Court are just and proper and do not call for any interference.
9. I have heard learned counsel for the parties and perused the material

available on record.

10. The prosecutrix (PW-1) has stated in her evidence that on the date of incident her husband & in-laws had gone to village Somni. At about 11.00 p.m. in the night the accused persons knocked the door of the house of prosecutrix and being asked, they replied that they are her brothers whereupon she opened the door. The accused persons came inside the room and caught hold of her. Accused Hamid gagged her mouth by a piece of cloth and accused Sewak caught hold of her both hands. Accused Nizam knocked her down on the floor and thereafter committed rape with her. She has further stated that she tried to raise cries for help but could not do so because the accused persons have gagged her mouth. After committing rape with her, the accused persons threatened her that if she will disclose the incident to anyone, she would be killed. Thereafter they fled from there. Since the accused persons have threatened her for life, she could not disclose the incident to anyone in the night itself. She has further stated that next morning she went to the police station and lodge the report. She has further stated that the police had seized her clothing which she was wearing at the time of incident and also seized broken pieces of bangles from the spot. She has further stated that Sultaan is her brother whose wife Wahida Begum is in jail for committing murder. She has further stated that she is not in talking terms with her brother. She has admitted that her brother Sultaan has been prosecuted and punished for illegally possession gaanja. However, she has denied the fact that at the instance of her brother she has lodged the false report. She has stated that accused Nizam Ali is her cousin brother, whereas accused Hamid is also in her relation. She has clarified that at the time of commission of offence there was sufficient light. This witness remained firm and nothing could be elicited by the

- defence in her lengthy cross-examination so as to discredit her testimony.
11. Guljaar Ali (PW-2) is the brother of the prosecutrix and he has stated that he was informed by the prosecutrix about the incident which had taken place with her and he met the prosecutrix in the police station. He admits that ganja was seized from the possession of his brother. This witness was subjected to various questions regarding coming to know about the incident either from the police or the prosecutrix but they are not very material in view of the statement of the prosecutrix.
 12. Bajrang Das (PW-4) is the witness of spot map (Ex.P-3), seizure memos of Ex.P-6, P-7 & P-8 by which certain articles were seized. Though this witness has been declared hostile but he has admitted his signature over the aforesaid documents.
 13. Khelan Verma (PW-5) is another witness of seizure memos Ex.P-6, P-7 & P-8 and he has duly supported the prosecution case.
 14. Dr. O.P. Mahobia (PW-6) is the witness who medically examined accused/appellant Nizam Ali vide Ex.P-9 and opined that he is capable of having sexual intercourse.
 15. Sanjay Pradhan (PW-7) is the Patwari who prepared the spot map vide Ex.P-4.
 16. Surendra Shrivastava (PW-8) is the person who registered FIR (Ex.P-11).
 17. Gulmeer Mohammed (PW-10) & Sewaram (PW-11) are the witnesses of seizure memo Ex.P-5 by which petticoat of the prosecutrix was seized.
 18. Dr. Rubi Markaam (PW-12) is the witness who medically examined the prosecutrix vide Ex.P-12. According to this witness, she had noticed linear scratch mark on both the forearms and vagina of the prosecutrix was easily admitting two fingers. She had referred the prosecutrix to the Gynaecologist for opinion.
 19. Rajendra Singh Thakur (PW-13) is the investigating officer who has duly

proved the prosecution case.

20. Dr. (Smt.) Rekha Gupta is the Gynaecologist who examined the prosecutrix and gave her report Ex.P-20 opining that no definite opinion can be given about the recent sexual intercourse and the prosecutrix is habitual to intercourse.

21. In sex related offences, it is a settled law that the paramount consideration should be given to the statement of the prosecutrix and unless and until there appears to be some lacuna in the same, corroboration to the same is not required to be looked for. On going through the testimony of the prosecutrix the only inference which could be drawn is that on 3.9.2009 taking advantage of loneliness of the prosecutrix, accused/appellants gained entry in her house, caught hold of her, threw her on the ground, gagged her mouth by a piece of cloth and thereafter accused/appellant Nizam Ali committed forcible sexual intercourse. Evidence also goes to show that after committing the offence the accused persons have threatened the prosecutrix for dire consequences if she disclosed the incident to anyone. Statement of the prosecutrix specifically describing the role played by each of accused/appellants gets corroboration from the version given by her in the promptly lodged FIR (Ex.P-1). According to the report of FSL (Ex.P-19), petticoat of the prosecutrix and accused/appellant Nizam Ali's underwear seized during investigation were stained with semen, but accused/appellant Nizam Ali has not offered any acceptable explanation in his statement recorded under Section 313 of Cr.P.C. as to how his underwear was stained with semen nor any question has been put to the prosecutrix that semen found on her petticoat could be of her husband. Since at the time of commission of sexual intercourse by accused/appellant Nizam Ali, there were two other persons also on the

spot holding her legs etc., she could not be expected to raise her cries attracting attention of people nearby. Further, when the accused persons were three in number, the prosecutrix is not expected to offer such resistance as would cause injuries on her. In this case the prosecutrix has given a vivid account of the entire incident which being fully reliable and trustworthy needs no corroboration from any other source. Moreover, nothing has been elicited by the defence as to why the appellants have been falsely implicated in this case and thus the stand of false implication taken by them is also not worth acceptance. Accordingly, the conviction of accused/appellant Nijam Ali under Sections 376, 450 & 506 (B) IPC and accused/appellants Hamid Ali & Sewakram under Sections 450 & 506 (B) IPC being just and proper, is not required to be interfered with.

22. As regards the sentence imposed on accused/appellant Nijam Ali under Section 376 IPC, considering the fact that the incident had taken place in the year 2009 and he is languishing in jail since 5.9.2009 i.e. for the last more than 5½ years, this Court deems it just, proper and in the interest of justice if the sentence imposed upon him is reduced to RI for 7 years which is a minimum one for the offence under Section 376 of IPC by enhancing the fine amount from Rs.500/- to Rs.3,500/-. Order accordingly.

23. As regards the sentence imposed on accused/appellant Hamid Ali under Section 450 IPC, considering the fact that he remained in custody for about 1 year & 10 months and further considering that he and the prosecutrix have entered into a compromise, this Court is of the considered view that ends of justice would be served if the jail sentence imposed on him under Section 450 IPC is reduced to the period already undergone by him by imposing fine of Rs.3,000/- in addition to the fine of

Rs.500/- imposed by the court below.

24. In the result;

- Criminal Appeal No.640/2010 is partly allowed. Conviction and sentence of accused/appellant under Sections 450 & 506 (B) of the IPC are hereby maintained. Conviction under Section 376 of IPC is also maintained, however the sentence is reduced to R.I. for 7 years from that of RI for 10 years as has been imposed by the Court below. He is further sentenced to pay a fine of Rs.3,000/- in addition to the fine imposed by the court below, and in default, he shall suffer additional RI for 03 months.
- Criminal Appeal No.621/10, so far as it relates to accused/appellant Hamid Ali, is partly allowed. Conviction of accused/appellant Hamid Ali under Sections 450 & 506 (B) IPC are hereby maintained, however, the sentence imposed on him under Section 450 of IPC is reduced to the period already undergone. He is further sentenced to pay a fine of Rs.3,000/- inclusive of fine of Rs.500/- imposed by the trial Court, and in default, he shall suffer additional RI for 1 month.
- Since accused/appellant Sewakram in Criminal Appeal No.621/10 is already reported to have completed his entire sentence and has been released from jail, no order is required to be passed regarding his release etc.
- On deposit of said fine amount, it shall be paid to the victim by the trial Court after due verification/identification.

Sd/-

(Pritinker Diwaker)
Judge

roshan