

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 687 of 2010

- Shankar Nishad S/o Tiharu Ram Nishad, aged about 50 years, R/o Vill. Mohrenga, Thana Magarroad, Distt. Dhamtari (CG)

---- Appellant

In Jail

Versus

- State Of Chhattisgarh, through Police Station Magarroad, Distt. Dhamtari (CG)

---- Respondent

For appellant : Shri Goutam Khetrapal, Advocate.

For Respondent/State : Shri Rahul Tamaskar, Panel Lawyer.

Hon'ble Shri Justice Pritinker Diwaker

Judgment on Board

31/03/2016

This appeal arises out of the judgment of conviction and order of sentence dated 14.9.2010 passed by the Sessions Judge, Dhamtari in S.T.No.40/2010 convicting the accused/appellant under Sections 376/511, 354 of IPC and sentencing him to undergo RI for 5 years, fine of Rs.6000/- and RI for 1 year, fine of Rs.2000/- with default stipulations respectively.

02. As per the prosecution case, the accused/appellant used to practise exorcism. It is alleged that on 19.4.2010 the prosecutrix along with her aunt (PW-5 Bisantinbai) came to the house of the appellant as she had pain in her knee. It is further case of the prosecution that after

taking the prosecutrix inside the room, the accused/appellant asked her to remove her clothes and thereafter, he touched her private parts and breast. After coming out from the room, the prosecutrix informed about the incident to her aunt and on 23.4.2010 FIR (Ex.P/1) was lodged by the prosecutrix against the appellant, based on which offence under Section 354 of IPC was registered against him. On 23.4.2010 vide Ex.P/2 the prosecutrix had refused for her medical examination and likewise, vide Ex.D/3 her father Awadhram (PW-3) also refused for medical examination of the prosecutrix. However, vide Ex.P/3 she was medically examined on 23.4.2010 by PW-4 Dr. Sharda Thakur who found no external or internal injury on her body but noticed that she was complaining of pain all over her body. On 24.4.2010 diary statement (Ex.D/1) of the prosecutrix was recorded in which she has alleged that after removing her clothes the accused/appellant had inserted his finger into her private part and then also made an attempt to commit sexual intercourse with her. After investigation charge sheet was filed against the appellant under Sections 354, 376, 511, 342 of IPC followed by framing of charge by the trial Court accordingly.

03. So as to hold the accused/appellant guilty, the prosecution examined as many as 8 witnesses. Statement of the accused/appellant was also recorded under Section 313 of Cr.P.C. in which he denied the circumstances appearing against him in the prosecution case, pleaded innocence and false implication. In defence, he examined one Likheshwar Kumar Gwal.

04. 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.

05. Learned counsel for the appellant submits as under:

- that there is four days delay in lodging FIR, which has not been properly explained by the prosecutrix.
- that in the FIR the prosecutrix has not made any allegation against the appellant regarding commission of rape or even attempt to rape and it has been alleged subsequently in her diary statement as well as in the Court statement, which makes the prosecution case in relation to offence under Section 376/511 of IPC doubtful.
- that at best the accused/appellant can be convicted under Section 354 of IPC, for which he has already remained in jail for about 1 years (356 days).

06. On the other hand, supporting the impugned judgment it has been argued by the State counsel that conviction of the appellant is strictly in accordance with law and there is no illegality or infirmity in the judgment impugned warranting interference by this Court.

07. Heard counsel for the respective parties and perused the material on record.

08. PW-1 prosecutrix has stated that the accused/appellant used to practise exorcism and on the date of incident she had been to him along with her aunt PW-5 Bisantinbai. She has stated that the accused/appellant asked her aunt to sit outside the room, took her inside the room, pulled the curtain and asked her to remove her

clothes. When she refused to do so, the appellant told her that he is Goddess incarnate and then removed his clothes, applied lemon on her entire body. When she called her aunt, she came inside and then went back. Thereafter, the accused/appellant abused her filthily calling her prostitute and then tried to mount on her. He also tried to commit rape with her. She has further stated that the appellant committed rape with her by inserting his private part into her private part. When she told him to disclose about this incident to her father, he slapped her. Thereafter, she called her aunt, informed her about the incident, by that time she had worn her clothes and the appellant again started practising sorcery. She has stated that due to sorcery being done by the appellant on her, as she felt giddiness, she laid in the lap of her aunt and after some time she was woken up by her aunt and then both of them along with the accused/appellant returned to their house. She has stated that she was complaining pain in her entire body, she informed about the incident to her father, who took her to other village in house of her another aunt and when her uncle enquired from her aunt about the incident, she showed her ignorance. She has stated that she was taken to pathology lab and then report was lodged. She has stated that she had eloped with one Rajkumar as she was scolded by her mother and she was taken back to her house by one Avan Patel. She has stated that her aunt was sitting in verandah along with 25-30 persons and there was a curtain in between the room and the verandah. She has further stated that there was no door between the room and the verandah.

09. PW-5 Bisantinbai, aunt of the prosecutrix, who had accompanied

the prosecutrix to the house of the appellant, has turned hostile. She admits that the accused/appellant and her husband are friends. She has further stated that in the verandah 20-30 persons were sitting and that she accompanied the prosecutrix to the room of the appellant. PW-2 Sudarshan Patel, brother of the prosecutrix, has stated that on 18.4.2009 he along with his maternal uncle had gone to the house of the accused/appellant for the treatment of the prosecutrix, however, on that day the appellant was not there and therefore, they returned. He has stated that after the incident, he was informed by the prosecutrix that the appellant had removed her clothes and made an attempt to commit rape with her and that when her body was checked, lemon pulp was found in her vagina. However, this appears to be an improvement as the same is not part of her diary statement.

10. PW-3 Awadhram, father of the prosecutrix, has made almost similar statement as has been made by PW-2 and he too has improved while deposing in the Court. PW-4 Dr. Sharda Thakur medically examined the prosecutrix vide Ex.P/3 and found that the prosecutrix was complaining pain, there was no external or internal injury on her body and that she treated her for anemia. PW-6 RK Dhruv registered the FIR (Ex.P/1). PW-7 Dr. TR Dhruv did medical examination of the appellant and found him capable of performing sexual intercourse vide Ex.P/5. PW-8 Pradeep Sori, investigating officer, has supported the prosecution case. He has also admitted that the room where the incident is alleged to have taken place has no door and there is only curtain.

11. DW-1 Likheshwar Kumar Gwal has stated that on the date of

incident he had also gone to the house of the appellant, number of persons were sitting in his house and there was no door in the room where the incident had allegedly taken place and that the room and the verandah is partitioned by a transparent curtain.

12. Close scrutiny of the evidence makes it clear that that in the FIR lodged by the prosecutrix, there is no allegation, either of commission of rape or even of making an attempt to commit rape by the appellant. Admittedly, the report has been lodged with a delay of four days and no satisfactory explanation has been offered by the prosecutrix for such delay. It is only in her statement under Section 161 of Cr.P.C. and thereafter in the Court that she has stated about commission of rape by the appellant. However, medical evidence is totally at variance with her version and does not support the prosecution case. As per statement of the prosecutrix, her aunt and other witnesses, it has come that the accused/appellant had taken the prosecutrix inside the room and applied lemon on her entire body. The evidence also shows that there were 20-30 persons sitting in the verandah and that there was no door in the room where the prosecutrix was taken by the appellant and that there is a curtain in between the said room and the verandah. Even aunt of the prosecutrix was sitting in the verandah, on being called by the prosecutrix when she went inside the room she found nothing objectionable there. There are material improvement in the statement of the prosecutrix, her version is not corroborated by other witnesses as well as the medical evidence and in these circumstances, in the absence of any conclusive and convincing evidence, it would be hazardous to hold that the appellant had made any attempt to commit

rape with the prosecutrix. Thus, considering the overall evidence on record, this Court is of the opinion that the trial Court was not justified in holding the appellant guilty under Section 376/511 of IPC on the basis of evidence adduced by the prosecution and he is entitled to be acquitted of the said charge.

However, from the FIR lodged by the prosecutrix and her evidence before the Court, it is apparent that the accused/appellant forced her to remove her cloths and then made indecent advancement towards her, thereby outraged her modesty and as such, his conviction under Section 354 of IPC appears to be strictly in accordance with law and needs affirmation.

13. In the result, the appeal is allowed in part. While acquitting the appellant of the charge under Section 376/511 of IPC, his conviction under Section 354 of IPC is hereby maintained. The appellant has already remained in jail for about 356 days, whereas he is sentenced to one year's RI by the trial Court, he is reported to be on bail, therefore, his bail bonds stand discharged and he need not surrender.

Sd/

(Pritinker Diwaker)

Judge