

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 830 of 2014**

Puskar Yadav S/o Punitram Yadav, aged about 19 years, R/o Hatka Charama, P.S. - Charama, Civil & Revenue District North Bastar, Kanker, Chhattisgarh.

---- Appellant**Versus**

State of Madhya Pradesh through District Magistrate, Kanker, District Kanker, Chhattisgarh.

---- Respondent

For the Appellant	:	Smt. Indira Tripathi, Advocate.
For the Respondent/ State:		Shri R.K. Jaiswal, Panel Lawyer.

Hon'ble Shri Justice Rajendra Chandra Singh Samant**Judgment on Board****21.11.2016**

1. This appeal has been preferred against the judgment of conviction and order of sentence dated 23.8.2014, passed by the Learned Special Judge under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short 'the SC & ST Act, 1989'), North Bastar, Kanker, Chhattisgarh, in Sessions Trial No. 01 of 2014, whereby and whereunder the learned Special Judge has convicted the appellant/ accused under Sections 450, 376/ 511 of the Indian Penal Code (for short 'the IPC') and sentenced to undergo RI for 5 years and RI for 5 years and to pay fine of Rs.5,000/- on each count, in default of payment of fine, to further undergo RI for one year, respectively.

2. The case of the prosecution, in brief, is that on 27.11.2013, at about 3:00 pm, the prosecutrix (PW-1) was alone at her residence in Village Hatka, Charama. At that time, the appellant/ accused entered her house and forcibly laid her down on the ground, unclothed her and committed rape with her. She tried to raise alarm, but the appellant stifled her voice. After the incident, the appellant fled from the spot. The prosecutrix (PW-1) narrated about the incident to her parents in the night. On the next day, Kotwar and other elders of the village were called and informed about the incident. Thereafter, on 29.11.2013 at about 9:50 am, the prosecutrix (PW-1) went to Police Station Narharpur, District Kanker and lodged the First Information Report (Ex.P/14). During the investigation, the prosecutrix and the appellant/ accused were medically examined. The prosecutrix (PW-1) is a member of scheduled tribe and her caste certificate was seized vide Ex. P/1. Vaginal slides prepared by the doctor were seized vide Ex. P/2. Undergarments of the appellant/ accused were seized vide Ex. P/3. Semen of the appellant/ accused was preserved during medical examination, which was seized vide Ex. P/4. Spot map (Ex. P/5) was prepared by the Revenue Officer. The undergarments of the prosecutrix were seized vide Ex. P/17 and the seized articles were examined and prepared the spot map vide Ex. P/18. Statements of the witnesses were recorded and on completion of the investigation, the appellant was charge-sheeted for the offence punishable under Sections 450 and 376 of the IPC and Section 3 (ii) (v) of the SC and ST Act, 1989. The appellant pleaded innocence and denied the charges. On his denial of charge, the trial was conducted. The prosecution examined as many as 14 witnesses. The accused in his statement under Section 313 Cr.P.C. has claimed that he has been falsely implicated in the case, but he has led no evidence in his defence. After giving opportunity of hearing and

leading evidence to the prosecution and defence, the impugned judgment has been passed by which the appellant has been convicted and sentenced as mentioned above. Hence, this appeal.

3. The grounds of the appeal are, that the learned trial Court has erred in convicting and sentencing the appellant and the finding of conviction against the appellant is unsustainable being not based on any evidence which can be termed as proof beyond reasonable doubt. The evidence of the prosecutrix cannot be considered as sufficient to inspire confidence to convict the appellant. No other witnesses have made such statement which can be termed as sufficient to corroborate the version of the prosecutrix.

4. Learned counsel for the appellant submits that the First Information Report was lodged after deliberations with the village persons and on their advise the appellant has been falsely implicated. For this reason, the appellant is entitled for benefit of doubt. It is also submitted that the appellant is in custody since 29.11.2013 till today. He has already completed three years in custody, out of the award of RI for five years, which may be considered while disposing of this appeal.

5. On the other hand, learned State counsel has opposed the grounds raised in this appeal and the arguments submitted on behalf of the appellant. He also argued that the prosecution had successfully proved its case against the appellant and there is no reason to interfere with the impugned judgment.

6. I have heard learned counsel appearing for the parties at length and also perused the evidence available on record. The issue arising for adjudication is whether the conclusion arrived at by the trial Court is based on proof beyond reasonable doubt to support the conviction of the appellant under Sections 450, 376/ 511 of the IPC.

7. The main witness in this case is the prosecutrix (PW-1). An observation has been made by the trial court that the prosecutrix appears to be mentally retarded, but another observation has also been made to the effect that she is competent to depose. This note on the deposition sheet cannot be considered as conclusive. Section 118 of the Indian Evidence Act, 1872 provides that all persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind, with explanation a lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them. By words of this provision and explanation, it is made clear that even a lunatic can be a competent witness. Hence, in the instant case, the note regarding the mental capacity of the witness (the prosecutrix) should have been exhaustive. The part of this note which discloses that the prosecutrix was considered as a competent witness is important and which can be taken into consideration.

8. The prosecutrix (PW-1) stated that at the time of incident she was alone at her residence. At that time, the appellant entered her house, by

pressing her mouth, he disrobed her and committed rape with her. On being asked, the witness answered that the appellant/ accused removed his clothes and laid on top of her. No further explanation was given by her. She admittedly stated that she went to the police station to lodge the report. In cross-examination, she denied the suggestion regarding any enmity with the family members of the appellant/ accused. She also stated that the appellant/ accused used force with her, also admitted that she suffered no injury and she did not resist to the act of the appellant/ accused. On suggestion of the defence counsel, she admitted that the appellant did not do any wrong act with her. At one point of time, she stated that she got injury on her private parts. On being asked again and again, she admitted that the appellant simply pressed her breast and neither she bled from anywhere nor she felt any pain. She did not raise any alarm because if she would have raised alarm, the neighbours would have known about the incident. She also admitted that she did not approach her neighbours to inform about the incident. Regarding lodging of report, she stated first that it was read out to her and she also stated that it was not read out to her. Upon perusal of the statement of this witness, it appears that the prosecutrix (PW-1) is not consistent in making her own statement and she has changed her statement depending upon the questions put to her. Apart from the observations made by the trial court, no question was put to this witness by the court itself. Looking the quality of her statement, it cannot be said that the evidence of the prosecutrix had been of quality to such extent which could inspire confidence under the circumstances to convict the appellant and it was the necessity that corroboration should be looked into.

9. Kala Bai (PW-2) and Awadh (PW-3) are parents of the prosecutrix (PW-1). On the date of incident, when they returned to their home in the evening, the prosecutrix narrated them about the incident, that the appellant entered their home and forcibly committed rape with her. They informed to the village elders and thereafter, on the next day, the prosecutrix was taken to the police station. In cross-examination, both these witnesses have denied the suggestion regarding any enmity with the appellant or his family members but it was admitted by Awadh (PW-3) in his cross-examination that his family and the family of the appellant are not in talking terms and in this regard, no reason has been given by the witness himself nor suggested by the defence counsel. Mangia Ram (PW-4) was informed about the incident by Awadh (PW-3).

10. Narration by the prosecutrix (PW-1) to Kala Bai (PW-2) and Awadh (PW-3) may be considered as corroborative, but in this case the medical evidence has more importance. Dr. Ujjwala Dewangan (PW-10) has stated that she examined the prosecutrix (PW-1) on 28.11.2013. She found that some whitish secretion was coming out from private part of the prosecutrix (PW-1) and no injury was found. The hymen was intact and the report in this regard is Ex. P/7. She also stated that no definite opinion could be given on the basis of this examination whether sexual intercourse had taken place with the prosecutrix or not. In cross-examination, she, however, admitted that she did not find any swelling or redness on the private part of the prosecutrix nor she found any injury. The medical evidence is neither suggestive regarding use of any force on the prosecutrix nor suggestive regarding any forcible sexual intercourse with her. Looking to this, the medical evidence cannot be regarded as corroborative piece of evidence.

11. The seized articles were sent to FSL for forensic examination. The seizure has been proved by ASI, R.P. Sinha, (PW-14), who did the investigation. The FSL report Ex. P/8 needs consideration. Article B was a slide which was prepared from the vaginal secretion of the prosecutrix. As per this report, no sign of sperm or spermatozoa was found on this article as well as on the underwear seized from the possession of the prosecutrix.

12. Looking to the inconsistencies in the statement of the prosecutrix herself, the corroboration, which should have come from the medical evidence and the report of the FSL examination, is missing and for these reasons, the judgment of conviction of the accused/appellant under Section 376/ 511 of the IPC is found to be not based on proof beyond reasonable doubt. Regarding the offence under Section 450 of the IPC, whoever commits house-trespass in order to commit any offence, is punishable with imprisonment for life. Even if it is considered that appellant/accused committed house-trespass in this case, then the purpose of the house-trespass is not proved. The requirement of trespass, as defined under Section 441 of the IPC, is that having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence. The prosecution has not based its case on any other ground except this, that the appellant committed the trespass for the purpose of committing offence of rape. Under these circumstances, the conviction under Section 450 of the IPC also cannot be sustained.

13. In view of the above discussion, this appeal is allowed. The impugned judgment of conviction and order of sentence is hereby set aside and the

appellant is acquitted of all the charges framed against him. He is reported to be under custody and he be released forthwith unless otherwise required in any other case.

Sd/-

(Rajendra Chandra Singh Samant)
Judge

Nimmi