

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 105 of 2011

- Ravi Baghel S/o Kaliram Baghel Aged About 22 Years R/o Village Anwari, O.P. Birejhar, Police Station Kurud, Distt. Dhamtari Chhattisgarh.

---- Appellant

In Jail

Versus

- State Of Chhattisgarh Through Police Station Kurud, Distt. Dhamtari Chhattisgarh.

---- Respondent

For appellant : Shri Adil Minhaj, Advocate.

For Respondent/State : Shri Vivek Sharma, Govt. Advocate.

Hon'ble Shri Justice Pritinker Diwaker

Judgment On Board

03/02/2016

This appeal arises out of the judgment of conviction and order of sentence dated 20.1.2011 passed by the Sessions Judge, Dhamtari in S.T.No.60/2010 convicting the accused/appellant under Sections 376, 450, 325, 323 of IPC and sentencing him to undergo RI for 10 years, fine of Rs.5000/-; RI for 5 years, fine of Rs.5000/-; RI for 2 years, fine of Rs.3000/- and RI for 6 months, fine of Rs.500/- with default stipulations respectively.

02. As per the prosecution case, on 9.6.2010 an unnumbered FIR (Ex.P/1) was lodged by the prosecutrix (PW 1) at Police Outpost - Birejhar, P.S. Kurud, alleging in it that on that day at about 1 pm when

she was in her house along with her daughter Geeteshwari (PW-3), who was watching TV in another room and her mother-in-law Biswantinbai (PW-2) was in the verandah, the accused/appellant who is resident of her village came in intoxicated condition to her house and started abusing her mother-in-law, which was objected by her mother-in-law. Thereafter, the accused/appellant entered her house, when her mother-in-law intervened, he caught hold of her mother-in-law and threw her on the floor. Then the accused/appellant entered into her room, threw her on the cot, removed her sari and after upturning her petticoat and removing his pant committed forcible sexual intercourse with her. Thereafter, he entered the room of her daughter Geeteshwari, caught hold of her and on protest being made by her, threw her on the floor. However, on hue and cry being raised by them, their neighbours Lakshawantin and son of Gangaram came to their rescue and took the accused/appellant outside their house. After about an hour when husband of the prosecutrix returned to the house from his workplace, she narrated the entire incident to him and thereafter, she came to lodge the report. Based on this unnumbered FIR, a numbered FIR (Ex.P/10) was registered against the accused/appellant at P.S. Kurud under Crime No.195/10 for the offence under Sections 450, 376 and 323 of IPC. On 10.6.2010 MLC of PW-2 Biswantinbai was done vide Ex.P/5, MLC of PW-3 Geeteshwari is Ex.P/7, MLC of accused/appellant is Ex.P/8 and that of the prosecutrix (PW 1) is Ex.P/9. Vide Ex.P/6 opinion on the basis of x-ray report was obtained from the doctor, according to which Biswantinbai suffered grievous injury caused by hard and blunt object. After investigation, charge sheet was filed against the accused/appellant under Sections 450, 376,

323, 325 of IPC and accordingly, charges were framed.

03. So as to hold the accused/appellant guilty, the prosecution examined as many as 8 witnesses. Statement of the accused 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 his defence, he examined Hitendra Kumar Bhimo and Chandrikabai Baghel as DW-1 and DW-2 respectively.

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 appellant as mentioned in para-1 of this judgment.

05. Learned counsel for the appellant submits as under:

(i) that the statement of the prosecutrix is not worth reliance as she is not consistent while lodging FIR and while deposing in the Court, and there is material omission in her Court statement.

(ii) that there are material contradictions and improvement in the statement of the prosecutrix and other witnesses.

(iii) that as per statement recorded u/s 161 Cr.P.C. of PW-3 Geeteshwari, she had not seen the appellant committing rape with the prosecutrix, however, while deposing in the Court she becomes the eyewitness to commission of rape, which itself makes her evidence doubtful.

(iv) that medical report of the prosecutrix in no way supports the

version of the prosecutrix because as per medical report no injury, external or internal, was noticed by the doctor whereas the prosecutrix has stated that before subjecting her to rape she was brutally beaten by the accused/appellant as a result of which blood was oozing from various parts of her body.

(v) though the clothes of the prosecutrix and the appellant were seized, but they were not even sent to the doctor and in absence of FSL report, no adverse inference can be drawn against the appellant.

(vi) that there was a scuffle between the accused/appellant on the one side and the prosecutrix, her mother-in-law, her daughter on the other, in which the appellant had also suffered injuries vide Ex.P/8, but just to make the offence much graver the charge of rape has been leveled against the appellant. In the face of evidence on record, at best the appellant is liable to be convicted under Sections 450, 323 & 325 of IPC only but considering his detention period, which comes to more than 5 years, he may be released forthwith.

(vii) had there been any incident of rape, the prosecutrix must have disclosed the same to Lakshawantin and son of Gangaram namely Raman Markandey, who immediately rushed to the spot after hearing their cries. In their statements u/s 161 Cr.P.C. these witnesses have not stated that the prosecutrix was subjected to rape by the appellant and though they were cited as prosecution witnesses, but were subsequently not examined by the prosecution.

(viii) yet another important witness namely Hitendra @ Pilu who was earlier cited as prosecution witness was not examined by the

prosecution and ultimately, the said witness was examined as a defence witness wherein he has categorically stated that on the date of incident the accused/appellant had abused the children playing there, then he was beaten by the prosecutrix, her mother-in-law and that the accused/appellant had never entered in their house.

06. On the other hand, supporting the impugned judgment it has been argued by the State counsel that there is no reason for this Court to disbelieve the statement of the prosecutrix which has been duly supported by the evidence of her daughter (PW-3). Injured witnesses (PWs-2 & 3) have categorically stated as to the manner in which they were assaulted by the appellant and their version finds due corroboration from the medical evidence as well.

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

08. PW-1 prosecutrix has stated that on the date of incident in the afternoon she was sleeping in her room, her daughter Geeteshwari was watching TV in another room and her mother-in-law Biswantinbai was in the verandah. At that time, the accused/appellant after consuming liquor came to her house, threw her mother-in-law on the floor, as a result of which her thigh bone got fractured, he entered her room, beat her and after upturning her petticoat committed forcible sexual intercourse with her. Thereafter, the accused/appellant caught hold of her daughter, who was watching TV, and beat her also. When she tried to save her daughter, he pushed her away and then he was driven away by Lakshawantinbai. After the incident when her husband

returned home, she narrated the entire incident to him and then report was lodged.

In cross-examination, she has stated that she knows the accused/appellant, he is grand-son of one Chherkinbai, who was friend of her mother-in-law, and he was residing with her. She has admitted that her house is surround by number of houses. She has stated that on account of severe beating given to her, her bangles were broken, blood started oozing, she suffered injuries on her calf, thigh, knee, one inch deep injury on little toe of left foot also and it was bleeding all over. The appellant beat her for about ten minutes in the verandah, though she raised cries but nobody came to her rescue. In the said marpeet, her sari, blouse, petticoat got stained with blood, they were torn, the police personnel did not seize sari and blouse, and only seized her petticoat. She has stated that out of fear she hid herself in the room, however, the appellant pushed open the door, as a result of which the hinges of the door uprooted and then he threw her on the cot, gagged her mouth by inserting her sari and after upturning her petticoat started committing rape with her. At that time, her daughter came there, she assaulted him on his head with an iron rod, then he stood up and ejaculated and thereafter, he came out from there and started committing marpeet with her daughter brutally. The accused/appellant remained in their house for about an hour. On account of assault, she (prosecutrix) suffered injury on her back, her elbow got broken and it was bleeding. Her daughter's finger also got cut. The accused/appellant was drunk. She has stated that she had disclosed the police all the above facts as well as the injuries suffered by her in

the said incident and if the same have not been written in her case diary statement Ex.D/1, she could not tell the reason.

09. PW-2 Biswantinbai, mother-in-law of the prosecutrix, has stated that at the time of occurrence she was sitting in her verandah, the accused/appellant came there by saying that he would rob the honour of her daughter-in-law, he is not afraid of police as he is a moneyed man. He threw her on the floor thrice as a result of which she sustained injuries on her waist and left eye, and then he also beat her daughter-in-law and grand-daughter Geeteshwari. She has admitted in her examination-in-chief itself that the accused/appellant did nothing to her daughter-in-law except beating and that her daughter-in-law had not told her anything. This witness was declared hostile. In cross-examination she has further admitted that the prosecutrix was not raped by the accused/appellant.

10. PW-3 Geeteshwari, daughter of the prosecutrix, aged about 17 years, has stated that at the time of occurrence she was watching TV in her room whereas her mother was sleeping in her room and her grand-mother was in the verandah. Upon hearing cries when she entered the room of her mother, she saw the accused/appellant committing rape with her mother, when she was searching something to assault him, he caught hold of her by hair and beat her also. The appellant also assaulted her mother and grand-mother. On account of assault she suffered injuries on her finger and back. After the incident when her father reached home, he was informed about the entire incident and then report was lodged. In cross-examination, she has stated that she had not seen the accused/appellant beating her grand-

mother. She has denied the suggestion that the accused/appellant was beaten by her or her mother. She has stated that upon hearing cries of her mother when she went to her room, she saw the accused/appellant committing rape with her mother, but she did not make any effort to pull him away. According to her when the accused/appellant advanced towards her, at that time he was wearing his clothes. She has further admitted that it is so that when she assaulted the appellant with iron rod while he was committing rape with her mother, then only he stood up.

11. PW-4 Dr.RS Baghel did MLC of Biswantinbain (PW-2) on 10.6.2010 vide Ex.P/5 and noticed swelling and pain over her right thigh, backside of her waist and then advised for x-ray. On the basis of x-ray report, he opined (Ex.P/6) that there was fracture of femur bone and pubic bone. According to him, the injuries were grievous in nature, caused by hard and blunt object. On the same day, he also medically examined Geeteshwari (PW-3) vide Ex.P/7 and noticed abrasion on forehead (2 x .5 cm), contusion over backside of right elbow (3 x 2 cm with irregular margin), contusion on middle finger of right hand (2 x 1 x .5 cm with irregular margin), contusion on palm aspect of right hand (3 x 2 cm). All these injuries were simple in nature, caused by hard and blunt object. Accused/appellant was also medically examined by him vide Ex.P/8 on 10.6.2010, according to which the appellant suffered incised wound on back side of right forearm (4 x 3 x 1 cm with regular margin) and another incised wound on right side of forehead above right ear (5 x 3 x 1 cm with regular margin). He opined that the accused/appellant was capable of performing sexual intercourse.

12 PW-5 Dr. Saroj Diwan conducted medical examination of the prosecutrix vide Ex.P/9 and noticed no external or internal injury on her body and that her hymen was old torn. In cross-examination she has further stated that she found no injury on the whole body of the prosecutrix.

13 PW-6 Arun Kumar registered numbered FIR (Ex.P/10) on the basis of unnumbered FIR (Ex.P/1). PW-7 Harilal is a witness to seizure of petticoat of the prosecutrix (Ex.P/4) and underwear of the appellant (Ex.P/11). He is also a witness to the spot map Ex.P/3. PW-8 GS Thakur, investigating officer, has stated that PW-3 Geeteshwari had never informed him that she entered the room where the prosecutrix was subjected to rape and that she was beaten there and in the verandah. He has further admitted that he was informed by DW-1 Hitendra that at the time of occurrence, some boys were playing marbles in front of house of the prosecutrix, the accused/appellant reached there and started abusing them, and on being objected by the prosecutrix and her mother-in-law, there was hot talks between them and then the appellant committed marpeet with them.

14. DW-1 Hitendra Kumar, who was initially cited as prosecution witness and whose case diary statement was recorded by the police, has stated that he saw the quarrel between the prosecutrix, her mother-in-law and the appellant, and that the appellant had not entered the house of anybody. DW-2 Chandrika Baghel has made almost similar statement as has been made by DW-1.

15. Close scrutiny of the evidence makes it clear that on 9.6.2010 after

consuming liquor, the accused/appellant reached the house of the prosecutrix, started abusing them and on objection being raised by her mother-in-law Biswantinbai (PW-2), first beat her after throwing her on the floor and when the prosecutrix came to her rescue, she too was assaulted. Upon hearing the cries, when daughter of the prosecutrix Geeteshwari (PW-3) intervened, she was also assaulted by the appellant. On account of assault, PW-2 and PW-3 suffered injuries and according to medical evidence, injuries suffered by PW-2 were grievous whereas the injuries suffered by PW-3 were simple in nature. Thus, on the basis of evidence, oral and documentary, available on record, it stands established beyond reasonable doubt that on the date of incident the appellant forcibly entered the house of the prosecutrix and committed marpeet with them, thereby causing grievous injuries to PW-2 and simple injuries to PW-3. As such, this Court has no hesitation in holding that conviction of the appellant under Section 450, 325 and 323 of IPC is based on proper appreciation of the evidence and therefore, it is hereby maintained.

16 Now it is to be seen whether on the basis of evidence on record, the accused/appellant is liable to be convicted under Section 376 of IPC also?

17. True it is that conviction under Section 376 of IPC can be based on the sole testimony of the prosecutrix provided it inspires confidence of the Court, is consistent and free from the suspicion of falsity. But where the testimony of the prosecutrix is bristling with infirmities and improbabilities, it would be hazardous to base conviction on it, it needs corroboration to rule out the possibility of false implication.

18. The evidence reflects that during quarrel, there was hot talk between the prosecutrix, her mother-in-law, her daughter and the appellant. However, there is no conclusive and clinching evidence to show that the prosecutrix was subjected to rape by the appellant. Though in the FIR and statement under Section 161 Cr.P.C. the prosecutrix has alleged that she was subjected to rape by the appellant in her room but her version does not appear to be natural and convincing, rather it appears to be exaggerated one, suffering from the vice of contradictions and omissions. The incident had taken place in the house where there were the prosecutrix, her mother-in-law and daughter. From the evidence of PW-2 Bisantinbai it reflects that she has categorically denied commission of rape by the appellant with her daughter-in-law (prosecutrix). This apart, as per the prosecutrix when she was being subjected to rape, her daughter (PW-3) reached there and assaulted on the head of the appellant with iron rod whereas in her case diary statement PW-3 has stated that she did not witness the incident of rape. However, while improving in the Court PW-3 has stated that she had seen the appellant committing rape with her mother. There are material contradiction in the statements of PW-1 prosecutrix and her daughter PW-3 on the point of commission of rape by the appellant.

19. Another important aspect of the case is that as per FIR lodged by the prosecutrix, after hearing her cries their neighbours Lakshawantin and son of Gangaram came to their rescue and took the accused/appellant outside their house, however, these two witnesses have not been examined by the prosecution and even in their case

diary statements these witnesses have not stated that the prosecutrix was subjected to rape by the appellant. They being the independent witnesses ought to have been examined by the prosecution to substantiate its case. Similarly, another important witness Hitendra @ Pilu who was cited as prosecution witness was not examined by the prosecution. The said witness was examined as a defence witness wherein he has categorically stated that on the date of incident the accused/appellant had abused the children playing in front of house of the prosecutrix, then he was beaten by the prosecutrix, her mother-in-law and that the accused/appellant had never entered in their house.

20. Most importantly, according to the prosecutrix on account of severe beating given to her by the appellant, her bangles were broken, blood started oozing, she suffered injuries on her calf, thigh, knee, one inch deep injury on little toe of left foot also and it was bleeding all over. The appellant beat her for about ten minutes in the verandah, she suffered injury on her back, her elbow got broken and it was bleeding. However, medical evidence contradicts her version *in toto*. PW-5 Dr. Saroj Diwan who medically examined the prosecutrix on 10.6.2010 vide Ex.P/9 i.e. second day of the incident, noticed no mark of external or internal injury on her body.

21. Thus, on the basis of evidence adduced by the prosecution, in particular the nature of evidence of the prosecutrix which is in total contrast with the medical evidence and also at variance with the evidence of inmates of the house i.e. PW-2 & PW-3 on the material points, it cannot be said that the prosecution has proved its case based on such evidence beyond reasonable doubt, rather the appellant

appears to have been falsely charged with the said offence just to make his act graver. Being so, the trial Court has committed an illegality in holding him guilty under Section 376 of IPC, and he is entitled to be acquitted of the said charge by extending him benefit of doubt.

22. In the result, the appeal is allowed in part. While maintaining conviction of the appellant under Sections 450, 325, 323 of IPC and sentence imposed thereunder, he is acquitted of the charge under Section 376 of IPC by giving him benefit of doubt. The appellant is reported to be in jail for the last more than 5 years, he has already deposited the entire fine amount and as such, has already undergone the entire sentence imposed on him. Therefore, he be set free forthwith if not required in any other case.

Sd/

(Pritinker Diwaker)

Judge

Khan