

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 1240 of 2013

1. Peelchand @ Munna S/o Sukhdhar Mandavi, aged about 22 years, R/o. Village Parthari Para, Godma, Police Station Badedongar, Civil and Revenue District Kondagaon (C.G.)
2. Gajendra Mandavi @ Gaddi S/o Mehattar, aged about 23 years, R/o. Village Korkuti, Police Station Dhanora, Civil and Revenue District Kondagaon (C.G.)
3. Manglu Mandavi S/o Mehattar Mandavi, aged about 25 years, R/o. Village Korkuti, Police Station Dhanora, Civil and Revenue District Kondagaon (C.G.)

---- Appellants

Versus

1. State of Chhattisgarh Through: the Station House Officer, Police Station Badedonger, District Kondagaon (C.G.)

---- Respondent

For Appellants – Shri Vineet Ku. Pandey, Advocate.

For Respondent – Shri Satish Gupta, Govt. Advocate.

Hon'ble Shri Justice Chandra Bhushan Bajpai

Judgment on Board

17/11/2016

1. Challenge in this appeal is to the judgment of conviction and order of sentence dated 29-10-2013 passed by the Additional Sessions Judge, Kondagaon, C.G. in Sessions Trial No. 261/2012 whereby and whereunder the learned trial Judge after holding the appellants guilty for kidnapping of the prosecutrix (PW-1) and thereafter for committing gang rape, convicted them under Sections 363, 376(2)(g) of the Indian Penal Code, 1860 (in short 'the IPC') and sentenced the appellants to undergo rigorous imprisonment for 7 years, rigorous imprisonment for 10 years, also to pay fine of Rs. 1000/-, Rs. 1000/-, in default of payment of fine to further undergo rigorous imprisonment for 3 months, 3 months to each appellants with a direction that both the substantive jail sentences shall run concurrently.

2. Appellant Peelchand (A-1) and appellant Gajendra (A-2) are serving the sentence since 03-11-2009 till date, appellant Manglu (A-3) is serving the sentence from 07-11-2009. With this, all the accused/appellants have completed the sentence of 7 years.

3. Conviction is impugned on the ground that without there being any iota of evidence, the trial Court convicted and sentenced the appellants as aforementioned and thereby committed illegality.

4. The prosecution case, in brief, is that in the intervening night of 30th and 31st of October, 2009, at about 2.00 a.m. night, all the accused/appellants knocked the door of Baderam, the uncle of the prosecutrix and asked about the prosecutrix that she has been called to near Godama Nala and told that they were naxali members. Thereafter, the uncle and aunt of the prosecutrix were taken to some distance, the accused/appellants forcibly returned the uncle and aunt of the prosecutrix and took the prosecutrix to village Barda in the house of Birajuram Korram. Thereafter, accused/appellant Peelchand (A-1) committed forcible sexual intercourse twice, other accused/appellants were in a nearby room. Thereafter, parents of the prosecutrix and other villagers came to village Barada and thereafter the villagers convened a meeting and the prosecutrix lodged the FIR (Ex.-P/1) before police of Badedongar, who, in turn, registered Crime No.23/09 under Sections 365, 342, 376, 34 of the IPC and proceeded for the investigation. They prepared the spot map (Ex.-P/2), also sent the prosecutrix for medical examination. As per not exhibited MLC report, the examining doctor not noticed any external injuries and also not noticed any symptom for forceful intercourse. The accused/appellants were arrested. Cloth of appellant No.1 Peelchand was seized. The prosecutrix was also sent for ossification test. Doctor Govind Singh (PW-9) opined that the prosecutrix was above 15 years of age and below 18 years of age, he gave his report (Ex.-P/23). The statements of witnesses were recorded under

Section 161 of the Code of Criminal Procedure, 1973 (in short 'the Code'). After completion of the investigation, charge sheet was filed before Judicial Magistrate First Class Kondagaon, C.G., who, in turn, registered the same as Criminal Case No.39/2010 and committed the matter for trial vide order dated 11-02-2010. The learned Additional Sessions Judge received the case on transfer and conducted the trial.

5. In order to prove guilt of the accused/appellants, the prosecution examined 10 witnesses. The statements of the accused/appellants were also recorded under Section 313 of the Code in which they denied the circumstances appearing against them, pleaded innocence and false implication in crime in question.

6. After affording opportunities of hearing to the parties, learned trial Judge convicted and sentenced the appellants as aforementioned.

7. I have heard learned counsel for the parties and perused the judgment impugned and record of the trial Court.

8. Learned counsel for the appellants after perusal of the entire evidence would submit that on the basis of the entire evidence surfaced during the trial he is not contesting the instant criminal appeal on its merit, he is confining his argument to the quantum of the sentence. Learned counsel would further submit that all the appellants have served more than 7 years, with this, they have served the sentence awarded under Section 363 of the IPC and as the trial Court directed to run both the substantive jail sentences concurrently and the accused/appellants are sentenced rigorous imprisonment for 10 years for the offence under Section 376(2)(g) of the IPC and as the date of incident is prior to the Criminal Law (Amendment) Act, 2013, section 9 for section 376 (w.e.f. 03-02-2013), as per proviso applicable in case of gang rape also, the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term

of less than 10 years, the accused/appellants are aged about 22 to 25 years at the time of incident, the prosecution failed to examine the doctor who conducted examination of the prosecutrix, even after perusal of said un-exhibited report of the doctor and other fact that it is appellant Peelchand (A-1) only who committed forcible sexual intercourse, the other co-accused were convicted as they involved for the kidnapping and they were convicted on the basis of explanation 1 given for the definition of deemed gang rape in the matter as they were present in the nearby room, as alleged they were acting in furtherance of their common intention but they not took any active part, they were the first offender and the appellants are in jail since more than 7 years, they are young boys, all aged about 22 to 25 years, they will not commit any offence in future, they were not in a position to file criminal appeal in the matter and only after free legal aid given to the appellants, they have filed the said criminal appeal, therefore, looking to their entire condition, age and other facts, they may be considered sympathetically and may be awarded sentence to the period already undergone by them for offence under Section 376(2)(g) of the IPC.

9. Per contra, learned counsel for the State/respondent opposed the argument advanced on behalf of the appellants and would submit that on the pretext of fake and wrong identification that the accused/appellants are members of the naxali group at about 2.00 a.m. of the morning they knocked the door of the uncle of the prosecutrix where the prosecutrix was living for some days and they took the prosecutrix along with her uncle and aunt and thereafter her uncle and aunt were asked forcibly to go back and thereafter they took the prosecutrix and in another village Barada appellant Peelchand (A-1) committed sexual intercourse forcibly twice, the other appellants acted in furtherance of their common intention, hence the trial Court rightly held them

guilty and sentenced the minimum sentence. Therefore, the appeal may be dismissed in all counts.

10. In order to appreciate the arguments advanced on behalf of the parties, I have perused the evidence adduced by the prosecution.

11. On minute examination of the statements of the witnesses, it appears that the prosecutrix came to house of her uncle and aunt and was residing there for a few days and in the night, 2.00 a.m., she was taken forcibly by the accused/appellants and in another village appellant Peelchand (A-1) committed sexual intercourse twice and other co-accused were remain present in the same house till kidnapping of said prosecutrix and till recovery. Though the statement of lady doctor who examined the prosecutrix was not examined by the prosecution but it is not law that in absence of statement of lady doctor the allegation of rape cannot be proved. On perusal of the statement of the prosecutrix (PW-1), this Court is of the considered view that she was raped by appellant Peelchand (A-1) twice in the village Barada and since her kidnapping from the house without consent of her parents and as she was noticed below the age of 18 years by Doctor Govind Singh (PW-9), the prosecution duly proved the allegations and charges against all the appellants. Even otherwise, learned counsel is not contesting the instant criminal appeal for the conviction part. On its entirety, the conviction passed by the trial Court against the appellants for the offence under Sections 363, 376(2)(g) of the IPC do not require any interference.

12. So far as fine sentences awarded to the accused/appellant are concerned, on due consideration, the same are also not on higher side. Consequently, the fine sentences awarded by the trial Court also require no interference.

13. So far as the jail sentences are concerned, as the accused/appellants are in jail since more than 7 years, with this, they have served the entire jail

sentence awarded under Section 363 of the IPC and as the Court below directed to run both the substantive jail sentences concurrently, they have also served the substantive jail sentence for the offence under Section 376(2)(g) of the IPC for 7 years and 14 days (for appellant No.1 Peelchand and appellant No.2 Gajendra), 7 years 10 days (for appellant No.3 Manglu). As per the provision applicable prior to the substitution of present Section 376 w.e.f. 03-02-2013 as substituted by the Criminal Law (Amendment) Act, 2013 under section 9, as per provision applicable, the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for less than 10 years. In the present case, all the accused/appellants are the first offender with no any criminal antecedent or reputation prior to the present incident, they were aged about 22 to 25 years of age, they are poor villagers, residents of same village and labour by profession living in the remotest tribal area, upon consideration of the entire facts, in the considered view of this Court, object of justice would be served if they be sentenced rigorous imprisonment to the period already undergone for Section 376(2)(g) of the IPC.

14. Consequently, the appeal filed on behalf of the appellants is allowed in part. Conviction of the appellants under Sections 363, 376(2)(g) of the IPC are hereby affirmed. Fine sentences including the default part imposed on default of payment of fine are also hereby affirmed. Substantive jail sentence awarded under Section 363 of the IPC is also affirmed; as the accused/appellants have served the sentence for more than 7 years, hence the substantive jail sentence awarded under Section 363 of the IPC is served completely. So far as substantive jail sentence awarded under Section 376(2)(g) of the IPC is concerned, instead of rigorous imprisonment for 10 years to each appellants, all the appellants are sentenced to the period already undergone by them; as the trial Court directed to run both the substantive jail sentences concurrently,

with this, as the appellants are in jail, they be set at liberty forthwith if not required in any other case after deposition of fine amount awarded. If fine amount are not deposited, then the authorities concerned are directed to serve the accused/appellants with the default sentence as mentioned in para 20 of the judgment of the trial Court.

15. Appeal partly allowed.

16. Copy of this judgment may be filed on behalf of the appellants for compliance.

17. Registrar (Judicial) is also directed to send copy of the judgement to the trial Court through usual mode and fax mode immediately.

Sd/-
(Chandra Bhushan Bajpai)
Judge