



IN THE HIGH COURT OF JUDICATURE AT JABALPUR

Cr.A.No.

655

of 1999

CRIMINAL APPEAL UNDER SECTION 374 (2)
OF THE CODE OF CRIMINAL PROCEDURE, 1973

Appellants: 1. Vijay Kumar, aged 23 years,
Accused
(In, Jail) son of Dulakhandas Gendre;

2. Jalesh Kumar, aged 23 years,
son of Sanat Kumar Satnami;

3. Pyarelal, aged 28 years,
son of Bhikodas Grende;

All R/o Bhalu Choona, P.S. Kawardha,
District Rajnandgaon, M.P.

versus

Respondent: The State of Madhya Pradesh

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8/3/99
Filed on
by Shri. S.D. Gupta
Advocate

Rto. A R

C.O. - 13/10/15
abated

**HIGH COURT OF CHHATTISGARH, BILASPUR**

(54)

CRA No. 655 of 1999

Vijay Kumar & Another

---- Appellants

Versus

The State of Madhya Pradesh (now C.G.)

---- Respondent

For appellants- Shri Arun Kochar, Advocate.
For State – Shri Sangarsh Pandey, Dy.G.A.

Hon'ble Shri Justice Goutam Bhaduri**Order****24/08/2017**

1. During pendency of the appeal, appellant No.2 Jalesh Kumar died in the year 2009. Therefore, appeal stands abated in respect of appellant No.2 Jalesh Kumar as per order dated 13/01/2015 and now the case is heard on behalf of appellant No.1 Vijay Kumar and appellant No.3 Pyarelal.

2. This instant appeal is against the order dated 24/02/1999 passed by the Additional Sessions Judge, Khairagarh whereby the appellants have been convicted under Section 366 of IPC and have been sentenced to RI for 7 years and to pay fine of Rs.1000/-, in default of payment of fine, to undergo additional RI for 6 months, under Section 376(2)(g) of IPC appellants have been sentenced to RI for 10 years and to pay fine of Rs.1000/-, in default of payment of fine, to undergo additional RI for 6 months and under section 506-B of IPC, appellants have been sentenced to RI for 5 years and to pay fine of Rs.1000/-, in default of payment of fine, to undergo additional RI for 6 months.



3. As per the case of the prosecution, on 14/05/97 at village

Ragupara some function was organized wherein prosecutrix alongwith her mother had went to village Ragupara to see the function. While function was going on, at about 2'O clock the victim went to answer the call of nature. Thereafter, while she was coming back few of the accused caught hold of her and took her to the forest by motorcycle. Thereafter, all three of them committed forcible sexual intercourse, when she became unconscious she was left in the forest and the appellants fled away. When she gained her conscious and while walking she came to Bharamdeo jungle and saw one person coming in a bicycle and he asked how she is there, at that time she disclosed the incident to him. Subsequently, the incident was disclosed to Kotwar and the FIR was made by EX.P-4. After lodging of the report, investigation was carried out and case was registered under Section 366, 376(2)(g) and 506-B of IPC. During the course of trial, appellants abjured their guilt and claimed to be tried. Prosecution on their behalf had examined 13 witnesses.

4. Learned counsel for the appellants would submit that in the FIR place of incident is stated to be Bharamdeo jungle whereas in the court statement place of incident has been stated to be Kodarkhar. It is further submitted that in the statement before police under Section 161 of Cr.P.C. the victim has named only one person whereas in the statement before the court all the three have been inculpated. He referred to the statement of PW-11 and would submit that taking her forcefully by closing her mouth has not been stated before the police and improvement was made in the court. He further submits that statement of the father PW-1 would show that nothing was disclosed to

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him and he has not supported the case of the prosecution. It is further contended that a panchayat was held wherein settlement was arrived at and wherein the prosecutrix admitted the fact that she has falsely lodged the report of rape, therefore statement of the prosecutrix cannot be relied upon and even if FSL report is accepted it would show that she was a consenting party as she herself had went alongwith the appellant No.1. It is further contended that there are serious contradiction and omission has appeared in the statement of the prosecutrix, therefore conviction itself is bad in law which needs to be set aside.

5. Per contra, learned State counsel supports the order of the court below and would submit that order passed by the court below is well merited which do not call for any interference.

6. Perused the record of the court below. The FIR in this case is dated 14/05/97 lodged by the prosecutrix. In the FIR three appellants have been named i.e. Vijay Kumar (A-1), Jalesh Kumar deceased (A-2) and Pyarelal (A-3). In the FIR it is stated that while the prosecutrix went to answer the call of nature, all the three accused persons caught hold of her made her blind folded by putting clothes over the eyes and made her to sit in the motorcycle. Thereafter, at Bhoramdeo forest initially Vijay Satnami committed rape followed by Pyarelal and thereafter Jalesh committed rape and then she became unconscious. She further stated that rape was committed on the point of knife and threat was extended that if she raises her voice she would be killed. Thereafter, she came out of the forest went alongwith a person who came in cycle and went to the house of one Ramnath Sahu and



disclosed the incident to Ramnath Sahu and Kotwar of the village. In FIR she further discloses that thereafter her family members came and the incident was disclosed to Kartik Das her father, Kamla Bai mother, Prabhati Lal brother-in-law and Bedu uncle.

7. Statement of the prosecutrix under Section 161 Cr.P.C. is marked as Ex.D-1 and she was examined as PW-11 before the court. In Ex.D-1 it is stated that while she was coming back after answering call of nature alongwith one Sunta Bai, at that time all the appellants met there and Vijay Satnami asked Pyarelal and Jalesh to make her sit in the motorcycle, at that time Pyarelal and Jalesh forced her to sit in the Luna motorcycle. Further Vijay Satnami extended threat that if she raises alarm and try to flee away she would be killed, therefore she kept silent. Thereafter, Vijay forcefully took her away and the prosecutrix told the other accused that they would be witness. Subsequently, she was taken to a place known as Kodarkhar and in the field forceful rape was committed by Vijay. She further stated that when she tried to make alarm by shouting she was threatened that if she raises her voice, she would be killed and out of fear she could not shout. She further stated that she requested Vijay to leave her in the place where dance programme was going on but she was left there alone. Subsequently, she met Dayal Sahu and when the said person asked her where she was going alone the incident was disclosed. Thereafter, she was taken to the house of Shobaram Sarpanch. Thereafter, father of the victim came it was disclosed to him as also to the Kotwar of the village Chikli and the report was made.

8. Before the court she has narrated entirely different story that all

the three accused took her to Kodarkhar and one by one she was subjected to rape. First by Vijay subsequently by Pyarelal and thereafter Jalesh committed rape. It is further contended that one of the accused caught hold of her hand while other used to caught hold of the legs and the other remaining one used to commit rape. It is further stated that during such activity piece of cloth was put into her mouth, as such she could not raise voice. In the statement further she stated that after committing rape at Kodarkhar, she was taken by all the three accused to Bhoramdeo forest and near Chapri named Harmokhar she was left and all of the three accused fled away. Thereafter, she met Dayal Sahu and disclosed the incident to him. In the cross examination she stated that Jalesh was driving the motorcycle, she was sitting behind him and thereafter two accused were sitting after her in the motorcycle. Jalesh started the motorcycle by kick and when she was caught she stated that she would make noise, at that time pieces of clothes (chindi) was placed in her mouth as such she could not raise her voice.

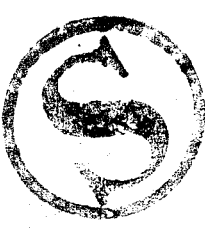
9. Witness was confronted with her statement made to the police under section 161 of Cr.P.C. Statement recorded by the police. In such statement omission part was marked that before the police she has not made allegation on three accused that they have committed rape and only allegation was attributed to one. The statement made to the police is marked as Ex.D-1 and was affirmed by PW-13 the I.O. R.L. Sahu who recorded the statement and stated according to the statement given by the prosecutrix it was recorded. With respect to the specific question as to why only allegation was attributed to one appellant Vijay she denied to have given such statement.



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10. Therefore, if the FIR which was lodged by the prosecutrix marked as Ex.P-5 read with the statement of the prosecutrix under section 161 Cr.P.C. which is marked as Ex.D-1 as also statement before the court major omission and contradiction appears as before the police prosecutrix stated that only Vijay committed rape whereas in FIR allegation of rape was on the three accused. Statement before the police was recorded on 16/05/97 which is marked as Ex.D-1 i.e. after a day of the FIR. Consequently, if such omission exist in the statement before the police and then reading it with the statement given before the court would take it within the ambit of omission consequently would amount to material contradiction. As has been held in case of **Shri Gopal and Anr. Vs. Subhash and others** reported in **AIR 2004 SC 4900** omission to state a fact would amount to contradiction. The omission in this case appears to be significant and relevant having regard to the context in which such omission occurs. Therefore, taking into question of fact that when statement under section 161 of Cr.P.C. given to the police when only allegation is attributed to one of the accused whereas later on before the court allegation has been clamped on three it would be an omission and as such a contradiction of the own statement of the victim.

11. Further the prosecutrix stated that after the incident she met Dayal and disclosed the entire incident to Dayal. The witness Dayal has not been examined by the prosecution. As per the FIR she went to the house of Ramnath Sahu wherein Kotwar was also called of village Chikli. Ramnath is examined as PW-5. In his statement he has stated that he saw the girl was sitting in the house when he came back from his field. Thereafter, he talked to her and name of the father was



enquired which was told to be Kartik. Subsequent to it Kotwar asked to inform mother and father of the victim and when they came she left alongwith them. He stated that he has not asked anything to the girl and nothing was disclosed to him by the girl. Siyaram PW-4 only stated that at the request of Dayal he had left the girl in a house. He has also not disclosed anything that the victim had disclosed said witness. PW-3 Beduram has not supported the case of the prosecution. Further in the cross examination he has stated that he has escorted the girl in his cycle to Kawardha and before him no incident was disclosed to him by girl. Likewise PW-9 Sobharam stated that he had went to village Chikli after receiving news that the victim is in the house of one Sahu wherein victim at the presence of his father has not disclosed anything. He has also not supported the case of the prosecution. PW-2 Prabhati Lal also not supported the case of the prosecution and stated that when the father of the victim had disclosed that his daughter is in village Chikli and asked for help, therefore he accompanied them to Chikli and went to the house of one Sahu wherein prosecutrix and other villagers were also present, however the girl did not disclose anything. Witness stated that at the time Kotwar was having written paper in his hand and he disclosed that the victim had come alongwith other boys of the village however victim had not disclosed anything.

12. The father of the victim Kartik Ram PW-1 has also not supported the case of the prosecution, importantly in the cross examination he stated that when he went to Chikli to bring his daughter on asking also she did not disclose anything. Subsequently, mother of the girl informed him that few of the boys had committed rape. In statement of the Kartik Ram he admits this fact that commission of rape was

disclosed by the daughter to her mother which in turn was disclosed to him was not narrated to the police in his police statement and for the first time it was stated before the court. Witness father further admitted the fact that he wanted his daughter to wear chudi from Vijay accused (A-1) so that she may remain in the village but on the advise of Jalesh and Pyarelal, Vijay did not accept her and did not gave chudi to her daughter. He further stated that villagers of Chikli made a report and after report his daughter wanted to wear chudi from Vijay and he also tried for it and at that time one of the accused stated that if the daughter accepts truth before panch then only he will accept and keep the prosecutrix as his wife. The father further stated that subsequently, prosecutrix admitted before the panch that accused have not committed any rape and she had made false report. He further admitted the fact before panch everything was written in writing and the panch as also victim had placed their signature and thumb mark and the father had also placed his thumb mark on such paper. He also admits the fact that daughter had told since Vijay had refused to give her chudi and he was in tension as such she herself fled away from the place of programme where dance programme was organised and went to Chikli. It is further stated that the daughter/victim has not stated that accused have committed rape.

13. At this juncture, considering the admission of certain facts the document Ex.D-2 which is scribed as Ikrarnama would be of much relevance. Ikrarnama reads that victim had accepted one accused Vijay (A-1) as her husband and stated that on the advise of other persons she had made report under section 376 which may be accepted to be false as cancelled. It further records that such report of



rape was fraud and therefore agreement was executed. Said agreement contains signature of 12 villagers. Statement of DW-2 Goutam Prasad would show that he was also signatory to such agreement and proved that agreement. He stated that a meeting was convened at the request of father of the victim i.e. PW-1 Kartik Ram. On asking the reasons witness states that Kartik Ram disclosed that his son-in-law Baldev told that he was going out side of village to earn his livelihood and do not want to take her daughter and requested that the wife (victim) should get married to someone by way of chudi marriage. After some day one of the accused Vijay accepted to offer chudi to the victim but subsequently refused, therefore report was made against all the accused. He further stated that in such meeting the victim accepted that she wanted to wear chudi from Vijay and since Vijay had refused as such report was made by her, however no rape was committed and at her request it was written in the writing and she had put her signature.

14. In the facts of this case, statement of the prosecutrix would show that she kept on changing her version at different point of time. Initially in the FIR place of incident was shown to be Bhoramdeo forest and it was stated that her eyes were blind folded and hands were tied and rape was committed on the point of knife by three persons. Subsequently, in statement before the police under Section 161 of Cr.P.C. commission of rape is attributed to only one of the accused. In statement to the police she stated that two of the accused made her to set in the motor cycle, thereafter Vijay took her away and thereafter he committed rape whereas in statement before the court such version was changed and the allegation of rape was attributed to all the three



accused. The fact that she stated that it was disclosed to her father PW-1, mother and other witness Siyaram PW-4, Ramnath PW-5 in whose house she went at Chikli they have not supported the prosecution story. On the alternate father has accepted the fact that he wanted to get her married for the second time to Vijay as his first son-in-law never wanted to take her daughter (victim) with him when he was going out of the village to earn his livelihood, at that juncture initially Vijay accepted to offer bangles to accept prosecutrix as his wife but subsequently refused to make such offer at the instance of other two accused. Thereafter report of rape was made.

15. Thereafter, again meeting was convened and Vijay accepted that he would accept the prosecutrix to be his wife provided victim comes out with truth. According to Ex.D-2 existence of those facts which finds place at Ikrarnama has been fortified by father of prosecutrix. Further the way the offence is said to have happened as narrated by the prosecutrix also do not inspire confidence. It is stated that she was taken by putting the piece of cloth into her mouth also do not appear to be logical. The facts suggest in a crowded place of programme she did not shout for help while she was being taken in the motorcycle at the alleged time of incident. Place of rape has also been kept on changing intermittently. Further the evidence of doctor PW-10 also do not show that the prosecutrix though was ravished thrice by the adult persons no injury was found as per PW-10 and Ex.P-8. Further the statement of the prosecutrix made to the police under section 161 Cr.P.C. discloses that she was taken alone by the appellant No.1 Vijay. Therefore in totality it will lead to show that she herself had went alongwith the appellant without much resistance. In facts of case the principle as laid

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down in case of **Hem Raj Vs. State of Haryana** reported in **2014 SAR (Criminal) 247** finds supports for doubt. It would show that prosecutrix changed her version at different stage and it will be extremely difficult and dangerous to rely on such statement and evidence of the prosecutrix cannot be accepted as gospel truth though it may be at par with the injured witness but at the same time accused must also be protected against possibility of false implication.

16. In view of this, taking into totality of the facts, I am of the view that benefit of doubt leans in favour of the accused/appellants. Consequently, it is difficult to accept version of the prosecutrix at its face value coupled with fact other evidences and witnesses do not support her testimony and is inconsistent with the statement of the other witness. Taking into totality of facts, I am inclined to allow the appeal.

17. In the result, appeal is allowed and the conviction & sentence imposed on appellant No.1 Vijay Kumar and appellant No.3 Pyarelal is set aside. They are acquitted of the charges. Appellant No.1 Vijay Kumar and appellant No.3 Pyarelal are on bail. Their bail bonds shall continue for a period of 6 months in view of provision contained under Section 437-A of Cr.P.C.

Sd/-
Goutam Bhaduri
Judge