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IN THE HIGH COURT OF JUDICATURE AT JABALPUR (M.P.)Criminal Appeal No. 1741 of 1999

8874)
30/6/99
J. Macik

APPELLANT : Kaithiha alias Tulsi Ram, aged about
(ACCUSED)
(IN JAIL) 33 years, son of Shri Dalad Ram
Satnami, r/o village Peihrid, Police
Station Malkharoda, District Janjgir
Champa.

VERSUS

RESPONDENT : State of Madhya Pradesh through the
Police Station Malkharoda, District
Janjgir Champa.

APPEAL UNDER SECTION 374, CODE OF CRIMINAL PROCEDURE, 1973



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HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 1741 of 1999

- Kaithiha @ Tulsi Ram

---- Appellant

Versus

- The State Of M.P.

---- Respondent

For Appellant	:	Shri Parag Kotecha, Advocate
For Respondent-State	:	Shri Ramakant Pandey, PL for the State

Hon'ble Shri Justice Goutam Bhaduri

Order On Board

24/08/2017

1. This appeal is against the judgment of conviction and sentence dated 21.06.1999 passed by the court of Additional Sessions Judge, Sakti, District Bilaspur in ST No.527/98 whereby the appellant has been sentenced to undergo R.I. for 7 years with fine of Rs.1000/- under Section 376 IPC and under Section 450 of the IPC he was sentenced for 5 years R.I. and fine of Rs.1000/-, failing which three months further R.I. on each count was ordered. Thus, he was directed to suffer separate sentence of 12 years and in absence of payment of fine additional R.I. for six months was ordered.
2. As per the case of the prosecution on 17.11.1998 the prosecutrix was sleeping in her house along with her children. Her husband and other family members had gone to watch T.V. in the recreation centre of the village. The accused went inside the house, closed the mouth of the victim thereafter committed forceful sexual intercourse. In the meanwhile, when the husband

of the prosecutrix came, the appellant hide himself below the cot, however, caught thereafter he was assaulted and prayed for mercy. He fled away from the scene, subsequently, report was made by the prosecutrix vide Ex-P18.

3. Learned counsel for the appellant would submit that this is the case of consent as the prosecutrix who was a married lady did not resist at the time of the incident and when her husband came then only the appellant was caught, therefore, the consent would be evident from the facts of the case. He would further submit that in order to save her face in the society a false report was made.
4. Learned State counsel opposes the arguments advanced by learned counsel for the appellant and submits that the order of conviction is well merited, which do not call for any interference.
5. Perused the statement of the victim/prosecutrix PW-17. In her statement it is contended that while she was sleeping in her room with her children, the door was not locked, as her husband had gone to watch T.V. in the recreation hall of the village. She has further stated that her brother-in-law was sleeping in other room whose name is Inderjeet and her mother-in-law and elder son had also gone to watch T.V. At the relevant time the appellant entered into room and when he caught hold of her hand, she got up. It was all dark, she could not recognize the appellant but she tried to free her hands and at that time the appellant caught hold of her neck, consequently, she could not raise her voice. Thereafter, her Saree was taken out and the appellant took out his garments and committed rape by putting her hand on her mouth. In the meantime, her husband came and called the accused/appellant and the appellant hide himself under the cot.

Her husband thereafter with the help of lantern discovered the accused hiding himself below the cot and caught hold of him thereafter tied his hands, but the appellant fled away subsequently.

6. In the cross-examination, the prosecutrix has stated that the house consists of two rooms. The map is marked as Ex P-7. The prosecutrix further stated that in one of the room her brother-in-law was sleeping and had there been any voice he would have woken up. The prosecutrix further stated that since the accused had placed his hand on her mouth, she could not raise any voice. In the cross-examination she has further stated that if her husband had not come, the accused would not have got down from the cot. In cross-examination she admits that she cleaned sperm of accused by her clothes. When she was confronted with her statement (Ex.D-4) recorded under Section 161 Cr.P.C., it is stated that the accused had not caught hold of her neck, it was denied.
7. Husband of the prosecutrix Maharathi has been examined as PW-14, has stated that he had gone to watch T.V. at the recreation hall in the village and after sometime his mother and elder son had also come to watch T.V. Subsequently, he came back to his house and when he opened the door of his room he saw that there was darkness in the room and heard muffled sound of his wife. Thereafter he lit up the match stick and saw the appellant was committing sexual intercourse with her wife. This witness has further stated that thereafter he called his brother and tied up the appellant, however, the appellant somehow fled away.
8. Doctor Smt. S.D. Kanwar has been examined as PW-3 and her report is marked as Ex.P/2, which shows that no definite opinion can be given about rape. The medical report also do not show any injury found in any part of the

body.

9. From the facts of this case it appears that the prosecutrix was alone in her house and kept the door of her room open. When the husband came he heard the voice of his wife thereafter after lighting the matchstick he could see the appellant with her wife in a compromising position. The prosecutrix was a married lady she herself was aware of the fact and could have easily distinguished a different person with that of the husband. The manner in which the offence has been committed it appears that the prosecutrix was a consenting party and the story put forth itself defies the forceful rape. In view of this, the judgment of conviction and sentence passed by the court below cannot be sustained.

10. In the result, the appeal is allowed and the conviction & sentence imposed on the appellant is set aside. He is acquitted of the charge leveled against him. The appellant is on bail. His bail bonds shall continue for a period of six months in view of the provision contained under Section 437-A of Cr.P.C.

**Sd/-
Goutam Bhaduri
Judge**

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