

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment reserved on 12-09-2017

Judgment delivered on 08-11-2017

Criminal Appeal No. 425 of 2010

Hemraj Chandrakar s/o Shyamlal aged about 30 years, Caste Kurmi,
Occupation Agriculture, R/o village Borigaon, Police Station Karpavand,
Tahsil Jagdalpur, District Bastar (CG)

---- Appellant

Versus

State of Chhattisgarh, Through The Police Station Anusuchit Jati
Kalyan Jagdalpur, District Bastar (CG)

---- Respondent

For Appellant	:	Mr. Malay Kumar Bhaduri, Advocate.
For Respondent/State	:	Mr. Rahul Tamaskar, Panel Lawyer.

**Coram: Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Ram Prasanna Sharma**

CAV JUDGMENT

Per Ram Prasanna Sharma, J.

1. This appeal is directed against the judgment

450, 376, 307 IPC and Section 3 (2) (v) of the SC/ST Act and sentencing him to undergo R.I. for 7 years and fine of Rs. 500/-, in default of payment of fine to further undergo R.I. for 1 month; R.I. for 7 years and fine of Rs.1000/-, in default of payment of fine to further undergo R.I. for 2 months, R.I. for 10 years and fine of Rs.500/-, in default of payment of fine to further undergo R.I. for 1 month; and imprisonment for life and fine of Rs.1000/-, in default of payment of fine to further undergo R.I. for 2 months respectively with a direction to run the sentences concurrently.

2. Case of the prosecution, in brief, is that the prosecutrix lodged a written report Ex.P/12 in Police Station Tribal Welfare, Jagdalpur on 3.4.2007 to the effect that on 2.4.2007 while she was alone in the house, as her brother went to Jagdalpur to see his ailing father who sustained injuries in a motor accident, at about 11.00 pm, the accused/appellant forcibly entered in the house of the prosecutrix. On being resisted by the prosecutrix, the appellant assaulted and committed sexual intercourse with her. At about 4.00 am, the appellant threw a burning chimney on the body of the prosecutrix and ran away. Soon after the incident, this fact was narrated by the prosecutrix to her sister-in-law (Bhabhi) Mangaldei (PW8) and then in the morning she was taken to hospital. On the basis of her report, Police started investigation. During the course of investigation, statements of the witnesses were recorded and dying declaration of the prosecutrix was also recorded. After investigation charge sheet was filed against the appellant before the Court of Judicial Magistrate First Class, Jagdalpur, who in turn committed the case to the Court of Sessions. The Trial Court framed charges against the appellant as mentioned above to

which the appellant did not plead guilt. Trial was conducted against the appellant and statements of prosecution witnesses were recorded and thereafter statement of the accused/appellant under Section 313 Cr.P.C. was also recorded. After hearing both the parties, the Trial Court has convicted and sentenced the appellant as mentioned above.

3. Learned counsel appearing for the accused/appellant submits as under:

- (i) That the prosecutrix is a major lady and from the statements of the witnesses, it revealed that prior to the incident the prosecutrix and the appellant had love affair and good relations, therefore, consent on the part of the prosecutrix cannot be ruled out.
- (ii) That the dying declaration was recorded by Naib Tehsildar/Executive Magistrate after obtaining certificate of Doctor regarding fitness of mental state of the prosecutrix and in that declaration she stated that while she was lightening chimney at about 4.00 am, she came into contact of the flame and therefore, the dying declaration confirmed that the accused/appellant has not committed any offence under Section 307 of IPC.
- (iii) That the appellant entered into the house of the prosecutrix as a matter of routine, therefore, an offence under Section 450 IPC and offence under the SC/ST Act would not be made out.

4. *Per contra*, learned State counsel supporting the impugned judgment has submitted that conviction of the appellant is strictly in accordance with law and there is no infirmity in it warranting any interference by this Court.
5. We have heard counsel for the parties and perused the material on record.
6. Prosecutrix, PW7 deposed in para 35 of her evidence that the appellant is her cousin as he is the son of his maternal uncle and she knew him from birth. She also stated that the appellant was in habit to joke with her. From this statement of the prosecutrix, it appears that the appellant was not unknown to her and he is in relation with the prosecutrix and there were prior meetings of the appellant and the prosecutrix. From the statement of the prosecutrix in para 1 of her evidence, it is clear that the appellant had entered into her house at about 10.00 pm and he remained there for the whole night. She deposed in para 22 that the appellant committed intercourse with her at about 3.00 am. From her statement in para 23 it is established that she has not resisted during intercourse. She further deposed in para 1 that the appellant threw a burning chimney on her and the same caught fire as against this, Naib Tehsildar, Smt. Ritu Hemnani (DW2) stated that she has recorded the dying declaration of the prosecutrix on 3.4.2007 at Maharani Hospital, Jagdalpur. She deposed that first the Doctor examined the prosecutrix and satisfied about the mental fitness of the prosecutrix and thereafter, she recorded her statement as per Ex.P/13. In her dying declaration, the prosecutrix deposed that she was lightening the chimney and at the same time accidentally she caught fire. From the statement of Dr. KM Gupta (DW1), who has examined the prosecutrix

before dying declaration and from the statement of Naib Tehsildar, Smt. Ritu Hemnani (DW2), it is established that the burning is accidental and there is nothing on record to discard the testimony of both these public servants, who have recorded the statement in their official duty. It is presumed that official acts are performed regularly and therefore, it cannot be presumed that they have recorded a false dying declaration.

7. From the dying declaration it is established that the prosecutrix caught fire accidentally whereas she has deposed before the Court that it was the appellant who had thrown the burning chimney over her body. Version of the prosecutrix on this count is not reliable, looking to the statement of the Doctor and the Naib Tehsildar. Other part of the evidence is also not convincing because from the statement of the prosecutrix, it is clear that the appellant is her relative and he used to visit her. When she had previously not raised any objection in mixing with the appellant and had not resisted during intercourse, it cannot be safely inferred that any act done by the appellant is without consent of the prosecutrix.

8. Dr. Shashikala Thakur (PW1) has examined the prosecutrix on 1.5.2007 and found no external injury on the body of the prosecutrix. Dr. RVP Gupta (PW2) has examined the appellant and found him to be competent for commission of intercourse. Inspector, B.L. Kehri (PW3) has assisted in investigation, Son Singh, (PW5) and Sunder Nath Chandrakar, (PW6), are the persons to whom father of the prosecutrix has informed about the accident and admission of her daughter in the hospital. Kamla Bai(PW9) is mother of the prosecutrix to whom the prosecutrix had informed about the incident. Lupteshwar (PW11) is brother of the

prosecutrix to whom she has narrated the incident. Vijay Gopal Chandrakar (PW13) is the village person before whom the prosecutrix had stated that she burnt accidentally while lightening the chimney. DRS Uike (PW14) is Dy. Superintendent of Police who had investigated the matter.

9. On careful scrutiny of the evidence it is clear that the accused/appellant and the prosecutrix are the relatives and they were well known to each other. They have prior meetings before the incident. Both were major as the prosecutrix was aged about 19 years at the time of incident and the appellant was aged about 28 years. On the date of incident, the appellant had stayed in the house of the prosecutrix for whole night and from the statement of the prosecutrix, it is established that she has not resisted the appellant from doing intercourse, therefore, it can be inferred that it may be a case of consent. Again the statement of the prosecutrix is not trustworthy regarding throwing of burning chimney on her person by the appellant because she herself has stated in her dying declaration that it was an accident.

10. On overall assessment of the evidence, we are of the view that statement of the prosecutrix is not inspiring confidence of the Court and there are material contradictions regarding the factual aspect of the incident, therefore, it is unsafe for us to sustain the conviction recorded by the trial Court.

11. For the foregoing reasons, the appeal is allowed. The conviction and sentence awarded by the trial Court are set aside. The appellant is reported to be on bail, therefore, his bail bonds stand discharged and he

need not surrender. The fine amount, if any paid by him shall be refunded to him.

Sd/-
(Pritinker Diwaker)
JUDGE

Sd/-
(Ram Prasanna Sharma)
JUDGE

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