

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 2687 of 2000**

- Khikh Ram @ Butagoo S/o Kholbehara Gara (Prabhoova) R/o Madkada Ps Kasdol Distt. Raipur C.G. ... **Appellant**

Versus

- State of Madhya Pradesh (Now Chhattisgarh) through Police Station Kasdol, Distt. Raipur (CG) --- **Respondent**

For the Appellant	:	Mrs. Savita Tiwari, Advocate.
For the State	:	Mr. Anupam Dubey, Dy. Govt. Adv.

Hon'ble Shri Justice Goutam Bhaduri**Judgment/Order on Board****10.10.2017**

1. This appeal is against the Judgment/order dated 09.12.1999 passed by the Court of Second Additional Sessions Judge, Baloda Bazar, Distt. Raipur in Sessions Trial No. 456 of 1999 whereby the appellant was convicted under sections 450 & 376 of IPC and sentenced to undergo R.I., for 3 years and R.I. for 7 years respectively. He was further directed to pay a fine of Rs.500/- - u/s 450 of IPC, in absence of payment of fine, to further undergo additional imprisonment for 3 months and also directed to pay a fine of Rs.1000/- u/s 376 of IPC and in absence of payment of fine, to further undergo additional imprisonment for 6 months.
2. The prosecution story in brief is that the victim is a married lady and is resident of Madakala and was engaged in agriculture. On 05.10.1998 at about 9 o' clock, the husband of the victim had gone to participate in a meeting in the

village. The children had gone to watch TV and the victim prosecutrix was alone in her house alongwith her daughter. As per the prosecution case, while she was sleeping and the doors were closed and at about 11 o' clock in the night, the appellant entered into the room, thereafter, he was identified but the mouth of prosecutrix was gagged and she was subjected to forcible rape and when she tried to relieve from clutches of the accused, he did not leave her from his clutches, therefore, she raised voice. On hearing the voice, her daughter Durga Bai got up and having seen, therefore, the appellant fled away which was seen by her. Subsequently, when the husband of the applicant came back, the entire incident was disclosed to him which in turn was proved by the Kotwar of the village and on the next day on 06.10.1998, the FIR was lodged. After the FIR, the police investigated the incident and recorded the statements of the prosecutrix, her husband, Kotwar and filed the charge sheet u/s 453, 376 of IPC.

3. During the course of trial, the appellant abjured the guilt and claimed to be tried. During the trial, the prosecution has examined the main witnesses i.e., prosecutrix as P.W.1, her husband Shiv Prasad as P.W.2, her daughter Ku. Durga Bai (P.W.3), the village Kotwar Sitaram (P.W.5) and Dr. Nihar Bajpai (P.W.8). The learned trial Court after evaluating the entire evidence convicted and sentenced the appellant as aforesaid. Hence this appeal.
4. Learned counsel for the appellant would submit that if the statement of the prosecutrix is seen, it would show that no allegations of rape has been made by the victim. It is

contended that serious contradictions were existing in the versions of witnesses i.e., husband (P.W.2), daughter (P.W.3) and the village Kotwar (P.W.5) about the commission of rape. It is further pleaded that the Doctor P.W.8 has also not supported the case as the prosecutrix was a major lady of 40 years of age and she was married, therefore, no definite opinion could have been given about the happening of the incident. Consequently, the statement of prosecutrix and the entire allegations have been diluted, therefore, the conviction made by the court below cannot be sustained and is liable to be set aside.

5. Per contra, learned State Counsel opposes the same and submits that the order of the court below is well merited which do not call for any interference by this court.
6. Perused the records of court below including the statement of the prosecutrix and different documents exhibited on record.
7. The prosecutrix was examined as P.W.1. Narrating the incident, she has stated in her examination-in-chief that the appellant came to the house while her husband was outside the house and thereafter committed rape and when she abused the appellant, he fled away. The report was made vide Ex.P-1. In the cross-examination she contended that at the time of incident, a meeting was convened in the village and her husband was there in the meeting and the children had gone to watch TV. At about 11-12 p.m., in the night while she was sleeping it was all dark and someone came inside the house and pulled her garments. She further stated that when she shouted the person fled away. She has

further stated that on hearing such voice, her daughter woke up. She further admits that there was no light in the room where she was sleeping and the door from which the person came he fled away from that door itself.

8. The prosecutrix admits the fact that after her husband came she had disclosed that someone had come inside the room and had pulled her clothes and having hurled abuses, he fled away. She further stated that she had disclosed to her husband that because of the darkness, she could not recognize the person. She further admits the fact that that she had disclosed to the police that someone had come in the night while she was sleeping and tried to pull her garments and when she shouted, the person fled away and she could not recognize that person. She admits the fact that the accused had neither come to her house nor had done any obscene act. She further admits that the wife of brother of her husband had stolen the crop of the accused and for which a meeting was convened in the village. Therefore, the statement of the prosecutrix would show that she has completely denied the incident and even the identity of the accused/appellant. The prosecutrix has stated that someone has entered into the room whom she could not recognize, therefore, the identity of the accused is completely diluted.
9. As against the version of prosecutrix, the husband Shiv Prasad (P.W.2) in his statement had deposed that when he came back to the house on the date of incident her wife has stated that the appellant has committed rape with her. In the cross-examination, he stated that his wife has disclosed

that she surrendered herself to the appellant thinking that it was the husband and further stated that the wife has not stated anything about pulling up the garments but stated about the commission of sexual intercourse. He further admits that her daughter has also not disclosed anything. He further admits the fact that neither there were injuries on the body of his wife nor there was any sign of burst in her clothes.

10. The witness Durga Bai (P.W.3) who is daughter has stated that she was also in the house and after hearing the voice of her mother, she saw the accused was running away from the place of incident. The daughter further stated that her mother told that someone was pulling her clothes and when she abused that person fled away and she saw the appellant from the back. She has corroborated the further incident narrated by the prosecutrix P.W.1 that the mother had disclosed to the father that someone tried to pull her clothes and when she shouted, the person fled away. Therefore, the statement of the prosecutrix that she was not subjected to rape is further corroborated by P.W.3.
11. Likewise, the Kotwar P.W.5 Sitaram had stated that at about 11 o' clock, the husband of the prosecutrix came and stated that the appellant had entered into their house and tried to commit rape and on the next day, the allegation of rape was made by the victim. Therefore, there is serious contradiction about the commission of rape as the prosecutrix herself has denied the rape which is corroborated by the husband and the husband admits the fact that the prosecutrix disclosed that she allowed the physical access to the person thinking it

to be her husband. In continuation, it is also stated that the wife had disclosed that she could not identify the person.

12. Therefore, the probability which arises that initially the prosecutrix has denied the entire allegation and even the identity of the accused and the commission of rape has completely been negated by the prosecutrix. The disclosure made to the husband that she had allowed the sexual intercourse thinking the victim to be her husband also raises a serious doubt about the forcible rape. On the contrary, it gives rise to the presumption of consent. It is also important to note that one of the daughter P.W.3 Durga Bai who was in the house has also not corroborated the incident of rape and as a natural consequence of forceful rape, if the prosecutrix was subjected to rape she would have resisted, that should have been seen by P.W.3 who was in the house.
13. In view of the aforesaid statements, the statement of the doctor completely becomes redundant as the prosecutrix was major and married lady of 40 years of age. As per the Doctors report Ex.P-5 the hymen was old torn and no injury was reported over the body of prosecutrix as Ex.P-5 shows that no sign or symptom was there. Taking into the statements of the witnesses, I am of the opinion that the prosecutrix has failed to prove the commission of offence beyond reasonable doubt.
14. Accordingly, the judgment of conviction and order of sentence dated 09.12.1999 passed by the court below is set aside. The appellant is accordingly acquitted of the charges u/s 450 & 376 of IPC. The appeal is allowed.
15. It is stated that the appellant is on bail. His bail bonds shall

continue for a period of six months in view of provisions contained in Section 437-A of Cr.P.C.

**Sd/-
GOUTAM BHADURI
JUDGE**

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