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NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 997 of 2000

Sukhdeo Chauhan, S/o Jai Lal Chauhan, aged about 21 years,
R/o Rajiv Gandhi Nagar, Raigarh

---- Appellant

Versus

State of M. P. (Now Chhattisgarh), Through the District
Magistrate, Raigarh

---- Respondent

AND

CRA No. 1597 of 2000

Dukalu Ram Sidar, S/o Mohan Singh Sidar, aged about 21 years,
R/o Sangitarai, Raigarh (M.P.) (Now Chhattisgarh)

---- Appellant

Versus

State of M. P. (Now Chhattisgarh)

---- Respondent

For Appellants :

Ms. Pritha Ghoshal, Advocate under the
instruction of Shri Awadh Tripathi,
Advocate

For Respondent/State :

Shri R.K. Jaiswal, Panel Lawyer

Hon'ble Shri Justice Rajendra Chandra Singh Samant

Judgment on Board

23/01/2017

1. Both appeals have arisen from the judgment passed by First Additional Sessions Judge, Raigarh in Sessions Case No. 84/98 on 07/04/2000, by which the appellants in both the case have been convicted under Section 376 (2)(g) of the Indian Penal Code and



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sentenced with RI of 10 years along with fine of Rs.500/- each, with default stipulations.

2. The case of the prosecution in brief is this, that prosecutrix (PW-3) is resident of village Hardi. On the date of incident i.e. 11/03/1998 she along with Rajeshwari (PW-4) came to Raigarh by bus and arrived at about 1 p.m. in the afternoon. She was on her way to her sister's house when they met with Vijay Das, who forced them to come his residence and they had meals in his house. Appellant Dukalu also arrived there, then all of them came to a photo studio on riksha, where prosecutrix and Rajeshwari (PW-4) were photographed. After that they had some snacks. It was about 8 p.m. in night when appellant and his companion asked her to come to his house and took her to a nearby agricultural field. Appellant Dukalu forcefully committed rape with prosecutrix (PW-3) at the same time Vijay Das had taken Rajeshwari to a different field. After this incident, they were coming back when they were stopped by five boys and on their threatening Vijay and appellant Dukalu fled from the spot. One of the boys appellant Sukhdeo and another was Dhiraj both of them took prosecutrix (PW-3) and Rajeshwari (PW-4) towards agricultural field. Dhiraj took Rajeshwari (PW-4) separately and committed rape with her, Sukhdeo took prosecutrix (PW-3) separately on the field and forcefully committed rape with her. After this incident, prosecutrix (PW-3) and (PW-4) were brought and left in the bus stand. In the morning they narrated this incident to one jeep owner, who left them in the house of sister of prosecutrix (PW-3). Later on, prosecutrix (PW-3) came to Police Station, Raigarh and lodged FIR vide Ex.P/5.

3. Investigation was conducted. Prosecutrix was medically examined by Dr. (Smt.) Arti Nande (PW-11) vide report Ex.P/17, she advised for age verification by Radiologist. Dr. M.D. Joshi (PW-7) conducted the radiology test vide his report Ex.P/7 opined that age of the prosecutrix (PW-3) between 15 to 16 years. He also examined appellant Dukalu and Sukhdeo vide Ex.P/11 A and 12 A about their competency to indulge to sexual intercourse and gave positive report. In proof of age of prosecutrix (PW-3) a photocopy of mark-sheet was seized vide Ex.P/6. Spot map Ex.P/10 was prepared. Vaginal slides prepared by Dr. (Smt.) Arti Nande (PW-11) were seized vide Ex.P/1. Clothes and undergarment of prosecutrix (PW-3) were seized vide Ex.P/2. Underwear of appellant Dukalu was seized vide Ex.P/3 and underwear of appellant Sukhdeo was seized vide Ex.P/4. Seized articles were sent for FSL Examination and FSL report is on record. On completion of investigation both the appellants were charge-sheeted.

4. Trial Court framed charges under Section 376 (2)(g) of IPC against the appellants in both the cases. On denial of charges prosecution has examined 11 witnesses. On examination under Section 313 of Cr.P.C. appellants in both the cases denied all the incriminating evidence against to them and pleaded innocence. No evidence was led in defence. Impugned judgment was passed by which appellants in both the cases have been convicted and sentenced as mentioned in the first paragraph.

5. The grounds in appeal in both the cases are these, there had been no evidence of prosecution to hold conviction against the



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appellants. The statement of prosecutrix (PW-3) was full of contradictions and omissions compared to her previous statement, hence un-reliable. For these reasons, the conviction recorded against both the appellants is contrary to the facts, circumstances and law. Acquittal has been prayed for.

6. It is submitted by counsel for appellants that it was not proved by the prosecution before the trial Court that age of prosecutrix was below 18 years. As per the statement of prosecutrix (PW-3) and Rajeshwari (PW-4) it is clearly made out, that both of them willingly participated in the incident, hence it is a case of consent. As per the evidence on record the alleged rape was committed by appellant Dukalu and Sukhdeo in different places and both of them were not in company, when the incident took place, under these circumstances, this is not a case under Section 376 (2)(g) of IPC. Further the statement of prosecution witnesses is not reliable. For these reasons, appellants in both the cases are entitled for benefit of doubt.

7. Counsel for the State has opposed the grounds in appeal and arguments submitted on behalf the appellants in both the cases. It is submitted, that prosecution has successfully proved the case against both the appellants beyond reasonable doubt and the impugned judgment cannot be interfered with.

8. Considering the material on record and the arguments submitted from both the sides the question in this appeal is, whether the conviction against the appellants is supported by evidence of prosecution beyond all reasonable doubt?

9. The main witness prosecutrix (PW-3) has stated, that on the date of incident when she arrived at Raigarh along with Rajeshwari (PW-4), she met with Vijay Das who said that he will tell them about the address they wanted to go and took them to Badal Mahal. Then Vijay Das took them to a shop of photographer. From the shop of photographer he took both of them on a cycle near a pond. In this place Dukalu committed rape with her and similarly Vijay Das committed rape with Rajeshwari (PW-4). After some time five persons came on the spot, Dukalu and Vijay Das left the prosecutrix (PW-3) and Rajeshwari (PW-4) in charge of those five persons, then she clarified they were left with one Dhiraj and appellant Sukhdeo. After which Sukhdeo committed rape with her and Dhiraj committed rape with Rajeshwari (PW-4). After that appellant Sukhdeo and Dhiraj left them in bus stand from there they went to her sister's place in one auto. She found that her father was present in her sister's house. She was taken to the Police Station where she lodged report Ex.P/5.

10. Prosecutrix (PW-3) has in cross-examination stated that after arriving at Raigarh, she along with Rajeshwari (PW-4) started for Madhuban Para and she knew the way. They met with Vijay Das near Badal Mahal. She admitted, that if they would have wanted they could have directly proceeded to her sister's house, then she has stated that Vijay Das took them in upper story of Badal Mahal and when she raised alarm on which the door was bolted. She and her friend remained 4-5 hours. Further she has stated that she and her friend had been to the shop of photographer by riksha while going to the shop of photographer she did not try to make it known to other persons that she was being

taken against her will. She admitted that shop of photographer was between a number of shops and 5-7 persons were sitting in photographer's shop, even then she did not try to tell anybody she has been forcefully brought by Vijay Das. After staying about for one hour in photographer's shop she came with Vijay Das to Gopi Talkies, where they wanted to watch a movie but could not get tickets. After that they had some snacks in a nearby hotel and kept sitting sometime, at that time she did not tell the hotel owner or any servant about the incident. She has admitted that on coming of five persons near the pond Vijay Das and Dukalu went away from there. She stated that she suffered injuries on her body at the time of incident and she did not submit herself to sexual intercourse. She denied that she and her friend stayed in the bus stand whole of the night. Later on she has stated that she could not identify the person who committed rape with her in the second incident due to darkness, but she heard his name as Vijay Das or Santosh.

11. Statement of prosecutrix (PW-3) appears to be full of contradictions, the chain of events that she narrated in FIR have been varied in the Court statement. There is some improvement as well. She has omitted to state that after arriving at Raigarh she met with Vijay Das who forced them to come his house and they had meals with her friend. Later on she and her friend taken to photographer's shop from residence of Vijay Das. In FIR Ex.P/5 she has stated that the place of first incident was an agricultural field, whereas in Court statement she has stated that the place was near a pond. In FIR Ex. P/5 she has stated, that after the first incident five boys came on the spot and on

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their threatening Dukalu and Vijay Das left the spot. This has been modified by stating that Vijay Das and Dukalu willfully handed her to the five boys came on the spot. Before giving any finding on the veracity and reliability of the statement of this witness, it would be proper to consider the statement of Rajeshwari (PW-4) as well. One improved statement before this Court is that she and her friend were kept locked in the upper story of Badal Mahal.

12. Rajeshwari (PW-4) has stated that after arriving at Raigarh with prosecutrix (PW-3) they were taken to Badal Mahal by Vijay Das where he gave them some snacks and locked them in a room. Later on Vijay Das took them on a riksha to go to the place of photographer. At photographer's place some photographs were taken. Vijay Das took her inside the photographer's shop and committed rape with her. Photographer also committed rape with her. Appellant Dukalu arrived on the spot, he along with Vijay Das took both of them to an agricultural field where prosecutrix (PW-3) was raped by Dukalu and she herself was raped by Vijay Das. Then five boys arrived on the spot and on their threatening Vijay Das and Dukalu fled from there. After which, Sukhdeo raped prosecutrix (PW-3) and Dhiraj raped Rajeshwari (PW-4). Later on boys left them in the bus stop from where both of them came in an auto riksha to the place they wanted to go.

13. In cross-examination Rajeshwari (PW-4) has stated, that when she and her friend prosecutrix (PW-3) were taken by Vijay Das; they had numerous opportunities to raise alarm, but they did not raise any alarm. Though she denied that both of them willingly went with Vijay

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Das of Badal Mahal. She has omitted her previous statement in Ex.D/5 that Vijay Das took them to the place of his residence and offered them meals. She further admitted that for going to photographer's shop they went on a riksha to the photographer's shop in midst of number of houses and shops, even then she did not try to inform anybody that she was being taken forcefully. Later on, it is also admitted that all of them came to Gopi Talkies in middle of the town and had snacks in a nearby hotel, even then she and her friend did not tell anyone that they have been brought forcefully against their will. Other suggestion given in defence have been denied.

14. Damrudhar (PW-1) father of prosecutrix (PW-3) he has stated hearsay account of the incident as narrated to him by daughter prosecutrix (PW-3).

15. Dr. (Smt.) Arti Nande (PW-11) examined prosecutrix (PW-3) vide Ex.P17 and found that her secondary sexual organs are fully developed. She did not found any injury on her body and private parts. Hymen had old tear and on the day of examination it was 3rd day of menstrual cycle of prosecutrix (PW-3). She prepared two slides from her vaginal secretion, after sealing them handed over to the constable for FSL Examination and also advised to verify the age of prosecutrix by radiological examination. She has opined that prosecutrix was subjected to sexual intercourse. In cross-examination she admitted that as per the report no opinion could be given as to how many days before, the sexual intercourse had taken place.

16. Trial Court has given this finding in the impugned judgment that



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prosecution has failed to prove that the age of prosecutrix (PW-3) was below 18 years on the date of incident. This finding is in favour of appellants in both the cases. Further the evidence of FSL report though on record has not been exhibited and relied upon the prosecution before the trial Court. Hence, the statement of seizure witnesses and Investigation Officer need not be considered.

17. This whole case is based only on the statement of prosecutrix (PW-3) and Rajeshwari (PW-4). After close scrutiny and analysis of the complete deposition of both these witnesses, it is apparent that prosecutrix (PW-3) and Rajeshwari (PW-4) met with one Vijay Das, who is not an accused in this case, accompanied him to his place of residence and had meals, but this version is changed in the Court statement that they were taken to Badal Mahal and locked in a room there, which is an improvement. Later on they accompanied Vijay Das and Dukalu to the photographer's shop in the afternoon of the same day and continued in their company while going to Gopi Talkies and having snacks nearby hotel. After which the alleged incident of rape took place in agricultural field as per the version of FIR Ex.P/5 nearby a pond as per the version in Court statement. Further on arrival of five boys, one of whom was appellant Sukhdev, Dukalu and Vijay Das and Sukhdeo left the place due to threatening given by those boys. Later on appellant Sukhdeo committed rape with prosecutrix (PW-3).

18. Statement of these witnesses are thus full of discrepancies, omissions, contradictions and improvements which do not inspire confidence in any manner, apart from that, the medical evidence also

does not support the prosecution that prosecutrix (PW-3) was subjected to forceful sexual intercourse against her will, as no sign of injury was found in her body or private part. The prosecution had been under Section 376 (2)(g) of IPC which is an offence of gang rape. As per the version of witnesses the first incident of alleged rape took place with prosecutrix (PW-3) and her companion by appellant Dukalu and Vijay Das, Vijay Das has not been prosecuted in this case. As per the evidence after arrival of other group of appellant Sukhdev and others, Dukalu and Vijay Das were forced to leave the place, then Sukhdeo took charge prosecutrix (PW-3) and raped her. This shows that appellant Dukalu and Sukhdeo were not in company.

19. This is a incident which occurred on 11/03/1998, at the relevant time the amended Act 2013 was not applicable. As per the old Act the age for giving consent to sexual intercourse was 16 years. Though there had been finding of trial Court that prosecution has failed to prove that prosecutrix (PW-3) was below 18 years of age at the time of incident. In the relevant provision inforce, the explanation (1) to Section 376 of IPC was that, "where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section". In the circumstances of this case, it is clear that appellant Sukhdeo was not in company with appellant Dukalu when allegedly raped the prosecutrix (PW-3) and vice versa. Thus, on the basis of these facts, circumstances and findings aforementioned, this was certainly not a case of gang rape, but as alleged seems to be two consecutive incidents of rape.

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20. Further the evidence prosecution cannot be regarded as trustworthy for the reasons mentioned above. Hence in conclusion the finding is given that the conviction of appellants in both the cases is against the facts, circumstances and law, which is liable to be set-aside. Hence both the appeals are allowed. Impugned judgment against the appellants is hereby set-aside. Appellants are on bail, their bail bonds are discharged.

Sd/-

(Rajendra Chandra Singn Samant)
JUDGE

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