

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 846 of 2004****Order Reserved on 21.03.2017****Order Delivered on 06.04.2017**

Ramsanehi Azad S/o Hiralal Azad, aged 28 years, R/o village Jamuha, police station Lahar, District Bhind, Madhya Pradesh.

---- Appellant**Versus**

State of Chhattisgarh through police station Kawardha, District Kabirdham, Chhattisgarh.

---- Respondent

For the Appellant	:	Shri Malay Shrivastava, Advocate.
For the Respondent/ State	:	Ms. Smita Ghai, Panel Lawyer.

Hon'ble Shri Justice Prashant Kumar Mishra**Hon'ble Shri Justice Rajendra Chandra Singh Samant****CAV JUDGMENT****Per R.C.S. Samant, J.**

1. This appeal has been preferred against the judgment of conviction and order of sentence dated 06.09.2004 passed by the Additional Sessions Judge (F.T.C.), Kawardha, District Kabirdham, Chhattisgarh in Sessions Trial No. 18 of 2004 whereby and whereunder the learned Additional Sessions Judge convicted the appellant under Sections 376(1), 366, 347 and 323 of the Indian Penal Code (for short 'the IPC') and sentenced him to undergo rigorous imprisonment for life, RI for 10 years, RI for 3 years and RI for one year and to pay fine of Rs.30,000/-, Rs.30,000/- and Rs.10,000/-, in default of payment of fine, to further undergo additional RI for one year, one year and six months, respectively.

2. The case of the prosecution, in brief, is that on 28.10.2003 at about 7:30 - 8:00 pm, the prosecutrix (PW-5) was seen to be forcibly taken by the appellant. A telephonic information was received by ASI, Laxmikant Sen (PW-9) on 29.10.2003 at about 8:46 am from an unknown informant that a woman is lying unconscious near the canal on Rajnandgaon road. The said information was recorded in the station house diary vide Ex. P/9. Thereafter, Laxmikant Sen (PW-9) went to the spot and found that one woman was lying in unconscious condition in a dilapidated house. The woman was shifted to the hospital at Kawardha and she was medically examined by Dr. K.K. Sharma (PW-15) vide Ex. P/15 and injuries were found present on her body. In the meanwhile, one written complaint Ex. P/1 was filed by Dausingh (PW-2) in police station Kawardha alleging that one unknown girl was seen to be forcibly taken by the appellant which should be enquired into. The dying declaration (Ex. P/6) was recorded by the Executive Magistrate, S.K. Tandon (PW-8) on 30.10.2003. Later on, the second dying declaration (Ex. P/7) was also recorded on 1.11.2003 on the request made by the P.S. Kawardha vide Ex. P/8, in which the prosecutrix named the appellant as the person who ravished her.

3. The First Information Report Ex. P/16 was recorded on 1.11.2003 registering offence under Sections 376(1), 366, 347 and 323 of the IPC against the appellant, who was a Police Constable. In further investigation, the prosecutrix was again medically examined by Dr. Smt. Jangde (PW-18) vide Ex. P/24, who conducted the examination and preserved the articles for FSL examination alongwith slides prepared from vaginal smear of the

prosecutrix, which were handed over to the Constable. The clothes worn by the prosecutrix were seized vide Ex. P/12. The appellant was also medically examined vide Ex. P/13. The articles preserved by Dr. Smt. Jangde (PW-18) were seized vide Ex. P/19. The underwear and the cycle of the appellant were seized vide Ex. P/20. The pubic hairs of the appellant preserved in medical examination were seized vide Ex. P/21. All the seized articles were sent for FSL examination in which it was reported that the articles i.e. petty-coat of the prosecutrix and the slides prepared from vaginal smear of the prosecutrix contained patches of sperm and human spermatozoa. The Test Identification Parade was conducted vide Ex. P/2 in which the prosecutrix identified the appellant correctly. The spot map was prepared by Patwari vide Ex. P/3 and another spot map was prepared by the Investigating Officer vide Ex. P/5. Statements of the witnesses were recorded and on completion of the investigation, the appellant was charge-sheeted for the offence under Sections 376(1), 366, 347 and 323 of the IPC.

4. The appellant was charged under Sections 366, 376(1), 506 (part II), 323 and 347 of the IPC. He denied the charges. The prosecution examined as many as 18 witnesses and the defence examined only three witnesses. On being examined under Section 313 of the Cr.P.C., denying all the incriminating evidence against him, the appellant pleaded innocence and false implication. It is submitted in defence that at the relevant time of incident, the appellant was present in the roll-call held in Kawardha from where he got issued rifle and later on he was engaged in night duty in the Bungalow of the Superintendent of Police. After giving opportunity to the prosecution and defence, the impugned judgment has been passed by

which the appellant has been convicted and sentenced as above-mentioned.

5. The grounds taken in this appeal are that the trial court has failed to appreciate the major contradictions in statements of the prosecution witnesses and erroneously passed the impugned judgment against the appellant. The trial court has also failed to appreciate the evidence adduced in defence in which it was clearly established that the appellant was on duty at the relevant point of time. The evidence adduced by the prosecution was not sufficient to hold the conviction of the appellant. Hence, it is prayed that the appellant may be acquitted of the charges.

6. Learned counsel for the appellant submits that as per the prosecution case, the incident took place on 28.10.2003 between 7:30 to 8:00 pm in the night. The prosecutrix was recovered on 29.10.2003 and her first dying declaration was recorded on 30.10.2003 in which she did not make any statement against the appellant. Dausingh (PW-2) had been interested to implicate the appellant, on his complaint and on the basis of some news published in newspaper, a second dying declaration was recorded on 1.11.2003 in which the prosecutrix disclosed the name of the appellant for the first time after passing of four days. No definite opinion regarding rape with the prosecutrix was given by Dr. Smt. P. Jangde (PW-18) in her report Ex. P/24. The recording of dying declarations Exs. P/6 and P/7 is itself suspicious as mother of the prosecutrix Geetabai (PW-7) stated in her cross-examination that on getting information about the incident after four days of the incident, she came to hospital at Kawardha and the prosecutrix came to consciousness further after passing of 8 to 10 days. The defence witnesses have clearly stated by producing the documents in defence that the

appellant was present in roll-call at police line Kawardha on 28.10.2003 at about 8:00 pm and thereafter he got issued rifle to join his duty in the bungalow of the Superintendent of Police for the whole night. It is lastly submitted the said evidence was wrongly rejected by the trial court and as such the appellant is entitled for benefit of doubt.

7. Considering the material on record and the arguments advanced on behalf of both the sides, the question which arises for decision in this appeal is, whether the conviction against the appellant is supported by the evidence of the prosecution beyond all reasonable doubt?

8. The prosecutrix (PW-5) was found in unconscious condition in a dilapidated house near the Rajnandgaon road by ASI, Laxmikant Singh (PW-9) and she was shifted for treatment to the hospital at Kawardha. This fact appears not to be disputed in any respect. The finding of the injuries on the body of the prosecutrix by Dr. K.K. Sharma vide Ex. P/6 and the findings in medical examination report Ex. P/24 by Dr. Smt. P. Jangde (PW-18) as well, are not disputed by the appellant. Hence, there is no need to discuss about this evidence in this judgment.

9. The first dying declaration Ex. P/6 was recorded on 30.10.2003 and the second dying declaration Ex. P/7 was recorded on 1.11.2003 by the Executive Magistrate, S.K. Tandon (PW-8) cannot be taken into consideration because the prosecutrix (PW-5) is alive. Hence, Exs. P/6 and P/7 have the value of previous statement and they can be put to use only in accordance with the provisions under Section 162 of the Cr.P.C. Hence, in these circumstances, the statement of the prosecutrix (PW-5) before the

court seems to have more importance. The prosecutrix (PW-5) stated that on the date of incident she had been to Kawardha and she was forcibly carried on a cycle by the appellant to a place near canal and she was subjected to rape by the appellant. Thereafter, she lost her consciousness and she was brought to the hospital in Kawardha. A note was recorded by the trial Judge that the mental capacity of the prosecutrix appeared to be below normal. No issue has been raised by the defence on the basis of this note by the trial Judge.

10. The prosecutrix (PW-5) further stated that she was previously acquainted with the appellant and it was the appellant who committed rape with her. In cross-examination, her statement has remained un-rebutted and various relevant and irrelevant questions were put in cross-examination. On going through the whole deposition, there does not seem to be any statement rebutting or contradicting her statement in examination-in-chief. It was suggested in defence that father of the prosecutrix was arrested by the appellant on one occasion, which fact has been admitted by her, but she denied that she had any grievance against the appellant because he arrested her father.

11. Another relevant witness in this case is Dausingh (PW-2) who stated that on 28.10.2003 at about 8:00 pm he saw the appellant forcibly carrying the prosecutrix on a cycle and also saw that a polythene containing rice fell down from the hands of the prosecutrix as she was trying to escape from the appellant. He came to know on 29.10.2003 that one girl was found lying near the canal and she has been brought to the hospital. He saw the girl in the hospital and identified her as the prosecutrix. He stated that a written

complaint Ex. P/1 was given by him in police station Kawardha. In cross-examination, innumerable questions, relevant and irrelevant, were put to him, and the same does not seem to have any statement rebutting or contradicting his statement in examination-in-chief. Some minor discrepancies are there have compared to his previous statement Ex. D/2 which is insignificant. The statement about identifying the prosecutrix is unrebutted. He denied the suggestion in defence that he had any grievance with the appellant because he had arrested his brother in some other cases of theft and pickpocketing. He denied any personal interest to implicate the appellant.

12. Manoj Mongre (PW-13) has stated in support of Dausingh (PW-2) and his statement has remained unrebutted in cross-examination. Similar is the statement of Adalat Singh (PW-11) and he also stated about his conversation with the appellant. He stated that the appellant told him that was taking the prosecutrix to her brother's house who resides in Kailash Nagar. This statement has remained consistent and there is no contrary statement in his cross-examination. Dharm Singh (PW-14) is also one of the witness having seen the prosecutrix being taken by the appellant at the time of incident.

13. Rambai (PW-6) is Aunt of the prosecutrix. On getting information about the incident with the prosecutrix, she came to the hospital at Kawardha and identified her niece (prosecutrix). Geetabai (PW-7) is the mother of the prosecutrix. She also came to the hospital on getting information about her daughter. She stated that when the prosecutrix came to consciousness she told her about the incident. The statements of

Anjorwa (PW-1), Executive Magistrate S.K. Tandon (PW-8), Ramelal (PW-10), Dr. N.K. Yadu (PW-12), Patwari, Prahlad Pandey (PW-13), Dr. K.K. Sharma (PW-15), ASI, Rampher Jaiswal (PW-16), Inspector, R.D. Sonwani (PW-17) and Dr. Smt. P. Jangde (PW-18) need no discussion as they are related to the investigating procedures.

14. Hridaylal (PW-4) is the witness of the Test Identification Parade Ex. P/2. He stated that the appellant was identified by the prosecutrix (PW-5) in this procedure. No question was put to the prosecutrix (PW-5) regarding the identification Ex. P/2 but Geetabai (PW-7) has stated that it was in her presence prosecutrix identified the appellant. The identification of the appellant by the prosecutrix in TIP in this case has not been seriously challenged. Hence, the evidence about the identification of the appellant needs no further discussion.

15. The evidence of defence needs consideration, Constable Bhuwanlal (DW-1) has stated, that on 28.10.2003 the appellant was present in the roll-call, who got issued a rifle and thereafter he alongwith the appellant was present on duty in the Bungalow of Superintendent of Police from 8:00 pm till the morning of next day. The document *i.e.* copy of the register of Bungalow duty is produced as Ex. D/4 which mentions that the appellant was issued a rifle and his signature is also affixed on it. In cross-examination, he could not recollect about the duties fixed on other dates. He admitted that there is no entry made regarding joining the duty and leaving the duty of the bungalow of the Superintendent of Police and any person on duty can leave for some emergency reason as well.

16. Head-constable, Prabhudas Bande (DW-2) produced the roll-call register dated 28.10.2003 vide Ex. D/5 and stated that the appellant was present at the time of roll-call and his duty was assigned to him in the bungalow of the Superintendent of Police. An entry was also made in *Roj Naamcha* Ex. D/6. As per *Roj Naamcha*, the appellant left for duty at 20:35. His statement has remained unrebutted in his cross-examination.

17. Girjashankar (DW-3) stated about the issuance of rifle and cartridges for performing duty of the appellant the copy of relevant page of register vide Ex. D/4 is cited. In cross-examination, he stated that he cannot make any statement as to whether the appellant committed any offence before the time of roll-call.

18. The burden of proof of evidence is not equivalent to that of the prosecution. If the evidence brought in defence is sufficient to draw any conclusion on the basis of preponderance of probabilities then it can be said that the defence has discharged its burden. The appellant has relied on the judgments of the Apex Court in **Krishna Janardhan Bhat vs. Dattatraya G. Hedge** reported in **(2008) 4 SCC 54** and **Noor Aga vs. State of Punjab and Another** reported in **(2008) 16 SCC 417**.

19. Learned counsel for the appellant submits that the defence witnesses are entitled for equal treatment compared to the prosecution witnesses and this view has been taken by the Hon'ble Supreme Court in the judgment of **Dudh Nath Pandey vs. State of Uttar Pradesh** reported in **AIR 1981 SC 911**.

20. On the basis of these principles with regard to appreciation of the evidence of the defence witnesses, the question before this court is whether the appellant has succeeded in proving his defence. Witnesses examined in defence i.e. Bhuwanlal (DW-1), Prabhudas Bande (DW-2) and Girjashankar (DW-3), all are police constables and their respective postings are in police line Kawardha which is not challenged by the prosecution. It is a practice of making roll-call at about 8:00 pm everyday for all the members of police force present in the police line. These witnesses have stated about the presence of the appellant at the time of roll-call and also his presence on duty in Bungalow of the Superintendent of Police, Kawardha for the whole night. Their statements are supported with the documents of the defence. The veracity of such documents is not questioned by the prosecution. Hence, this evidence could not have been rejected altogether without assigning proper reasons and that the witnesses could not give details of the duties assigned on other dates cannot be regarded as sufficient reason to discard such evidence.

21. Dausingh (PW-2) has stated that he saw the appellant taking the prosecutrix at about 8:00 pm in the night of 28.10.2003, which is exactly the time of roll-call. Similar is the statement of Manoj Mongre (PW-3) who neither stated about specific time nor stated about the date. Adalat Singh (PW-11) is also witness of this incident and he did not mention about the time when he saw the appellant taking the prosecutrix. Hence, the suggestion of the prosecution that if the evidence of defence is to be believed then the incident may have taken place before the time of roll-call does not seem to be acceptable.

22. Although, Ex. P/6 the first dying declaration recorded on 30.10.2003 and Ex. P/7 the second dying declaration recorded on 1.11.2003 cannot be read in evidence directly, however as being previous statements, the same have some relevance in deciding this case from the point of view in favour of the appellant. As per the prosecution story, the incident took place on 28.10.2003, the prosecutrix (PW-5) was recovered on 29.10.2003 and her first dying declaration Ex. P/6 was recorded on 30.10.2003 in which she did not make any statement about the commission of offence of rape with her. On the contrary, she made a statement that she suffered injuries because she had a bout of epileptic attack. Hence, the prosecutrix (PW-5) made allegation against the appellant for the first time on 1.11.2003 i.e. in her second dying declaration Ex. P/7. This fact is in support of doubt theory. The medical evidence with regard to the fact that the prosecutrix (PW-5) is also not very much supportive to the prosecution as no injuries were found on her private parts and no definite opinion has been given by the examining Dr. Smt. P. Jangde (PW-18).

23. The evidence in FSL report (Ex. P/26) has some importance. According to which, seized articles related to the prosecutrix (PW-5), petty-coat and slide prepared from vaginal smear contained spots of sperm and human spermatozoa whereas the articles seized from the appellant i.e. two underwears and pubic hairs were not found to have contained sperm or human spermatozoa. Only on the basis of this evidence, it cannot be assumed that the finding in FSL report with regard to articles connected with the prosecutrix have a direct connection with the appellant. No further test has been conducted in this respect.

24. It was observed by Three Judge Bench of Supreme Court in the judgment of **Dahyabhai Chhaganbhai Thakker vs. State of Gujarat** reported in **AIR 1964 SC 1563** that;

'The three cardinal principles of criminal jurisprudence are:

1. Prosecution has to prove its case beyond reasonable doubt.
2. The accused is presumed to be innocent until he is proved guilty.
3. The onus of prosecution never shifts.

If an accused succeeds to establish reasonable doubt on the case of the prosecution on the basis of preponderance of probabilities in his favour, then this principle becomes applicable, that where two views are possible the view in favour of accused has to be followed to arrive at a conclusion. It has been observed and reiterated in the case of **Vijayee Singh and Others vs. State of Uttar Pradesh** reported in **AIR 1990 SC 1459** by the Hon'ble Supreme Court and also in other cases.'

25. After completely analyzing and scrutinizing the evidence of the prosecution, it is found that the prosecution has not proved its case beyond reasonable doubt. The discrepancies and non-explanation of the procedure adopted in the investigation itself was sufficient to raise doubt. Thereafter, the evidence in defence was sufficient to establish the point raised in defence on the basis of preponderance of probabilities. Hence, for these reasons, the conviction of the appellant in the impugned judgment is not based on legally admissible evidence which needs to be interfered with.

26. In view of the aforesaid discussion, this appeal is allowed and the impugned judgment passed by the trial court is hereby set aside. The appellant is on bail. His bail bonds are not discharged at this stage and shall

remain operative for a further period of six months in terms of Section 437-A of the Cr.P.C.

Sd/-

(Prashant Kumar Mishra)
Judge

Sd/-

(R.C.S. Samant)
Judge