

NAFR

HIGH COURT OF CHHATTISGARH AT BILASPUR**Criminal Appeal No. 41 of 2008**

Narad @ Narendra Tamrakar, S/o. Ravishankar Tamrakar, Aged about 45 years, R/o. Village-Kareli, Police Station- Dhamdha, Distt.-Durg (C.G.)

---- Appellant

Versus

State Of Chhattisgarh, Through the Station House Officer, Police Station – Dhamdha, Distt. Durg (C.G.).

---- Respondent

For Appellant : Mr. Praveen Dhurandhar, Advocate

For State/Respondent : Mr. Anupam Dubey, Dy. Govt. Advocate

Hon'ble Shri Justice Goutam Bhaduri**JUDGMENT****01.11.2017**

1. This appeal is against the judgment of conviction dated 29.12.2007 passed by the learned Eleventh Additional Sessions Judge (F.T.C.) Durg in S.T. No.168/2006 whereby the appellant has been convicted under Section 376 of I.P.C. and sentenced to undergo R.I. for 10 years and fine of Rs.50,000/-, in default of payment of fine, further R.I. for 1 year.
2. As per the prosecution case, the prosecutrix, who is resident of village Kareli, had gone to the field to collect Pulse (*Mung*) and she used to work in the agricultural field of the accused. On the date of incident, in the afternoon, she went alongwith another lady namely Ahilya Bai and while they were taking lunch some animal entered into the field and having seen so Ahilya Bai left the victim alone went there to stop them grazing over the field and to drive them away. During such time, the accused/appellant came, as the victim was alone, caught hold of the hand of the prosecutrix and dragged her into a nearby Pump-room and committed forceful sexual intercourse. Thereafter, the prosecutrix

came back and after the incident of 3-4 days when the husband came back who was out of station, it was disclosed and eventually the report was lodged to the police. During the investigation, statement of the prosecutrix was recorded as also different seizures were made. The prosecutrix was also subjected to medical examination and after investigation the charge sheet was filed under Section 376 of I.P.C.

3. During the course of trial, the appellant/accused abjured the guilt and claimed to be tried and the prosecution in this case primarily relied upon and examined the prosecutrix as PW-6, Ahilya Bai who was said to be with the prosecutrix as PW-9. Apart from the other witnesses, husband of the prosecutrix was examined as PW-5. In the statement under Section 313 of Cr.P.C., it was stated by the accused/appellant that an amount of Rs.5000/- was advanced to the husband of the prosecutrix and when he asked for return instead of returning the amount, the false report was lodged. The trial Court after evaluating the entire evidence and facts, convicted the accused under Section 376 of I.P.C. and sentenced as aforesaid; hence this appeal.
4. Learned counsel for the appellant would submit that the present case is of consent and it is contended that actually no rape was ever committed and the appellant has been falsely implicated. He went through the statement of the prosecutrix and would submit that in cross examination, it would reveal that either the incident never happened or she was a consenting party. He further referred to the statement of PW-9, Ahilya Bai, who was said to be with the prosecutrix and the Doctor, PW-10, and would submit entire statement of the witnesses would reveal that false allegations have been attributed to the appellant; therefore, he may be acquitted of the charges.

5. Learned State counsel opposes the argument and would submit that the order of conviction is well merited, which do not call for any interference.
6. I have heard learned counsel for the parties at length, perused the documents and statements on record.
7. Perused the record of the Court below. The prosecutrix in this case was examined as PW-6. In her statement in chief, she stated that when she went to the field of Narad Dau to pick the *Mung* Pulse alongwith her Ahilya Bai, PW-9 was also present. While they were taking meal, the accused called her, but she did not go there. Thereafter, the accused came there, caught hold of her and dragged her into the room and threw her to the ground, thereafter, committed forceful sexual intercourse. In the examination in chief, she further stated that she was subjected to forceful sexual intercourse, which was seen by Ahilya Bai as she came there to collect the Basket and she had seen the happening of incident and after Ahilya Bai came, the accused left her and went away. The fact that even the incident if is accepted to have happened, the prosecutrix at para 8 stated that while the undergarment was being taken out by the appellant/accused, her hands & legs were open and mouth was also not closed. This act non resistance by the victim would lead to inference of consent.
8. The husband, PW-5, had stated that the wife had narrated that at the relevant time of incident, the appellant came and sent another woman who was with the prosecutrix namely Ahilya to remove the cattle from the field and thereafter dragged the prosecutrix into the room and committed sexual intercourse. The PW-5 further stated that having shouted cloths were put into the mouth thereby to stop her from making noise and when Ahilya Bai came back there to collect the

Basket the appellant left. The said statement do not correspond with the statement of the prosecutrix PW-6 wherein she stated that her mouth was completely open. Further, in her statement, the prosecutrix stated that before the incident with her Ahilya Bai was there and when she went to remove the cattle at that time the accused committed sexual intercourse. Most importantly it is also said by prosecutrix that she did not object to such sexual act. Further, it is stated that when the incident of sexual intercourse was seen by Ahilya Bai even then she did not object to it, neither she shouted nor disclosed the incident thereafter to anyone. At para 10, she further stated that about an hour, the accused/ appellant was lying over the prosecutrix and when Ahilya Bai came to collect the Basket, then the appellant got up. She further states that after she saw Ahilya Bai, she asked the appellant/accused to get up but he refused thereafter after seeking Ahilya Bai, the appellant got up. She further stated that thereafter she started collecting the Pulse from the field alongwith Ahilya Bai and after an hour they came back to the house. During such one hour, she also did not disclose anything about happening of sexual intercourse with her. The inference therefore can be drawn if the prosecutrix was not a consenting party how and why she allowed the appellant to have sexual intercourse with her. The averments that even after she was seen with appellant in compromising position by Ahilya Bai also raises doubt as Ahilya Bai has not supported the incident in similar way.

9. Ahilya Bai, PW-9, stated that she was alongwith the prosecutrix and had been to the field to do the job. After taking meal, both of them had again went for their job and having spotted certain cattle entered into the field, she went to drive them away and after coming back both again started picking up the Pulse. During such time, the appellant came and said that after completion of work they may go after locking the room and went away and no incident happened in front of her.

Thereby, PW-9 who was said to be with the prosecutrix has completely disowned the happening of the incident.

10. The Doctor, who examined the prosecutrix namely Dr. Smt. Rachna Agrawal examined as PW-10. She had stated that she had examined the prosecutrix and had given her report by Ex.P-10. Examination of Ex.P-10 would show that no external injury was found in the body of the victim PW-6; whereas PW-6 stated that while she was thrown to the ground, the Bangles were broken and thereby she sustained injury on her hand, which caused bleeding. She further stated that since she was thrown into ground, she sustained injury on her shoulder, waist and hand. The said injuries have not been corroborated by the MLC Ex.P-10 and in the opinion of the Doctor, it is stated that the prosecutrix was habituated to intercourse as would be evident that she was a major married lady.
11. Reading the evidence together, the testimony of the prosecutrix do not inspire confidence as major contradiction appears about the happening of the incident, which has been stated by the PW-9, who was said to be along-with the prosecutrix. With respect to narrating the incident to the husband that cloths were placed in her mouth is also not been stated by the prosecutrix and in the cross examination, prosecutrix had stated that while she was subjected to sexual intercourse, it lasted for one hour and during the intercourse she did not object to the appellant gives a presumption of consent.
12. Taking into totality, the conviction in the opinion of this Court, cannot be based on the sole testimony of the prosecutrix as major contradiction and inference of consent comes to fore. Therefore, the element of consent cannot be ruled out. In a result, the conviction so made by the learned Court below cannot be sustained to hold that the prosecution was able to prove the case beyond reasonable doubt. In

the result, the appeal succeeds and is accordingly allowed. The impugned judgment of conviction dated 29.12.2007 is hereby set aside and the appellant is acquitted of the charge under Section 376 of I.P.C. The appellant is reported to be on bail, his bail bond shall continue for a period of six months in view of the provisions contained under Section 437-A of Cr.P.C.

Sd/-
(Goutam Bhaduri)
JUDGE

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