

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 2538 of 1999

Judgment Reserved on 09/07/2018

Judgment Delivered on 23/08/2018

- Manoj Kumar, S/o Bhuneshwar Prasad Shrivastava aged about 31 years, R/o Village Navapara, at present Choupada Para P.S. Patna, Ambikapur, District Sarguja M.P. (Now C.G.)

----Appellant

Versus

- The State Of Madhya Pradesh (Now C.G.)

---- Respondent

For Appellant : Ms. Saveeta Tiwari, Advocate.
For State/Respondent : Shri Adhiraj Surana, Dy. G.A.

Hon'ble Shri Justice Gautam Chourdiya

C A V Judgment

1. This appeal arises out of the judgment of conviction and order of sentence dated 06.03.1997 passed by learned 2nd Additional Sessions Judge, Ambikapur, District Sarguja, M.P (Now C.G.) in Sessions Trial No. 142/1996, whereby, the appellant stands convicted and sentenced as under:-

Conviction	Sentence
Under Section 323 of Indian Penal Code	One year R.I.
Under Section 376(1) of Indian Penal Code	7 years R.I. and fine of Rs.1000/-, in default of 2 months Additional R.I.

2. Prosecution case in brief is that on the date of incident i.e. on 6th March, 1996, at 21:00 pm, (PW-5) Patikuwar informed the prosecutrix that the accused/appellant is involved in scuffle with his wife because of which she(wife of the appellant) received injuries and she has called the prosecutrix. Hearing this the prosecutrix went to the house of the accused/appellant and started talking to him. Thereafter, the appellant/accused manhandled the prosecutrix which she resisted. Thereafter, the appellant/accused dragged the prosecutrix and took her to another room and assaulted her with a club on her head as a result she fell down and thereafter, the appellant/accused gave two-three blows on the head of the prosecutrix. Thereafter, when (PW-5) Patikuwar was trying to save the prosecutrix, the appellant/accused had also bitten on his cheek. The appellant/accused thereafter committed rape with the prosecutrix. Report of the incident was lodged on 07.03.1996 by the prosecutrix herself vide Ex.P-6.
3. The prosecutrix was medically examined by (PW-2) Dr. Smt. S.P. Jaiswal vide Ex.P-3. Vaginal slide was prepared vide Ex.P-10. The matter was investigated by (PW-3) S.C. Shukla, Assistant Sub-Inspector who, during investigation, seized Petticoat of the prosecutrix vide Ex.P-11. He also seized the underwear of the accused/appellant vide Ex.P-1. Thereafter, statement of witnesses were recorded and the accused was arrested. According to the FSL report, which is not exhibited, no semen or spermatozoa was found.
4. After completion of investigation charge sheet was filed against the accused/appellant under Sections 323 & 376 of IPC.

However, while framing charge the trial Court framed charge against the accused/appellant under Section 323 & 376(1) of IPC.

5. So as to hold the accused/appellant guilty, the prosecution examined 5 witnesses in all. Statement of the accused was also recorded under Section 313 of Cr.P.C. in which he denied the circumstances appearing against him in the prosecution case, pleaded innocence and false implication. In his defence, he examined only one witness i.e. Smt. Nalini Rai.
6. The trial Court after hearing counsel for the respective parties and considering the material available on record, by the impugned judgment convicted and sentenced the appellant as mentioned in para-1 of this judgment, hence this appeal.
7. Learned counsel for the appellant submits that the allegation against the appellant/accused that he committed sexual intercourse with the prosecutrix in presence of his wife appears to be unsustainable. The age of the prosecutrix is about 35 years and she is fully grown up lady. The accused/appellant has been implicated in the offence because the prosecutrix had taken loan from the accused, because of which there was a dispute between them. The place where the offence is alleged to have been committed is densely populated residential area where crime cannot be committed easily by anyone. The appellant/accused has examined Smt. Nalini Rai (DW-1) in his defence, who has

stated that on the date of the incident she did not hear anything from the house of the appellant/accused. Had anything happened on the date of the incident, being a member of the Mahila Congress, people of the vicinity would have informed me and in that event I would have definitely proceeded. She further stated that she personally knows the prosecutrix and her daughter. The character of prosecutrix and her daughter is not good whereas the appellant is a well cultured man and I know him personally. This witness has not supported the case of the prosecution.

8. Opposing the submission of counsel for the appellant, it has been vehemently argued by learned counsel for the State that the impugned judgment has been passed keeping in view the entire evidence adduced by the prosecution in the light of the provisions of the act and as such there is no illegality or infirmity in it warranting interference by this Court.
9. Heard counsel for the respective parties and perused the material on record.
10. This case is based only on the evidence of PW-4 prosecutrix and PW-5 Patikuwar. PW-4 Prosecutrix stated in her evidence that when PW-5 Patikuwar reached her house and informed that the accused/appellant was beating his wife, then prosecutrix along with PW-5 Patikuwar went to the house of the accused/appellant. The Prosecutrix intervened and objected whereupon the appellant/accused got enraged and the appellant/accused closed the door of his house and locked it. The prosecutrix was already

inside the home. The accused/appellant assaulted the prosecutrix by a club as a result she received injury on her head and she fell on the ground and became unconscious. The accused/appellant torn the blouse of the prosecutrix and after removing her clothes he started committing sexual intercourse with her. The prosecutrix cried and raised an alarm on which the appellant/accused left her. Next day the prosecutrix along with PW-5 Patikuwar went to the police station and narrated the incident to the police. In para-9 of cross-examination, she stated that she regained consciousness after one hour. When she regained consciousness she raised alarm. It was 11:00 pm when the incident had taken place. She remained in the house of the appellant/accused from 9:00 pm till 12:00 mid night. The appellant/accused closed the door from inside which was opened by his wife. At the time of the incident, the appellant, his wife, prosecutrix and Patikuwar were present. She further stated that it is correct that at the instance of Patikuwar she went to the house of the accused/appellant where the appellant/accused was preparing omlet. He offered the omlet to the prosecutrix which she refused. She further stated that when she reached the house of the appellant/accused, at that time there was no quarrel between the accused/appellant and his wife. The prosecutrix also stated that on the request of wife of the accused she went to the house of the accused/appellant. She also stated that she asked the accused/appellant as to why he is beating his wife. On the date of the incident she returned to her home at 12:00 mid night.

11. Patikuwar PW-5 has stated in cross-examination that she did not accompany the prosecutrix to the police station for lodging the report. In para-6 of her cross-examination she stated that she and the accused/appellant are neighbours and on the date of the incident she did not hear anything regarding the rape committed by the appellant/accused. Earlier the prosecutrix had borrowed some money from the accused which the accused was demanding. The prosecutrix informed this witness that the appellant and his family members are asking to return the money. The prosecutrix told her that how she could pay the money. She also said that she would falsely implicate the appellant and lodge the report in the police station. This witness further says that she does not have inimical relation with the prosecutrix.

12. On closed scrutiny of the evidence, it appears that the rape was committed at 11:00 pm and prosecutrix left the home of accused after 12:00 pm. It is very unnatural conduct of the prosecutrix that she remained in home of accused from 9 pm to 12 mid night and rape was committed at 11 pm in the presence of wife of accused and PW-5 Patikuwar, but PW-5 Patikuwar in her cross-examination admitted that there is no dispute between accused and his wife. Accused/appellant did not beat his wife in presence of Patikuwar. Patikuwar PW-5 has not corroborated the evidence of prosecutrix. She never asked the prosecutrix to go with the appellant/accused and never stated that the wife of appellant/accused was calling her. PW-5 Patikuwar was declared

hostile, as in para 6 she stated that she never heard about any rape committed by accused/appellant with the prosecutrix and never heard about the assault made by the accused/appellant to the prosecutrix. The dispute was persisting as the prosecutrix borrowed the money from the accused/appellant. The accused and his family members were asking the prosecutrix to return the amount because of which the prosecutrix was disturbed. The prosecutrix wanted to implicate the appellant/accused in a false case and therefore she lodged a report against accused/appellant. PW-5 Patikuwar the only eyewitness to the incident turned hostile. DW-1 Smt. Nalini Rai, who also reside near the house of the accused, did not hear anything on the date of the incident.

13. In case of rape it is the duty of Court to appreciate the evidence of prosecutrix with sensitivity and only the conviction can be upheld on the basis of the statement of prosecutrix but in this particular case, none of the prosecution witnesses have supported the case of the prosecution regarding rape so appreciation is required with great care and caution in this particular case. As per the medical report submitted by Dr. S.P. Jaiswal, (PW-2) injury was found on the lip and head of the prosecutrix only. There was no sign of rape with the prosecutrix. Prosecutrix is aged about 36 years old grown up lady and being a married woman, habitual to intercourse. No semen or spermatozoa was found on the clothes of the prosecutrix. The

FSL report also indicated that no semen or spermatozoa was found on the clothes of the prosecutrix.

14. Story of prosecution regarding the origin of dispute was also not proved. In the present case the place of the incident is highly populated area where accused/appellant was also residing with his wife and nobody heard anything about the crime committed by the appellant. Even the friend of prosecutrix PW-5 Patikuwar admitted the fact that the prosecutrix had borrowed some money from the accused which she was not returning and his family members were time and again asking the prosecutrix to return the amount because of which the prosecutrix was disturbed and the prosecutrix told PW-5 Patikuwar that she would implicate the appellant in a false case.

15. On the basis of above discussion, this Court is of the opinion that the conviction imposed on the appellant under Section 376 (1) of the IPC is not sustainable and the same deserves to be set aside. Regarding the charge of under Section 323 of IPC, injury was found on the lip and head of the prosecutrix because of quarrel between prosecutrix and accused. Prosecutrix herself admitted in para-7 of her statement that she borrowed Rs.200/- from the wife of appellant and Rs.150/- from the appellant/accused. Because of this dispute appellant/accused may be assaulted prosecutrix in the home but there is no other evidence regarding rape committed by the appellant/accused was proved. So, conviction imposed on the appellant/accused

under Section 323 of the IPC is maintained.

16. In the result, the appeal is partly allowed. Conviction and sentence imposed on the appellant under Section 376 (1) of the IPC are set aside and he is acquitted of the said charge. However, conviction imposed on the appellant under Section 323 of the IPC is maintained. The appellant has been in jail since 08.03.1996 till 19.07.2000 when he was granted bail by the High Court. Thus, the appellant has undergone the sentence imposed upon him under Section 323 of the IPC.

17. The appellant is on bail. Surety and personal bonds earlier furnished at the time of suspension of sentence shall remain operative for a period of six months in view of the provisions of Section 437-A of the Cr.P.C. The appellant shall appear before the higher Court as and when directed.

Sd/-
Gautam Chourdiya
Judge