

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 107 of 1998

Suresh Kumar son of Shyamlal Marar aged 22 years resident of Nangtola (Ajarpura) Thana Dandilohara, District Durg M.P. (now C.G.)

---- Appellant

Versus

State of M.P. (now C.G.) through Police Station Thana Dondi Lohara, District Durg M.P. (now C.G.)

---- Respondent

And

CRA No. 256 of 2001

Fathoo Ram son of Ratnooram, aged 25 years Gond, resident of village Nagootola Arjapuri P.S. Dondi Lohara, District Durg, Chhattisgarh

----Appellant

Versus

State Of Chhattisgarh through the District Magistrate, Durg, District Durg, Chhattisgarh.

--Respondent

For appellants – Smt. Meera Jaiswal and Shri Aman Kesharwani, Advocates.

For Respondent/State –Smt. M. Asha, PL.

Hon'ble Shri Justice Goutam Bhaduri

Order

10/03/2018

Heard.

1. Both these appeals are against the order dated 30/12/97 passed in Sessions Case No.423/96 by the 8th Additional Sessions Judge, Durg whereby the appellants have been convicted under Sections 376(2)(g) IPC, 366 IPC and 363 IPC and have been sentenced to undergo RI for 10 years, 5 years and 3 years respectively.
2. These appeals are on behalf of Suresh Kumar and Fathoo Ram whereas other accused have already suffered their jail sentence and have been released, as such evaluation of the evidence is primarily confined to the evidence against Suresh Kumar and Fathoo Ram.

3. As per the case of the prosecution, prosecutrix PW-17 was resident of village Murethitola and had come to village Nangutola to attend a marriage of one Katharam. In such marriage to prepare food Kalshiram, Genduram, Dheluram, Suresh and Fathoo were engaged. On the date of marriage, at about 10 pm the prosecutrix went along with one Bhudiyarin to answer the call of nature. After answering the call of nature while they were coming back few of the persons of the village came and one Dheluram (A-3) and Suresh (A-1) stopped their way. At that time, the prosecutrix and her friend wanted to run away, her friend was successful to run away whereas the prosecutrix was caught by the accused. Prosecutrix tried to save herself by shouting but it was suppressed on the sound of loud speaker and nobody could hear the cry for help. Thereafter, out of the accused one of them caught hold of her and picked her up and took her to the straw heap wherein certain people again joined thereafter she was taken to one house. One of the accused suggested to leave the prosecutrix and then one of them assured to escort her to her house and thereafter instead of sending her home took her towards the river and forcefully committed rape and also assaulted her. Another accused namely Fathoo also committed forceful rape on her. Subsequently she was taken to different locations and during such period again rape was committed on the pretext of threat. After the initial sexual assault one Dheluram (A-3) who was brother of Fathoo joined them and he also committed rape while she was on her way back to her home and at 4 am in the morning she was left near village. At that time, brother of the prosecutrix Katharam started searching for the prosecutrix and having found she was taken back to the home and the entire incident was disclosed by the prosecutrix to their family members. Initially report could not be lodged as there was no conveyance was available to police station. Subsequently by Ex.P-22 FIR was lodged

and thereafter prosecutrix was subjected to medical check up. The police thereafter conducted the investigation and registered the case and filed the charge sheet under sections 363, 366 and 376(2)(g) of IPC.

4. During the course of trial, the appellants abjured their guilt and claimed to be tried. Primary witness of the prosecution were PW-17 prosecutrix, Dr. Shashi Cladius PW-19 and apart from that identification witness PW-11 Pramod Singh Chouhan and I.O. PW-20 were examined, in all 20 witnesses were examined.

5. Learned court below after evaluating the entire facts and evidence convicted the accused as aforesaid. Hence this appeal.

6. Learned counsels appearing for the appellants would submit that in this case identification of the accused has not been established by the prosecution. It is stated that according to the statement of the prosecutrix PW-17 she did not knew the accused as she belong to the other village and forced identification was made at the behest of the police officers. It is stated that evidence of the PW-11 who is independent witness would show that the accused were actually not identified and whatever has been written was written at the behest of the police officer. Learned counsels would further submit that the incident might have happened to the prosecutrix but accused were not involved in this case. Submission is also made that the way the incident has been stated it would show that she herself had went with one of the alleged accused and she did not try to flee away and roamed around at her own will. They would further submit that the prosecutrix was major which would show that she was a consenting party and was in company of one of the alleged accused, therefore conviction so made is bad in law and deserves to be set aside.

7. Learned State counsel opposes the argument and would submit

that order passed by the court below is well merited which do not call for any interference.

8. Heard learned counsels for the parties and also perused the record of the court below.

9. Prosecutrix in this case is examined as PW-17. In her deposition it is stated that when she went to answer the call of nature alongwith Budhiyarin at about 10-11 pm Suresh (A-1) and Dhelu (A-3) came there and stopped their way. When they tried to flee away Budhiyarin could escape and ran away and thereafter one of the accused Kalshiram (A-2) stopped her way and gagged her mouth. Thereafter Suresh (A-1) and Dhelu (A-3) dragged her and threw her to the ground, thereafter she was taken to straw heap by Suresh and Dhelu. The victim stated that though she cried for help but could not escape and subsequently the other persons came there and one of the accused suggested nothing has happened till that time and advised to let her free and to go to her house. Thereafter Fathoo (A-4) promised her to take her back to her home but instead of home she was taken to a field and Fathoo committed forcible sexual intercourse with her. Thereafter, she was taken to other places wherein also she was subjected to rape and during the period for 3 to 4 times rape was committed. Witness further stated that Gendu who is brother-in-law of Fathoo was asked to call his brother and while she was kept in the hut she was again subjected to rape. It is further deposed that after brother of Fathoo came, Fathoo was asked to go back and his brother assured her to escort her to her home whose name was Dhelu (A-3), but instead of taking her home Dhelu also committed rape. Thereafter, she was taken to the village.

10. FIR of the incident was lodged by Ex.P-22. FIR was lodged on 4/05/96 for the happening on 3/05/96. In the FIR name of the appellants have not been narrated immediately. Presence of the prosecutrix in the

village is supported by Ram Bai PW-2 wherein she stated that the prosecutrix had come to their house to attend the marriage and after the incidence the prosecutrix when met her narrated the incidence of rape. The deposition of the prosecutrix PW-17 would show that by Ex.P-5 and P-8 she had identified Fathoo Ram in the court as also the other accused namely Kalshiram (A-2), Dhelu (A-3), Suresh (A-1) and Gendu (A-5). It is stated that the identification was carried out by some officer. Ex.P-5 is the test identification parade memo of Fathoo Ram (A-4) which is proved by PW-4 C.L. Yadav Tehsildar. According to him on 6/05/96 identification of Fathoo Ram (A-4), Gendu Ram (A-5) was done by Hem Kumari and test identification parade is marked as Ex.P-5. He further stated that both the accused were mixed up with other people and Hem Kumari had identified Fathoo Ram and Gendu Ram. In the cross examination of this witness nothing has come on record to show that identification was not carried out.

11. The other test identification parade is Ex.P-8. By such identification parade, Kalshiram (A-2), Dhelu (A-3) and Suresh (A-1) were identified. This Ex.P-8 was corroborated by Chamar Singh PW-6. His statement would show that the prosecutrix has identified Suresh Kumar and other accused. It also bears signature of the witness PW-6. In statement of the prosecutrix at para 27 she has deposed that two identification parade were carried out which is Ex.P-5 and Ex.P-8 and the accused were called by the names and she had identified them. It is stated that the accused were called by names by the police.

12. The memo of test identification parade Ex.P-8 was written by PW-11 Pramod Singh Chouhan. It is stated that during the identification parade one Atul Singh police officer was present and apart from him 4-5 police officers were also present and according to the dictation given by Atul Singh, Ex.P-8 was scribed. He further stated that before him no

identification were actually carried out and only on the direction of the police officer it was written. He further stated that prosecutrix and Bhudiyarin also did not identify any of the accused and everything was written on the dictation of Atul Singh.

13. The evidence therefore which is on record with respect to the identification memo of Ex.P-8 if the related facts are seen together with FIR it would show that name of the accused were not known to the prosecutrix. In the examination-in-chief she has categorically deposed the name and in the court one Fathoo was identified whereas other accused were identified on the basis of the identification parade memo Ex.P-5 and P-8. Statement of the prosecutrix would depose that she has categorically admitted the fact that before the incident she has not seen the accused and further she stated that while identification was carried out all the accused were called by their name and thereafter she had identified the accused. Reading the statement of the prosecutrix alongwith statement of PW-11 who has written the Ex.P-8 doubt have been raised in respect of the identification of Suresh (A-1) as two contradictory similar parallel facts have come on record. In statement of one witness Chamar Singh PW-6 he has deposed that at the time of the identification parade Gendu (A-5), Dhelu (A-3), Kalshi (A-2), Suresh (A-1) were only produced and other persons were not mixed up with them. He further stated that entire identification was carried out by the police inspector only and they had only signed the papers. Therefore, identification which was carried out in respect of Suresh Kumar (A-1) by Ex.P-8 doubts have been created but eventually the dock-identification parade is not rebutted. There is no reason and explanation has come to disbelieve the statement of victim in court.

14. With respect to identification of Fathoo Ram the statement of the prosecutrix would show that he was identified even before the court.

Identification memo Ex.P-5 purports that the prosecutrix identified Fathoo Ram with specific averment that he had committed rape on her. Same is also corroborated by PW-4 the Tahsildar. As such identification of the appellant Fathoo Ram (A-4) has been proved before the court as also by identification memo Ex.P-8. The Supreme Court in case reported in **(2010) 6 SCC 1** in between **Sidhartha Vashisht alias Manu Sharma Vs. State (NCT of Delhi)** has laid down that even where there is no previous test identification parade, the court may appreciate dock identification.

15. Now reverting back to the statement of the prosecutrix it would show that allegation of rape is attributed to Fathoo Ram that on a promise to leave her back to her home he had committed rape. The prosecutrix further at para 18 has deposed that while one of the accused was taking her away the other accused had returned. In her statement name of Fathoo has been made that he was holding her hand at that time and after that she was taken to a field forceful rape was committed under the threat by Fathoo for more than 4 times. No plausible explanation or rebuttal has come in the cross-examination to rebut such averments. The evaluation of statement of prosecutrix therefore would show that allegation of rape is attributed to Fathoo and his brother Dhelu (A-3). The allegations of rape is not on Suresh (A-1). The other accused Dhelu (A-3) has suffered the entire jail sentence alongwith Kalshiram (A-2) & other Gendu (A-5). So only appeal of Fathoo (A-4) and Suresh (A-1) remains to be considered.

16. With respect to the medical report of prosecutrix, Dr. PW-19 Shashi Cladius has proved the medical examination report of the prosecutrix by Ex.P-23 and the following injuries were found:-

- (a) Labia majora and minora both swollen red in colour tender.
- (b) Lacerated wound $\frac{1}{2}$ cm x 1mm x 1mm red in colour just below the

urethra. Age of wound 2-3 days back and injury was simple in nature.

(c) Lacerated wound 3 cm x ½ cm x 2cm at 6 'O clock position over the hymen.

(d) Lacerated wound in hymen at 10'O clock position which was measuring 1cm x 2mm. Age of wound 2-3 days back and simple in nature.

(e) Lacerated wound at 3' O clock position measuring 1 cm x 2mm x 2mm. Age of wound 2-3 days back.

According to the doctor forceful intercourse was done 2-3 days back. The injured was examined on 5/05/96. Apart from this, the victim was having injury on her body. The following injuries were found:-

(a) Contusion 10 cm x 2 inch black in colour with parallel lines on the left thigh back side which was simple in nature was inflicted 2-3 days back by way of a club.

(b) Injury No.2 was simple on the right thigh on the back side inflicted by hard and blunt object like club.

(c) Many lacerated wound on the lips of 1cm x ½ cm which was small and were inflicted 2-3 days back were appeared to have been made by biting.

This statement is further corroborated by statement of PW-5 Pooja who has seen the victim after the incident and stated that after the incident prosecutrix was in very bad physical condition and she was not able to even talk and was talking in very low voice.

17. Therefore, evaluation of the statements of the witness and test identification parade would show that identification of Fathoo has been established which is also corroborated by the statement of the victim as also doctor. Statement of the prosecutrix also remains unrebutted of the fact that forceful intercourse was committed by Fathoo and other accused Dhelu whereas in respect of the other accused no allegation of rape has been attributed. In view of this, I am of the opinion that

conviction so made by the court below in respect of the appellant Fathoo Ram do not call for any interference, however with respect to the appellant Suresh Kumar since he has already suffered more than 6 ½ years of sentence and identification has created a doubt and no allegation of rape has been made against him, he is acquitted of the charges under section 376(2)(g) of IPC whereas he is convicted under sections 363 and 366 of IPC. With respect to the part of sentence, in the facts of case conviction of Fathoo is maintained under sections 376(2)(g) IPC, 366 IPC and 363 IPC and is ordered to be sentenced for 10 years, 5 years and 3 years respectively. With respect to sentence to Suresh Kumar, as disclosed he has already undergone a sentence of 6 ½ years the same to be treated as undergone.

18 (I) Accordingly, CRA No. 107 of 1998 filed on behalf of appellant Suresh Kumar is partly allowed. Appellant is on bail. His bail bonds shall continue for a period of 6 months in view of provision contained under Section 437-A of Cr.P.C.

(II) CRA No. 256 of 2001 filed on behalf of appellant Fathoo Ram is dismissed. The appellant is on bail, he is directed to surrender before the trial court immediately to serve the remaining part of jail sentence.

Sd/-

(Goutam Bhaduri)

JUDGE

