

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 30 of 2010****Reserved on : 05.09.2018****Delivered on : 19.09.2018**

Hazari Patel, S/o Ghoor Singh Patel, Aged about 32 years, Resident of Sakin Koni, Police Station- Masturi, District- Bilaspur (C.G.)

---- Appellant

Versus

State of C.G. Through – P.S. Center Masturi, District- Bilaspur (C.G.)

---- Respondent

For Appellant : Mr. Arvind Shrivastava, Advocate.

For State/respondent : Ms. K. Tripti Rao, Panel Lawyer.

Hon'ble Shri Justice Ram Prasanna Sharma

CAV JUDGMENT

1. This appeal is preferred under Section 374(2) of the Code of Criminal Procedure, 1973 against judgment dated 12.11.2009 passed by Sessions Judge, Bilaspur (C.G.) in Session Case No. 44/2009, wherein the said court convicted the appellant for commission of offence under Sections 450, 323 & 376(1) of IPC and sentenced to R.I. for 3 years and fine of Rs. 1000/-, R.I. for 6 months and R.I. for 7 years and fine of Rs. 1000/- respectively with further default stipulations.
2. As per version of prosecution, on 06.11.2008, the appellant knocked on the door of the prosecutrix at about 10.00 p.m. while she was sleeping with her child in the house. She opened the door assuming that it was knock of her husband. When she opened the door, the appellant pushed her to the ground and then committed rape on her. While committing

rape, she had been slapped by the appellant on her resistance. Husband of the prosecutrix came to the house when he heard cry of his wife and he saw that the appellant was escaping by removing tin shed of the home. When husband of the prosecutrix tried to get hold to the appellant, the appellant pushed and slapped him and succeeded to run away. The matter was reported and investigated and the trial court convicted the appellant as mentioned above.

3. To substantiate the charge, the prosecution examined as many as 10 witnesses. To nullify the charge, the defence side examined one witness namely, Pramod Kumar Yadav (DW-1). The prosecutrix (PW-4) deposed that she was sleeping in the house at about 10.00 p.m. at night and her husband had gone to watch TV in house of his brother. At that time, one knock was there in the door of the prosecutrix and she opened the door assuming that it was knock of her husband. At the same time, the appellant pushed her on the ground and remove her Sari & Peticoat and committed rape on her. When she resisted, the appellant slapped in cheek and she sustained swelling in cheek and left hand. Version of the prosecutrix is supported by version of her husband Premlal Sahu (PW-1). As per version of this witness, on hearing cry of her wife, he reached to the house and saw that the appellant escaping by removing roof of his house. He further deposed that when he tried to get hold of appellant, he pushed and slapped him and succeeded to flee away. Version of this witness is again

supported by version of Lalji Satnami (PW-2) who deposed that on hearing cry, he went to house of the prosecutrix and saw that the appellant was got hold there and he flee away from the spot later.

4. Mahetru Sahu (PW-3) also supported version of the prosecutrix and as per version of this witness, he saw the appellant assaulting to husband of the prosecutrix namely Premlal Sahu. He further deposed that the prosecutrix informed him that rape has been committed by the appellant with her. Version of direct evidence is supported by version of medical expert Dr. Madhu Saxena (PW-8). As per version of this witness, she examined the prosecutrix on 08.11.2008 at Community Health Centre, Masturi, District- Bilaspur (C.G.). Upon her examination, she found injuries on the body of the prosecutrix as under:-

- (i) Bluish Black Bruise over R-scapular region below thigh.
- (ii) Bruise on the post aspect of left shoulder.
- (iii) Swelling on left cheek, swelling diffuse in front of ear between left eye and left ear.
- (iv) Swelling diffuse along tenderma.
- (v) Swelling on left palm.

5. As per version of this witness, all the injuries found in body of the prosecutrix is probably caused by hard and blunt object within 24 to 48 hrs. before examination. Opinion of the medical expert is unshaken during cross-examination and

there is no opinion of other medical expert to the contrary opinion of this expert, therefore, it is established that injuries as noted by the medical expert is found on body of the prosecutrix. The matter is reported to police on next day i.e. on 07.11.2008 and it is mentioned in FIR that since incident happened in the night, the matter is reported next day morning.

6. Learned counsel for the appellant submits that conduct of husband of the prosecutrix is not natural because he did not help wife but, called his father Mahetru after the incident, therefore, version of the prosecution is doubtful. In view of this Court, the argument is without substance. It is case of rape in which testimony of prosecutrix is having decisive value, the court should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of other witnesses. Different people/witnesses react different under different situation, it depends on individual. There cannot be any concept or uniform rule of human reaction and to declare a piece of evidence unnatural on the ground of his reaction, therefore, if husband of the prosecutrix called his father after the incident, there is nothing unnatural and the same is insignificant.
7. Learned counsel for the appellant submits that it may be a case of consent looking to the conduct of the prosecutrix. In view of this Court, the prosecutrix clearly stated in her statement that she resisted the appellant. The appellant

slapped her and then pushed her. Version of the prosecutrix is supported by version of medical expert who found injuries on the right back, left shoulder, left cheek, left elbow and left palm. Presence of the appellant is also established by evidence of Premal Sahu (PW-1), Lalji Satnami (PW-2), Mahetru Sahu (PW-3) & Dhanbai (PW-4). Looking to the direct and medical evidence, there is no scope to infer consent on the part of the prosecutrix. She made cry at the time of incident, upon her cry her husband and other persons reached to the spot where appellant was trying to escape. Looking to the version of the prosecutrix and looking to conduct of the appellant, it is not a case of consent.

8. Learned counsel for the appellant submits that there is omission and contradiction which is overlooked by the trial court, therefore, version of the prosecution is doubtful. Now point is whether there is any contradiction or omission, if any, is sufficient to discard testimony of the witnesses. After going through the statement of all the witnesses present on the spot, there is no material contradiction in their statement regarding commission of offence. Unless contradiction is of the material dimension, minor contradiction will not render the evidence of eyewitness unbelievable. There may be some discrepancies between narration of different witnesses when they speak on details but when the same is not related to basic of the offence committed, it cannot be used to discard evidence in its entirety.

9. Learned counsel for the appellant submits that the trial court was wrong in discarding the evidence of the defence witnesses. In view of this Court, evidence of defence namely, Pramod Kumar Yadav (DW-1) examined on 26.06.2009 i.e. after 7 months of the incident. His version is based on evidence what is told to him by Premlal. In this way, the witness is hearsay witness who was not present on the spot at the time of commission of offence or after the commission of offence. Therefore, defence witness is of no help to the appellant. In the matter of **Kalyan Kumar Gogoi Vs. Ashutosh Agnihotri** reported in **(2011) 2 SCC 532**, Hon'ble the Supreme Court has held as under:

“(a) the person giving such evidence does not feel any responsibility. The law requires all evidence to be given under personal responsibility, i.e., every witness must give his testimony, under such circumstance, as expose him to all the penalties of falsehood. If the person giving hearsay evidence is cornered, he has a line of escape by saying "I do not know, but so and so told me",

(b) truth is diluted and diminished with each repetition and

(c) if permitted, gives ample scope for playing fraud by saying "someone told me that.....". It would be attaching importance to false rumour flying from one foul lip to another. Thus statement of witnesses based on information received from others is inadmissible.”

10. Learned counsel for the appellant submits that there is delay in lodging FIR which creates a question mark on the

prosecution story. In the present case, offence was committed at night and matter was reported next day morning and it is mentioned in FIR that due to night they could not lodge the report. In the matter of **Tulsidas Kanolkar Vs. The State of Goa** reported in **(2003) 8 SCC 590**, Hon'ble the Supreme Court has held as under:

“The unusual circumstances satisfactorily explained the delay in lodging of the first information report. In any event, delay per se is not a mitigating circumstances for the accused when accusation of rape are involved. Delay in lodging first information report cannot be used as a ritualistic formula for discarding prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered, the Court is to only see whether it is satisfactory or not. In a case if the prosecution fails to satisfactory explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is a relevant factor”.

11. In the present case, since matter is reported on next day morning and there is no scope of embellishment or exaggeration on the part of any of the evidence on count of reporting next day, prosecution case could not be doubted. Argument advanced on behalf of the appellant is not sustainable.
12. House-trespass in order to commit offence punishable with imprisonment for life is an offence under Section 450 of IPC;

punishment for voluntarily causing hurt is an offence under Section 323 of IPC and committing rape is an offence under Section 376(1) of IPC, for which the trial court had convicted the appellant and this Court has no reason to interfere with the finding recorded by the trial court. Accordingly, the conviction for the offences mentioned above are hereby affirmed. Section 376(1) IPC is punishable with minimum imprisonment for 7 years and less than minimum cannot be awarded. Sentence part is also not liable to be interfered with. Accordingly, the appeal is liable to be and is hereby dismissed.

13. It is reported that the appellant is on bail and his bail bonds are cancelled. The trial court will prepare super-session warrant and issue warrant of arrest against the appellant and after his arrest, he be sent back to the concerned jail for serving out the remaining part of the jail sentence. The trial court shall submit compliance report on or before 30.12.2018.

Sd/-
(Ram Prasanna Sharma)
Judge