

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No.512 of 2004**

1. Kamlesh Kumar alias Kamal, aged about 19 years, son of Shri Kanhaiya Yadav,
2. Kailash Kumar, aged about 24 years, son of Shri Samaru Yadav,
3. Phagnuram, aged about 24 years, son of Shri Ramprasad Gond,
4. Bhooshanlal, aged about 23 years, son of Shri Ramluram Gond,

All are residents of Belargaon, P. S. Sihava, District Dhamtari (CG)

---- Appellants (Accused persons in jail)

Versus

- State Of Chhattisgarh

---- Respondent

For Appellants	:	Shri Avinash K. Mishra, Advocate
For Respondent/State	:	Shri Suryakant Mishra, Panel Lawyer

D.B.: Hon'ble Shri Justice Manindra Mohan Shrivastava
Hon'ble Smt. Justice Rajani Dubey
CAV Judgment

Per Manindra Mohan Shrivastava, J.

15/07/2019

1. This appeal is directed against the impugned judgment of conviction and order of sentence dated 30-04-2004 passed by the Additional Sessions Judge, Dhamtari in Sessions Trial No.217/2002, whereby and whereunder the appellants have been held guilty for commission of offence under Section 376(2)(g) of IPC and sentenced them, as described below-

Section- 376(2)(g) IPC	Rigorous Imprisonment for 12 years and fine of Rs.2000/-, in default of payment of fine, additional R.I. for 1 year.
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2. The prosecution case, as unfolded from the impugned judgment and records of the case is that the prosecutrix-Basanti, PW-3 lodged FIR in Ex.P-6 at Police Station Sihawa on 23-02-2002, alleging that on 22-02-2002, she had

gone to attend a function along with her friend Sarita in the house of another friend Bhuneshwari, when she was going along with her friend Sarita at about 7.30 in the evening, crossing through the field, appellant Kailash came from behind and caught hold of her, mouth was gagged and then two others accompanying Kailash namely Phagnu Gond and Bhooshan Gond bodily lifted her. Her friend Sarita was also bodily lifted by Kushal Gond, Kamlesh Yadav and Dilip and taken to the agricultural field. Prosecutrix Basanti was taken towards agricultural field and thereafter, she was subjected to rape one after the other by Kailash, Bhushan, Phagnu and Kamlesh. Dilip was asked to watch passers by, so that, no interruption takes place. After the incident, when she was coming back, she met her friend Sarita on the way. The accused-appellants were also moving along with them and at that time, one Indal Sahu met with them. The appellants threatened them not to disclose the incident in the house. The prosecutrix went to the house of Sarita and the incident was informed to the parents of Sarita. Parents of the prosecutrix were also called. Number of villagers gathered. Report could not be lodged as it was late in the night. On the next day, she came to the police station to lodge a report. The prosecutrix was medically examined by Dr. Abha Rani Singh, PW-2 and certain injuries were found on her body. Though, hymen was found intact, vagina was found swelled and red. Upon examination, Dr. Abha Rani Singh, PW-2 prepared report, Ex.P-2. Clothes of the prosecutrix-Basanti and that of the appellants were seized. Those articles were sent for chemical examination to the Forensic Science Laboratory, wherefrom, report in Ex.P-32 was received. In the said report, seminal stains and male spermatozoa was found in the underwear of the appellant Phagnu and Kailash and the skirt and underwear of the prosecutrix. Upon completion of usual investigation, charge sheet was filed and on the basis of the allegations contained in the charge sheet, the appellants were charged of

having committed gang rape on the prosecutrix and therefore, liable for commission of offence under Section 376(2)(g) of IPC. The appellants having abjured guilt, were subjected to trial. In order to prove its case, the prosecution examined as many as 16 witnesses which included Prosecutrix, PW-3, and her friend Sarita, PW-9.

Learned trial Court, relying upon the evidence led by the prosecution, particularly the evidence of the prosecutrix, presence of injury and also presence of spermatozoa in the clothes of the prosecutrix and some of the accused, held the appellants guilty of commission of offence of gang rape and they were accordingly sentenced, as described above, giving rise to this appeal.

3. Assailing correctness and validity of the impugned judgment of conviction and order of sentence, learned counsel for the appellant argued that the prosecution has failed to prove its case beyond reasonable doubt. According to him, narration of the incident of rape by Basanti, PW-3 is not only improbable, but also suffers from material contradiction and omission and the present is a case of false implication. It is argued that the presence of the prosecutrix alone in the agricultural field in the night itself, raises serious doubt as to what was she doing alone with her friend. Next submission is that her story that she was caught hold of by the appellants and subjected to rape one after the other, is not supported from the nature and extent of injury found in her vagina and other parts of the body. He argued that the injuries are too trivial and Dr. Abha Rani Singh, PW-2 has clearly stated that if the prosecutrix would have been raped by number of persons one after the other, definitely, her hymen would not have remained intact. Further submission is that merely scratch injuries have been found on the body of the prosecutrix, which also does not support the prosecution story of she have been subjected to gang rape by number of persons that too in the agricultural field. Learned counsel for the appellants

further argued that the report of Forensic Science Laboratory is not conclusive and mere presence of spermatozoa and seminal stains on the clothes of the prosecutrix, did not establish alleged commission of offence of rape on the prosecutrix. Learned counsel for the appellants would highlight that the evidence of the prosecution witnesses namely Indal Sahu, PW-13 renders probable and plausible the defence raised by the appellants that in fact, the prosecutrix and her friend Sarita had gone towards the agricultural field to meet other boys/their lovers and when the appellants happened to reach at the spot, two boys ran away and when they scolded, Sarita and Basanti for having indulged in secret meeting with certain boys in the night and brought them to their house, the prosecutrix and the other friend Sarita, PW-9, in order to save themselves from all the allegations, falsely implicated the appellants.

4. On the other hand, learned State counsel would support the impugned judgment of conviction and order of sentence by submitting that the conviction of the present appellants rests on the clinching evidence of the prosecutrix, PW-3, who has very clearly and in detail, stated regarding commission of offence of rape on her by the appellants. He would argue that the evidence of the prosecutrix and other prosecution witnesses proves that soon after the incident, the prosecutrix and her friend Sarita had gone to the house of Sarita and the matter was immediately informed to the parents of Sarita. The parents of Prosecutrix-Basanti were also called in the house of Sarita and villagers were also informed. Domar Singh, PW-14, Up-Sarpanch of the Village was also informed regarding the incident, who called the appellants and their parents, in which, an attempt was made to exert pressure on the parents of the prosecutrix and Sarita. However, the prosecutrix and their families without affected by any pressure, finally lodged report in the next morning i.e. on 23-02-2002, thus, lodging of FIR is prompt. Next submission of learned State counsel is that the

allegation of commission of offence of rape, as stated by Basanti, PW-3, does not suffer from any material contradiction and the prosecutrix, by and large, has remained firm on all material aspects with regard to time, place and role of the appellants in the alleged commission of offence. According to him, the prosecutrix also suffered injuries not only on her private parts, but also on other parts of the body. Even though, it is argued, that it is not necessary in all the cases, injury must have been caused on the body of the prosecutrix or that medical evidence must necessarily corroborate the evidence of the prosecutrix, but, in the present case, medical evidence itself corroborates the evidence of the prosecutrix regarding she having been subjected to rape.

5. Having considered the submission of learned counsel for the parties, we have perused the records of the case.

6. Before dealing with the present case, it would be relevant to state that prosecutrix Basanti, PW-3 and Sarita, PW-9 lodged two separate reports, alleging commission of offence of rape against them leading to registration of two different cases. In both the cases, respective appellants have been convicted on the allegation of commission of offence of rape. The present case relates to commission of offence of rape on Basanti, PW-3.

7. FIR lodged by Basanti, PW-3 in Ex.P-6 on 23-02-2002 at 12 Hours contains specific allegations against the appellants Kailash, Phagnu, Bhooshan and Kamlesh that she was subjected to rape by these persons, in the previous evening, when, for attending a function in the house of one of her friend-Bhuneshwari, she was going along with her friend Sarita, PW-9. In the FIR, it was stated that the prosecutrix-Basanti was caught hold of by the appellants and thereafter, she was bodily lifted and taken towards the agricultural field and there, she was made to lie down and one after the other, the appellants committed rape on her. Learned counsel for the appellants has sought to raise a

doubt on the prosecution story on the ground that the FIR was not lodged on the same date promptly, though incident of rape is said to have been taken place at about 07.30 PM in the previous evening and the police station was situated only at a distance of 16 KM from the village and place of residence. After going through the evidence of the prosecutrix, PW-3, her friend Sarita, PW-9, Parsuram, PW-8, Maikuram, PW-10, father of Sarita, Indal Sinha, PW-12, father of Basanti, PW-3 and Domar Singh, PW-14, Up-Sarpanch of the Village, it is proved that after the incident of rape, both the girls namely Basanti and Sarita had gone to the house of Sarita, met with the parents of Sarita and informed about the incident. Soon thereafter, the parents of Basanti were also called at the same place and then, the matter was informed to the Up-Sarpanch-Domar Singh. A meeting was organized. The appellants and their respective father were also called, villagers gathered and the appellants denied having committed any criminal overt act. It further shows that after the incident, the matter was taken up at the village level and a meeting was organized and the people of the village had gathered in the house of Sarita and thereafter, in the house of Domar Singh, Up-Sarpanch. The prosecutrix has stated that an attempt was made by Domar Singh, Up-Sarpanch of the Village to get the dispute settled, but the prosecutrix stated that she would be lodging the case. The report was not lodged on the same date, as it became late in the night and on the next date, report was lodged in the police station. This is what has been broadly stated by the aforesaid witnesses. It is not a case, where the prosecutrix, after having returned to her house, did not disclose the incident to anybody and only on the next day, in the afternoon, for the first time, disclosed the incident to others. On the contrary, the evidence of the aforesaid witnesses goes to prove that immediately after the incident, the matter was disclosed to the parents of the prosecutrix as well as the parents of other girl Sarita, who was also ravished

in the same incident and the village meeting was organized, where the appellants and their parents were also called. The police station is situated at about 16 kilometers from the village and after the incident, calling of meeting and discussions consumed time and therefore, in the night, report could not be lodged, but, on the very next day, at about 12 hours, report was lodged in the police station. Slight delay, therefore, also stands fully explained.

8. Commission of offence of rape has been very clearly stated by the prosecutrix, PW-3, Basanti in her evidence. She has deposed very firmly in the Court that while she was going along with her friend Sarita and crossing agricultural field, the appellants arrived at the spot and she was caught hold of by the appellants, her mouth was gagged and she was bodily lifted and taken inside the agricultural field, thrown on the ground and she was subjected to rape by each of the appellants. She has clearly stated regarding penetration by each of the appellants and commission of sexual act. In her cross-examination, which is a detailed one, no material contradiction or omission has been elicited. Omission in the diary statement, Ex.D-1 and FIR, Ex.P-6 regarding administration of threat after the incident, has been elicited. Moreover, contradiction with regard to time when the matter was informed to the father of Sarita, has been elicited. The episode of appellants threatening and assaulting the father of Sarita, after the incident, having not been disclosed in the case diary statement, has been elicited and certain contradictions elicited with regard to the details of disclosures made by the prosecutrix to the Up-Sarpanch Domar Singh. All the contradictions and omissions are with regard to what happened after the incident of rape and not with regard to time and place, when the prosecutrix was caught and subjected to rape.

9. The testimony of the prosecutrix, PW-3 is corroborated from the evidence of Sarita, PW-9, who has clearly stated regarding that while she and her friend

Sarita were going in the night, Sarita was caught hold of by Kushal (one of the appellants in Criminal Appeal No.513 of 2004) and taken towards the field and she has also alleged commission of offence of rape on her. Sarita, PW-9 fully supports the evidence of the prosecutrix, Basanti, PW-3 on all material aspects. Sarita, PW-9 has stated that after the incident, she and Basanti had gone to her house and the matter was informed to her parents and thereafter, it was informed to the Up-Sarpanch, Domar Singh. A meeting of villagers was organized, in which, the appellants and their parents were also called and finally, on the next day, the matter was reported in the police station.

10. Further corroboration to the prosecution story and the evidence of Basanti, PW-3, finds from the evidence of Dr. Abha Rani Singh, PW-2, who medically examined the prosecutrix-Basanti. Though, it is not a legal requirement that in each and every case, the evidence of the prosecutrix must necessarily be corroborated from the medical evidence, in the present case, Dr. Abha Rani Singh, PW-2 has found scratch injuries on the back and waist of the prosecutrix. Though, hymen of the prosecutrix, Basanti was found intact, it was swelled and developed redness, which is clearly indicative of sexual assault made by the appellants. May be that full penetration had not take place, and therefore, hymen was not ruptured, but redness and swelling only supports the evidence of the prosecutrix that she was subjected to rape, may be partial penetration by the appellants.

Learned counsel for the appellants has referred to the opinion of the Dr. Abha Rani Singh, PW-2, who has stated in para 16 of her evidence that if the prosecutrix would have been subjected to rape by number of persons one after the other, her hymen would have been torn and the vagina would have admitted easy insertion of two fingers.

11. Though opinion of the doctor is only one of the possibilities, but merely

because, hymen was found intact, it cannot be said that the allegation of commission of offence of rape is false. There is nothing in the evidence of the Dr. Abha Rani Singh, PW-2, to say that in case of gang rape with possibility of incomplete penetration, hymen could be ruptured. It would only depend upon the extent of penetration and the size of genital organs of the prosecutrix and the assailants. The prosecutrix has very clearly and emphatically stated regarding commission of offence of rape by the appellants one after the other. What can be inferred from the evidence of the prosecutrix and the medical evidence is that though, rape was committed, penetration was only partial and was not complete, and therefore, hymen was not ruptured and there were injuries caused to the vaginal walls and the hymen was swollen and had turned red.

At that stage, it is necessary to refer one of the decisions of the Supreme Court, wherein it has been held that even partial penetration is sufficient to constitute commission of offence of rape in the case of ***Parminder vs. State of Delhi, (2014) 2 SCC 592***, held as below:-

9. PW-15, the doctor who conducted the medical examination of the prosecutrix on 31.01.2001, however, has stated that there was no sign of injury on the prosecutrix and the hymen was found intact. The High Court has considered this evidence and has held that the non-rupture of hymen is not sufficient to dislodge the theory of rape and has relied on the following passage from Modi in Medical Jurisprudence and Toxicology (Twenty First Edition):

“Thus, to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the Labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is, therefore, quite possible to commit legally the offence of rape without producing any injury to the genital or leaving any seminal stains.”

[Section 375, IPC](#), defines the offence of ‘rape’ and the Explanation to [Section 375, IPC](#), states that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. This Court has

accordingly held in [Wahid Khan v. State of Madhya Pradesh](#) [(2010) 2 SCC 9] that even the slightest penetration is sufficient to make out an offence of rape and depth of penetration is immaterial. In the aforesaid case, this Court has relied on the very same passage from Modi in Medical Jurisprudence and Toxicology (Twenty Second Edition) quoted above. In the present case, even though the hymen of the prosecutrix was not ruptured the High Court has held that there was penetration which has caused bleeding in the private parts of the prosecutrix as would be evident from the fact that the underwear of the prosecutrix was stained by blood. In our considered opinion, the High Court was right in holding the appellant guilty of the offence of rape and there is no merit in the contention of the learned counsel for the appellant that there was only an attempt to rape and not rape by the appellant.”

12. From the evidence of the prosecutrix, it is clear that when the prosecutrix was going along with her friend Sarita, all the appellants had gathered around the prosecutrix, caught hold of her and thereafter, she was bodily lifted by them.

13. In view of the provisions contained in Section 376(2)(g) of IPC, explanation-1, Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of said provision. Therefore, even if, for the arguments sake, it is accepted that all the appellants have not caused penetration and some of them have committed rape, their conduct and criminal overt act of giving threats, surrounding the prosecutrix and some of them catching hold of her and remaining were bodily lifted and taken towards the agricultural field, clearly proves that there were common intention of the appellants to commit offence of gang rape, and therefore, each of them, shall be deemed to have committed the offence of rape on the prosecutrix.

14. The defence of the appellants that when the prosecutrix and Sarita, had gone to meet boys in the night and appellants sought to bring them to their house and appellants scolding the prosecutrix and Sarita and in order to save

themselves from the allegations, the appellants were falsely implicated, does not hold ground. The evidence of Basanti, PW-3 and her friend Sarita, PW-9 is very emphatic and they have denied any such suggestion. Moreover, from the evidence of prosecution witnesses particularly Parsuram, PW-8, Chunnulal, PW-7, Maikuram, PW-10 and Indal Sinha, PW-12, it is clear that at the time of village meeting, when the appellants were called, the appellants sought to raise defence like this, but the prosecutrix and her friend Sarita has emphatically denied the same. Much insistence has been placed on the evidence of Indal Sinha, PW-12 and Domar Singh, PW-14 to buttress submission that it is a case of false implication, because the appellants had caught the prosecutrix along with her friend Sarita, when they had gone to meet their friend in the agricultural field in the night.

15. Indal Sahu, PW-13 only supports the prosecution story and the evidence of the prosecutrix, PW-3 and Sarita, PW-9 that the the prosecutrix and Sarita were seen in the company of the present appellants. He had seen one Kushal along with the prosecutrix. It was said that they are being taken to their house and at that stage, he suggested that these girls may be taken to their house. What has been stated by him in his cross-examination that upon hearing the sound of whistle, the girls went towards the field and they were also followed by the present appellants, only supports the prosecution case that the appellants had chased the prosecutrix and thereafter, they all were seen coming back with the prosecutrix. The prosecutrix, PW-3 and her friend Sarita both were surrounded by the appellants. Basanti, PW-3 has clearly stated in her testimony that she was given threat of murder, if she discloses the incident to any body. Soon thereafter, the appellants and the prosecutrix came across Indal Sahu, PW-13. In this background, the prosecutrix may not have disclosed anything about the incident, obviously for the reason that she was in the fear of the

appellants, therefore, no doubt can be raised over the prosecution story. This is so because, as soon as the girl reached their house, they immediately disclosed the incident to their parents.

16. Domar Singh, PW-14 has deposed that the prosecutrix and her friend Sarita both disclosed that they have been subjected to rape by the appellants. His evidence is that they have been subjected to rape by the appellants and in the village meeting, the appellants were also called. In the said meeting, the appellants denied having committed the offence, but came out with the story that some other boys had come and they only scolded the girls. From the evidence of Domar Singh, PW-14, all that can be said, is that when the appellants were called in the meeting, they denied commission of offence and came out with the defence that the prosecutrix had gone to the field on the call of their friends and when the appellants reached there, they all ran away and the girls also started running away and therefore, they are falsely implicated. Story of the defence does not inspire confidence. According to the appellants, the prosecutrix and Sarita went towards the field and they chased them and then the prosecutrix were brought back, and if that was so, how Basanti sustained injuries on her private parts badly, was not explained by them. The evidence of the prosecutrix cannot be doubted only on this count. The prosecution story further finds corroboration from the FSL report that the skirt and underwear of the prosecutrix has been found stained with spermatozoa. Seizure of underwear and skirt of the prosecutrix has been proved from the evidence of seizure witness, Ramji, PW-5, who has clearly stated that from Basanti, PW-3, Salwar suit and underwear has been seized and has proved his signature.

Another argument raised by learned counsel for the appellants is that if according to the prosecutrix, she was bodily lifted and taken deep into the fields

and subjected to rape on the ground of the agricultural field, which was rough and uneven and therefore, much more injuries would have been found on the body, while offering resistance, is liable to be rejected. If we look into the evidence of Sarita, PW-9, it is found that it is not a case that she was beaten up, or that she offered resistance to the act of sexual assault. According to her evidence, in the night, she was caught by as many as four persons, her mouth was gagged and she was bodily lifted and administered threat also. The time, place and that the prosecutrix was overpowered by as many as four accused persons, shows that she was completely helpless and even then, some injuries were caused on the back and private parts, corroborates the evidence of the prosecutrix that she was subjected to rape.

17. At the last, a prayer was made to reduce the period of sentence. We find no good ground to reduce the period of sentence awarded to each of the appellants, taking into consideration that the present is a case of gang rape.

18. In the result, the appeal has not merit and the same is accordingly dismissed.

SD/-
(Manindra Mohan Shrivastava)
Judge

SD/-
(Rajani Dubey)
Judge