

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 1292 of 1998**

- Deva @ Devkumar, aged about 26 years, son of Rambriksh Sao, resident of Jhumarkola, P.S. Rajpur, District- Surguja M. P. (Now in Chhattisgarh).

---- Appellant**Versus**

- The State of Madhya Pradesh through Police Station Rajpur, District- Surguja M.P. (Now in Chhattisgarh).

---- Respondents

For Appellant	:	Shri Rahil Kochar, Advocate
For Respondent	:	Shri Vikash Shrivastava, P. L.

Hon'ble Shri Gautam Chourdiya, J**Judgment On Board****18/07/2019**

(1) This appeal is directed against the judgment of conviction and order of sentence dated 5.5.1998 passed by Special Judge (Prevention of Atrocities) Act, Surguja at Ambikpuar in Special Criminal Case No. 26/1997, convicting the accused/appellant for the offences punishable under Section 376(1) of the Indian Penal Code and under Section 3(1) (xi) of the Scheduled Caste & Scheduled Tribe (Prevention of Atrocities) Act (henceforth "The Act") and sentencing him to undergo rigorous imprisonment for seven years and to pay fine of Rs. 2,000/-, and to undergo rigorous imprisonment for one year and to pay fine of Rs. 500/-, respectively with default stipulation.

(2) Briefly stated case of the prosecution is that on i.e. 26.04.1994 prosecutrix aged about 18 years was returning from Dabra weekly

market alongwith her neighbour Nand Keshar and his wife and when they reached near forest, Deva @ Dev along with two other persons threatened Nand Keshar and his family members and accused Deva took away the prosecutrix towards forest, firstly accused Dev Kumar committed forcible sexual intercourse with the prosecutrix thereafter his another friends committed rape on the prosecutrix. After committing rape on the prosecutrix, accused persons offered the prosecutrix to drop her in her house, which was refused by the prosecutrix and she came towards home. On the way she met with Dileep Bania and Bhogia and she along with them reached village Burgi and thereafter she reached her home at about 8,00 pm where she narrated the entire incident to her sister-in-law (Bhabi). When her father and mother returned home, she also narrated the story to them and thereafter when her brother, who was residing at Ambikapur, came back FIR vide Ex. P/4 was lodged on 27.04.1994 at Police Station Chalgali District Sarguja against the accused persons. Thereafter, the prosecutrix was examined by Dr. (Smt.) Kiran Bajgoli (PW-13).

(3) After usual investigation, charge sheet was filed against the three accused persons for committed gang rape with the prosecutrix, who belongs to the Scheduled Tribe, for the offence punishable under Sections 3(1)(v) & 3 (1)(xii) of the Act and Section 376 (2) (g) of the Indian Penal Code. After considering the material and evidence available on record, two accused Narendra and Anil both were acquitted of the charges leveled against them whereas, accused Dev Kumar Bania was convicted and sentenced by the trial Court as mentioned above.

(4) Learned counsel for the appellant submits that the appellant has been convicted only on the basis of statement of the prosecutrix whereas on the same set of evidence, two other accused persons namely Anil & Narendra were acquitted by the trial Court. He further submits that the prosecutrix herself disclosed this fact in her statement that she did not know the name of the accused persons, who committed rape on her and arrested for the charge of gang rape. He

submits that in the FIR lodged on the next day of incident, she has stated that friends of Dev Kumar Bania committed rape on her. Prosecutrix, who was aged about 20 to 21 years at the time of incident, admitted before the trial Court that the village people committed rape on her but no test identification parade was conducted by the Police during investigation. Prosecutrix admitted this fact in her statement in paragraph 14 that prior to incident, she did not meet with any of the accused persons and after lodging the FIR against the accused persons, she came to know about them and, thus, it appears that the prosecutrix has no knowledge about any of the accused persons but she mentioned the name of accused Dev Kumar Bania in para 31, 32 of her Court statement. As per the statement of Bogi Goswami (PW-6), when he was going from weekly market the prosecutrix informed that Deva, Anil molested her but it cannot be possible for her to specifically mention the name of accused persons Dev Kumar and Anil just after the incident as in her Court statement she stated that she did not know the name of the accused person at the time of incident and it is not intimated to Bhogi Goswami, the person to whom, she met first after the incident and she only narrated the offence of molestation.

(5) Learned counsel for the appellant further submits that Nandkeshwar is the person, who was with the prosecutrix in the weekly market, he has not supported the case of the prosecution and turned hostile. Birso (PW-7), Mother of the prosecutrix stated that when she returned her home, her daughter told her that three persons from the market had forcibly taken her and two persons committed sexual intercourse with her but she has not narrated the name of accused persons. Thus, the prosecutrix is not reliable witness as her statement is not supported by medical or forensic report. He placed reliance on the decision of Supreme Court in the Matter of **Bhaiyamiyan @ Jardar Khan & Anr. Vs. Stated of M.P.** reported in **2011 SAR(Criminal) 625 SCC** and in the matter of **Krishan Kumar Malik Vs. State of Haryana** reported in **2011 SAR (Criminal) 700**.

(6) Per contra, Shri Vikash Shrivastava, learned State counsel would submit that there is clear, cogent and unimpeachable evidence, in

support of case of the prosecution and there being evidence regarding rape committed by the appellant, the conviction is fully justified.

(7) I have heard learned counsel for the parties and perused the impugned judgment including record of the trial Court.

(8) In the FIR, prosecutrix firstly stated that accused Deva has committed rape on her whereas in her Court statement she stated that she did not know the persons, who committed rape on her. When the FIR was lodged and after a week of lodging the FIR she came to know about the accused persons and when FIR lodged on the basis of information given by the SO and villager, she narrated the name of Dev K. Baniya in FIR. Prosecutrix has stated in her statement that when she was returning from weekly market along with her neighbour Nandkeshwar and his wife, Dev Kumar and two other persons namely Narendra & Anil took her to the forest but Nandkeshwar has not supported the case of the prosecution and turned hostile. Nandkeshwar and the prosecutrix are from the same caste and resident of same village. Therefore, the important witness, who was present at the time of incident, has not supported the case of the prosecution.

(9) Nandkeshwar (PW-1) has admitted in para 1 of his statement that the prosecutrix was not returning with them whereas as per FIR, prosecutrix stated that she was returning along with Narendra, thus the said fact is not corroborated with the statement of PW-1. Furthermore, as per statement of Dr. Smt. Kiran Bhajgoli (PW-7), she opined that no external or internal injuries were found on the body of the prosecutrix therefore, medical report does not support the statement of prosecutrix. Prosecutrix has lodged FIR on the next date of incident.

(10) In the matter of **Bhaiyamiyan @ Jardar Khan (supra)** the Hon'ble Supreme Court considering the fact that as per medical evidence no internal or external injury was found on the person of the prosecutrix, the quality of evidence of the prosecutrix which was full of

contradiction acquitted the appellant of the charge under Section 376(2)(g) of IPC.

(11) As per FIR, two persons forcibly intercourse with the prosecutrix and one person caught her hold but in the court Statement, she specifically denied that Narendra & Anil have committed rape with the prosecutrix. As per FIR three persons jointly abducted the prosecutrix against her will and committed rape on her but that version is not supported by any oral and medical evidence. In the matter of **Krishan Kumar Malik (Supra)**, the prosecutrix had not mentioned the name of the appellant in the FIR, even though she was aware of his name- Identification- The description given by prosecutrix about details did not match with appellant appearance. In the instant case the prosecutrix had not knowledge about the accused person and their name at the time of incident and she mentioned this fact in her Court statement. In FIR she mentioned the name & Identification of the accused persons only at the instance of the police officials.

(12) As per the Statement of Bhogi Goshwami (PW-6) who met just after the incident with the prosecutrix, she narrated only this fact that Anil and Dev Kumar Baniya molested her (**bura Kaam kiya/ Badmashi Kiya**) and no any other information has been given. Thus, the entire evidence of prosecutrix is unreliable looking to the facts and circumstances of the case. From close scrutiny of the statement of the prosecutrix it is apparent that there are material contradiction and improvement in her statement as compared to the FIR and statements of other witnesses and as such her statement does not inspire confidence of the Court. Even medical evidence also does not support the version of the prosecutrix. True it is that it is a well settled principal of law that conviction can be based only on the statement of the prosecutrix and no corroboration thereof is required, however, for holding a person guilty of the offence of rape on the basis of only statement of the prosecutrix the Court is required to see whether the statement of the prosecutrix inspires confidence of the Court and is free from suspicion of falsity. However, as observed above the

statement of the prosecutrix is found to be inconsistent with the other material available on record and is not of such a nature which could justify conviction of the appellant. This apart on the same set of evidence, other co-accused namely- Narendra and Anil Kumar Jaiswal have already been acquitted by the Trial Court.

(13) On the basis of aforesaid discussion this Court is of the opinion that the Trial Court was not justified in convicting and sentencing the appellant under Section 376(1) of the Indian Penal Code and under Section 3(1)(xi) of the Scheduled Caste & Scheduled Tribe (Prevention of Atrocities) Act.

(14) Resultantly, the appeal is allowed. Judgment of the trial Court is set aside and the appellant is acquitted of the charges leveled against him. The appellant is reported to be on bail, therefore, his bail bonds shall remain in force with a period of six months from today in view of provisions of Section 437A of Cr.P.C.

Sd/-

(Gautam Chourdiya)
Judge