

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 849 of 1999

Babu Lal Mar (Died) And Others

---- Appellants

Versus

- State of Madhya Pradesh, Now CG

-----Respondent

- **CRA No. 1114 of 1999**

- Dinesh Soni

---- Appellant

- **Versus**

- State Of Madhya Pradesh, Now CG

---- Respondent

Post for pronouncement of the judgment on

01.10.2021

____Sd/-____

JUDGE

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment reserved on : 26.07.2021****Judgment delivered on : 01.10.2021****CRA No. 849 of 1999**

1. Babu Lal Mar (Died) Per Honble Court Order Dated 15-07-2021.
2. Banshidhar Malar S/o Shivnarayan Malar Aged About 23 Years
Occupation Agriculture R/o Pachawal, P.S. Balrampur.
3. Basu Singh Mar S/o Govind Singh Mar Aged About 22 Years
Occupation Agriculture R/o Pachawal, P.S. Balrampur.
4. Kanhaiya Yadav Alias Raju S/o Ramdev Yadav Aged About 21
Years Occupation Agriculture R/o Pachawal, P.S. Balrampur,
District Surguja Madhya Pradesh.

---- Appellants**Versus**

- State Of Madhya Pradesh Now CG through PS AJAK,
Ambikapur, District Surguja

---- Respondent**CRA No. 1114 of 1999**

- Dinesh Soni, S/o. Krishna Prasad Soni, Aged 20 years,
Occupation- Agriculture, R/o. Village Panchawal, PS Balrampur
Distirict Surguja CG

---- Appellant**Versus**

- State Of Madhya Pradesh Now Chhattisgarh

---- Respondent

For Appellants	: Shri Sushil Dubey and Shri A.K. Prasad, Shri Sameer Singh from Legal Aid, Advocates
For Respondent/State	: Mrs. Shubha Shrivastava Panel Lawyer for State

Hon'ble Smt. Justice Rajani Dubey

C A V Judgment

01/10/2021

As both these appeals arise out of a common judgment dated 09-03-1999 passed by the Special Judge SC/ST (Prevention of Atrocities Act) Surguja, District Ambikapur in S.T. No. 90/98, whereby convicting the accused/appellants under Section 376(2)(g) IPC and sentencing each of them to undergo RI for 10 years and to pay fine of Rs. 2,000/- plus default stipulation, they are being disposed of by this common judgment.

2. As per prosecution case, on 30.05.98 at about 7.00 p.m. the prosecutrix, aged about 17 years has gone to attend the prayer held at village Karamdeepa Pachawal along with his brother Arjun Dayakar and other villagers. It is stated that at about 11.00 p.m. when she was returning along with her friend Susheela, on the way 4-5 boys came and two of them namely Babulal and Banshidhar caught hold of her friend Susheela and took her to the backside of a nearby house and when she shouted, they ran away from there whereas the other accused persons namely Raju Yadav, Dinesh Soni and Basumar caught her and took near the tamarind tree. It is further stated that the other accused persons also came there and surrounded her, Babulal threw her on the ground and after removing her clothing committed rape on her. At that point of time, Sangeeta, Vijay and Daniel reached there searching and on seeing them, the accused persons ran away. Complainant has stated that her mouth was closed and therefore she was not able to raise alarm. FIR was lodged against the appellants on

the next day at police station Balrampur under Sections 376 (2)(g) IPC and 3(1)(XII) of the SC/ST (Prevention of Atrocities) Act. After filing of charge sheet, the trial judge has framed charge against the appellants under Sections 376(2)(g) and 147 IPC and 3(1)(XII) and 3 (2)(v) of the SC/ST (Prevention of Atrocities) Act.

3. In order to establish the guilt of the accused/appellants, prosecution has examined 11 witnesses. Statement of the accused/appellants were recorded under Section 313 of the Cr.P.C. in which they denied the charges levelled against them and pleaded their innocence and false implication in the case.

4. After hearing the parties, the trial Court by judgment impugned, has acquitted the appellants under the provisions of Atrocities Act but has convicted and sentenced them as mentioned in paragraph 1 of the judgment. Hence the present appeals.

5. Counsel for the appellants in Cr.A. No. 849 of 1999 submits that the Court below has erred in law, facts and material on record. The statement of the witnesses are not reliable and are contradictory. He submits that the doctor did not find any injury on the body of the prosecutrix and the trial court has convicted the appellants under Section 376 (2)(g) IPC which is a gross error. The prosecution has failed to establish the ingredients of Section 376 (2)(g) IPC beyond reasonable doubt. The independent witnesses PW-6 and PW-11 have not supported the version of the prosecutrix but the court below has adopted the theory of pick and choose and only that part of testimony has been considered which supports the prosecution case. The

findings of the trial court are totally perverse therefore the conviction of the appellants be set aside.

6. Counsel for the in Cr.A. No. 1114 of 1999 submits that there is no allegation against the present appellant regarding the commission of rape but the learned trial court has convicted him for the said offence. He submits that the appellant has not committed the offence nor supported any of the accused persons and therefore the conviction of the appellant be set aside. Reliance has been placed in the matter of **Sanjay Pathak Vs. State of CG** reported in **2006(1)CGLJ 375**; **Devinder Singh and Others Vs. State of Himachal Pradesh** reported in **(2003) 11 SCC 488** and **Lalliram and Another Vs. State of Madhya Pradesh** reported in **(2008) 10 SCC 69**.

7. On the other hand, State counsel while supporting the judgment impugned has submitted that the findings recorded by the Court below convicting the accused/appellants under Section 376 (2)(g) IPC is strictly in accordance with law and there is no infirmity in the same.

8. Heard the counsel for the parties and perused the material available on record.

9. During pendency of the appeal, Babulal Mar died and therefore, the appeal on his behalf stands abated.

Prosecutrix (PW-1) has stated in her examination-in-chief that Babulal (deceased) has committed rape on her and the other appellants have not done any bad work with her. She has stated that they went to the police station for lodging the report on the next day. The version has been supported by the friend of the prosecutrix who

has stated that accused Babulal and Banshidhar caught hold of her friend Susheela and took her to the backside of a nearby house whereas the other accused persons namely Raju Yadav, Dinesh Soni and Basumar caught her and the accused Babulal committed rape on her. Dr. Smt. Shobha Khare (PW-4) has medically examined the prosecutrix and she opined that the hymen was found ruptured and there was bleeding. She has stated that there is no evidence of recent sexual intercourse and there was no external injury on her body regarding resistance. Prosecutrix (PW-5) has stated that Babulal and Dinesh caught hold of her whereas the other three accused persons caught hold of her friend. She has stated that when she shouted and bite the accused, they left her and at that point of time, her brother Daniel, sister Sangeeta and Vijay reached there in search of the prosecutrix. She has further stated that with the help of torch light, Vijay saw that all the accused persons were surrounding the prosecutrix and Babulal was committing rape on her and thereafter they ran away from the spot. She has stated that she was not knowing the accused persons earlier to the incident. Prosecutrix (PW-1) has admitted in her cross-examination that in the report, the names of the persons were written as told by the villagers. She has stated that her friend told the names of the accused persons to her and also about the accused who committed rape on her. She has further stated that she has seen the accused/appellants for the first time, on the date of incident.

10. In the present case, date of incident is 30.05.98 and FIR Ex.P-1 was lodged on the next day i.e. on 31.05.98 at 10.00 a.m. The prosecutrix was medically examined by Dr. Smt. Shobha Khare (PW-4)

on 01.06.98 and opined that there is evidence of recent sexual intercourse and for confirmation, slides were prepared for chemical examination. Vijay (PW-2), Sangeeta (PW-3) and Daniel (PW-6) has supported the prosecution case and stated that when they reached the spot, prosecutrix narrated about the incident of rape committed by accused Babulal. In her cross-examination, the prosecutrix remained firm and has reiterated as to the manner in which she was subjected to rape by the appellant. Before amendment of Section 376(2)(g) IPC which reads thus :

Provides punishment to gang rape and exception (1)

“376. Punishment for sexual assault – (2) Whoever commits gang sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may be for life and shall also be liable to fine.

Explanation 2 -Where a person is subjected to sexual assault 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 sexual assault within the meaning of this sub-section.

11. Prosecutrix (PW-1) and her friend (PW-5) have stated that the bad act (rape) was done by Babulal and not by the other accused persons. The trial court has convicted all the accused persons under Section 376 (2)(g) IPC for the offence of gang rape but it is clear from the version of the prosecutrix that only accused Babulal has committed rape on her and the other accused persons have not done anything. In

the present case, earlier the prosecutrix was not knowing the accused persons and she has admitted that at the time of lodging the report, her friend has told the names of all the accused persons. In **Sanjay Pathak Vs. State of CG** reported in **2006 CGLJ 375**, this Court has held that

“ It cannot be ruled out that if gang rape was committed on the prosecutrix by the appellant and his two associates one after another in the field after removing clothes, some injuries on the back of the prosecutrix would have certainly been found. It is difficult to believe that Dogaram (PW-3) a young man of 25-26 years did not raise any hue and cry and also did not make any effort to rescue the prosecutrix or to free himself from the two unknown associates of the appellant.”

12. The Apex Court in the matter of **Lalliram and Another Vs. State of Madhya Pradesh** reported in **(2008) 10 SCC 69**, has held that,

“where allegation of rape is by many persons and several times but no injury is noticed that certainly is an important factor. It is true that injury is not a *sine qua non* for deciding whether rape has been committed. But it has to be decided on the factual matrix of each case. If the court finds it difficult to accept the version of a prosecutrix on the face value, it may search for evidence direct or circumstantial.”

13. In the present case, the prosecutrix has stated that Babulal committed rape on her and in the examination-in-chief she has stated that the other accused persons have not done any bad work with her. It is clear from the evidence of the prosecutrix that she did not know the name of the accused persons and it is only her friend who has

disclosed the name of the appellants to her. In the matter of **Devinder Singh and Others Vs. State of Himachal Pradesh** reported in **(2003) 11 Supreme Court Case 488**, it has been held by the Apex Court thus :

20. There is another reason for suspecting the case of the prosecution. Though the appellants were arrested within a few days of the incident, they were never put up for identification in a test identification parade. While it is true that in every case the holding of the test identification parade may not be necessary but that depends on the facts and circumstances of each case. In the instant case the prosecutrix had not said in the course of her deposition that she had personally known all the appellants by name or otherwise. She also does not claim that she had other reasons to know them as to be able to identify them. The question is whether in the facts and circumstances of this case, holding of a test identification parade was necessary. Since there is no evidence to show that the prosecutrix was acquainted with the appellants or had reasons to know them from before the occurrence, it must be held that the prosecutrix had only a fleeting glimpse of the culprits on the night of the occurrence. Even this appears to be doubtful because of the very unconvincing story narrated by the prosecutrix about her having an opportunity to identify the appellants.

14. Here, the prosecutrix did not know the accused persons and she has clearly stated the name of the accused persons in the FIR which was informed by her friend therefore, the Test Identification Parade was necessary. The prosecutrix has stated that she had seen the accused persons in the torchlight after the incident but it is clear from

her evidence and other witnesses that the torch light was splashed by Vijay and on seeing him, the accused persons ran away from the spot. Sangeeta (PW-3) has also admitted that the place of incident was dark as there were no street lights on the way. The prosecutrix in her statement has deposed that she was not knowing the name of the accused persons but in the FIR and statement recorded under Section 161 Cr.P.C. the prosecutrix and her friend has not mentioned about this fact and thus, there is material omission on their part. In the light of the abovementioned contradictions, the testimony of the prosecutrix and her friend renders unworthy of credit. It is difficult to accept the truthfulness of the version of the prosecutrix and her friend that any sexual assault was committed on the prosecutrix by the appellants. Even otherwise, she has stated against accused Babulal Mar and nothing has been disclosed by her about the other accused persons. However, the accused Babulal has died and therefore the appeal on his behalf stands abated. Since her narration of the incident becomes feeble on account of being contradicted by statement of other witnesses and in absence of the Test Identification Parade.

15. Taking into consideration these features of the prosecution case, it is not safe to rely upon the testimony of the prosecutrix (PW-1 and PW-5) and therefore in these circumstances, the appeals are allowed. Appellants are acquitted of the charges under Section 376 (2)(g) IPC. They are reported to be on bail. Their bail bonds stand discharged.

Sd/-
(Rajani Dubey)
Judge