2024:CGHC:32776-DB

NAFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

CRA No. 1130 of 2023

Chandra Kumar Jaiswal @ Butu S/o. Roopnarayan Jaiswal, aged about 36 Years R/o. Village Tikeja, Mohalla- Bala Sagar, P.S.- Urga District Korba Chhattisgarh

... Appellant

versus

State of Chhattisgarh Through P.S. AJK, District Korba Chhattisgarh

... Respondent

(Cause Title taken from Case Information System)

For Appellant : Mr. Rajesh Jain and Ms. Kiran Jain, Advocates
For Respondent/State : Mr. Shailendra Sharma, Panel Lawyer

Hon'ble Mr. Ramesh Sinha, Chief Justice
Hon'ble Mr. Bibhu Datta Guru, Judge

Judgment on Board

Per Ramesh Sinha, Chief Justice

28.08.2024

1. The appellant has preferred this appeal under Section 374(2) of Code of Criminal Procedure, 1973 (for short, 'CrPC') questioning the impugned judgment of conviction and order of sentence dated 09.05.2023 passed by the Special Judge, Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989, Korba (C.G.) in Special Criminal Case No. 17/2020, whereby the trial Court has convicted and sentenced the appellant with a direction to run all the sentences concurrently in the following manner :

ROHIT KUMAR CHANDRA
Digitally signed by ROHIT KUMAR CHANDRA
Date: 2024.09.03 11:06:28 +0530

CONVICTION	SENTENCE
U/s 376(2)(ւ) of IPC	Rigorous imprisonment for 20 years and fine of Rs. 5,000/- and in defaults of payment of fine amount, additional RI for 02 months
U/s 3(2)(v) of the SC & ST (Prevention of Atrocities) Act, 1989 (*for short, the Atrocities Act*)	Life imprisonment and fine of Rs. 5,000/- and in defaults of payment of fine amount, additional RI for 02 months
U/s 3(1)(w) of the Atrocities Act.	Rigorous imprisonment for 01 year and fine of Rs. 1,000/- and in defaults of payment of fine amount, additional RI for 07 days.

2. Case of the prosecution, in brief, is that the mother of the victim of the case appeared and submitted an application to the Urga police station in Korba district, stating that she is a resident of Tilkeja village and her 26-year-old daughter (the victim) has been suffering from mental health issues for 8-9 years. Despite medical treatment, her condition has not improved. On 03.05.2020, around 7:00 pm, the victim left her house and was walking towards the high school in Tilkeja when Chandrakumar Jaiswal took her on his motorcycle and started heading towards his house. The victim's father told Chandrakumar to drop her home, but instead, he took her to another location, raped her, and tore off her clothes. This was witnessed by Bharat Karsh and Narmada Patre. Based on the written application submitted by the victim's mother, an FIR was registered against Chandrakumar Jaiswal under section 376

of the IPC at Urga police station, bearing Crime No.149/2020. During the course of investigation, it was found that the victim belongs to Schedule Caste, therefore, the case diary was sent to Ajak Police Station, Korba for further investigation. During the investigation, the victim's caste certificate was seized on 29.05.2020. After completing the other procedures of the investigation, the final report against the accused Chandrakumar Jaiswal was submitted to the Court under Section 376 of the IPC and Section 3(1)(w) and 3(2)(v) of the Atrocities Act by Ajak Police Station, Korba.

3. Trial Court framed charges against the accused under Sections 376(2)(ऱ) and 376(2)(k) of the Indian Penal Code and Sections 3(2)(v) and 3(1)(w) of the Atrocities Act, on 19.01.2021. On reading and explaining the charges to the accused, he denied the charges and claimed a trial. The prosecution presented a total of 08 witnesses to prove the charges against the accused, the victim's mother (PW-01), the victim's father (PW-02), the victim's sister-in-law *(bhabhi)*, Tulsi Mala Sarathi (PW-03), Medical Officer, Dr. K.B. Singh (PW-04), Inspector Abhay Singh (PW-05), Inspector Mrs. Bhavna Khandare Singh (PW-06), Lady Medical Officer, Dr. Ananya Srivastava, (PW-07) and Zonal Superintendent of Police Ramgopal Kariyare (PW-08) and 22 documents were exhibited. Under Section 313 of the Code of Criminal Procedure, the accused was given the opportunity to make a statement, wherein he stated that he was innocent and chose not to produce any defense evidence.

4. The Special Judge after completion of trial and after appreciating oral and documentary evidences available on record, by the impugned judgment dated 09.05.2023 convicted and sentenced the appellant in the manner mentioned in the opening paragraph of this judgment, against which this appeal under Section 374(2) of the CrPC has been preferred by them calling in question the impugned judgment.

5. Learned counsel for the appellant vehemently argued that the learned Special Judge has failed to consider the facts that prosecution has not examined prosecutrix during the trial and even Investigating Officer, Abhay Singh (PW-5) had sent the prosecutrix to Anna Rose Mary Tigga, who is a teacher of Divya Jyoti Special School, Korba, to get the statement of the victim recorded vide letter dated 04.05.2020 (Ex.D-2), wherein the victim has not stated anything about rape. They also submitted that in the statement recorded under Section 164 CrPC (Ex.D-3), the victim has not stated about recent intercourse or about rape. They further submitted that according to statement of the mother of victim (PW-1), when the victim came to her home at that time she has sustained injury in her forehead and her cloth were torn and when she and one Ram Manohar Soni enquired about injuries, then the victim disclosed that appellant took her at village Pahanda and beaten her and committed rape with her, but prosecution has not examined said Ram Manohar Soni to corroborate with the statement of the mother of victim. They contended that Lady Medical Officer, Dr. Ananya Shrivastava,

(PW-07), who conducted medical examination of the prosecutrix, has found no external or internal injuries except 2 bruises on left side of the face which were on the back side of neck measuring to 4x5 cm each and no opinion was given regarding recent intercourse or she was subjected to sexual intercourse. They further contended that the learned Special Judge also failed to consider that though in the FSL report, semen were found on the seized articles i.e. slides, panty and gown of the victim, but the prosecution has not conducted DNA of the appellant to show that the semen belongs to the appellant. They also contended that the prosecution has also not examined the witnesses, who had issued the Caste Certificate (Ex.P-10) and not examined the Tahsildar on whose signature the said Caste Certificate has been issued, therefore, it can be said that the prosecution has failed to prove the fact that prosecutrix belongs to which caste, therefore, the conviction of offences under the Atrocities Act is not sustained in the eye of law. They lastly submitted that the learned Special Judge further failed to consider that prosecution has not produced any medical certificate to show that the prosecutrix is mentally retarded, even the prosecutrix was not produced before the doctor for examination of her mental condition. There are material contradictions and omissions between the judicial statements and police statements of the prosecution witnesses. Thus, the prosecution has failed to prove its case beyond any reasonable doubt, hence, the impugned judgment of conviction is liable to be set aside.

6. On the other hand, learned State counsel submitted that the prosecution had examined total 08 witnesses and the prosecution has collected sufficient material evidences which prima facie establish the commission of offence by the appellant, offence committed by the appellant was heinous in nature and thus, the learned trial Court had rightly convicted him. He further submitted that the trial Court had considered all the arguments made by the appellant and there was sufficient evidence to prove his guilt beyond a reasonable doubt. As such, the judgment of conviction and sentence awarded by the learned trial Court is just and proper warranting no interference.

7. We have heard learned counsel for the parties, considered their rival submissions made herein-above and went through the records with utmost circumspection.

8. Conviction of the appellant has been substantially based on the evidence of the victim's mother (PW-01) and the victim's father (PW-02), who have stated that, on 03.05.2020 at about 7.00 PM, the accused took the prosecutrix with him saying that he will drop her at her home and took her to village Pahanda and committed forceful sexual intercourse with her and also beaten her badly.

9. PW-1, mother of the victim, has stated in paragraph 2 of her examination-in-chief that the victim of the case is her daughter whose age would be around 25/26 years. Her daughter, the victim is mentally challenged. She belong to the Ghasia caste which comes under the Scheduled Caste category. The accused

Chandra Kumar Jaiswal belongs to the Kalar caste which comes under the category of Other Backward Class. In paragraph 3, she has further stated that it was about one and a half years ago. Her daughter, the victim, had left the house at 07:00 in the evening, after which we went out to search for the victim in the village. At that time, the victim's father Sonsai met the victim near the wood depot and the accused told the victim's father to drop the victim home in his motorcycle. Then we returned to our home and saw that the victim was not at home. At around 10 pm, accused Chandra Kumar Jaiswal had dropped her daughter near the school. Then the victim came home staggering, there were injury marks on the right side of her forehead and her clothes were also torn. Then she and one Ram Manohar Soni of the village asked the victim how she got the above injuries, the victim told that Chandra Kumar Jaiswal alias Butu of the village had taken her to village Pahanda and had beaten and raped her. In paragraph, she has stated that since it was night, they went to Urga Police Station the next day to lodge a report, then at around 2 O'clock, the policemen caught the accused Chandra Kumar Jaisawal and brought him to the police station. The police interrogated her and recorded statement regarding the incident.

10. In paragraph 07 of cross-examination, PW-1, mother of the victim, has admitted that her daughter, the victim, was married about 7-8 years ago, but the 'gauna' (a ritual where the bride goes to her husband's home) had not taken place. Her daughter had gone to

Anjoripali Bhaisma after getting married, but due to her mental illness, her in-laws sent her back. In paragraph 11, she further admitted that she did not witness the incident, she did not see the accused taking the victim away on his motorcycle; the witness herself says that victim's father saw it.

11. PW-2, father of the victim has stated in paragraph 2 of his statement that the victim of this case is his youngest child, who was around 20-22 years old. She was not mentally unstable since childhood, but she became mentally unstable around 17-18 years of age. He belong to the Ghasiya caste, which has been declared a Scheduled Caste by the government and falls under the Scheduled Caste category. The accused, Chandrakumar Jaiswal, belongs to the Kalar caste, which falls under the Other Backward Class category. In paragraph 3, he further stated that on 03.05.2020, while he and his daughter, the victim, were coming back after a walk in the village, she was about 20-25 steps ahead to him. At the same time, the accused, Chandrakumar Jaiswal, arrived on his motorcycle. He took his daughter on his motorcycle and drove her to the jungle, where he raped her. He returned home, but the victim did not come back. After some time, they searched for their daughter in the surrounding area, but she was nowhere to be found. In paragraph 4, he further stated that when the accused took his daughter away on his motorcycle, about two to three hours later, he dropped her off in front of his house. When the victim came home, he saw that she had an injury mark on her

forehead on the right side and also had injury marks on her waist. They gave her water and to drink. When they asked her, she told them that the accused, Chandrakumar, had taken her to the jungle and had forcibly raped her there.

12. On conjoint reading of the statements of both these witnesses, it is evident that there are material contradiction in their statements, as PW-1, mother of the victim in her statement has stated that the victim had told them that the accused had taken her to village Pahanda and had beaten and raped her, whereas PW-2, father of the victim in his statement has stated that the victim had told them that the accused had taken her to the jungle and had forcibly raped her there. Moreover, as per the evidence of PW-1, mother of the victim, she and one Ram Manohar Soni of the village asked the victim how she got the above injuries, the victim told that Chandra Kumar Jaiswal alias Butu of the village had taken her to village Pahanda and had beaten and raped her, but prosecution has not examined said Ram Manohar Soni to corroborate with the statement of the mother of victim.

13. Unfortunately, since the prosecutrix has not been examined, it would be difficult to come to the conclusion that she had been raped by the accused. It is no doubt true that Dr. Annya Shrivastava (PW-7), who had examined the prosecutrix has stated that there was no external injury mark present on the victim's body. The victim's secondary sexual characteristics were found to be fully developed, but the victim had contusions at two places on

her left fact, one at the back of the neck, its size were 4x5 cm and 4x5 cm and during the examination of the victim's genitals, she found that there was no injury mark of any kind on the external genitalia of the victim. The victim's hymen was ruptured. The two fingers were not entering the victim's genitals easily and she was experiencing pain upon insertion. According to her opinion, the victim was not addicted to sex and no symptom of recent intercourse has been found by the doctor. Moreover, though as per the FSL report (Ex.P-22), semen were found on the seized articles *i.e.* slides, panty and gown of the victim, but the prosecution has not conducted DNA of the appellant to show that the semen belongs to the appellant. Therefore, it would be difficult to establish whether the prosecutrix was subjected to forcible intercourse or not.

14. So far as the submission made by the learned Counsel appearing on behalf of the appellant that non examination of the prosecutrix was fatal to the prosecution case is concerned, it is settled law that if there is sufficient evidence on record other than the evidence of the prosecutrix which would indicate that an offence had taken place, it would be open for the Court to take into consideration the evidence given by the other witnesses to come to a conclusion whether an offence under Section 376 or under any other provisions of the Act had been committed or not.

15. It is essential to express our dissatisfaction on the manner in which the investigation has been carried out. In our view, it was

the duty of the Investigating Officer to have recorded the statement of the witnesses who have been named by PW-1, mother of the victim to corroborate her evidence. The Investigating Officer in our view, has acted in a careless manner and has not bothered to record the statement of those witness, Vedram Sarthi, Narmada Parte and Bharat Karsh, who have stated in their statement recorded under Section 161 CrPC that they have seen the accused taking the prosecutrix in his motor-cycle. Secondly, if the evidence of the prosecutrix had come on record, it would have been possible to appreciate her evidence in a proper perspective. The Accused would also have got an opportunity to cross-examine her.

16. In the present case, unfortunately there is no other eye witness who has seen the accused committing an offence under Section 376 of the Indian Penal Code nor there is other medical evidence or evidence of the Chemical Analyser to prove that the accused had sexual intercourse with the prosecutrix. It is a settled position in law that a moral conviction regarding the guilt of an individual has no place in criminal jurisprudence. The Court has to give a finding from the legal evidence placed before it by the prosecution and by the defence and is not to be influenced by the gravity of the crime. In a case of this nature, one may be convinced morally that the accused was the author of the crime. But moral conviction cannot lead to a legal conviction of an Accused. An order of conviction can be based only on legal evidence and not on

hypothetical propositions or unwarranted inferences. The trial Court, therefore, in our view, has acted on surmises and unwarranted inferences and the conviction of the accused under Section 376(2)(ւ) of the IPC is not based on legal evidence and the finding of the trial Court is, therefore, set aside.

17. Since the commission of offence under Section 376(2)(ւ) of the IPC is not made out in this case, there is no question of commission of offence under the Atrocities Act and as such, the same is also set aside.

18. Thus, in view of the foregoing, we are of the considered opinion that the prosecution was not able to prove its case beyond all reasonable doubt. By giving the benefit of doubt to the appellant, **Chandra Kumar Jaiswal @ Butu**, instant criminal appeal is **allowed**. The impugned judgment of conviction and order of sentence dated 09.05.2023 passed by the Special Judge, Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989, Korba (C.G.) in Special Criminal Case No. 17/2020 is hereby set aside. The appellant is acquitted from all the charges. The appellant is reported to be in jail. He be released forthwith if not required in any other case.

19. Keeping in view the provisions of section 437-A of Cr.P.C., the appellant is directed to forthwith furnish a personal bond in terms of Form No. 45 prescribed in the Code of Criminal Procedure of some of Rs. 25,000/- with one reliable surety in the like amount

before the court concerned which shall be effective for a period of six months along with an undertaking that in the event of filing of special leave petition against the instant judgment or for grant of leave, the aforesaid appellant on receipt of notice thereof shall appear before the Hon'ble Supreme Court.

20. The trial court records along with a copy of this judgment be sent back immediately to the trial court concerned for compliance and necessary action.

Sd/-
(Bibhu Datta Guru)
Judge

Sd/-
(Ramesh Sinha)
Chief Justice

Chandra