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HIGH COURT OF CHHATTISGARH AT BILASPUR

CRIMINAL APPEAL NO.264 OF 2004

APPELLANT

DILIP KUMAR

Vs

RESPONDENT

STATE OF CHHATTISGARH.

POST FOR JUDGMENT ON 31st May, 2007

Sd/-
Dhirendra Mishra
Judge

HIGH COURT OF CHHATTISGARH AT BILASPUR
CRIMINAL APPEAL NO.264 OF 2004

APPELLANT

Dilip Kumar, S/o Bhola Ram Gond, Aged about 23 years, Occupation- Labour, R/o Village -Dhengapara Salna, Chowky-Vishrampur, P.S. Keshkal, District Bastar (C.G.)

Vs

RESPONDENT

State of Chhattisgarh, through the S.H.O., P.S. Keshkal, District Bastar.

Present:

Mr K.K. Singh, Advocate for appellant.

Mr. G.D. Vaswani, Government Advocate for the State.

J U D G M E N T
(Delivered on 31.5.2007)

Per Dhirendra Mishra, J:

1. The instant appeal is directed against the judgment dated 22nd January, 2004 passed in S.T. No.379/03 by learned Sessions Judge, Bastar at Jagdalpur whereby the appellant has been convicted under Section 376 of the I.P.C. and sentenced to undergo R.I. for 10 years and to pay a fine of Rs.2,000/-, in default of payment of fine to further undergo R.I. for 1 year.
2. Case of the prosecution, in brief, is that on 15.2003 at about 11.00 a.m. accused/appellant Dilip Kumar took the prosecutrix, who is aged 5 years, towards his animal barn and raped her. Rukhmani Bai (PW-3), mother of prosecutrix, hearing cries of prosecutrix rushed there and saw her lying on the ground and accused was committing rape with her. The accused ran away after seeing Rukhmani. Rukhmani narrated the incident to Dhaneshram Rawat, Kushal Singh Rawat, Sitaram etc. On being asked, the prosecutrix told that accused had taken her on his lap in a room, thereafter he took out her underwear and sat over her after taking out his

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underwear. On examination of her private part, they found that it was swollen and blood was oozing. In the same evening of 15.2003 at about 1900 hrs, Ramesh kumar, father of prosecutrix, lodged the report (Ex.P-1) in the Police Outpost Vishrampur. The prosecutrix was sent for medical examination to Primary Health Centre, Farsadih vide Ex.P-7, from where the lady doctor after preliminary examination referred the prosecutrix to Maharani Hospital, Jagdalpur for specialist report. Thereafter, the prosecutrix was sent to Maharani Hospital, Jagdalpur where Dr. (Mrs.) M. Tiwari (PW-8) examined her and gave her report of Ex. P-13. During investigation underwear of the accused was taken into possession vide Ex.P-2. Accused was sent for medical examination to Community Health Centre, Vishrampur vide Ex.P-4A where Dr. D.K. Krishan (PW-6) examined him and gave his report Ex.P-6. Spot map was prepared vide Ex.P-11. Underwear of the accused and other articles seized during investigation were sent to Forensic Science Laboratory, Raipur for chemical examination.

3. After completing investigation, charge sheet was filed against the accused/appellant in the Court of Judicial Magistrate First Class, Kondagaon, who in turn committed the case to the Court of Sessions Judge, Jagdalpur for trial. During trial the prosecution in order to establish the charge against the accused/appellant examined nine witnesses in all. Statement of accused/appellant was recorded under Section 313 of the Cr.P.C. in which he denied the circumstances appearing against him in the prosecution case and pleaded innocence and false implication due to enmity. Learned trial Court after hearing learned counsel for the respective parties, convicted & sentenced the appellant as mentioned above.
4. Learned counsel for the appellant contended that from the evidence available on record the offence of commission of rape has not been established. From perusal of the statement of lady

doctor (PW-8) it is evident that on medical examination of the prosecutrix no sign of rape was noticed and only possibility of attempt to commit rape has been shown, even then the trial court has convicted the appellant under Section 376 of the IPC. Placing reliance on the judgment of Supreme Court in the matter of **Guddu @ Santosh Versus State of Madhya Pradesh** reported in 2006 (5 & 6) SBR 196, it is submitted that the facts of present case is identical to the facts of above cited case and in the identical circumstances the Supreme Court convicting the accused under Section 376/511 of IPC has held that appropriate sentence was imprisonment for 5 years.

5. On the other hand, learned Government Advocate for the State supported the judgment of the trial court.
6. I have heard learned counsel for the parties and perused the record as also the impugned judgment.
7. Ramesh (PW-1), who is father of the prosecutrix and complainant, has stated in his deposition that on the date of incident he had gone on his work and his wife Rukhmani was in the home. His wife told him about the incident. Rukhmani was told about the incident by the prosecutrix. As told by Rukhmani, she had shouted and abused the accused upon which he ran away towards forest. Prosecutrix returned from the house of accused shouting after the incident and narrated the incident to Rukhmani whereupon Rukhmani called Kushal Singh & Amru and informed them about the incident. He returned at 12 noon, just 10 to 15 minutes after the incident. He went to Police Outpost Vishrampuri to lodge the report. On examination of the prosecutrix they noticed that blood was oozing from her urethra and other sides were swollen. Accused was brought from the forest.

8. The prosecutrix (PW-2) was not about to depose due to her tender age which has been assessed by the trial court between $2\frac{1}{2}$ to 3 years.
9. Rukhmani Bai (PW-3), mother of prosecutrix, has stated that on the date of incident at about 11.00 a.m. she had gone to take bath near the tap, whereas, her daughter had gone to Aanganbadi. When her daughter did not return and she was going to search her, on the way, she heard the sound of her cries, which was emanating from the house of Bhola, father of accused. On which, she went to the house of accused, at that time her daughter told that accused had taken her inside his room on his lap, made her lie, took out her underwear and sat over her after taking out his own underwear. She had seen her urethra, the same was swollen and blood was oozing. She called other villagers and on their arrival she had also shown her daughter to them and narrated them about the incident. At that time her husband came back and she also narrated the incident to him, who in turn went to the police station and lodged the report. In the cross-examination this witness has denied the suggestion that on being asked her daughter, in fact, told that she had sustained injury while playing as a result of which blood was oozing. She has further stated that the fact that accused taken out the underwear of prosecutrix as also his underwear was told by her to the police while giving her statement, however, if this fact is not mentioned in her diary statement of Ex.D-2, then she is not able to tell the reason for the above omission. She has further denied the suggestion that she is falsely implicating the accused in the above offence due to some old quarrel.
10. Statement of Rukhmani (PW-3) finds corroboration from the statement of Kushal Singh (PW-4) in material particulars, as he has also stated that on hearing about the incident they had gone to the house of Ramesh and had seen the private part of the prosecutrix,

which was swollen and blood was oozing. Rukhmani had told them that the accused had taken the prosecutrix to his home and from where she has returned weeping.

11. Dr. (Mrs.) M. Tiwari (PW-8) has stated that on 3.5.2003 at about 11.30 a.m. she had examined the prosecutrix and found one abrasion on her right hip. She did not notice any injury on her private part, however, on internal examination she had seen signs of clotted blood beneath labia majora and prosecutrix was complaining pain on pressing. Her hymen was intact. She did not notice any sign of rape, however, it appears that rape was attempted. In the cross-examination she has stated that the above described injuries could be caused by hard & blunt object and the same could be caused by fall on blunt object also.
12. From the above evidence available on record, it is evident that the appellant had taken the girl with an intention to satisfy his passion and the version of Rukhmani Bai (PW-3), which is based on the information received from the prosecutrix immediately after the incident, goes to show that the appellant attempted to rape the prosecutrix, however, because of cries and arrival of this witness he could not succeed in his attempt. From the medical evidence also it is clear that though the hymen of prosecutrix was intact but blood was noticed beneath labia majora and on the basis of above evidence Dr. (Mrs.) M. Tiwari (PW-8) has opined that possibility of attempt to commit rap was there. However, the trial court on the basis of statement of lady doctor (PW-8) and Rukhmani Bai (PW-3) has arrived at the conclusion that presence of blood beneath labia majora and complain of pain on pressing the above organ establishes the commission of rape beyond all reasonable doubts. However, taking into consideration the positive and categoric opinion of the lady doctor (PW-8), who had examined the prosecutrix and opined that no sign of rape was found though

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possibility of attempt to commit rape was there, the conviction of the appellant under Section 376 of the IPC for committing rape cannot be sustained.

13. In the result, the appeal of the appellant is partly allowed. Conviction and sentence of the appellant under Section 376 of the IPC are hereby set aside and instead thereof, relying on the judgment of Hon'ble Apex Court in the matter of Guddu @ Santosh (Supra), the appellant is convicted under Section 376 (2) (f) read with Section 511 of the IPC and sentenced to undergo R.I. for 5 years and to pay a fine of Rs.5,000/-, in default of payment of fine to further undergo R.I. for 6 months.

Sd/-
Dhirendra Mishra
Judge

Roshan/-