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HIGH COURT OF CHHATTISGARH, BILASPUR

SB: Hon'ble Shri Justice Ram Prasanna Sharma

Judgment reserved on 12-4-2018

Judgment delivered on -4-2018

CRA No. 741 of 2002

- Pawan @ Chamru @ Chaman s/o. Sudarshan & Luday, age 36 years, r/o. Village Nangur, at present Nakapara, Chhota Dewda, P.S. Parpa, District. Bastar (CG).

---- Appellant.

Versus

- State of Chhattisgarh through PS Tribal Welfare, Jagdalpur.

---- Respondent

For Appellant : Mr. R.N. Jha, Advocate.
For Respondent/State : Mr. Arvind Dubey, Panel Lawyer

CAV JUDGMENT

1. This appeal is directed against the judgment of conviction and order of sentence dated 28-6-2002 passed by Special Judge (Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989) (for short, "the Act, 1989"), Bastar at Jagdalpur, in Sessions Trial No. 134 of 2002 wherein the said court has convicted the appellant under Section 376 (1) of the IPC and Section 3 (1)(xiii) of the Act, 1989 and sentenced him to undergo RI for seven years and to pay fine of Rs.3,000/- and RI for two years and to pay fine of Rs.1000/- respectively with

default stipulations for committing rape on prosecutrix (PW/1) on 30-12-2001 at about 8.00 pm at village Chhote Devda and being in a position to dominate the will of a prosecutrix belonging to a Scheduled Tribe and used that position to exploit her sexually to which she would not have otherwise agreed.

2. In the present case, prosecutrix is PW/1. As per version of the prosecutrix on 30-12-2001 she went to ease herself at about 8.00 pm behind the field of one Sukhram and at the same time, appellant came behind her, caught hold of her hand and had got her laid down and thereafter committed sexual intercourse with her without her consent and against her will. On hearing cries of the prosecutrix, her husband namely Raghunath (PW/2) and elder brother of her husband namely Sukhram (PW/3) reached to the spot and the appellant fled away from the spot. It is further case of the prosecution that the appellant left his towel and chappals on the spot. Prosecutrix informed the incident to her husband and elder brother of her husband just after the incident and on the next day, the incident was brought to the knowledge of the villagers. Panchayat was convened in the village but the appellant did not turn up and then the matter was reported to Police Station.

3. Learned counsel for the appellant would submit as under:

(i) Incident took place on 30-12-2001 whereas the matter was reported to Police authorities on 2-1-2002 and delay of three days in lodging FIR is not properly explained which is fatal to prosecution, because the same is concocted and cooked up version of the prosecution.

(ii) The incident was put to the knowledge of Sarpanch Tularam and Up Sarpanch Kamal, but prosecution deliberately failed to examine both of material witnesses and adverse inference should be drawn against the prosecution.

(iii) As per version of prosecutrix, she had been thrown by the appellant, but she did not sustain injury upon her body as per version of Dr. Smt. Neela Kumare (PW/5) and want of injury negatives the theory of rape.

(iv) Statements of prosecutrix (PW/1), Raghunath (PW/2) and Sukhram (PW/3), are contradictory which falsified the case of prosecution.

(v) No seizure of wearing clothes of victim and no chemical report regarding seized materials, the prosecution has failed to proved the alleged offence under Section 376(1) of the IPC and sentence awarded by the trial Court is

excessive which deserves to be quashed.

4. *Per contra*, learned State counsel supporting the impugned judgment of the trial Court has submitted that the finding arrived at by the trial Court is just and proper and there is no illegality or infirmity in it warranting any interference by this Court.
5. I have heard counsel for the parties and perused the material on record.
6. In order to substantiate the charge, prosecution examined as many as seven witnesses.
7. Prosecutrix (PW/1) deposed that she went to ease herself at about 8.00 pm on the date of incident and while returning the appellant came from back side and got her laid down and committed forceful intercourse with her. She further deposed that upon her cries, elder brother of her husband Sukhram (PW/3) and her husband reached to the spot. Version of this witness is supported by the version of Raghunath (PW/1), who is husband of the prosecutrix and Sukhram (PW/3), who is elder brother of her husband. These witnesses have been subjected to searching cross examination, but nothing could be elicited in favour of the defence.
8. True, it is that FIR is lodged on 2-1-2002 whereas the incident took place on 30-12-2001 and there is delay of three days in

lodging FIR, but the point for consideration is whether delay in lodging FIR is fatal to the prosecution in the peculiar facts and circumstances of the case. From the statements of above three prosecution witnesses, it is established that the matter was referred to Panchayat but the appellant did not turn up and thereafter they lodged report in Police Station.

9. The delay in lodging FIR can occur due to various reasons. One of the reasons is the reluctance of the victim or her family members to go to the Police Station and to make a complaint about the incident which concerns the reputation of the victim and the honour of the entire family. In such cases, after giving very cool thought and considering all pros and cons arising out of an unfortunate incident, a complaint of sexual offence is generally lodged either by victim or by any member of her family.

10. In the present case, the delay is not abnormal because on the next day of the incident, Panchayat was convened in the village where appellant did not turn up and thereafter prosecutrix decided to lodge the complaint. Prosecutrix cried on the spot and both other witnesses reached to the spot just after the incident. Version of the prosecutrix is firm right from the day of incident till her evidence is recorded before the trial Court. It is not the case that the prosecutrix suppressed the fact to anyone after the incident, therefore, delay of three days in lodging FIR is not

sufficient to discard the prosecution case in the facts and circumstances. True it is that Sarpanch Tularam and Up-Sarpanch Kamal were not examined by the prosecution to whom the incident was informed, but they are not witnesses of the incident or the witnesses who reached on the spot just after the incident. Prosecution has examined the victim who is undoubtedly a competent witness under Section 118 of the Indian Evidence Act, 1872 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. There is no rule of law which requires corroboration for the statement of the prosecutrix. On the contrary, Section 114-A of the Indian Evidence Act, 1872 says that “in a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub clause (2) of Section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent”. At the most Sarpnch and Up-Sarpanch may be termed as hearsay evidence and their non-examination is not affecting the case of prosecution any way.

11. True it is that Dr. Neela Kumare (PW/5) did not find any injury on the body of the prosecutrix but where eye-witnesses or the evidence of the victim account is found credibility and trustworthy, the same cannot be discarded merely because no injury was found on the body of the victim. In cases of rape, primacy is with the statement of the prosecutrix for the reasons mentioned as below

    i) In case of rape no self respecting woman could come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her;

    ii) The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggregation are factors which the court should not overlook;

    iii) Seeking corroboration of victim of rape as a rule in such cases amounts to adding insult to injury;

    iv) It must not be overlooked that a woman or a girl subjected to sexual assault is not accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice.

12. In the present case, it has been established by the evidence that the appellant reached to the spot from back side of the prosecutrix and caught hold her from back side and got her laid down and thereafter committed forceful sexual intercourse, with her, therefore, it was not compulsory that her body sustained

injury and want of injury is not a factor to reject the prosecution case.

13. There is no material discrepancies in the evidence of all three witnesses. It is settled law that the discrepancies which do not affect the core of the prosecution case or credibility of a witness cannot be levelled as omissions and contradictions. The evidence of all the three witnesses as a whole, appears to have being of truth and if any witness defers in some details in relation to main incident, her/his version cannot be rejected. In the present case, all the witnesses are firm from the date of the incident and this Court has no reason to reject their version.

14. To constitute an offence of rape, it is not necessary that there should be rupture of the hymen, FSL report to corroborate emission of semen is not necessary. Offence of rape can be established without producing any injury and without rupture of hymen. The argument advanced on behalf of the appellant is not sustainable. For commission of offence of rape, trial Court has rightly convicted appellant under Section 376 (1) of the IPC.

15. The trial Court has also convicted the appellant under Section 3(1)(xiii) of the Act, 1989 which may be mentioned as under:

> "Being in a position to dominate the will of a woman belonging to a Scheduled Caste or a Scheduled Tribe and uses that position to exploit her sexually to which she would not have otherwise agreed".

16. Now the point for consideration is whether the appellant was in a position to dominate the will of prosecutrix. Will is not dominating without there is fiduciary relationship and active confidence exists between the parties. For example, relation between the parties subsists such as landlord and tenant, guardian and ward, agent and principal, doctor and patient, spiritual adviser and disciple, trustee and beneficiary, husband and wife, master and servant, employer and management, creditor and debtor. There is no evidence on record to show that the victim and the appellant are having fiduciary relation of active confidence, but the incident took place all of a sudden and attack was made from behind the victim and it is not a case where the appellant was in a dominating position and used his position to exploit the victim sexually. In absence of evidence, offence under Section 3(1)(xii) of the Act,1989 is not made out and the conviction/sentence recorded by the trial Court on this count is not sustainable and the appellant is acquitted of the charge framed against him under Section 3 (1)(xii) of the Act, 1989.

17. The trial Court awarded minimum sentence to the appellant for commission of offence under Section 376(1) of the IPC, which is seven years and less than minimum cannot be awarded.

Conviction and sentence awarded to the appellant by the trial Court under Section 376 (1) of the IPC is hereby affirmed.

18. Accordingly, the appeal is dismissed to the extent indicated above. It is reported that the appellant is on bail His bail bonds shall stand cancelled. The trial Court/Special Court, Bastar at Jagdalpur will prepare supersession warrant and thereafter will issue warrant of arrest against the appellant. After his arrest, he be sent to the concerned jail to serve out the remaining part of the jail sentence.

Sd/-

(**Ram Prasanna Sharma**)
JUDGE

Raju