ROOP SINGH

*v.*

STATE OF MADHYA PRADESH

(Criminal Appeal No. 1345 of 2005)

JUNE 18, 2013

**[A.K. PATNAIK AND GYAN SUDHA MISRA, JJ.]**

*Penal Code, 1860:*

*ss. 376 and 450 – Rape – Consent – Connotation of – Explained – Held: The evidence on record is clear that the victim was not a willing party to the sexual intercourse committed by the accused and it cannot be said that she voluntarily participated in it after fully exercising her choice in favour of assent – Nor can it be held that the accused was falsely implicated in the offences.*

**The appellant was convicted and sentenced to 7 years RI u/s 376 IPC and 3 years RI u/s 450 IPC for committing rape on her neighbor, the complainant (PW5), in the night when she and her sister-in-law (PW4) were sleeping in the house and her husband was out to irrigate the fields. The High Court dismissed the appeal of the convict.**

**Dismissing the appeal, the Court**

**HELD 1.1. So far as the plea of consent is concerned, unless there is voluntary participation by the woman to a sexual act after fully exercising the choice in favour of assent, the court cannot hold that the woman gave consent to the sexual intercourse. In the instant case, it cannot be said that the complainant had given her consent to the sexual intercourse committed by the appellant. The evidence of PW-4 and PW-5 is clear that**

A **the complainant was sleeping within 2-3 feet away from her sister-in-law (PW-4). PW-5 has stated in her evidence that her sister-in-law (PW-4) woke up when she shouted. There is no discrepancy in the evidence of PW-5 and PW-4 on this point. The evidence on record is clear that PW-**
B **5 was not a willing party to the sexual intercourse and this Court cannot hold that PW-5 voluntarily participated in the sexual intercourse with the appellant after fully exercising her choice in favour of assent. [para 6-7] [291-C-D, G; 292-C-D]**

C *State of U.P.* v. *Chhotey Lal* **2011 (1) SCR 406 = (2011) 2 SCC 550; and** *State of H.P. v. Mango Ram* **2000 (2) Suppl. SCR 626 = (2000) 7 SCC 224 – referred to.**

**1.2. As regards the plea of false implication owing to**
D **a land dispute between the two families, the trial court has held that there is no proof of any litigation being there between the parties. In the absence of any evidence to show that there was a dispute between the families in relation to a land on account of which PW-4 and PW-5**
E **would have lodged the FIR against the appellant, the Court cannot hold that the appellant had been falsely implicated in the offences punishable u/ss 450 and 376, IPC. [para 8] [292-E-G]**

**Case Law Reference:**

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| **2011 (1) SCR 406** | **referred to** | **para 5** |
| **2000 (2) Suppl. SCR 626** | **referred to** | **para 7** |

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
G No. 1345 of 2005.

From the Judgment & Order dated 13.12.2004 of the High Court of Judicature, Madhya Pradesh, bench at Gwalior in Criminal Appeal No. 452 of 2002.

H

R.C. Kohli for the Appellant. A

Vibha Datta Makhija, Archi Agnihotri for the Respondent.

The Judgment of the Court was delivered by

**A.K. PATNAIK, J.** 1. This is an appeal by way of special leave under Article 136 of the Constitution against the judgment dated 13.12.2004 of the Madhya Pradesh High Court, Gwalior Bench. B

2. The facts very briefly are that a First Information Report (for short 'FIR') was lodged by the complainant in Police Station, Civil Lines, Morena, on 01.03.2000 at 7.50 p.m. in the evening. In her verbal statement which was registered as FIR, the complainant stated that on the previous night while she was sleeping in her house in village Tighrapura in a room at about 2 a.m., the appellant, who was her neighbour, entered into her house and forcibly committed intercourse with her when her sister-in-law Guddi Bai sleeping in a nearby cot woke up after listening to weeping of the complainant and then the appellant ran away. The complainant further stated that her husband Rajesh had been to the well to give water to the field and when he came in the morning she told him about the incident and he went to Khadiahar to call her father-in-law Ram Bhajan but he did not meet him and then the complainant has come with her husband to lodge the FIR. Pursuant to the FIR, an x-ray was conducted on the complainant. The complainant was also medically examined. Investigation was conducted and the statements of witnesses were recorded by the police and charge-sheet was filed against the appellant under Section 450, IPC, (house trespass in order to commit an offence) and Section 376, IPC, (rape). C D E F G

3. At the trial of Sessions Case No.129 of 2000, the FIR was marked as Ex.P-6. Dr. Yogender Singh, who carried out the x-ray examination, was examined as PW-1 and the x-ray report was marked as Ex.P-1. Dr. Smt. Chandra Jatav, who H

A conducted the medical examination on the complainant, was examined as PW-2 and her examination report was marked as Ex.P-5. The *Petticoat* of the complainant along with the slide of her vaginal liquid were sent to the Forensic Science Laboratory (FSL), Gwalior, and the FSL report was marked as B Ex.P-7. Guddi Bai, the sister-in-law of the complainant, was examined as PW-4 and the complainant was examined as PW-5. On the basis of the ocular evidence of PW-4 and PW-5 and the medical evidence and FSL report, the learned Sessions Judge, Morena, convicted the appellant by judgment dated C 31.07.2002 and sentenced him to three years rigorous imprisonment and a fine of Rs.250/- for the offence under Section 450, IPC and also sentenced him to seven years rigorous imprisonment and a fine of Rs.500/- for the offence under Section 376(1) IPC. Aggrieved, the appellant filed D Criminal Appeal No.452 of 2002 before the Madhya Pradesh High Court, Gwalior Bench, but by the impugned judgment the High Court maintained the conviction and sentences under Sections 376 and 450, IPC, and dismissed the appeal.

4. At the hearing of this appeal, Mr. R.C. Kohli made two E submissions before us: (i) the appellant was not guilty of the offence of rape as PW-5, the complainant, had given her consent to the sexual intercourse as would be clear from the evidence on record; and (ii) the complainant has made out a false case against the appellant because of a grudge that the F family of the complainant bore against the appellant over a land dispute.

5. Ms. Vibha Datta Makhija, learned counsel appearing for the State, on the other hand, referred to the evidence of PW-5 G to show that the complainant made all efforts to resist the appellant and submitted that this was thus not a case where the complainant had given her consent for the sexual intercourse. She cited the judgment in *State of U.P. v. Chhotey Lal* [(2011) 2 SCC 550] to submit that the word "consent" in the definition of rape in Section 376, IPC, connotes exercise H

of intelligence based on knowledge of the significance and moral quality of the act to which consent is given and also presupposes a choice of the woman who is said to have given consent between resistance and assent. In reply to submission of Mr. Kohli that the complainant had made the false allegation of rape against the appellant only because of the dispute over the land between the appellant and the family of the complainant, Ms. Vibha Datta Makhija submitted that the trial court has held that there is no evidence whatsoever in support of this defence taken by the appellant.

6. We cannot accept the submission of Mr. Kohli that the complainant had given her consent to the sexual intercourse committed by the appellant. The evidence of PW-4 and PW-5 is that the complainant was sleeping within 2-3 feet away from her sister-in-law (PW-4) and she could not have given her consent for the sexual intercourse when her sister-in-law was sleeping within a short distance from her. Moreover, from the evidence of PW-4, we find that there were three rooms in the house where PW-4 and PW-5 were sleeping and the husband of PW-5 was not in the house and hence PW-5 and the appellant would have moved on to another room if PW-5 was willing for the intercourse. PW-5 has also stated in her evidence:

> *"I made efforts to remove aside the accused but did not scratch him. It is wrong to say that I had got done the bad act from the accused, or unknown person, with sweet-will."*

PW-5 has further stated in her evidence that her sister-in-law (PW-4) woke up when she shouted and prior to that she did not wake up and she was sleeping and there is no discrepancy in the evidence of PW-5 and PW-4 on this point. Hence, the evidence on record is clear that PW-5 was not a willing party to the sexual intercourse.

7. In *State of U.P. v. Chhotey Lal (supra)*, the following passage from the judgment of a three-Judge Bench of this

A Court in *State of H.P. v. Mango Ram* [(2000) 7 SCC 224] on the meaning of 'consent' for the purpose of the offence of rape as defined in Section 375, IPC, is quoted:

> "Consent for the purpose of Section 375 requires voluntary
> B participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study
> C of all relevant circumstances."

Thus, unless there is voluntary participation by the woman to a sexual act after fully exercising the choice in favour of assent, the Court cannot hold that the woman gave consent to the sexual intercourse. From the evidence of PW-4 and PW-5
D discussed above, we cannot hold that PW-5 voluntarily participated in the sexual intercourse with the appellant after fully exercising her choice in favour of assent.

8. On the second contention of the learned counsel for the
E appellant that PW-5 has falsely named the appellant out of grudge arising out of a dispute on the land between the two families, we find that the trial court has held that there is no proof of any litigation being there between both the parties. Learned counsel for the appellant has also not brought to our
F notice any evidence to show that there was any land dispute between the two families. In the absence of any evidence to show that there was a dispute between the families in relation to a land on account of which PW-4 and PW-5 had lodged the FIR against the appellant, the Court cannot hold that the appellant had been falsely implicated in the offences under
G Sections 450 and 376, IPC.

9. In the result, we do not find any merit in the appeal and we accordingly dismiss the same.

H R.P. Appeal dismissed.