
(2012) 02 CHH CK 0025
In the Chhattisgarh High Court
Case No : Criminal Appeal No. 104 of 1998

Nagendra Prasad Mishra

APPELLANT

Vs

State of M.P. (Now Chhattisgarh)

RESPONDENT

Date of Decision : 17-02-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173(2), 313, 374(2)
Penal Code, 1860 (IPC) — Section 376, 450

Citation : (2012) 2 CGBCLJ 436

Hon'ble Judges : Gulam Minhajuddin, J

Bench : Division Bench

Advocate : Arun Kochar, for the Appellant; Akhil Mishra, for the Respondent

Final Decision : Allowed

Judgement

Gulam Minhajuddin, J.—This appeal has been filed by the appellant u/s 374(2) of the Code of Criminal Procedure against the judgment of conviction and order of sentence dated 6th January, 1998 passed by Sessions Judge, Distt. Durg in S.T. No. 258/90, whereby the appellant has been convicted for the offence under Sections 450 and 376 of the Indian Penal Code and sentenced to undergo R1 for seven years and to pay a fine of Rs. 100/-, in default thereof, to undergo additional R1 for one month, on each count. Both the sentences have been ordered to run concurrently. Case of the prosecution, in brief, is that the prosecutrix resided with her husband in a tenanted house of one Goswami at Village-Kohka, Bajrang Para. The appellant was also residing in another portion of the same house. On the date of incident, husband of the prosecutrix had gone to his work and the prosecutrix having taken her meals was sleeping in her house along with her infant child after bolting the door. However, the appellant somehow entered into her room at night, whereupon the prosecutrix got up and asked the appellant, how did he enter her house, on which the appellant threatened her that if she raises an alarm, he will kill her. When the prosecutrix tried to raise alarm, the appellant pressed her mouth and forcibly made her lie

down on the floor and committed rape with her. During commission of rape, the appellant had bitten cheek of the prosecutrix. After committing rape, the appellant fled from there. When husband of the prosecutrix returned at night, the prosecutrix did not disclose about the incident to him due to fear. However, next day the prosecutrix, narrated the incident to the women residing in the vicinity and to her brother, who, in turn, disclosed the incident to husband of the prosecutrix. Report of the incident was lodged by the prosecutrix.

2. During investigation, the prosecutrix was sent for medical examination, but since the prosecutrix was habituated to sexual intercourse, it could not be ascertained as to whether she has been subjected to rape or not. The appellant was also medically examined and it was found that the appellant is capable of performing sexual intercourse. On being produced by the prosecutrix, her petticoat was seized. Lungi and underwear of the accused/appellant were also taken into possession, statements of the witnesses were recorded and spot map was prepared. The seized wearing apparels of the prosecutrix as well as the appellant and vaginal slides of the prosecutrix were sent for examination to Forensic Science Laboratory, Sagar. After completing investigation, charge sheet was filed in the Court of Chief Judicial Magistrate, Durg, from where the same was committed to the Court of Sessions Judge for trial.

3. Learned trial Court after hearing counsel for the respective parties and considering the material available on record, by the impugned judgment convicted and sentenced the appellant as mentioned above.

4. Heard learned counsel for the parties, perused the record of the trial Court as well as the impugned judgment.

5. Learned counsel for the appellant has contended that the trial Court has grossly erred in holding the appellant guilty of offences punishable under Sections 450 and 376 of the IPC, on the basis of evidence which is not at all cogent and reliable. On close scrutiny of the evidence available on record, on the basis of which the learned trial Court has passed the impugned judgment, possibility of the prosecutrix having been a consenting party cannot be ruled out. He has further argued that by any stretch of imagination, on the basis of evidence adduced by the prosecution, it cannot be said that the prosecution has been successful in proving guilt of the appellant beyond the shadow of reasonable doubt.

6. On the other hand, learned counsel for the State has supported the impugned judgment of conviction and order of sentence.

7. The prosecution in order to substantiate the charges u/s 450 and 376 of the IPC has examined the prosecutrix (PW 1), her brother Biharilal Sahu (PW 2) and Asstt. Sub Inspector J.P. Tiwari (PW 3). Statement of the appellant was recorded u/s 313 of Cr. P.C. in which he denied the circumstances appearing in evidence against him and pleaded innocence and false implication. In his defence, the appellant examined his landlord R.N. Goswami as DW-1.

8. As per statement of the prosecutrix (PW 1), on the date of incident, she alongwith her husband and child was residing in a tenanted house situated at Village-Kohka, Bajrang Para and at that time, the appellant was also residing in another portion of the same house. She has stated that in the month of October, 1989 at night, her husband, who is a tailor, had gone to his work and she was all alone in the house alongwith her infant child, aged about 10 months. After taking her meals, she was sleeping with her infant child on the cot and the door-chain was not fastened. She has stated that when she was sleeping, the appellant after entering into her house woke her up, on which she asked him that why he had entered into her house, whereupon the appellant had intimated her that if an alarm is raised by her, he would kill her. After this, according to the prosecutrix (PW 1), the appellant committed forcible sexual intercourse with her against her wish and without her consent. After committing rape, the appellant warned the prosecutrix that she should not disclose the incident to anyone, otherwise, she would be killed and thereafter, fled from there.

9. The prosecutrix (PW 1) has stated that after 4-5 hours of the incident, her husband returned from his work, but she had not disclosed the incident to her husband. She has also stated that during commission of rape, the appellant had bitten her lips as well as cheeks, on account of which she had sustained injuries on her cheek. She has admitted that before, during and even after commission of rape when the appellant had left her house, she had not raised any alarm. She has further stated that had she raised an alarm, the neighbours would have definitely woken up. She has also admitted that she had not narrated about the incident, either to her maternal mother-in-law or to his brother-in-law. According to the prosecutrix (PW 1), when her brother Biharilal Sahu (PW 2) had come to her house next day, that she had disclosed about the incident to him, on which her brother had gone to her husband at his shop and informed him about the incident and thereafter only FIR (Ex. P/1) was lodged by her at the police station.

10. As per statement of the prosecutrix, the incident of house trespass and rape had occurred at about 10 pm on 19.10.1989 and report of the incident (Ex. P/1) was lodged at police station on 21.10.1989 at about 9 pm, which is evident from the FIR (Ex. P/1). From the statement of the prosecutrix (PW 1), it is found that even when her husband had enquired about the injury on her cheek, she had not disclosed about the commission of offence by the appellant. Even when her brother Biharilal Sahu (PW 2) had come on the second day, that she had tried to conceal the injury mark on her cheek by applying ointment over it. However, there was no reason for the prosecutrix (PW 1) to conceal the injury from her husband as well as her brother Biharilal (PW 2).

11. Biharilal Sahu (PW 2), brother of the prosecutrix, has stated that on the same day i.e. the day when he had come to the house of his sister (prosecutrix), that the FIR (Ex. P/1) was lodged. But according to statement of the prosecutrix (PW 1) made in para-3, her brother Biharilal Sahu (PW 2) had come on the next day of incident i.e. 20.10.1989 and according to FIR (Ex. P/1), it was not lodged

even on 20.10.1989, but on 21.10.1989. However, no satisfactory explanation has been given for lodging the FIR (Ex. P/1) after about 48 hours of the incident and that too, of rape.

12. According to the prosecutrix (PW 1), the appellant while committing rape had bitten her lips and cheeks, on account of which there were injuries on her cheek. After lodging of the FIR (Ex. P/1), the prosecutrix (PW 1) was got medically examined by a lady doctor. Although that lady doctor has not been examined by the prosecution and consequently, the medical report in that regard has not been exhibited, but the said medical report has been filed alongwith charge sheet filed u/s 173(2) of Cr. P.C., therefore, the same can be looked into for ascertaining the fact whether it lends corroboration to the statement of the prosecutrix (PW 1).

13. From perusal of the said medical report, it is found that the doctor has not found any injury on the cheek as well as lip of the prosecutrix (PW 1) and had only found a slight scratch mark on the left second toe. No other injury, external or internal, was found on the body of the prosecutrix.

14. For ascertaining the age of the prosecutrix, ossification test was got done and as per report of the radiologist, age of the prosecutrix (PW 1) was, on the date of incident, 20 years. As such, the present case is not a case where prosecutrix is below 16 years of age and her consent for sexual intercourse would be no consent in the eye of law.

15. As per statement of the prosecutrix (PW 1), it is found that she had neither offered any resistance to the appellant nor had raised any hue and cry to attract the neighbours at the site of occurrence. Although the prosecutrix (PW 1) had tried to give an explanation that she had fastened the door-chain, but as it was loose, it had fallen down, on account of which the door was open and the appellant could manage to enter into her house. On the contrary, Biharilal Sahu (PW 2), brother of the prosecutrix, has stated in para-8 of his statement, that his sister (prosecutrix) had told him that she had forgotten to close the door of her house. The prosecutrix (PW 1) had herself stated that after taking meals, she was sleeping with her infant child, aged about 10 months and she was not expecting return of her husband immediately. Therefore, it is against the natural human conduct that a person, particularly a lady, who is residing at a new place only for the last 3-4 months, will sleep without bolting the door of the house. Moreover, the version of the prosecutrix also does not inspire confidence because even after return of her husband on the same day and on the next day also, the incident was not narrated by the prosecutrix to her husband, nor to anyone and the incident was narrated only to her brother Biharilal (PW 2) who had come the next day.

16. Further, no injuries, either internal or external, were found on the body or private parts of the prosecutrix. The statement of the prosecutrix (PW 1) regarding sustaining of injuries on her cheek is not corroborated from the medical evidence. Although the prosecutrix (PW 1) has stated, that she had not

narrated the incident to her husband, but from the statement of her brother Biharilal (PW-2), in para-6, it is evident that commission of rape with the prosecutrix by the appellant was within the knowledge of her husband, even then FIR was not lodged immediately after the incident. There has been delay of about 48 hours, for which no satisfactory explanation has been offered. As the husband of the prosecutrix had proceeded to his shop a short while ago and from the fact that the door was not bolted, the possibility that the prosecutrix was expecting someone to enter her house, cannot be ruled out. In addition to this, from the delayed lodging of the FIR and the subsequent conduct of the prosecutrix, the possibility cannot be totally overruled that in case there had been a commission of sexual intercourse, then in view of the totality of the circumstances, the prosecutrix had been a consenting party. As such, the commission of offence under Sections 450 and 376 of the IPC cannot be said to have been proved beyond the shadow of reasonable doubt and the appellant is definitely entitled to get the benefit of doubt.

17. On the basis of aforesaid discussions, we are of the opinion that the learned trial Court has committed an illegality in convicting and sentencing the appellant for the offence under Sections 450 and 376 of the IPC. In the result, the appeal is allowed. Impugned judgment of conviction and order of sentence dated 6th January, 1998 passed by Sessions Judge, Distt. Durg in S.T. No. 258/90 is hereby set aside. The appellant is acquitted of the charges u/s 450 and 376 of the IPC. The appellant is on bail, therefore, his bail bonds are cancelled and he is set at liberty. However, the fine amount, if deposited by the appellant, shall be refunded to him.