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**(2003) 09 JH CK 0068**

**In the Jharkhand High Court**

**Case No :** Criminal Appeal No's. 294 with 306 of 1999 (R)

Sitaram Chaudhary and Anil Ram

APPELLANT

Vs

State of Jharkhand

RESPONDENT

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**Date of Decision :** 24-09-2003

**Acts Referred:**

Penal Code, 1860 (IPC) — Section 376(2), 452

**Citation :** (2003) 4 JCR 487

**Hon'ble Judges :** Vikramaditya Prasad, J

**Bench :** Single Bench

**Advocate :** P.C. Tripathy, in Cr. A. No. 294/99R, T.R. Bajaj and R. Singh, in Cr. A. No. 306/99R, for the Appellant; H.K. Jha, APP., for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

Vikramaditya Prasad, J.—Both the appeals have been heard together and are being disposed of by this common judgment, as both arise out of the same judgment.

2. Both the appellants were convicted for an offence u/s 376(2)(g) and 452, IPC and were sentenced to undergo RI for 10 years and a fine of Rs. 25,000/- and in default, to undergo RI for 3 years and 3 years RI was awarded for the offence u/s 452, IPC, besides a fine of Rs. 5,000/- and in default, to undergo RI for 1 year and the fine so realized be given to the victim. However, both the sentences were to run concurrently.

3. According, to the fardbeyan, Ext. 4, of the prosecutrix, PW 2, Sushila Devi, recorded at 4,00 p.m. on 6.11.1998 at Chainpur P.S. in the District of Palamau, she, along with her husband, Anuj Ram, PW 8, lived in a rented house in the village-Sonartand. On 5.11.1998 (prosecutrix does not know the date and says yesterday), which was a Thursday at about 4.00 p.m. the neighbour (Bagalgir) of her rented house. Anil Kumar and Dilip Kumar, (both the appellants) and three other boys, who were of the same village-Somerdi, entered into her room and

closed it from inside and as the prosecutrix identified all these persons well, all belonged to the same village, thereafter they caught hold of her breast, started squeezing, saying that they will have physical relation with her. When she wanted to raise hulla, Anil, pressed her mouth and Dilip and others lifted her by catching her feet and hands and threw her inside and on a cot and thereafter they undressed her up to her waist, when the prosecutrix protested and tried to resist their act her feet and hands, then Anil Kahar and Dilip tied her hands and feet separately with the gamchi with the cot which they had brought, and also on her mouth. Thereafter, when she became helpless, firstly Anil came to her completely undressed her, made her naked and thereafter raped her and as she was wrything, he gave her slaps on cheeks and after satisfying his lust; he retreated. Thereafter the same act was performed by Dilip and then in sequence other three also raped her. She kept weeping, but none of them had any compassion and while leaving the room they untied her and took away the gamchi, which they had brought with them. After that, she wanted to get up from the cot, but as she was feeling pain in her stomach, legs and private parts, she could not get up. At about 8.00 p.m. in the night, her husband, came then she disclosed the entire event to him. In the morning, they went to her maike (father's house) at Baralota and from there she went to the Police Station straightaway, where the fardbeyan Was recorded in presence of her husband, Anuj Ram, who also signed the same, Ext. 3, and the prosecutrix put her LTI, which is marked for identification. On the basis of the aforesaid fardbeyan, the Chainpur P.S. Case No, 136/98 was instituted. It appears that the said fardbeyan was received in the office of the Chief Judicial Magistrate on 7.11.1998 and during investigation the police appears to have seized some broken pieces of yellow bangles from the room, in which the prosecutrix remained, by preparing a seizure list, Ext. 2, in presence of witness, Sarju Choudhary. After recording the fardbeyan, the prosecutrix was sent to a Doctor, Pushpa Sahagal, PW 5, who examined the prosecutrix on 6th November 1998, at 7.30 p.m. and submitted her report EXT. 1. After investigation, the police submitted charge-sheet against Anil Kahar, Dilip Kumar Chaurasia, Rajendra Chaudhary, Langra and Lekha Chaudhary @ Sitaram Chaudhary. On trial, two accused persons, namely, Rajendra Chaudhary and Langra, were acquitted by the impugned judgment and these two appellants were only convicted.

4. Out of the nine PWs examined, five turned hostile even the mother, father and husband of the prosecutrix. Four witnesses, who did not turn hostile are the Doctor (PW 5), prosecutrix (PW 2), seizure list witness of bangle broken pieces Sarju Choudhary and the IO (PW 9).

5. Though the husband, mother and father corroborated the prosecutrix in the following points :--

(a) The prosecutrix disclosing the incident of rape on her when the husband came in night and to the mother and father, when the prosecutrix with her husband went to Barolota in the morning.

(b) Mother said that the prosecutrix disclosed the names of accused in her presence at the police station, but on the point of disclosure of the names of the culprits to them they all did not support her and that led the prosecutrix to declare them hostile.

6. The question is whether in the aforesaid circumstances, the lone testimony of the prosecutrix be relied on. All these witnesses, husband, father, mother, were confronted with their earlier statements made before the police wherein they had stated that the prosecutrix had disclosed the names of two culprits-Anil and Dilip, and had also said that three other persons were also there and had raped her. When the IO (PW 9) was examined, he stated that these witnesses had made such statements before him during investigation, which they have concealed in their evidence before Court. From that, it is clear that it is not the prosecutrix, rather these witnesses, who are resiling back in part from their earlier statements. Though in case of rape, due to various reasons, such things do generally happen, when the factum of rape is supported or corroborated, but names of culprits are tried to be concealed 1, in order to find the line of investigation, have gone through the case diary, in para 39 of the case, diary, there is a recording that the husband of the prosecutrix had suddenly rushed to police station and stated that the prosecutrix had been taken away by some persons for her statement before the Chief Judicial Magistrate and he any how had escaped and come to the police station. It is not known what the police did thereon. Though not taking this circumstances as an evidence of reason for turning the witnesses hostile, but I find that it indicates the things that has happened. In such a prevailing situation in the society, if witnesses resile from the Jr statements and do not disclose the names of the culprits, then for that, the prosecutrix is not to be blamed and this cannot be a reason for disbelieving the evidence of the prosecutrix even if it is her singular evidence.

7. Now I take up the evidence of the prosecutrix (PW 2) as it came in Court, which is as follows :--

In her evidence before the Court, she said that she was cooking at 4.00 p.m., when first Anil came, then came Dilip, three other persons were outside and Anil dragged her from Dhaba inside the room and raped, then he called Dilip and Dilip also raped her. She had tried to resist, but they had tied her legs with the gamochi and rape continued for 10 minutes and in that course, the gamochi was left there and her bangles were also broken. She told about the incident to her husband, para 3, and thereafter they went to police station where her bayan was recorded and thereafter she was also medically examined.

This witness identified the accused Anil in the dock, but pointing to Sitaram, she said in the Court that his name is Dilip. Then to a Court question, she said that the time at which she was raped, she did not identify the accused by name, and face, para 7.

This is what her evidence in the ex-amination-in-chief, which reveals the names

of two persons, only Anil and Dilip, as rapists and presence of other three persons. She disclosed the incident to her husband, but from this evidence, it does not appear that she also disclosed the name of the accused persons to her husband. In cross-examination, she said that her husband sells groundnuts on thela and he used to come at about 8-9 in the night and during this period, she used to remain alone in the house and there are 4-5 houses nearby, but she could not tell their names. On her hulla, nobody had come. Because of breaking of the bangles, no injury was caused on her wrist and the bangles had broken only at the time when her hands were being tied with the cot. No mark of tying was left and both the legs were tied with one of the legs of the cot. In para 14 of the cross-examination, she said that there was seminal discharges, which also stained her clothes and also there was bleeding and blood and semen discharges had dropped on ground also and on her entire body, there were marks of pistol butts and that had caused some marks on her breasts, which she had shown to the Doctor. In para 15, she said that no bruise were there on the face because of tying by gamchi. In para 16, she said that in the morning, she went to her naihar along with her husband and then they with mother and father went to police station. Her husband had not gone to the police station in the night. She narrated the incident to the chowkidar in the morning at 7.00 a.m., but the chowkidar had not gone to the police station along with her. It takes four hours by bus in going from Semartand (PO) to naihar, Baralota. She had given the blood stained clothes to the Daroga. She had reached the police station in the morning at 8.00 a.m. This evidence is a bit discrepant. On these evidences, it is proved that she went to naihar. In reaching naihar and going to police station from there at 8.00 a.m. in the morning simply appears to be an error of recording or attributable to improper estimation of the appropriate time by the prosecutrix. In para 25, she said that certain bruises were on her back, which were still there (she said this at the time of recording, of evidence in the Court).

8. The Jardebayan, (Ext. 4) corroborates her evidence on the point of rape by Anil and Dilip, but it contradicts her on the point of rape by other persons also. In Jardebayan, she had complained of only aching in leg and private parts. It is, therefore, natural that the Doctor did not find any external or internal injuries on her persons. Though this witness has in her evidence talked of bleeding, seminal discharge falling on the ground and staining her clothes, but it is a development in evidence and not a contradiction.

Thus, there is no material contradiction between her evidence in Court and her previous statements in Jardebayan and statements before the police.

9. The argument is that the Doctor's evidence does not support her allegation as the doctor did not find any sign of rape, including absence of spermatozoa in vaginal swabs.

The victim was aged 34 years and mother of three children. A lady of such age and of such motherhood habituated of sex is not expected to receive some injury on private parts while raped, there is no chance of bleeding. Her hands and legs

were tied and this disabled her from giving resistance enough to cause any injury on her as also the culprits. The marks of tying disappear quickly, so absence of such external injury also does not discredit the prosecutrix. The medical examination was done after more than twenty-four hours and after such lapse of time since the alleged rape, no spermatozoa is likely to be found in vaginal swabs.

Thus, the medical evidence, if it does not corroborate the prosecutrix, it also does not contradict her.

10. When a sexual intercourse is committed, semen discharge is the obvious result. Though mere penetration is sufficient to cause the rape and it is simply the exaggeration on behalf of the rustic lady that blood etc. came out and nothing, more. Therefore, even in absence of seizure of the blood stained clothes and its production, there is no reason which may be a lache on the part of the IO to disbelieve the prosecutrix on the point of rape itself committed by a number of persons, at least two.

11. The IO found broken pieces of bangles (Ext. 2) second in presence of Sarju Choudhary and also the side of the cot on which rape was committed was found broken. These corroborate the prosecutrix.

12. Lodging the fardbeyan after delay of about 24 hours has been canvassed by the appellants to disbelieve the case.

A woman, particularly a woman from a lower strata of the society, has to build sufficient courage to come openly against those who are superior in various ways, caste, money or otherwise, such building of courage takes time, during which the family has to weigh the consequences.

In our society, the position of a woman is very weak, most of them a victim of real rape, can be suspected by the husband and others of her won character and the woman has to suffocate and conceal and deliberate before disclosing it to any one. The delay has to be examined in this backdrop of social realities. In the instant case, there has been a delay of about 2.4 hours. The explanation is that in the night at about 9.00 p.m. the husband came, in the morning they went to her father's house and from there they came to police station. All these facts are established on evidence. The victim woman (PW 2) in her cross- examination (para-26) said that even after hearing her complaint, the Daroga asked her to sit aside. This is a common feature, when even after the arrival of informant at the P.S. the information is not recorded immediately. Though there is some statements which create a confusion in respect of time, when the prosecutrix left her father's house and when she reached the police station but these are not substantive in nature and do not demolish or make doubtful, the going of the prosecutrix to her "maika" in the mbrning and then coming to police station from there. In such a circumstance, the delay is well explained and the argument of defence on this point is not acceptable.

13. The next question arises who are those culprits who committed rape? This question relates to the identity. In the fardbeyan two specific names of Anil and Dilip were taken. In the Court also, in examination-in-chief, PW 2 took the name of Anil and Dilip as the specific persons who committed the rape. Dilip, though he has given his address of Sasaram at the time of recording statements u/s 313, Cr PC, but in charge- sheet his address is of that very village, Sonartand. There is also allegation that three other persons were there. Though no T.I. Parade was conducted, yet it is undisputed that Anil was a resident of the village in which the occurrence did take place. In the Court, she identified Anil in the dock and there is no ambiguity about his identification and therefore, the allegation of first rape committed by Anil is proved beyond all reasonable doubt.

14. The next question is whether the other appellant was also the culprit? Though in the Jardbeyan the name of Dilip was there as the second man who committed rape, yet there is also evidence that three unknown persons were there. In the date on which PW 2 was deposing four persons were produced before the Court and in their presence, PW 2 deposed, vide order dated 5.5.1999. This means that all the four accused persons, i.e., Anil Kahar, Dilip Kumar Chaurasia, Rajendra Chaudhary @ Langra and Lekha Chaudhary @ Sitaram Chaudhary, were present in the Court and this witness identified Lekha Chaudhary @ Sitaram Chaudhary in the name of Dilip, vide para 6. To a Court question, she stated that she did not identify the accused by face and name. The question is if Dilip was present along with Sitaram Choudhary whether this identification by the prosecutrix of Sitaram Choudhary as accused Dilip can be a proper identification of Sitaram as a rapist? A man may have different names but the whole question of identification is related only to a face whether a particular man, known by any name, is the persons committing, the crime or not? What happens in T.I. Parade is that the witness is asked to identify the accused, who is mixed with a number of persons. If the witness catches one person saying that it was he who committed the crime, then that person irrespective of his name is taken to be identified. It is not the name that matters. This view was taken by the trial Court. But I differ from the view as I find that this Sitaram Choudhary was of another village, Kalyanpur, which is apparent from the case diary and his address given in his statement u/s 313, Cr PC. In the fardbeyan, a word, "Bagalgir" (neighbour) has been used, which refers to Anil and Dilip, as they were residents of that very village of "Semra Tand" and with regard to the rest of the culprits, the word "unknown" was used in the fardbeyan and in the evidence in Court. From this fact, it is proved that the prosecutrix was identifying by name and face, the neighbours Anil and Dilip, whereas she was not identifying others by name, obviously because they were of different village. In the aforesaid circumstances, suddenly identifying Sitaram Choudhary in the name of Dilip in the dock for the first time to the exclusion of Dilip in the Court creates a reasonable doubt about the propriety of her identifying Sitaram. Had she identified Dilip as well that Sitaram, not even by name, but as person committing rape, it would not have created such a doubt. This aspect of the identification

was not considered by the learned trial Court. I, therefore, find that on the facts as discussed above, the identification of Sitaram as Dilip in the Court, to the exclusion of Dilip, though he was in dock is not proper.

15. The appellants are not such men of means that to black mail them and to extract money from them, the prosecutrix lodged this case. Nothing has been brought on record against the character of the prosecutrix and no other circumstances has been shown as a motive for false implication. In such a situation, the prosecutrix cannot be disbelieved:

16. Cr. A. No. 306/99-R of appellant, Anil Ram

On the basis of the discussion made above, the conviction by the learned trial Court of the aforesaid appellant is confirmed as there is no infirmity in the judgment of the learned trial Court.

A submission has been made that the sentence awarded is severe. This was, in fact, a mass rape when the persons, in order to satisfy their lust, entered into the house of a lady, when she was alone. Thus, the sentence is not harsh and consequently, that sentence is also confirmed. In the result, his appeal is disallowed.

Cr. A. No. 294/99-R of Sitaram Choudhary

For the reasons discussed above, the identity of this appellant becomes doubtful in the Court and appears to be motivated for some reason. Consequently, there appears to be a reasonable doubt about his being culprit in this case and thus, he is given the benefit of doubt. His appeal is allowed. The conviction and sentence awarded to him by the trial Court is set aside. He is discharged from his bail bonds.