

(2018) 09 CHH CK 0164

Chhattisgarh High Court

Case No: Criminal Appeal (CRA) No. 1164, 1165 Of 2013

Pot Ram Sahu And Ors

APPELLANT

Vs

State Of Chhattisgarh

RESPONDENT

Date of Decision: Sept. 11, 2018

Acts Referred:

- Indian Penal Code, 1860 - Section 376(2)(g), 376(D), 450
- Code Of Criminal Procedure, 1973 - Section 313

Hon'ble Judges: Pritinker Diwaker, J; Rajani Dubey, J

Bench: Division Bench

Advocate: Alok Nigam, Ravindra Agrawal

Final Decision: Allowed

Judgement

Pritinker Diwaker, J

01. As these two appeals arise out of the common judgment dated 25.11.2013 passed by II Additional Sessions Judge, Baloda Bazar, in S.T.

No.63/2013 convicting the accused/appellants under Sections 376 (D) and 450 IPC & sentencing them to undergo imprisonment for life with fine of

Rs. 1,000/- and R.I. for three years with fine of Rs.500/-, plus default stipulation respectively, they are being disposed of by this common judgment.

02. As per the prosecution case, on 19.02.2013 written report (Ex.P/1) was lodged by the prosecutrix (PW/1) alleging in it that she is resident of

village Chorbhatti, P.S. Sarsiwa, District Baloda Bazar, her husband works as labourer and comes to the house after interval of 10-15 days, she has

three issues aged 5 year, 4 year and 2 year and that she is residing with her maternal grand father-in-law. She has further alleged that on 18.02.2013

at about 8.00 PM when she was in her house which was not bolted from inside, accused/appellant Potram Sahu entered the room whereas

accused/appellant Lekhram was standing near the door. Accused/appellant Potram, against her wishes, committed forcible sexual intercourse with her

and, thereafter accused/appellant Lekhram took his turn. As she got scared, she did not disclose the incident to anyone, however, upon seeing the

accused persons her daughter Pushpa (not examined) raised cries and upon hearing the same, her maternal grand father-in-law reached there and

saw the accused persons fleeing from the spot. She states that though she has disclosed the incident to her maternal grand father-in-law but on

account of fear she did not disclose the same to others. On the next morning i.e. on 19.02.2013 at about 8.00 AM, she made a call to her husband

from the cell phone of one Acchelal Sahu informing him about the incident and asked him to come home immediately. On the same day at 12.00 in the

afternoon her husband reached the house whom she narrated the entire incident and after consulting with family members, a decision was taken to

lodge the report, and accordingly she lodged the report. Based on this written report, an FIR (Ex.P/2) was registered on 19.02.2013 at 6.30 PM under

Sections 450 and 376 (2) (g) of IPC against the accused/appellants. The prosecutrix was medically examined vide Ex.P/20 on 21.02.2013 by Dr.

(Mrs.) Pramila Toppo (PW/8) noticing following injuries/symptoms:-

(i) Public hair present which was matted with menstrual blood. Menstrual bleeding continued. After cleaning blood, hymen destroyed. Labia majora

and minor and cervix were healthy. Her vagina admits two fingers very easily.

(ii) Above findings suggestive of sexual intercourse with old wound healed.

(iii) Two vaginal smear slides prepared, sealed packed and handed over to police.

(iv) One panty and one petticoat, after examination, sealed and packed.

03. Accused persons were also medically examined by Dr. Dindayal Sahu (PW/5) on 21.02.2013 vide Ex.P/16 and P/17 who found them capable of

performing sexual intercourse. In the incident, underwear and petticoat of the prosecutrix, vaginal slides, and underwear of the accused persons were

subjected to chemical examination, however, there is no FSL report in that respect.

It is relevant to note here that as per the prosecutrix, she was

under menstruation at the time of commission of offence. After investigation, charge sheet was filed against the accused/appellants under Sections

450 and 376 (2) (g) IPC and thereafter, the trial Court framed charges under Sections 450 and 376 (D) of IPC against them.

04. So as to hold the accused/appellants guilty, the prosecution examined as many as 9 witnesses. Statements of the accused/appellants were also

recorded under Section 313 of Cr.P.C. in which they denied the circumstances appearing against them in the prosecution case, pleaded innocence and

false implication. That apart, four defence witnesses namely Lakhan (DW/1), Santosh (DW/2), Kashiram (DW/3) and Bodhram (PW/4) were also

examined by the defence to substantiate its case.

05. The trial Court after hearing counsel for the respective parties and considering the material available on record has convicted and sentenced the

accused/appellants as mentioned in para-1 of this judgment. Hence, this appeal.

06. Learned counsel for the appellants submits as under:

That the accused/appellants have been falsely implicated in the crime in question as relations between her husband and the accused/appellants

were strained. That the statement of the Prosecutrix (PW/1) does not inspire confidence of this Court. That in absence of FSL or Serological

report, the medical report of the prosecutrix and that of the accused/appellants loses its significance. That prosecutrix never protested or resisted

while she was being subjected to forcible sexual intercourse. This conduct of the prosecutrix shows that she has falsely implicated the

accused/appellants. That according to the prosecutrix, she was thrown on the floor and subjected to physical relation by the accused/appellants but

no struggling injury has been noticed by the Doctor either on the body of the prosecutrix or on the body of accused/appellants. That most important

witness of the prosecutrix namely Pushpa, who according to the prosecutrix, had seen the accused person committing forcible sexual intercourse, has

not been examined.

The Court below has completely ignored the evidence of defence witnesses.

That typed written report has been lodged by the prosecutrix, on the basis of which FIR was registered, which was signed by her without seeing the

contents therein and as such the FIR is not reliable.

07. On the other hand, supporting the impugned judgment it has been argued by the State counsel that the conviction of the accused/appellants is strictly in accordance with law and there is no infirmity in the same. He submits that there is absolutely no evidence on record as to why the prosecutrix would falsely implicate the accused persons.

08. We have heard learned counsel for the parties and perused the material available on record.

09. Prosecutrix (PW/1) has stated that on the date of incident she was in her house along with her minor children and maternal grand father-in-law.

Her husband had gone to village Baramkela. At about 8.00 PM, the accused persons gained entry in her room and committed sexual intercourse with

her. She has further stated that she raised her cries once, and upon hearing the same, her daughter Pushpa (not examined) woke up, called her (this

witness) maternal grand father-in-law Sukhlal, who was sleeping in other room and as soon as he came there, the accused persons fled away from the

spot. On the next morning, she informed about the incident to her husband over phone and written report (Ex.P/1) was lodged, based on which, FIR

(Ex.P/2) was registered against the accused persons. She was medically examined, her underwear and petticoat were seized by the police and spot

map was prepared by the Patwari. This witness, in para 5, has stated that first she was subjected to physical relation by accused/appellant Potram, at

that time accused/appellant Lekhram was standing near the door. After Potram, accused/appellant Lekhram also repeated the same act. She admits

that there are number of houses around her house and accused/appellant Potram also resides in the same vicinity. This witness, in para 9, has stated

that she did not disclose the incident to her neighbour, village Panch, Sarpanch and Kotwar. Even her husband and maternal grand father-in-law had

not informed the same to any of the villagers. She has also admitted that her husband and maternal grand father-in-law had not informed the incident

to her father-in-law, mother-in-law or to brother-in-law (Dewar). She admits that on the date of commission of offence itself, she did not lodge the

report and the same was lodged on the next day after calling her husband. This witness has also stated that she is not aware as to who typed the

report but it is her husband who had gone for typing the same. She is not aware as to what had been typed in the written report and the same could

not be disclosed by her husband. She further admits that immediately after the incident or in the same night, she did not disclose the incident to her

husband and she could not call him on his phone but on the next morning she decided to inform her husband about the incident. However, though she

has used the phone of one Acche Ram but she did not disclose the incident to him also. She has stated that her petticoat and under were seized by the

police. This witness, in para 19, has stated that she informed the police that she was subjected to physical relation by the accused persons which

normally take place between the husband and wife and if the same is not recorded in her diary statement (Ex.D.1), she could not tell the reason.

Likewise, she has also informed the police that her daughter Pushpa called her maternal grand father-in-law but if the same is not recorded in her

statement, she could not tell the reason. She has further stated that opposite to her house there is public boring and about 50 meters away from her

house Nawdha Ramayan was being played. She admits that her maternal grand father-in-law was sleeping in the same house but in the last room. She

also went on to state that her maternal grand father-in-law had not seen the actual occurrence and saw the accused/appellants fleeing from the spot.

In para 22, specific averment has been made by the prosecutrix that at the time of incident, the accused/appellants were not having any weapon. In

para 23, she also went on to state that while the sexual intercourse was being done she did not bite or scratch the accused persons nor her bangles

were broken. According to her, it is only her underwear which was torn in the incident and that she did not suffer any injury on any part of her body.

Various suggestions have been given to this witness regarding deal of tractor between appellant Potram and her husband but she denied the said fact.

She has denied any conversation between her and the wife of the accused persons but she admits that accused/appellant Lekh Ram is in her relation

and that their family members are not on talking term. She also went on to state that on the date of incident itself, she was having her period, subjected

to sexual intercourse on the floor but no blood oozed from her private part.

10. Harideshwar (PW/2) is husband of the prosecutrix. He has stated that at about 7.00 in the morning he received telephonic call of his wife PW/1

which was made from the cell phone of one Acche Ram that she was being subjected to physical relation by the appellants. Thereafter, he reached

the house and went along with the prosecutrix, her maternal grand father-in-law and daughter Pushpa to lodge written report (Ex.P/1). When this

witness was confronted with his diary statement Ex.D/2, he states that all the facts were disclosed to the police including that of the act done by the

appellants and the fact of going to the Sarpanch, if the same is not recorded, he could not tell the reason. This witness had admitted that he was

informed by the prosecutrix that their daughter Pushpa had seen the accused/appellant committing the act but she did not inform him about the biting

and scratching to the accused persons. He has also admitted that his wife had not suffered any injury on her cheek, neck, breast, back or on her thigh.

He further admits that except underwear of the prosecutrix her other clothes like saree, blouse and petticoat were not torn. This witness has also

stated that at the time of incident all his three children were present in the house and this was informed to him by the prosecutrix.

11. Suklal (PW/3) is maternal grand father-in-law of the prosecutrix, who according to the prosecution case, was also present in the house in question

where the incident had taken place. He has stated that upon hearing the cries of Pushpa he came out of his room and saw the accused persons fleeing

from the spot and thereafter he was informed by the prosecutrix PW/1 that she was being subjected to physical relation by the accused persons. He

has further stated that on that night itself no action was taken and on the next morning PW/2 (husband of the prosecutrix) was informed about the

incident. This witness has also stated that in the night of incident he did not disclose the incident to anyone. He has clarified that he has not seen the

appellants committing sexual intercourse with the prosecutrix and he merely saw them coming out from the room of the prosecutrix. He has also

stated that in his diary statement Ex.D/3 he did inform the police that he was informed by the prosecutrix about the commission of offence but if the

same is not recorded in his statement, he could not tell the reason. He has further stated that at the time of occurrence Nawdha Ramayan was being

played in the village and lots of persons used to pass from front side of his house. He has also stated that immediately after hearing the cries of

grandchild Pusha, he came out from his room, saw the accused persons fleeing from the spot, by that time prosecutrix also came out from her room

she was standing in the courtyard wearing all the clothes. He has not noticed any injury on her face and hand. Thereafter, he went to sleep.

12. Dr. Pramila Toppo (PW/8) medically examined the prosecutrix (PW/1) and did not notice any external or internal injury on her body and according

to her, the prosecutrix was having her period. This witness prepared two vaginal smear slides of the prosecutrix and sent it for FSL, however, there is

no FSL report on record. This witness has further stated that old hymen of the prosecutrix was torn and that she might have sexual intercourse about

15-20 days back.

13. Dr. Dindayal Sahu (PW/5) medically examined accused/appellants Potram and Lekhram vide their MLC Ex.P/16 and P/17 respectively and found

them capable of performing sexual intercourse.

14. M.L. Tiwari (PW/9) - Investigating Officer, has duly supported the prosecution case.

15. It is relevant to mention here that there is no FSL and serological report on record confirming the presence of spermatozoa either on the vaginal

slides of the prosecutrix or on her clothes or clothes of the accused/appellants and the most important witness of the prosecution Pushpa, aged about 6

years, who is alleged to have seen the incident, has not been examined by the prosecution to substantiate its case.

16. As per written report (Ex.P/1), Prosecutrix (PW/1) was subjected to forcible sexual intercourse by the appellants. The written report was got

typed by her husband PW/2 and she without going through the contents therein signed the written report, based on which, FIR (Ex.P/2) was registered

against the appellants and the Prosecutrix (PW/1) is not aware as to where and who typed it and what has been typed. According to the evidence of

Prosecutrix (PW/1), she signed the FIR (Ex.P/2) at the instance of her husband PW/2, which makes it very clear that contents therein were not

explained to the Prosecutrix (PW/1) and as such the authenticity of written report (Ex.P/1), based on which FIR (Ex.P/2) was registered, loses its

significance.

17. Though, the prosecutrix PW/1 in her Court statement has made allegation against the appellants that she was subjected to forcible sexual

intercourse by them, but on the other hand she admits that she never offered any resistance or protest there-against. She has further admitted that first

appellant Potram committed sexual intercourse with her and, thereafter, appellant Lekhram took his turn. During this period, she even did not bother to

bite or scratch the accused persons to get herself free from their clutches. Further, she was subjected to physical relation on the floor but this also

appears to be improbable for the reason that no injury has been noticed either on the person of the prosecutrix or on the accused persons. As per the

prosecution case, Prosecutrix (PW/1) was subjected to rape in a room where her three children were sleeping and Pushpa, aged about 6 years, also

saw the entire incident, but the said Pushpa has not been examined by the prosecution. Furthermore, Suklal (PW/3) was present in the same house in

another room, who came out from his room after hearing the cries of the Prosecutrix PW/1 but there is no evidence that the prosecutrix made any hue

and cry or raised her cries when she was being subjected to forcible sexual intercourse. Evidence of Prosecutrix creates suspicion as at one place she

states that when she raised her cries, her daughter Pusha woke up and called her (prosecutrix) maternal grand father-in-law and at another she states

that after seeing the incident her daughter raised cries (para 21 of prosecutrix). That apart, medical report of the prosecutrix and the accused persons

nowhere specifically suggest the fact of any sexual intercourse committed with her. According to Doctor and Prosecutrix PW/1, she was having her

period at the time of commission of offence but there is no FSL or Serological report on record confirming presence of blood either on the clothes of

the prosecutrix or that of accused persons. It is not a case of the Prosecutrix PW/1 that she was subjected to gang rape at the point of gun or any

weapon. Prosecutrix PW/1 has admitted the fact that at the time of commission of offence there was no weapon in the hands of the accused persons.

According to PW/3, Prosecutrix PW/1 and PW/2, the incident was never informed to any person. PW/3 though allegedly seen the appellants fleeing

from the spot but he did not bother to inform the incident to any of the villagers. There are material contradictions in the statements of Prosecutrix

(PW/1) and PW/2 and the conduct of both these persons creates doubt as to whether any such incident had taken place or not. Further, it has also

come in the evidence that relations between family of accused persons and the Prosecutrix were not cordial and they were not on talking terms. The

evidence of prosecutrix does not inspire full confidence of this Court. Taking into consideration all the aforesaid facts, the possibility of appellants

being falsely implicated in the crime in question cannot be ruled out.

18. The findings recorded by the Court below thus appear to be beyond proper appreciation of the evidence adduced by the prosecution which cannot

have affirmation from this Court. Since, the prosecution has failed on all fronts to prove its case beyond the shadow of reasonable doubt, the benefit,

of course, has to go to the accused/appellants. The appeals are thus allowed, judgment impugned is hereby set aside and the accused/appellants stand

acquitted of the charges levelled against them. The accused/appellants are in jail, they be set at liberty forthwith if not required in any other case.

19. Appeals are thus allowed.