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**(2010) 09 JH CK 0043**

**Jharkhand High Court**

**Case No:** Criminal Appeal No. 568 of 2002

Mahalal Hambram

APPELLANT

Vs

The State of Jharkhand

RESPONDENT

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**Date of Decision:** Sept. 9, 2010

**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 354, 376

**Hon'ble Judges:** Pradeep Kumar, J

**Bench:** Single Bench

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### **Judgement**

Pradeep Kumar, J.

On repeated call, but nobody appeared on behalf of the Appellant to argue the case. On the request of the Court, Mr. M.B. Lall, argued the case on behalf of the Appellant as amicus curie.

2. This appeal is directed against the judgment of conviction and order of sentence dated 20.6.2002 passed by Shri S.K. Kartiyar, Additional Sessions Judge, IV, Dhanbad in Sessions Trial No. 43 of 2000, by which judgment he found the Appellant guilty u/s 376 of the Indian Penal Code and sentenced him to undergo R.I. for 7 years.

3. It is submitted by the learned Counsel for the Appellant as amicus curie that the conviction of the Appellant is based only on the evidence of the prosecutrix-P.W.4, which is not reliable. Since, according to the prosecution story as given by the prosecutrix that she was taken to a ditch by the Appellant and she was thrown into the said ditch and rape was committed upon her. She received injury on her back at 4 or 5 places and there was cut injury also, but the doctor has not found any such injury. In that view of the matter, her claim that she was raped, has not been even reasonable doubt and acquitted from the charges.

4. On the other hand, learned Counsel for the State has opposed the prayer and submitted that the evidence of the prosecutrix as well as the evidence of her two sons-P. Ws. 1 & 5, shows that the Appellant committed rape upon the prosecutrix, at

least, he committed the offence u/s 354 of the Indian Penal Code as he attempted to molest her.

5. After hearing both the parties and going through the record, I find that the prosecution case was started on the basis of a first information report given by the prosecutrix, Sohagi Hambram on 7.4.99 stating therein that on that very day at about 1 p.m. she was going to the flour mill at Tundi from her house and when she reached at Kalatand jungle at 1.30 p.m then she found that her nephew, Mahalal Hambram, who was present in the jungle came near her and caught hold of her hands and took her into the jungle and committed rape upon her. She further stated that she had dispute with her aforesaid nephew with regard to cutting of wood.

6. On the basis of the said Fardbeyan police registered a case u/s 376 of the Indian Penal Code and after investigation submitted charge-sheet in the case.

7. Since, the case was exclusively tribal by a Court of Sessions, the learned Chief Judicial Magistrate after taking cognizance, committed the same to the Court of Sessions and subsequently charges were framed by the Sessions Judge and transferred to the court of Additional Sessions Judge, who tried and the Appellant was found guilty u/s 376 of the Indian Penal Code.

8. In order to prove the charges the prosecution has examined 6 witnesses.

9. P. Ws. 2 and 3, namely, Lotha Hambram & Shishupal Hambram were tendered for cross-examination.

10. P.W.1, Ganesh Hambram, who is the son of the prosecutrix, although he stated in his examination-in-chief that he had seen the occurrence as he went to the place of occurrence on hearing crying of his mother, but subsequently considering his evidence the learned Additional Sessions Judge by his judgment found that he is a hearsay witness and he had not seen the occurrence.

11. P.W.5, Atwari Hambram is another son of the prosecutrix. He stated that he was told about the occurrence by his mother. Except the victim lady-P.W.4, there is no other evidence. It is pertinent to note that although the victim lady in her F.I.R. stated that she was caught hold by her nephew, Mahalal Hambram, who took her to the jungle and committed rape upon her. But, in court, she stated that the accused took her into a ditch where after lifting her cloth he committed rape upon her. She further stated that she received injury in her hand and also due to snatching of her silver chain from neck she got injury on her neck.

In her cross-examination, at para 41, she admitted that she had received injury at 4 or 5 places on her back due to presence of stone in the ditch and there was cut injury also on her back.

12. P.W.6, Dr. Laxmi Pandey, who examined the injury of the prosecutrix, found old hymen ruptured; no spermatozoa was found in the vagina swab and she was aged about 18-19 years. She only found one abrasion on her external body which was 1" x 1/4" over the angle of mandible. There was no injury on her internal organs.

13. Thus, the doctor has not corroborated that there was any injury on her back or on her neck. In absence of any corroboration from the medical evidence as also from any other independent evidence it is difficult to accept that any rape was committed upon her because the doctor found no sign of rape.

14. In that view of the matter, the conviction and sentence passed u/s 376 of the Indian Penal Code is altered to one Section 354 of the Indian Penal Code and the Appellant is sentenced to undergo the period already undergone by him during trial.

15. It appears that the accused was arrested immediately after the occurrence and remained in custody throughout till judgment was pronounced on 20.6.2002 and he was released during the pendency of this appeal by order dated 6.1.2004 and as such he has remained in custody for about 4 years, which is sufficient punishment of the offence committed by the Appellant.

16. In the result, with the aforesaid alternation in the order of sentence the appeal is allowed in part.

17. The Appellant is on bail, he is discharged from the liability of his bail bond.