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**(2013) 01 MP CK 0040**

**Madhya Pradesh High Court**

**Case No:** Criminal Appeal No. 561 of 2001

Komal Prasad Dhimolay

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

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**Date of Decision:** Jan. 3, 2013

**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 34, 376, 498A

**Citation:** (2013) 2 J LJ 228

**Hon'ble Judges:** N.K. Gupta, J

**Bench:** Single Bench

**Advocate:** H.S. Dubey, for the Appellant; Ajay Tamrakar, Panel Lawyer for the State, for the Respondent

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### **Judgement**

N.K. Gupta, J.

Since both the appeals are related with the common judgment dated 30.3.2001 passed by Additional Sessions Judge, Gadawara, District Narsinghpur in S.T. No. 5/2000, therefore, both the appeals are hereby decided by this common judgment. The appellants have preferred this appeal against the aforesaid judgment passed by the learned Additional Sessions Judge, Gadawara, District Narsinghpur, whereby the appellants Jaiprakash, Satish Verma and Komal Prasad were convicted for the offence punishable u/s 376 read with section 34 of IPC and sentenced for 10 years Rigorous imprisonment with fine of Rs. 500/-, whereas remaining appellants and the appellant Jai Prakash were convicted for the offence punishable u/s 498-A of IPC and sentenced for 2 years rigorous imprisonment with fine of Rs. 500/- and in each default of payment of fine, 3 months" rigorous imprisonment was also directed as default sentence.

2. The prosecution's case, in short, is that, the prosecutrix (P.W.1) was the wife of the appellant Jai Prakash. A matrimonial dispute was initiated between them but, ultimately, it was resolved in the Court with a compromise and therefore, on

17.11.1998, the appellant Jai Prakash took the prosecutrix to his house. The prosecutrix was kept in the house of the appellant Jai Prakash situated in the field at village Aamgaon Chhota (Police Station Gadarwara, District Narsinghpur). She was harassed by so many methods. She was directed to work in the fields. In the month of December, 1998, the appellant Pyari Bai, mother-in-law of the prosecutrix assaulted her by slaps and fists and other appellants, except Komal and Satish asked her to bring a sum of Rs. 1,50,000/- otherwise, directed her to leave the house. In the end of December, 1998. the appellant Jai Prakash sent his parents and relatives to the house situated in the village and thereafter, at about 10 p.m. in the night, he came to the house alongwith the appellants Komal and Satish Verma. The prosecutrix was taken to the bedroom of the house and thereafter, the appellant Jai Prakash assaulted her by kicks and fists and shown a knife to her and directed her to undress. The appellant Satish Verma was taking photographs while the prosecutrix was removing her clothes. Thereafter, the appellant Komal Dhimole pressed her breasts and tried to insert his penis in her vagina but, he could not complete the intercourse. Satish Verma took the photographs of the entire incident. Thereafter, the appellant Jai Prakash took the camera with him and the appellant Komal shown a knife to the prosecutrix and thereafter, the appellant Satish committed rape upon her. The photographs were taken by the appellant Jai Prakash during the incident. Thereafter, the appellant Jai Prakash also committed rape with the prosecutrix in front of other appellants. Thereafter, they threatened her not to tell anyone about the incident. After the incident, the prosecutrix was kept in watch and she was not permitted to talk with anyone. During this period, she was harassed by several methods. On 14.1.1999, at about 4 a.m. in the morning, the prosecutrix could escape from the house along with her daughter aged 2 years and by taking a bus, she went to her parents house at village Sahaban. She told the entire story to her father, brother Ganesh and other relatives Bhairo Prasad Verma and Jagdish Patel. On 15.1.1999, she had lodged a written report to SHO, Police Station Gadarwara, in which she had mentioned the entire story and also mentioned that she could not lodge report on 14.1.1999 because she was of the view that defamation could be caused in lodging such an FIR. The prosecutrix was sent to the District Hospital, Narsinghpur for her medico legal examination, where Preeti Singhai (P.W.6) examined her and gave a report, Ex.P/13. The appellants Jai Prakash, Komal and Satish were also sent for their medico legal examination. After due investigation, a charge-sheet was filed before the JMFC, Gadarwara, who committed the case to the Sessions Judge, Narsinghpur and ultimately, it was transferred to the Additional Sessions Judge, Gadarwara.

3. The appellants abjured their guilt. A specific plea was taken that the prosecutrix was not residing in the family in a proper manner. She was shirking to do any work and therefore, she resided with her parents and lodged various proceedings. After a compromise, she was residing with her husband but, she was not willing. The appellant Komal was the person who was the mediator for the compromise and

therefore, he was falsely implicated in the case. The prosecutrix left the house of her husband on 14.1.1999 without any information and thereafter, a false case was lodged against the appellants to harass them and get rid off with the appellant Jai Prakash, her husband. In those days, the crop of sugarcane was ripen and so many labours were working in the fields of the appellant Jai Prakash to prepare jaggery. There were only two rooms in the house situated at the fields of the appellant and one room was filled up with fodder, whereas another room was filled up with jaggery. There was no possibility to commit such a crime in a room. Persons who were looking after the manufacturing of jaggery were sleeping in the varandah, even their food was also prepared in the varandah. In defence, Manoj Verma (D.W.1) was examined.

4. The learned Additional Sessions Judge, Gadawara, after considering the evidence adduced by the parties, convicted the appellants Jai Prakash, Satish Verma and Komal Prasad for the offence punishable u/s 376 read with section 34 of IPC, whereas the appellant Jai Prakash and remaining appellants were convicted for the offence punishable u/s 498-A of IPC and the appellants were sentenced as mentioned above.

5. I have heard the learned counsel for the parties.

6. The learned counsel for the appellants have submitted that allegations made by the prosecutrix appears to be unnatural. The appellant Komal Prasad was an old person of more than 60 to 70 years of age and it was not expected from him to get involved in such a crime. There was no advantage to the appellant Jai Prakash, if a gang rape is caused upon his wife in his presence. No allegation was made by the prosecutrix against the other appellants about any harassment but, the learned Additional Sessions Judge, convicted the appellants for the offence punishable u/s 498-A of IPC, without any reason. The police could not seize any camera or any photograph alleged to be taken by Satish and Jai Prakash. Since the prosecutrix was not willing to reside with her husband and therefore, a grave case was prepared against the appellants to terrorize and pressurize them. It is prayed that the appeal may be accepted and the appellants may be acquitted.

7. On the other hand, the learned Panel Lawyer has submitted that the conviction as well as the sentence directed by the trial Court appears to be correct. There is no reason by which the present appeals can be accepted. Now a days, cases relating to gang rape are increasing and therefore, such culprits should be punished with deterrent sentence.

8. After considering the submissions made by the learned counsel for the parties and looking to the facts and circumstances of the case, it is to be considered as to whether the appeals filed by the appellants can be accepted? And whether the sentence directed against the appellants can be reduced?

9. In the present case, the prosecutrix (P.W.1) has alleged a gang rape against the appellant Komal, Satish and her husband Jai Prakash. Since the prosecutrix could lodge an FIR after 16 days of the incident, nothing could be found in the medical report. Hence, medical evidence prepared by Dr. Preeti Singhai (P.W.6) of the prosecutrix and medical evidence prepared by Dr. T.D. Choudhari (P.W.4) of the appellants Jai Prakash, Komal and Satish have no much importance. In the present case, the prosecutrix told the story to her father and other relatives who were present in her house and therefore, Rajaram (P.W.2), father of the prosecutrix and Jagdish (P.W.3) were examined that the prosecutrix narrated about the incident to them. However, it is to be considered as to whether the prosecutrix can be believed. It is true that now a days, cases of gang rape are increasing but, rape or gang rape is an offence, which can be alleged falsely due to enmity and therefore, factual position of the allegation is required to be assessed in each and every case. It is also true that there is no corroboration required to the testimony of the prosecutrix but, she should be believable otherwise. Under such circumstances, the conduct of the prosecutrix is to be examined carefully as to whether she is believable or not.

10. The learned counsel for the appellants has submitted that what could be the advantage to the appellant Jai Prakash in getting such an incident with the prosecutrix, who was his wife. A person, who has to reside with his wife for the entire life cannot bear such an insult of his wife amongst his friends etc., unless he gets some advantage in doing so. If he was preparing any evidence about bad character of the prosecutrix to get divorce in future then, such a bad character cannot be established with a person like Komal, who was an old man of 60 to 70 years of age. Hence, there was no advantage to the appellant Jai Prakash in getting such a document prepared. The statement made by the learned counsel for the appellants appears to be correct. There was no advantage to the appellant Jai Prakash in doing such an insult of his own wife with the others. If he wanted to prepare a document relating to bad character of the prosecutrix for the purpose of prosecuting a petition of divorce then, the appellant Komal could not be involved in the crime. Looking to the age group of the appellants Jai Prakash and Satish, the appellant Komal was misfit. Looking to the age of the appellant Komal, he could not be a friend of the appellant Jai Prakash. The prosecutrix told the entire story to her father and her father Rajaram had knowledge of the story as told by the prosecutrix but, there is a lot of contradiction between the story told by the prosecutrix in the Court and story told by the witness Rajaram.

11. The prosecutrix told before the Court that the appellant Komal tried to commit rape with her but, she abused him and shouted and therefore, he did not commit rape upon her and only tried to insert his penis in her vagina. On the contrary, the witness Rajaram has stated that the appellant Komal touched his penis into the vagina of the prosecutrix to prepared a photograph. Dr. T.D. Choudhari (P.W.4) has examined the appellant Komal and gave his report, Ex.P/7. He found him to be competent to do intercourse. If the appellants were bent upon to commit a gang

rape with the prosecutrix and photographs be taken then, there was no problem to the appellant Komal to commit the intercourse with the prosecutrix. Looking to the version given by the witness Rajaram, it appears that he was the author of the story which was reproduced by the prosecutrix in the Court. The conduct of the appellant Komal as shown by this witness indicates that it is not a true story but, it is a hypothetical allegation against the appellant Komal. It is possible that the appellant Komal was falsely implicated in the matter because due to his efforts, the prosecutrix was again directed to reside with the appellant Jai Prakash and therefore, she was inimical to the appellant Komal. Looking to the age of the appellant Komal, he could not be involved with the appellants Jai Prakash and Satish or if he was involved then, he should have done the complete intercourse with the prosecutrix. Under such circumstances, looking to the evidence of the prosecutrix and her father, it appears that the appellant Komal was not involved in the crime and a false case has been lodged by the prosecutrix against the appellant Komal. Hence a doubt is created in the testimony of the prosecutrix.

12. The prosecutrix has accepted that there were only two rooms in the house situated at the field of the appellant Jai Prakash. She has accepted that one room was filled with fodder and therefore, only second room was available for dwelling. She denied the suggestion that second room was also filled up with jaggery. Rajaram, father of the prosecutrix has accepted that jaggery was prepared in the fields of the appellant Jai Prakash but, it was also kept with fodder in the room where the fodder was kept. By such acceptance of the witness Rajaram, it is apparent that jaggery was prepared at the time in the field of the appellant Jai Prakash and therefore, the testimony of the defence witness Manoj Verma appears to be acceptable that some 14 to 15 persons were working in the field of the appellant Jai Prakash in those days to prepare jaggery etc. and second room was used for storage of jaggery. All the labours were sleeping in the night in the varandah and therefore, there was no possibility for the appellant Jai Prakash and Satish to do such a crime in front of those 14-15 labours.

13. As submitted by the learned counsel for the appellants, there was no advantage to the appellant Jai Prakash by preparation of such photographs. On the contrary, it was possible that since the prosecutrix escaped from the house of the appellant Jai Prakash without any intimation and therefore, it was for her to create a reason for such a disappearance. As discussed above, there was no room available at the spot, in which such type of offence could be committed. It is pertinent to note at this stage that the investigation officer neither prepared a spot map by his own, nor he directed any Patwari to prepare the spot map. Such non preparation of the spot map indicates that when the investigation officer went to the spot, he found that one room was filled up with fodder and another room was filled up with jaggery and no such crime could be committed in any room and therefore, if he would have prepared a spot map then, the spot map would have gone against the prosecution story and therefore, in such an important case, no spot map was prepared either by

the investigation officer or by the patwari. This situation also creates a doubt in the story of the prosecution.

14. The prosecutrix has stated in omnibus manner in the FIR, Ex.P/1 that after commission of the crime, some of the family members were having a watch upon her, so that she could not escape. She had stated in the FIR in omnibus manner but, in her statement before the Court, she has stated against her parents-in-law that they were watching her in those 15 days. The witness Rajaram had the knowledge about the incident as told by the prosecutrix but, he could not tell the names of the persons, who were watching the prosecutrix in those 15 days, so that she could not escape. It clearly indicates that the story of watching is not a correct version but, a fake story is created and therefore, Rajaram could not tell the names of the persons who had kept a watch over the prosecutrix in those 15 days, whereas the prosecutrix told that her father-in-law and mother-in-law had kept a watch upon her.

15. For the sake of arguments, if it is accepted that a watch was kept by the appellant Jai Prakash and his father and mother then, it was not possible for the prosecutrix to escape at about 4 a.m. in the night. If that room was vacant then, she could be kept in a lock and key and the appellant Jai Prakash and his parents could sleep in the Varandah. The prosecutrix could not tell any special reason as to how she could escape from the house of the appellant. She avoided the question to that fact as to how she escaped and how she dodged her husband and parents-in-law. Her conduct in not telling any special reason as to how she escaped indicates that there was no watch kept upon her and story told by the prosecutrix appears to be incorrect. She told that the incident took place 15 days prior to her escape because she knew that in medical evidence, she could not get anything if she tells about the story of rape upon her recently and therefore, she prepared a story that the incident took place, 15 days prior to her escape.

16. The FIR lodged by the prosecutrix also suffers from various infirmities. The nearest outpost from the village of Rajaram (P.W.2) was Salichowka. The prosecutrix and her father Rajaram could not give any explanation as to why they did not approach to the outpost Salichowka. It is accepted by the witness Rajaram that they did not try to contact the Sarpanch or Patel of the village to tell the story. It was stated by the prosecutrix that initially she went to the Police Station Gadarwara but, nobody was ready to lodge the FIR except it is submitted in writing and therefore, she went with her father and brother Ganesh to a petition writer available in the Court and got the FIR Ex.P/1 typed. If the text of the FIR, Ex.P/1 is perused then, it would be clear that it is prepared by some law knowing person. The witness Rajaram has stated that to lodge the FIR, the prosecutrix and her brother went alongwith the witness Rajaram. The written FIR was lodged on 15.1.1999, whereas the prosecutrix reached to her father's house on 14.1999 at about 9 a.m. in the morning. The reason of delay mentioned in the FIR is that it is a case of defamation and therefore,

she could not lodge the FIR on the previous day. However, this explanation is a contradictory to the fact that she told the entire story to her father when an unknown person Jagdish (P.W.3) was present in the house. The presence of the witness Jagdish appears that it was created to make him a witness. The witness Jagdish (P.W.3) has accepted in his cross-examination that his master Bhairo was cousin of Rajaram and therefore, he went to the house of Rajaram along with Bhairo but, he has stated that he had no relation with Rajaram, prior to that incident. He never visited the house of Rajaram prior to that day. Under such circumstances, Jagdish was not known to the prosecutrix prior to the incident and therefore, how could she tell the entire story before such an unknown person, whereas she was feeling shy to tell the story to the police one day prior to lodging the FIR. The witness Jagdish has given a pretext to visit the house of Rajaram that he went alongwith Bhairo to take a permit from sugar factory and he could not get the permit therefore, he went to the house of Rajaram on the next morning. However, he has accepted that permit is required after ripping of sugarcane and at that time, the crop of sugarcane was standing in the field of Bhairo, it was not ripen. Under such circumstances, the pretext about his visit to Rajaram appears to be baseless and it appears that the witness Jagdish is unnecessarily introduced to establish the story of the prosecutrix. Neither he was present at that time in the house of Rajaram when the prosecutrix reached, nor he was relative to Rajaram, so that such a story could be told to him by the prosecutrix.

17. The FIR, Ex.P/1 lodged by the prosecutrix is certainly lodged with delay of more than one day and explanation given for that delay appears to be incorrect. It is possible that when the prosecutrix left the house of her husband and so many disputes took place in the past then, it was thought by the father and brother of the prosecutrix to create a valid excuse and to create such a story, so that the appellants should be in a grave trouble. In this connection, it is also pertinent to note that the prosecutrix has accepted that his brother Ganesh was facing a trial of crime of rape and relations of her another brother with his wife were not peaceful and therefore, a criminal case was going on between her brother Shiv Kumar and his wife. Therefore, it was possible for Ganesh, brother of the prosecutrix to create such a story of rape, so that the appellants may suffer in a grave manner. If FIR is lodged with unnecessarily delay and there is possibility that it is lodged with due deliberations then, certainly, such delay in lodging the FIR makes a great doubt in the prosecution's story.

18. If various doubts as discussed above are considered simultaneously then, the possibility cannot be ruled out that since the prosecutrix escaped from her husband's house, therefore, a story was created for her excuse and to pressurize her husband and his family members. Story told by the prosecutrix appears to be unnatural and such type of crime could not be done with her especially when there is no room available in the house situated at the field of the appellant Jai Prakash. The testimony of the prosecutrix appears to be doubtful and therefore, the

prosecution has failed to prove beyond doubt that any intercourse was committed either by the appellants Komal or by Satish with the prosecutrix in presence of others or the appellant Jai Prakash had committed any intercourse with the prosecutrix in presence of the appellants Komal and Satish. In case of doubt, benefit of doubt is to be given to the appellant. Hence, the appellants Jai Prakash, Satish and Komal could not be convicted for the offence punishable u/s 376 of IPC either directly or with help of section 34 of IPC. The learned Additional Sessions Judge has committed an error in convicting the appellants for the aforesaid crime.

19. So far as the offence punishable u/s 498-A of IPC is concerned, the prosecutrix (P.W.1) did not say anything against her brother-in-law and sister-in-law about any dowry demand. There is no iota of evidence against them. Though it was mentioned in the FIR that they tortured the prosecutrix for demand of Rs. 1,50,000/-. Rajaram (P.W.2) has accepted that story of demand of that amount was a story of past. Thereafter, a compromise took place. Looking to the evidence given by Rajaram, father of the prosecutrix, it indicates that no demand of Rs. 1,50,000/- was made either by the brother-in-law, sister-in-law, father-in-law or mother-in-law of the prosecutrix. The prosecutrix did not give any sort of description about the harassment done with her. She has stated against her mother-in-law that she gave a slap and some fists but, she did not say anything about her brother-in-law and sister-in-law. Hence, the appellants Shiv Kumar, Roopram, Tara Bai and Dayawanti Bai were wrongly convicted for the offence punishable u/s 498-A of IPC, without any evidence. As per the evidence of the prosecutrix (P.W.1), Balkishan, father-in-law was liable for the harassment which he had done due to keeping a watch upon the prosecutrix but, it is not proved beyond doubt that a gang rape was committed upon the prosecutrix and it is also doubtful that any watch was done by the parents of the appellant Jai Prakash upon the prosecutrix and therefore, by such a fact it cannot be said that any harassment has been done by the appellant Bal Kishan to the prosecutrix. He is also convicted for the offence punishable under sections 498-A of IPC without any basis.

20. So far as the case of Pyari Bai, mother-in-law of the prosecutrix is concerned, it is alleged against the appellant Pyari Bai that she assaulted the prosecutrix by slaps and fists for demand of Rs. 1,50,000/-. If the appellant Pyari Bai had done such an assault with the prosecutrix then, the prosecutrix who knew about the pressure of some criminal proceedings and she was accepted by her husband again, she could go immediately to her parents house and lodge an FIR against her mother-in-law. It is not told by the prosecutrix that the appellant Pyari Bai got the shelter of other appellants in such a demand. In the FIR, Ex. P/1, the prosecutrix had alleged about the dowry demand and harassment against all the appellants, whereas she could not say about the overt-acts of other appellants. Looking to her conduct, where she is disbelieved on each and every count, she cannot be believed for the harassment done by the appellant Pyari Bai. Hence, looking to the conduct of the prosecutrix, it is not proved beyond doubt that the appellant Pyari Bai assaulted



her by slaps and fists and therefore, it is not proved that the appellant Pyari Bai has done any harassment with the prosecutrix for demand of any dowry or otherwise. She could not be convicted for the offence punishable u/s 498-A of IPC.

21. On the basis of the aforesaid discussion, it would be apparent that the appellant Jai Prakash husband of the prosecutrix entered in a compromise and he took his wife to his house. He has not done anything which may amount to a harassment with his wife. There is no allegation upon him that he asked for any money or any dowry from the prosecutrix or he assaulted the prosecutrix for fulfillment of such demand. Allegation of gang rape was alleged against the appellant Jai Prakash, which is not proved beyond doubt. Except of that allegation there is no allegation against the appellant Jai Prakash relating to harassment of the prosecutrix and such allegation of gang rape was not proved beyond. The appellant Jai Prakash could not be convicted for the offence punishable u/s 498-A of IPC because no harassment is proved which was done by the appellant Jai Prakash with the prosecutrix.

22. On the basis of the aforesaid discussion, the prosecutrix is not believable beyond doubt. It appears that a false case has been prepared by the father of the prosecutrix to save her act of escape. The appellants Jai Prakash, Satish and Komal Prasad cannot be convicted for the offence punishable u/s 376 read with section 34 of IPC, whereas the remaining appellants and the appellant Jai Prakash cannot be convicted for the offence punishable u/s 498-A of IPC. Therefore, the appeals filed by these appellants appear to be acceptable. Consequently, appeals filed by the appellants are hereby allowed. The conviction as well as the sentence directed against the appellants Jai Prakash, Komal Prasad and Satish for the offence punishable u/s 376 of IPC is hereby set aside. Similarly, the conviction as well as the sentence directed for the offence punishable u/s 498-A of IPC against the other appellants is also set aside. The appellants are acquitted from all the charges appended against them. They would be entitled to get the fine amount back, if they have deposited the same before the trial Court.

23. At present, the appellants are on bail. Their presence is no more required before this Court and therefore, it is directed that their bail bonds shall stand discharged. A copy of the judgment be sent to the trial Court alongwith its record for information and compliance.