

High Court of Madhya Pradesh: Bench at Indore

Single Bench: Hon'ble Shri Justice S.K. Awasthi

Cr.A. No. 1280/1999

Jagannath & Anr.

vs.

The State of Madhya Pradesh

Shri Vivek Singh, learned counsel for the appellant.
Ms. Mamta Shandilya, learned Public Prosecutor for the
respondent/State.

J U D G E M E N T

(Passed on 11/02/ 2019)

This appeal under Section 374 of the Code of Criminal Procedure, 1973 (for short "The Code") has been preferred by the appellant against judgment of conviction dated 24/09/1999, passed by Additional Sessions Judge, Narsingharh, District Rajgarh (Biaoro), in S.T. No.45/1999, whereby the appellant has been convicted for offence under Sections 376(2)(G), 450 of IPC and sentenced to undergo 10 years R.I. and 5 years R.I respectively with fine of Rs.500/- each for aforesaid offence.

02. Prosecution story in short is that on 16/01/1999, the husband of the prosecutrix has gone to Manpur after irrigating his field and her elder son Vishnupuri has also gone to village for watching movie. The prosecutrix was sleeping in her hut along with her younger son Vinod and daughter Sunitabai, at about 12.00 pm, somebody pressed her throat, therefore, she wake up and saw that co-accused Shivsagar was pressing her throat and one unidentified person was pressing both of her hands, thereafter

appellant -Jagannath committed rape upon her. After committing the offence, he left her then the prosecutrix raised alarm. On hearing the alarm her daughter Sunitabai woke up and the accused persons fled away from the place. After some time Vishnupuri, the elder son of the prosecutrix came to the house, then prosecutrix informed him about the incident. On 18/01/1999, the husband of the prosecutrix came back to home then she narrated the entire incident and went to police station Kurawar with her elder son Vishnupuri and lodged FIR (Ex.P/1). The police sent the prosecutrix for medical examination and visited the spot. Police prepared the spot map and arrested the accused persons. Police also recovered vaginal swab slide and clothes of the prosecutrix as well as the semen slide and clothes of accused Jagannath in sealed condition. Aforesaid articles were sent to FSL for chemical analysis. After completion of investigation, charge-sheet was filed before the Court of Judicial Magistrate First Class, Narsingarh, who committed the case to the Sessions Court, Rajgarh, which was transferred to Additional Sessions Judge, Biaora for trial.

03. Appellants abjured their guilt and took a plea that there was a quarrel between them and Narayanpuri, the husband of the prosecutrix, therefore, she has made false allegations against them, however, they have not examined any witness in their defence.

04. The trial Court, after appreciating the evidence adduced by the prosecution, convicted appellants for offence under Sections 376(2)(G), 450 of IPC and sentenced them as mentioned in para-1 of this judgment.

05. The learned counsel for the appellants has submitted that although the prosecutrix deposed against the appellants in her examination, however, in her cross-examination she accepted that due to the darkness she could not identify the person who committed rape upon her. She also admitted that she has not informed anybody about the alleged incident. It is further

submitted that the learned trial Judge has committed error of law in placing reliance on the testimony of prosecutrix and other witnesses in examination-in-chief and while brushing aside their statements in cross-examination.

06. On the other hand, learned public prosecutor appearing on behalf of the respondent/State has supported the impugned judgment and submitted that the appellant had adopted a tricky attitude and it is indicated by the act of his counsel praying for adjournment when the examination-in-chief was over. After that the prosecutrix, her daughter and son had been won over by the appellants and, therefore, they had taken u-turn in their cross-examination supporting the accused persons. Therefore, looking to the law laid down by Hon'ble Apex Court in the case of *Khuiji @ Surendra Tiwari vs. State of M.P., reported in AIR 1991 SC 1853* the trial Court has committed no error whatsoever, in passing the order of conviction and sentence against the appellant.

07. I have heard learned counsel for the parties and perused the record.

08. Prosecutrix (P.W.2) has deposed that in the month of march at night she was sleeping in her room along with her daughter Sunitabai and younger son Vinod. The door of the room was stuck. Her husband has gone to field for irrigation, whereas her elder son went to the village to watch television. At about 12.00 pm appellant No.1-Jagannath, appellant No.2-Shivsagar, and one '*Dadiwala*' (beard person) entered into her room, appellant no.2-Shivsagar pressed her throat, '*Dadiwala*' pressed both her hands and then appellant No.1-Jagannath committed rape upon her. She elbowed her daughter Sunitabai (P.W.4), who woke up then the accused persons fled away from the spot. After some time her elder son Vishnupuri came there then she narrated the whole incident. The same day she went to police-station Kurawar along with her elder son and lodged complaint against the accused

persons.

09. Vishnupuri (P.W.3) deposed that 9 months ago, at about 9.30 pm he went to the field for giving food to his father and about 1.30 am, when he came to house his mother told him that Shivsagar, Jagannath and one '*Dadiwala*' assaulted her. After two days he along with his mother went to police station Kurawar where his mother lodged complaint.

10. Sunitabai (P.W.4) has stated that on '*Shankranti*' at about 12.00 am, her mother pushed her then she woke up and saw Jagannath and one '*Dadiwala*' were running. Her mother informed her that the aforesaid persons assaulted her. The examination-in-chief of prosecutrix (P.W.2), her son Vishnupuri (P.W.3) and Sunitabai (P.W.4) were recorded on 14/09/1999, however, counsel for the appellants sought adjournment on the ground that he is appointed by the appellants today itself and he is not having copy of the charge-sheet, therefore, he is not able to cross-examine the witnesses, hence, the cross-examination of the prosecutrix (P.W.2), Vishnupuri (P.W.3) and Sunitabai (P.W.4) was deferred for the next date i.e. on 15/09/1999.

11. On 15/09/1999 when cross-examination of prosecutrix (P.W.2), her son Vishnupuri (P.W.3) and Sunitabai (P.W.4) was recorded then they have told entirely different version from their earlier statement, which was deposed by them in their examination-in-chief. Prosecutrix accepted in her cross-examination that when the said incident took place there was darkness on the spot and she was not able to identify the persons who were involved in the alleged offence. She also deposed that only on suspicion she has got registered the FIR against appellant Jagannath and Shivsagar. Vishnupuri (P.W.3) has admitted that his mother told him that appellants – Jagannath and Shivsagar entered into their house and assaulted her. Sunitabai (P.W.4) has also stated in her cross-examination that due to darkness, she has

not seen the accused persons at the time of the incident. However, trial Court is of the view that these witnesses have supported the prosecution story in their examination-in-chief and when cross-examination was deferred, they have been won over by the appellants and therefore, they are not supporting the prosecution in cross-examination, therefore, the trial Court relied the version narrated by these witnesses in their examination-in-chief and held the appellants guilty for the aforesaid offence.

12. It is pertinent to note that neither the prosecutrix, nor her son and daughter have been declared hostile and cross-examined by the prosecution. In fact when these witnesses stated something different in examination-in-chief and in their cross-examination, it was the duty of the prosecution to request for permission from the Court to put question to these witnesses in the nature of the cross-examination for the purpose of impeaching their credit and bring on record that for some ulterior motive they are not supporting the prosecution story and giving a false statement, but in the present case, the aforesaid efforts has not been made by the Public Prosecutor, who has conducted the case.

13. The evidence of prosecutrix (P.W.2), Vishnupuri (P.W.3) and Sunitabai (P.W.4) is binding on the prosecution. From the statement of the prosecutrix, it is clear that she has not supported the prosecution story in her cross-examination and prosecution did not choose to declare her hostile. Vishnupuri (P.W.3) was not present on the spot at the time of the incident and his statement is based on the version given by his mother. Sunitabai (P.W.4) has also not supported the prosecution in her cross-examination and she has refused to identify the appellants, therefore, the conviction of the appellants, which is based on the statement of the above prosecution witnesses is not sustainable under the law, because the guilt has to be proved to the extent 'of **must**' and not to the extent 'of may' as observed by Apex Court in the case of *Shivaji*

Sahabrao Bobade and Anr. v. State of Maharashtra reported as ***AIR 1973 SC 2622.***

14. Accordingly, the present appeal is allowed and the order of conviction and sentence of the appellants dated 24/09/1999, passed by Additional Sessions Judge, Narsingharh, District Rajgarh (Biaoro), in S.T. No.45/1999 is hereby set aside and the appellants are acquitted from the offence under Sections 376(2) (G), 450 of IPC. The appellants are in custody, they may be released immediately from the custody. Office is directed for issuance of release warrant for release of the appellants.

15. A copy of the judgment be sent to the trial Court along with record for information and compliance.

Certified copy as per Rules.

(S.K. Awasthi)
Judge

sumathi