

Devsharan Vs. State of Chhattisgarh

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Court : Chhattisgarh

Decided On : Aug-28-2008

Reported in : 2009CriLJ133

Judge : T.P. Sharma, J.

Appellant : Devsharan

Respondent : State of Chhattisgarh

Disposition : Petition dismissed

Judgement :

T.P. Sharma, J.

1. Cr.A. No. 967/2003 filed by Devsharan and Cr.A. No. 975/2003 filed by Taran Singh Marabi have been preferred against the same judgment dated 7-8-2003 passed in Sessions Trial No. 156/2003, therefore, they are being disposed of by this common-judgment.

2. These appeals are directed against the judgment of conviction and order of sentence dated 7-8-2003 passed by the 1st Additional Sessions Judge, Ambikapur in Sessions Trial No. 156/2003, whereby & whereunder learned Additional Sessions Judge after holding the accused/appellants along with two other co-accused persons guilty for kidnapping, abducting and committing gang rape on the

prosecutrix, convicted each of them under Sections 363 read with Section 34, 366 read with Sections 34 & 376(2)(g) of the I.P.C.. and sentenced to undergo rigorous imprisonment for seven years & pay a fine of Rs. 1,000/-, in default of payment of fine to further undergo rigorous imprisonment for six months under Sections 363 read with Section 34 & 366 read with Section 34 of the I.P.C., and to undergo rigorous imprisonment for ten years & pay a fine of Rs. 2,000/-, in default of payment of fine to further undergo rigorous imprisonment for one year under Section 376(2)(g) of the I.P.C.

3. The impugned judgment is challenged on the ground that without any credible evidence against the appellants for kidnapping, abducting and committing gang rape on the prosecutrix. The trial Court has convicted and sentenced the appellants and other co-accused persons as aforementioned.

4. It is informed by the Registry that co-accused persons Krishna Singh & Suresh Markam had not preferred any appeal against the impugned judgment.

5. I have heard learned Counsel for the parties and perused the impugned judgment as also the record of the trial Court.

6. Case of the prosecution, in brief, is that the prosecutrix (PW-1), who was aged about 18 years on the date of incident, was residing in her maternal house at Village Padiya, Distt. Ambikapur, on 3-3-2003 at about 10 p.m. after taking dinner, she came out of her house to answer the call of nature, at that time, Taran Gond along with other 8-10 persons came to her and forcefully took her towards Sarna, when she tried to raise cries, they closed her mouth by hand. The appellants and all other co-accused persons committed forceful sexual intercourse on her. She became unconscious, then they escaped from the spot. When she regained consciousness, she tried to go towards her house, but she got stray and reached Thodi. She was tired, therefore, she stayed at the wheat field. On 5-3-2003 in the morning hours, she went to Village Bilari in the house of one old lady who provided meals to her. At about 3 p.m. her brother-in-law Arjun & one Moharlal came to her, she narrated the incident to them and she came with her brother-in-law to her parents' house where she narrated the incident to her mother & father. She was tired and suffering from body pains. When she did not come to her house, on 5-3-

2003, her brother-in-law Arjun lodged report to Police vide Ex.P-6. Thereafter, she lodged the first information report vide-Ex.P-1 on 5-3-2003 at about 9.20 p.m. Her petticoat was seized vide Ex.P-2. After taking consent from her & her mother vide Ex.P-3, she was sent for medical examination vide Ex.P-4A and she was examined by Dr. Mrs. Shakuntala Xalxo (PW-7) vide Ex.P-4.

7. Dr. Mrs. Shakuntala Xalxo (PW-7) noticed one abrasion on posterior aspect of right elbow 1 cm. above elbow joint of about 1 cm. x V4 cm. size and one abrasion on posterior aspect of left elbow 1 cm. medial to elbow joint of about 1 cm. x Vi cm. size. On internal examination one linear abrasion of 1 cm. x 1 cm. size was present on right labia majora about 2 cms. above fourchette. Hymen old ruptured. One tear at 10'O clock position was present on the hymen of about 1 x 1 mm. One large tear was present in post vaginal wall of 4 cms. in length, 1 cm. in breadth and Vi cm in depth. No active bleeding was present. Bleeds on touch. The injuries were caused by hard & blunt object. They bleed on touch and tenderness. Vagina admits two fingers. Tenderness present. Slides of vaginal smear prepared and sent for chemical examination. The doctor has opined that there was possibility of forceful sexual intercourse with the prosecutrix.

8. The prosecutrix was admitted to the hospital for the examination. Her petticoat was examined by Dr. Mrs. Shakuntala Xalxo (PW-7) vide Ex.P-5 who found that brown stains were found on the petticoat same was sealed for chemical examination. Spot map was prepared by the Investigating Officer vide Ex.P-8. Spot map was prepared by the Patwari vide Ex.P-9. Slides of sealed packets prepared after examination of private parts of the prosecutrix were seized vide Ex.P-10.

9. Accused/appellant Taran Singh Marabi was also sent for medical examination vide Ex.P-20, he was examined by the doctor vide Ex.P-20A and found capable of committing intercourse. Accused/appellant Devsharan was also examined vide Ex.P- 18A and he was also found capable of committing intercourse. Other accused persons were also examined by the doctor and they were also found fit for committing intercourse. Undergarments of accused Suresh Ram Markarh, Dev Kumar Singh, Mahipal Singh, Taran Singh & Krishna Singh were seized vide

seizure memos Exs.P-11, 12. 13. 14 & 15, respectively and their clothes were examined by the doctor. Copy of the F.I.R. was sent vide Ex.P-28. The accused persons were arrested vide Exs.P-29 to P-34. Seized articles were sent for chemical examination to the F.S.L., Raipur vide Ex.P-35.

10. Statements under Section 161 of the Cr.P.C. were recorded and after investigation charge sheet was filed before the Chief Judicial Magistrate, Ambikapur, who in turn, committed the case to the Court of Sessions Judge, Ambikapur, from where learned 1st Additional Sessions Judge, Ambikapur, received the case on transfer for trial.

11. In order to prove the guilt of the accused persons, the prosecution has examined nine witnesses. Statements of the present appellants and other co-accused were recorded under Section 313 of the Cr.P.C. in which they denied the circumstances appearing against them, pleaded innocence and false implication. Defence has also examined their witnesses namely, Santosh (DW-1) & Jaldhari Ram (DW-2) in its support. Santosh (DW-1) who is husband of the prosecutrix has stated in his evidence that his wife was residing in her maternal home since last 4-5 years and on 3-3-2003 she was not with him. Jaldhari Ram (DW-2) has stated in his evidence that he knows all the accused persons, but he did not know who has reported against the accused persons, he has also stated that Arjun is his rival.

12. After affording opportunity of hearing to the parties, learned Additional Sessions Judge convicted and sentenced the appellants and other accused persons as aforementioned.

13. It is argued on behalf of the present appellants namely, Devsharan & Taran Singh Marabi that the prosecutrix has not named appellant Devsharan, she was not known to Devsharan prior to the incident and no test identification parade has been conducted to identify the accused persons. The FIR. was lodged after two days of the incident and the delay has not been explained. The prosecutrix stayed for some time in the house of one old lady, but the prosecution has not examined the said old lady. No positive sign of intercourse has been found on her private parts. The statements of the witnesses are full of contradictions and omissions and do not inspire confidence, their evidence is not trustworthy.

14. Reliance has been placed by learned Counsel appearing for the appellants in the matter of Narayan alias Naran v. State of Rajasthan : 2007 CriLJ2733 in which the Apex Court has held that there are material contradictions in the testimony of the prosecutrix relating to prove commission of rape, not getting down from the tractor on its way through many villages, sitting happily in the tractor, absence of injury on her body or private parts, absence of non-examination of a lady in whose house she slept on the fateful day are material contradictions and discredit her testimony.

15. Further reliance has been placed by learned Counsel for the appellants in the matter of Sanjay Pathak v. State of C.G. 2006 (1) CGLJ 375 which it has been held by this Court that absence of injury over body or private parts in case of gang rape and thereafter, history of beating by club and dragging, and also admission of sexual relationship with one appellant disprove the commission of gang rape.

16. Further reliance has been placed in the matter of Madan Lal v. State of C.G. 2007 (1) CGLJ 435 in which it has been held that story of repeated intercourse is suggestive of consent.

17. Further reliance has been placed in the matter of Ramdas and Ors. v. State of Maharashtra : AIR 2007 SC155 in which it has been held that mere delay in lodging the F.I.R. is not necessarily fatal to the case of the prosecution. However, the fact that the report was lodged belatedly is a relevant fact of which the Court must take notice, but it requires good explanation. It is also held that 'the conviction in a case of rape can be based solely on the testimony of the prosecutrix, but that can be done in a case where the court is convinced about the truthfulness of the prosecutrix and there exist no circumstances which cast a shadow of doubt over her veracity. If the evidence of the prosecutrix is of such quality that may be sufficient to sustain an order of conviction solely on the basis of her testimony. In the instant case we do not find her evidence to be of such quality'. Prosecutrix not appearing to be witness of sterling quality on whose sole testimony conviction can be based, then accused are entitled for benefit of doubt.

18. Further reliance has been placed by learned Counsel appearing for the appellants in the matter of Pradeep Kumar v. Union Administration, Chandigarh :

2006 CriLJ3894 in which it has been held by the Apex Court that in the case of Gang rape - Common Intention - Mere presence of appellant-accused at spot is insufficient to show that there was prior concert or meeting of mind or plan formed at time of commission of offence by him with other accused persons for commission of rape on prosecutrix - Appellant-accused hence entitled to benefit of doubt.

19. Learned Counsel for the appellants also placed reliance in the matter of Dilip and Anr. v. State of M.P. : 2001 CriLJ4721 in which the Apex Court held that narration of incident by prosecutrix - Contradicted by statement of her aunt to whom she had narrated the story of sexual assault - And also by medical evidence and report of Forensic Science Laboratory - Truthfulness of version of prosecutrix being doubtful, cannot be relied upon - Accused entitled to acquittal.

20. In order to connect the appellants with the crime in question, the prosecution has led ocular, documentary & medical evidence relating to kidnap & abduction of the prosecutrix and commission of intercourse by the appellants along with other co-accused, who had not preferred any appeal, against the consent and will of the prosecutrix.

21. In order to appreciate the contention of the parties, I have examined the evidence adduced on behalf of the prosecution. The prosecutrix (PW-1) is a married lady and her age has been ascertained by the Court as 18 years on the date of her evidence dated 7-7-2003. The date of incident was 3-3-2003. The prosecution has not adduced evidence relating to her age that on the date of commission of offence she was below the age of 18 years and also below the age of 16 years. The prosecutrix is a married lady and when she was with her husband for some time, she is accustomed to intercourse. She has stated in her evidence that on the date of incident at about 8-9 p.m. when she came out from her house at Village Padipa to answer the call of nature in the courtyard, the accused persons who were hidden in the courtyard suddenly came and caught hold of her. Co-accused Suresh pressed her mouth and all the accused persons took her to Sarna Dand where they threw her on the ground. Appellant Taran torn her underwear and committed rape on her. Thereafter, co-accused Suresh & Krishna

committed rape on her one by one and appellant Devsharan committed rape on her. Thereafter, co-accused Mahipal & Devkumar committed rape on her. She has specifically stated that the appellants and co-accused persons have committed rape on her one by one. At the time of commission of offence other co-accused persons used to catch hold of her hands to facilitate the intercourse. Lastly she became unconscious, when she regained consciousness she was in the field of wheat. She was having pain. She left from the wheat field and reached to Village Bilari where persons of the vicinity enquired about her whereupon she started weeping and the people said that she is hungry, therefore, she is weeping. One old lady took her to her house and provided food to her. Mohanlal of her Village Padipa was at Village Bilari to invite their relatives, he heard that one mad woman came from Village Padipa, then he said that one woman is missing from his village, thereafter, he came to her. After some time, her brother-in-law Arjun came along with Josu, she told the incident to her brother-in-law Arjun and she went with him to Village Padipa where she narrated the incident to her mother & father. Lastly she lodged the report vide Ex.P-1. Her petticoat was seized vide Ex.P-2. She consented for her medical examination vide Ex.P-3.

22. Arjun (PW-2), brother-in-law of the prosecutrix, has stated in his evidence that on the date of incident at about 1 a.m. his mother-in-law Rambai came to him and told him that some persons took the prosecutrix, then he searched for the prosecutrix, but she was not traceable. He along with Moharlal went to Police Station Ambikapur and lodged the missing report of the prosecutrix. When they were coming back to their village, then another Moharlal told him that one woman was present at Bilari, then they went to Bilari where they saw the prosecutrix, thereafter, he took her to Village Padipa. The prosecutrix told him that accused persons Taran, Suresh, Krishna, Mahipal, Devsharan & Dev Kumar have committed rape on her. Firstly, they took her to forest and committed rape on her. He informed the Police by telephone and ultimately, took the prosecutrix to the Police Station where she lodged the report. He has supported the seizure of petticoat of the prosecutrix vide Ex.P-2.

23. Smt. Rambai (PW-3). mother of the prosecutrix, has stated in her evidence that at the time of incident her daughter went out from her house to answer the call

of nature, some persons took her and she was crying at that time. The prosecutrix did not come back to her house, then she informed to her son-in-law Arjun and he searched for the prosecutrix. The prosecutrix came after l/i days and told her that the appellants along with other co-accused persons took her to forest and committed rape on her one by one. She has further stated that she and her husband are very poor persons and they live on alms.

24. Moharlal (PW-4) has supported the evidence of Arjun (PW-2). Another Moharlal namely, Moharlal Panika (PW-5) has stated in his evidence that when he was at Bilari, he came to know that the prosecutrix was at Village Bilari, then he informed to Arjun. Seizure of petticoat of the prosecutrix vide Ex.P-2 was supported by Samaylal (PW-6),

25. Dr. Mrs. Shakuntala Xalxo (PW-7) has examined the prosecutrix on 5-3-2003 and noticed injuries as aforementioned. She opined that forceful intercourse has been committed on the prosecutrix. Two slides of vaginal sperm were prepared, same were sent for chemical examination and she admitted the prosecutrix for observation and treatment. She has also examined the petticoat of the prosecutrix which was maroon colour and same was sent for chemical examination.

26. Dr. M.K. Jain (PW-9) has stated in his evidence that he has examined the co-accused persons and appellants Taran & Devsharan vide Exs.P-16A to P-21A and found them capable to perform intercourse. He has also examined the undergarments of the accused persons vide Exs.P-22A to P-27A.

27. M.S. Chandel (PW-8), Assistant Sub-Inspector, has categorically stated in his evidence the details of investigation relating to missing of the prosecutrix, Roznamcha Sanha vide Ex.P-6, F.I.R. vide Ex.P-1, medical examination of the prosecutrix & the accused persons, seizure of the articles, arrest of accused persons and the statements of the witnesses. He has proved the documents Exs. P-1 to P-35.

28. The prosecutrix (PW-1) has denied the suggestion that she has not lodged the report. She has admitted in her cross-examination para 13 that she has stated in (Part 'A' to 'A') of F.I.R. Ex.P-1 that '(vernacular matter is omitted - Ed.)' but she

has denied that she was not knowing appellant Devsharan on the date of incident. She has further admitted that her petticoat which she was wearing at the time of incident has been seized, but she has denied the suggestion that she has lodged the report at the instance of her brother-in-law Arjun & her brother Moharlal. She has specifically stated in her cross-examination para 18 that nobody has told the names of accused persons to her, but she has seen and she knows the appellants & the other co-accused persons. The house of appellant Taran is only 200 mtrs. away from her house and the house of appellant Devsharan is near the house of Taran. She has accepted the suggestion that at the time when Taran was committing intercourse with her, she was feeling very bad. She has also denied the suggestion that appellant Taran has not taken her forcefully. She has further denied the suggestion that she went along with appellant Taran with her consent. She has stated that when Taran was taking her, she raised cries. She has also denied the suggestion that at the instance of her brother-in-law she is implicating Taran falsely. In her cross-examination she has stated that she was perturbed and her physical & mental condition was not good after the commission of rape by six persons.

29. Defence has cross-examined this witness at length, but it has not been able to elicit anything in her cross-examination to discredit her testimony. She is a rustic lady and beggar, but she has, categorically stated in her examination-in- chief and cross-examination about the details of the incident against all the accused persons.

30. Arjun (PW-2) has admitted in his evidence that he is accused for offence under Section 376 of the I.P.C. and Shambai has lodged report against him, but he does not know the relationship between Taran & Shambai. He has denied the suggestion that the report has been lodged by the prosecutrix at his instance with a view to take revenge against Taran.

31. Defence has cross-examined Arjun (PW-2), Smt. Rambai (PW-3), Moharlal (PW-4) & Moharlal Panika (PW-5), but it has not been able to elicit anything substantially to discredit their evidence. There is some discrepancy in their evidence, which is natural. The evidence of the prosecutrix (PW-1) is material. She

has categorically stated in her examination-in-chief & cross-examination that the appellants & other co-accused persons took her forcefully from her courtyard to Sarna Dand and committed rape on her against her will and consent. She was examined by Dr. Mrs. Shakuntala Xalxo (PW-7) who has noticed injuries over back of her elbow joint and private parts which are suggestive of commission of forceful intercourse with the prosecutrix.

32. The F.I.R. has been lodged after one day of the incident. Evidence of the prosecutrix (PW-1) reveals that on 3-3-2003 the appellants & other co-accused persons committed rape on her at night, on 4-3-2003 she reached to her village and next day i.e. on 5-3-2003 she has lodged the report. During this period, she was physically and mentally perturbed and not well. On 5-3-2003 Arjun (PW-2), brother-in-law of the prosecutrix, has lodged the missing report of the prosecutrix vide Ex.P-6. Appellant Taran has tried to take defence that the prosecutrix was the consenting party, she went with him on her consent, but the prosecutrix has denied the suggestion to this effect in para 18 of her cross-examination. Appellant Devsharan has tried to take defence that the prosecutrix was not known him prior to the incident, but the prosecutrix has specifically stated in her cross-examination para 18 that she knows both the appellants (herein) they are residents of the same vicinity and their houses are 200 mtrs. away from her house at the same village. She has stated in the F.I.R. that she will identify Taran & his friends. She has further stated in the F.I.R. that she did not know any accused person or unknown person had committed rape on her. She has also stated in the F.I.R. that appellant Taran along with his 8-10 friends committed the offence. She has further stated in the F.I.R. that she was not feeling good even at the time of lodging the report and at the time of medical examination, on this ground she was admitted in the hospital for observation & treatment. This shows that at the time of report and after commission of the incident, even at the time of her medical examination, her physical and mental condition was not good. This is sufficient explanation for delay of one day in lodging the F.I.R.

33. Dr. Mrs. Shakuntala Xalxo (PW-7) has admitted in her cross-examination that she is only M.B.B.S. and she is not expert in any field. She has admitted in her cross-examination that on the basis of assumption she has stated that forceful

intercourse has been committed on the prosecutrix, but she has not stated that as to how many persons have committed rape on the prosecutrix, even, it was not possible for her to say that how many persons have committed forceful intercourse on the prosecutrix.

34. In this case, appellant Taran has taken the defence of consent, but same has been denied by the prosecutrix. Injuries found over private parts & body of the prosecutrix are also suggestive of the fact that she was not consenting party. She has narrated the incident to her brother-in-law and thereafter, to her mother & father. This fact also negatives the story of consent. Evidence of the prosecutrix is corroborated substantially by the evidence of Arjun (PW-2), Smt. Rambai (PW-3), Moharlal (PW-4) & Moharlal Panika (PW-5). Her evidence appears to be natural and inspires confidence and same is trustworthy.

35. The appellants & other co-accused persons had abducted the prosecutrix from her house when she was under the guardianship of her mother & father with whom she was living at the time of her abduction, thereafter, the appellants & other accused persons committed forceful intercourse with her one by one. The accused persons have not admitted or stated that she has consented for intercourse. The prosecutrix has specifically denied the suggestion of consent and stated that the appellants have committed forceful intercourse with her. The circumstances shown by the prosecution are also suggestive of the fact that the prosecutrix is not a consenting party. On the point of consent, her evidence inspires confidence. Taking into considering her evidence that she has not consented for sexual intercourse, the Court shall presume that she did not consent in accordance with the provisions of Section 114A of the Indian Evidence Act,. 1872.

36. After appreciating the evidence available on record, learned trial Court has convicted & sentenced the appellants & two other accused persons as aforementioned.

37. Defence has examined Santosh (DW-1), husband of the prosecutrix & Jaldhari Ram (DW-2). They have substantially stated nothing against the prosecutrix or relating to commission of offence.

38. The prosecution has not examined the old woman of Village Bilari who provided food to the prosecutrix at Village Bilari. According to the evidence of the prosecutrix (PW-1), the prosecutrix has not narrated the story to the said old woman, the old woman had only provided food to the prosecutrix and she was not the material witness. Absence of her examination is not fatal to the prosecution.

39. Evidence of the prosecutrix is corroborated on material parts. Occular and medical evidence is sufficient for drawing inference that the appellants along with other accused persons abducted her from the guardianship of her mother & father without their consent and without the consent of the prosecutrix, and committed intercourse with her without her consent, one by one. This is sufficient for drawing inference that the appellants & other co-accused persons had abducted the prosecutrix and committed gang rape on her. Corroborative statement of the prosecutrix by independent source is not a rule of law, but rule of prudence and corroboration is not always necessary, same can be inferred from other circumstances. Conviction of the appellants is sustainable under law and it based on clinching and credible evidence. The trial Court has not committed any illegality or infirmity in convicting the appellants.

40. As regards the question of sentence, the prosecutrix is a married lady, she is rustic lady and beggar, she has been abducted and subjected to gang rape by the appellants along with other co-accused persons. The accused persons have taken the benefit of her poverty and helplessness and committed the aforesaid offence. They deserve no sympathy and the sentences imposed upon them are just and proper.

41. In the case of Ramdas AIR 2007 SC 155 (supra), the F.I.R. was lodged belatedly and the Apex Court has held that delay itself is not necessarily fatal' to prosecution case. The accused was acquitted on the ground that firstly the report was lodged relating to non-cognizable offence, thereafter, the second report was lodged for commission of rape which raises, suspicion as to its truthfulness. In the case on hand, the prosecutrix has lodged the F.I.R. after one day of the incident, but her evidence and other circumstances are sufficient to explain the delay. The facts of the case cited above and the facts of the case in hand are distinguishable

in nature.

42. In the case of Pradeep Kumar : 2006 CriLJ3894 (supra), it has been held by the Apex Court that rape was committed by more than one person, but the co-accused persons reached to the spot one by one and in absence of sharing common intention of the appellant, the appellant was not held liable for commission of gang rape. In the instant case, the appellants along with other co-accused persons simultaneously came to the prosecutrix, they abducted her to the forest and committed rape on her one by one. This shows that all the accused persons have shared common intention in commission of rape. The facts of the case cited above and the facts of the case in hand are distinguishable in nature.

43. In the case of Dilip : 2001 CriLJ4721 (supra), the prosecutrix narrated the incident to her aunt, but her aunt has not supported the statement of the prosecutrix and contradicted in material part and also contradicted by medical evidence and chemical report.

44. In the instant case, the evidence of the prosecutrix is supported by medical evidence and the evidence of her mother. The prosecution has not examined the old woman, who provided food to the prosecutrix, even the prosecutrix has not narrated the incident to the said old lady. The facts of the case cited above and the facts of the case in hand are distinguishable in nature.

45. In the result, I do not find any merit in both the appeals (Cr.A. Nos. 967/2003 & 975/2003), same are liable to be dismissed and they are accordingly, dismissed.

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