

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 470 OF 2012

Manoj Giri

.... Appellant

Versus

State of Chhatisgarh

.... Respondent

JUDGMENT

S. A. BOBDE, J.

1 The present appeal arises out of the judgment and order passed by the High Court of Chattisgarh at Bilaspur whereby the High Court maintained the conviction of the appellant under Sections 396 and 376 (2)(g) of the Indian Penal Code, 1860 [in short 'the IPC'] and sentenced him to undergo imprisonment for life and rigorous imprisonment

for ten years, respectively, but set aside his conviction under Section 395 of the IPC for a period of five years awarded by the trial court. Earlier, the trial court while acquitting other co-accused held the appellant - Manoj Giri guilty for commission of dacoity, murder of Domara Sahu in the course of committing dacoity etc. and convicted him under Sections 395, 396, 397, 398 and 376 (2)(g) of the IPC and sentenced him to undergo imprisonment for life and RI for different periods.

2. According to the prosecution, on the fateful night of 25.01.2004 at about 9 pm, prosecutrix (PW1) was returning with her husband, namely, Ganesh Sahu (PW2) on the bicycle from Village Gatauri along with her father-in-law - Domara Sahu (since deceased) on other bicycle from village Mohtarat after taking her treatment. It was a lonely road as they were passing by Koshtha pond at Village Mohtarai, someone focused a torch light on them and then hurled abuses and stopped them. Then two more persons reached

there and caught the cycle of Ganesh Sahu and stopped him. Two other persons stopped the cycle of Domara Sahu. One person inflicted iron rod blow to Ganesh Sahu and another slapped Domara Sahu. They took the prosecutrix, her husband and Domara Sahu towards the field and threatened they would be killed if they cried out. Ganesh Sahu was beaten senseless and his hands and legs were tied up with a lungi. Domara Sahu was also beaten senseless. Those persons threatened the prosecutrix and took off her sari and under garments and then raped her one by one. One of them had tied her legs and raped her, another untied her while raping her. Subsequently, after tying her up, they sat for sometime and then ran away. Somehow she untied herself and untied her husband and they reached the house of one Raj Kumar Suryavanshi, who gave them shelter. She narrated the incident to Raj Kumar Suryavanshi, who sent Ashok Kumar (PW 13) to lodge the

FIR at about 2.00 am. Domara Sahu who had been carried to local hospital, died at about 4.35 am.

3. Ganesh (PW2) was examined by Dr. A.N. Mandal (PW4), vide Ex.P-4 and following injuries were found :

1. Incised wound of 4 cm X 1 cm X 1 cm on forehead.
2. Lacerated wound of 3 cm X 1 cm. X ½ cm over left temporal region.
3. Lacerated wound of 1 cm X ½ cm. X ¼ cm near left eye.
4. Swelling of 2 cm X 2 cm over right leg.
5. Left eye was blackened and swollen.
6. Left cheek was swollen.

4. For treatment, Ganesh was admitted in the hospital, Domara Sahu was also examined by Dr. A.N. Mandal (PW4) vide Ex.P-5 and following injuries were found:

1. He was under coma, his general condition was very poor.
2. Blood was coming from nose and ear.

3. Swelling on left temporal region.

5. Domara Sahu was immediately admitted in Surgical Ward for emergency treatment. During treatment, Domara Sahu died on 26.01.2004. The death of Domara Sahu was intimated by the doctor, message was recorded vide Ex.P-22 and on the basis of FIR under zero number, numbered FIR was registered at Ratanpur Police Station vide Ex.P-21. After summoning the witnesses vide Ex.P-19 inquest over the dead body of Domara Sahu was conducted vide Ex.P-20. Thereafter dead body was sent for autopsy to Medical College, Bilaspur vide Ex.P-28. Dr. A.K. Shukla (PW3) conducted autopsy on the body of Domara Sahu and found following injuries as symptoms:

1. Blood clot in nose and ear with swelling.
2. Defused swelling over right temporal region of 8 cm x 7 cm.
3. Haemorrhage inside the skin with swelling.

4. Depressed fracture of temporal bone with swelling.

5. Abrasion over forehead.

6. Fresh abrasions over both the knees.

Cause of death of Domara Sahu was coma. Spot map was prepared by the police vide Ex.P-43.

6. There is no doubt that the death of Domara Sahu was homicidal and that it was caused by the accused persons. The findings of the trial court and the High Court in that regard are not seriously assailed in the appeal.

7. In the morning of 26.01.2004, the prosecutrix's statement was recorded in detail by the Investigating Officer - Anil Kumar Tiwari. Police seized the clothes of the prosecutrix and those of the accused persons, five in number. The prosecutrix as well as the accused persons were sent for medical examination. Forensic tests were conducted on the clothes of the accused persons. The examination of the prosecutrix conducted by Dr. M. Pandey revealed that her secondary sexual characters were well

developed, hymen was old ruptured, vagina admits two fingers easily and she was found accustomed to sexual intercourse.

8. During the course of investigation, accused Dilip, Ashish Dubey, appellant Manoj Giri and Dhruv Narayan were sent for medical examination on 26.01.2004 and they were examined by Dr. Dharmendra Kumar (PW 19) vide Exs. P-32, 33, 34 & 35 respectively. Vide medical examination report Ex.P-34, Dr. Dharmendra Kumar (PW 19) noticed that appellant Manoj Giri was capable of committing sexual intercourse, no injury was found over his private part and smegma was missing over glans penis.

9. Appellant Manoj Dubey was also taken into custody, he made a disclosure statement whereupon an iron rod and lachha (silver ornaments) were recovered at his instance vide Ex.P-38. Stained undergarments (langot) of appellant Manoj Giri was seized vide Ex.P-12. The stained sari and stained petticoat of the prosecutrix were seized vide

Ex.P-13. Slides of the vaginal smear of the prosecutrix were also taken. From the other accused other iron rods, one pair of chappal, broken pieces of bangles and part of ear tops were seized and two old cycles and one piece of iron rod were seized from the spot. Seized articles were sent for chemical examination and presence of sperm was confirmed on petticoat and sari.

10 The trial court considered the evidence and came to the conclusion that the accused were properly identified by the prosecutrix and with regard to whom there was sufficient evidence available for conviction held them guilty under Sections 395, 396, 397, 398 and 376 (2)(g) of the IPC. As regards the other accused, the trial court came to the conclusion that the evidence against them was insufficient and contradictory and after the detailed discussion came to the conclusion that it was not possible to convict them mainly on the ground for want of identification. They were thus acquitted.

11. The State did not file any appeal against the acquittal of the other accused. The appellant – Manoj Giri, however, filed an appeal to the High Court. Before us, this appeal has been filed against the said judgment.

12. The first contention of Shri S.P. Singh, the learned counsel for the appellant is that the conviction of the appellant is unjustified in view of the acquittal of the other accused. There is no merit in this contention, since the trial court did not find sufficient evidence against the other accused to infer their guilt. The trial court found sufficient anomaly in the identification and contradictions in the version of the witnesses. We may have been persuaded to take a different view of the evidence but we find that the State did not consider it even worthwhile to file an appeal against the order of the trial court for reasons best known to it.

13. The second contention is that the story of the prosecutrix is not credible for several reasons. According to

the learned counsel for the prosecution, the prosecutrix did not disclose the gang rape to any one till the next morning i.e on 26.01.2004 she disclosed it, first time to the Investigating Officer - Anil Kumar Tiwari. This is not so. She did disclose it to her husband Ganesh when he regained consciousness at the house of Raj Kumar Suryavanshi on 25.01.2004 itself and then in the morning she disclosed it to the Investigating Officer when her statement was recorded. No inference of any lack of credibility can be drawn from this. The resistance of a woman, who has been raped, to announce it to anyone is well known and there is nothing unnatural for her in disclosing all the facts in details, for the first time to a police officer.

14. With regard to the appellant's conviction under Section 396 of the IPC for the murder of Damara Sahu in the case of dacoity, it was contended by the learned counsel for the appellant that since the other four accused who have been

similarly charged were acquitted of the offence of dacoity, it would not be legal and proper to convict the appellant of the said charge. The argument is based on the presupposition that a conviction for dacoity with murder can be maintained only when five or more persons are convicted. Section 396 of the IPC reads as follows:

"Section 396 -Dacoity with Murder: If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or [imprisonment for life] or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine".

15. This contention cannot be upheld in view of the observations made by this Court in **Raj Kumar Alias Raju** versus **State of Uttranchal** (Now Uttarakhand) (2008) 11 SCC 709, which read as follows:

"It is thus clear that for recording conviction of an offence of robbery, there must be five or more persons. In absence of such finding, an accused cannot be convicted for an offence of dacoity. In a given case,

however, it may happen that there may be five or more persons and the factum of five or more persons is either not disputed or is clearly established, but the Court may not be able to record a finding as to identity of all the persons said to have committed dacoity and may not be able to convict them and order their acquittal observing that their identity is not established. In such case, conviction of less than five persons - or even one - can stand. But in absence of such finding, less than five persons cannot be convicted for an offence of dacoity".

16. The observations squarely apply to this case. Domara Sahu was killed in the assault by the five accused. The evidence against the other four was not sufficient to convict them. There is no doubt, the murder was committed during the conjoint commission of dacoity. If properly convicted each one of them were liable to be punished with death vide Section 396 IPC. Since that has not happened the conviction of five persons - or even one - can stand. We have therefore no hesitation in maintaining the conviction of the appellant for the incident in which there

was a gang rape, dacoity and a wanton murder of the hapless father-in-law.

17. It was next contented that there are no injuries on the prosecutrix to infer rape. There is no merit in this contention in view of the fact that the prosecutrix was a married woman and was overpowered by several men before she was raped. She was obviously not in a position to resist and to fight several men, who had threatened her with death in case she cried out. There is, however, ample evidence of rape in view of the forensic report regarding the clothes of the prosecutrix and those of the appellant. The report clearly discloses the presence of semen spots and human sperm on the clothes of the accused including the appellant and the prosecutrix. The entire evidence thus collected along with the proper and clear identification of the accused at identification parade and in the court by the prosecutrix leaves no manner of doubt that conviction

of the appellant is well founded. In the result, we see, no merit in the appeal. It is hereby dismissed.

.....J.
[T.S. Thakur]

.....J.
[S.A. Bobde]

New Delhi,
May 08, 2013



JUDGMENT