

HIGH COURT OF MADHYA PRADESH
BENCH AT INDORE
S.B: HON'BLE SHRI JUSTICE VIVEK RUSIA

CRIMINAL APPEAL NO.1275 of 2013

Radheshyam @ Mama
Vs.
State of Madhya Pradesh

-X-X-X-X-X-X-X-

Shri Ashish Sharma, learned counsel for the appellant.

Shri Abhishek Soni, learned counsel for the respondent/State.

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ORDER

(Delivered on 31/07/2018)

This appeal is filed against the judgment and order dated 03-06-2013, by which the appellant has been convicted by 15th Additional Sessions Judge, Indore under sections 376, 450 and 506 of the IPC and sentenced to undergo 10 years RI with fine of Rs.10,000/-, 5 years RI with fine of Rs.1,000/- and two years RI with fine of Rs.1,000/- with default stipulation respectively.

As per prosecution story, the prosecutrix aged about 14 years studying in class 6th was residing with her parents in village Arjun Baroda District Indore. On 23-06-2010 in the morning father and mother of the prosecutrix being labour went for their job, she was alone inside the house and near about 2:00 PM when she was cleaning the utensils, accused/appellant Radheshyam came inside the house silently and closed the door. He took out the knife and threatened the prosecutrix that if she screamed or make any issue, he would kill her. He removed the clothes of the

prosecutrix and committed rape on her. He closed her mouth by his hand, therefore, she could not shout and after committing rape on her, he left the house and thereafter, the prosecutrix narrated the incident to veenabai PW/04 and further narrated to her parents in the evening when they returned to home. Thereafter, they lodged FIR which was registered as crime No.202/2010 (Ex P/1). After obtaining consent, she was medically examined vide Ex P/4. Spot map Ex P/4 was prepared, scholar register and mark sheet Ex P/9 and P/10 were recovered. The accused was arrested vide Ex P/6 and submitted memo under section 27 of the evidence act vide Ex P/7. Clothes of the accused as well as prosecutrix were recovered and were sent to FSL, Rau district Indore. The police recorded statement of the prosecutrix-Reena Rajore PW-1, Sunita PW-2, Laxminarayan PW-3, Veena PW-4, Rajesh PW-5, Kanta PW-6, Seemabai PW-7 and after completing the investigation, challan was filed under sections 376, 506, 323, 452, 376 (2)(cha), 450 of the IPC and 25 of the Arms Act before the Additional Judicial Magistrate First Class. Since the offence was triable by Sessions Court, therefore, trial was committed to the Sessions Court.

The Sessions Judge framed charges under Section 376, 506, 323, 450 of the IPC.

The appellant abjured his guilt and pleaded for trial.

The prosecution has examined as many as 12 witnesses namely prosecutrix-Reena Rajore PW-1, Sunita PW-2, Laxminarayan PW-3, Veena PW-4, Rajesh PW-5, Kanta PW-6, Seemabai PW-7, Dr A K Verma PW-8, Rakesh Mishra PW-9, Dharmendra Ojha PW-10, Neeraj Sarwan PW-11 and Dr Kalpana Patidar PW-12. The prosecutrix PW-1 who was minor at the time of the

incident narrated the entire incident before the learned Trial Court. Mother of the prosecutrix Sunita was examined as PW-2, who stated that when she returned from the job her neighbor Veena PW-4 gave her information about the entire incident. The father of the prosecutrix Laxminarayan was examined as PW-3. Neighbor Veena was examined as PW-4 but she has turned hostile. Seizure witness PW-5 has also turned hostile. The prosecutrix examined Incharge Head Master Kanta Jivne as PW-6, who came with the scholar register and mark sheet and as per the school record the date of birth of the prosecutrix is 04-09-1998. Independent witness Seemabai examined as PW-7 has turned hostile. Dr AK Verma PW-8 who examined the accused found him capable of committing intercourse. PW-9 Rakesh Mishra has also supported the seizure made by the police. Neeraj Sarwan I.O. was examined as PW-11 who conducted the investigation. DR Kalpana Patidar PW-12 examined the prosecutrix and found that the hymen was not torned and advised for sonography. She has also not found any injury on her internal part of the body. The accused has stated that only because of the enmity and his dispute of property with the mother of the prosecutrix, he has been falsely implicated in the case.

Learned Sessions Judge vide judgment dated 03-06-2013 has acquitted the accused under section 323 of the IPC and found the age of the prosecutrix 14 years at the time of the incident and recorded finding that appellant committed rape on her and convicted him under sections 376, 506 and 450 of the IPC. Hence, the present appeal before this Court.

The learned counsel for the appellant submitted that as per the medical report and the statement of

doctor hymen was not found ruptured, therefore, it cannot be said that any rape was committed on her. The independent witnesses PW-4 Veena and PW-7 Seemabai who were examined as eye witnesses have turned hostile, therefore, the accused has wrongly been convicted. His conviction is based only on his criminal antecedents as 20 cases have been registered against him from 1995 to 2010. One of the independent eye witness namely Teena was not examined before the Court, therefore, the appellant is entitled for acquittal.

Learned Government Advocate in support of the impugned judgment submitted that the Hon'ble Apex Court in the case of **Madan Gopal Kakkad Vs Naval Dubey** reported in **(1992) 3 SCC 204** has held that even slightest penetration of penis into vagina without rupturing the hymen would constitute rape. The testimony of the prosecutrix is corroborated by other evidences and the same has to be placed on higher pedestal which itself is sufficient to convict the accused. Admittedly, she was minor at the time of the incident and could not resist the force of the accused who is having a criminal background, therefore, no leniency is liable to be shown and the appeal be dismissed

The age of the prosecutrix has been proved by mark-sheet as well as scholar register, therefore, there is no dispute that at the time of the incident, she was minor. The learned Trial Court has convicted the appellant on the basis of testimony of the prosecutrix which is not supported by medical evidence and by the independent witnesses. She was medically examined on 23-6-2010 at 11:30 PM in the year 2010. As per prosecution, when the prosecutrix was alone in the house, the present appellant came inside the house

and closed the door from inside and committed rape on her. According to the prosecutrix her friend Teena saw the incident from the gap between the door but such a material witness was not examined by the prosecution. Even her statement under section 161 of the CR.P.C was not recorded. According to the prosecutrix she narrated the entire story to her neighbor Veena but she has also turned hostile. The police has seized vaginal underwear of the prosecutrix and sent to the FSL and as per FSL report (Ex P/16) semen was found on the clothes of accused as well as prosecutrix. Semen was found on underwear of prosecutrix and accused vide Article A and D were not sufficient to seriological examination. Semen was not found on article E i.e. pubic hair of the accused. The Hon'ble Apex Court in the case of **State of Karnataka Vs F. Nataraj** reported in **(2015) 16 SCC 752** has held that it may be true that the rupture of hymen would not occurred in all case of sexual intercourse but it is the burden of the prosecution to extract from the medical examiner, examining the rape victim that the nature of the hymen was such that take remain intact despite intercourse with the girl. The Court must bear in mind that question whether rape committed or not will depend on the facts and circumstances of each case.

Para 11 to 17 of the judgment reads thus:-

"11- The medical examination of the prosecutrix took place on 16.11.2003 and she was examined by Dr. M. Latha (PW5) who was the Lady Medical Officer at the Government Hospital, Hiriyur. Her deposition was that upon examination, no injury was found on the private parts of the prosecutrix and her hymen was intact. She also stated that there were no signs of recent sexual intercourse as the prosecutrix was not subjected to sexual intercourse during the past seven

days from the date of her medical examination and she issued a certificate Ext.P-7 to this effect. But she could not say clearly as to whether the prosecutrix was subjected to sexual intercourse previously or not.

12- It is not elicited by the evidence of PW5 as to what was the nature of the hymen that was found intact in the person of the prosecutrix. Though it may be true that the rupture of the hymen may not occur in all cases of sexual intercourse, but it is the burden of the prosecution to extract from the medical examiner examining a rape victim, that the nature of the hymen was such that it could remain intact despite there being intercourse with the girl on several occasions within a period of 15 to 20 days. The medical examiner has merely mentioned that there were no signs of recent sexual intercourse which is inadequate to establish that sexual intercourse took place before that at all.

13- The appellant State relied upon the case of Madan Gopal Kakkad v. Naval Dubey, (1992) 3 SCC 204, wherein this Court has held that even the slightest penetration of penis into vagina without rupturing the hymen would constitute rape. The appellant contended that the fact that the hymen of the prosecutrix was not ruptured does not lead to the inference that there was no sexual intercourse. But we do not find any weight in this submission as there is no medical evidence even to suggest the slightest of penetration.

14- Learned counsel for the respondent relied upon the case of Radhu v. State of M.P., (2007) 12 SCC 57, wherein this Court had laid down the principle that a conviction of rape can be based on the uncorroborated testimony of the prosecutrix and even the absence of injuries on the private parts of the victim will not falsify the case of rape, but at the same time, the

Courts must bear in mind that the question whether there was rape or not would depend ultimately on the facts and circumstances of each case.

15- Learned counsel for the respondent further relied upon Mohd. Ali v. State of U.P., (2015) 7 SCC 272, wherein this Court recently held as follows:

“30. True it is, the grammar of law permits that the testimony of a prosecutrix can be accepted without any corroboration without material particulars, for she has to be placed on a higher pedestal than an injured witness, but, a pregnant one, when a court, on studied scrutiny of the evidence finds it difficult to accept the version of the prosecutrix, because it is not unrepachable, there is requirement for search of such direct or circumstantial evidence which would lend assurance to her testimony...”

16- In the present case, the gaps in the evidences of the prosecutrix and the medical officer make it highly improbable that sexual intercourse took place. It would be erroneous to rely upon such discrepant testimonies and convict the accused. It can thus be stated with certitude that the solitary evidence of the prosecutrix, in absence of any corroboration by the medical evidence, is not of such quality which can be relied upon. The accused-respondent is, therefore, entitled to benefit of doubt.

17- Thus, in the light of the above discussion, we are of the view that the present appeal is devoid of merits, and we find no grounds to interfere with the judgment passed by the High Court. The appeal is, accordingly, dismissed"

In the present case, only the statement of the

prosecutrix is against the accused and there is no evidence by independent witnesses or by eye witnesses who were present at the time of the incident. As per the statement of the prosecutrix her younger brother and sister were also playing outside the house. The independent witnesses have turned hostile but the Court has relied only on the ground that the accused is having criminal antecedents and under the fear they all have turned hostile. At the time of their evidence in court, the accused was in jail, therefore, he had no occasion to influence or terrorize the witnesses. The prosecutrix made her improved version of evidence before the Court and there is lots of omission and contradiction in her statement. Dr Kalpana Patidar PW-12 did not give any definite opinion of rape. That biochemical report was required but that was not done by the prosecution. Doctor Kalpana Patidar PW-12 has not found any injury on the internal part of the prosecutrix. Hymen was not found torn, therefore, the accused/appellant is entitled for the benefit of doubt. He has also completed more than seven years in jail, hence, the present appeal is allowed

He be released forthwith, if not required in any other offence. Fine amount, if deposited, be returned to him. Order of the Court regarding disposal of the property is maintained.

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(Vivek Rusia)
Judge