

Checked & Verified, 2013

Single Bench (Criminal)

IN THE HIGH COURT OF JUDICATURE AT JABALPUR, MP.

Criminal Appeal No. 2673 /1998.

APPELLANT.
(IN JAIL).

: Pintha Ram @ Pintu,
S/o. Lekh Ram, age 26
years, Occupation
Mechanic, R/o. Mahamaya-
para, Ambikapur PS-
Ambikapur District- Sarguja, MP.

-Versus-

RESPONDENT.

: The State of M.P. through
PS- Ambikapur District-
Sarguja, MP.

17881

12-11-98

Advocate

Na. A. R.

CRIMINAL APPEAL U/S. 374(2) OF THE CODE OF CRIMINAL
PROCEDURE-1973.

HIGH COURT OF CHHATTISGARH : BILASPUR

Single Bench: Hon'ble Shri Manindra Mohan Shrivastava, J.

Criminal Appeal No.2673 of 1998

APPELLANT

Pintha Ram @ Pintu

Versus

RESPONDENT

The State of M.P. (now C.G.)

Present: -

Smt. Savita Tiwari, counsel for the appellant.

Shri Ashish Shukla, Govt. Advocate for the State.

JUDGMENT (Oral)

(Delivered on 17th June, 2015)

1. This appeal is directed against the judgment of conviction and order of sentence dated 7.11.1998 passed by learned 1st Additional Sessions Judge, Ambikapur, Sarguja in Sessions Trial No.273/94, whereby and whereunder the appellant has been held guilty of commission of offence alleged against him and sentenced as described below:-

Conviction	Sentence
u/S. 363 IPC	R.I. for 7 years
u/S. 376 (2) (g) IPC	R.I. for 10 years

2. Prosecution story, as unfolded from the records of the case and impugned judgment, is that FIR in Ex. P-3 was lodged in the Police Station -Ambikapur on 15.7.1992 at 4:25 p.m. by the

prosecutrix (P.W.2) (name is not being disclosed). In the FIR, it was stated by the prosecutrix that on the date of incident, in the intervening night of 14-15th July, 1992, when the prosecutrix, suffering from upset stomach, had gone towards field to respond to call of nature, the appellant alongwith co-accused Sukul arrived the spot. Appellant threatened her by wielding sword, stating that he has committed a murder and she would also be murdered unless she goes alongwith him. Thereafter, she was dragged in the field and then subjected to rape, first by the appellant and thereafter by the other co-accused Sukul. At that time, two associates namely Cherva & Chaitu Gond came in stating that the girl is being searched. Thereafter, she was taken by the appellant towards Luchka valley. In the early morning, she could escape and while returning to Ambikapur, she met with her father and another persons who were searching her. The entire matter was informed to them and then the report was lodged. The prosecutrix was subjected to medical examination by Dr. Rashmi Verma (PW 6), who upon examination, gave her report in Ex. P-6-A stating about prosecutrix having been subjected to sexual intercourse within 24 to 48 hours. In order to ascertain the age of the prosecutrix, the prosecutrix was also subjected to radiological examination and Dr. M.K. Jain (P.W.4), after examination of x-ray report, gave his radiological report in Ex. P-4, stating that the prosecutrix appeared to be aged between 14 to 16 years. Spot map was prepared and after completion of investigation, charge sheet was filed in the Court of Chief Judicial Magistrate, who in turn committed the case to the Court of Sessions for trial. The trial Court on the basis of material contained in the charge sheet, framed charges against the appellant and the co-accused for alleged commission of offence under Section 363 and 376 (2)(g) IPC. The appellant was charged that he kidnapped a minor girl and committed rape alongwith other co-accused. As the

appellant abjured guilt, he was put to trial. in order to prove its case, prosecution examined as many as six witnesses. The appellant was thereafter examined under Section 313 of Cr.P.C in respect of incriminating evidence and circumstances appearing against him in the evidence led by the prosecution. Appellant denied having committed any offence and stated that he has been falsely implicated. No defense witness was examined. Learned trial Court relying upon the evidence of the prosecution held the appellant guilty of commission of offence alleged against him and sentenced as described above.

3. Assailing correctness and validity of the impugned judgment of conviction and order of sentence, learned counsel for the appellant contended that the prosecution has failed to prove its case beyond reasonable doubt. Learned counsel for the appellant submits that there are serious contradictions and omissions in the testimony of the prosecutrix (P.W.2). She has given contradictory statement with regard to the company in which she was, while coming out of her house in the mid-night to respond to call of nature. In the FIR, at one place, she has stated that she had come out with her mother, but she has not remained firm on this statement. It is next contended that the allegation of commission of rape is not corroborated from the medical evidence as there are no external injuries found on the body of the prosecutrix much less around the private parts. Therefore, the allegation that she was caught in the field, thrown there and thereafter, subjected to rape by two persons, is highly improbable and smacks of false implication. It is further argued that mere evidence of recent sexual intercourse does not necessarily lead to allegation of rape. It is argued that other proved circumstances of the case, as revealed from the prosecution evidence itself, render plausible and probable that it was a case of an affair between the appellant and the prosecutrix. The

prosecutrix, of her own, had come out from her house in the night and thereafter, she went away along with the appellant far away from her house towards Luchka Valley and there she was found by her father and other persons. The prosecutrix herself stated in her evidence that while she was being taken by appellant towards Luchka Valley, they met with two persons, but at that time also, she did not raise any alarm nor called for help to get her rescued. This clearly shows that in fact, the prosecutrix had run away with the appellant with whom she was having an affair.

The last contention of learned counsel for the appellant is that the prosecution, in order to prove the age of the prosecutrix, has only come out with the Radiologist's Report and the evidence of Dr. Rashmi Verma (P.W.6). There is no other documentary evidence to prove her age. According to doctor, the age of the prosecutrix has been stated as 14 to 16 years, but as this is only a rough estimation and it has been judicially evolved that the estimation is to be taken with a range of less than or more than 2 years, on the date of commission of offence, it cannot be conclusively stated that the prosecutrix was less than 16 years of age. Therefore, no case of commission of offence under Section 363 IPC is made out and as the prosecutrix was a consenting party, no case of commission of offence under Section 376 (2) (g) IPC is made out and the appellant is entitled to be acquitted.

In the alternative, it is submitted that even if the appellant is held guilty of commission of offence alleged against him, taking into consideration the age of the appellant and that the incident is stated to be of the year 1992 and that the appellant has been facing agony of trial for the last 23 years and he has already undergone more than 5 years and 11 months of imprisonment by now, the sentence part may be reduced to the period already undergone in view of these extraordinary circumstances.

4. Per contra, learned counsel for the State has supported the impugned judgment of conviction and order of sentence and argued that the FIR was promptly lodged by the prosecutrix. It is not a case of broad day light. The incident happened in the midnight. The prosecutrix was taken towards hills and valley by the appellant in the night itself until she escaped and was recovered in the valley by search party including her father. It is next contended that ocular testimony of the prosecutrix that she was subjected to gang rape by two persons is fully corroborated from the medical evidence and the testimony of the doctor, which clearly shows that the prosecutrix was subjected to recent sexual intercourse, containing three fresh tears in the hymen. It is further submitted that the story of consent is neither plausible nor probable, much less raised as a defence by the appellant either during cross-examination of the prosecutrix or in his examination under Section 313 Cr.P.C. In so far as sentence part is concerned, it is submitted that as present is a case of gang rape, the appellant is liable to be punished for a minimum period of 10 years as provided under the law and the only reason of there being long pendency of criminal case, up to the appellate stage before this Court, does not, by itself, constitutes a valid reason to reduce the period of sentence.

5. I have considered the rival submissions made by learned counsel for the parties and perused the records of the sessions trial.

6. FIR in Ex.P-3 has been proved by the prosecution by examining the prosecutrix (P.W.2) and Investigating Officer Ramcharan Verma (P.W.5). The prosecutrix (PW2) in para-3 of her evidence has clearly stated that she had lodged report in the police station. The contents of FIR were read over and she then stated in the Court that she had lodged this report in Ex.P-3. On this part, nothing could be elicited in her cross-examination. The Investigating

Officer Ramcharan Verma (P.W.5) has also stated that the FIR was recorded by the then S.I. K.S. Dwivedi and has identified his signature and writing.

In the FIR, the story stated by the prosecutrix is that when she had gone to respond to call of nature in the midnight, the appellant along with other co-accused came in, she was threatened and then subjected to rape one after the other, first by appellant - Pintha and thereafter, by other accused - Sukul. In her evidence before the Court, the prosecutrix has clearly stated that in the midnight she had come out of her house to respond to call of nature as she was suffering from upset stomach. She has stated that when she was in the field, the appellant and other accused came from behind. The appellant wielded a sword, threatened her that if she raises any alarm, he would kill her. She was caught hold of by her hair and taken to other side of the field. She also deposed that the appellant assured that they will not do anything with her but at the same time disclosed that they are returning after committing murder and they will call her father to arrange bail for them. When the prosecutrix repeatedly requested that she may be released, she was abused and then thrown in the field. Thereafter, she was subjected to rape, first by the appellant- Pintha and after 5 to 7 minutes, by other co-accused Sukul. She has very categorically and emphatically stated in para-2 of her evidence that due to rape committed on her, she had sustained injury. She had further stated that thereafter, she was taken to Mayamaya Hill by the appellant and other co-accused. Other co-accused left them mid-way and thereafter the appellant Pintha carried her towards hill area, towards a village, left his sword in a house and then she was taken towards Raghunathpur on foot. She has further stated that near Raghunathpur, she could somehow manage to escape and reach near Luchka valley where she met with her father who was

searching her alongwith Police. This witness has been subjected to detailed cross examination.

7. At this stage, it would be relevant to examine the submission made by learned counsel for the appellant.

A suggestion was given to the prosecutrix that she had gone alongwith the appellant with her consent towards field and then towards hills. She has stated in para-9 of her statement that while going towards hills, they met with two persons, namely Cherva & Chetu Gond, but she did not disclose regarding the act of the appellant. Therefore, it has been vehemently urged, it is a case of consent because if the prosecutrix was not a consenting party, her natural conduct would have to call for help and rescue and raise alarm by calling persons known to her.

The argument at the first blush appears to be lucrative, but in the backdrop of the circumstances in which the prosecutrix was, it has to be rejected.

The incident took place in the midnight. The prosecutrix has clearly stated that when the appellant and another accused caught hold of her in the field, she was threatened by wielding sword. True it is that the sword has not been recovered from the appellant, it is clear that the prosecutrix, who was a girl of tender age, was caught by two persons in the field and threatened. She had been subjected to trauma of gang rape by two persons. It is not a case of day light or that she was taken by the appellant by crossing busy market or inhabited locality where she had an occasion to raise alarm and save herself. The circumstances, as stated by the prosecutrix in her evidence, are that she was taken away by the appellant in the midnight from field towards hills and valley. She has stated in para-9 of her evidence that she could not say anything to two persons who crossed them because appellant - Pintha told them that they

should take care of their own matter. The cumulative view of all these circumstances renders probable that the prosecutrix, because of threat and having been subjected to gang rape by two persons, was not in a position to offer any resistance.

8. The defence of consent is liable to be rejected for yet another strong reason. According to Dr. M.K. Jain (P.W.4) who conducted radiological examination and who opined that the prosecutrix is aged 14 to 16 years, shows that the prosecutrix was a girl of tender age and not very mature. Learned counsel for the appellant emphasized that the age as stated in the radiological report and the opinion of the doctor is a rough estimation. Relying upon the judgment in the case of **Sandhari Vs. State of M.P.**, Criminal Appeal No.2052/97, decided on 8.1.2014, it has been submitted that the aforesaid rough estimation allows margin of 2 years on either side. Even if the argument of learned counsel for the appellant is accepted, the prosecutrix appears to be of tender age and it cannot be said that she was a mature lady so much so that she was able to contain herself, regain strength and come out of trauma immediately and then start making efforts to rescue herself. Medical examination report of the prosecutrix prepared in Ex.P-6 A by Dr. Rashmi Verma (P.W.6) who examined her, clearly proves that prosecutrix was subjected to vigorous sexual intercourse within 24 to 48 hrs. In the report, it has been clearly stated that as many as three fresh tears on hymen were found by the doctor which were bleeding. The suggestion given that as the prosecutrix was in menses, therefore, bleeding was normal, has been clearly denied by the doctor. This medical evidence is very strong evidence that the prosecutrix was badly ravished by two persons including the appellant.

9. The prosecutrix's evidence is that she somehow managed to escape herself from the appellant- Pintha and rushed towards

Luchka valley in the hills and while attempting to come back Ambikapur, she happened to meet her father who, along with the police team was searching the prosecutrix. The FIR was lodged on the same day at 4:25 p.m. in the evening.

The ocular testimony of the prosecutrix, coupled with the medical evidence, clearly proves beyond reasonable doubt that the prosecutrix was subjected to gang rape including appellant as one of the accused.

10. The submission of learned counsel for the appellant that long pendency of the criminal case, by itself, constitutes an extraordinary circumstances, to reduce the period of sentence of 10 years, has to be rejected in view of the judgment of the Supreme Court in the case of **State of Rajasthan Vs. Vinod Kumar**¹, wherein similar arguments of reduction of sentence below minimum period of sentence of 10 years was rejected, observing thus:

“21. Awarding punishment lesser than the minimum prescribed under Section 376 IPC is an exception to the general rule. Exception clause is to be invoked only in exceptional circumstances where the conditions incorporated in the exception clause itself exist. It is a settled legal proposition that exception clause is always required to be strictly interpreted even if there is a hardship to any individual. Exception is provided with the object of taking it out of the scope of the basic law and what is included in it and what legislature desired to be excluded.

22. The natural presumption in law is that but for the proviso, the enacting part of the section would have

¹ (2012) 6 SCC 770

included the subject-matter of the proviso; the enacting part should be generally given such a construction which would make the exceptions carved out by the proviso necessary and a construction which would make the exceptions unnecessary and redundant should be avoided. Proviso is used to remove special cases from the general enactment and provide for them separately. Proviso may change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable. (Vide *S. Sundaram Pillai v. V.R. Pattabiraman*, *Union of India v. Wood Papers Ltd.*, *Grasim Industries Ltd. v. State of M.P.*, *Laxminarayan R. Bhattad v. State of Maharashtra*, *IRDP v. P.D. Chacko* and *CCE v. Hari Chand Shri Gopal*.)

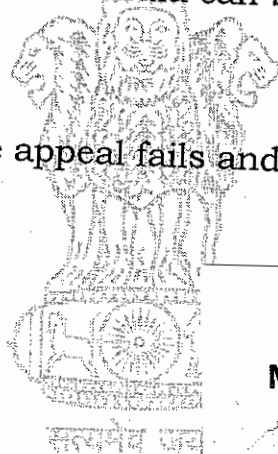
23. Thus, the law on the issue can be summarised to the effect that punishment should always be proportionate/commensurate to the gravity of offence. Religion, race, caste, economic or social status of the accused or victim are not the relevant factors for determining the quantum of punishment. The court has to decide the punishment after considering all aggravating and mitigating factors and the circumstances in which the crime has been committed. Conduct and state of mind of the accused and age of the sexually assaulted victim and the gravity of the criminal act are the factors of paramount importance. The court must exercise its discretion in imposing the punishment objectively considering the facts and circumstances of the case.



24. The power under the proviso is not to be used indiscriminately in a routine, casual and cavalier manner for the reason that an exception clause requires strict interpretation. The legislature introduced the imposition of minimum sentence by amendment in IPC w.e.f. 25-12-1983, therefore, the courts are bound to bear in mind the effect thereof. The court while exercising the discretion in the exception clause has to record "exceptional reasons" for resorting to the proviso. Recording of such reasons is sine qua non for granting the extraordinary relief. What is adequate and special would depend upon several factors and no straitjacket formula can be laid down."

11. In the result, the appeal fails and is hereby dismissed.

Praveen



Sd/-
Manindra Mohan Shrivastava
Judge