

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.670 of 2000

Jhamendra Kumar, son of Mahesh Kumar Mahar, aged 24 years, Student,
Resident of Village Pendakode, Police Station Mohala, District Rajnandgaon,
Madhya Pradesh (now Chhattisgarh)

---- Appellant

versus

State of Madhya Pradesh (now Chhattisgarh)

---- Respondent

For Appellant : Shri Satish Chandra Verma, Advocate
For State/Respondent : Shri Vinod Deshmukh, Deputy Government Advocate

Hon'ble Shri Navin Sinha, Chief Justice
Hon'ble Shri Justice P. Sam Koshy

Judgment on Board

Per Navin Sinha, Chief Justice

16/11/2015

1. The Appellant stands convicted under Section 376(1) I.P.C. to life imprisonment with fine of Rs.10,000/-, failing which he was required to undergo two years further rigorous imprisonment. A sum of Rs. Rs.8,000/- from the fine has been directed to be paid as compensation under Section 357 Cr.P.C. as ordered on 29.2.2000 by the Additional Sessions Judge, Rajnandgaon in Sessions Trial No.115 of 1999.

2. The prosecutrix, aged 22 years at the time of occurrence, was noticed by her mother to be carrying a pregnancy of approximately 4-5 months. The mother then told PW-1, Sunderlal, the father of the prosecutrix. F.I.R. No.98 of 1999, Exhibit P-1, was lodged on 8.5.1999 by PW-1 naming the Appellant @ Munna who was a neighbour, on disclosure by the prosecutrix after he had put to her the names of all the boys in the village that he had dragged her to his house when she was washing dishes by the well and committed rape upon her. She reiterated the name of the Appellant at the

Panchayat, and held his hand in identification.

3. The medical report of the prosecutrix, Exhibit P-4 conducted on 8.5.1999 by PW-7, Dr. Smt. Shail Khare opined that she was mentally retarded, but had developed sexual characteristics, carrying a pregnancy of approximately 7 to 7½ months. The Appellant was taken into custody on 18.5.1999. A plea of false implication because he belonged to a well to do family was taken under Section 313 Cr.P.C. It was denied that she had recognized him at the Panchayat voluntarily and that he had also lodged a police report on 23.4.1999 in a conspiracy to foist the prosecutrix by marriage upon him, marked Exhibit D-2.

4. Learned Counsel for the Appellant submitted that the prosecutrix was mentally retarded and did not possess normal human intelligence capabilities of understanding and speaking. The police during investigation did not take any steps to have her medically examined with regard to the level of mental abnormality, as to whether she was capable of understanding anything or not so as to decipher the extent of reliability with regard to what she may have stated or done either verbally or by signs or gestures. PW-8, Ajay Shankar Tripathi, the Investigating Officer expressly acknowledged that he took no steps for identification of the Appellant during investigation much less any medical ascertainment of the prosecutrix. The Trial Court also did not take any steps to have the victim examined medically to ascertain the level of her mental abnormality. It cannot be said with certainty that she had any level of understanding or ability to communicate either verbally or by signs so as to safely maintain a conviction based on any alleged identification by the prosecutrix at a Panchayat in a serious allegation under Section 376 IPC. In absence of any reliable medical evidence with regard to her level of mental abnormality, there arises a reasonable doubt with regard to her abilities and reliability of

any evidence given by her with regard to identification of the Appellant as the perpetrator and the benefit of doubt has to be given to the Appellant as it cannot be said with certainty that her evidence was completely reliable and convincing.

5. The prosecutrix is alleged to have first told the name of the Appellant to her mother. The latter in turn told her husband PW-1, Sunderlal, who then called a village Panchayat. The information to PW-1, is therefore of hearsay nature. The mother of the prosecutrix, to whom the name of the Appellant is stated to have been first disclosed was therefore an important witness who should have been examined. The prosecution has not assigned any reason for her non-examination which makes the credibility of the prosecution evidence weak and poor.

6. The Trial Court purported to examine PW-2, the prosecutrix as a prosecution witness, but recorded that she was mentally retarded and from the manner in which she gave her replies it was apparent that she did not possess the necessary intelligence and did not understand the importance of oath as also was incapable of fully understanding the questions put to her, because of which the Trial Judge discharged her as unreliable. Therefore, it is doubtful if she was capable of any identification of the Appellant or any other or that she was capable of understanding and explaining the nature of the offence alleged to have been committed upon her. The prosecutrix unable to understand the questions put by the Court did not give any verbal replies. Reliance was placed on (2012) 5 SCC 789 (State of Rajasthan v. Darshan Singh alias Darshan Lal) to submit that the status of the prosecutrix was akin to that of a deaf and dumb witness whose evidence was unreliable relying on Section 119 of the Indian Evidence Act, 1872 (hereinafter referred to as the Evidence Act). Reliance was further placed on (1994) 4 SCC 182 (Meesala Ramakrishan v. State of Andhra

Pradesh) with regard to evidentiary value of evidence given in a sign language. Relying on (2013) 12 SCC 406 (Sujit Biswas v. State of Assam) it was contended that any alleged identification of the Appellant by the prosecutrix holding his hand in a Panchayat, given her mental condition at best may raise suspicion only which could not be the basis for conviction in absence of formal proof by cogent, reliable and convincing evidence.

7. Reliance was also placed on the police report dated 23.4.1999, Exhibit D-2, lodged by the Appellant in support of the plea of false implication as the Appellant belonged to a well to do family. It was next submitted that the Appellant does not deny his presence at the Panchayat on 30.3.1999. The prosecutrix did not voluntarily identify the Appellant at the Panchayat but was literally goaded by PW-1, Sunderlal and others present to identify the Appellant by repeatedly naming him after which she walked up to him and held his hand in identification. His mere presence at the Panchayat therefore cannot be considered as an incriminating factor against him. The prosecution has not established and proved that she understood the question put to her by the Panchas with regard to the identification of the Appellant and then only moved towards him. This becomes important in view of her admitted mental retardation. A direct disclosure was made by the prosecutrix to her mother. Those present in the Panchayat were therefore only hearsay witnesses after it was communicated to them by PW-1, Sunderlal. There were approximately 8-10 persons in the village named Munna. There is no evidence to establish how the prosecutrix was able to distinguish and identify the Appellant alone from other persons named Munna in the village when anyone else of them could have been the perpetrator as it has come in the evidence of the prosecution that she would invariably be alone in the house when her parents went out to earn livelihood or at times would be wandering around in the village. The

possibility therefore cannot be ruled out that the offence may have been committed by any other person of the village named Munna. The alleged extra judicial confession of the Appellant during the Panchayat is of no consequence as it was made under pressure of the persons present in the Panchayat to marry the prosecutrix and cannot be called a voluntary confession much less reliable and convincing to be admissible in evidence. In any event, the confession was retracted when at the subsequent Panchayat on 30.4.1999 any earlier commitment made on 30.3.1999 to marry the victim was resciled from. An involuntary confession cannot be even a corroborative factor for conviction.

8. Learned Counsel for the State submitted that the main defence of the Appellant is the mental retardation of the prosecutrix coupled with her inability to speak and the non-examination of her mother. Repelling the defence, Learned Counsel for the State submitted that the prosecutrix was fully capable of understanding and answering by sign language and by which she disclosed events to her mother, to her father PW-1, Sunderlal and the Investigating Officer Ajay Shankar Tripathi, PW-8. The evidence reveals that her mental retardation was not of a level that she was completely incapable of understanding anything or communicating by sign language. Her evidence may require a closure scrutiny, but cannot be held to be unreliable and unacceptable. PW-1, Sunderlal, the father of the prosecutrix was not a hearsay witness. He had put the name of all the boys in the village to her after which she had named the Appellant. During the Panchayat, the prosecutrix had walked up to the Appellant and held his hand in identification. The Appellant acknowledges his presence at the Panchayat when the prosecutrix identified him. DW-1, Maheshram Meshram and DW-2, Chhayabai, the defence witnesses have also admitted the holding of the Panchayat meeting on 30.3.1999. Reference was also

made to the extra judicial confession by the Appellant during the Panchayat. It was lastly submitted that the evidence of the prosecutrix was fully acceptable under Sections 118 and 119 of the Evidence Act deposing in sign language after understanding questions relying on (2008) 16 SCC 769 (Golla Yelugu Govindu v. State of Andhra Pradesh) and 2008 (5) Supreme 25 (Md. Kalam v. The State of Bihar).

9. We have considered the submissions on behalf of the parties and carefully examined the evidence on record also.

10. The Trial Judge on analysis of evidence has held that the prosecutrix was pregnant. She had identified the Appellant as the perpetrator, the police report, Exhibit D-2 made on 23.4.1999 by the Appellant in support of the plea for false implication was an after thought and did not contain any reference to a monetary demand for the purpose as deposed by the defence witnesses. On this reasoning, the Learned Trial Judge concluded the guilt of the Appellant because of his retraction from the promise of marriage also holding that the absence of the mother of the prosecutrix as a witness was inconsequential.

11. In our opinion, the first question for consideration would be the level of mental abnormality of the prosecutrix. Whether her mental retardation was at an extreme level with no intelligence quotient at all? In Medical Jurisprudence and Toxicology (Practice and Procedure) by Dr. Gupta and Agrawal, mental retardation has been explained as “learning disability” and does not imply any disorder. Learning disability is a condition of arrested or incomplete development of the mind. There is reduced intellectual functioning, together with a diminished ability to adapt to the daily demands of normal life. It can be mild, moderate, severe or profound. In mild mental retardation a person takes longer to learn to talk but can communicate well once he or she knows how to do so. The person is fully independent in self-

care but has problems with reading and writing and is socially immature. He or she may benefit from specialised education plans and would have an intelligent quotient range of 50 to 69. A person with moderate mental retardation is slow in understanding and using language, has only a limited ability to communicate, is a slow learner, is unable to live alone but can get around on own and can take part in simple social activities and will have an intelligent quotient range of 35 to 49. The other levels of mental retardation are not considered relevant for discussion in the facts of the present case. Those with mild and moderate learning disability lead stable lives with their families or others who take care of them.

12. Keeping the aforesaid considerations of Medical Jurisprudence in mind, we find from the evidence of PW-1, Sunderlal that the prosecutrix could wash dishes at the well, she could perform a bit of agricultural work at home and did sweeping also, as deposed by PW-3, Motiram. She was capable of understanding with difficulty and then could speak the concerned words. She was capable of watching TV also, as deposed by PW-1, Sunderlal and would visit the house of neighbours, including that of the Appellant who was also her neighbour, evident from the spot map, Exhibit P-2 proved by PW-5, Banasram, who also deposed that the prosecutrix had shown him the exact place where she was sexually assaulted. PW-4, Omprakash Ramteke has also deposed that when he had gone to the house of PW-1, Sunderlal, the prosecutrix was cooking. It is not the case of the Appellant or the two defence witnesses that the prosecutrix was in such abnormal mental condition that she would roam around in the street unconcerned whether she was properly clothed or not. The Investigating Officer Ajay Shankar Tripathi, PW-8 stated that it took him some time to record the statement of the prosecutrix who would understand by sign language as she did not have normal intelligence. Last but not the least

important, DW-2, Chhayabai has deposed that the prosecutrix was mentally retarded, but had the capacity to recognise people.

13. An analysis of the above evidence with regard to the condition, activities and behaviour of the prosecutrix leaves it in no doubt that she was not possessed of normal human intelligence but because of her mental retardation took time to understand things and answer whether by sign language or slow response verbally. She was not an insane or a lunatic much less an idiot or imbecile. Her learning disability only made her responses slow and she can easily be classified as moderate mental retardation. Her intelligent quotient therefore was between 35-49. This conclusion arrived at by us get fortified from the questions put to her by Court. In response to who was her father she pointed towards PW-1, Sunderlal, who was present in the Court. Likewise, when she was asked if she could speak, she nodded her head positively, indicative of the fact that she understood the question. In response to where her village was, she pointed towards the reverse side from the Court room. She also responded positively to the question if she understood the meaning of the word “mother” by nodding her head in affirmance and also replied by head movement that she had never been to school. On being asked if she had any brother or sister, she raised three fingers to indicate the number three. She nodded her head positively in reply if she understood the difference between truth and falsehood and that one should not speak lies. When she was asked if she could speak she answered in the positive. Her demeanor in the Court by gestures and signs leaves it in no doubt that she was capable of understanding questions put to her though not as quickly as a person of normal intelligence. But, she did understand and replied in her own manner either by a slow response or by a sign language by nodding her head or otherwise.

14. It is therefore apparent that the submission on behalf of the Appellant that in absence of any medical standardisation of her level of mental abnormality, the benefit of doubt should go to the Appellant holding her to be an unreliable witness is unacceptable. The police during investigation, the Trial Judge during the course of Trial could certainly have done better by resorting to appropriate medical examination of the victim. We need not examine the effect of absence of such evidence as from the aforesaid discussion it is more than evident that there is sufficient evidence available on record otherwise with regard to the level of her mental abnormality and the reliability or unreliability of her evidence on basis of the same.

15. The chastity of a woman is her most prized possession. Any attack on the same will remain etched in her mind as also the identity of the perpetrator because she would have enough time to recognize him for identification in the nature and manner of occurrence. We need not consider the issue for identification even in such cases by a lunatic or insane as the prosecutrix does not fall in that category. The fact that there may have been eight to ten persons with the name Munna in the village, including the brother of the Appellant was was also nicknamed as Munna is considered irrelevant in view of the specific evidence of DW-1, Maheshram Meshram, who claimed to be present during the Panchayat on 30.3.1999, that four persons by the name of Munna, alias Somendra, alias Jhamendra (present Appellant), alias Vinod and alias Dharampal were present in the Panchayat. An electric bulb was burning t the place where the Panchayat was taking place. The prosecutrix on being asked walked upto the Appellant and not any of the other persons named Munna present at the Panchayat and held his hand in identification. It must be kept in mind that PW-5, Banasram, who prepared the spot-map, deposed that the prosecutrix had shown him the exact place where the offence had been committed upon her and DW-2,

Chhayabai had deposed that the prosecutrix was capable of recognising people. The Appellant, who was only two years elder to the prosecutrix, has also been found medically fit for sexual intercourse. The spot-map reveals that the well in question was situated in the yard of the house of PW-1, Sunderlal and the house of Neerabai, the grand mother of the Appellant where he resided was located virtually as a neighbour.

16. The first Panchayat was held on 30.3.1999. According to the prosecution, the Appellant and his father asked for one month to consider the suggestion of the Panchayat for marriage between the prosecutrix and the Appellant. The second Panchayat was held on 30.4.1999, when they retracted. In the meantime, on 23.4.1999, Exhibit D-2, the Appellant wrote to the police that he has been falsely implicated for the pregnancy of the prosecutrix as he did not reside in Village Darri but Village Pendakondo with his parents, that the prosecutrix was mentally retarded and would generally wander around. He was being blackmailed for marriage failing which a police report would be lodged against him. It is noticeable that in the complaint there was no reference to the Panchayat held on 30.3.1999 much less any monetary demands made for any false implication in order to coerce him for marriage contrary to the defence being taken subsequently that he was asked to pay compensation of Rs.25,000/-, failing which he would be falsely implicated, as deposed by DW-1, Maheshram Meshram.

17. The violation of the chastity of a woman, as observed earlier which is her more prized possession is not only a grave offence for the individual concerned but also the society at large. The offence gets aggravated when the perpetrator takes advantage of the disability or handicap of the victim. This depraved situation which is taken advantage of by the perpetrator knowingly to forcibly dominate his will over the other not in a position to resist is an act completely abhorrent and unacceptable to any civilised

society.

18. In (2003) 8 SCC 590 (*Tulshidas Kanolkar v. State of Goa*), the prosecutrix was also mentally challenged. Her intelligence quotient was not even 1/3rd of what a normal person has. Signs of pregnancy shocked the parents who were informed in a similar manner by the prosecutrix pointing fingers at the Appellant therein. Charges were framed under Sections 376 and 506(2) IPC. Similar defence of false implication was taken under Section 313 CrPC. Indirectly a case of consent was also pleaded including delay in lodging of FIR. Many persons, who could have thrown light with regard to the disclosure made by the victim about the involvement of the Appellant, were not examined. Conviction followed for ten years and one year respectively with fine. The High Court upheld the conviction but reduced it to seven years under Section 376 IPC. In appeal the Supreme Court declined to interfere with the sentence.

19. Section 118 of the Indian Evidence Act, 1872 provides that all persons are competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. Clearly, from the discussion of the evidence available with regard to the level of mental abnormality of the prosecutrix, she was capable of testifying. Section 119 of the Act provides that a witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court, evidence so given shall be deemed to be oral evidence. The Court may take assistance of an interpreter or a special educator in recording the statement.

20. In *Darshan Singh* (supra), relied upon by the Appellant, the sole

prosecution witness was deaf and dumb. The High Court granted acquittal holding that even her father who acted as an interpreter was not administered any oath. But, it was observed at paragraphs 26 and 28 as follows:

"26. The object of enacting the provisions of Section 119 of the Evidence Act reveals that deaf and dumb persons were earlier contemplated in law as idiots. However, such a view has subsequently been changed for the reason that modern science revealed that persons affected with such calamities are generally found more intelligent, and to be susceptible to far higher culture than one was once supposed. When a deaf and dumb person is examined in the court, the court has to exercise due caution and take care to ascertain before he is examined that he possesses the requisite amount of intelligence and that he understands the nature of an oath. On being satisfied on this, the witness may be administered oath by appropriate means and that also with the assistance of an interpreter. However, in case a person can read and write, it is most desirable to adopt that method being more satisfactory than any sign language. The law requires that there must be a record of signs and not the interpretation of signs.

28. Language is much more than words. Like all other languages, communication by way of signs has some inherent limitations, since it may be difficult to comprehend what the user is attempting to convey. But a dumb person need not be prevented from being a credible and reliable witness merely due to his/her physical disability. Such a person though unable to speak may convey himself through writing, if literate or through signs and gestures, if he is unable to read and write. A case in point is the silent movies which were understood widely because they were able to communicate ideas to people through novel signs and gestures. Emphasised body language and facial expression enabled the audience to comprehend the intended message."

21. Meesala Ramakrishan (supra) is distinguishable on its own facts as it is related to answers given by sign language by nodding head etc. by a person who had suffered burn injuries, but did not suffer from any mental abnormality.

22. Sujit Biswas (supra) relating to circumstantial evidence and that suspicion cannot take place of a proof also has no application to the facts of the present case.

23. Likewise, Golla Yelugu Govindu (supra) and Md. Kalam (supra),

relied upon by the State, both related to the evidence of a child witness. Both have no relevance to the facts of the present case as the prosecutrix is not a child witness.

24. In conclusion, we find no reason to interfere with the conviction of the Appellant, but keeping in mind *Tulshidas Kanolkar (supra)* where the facts were identical to that in the present case, we consider it proper to reduce the sentence from life imprisonment to seven years. But the criminal justice delivery system cannot be accused centric only leaving the victim as a hapless observer. While conviction for offence is in the interest of the Society at large, the victim cannot be left to suffer without any recompense. Section 357 Cr.P.C provides for payment of compensation to the victim at the conclusion of the trial. In (2015) 3 SCC 449 (*Manohar Singh v. State of Rajasthan*) noticing earlier precedents, dwelling upon the rights of the victim and award of proper compensation it has been observed that payment of compensation is now an integral part of sentencing. The Court must give attention not only to the nature of the crime, the prescribed sentence, mitigating and aggravating circumstances to strike just balance in needs of society and fairness to the accused, but also must keep in mind the need to give justice to the victim of crime by grant of adequate compensation and the victims plight cannot be ignored even when a crime goes unpunished for want of adequate evidence. It was observed as follows:

“11. Just compensation to the victim has to be fixed having regard to the medical and other expenses, pain and suffering, loss of earning and other relevant factors. While punishment to the accused is one aspect, determination of just compensation to the victim is the other. At times, evidence is not available in this regard. Some guesswork in such a situation is inevitable. The compensation is payable under section 357 and 357 – a CRPC. While under section 357 CRPC, financial capacity of the accused has to be kept in mind, section 357 – a CRPC under which compensation comes out of the state funds, has to be invoked to make up the requirement of just compensation.”

It would be a travesty of justice if we were to reduce the sentence only in the facts of the case. Keeping in mind the fact that the occurrence is very old, the appeal has remained pending for long, the Appellant has had the scepter of uncertainty in the appeal pending over his head all these years, the victim has also moved forward in years and that the financial capacities of the parties coming from a rural background, we consider it proper to enhance the compensation from Rs.8,000/- to Rs.20,000/- which must be paid to PW-1, Sunderlal, the father of the victim or her mother in case of the formers unavailability for any reason, or any other under whose guardianship the victim may be living, to the satisfaction of the Trial Court after adjusting the amount of Rs.8,000/- already paid. The Court concerned shall ensure compliance within a maximum period of two months, failing which the period of sentence shall stand enhanced to an additional one year of rigorous imprisonment.

25. With the aforesaid modification of the sentence and compensation, the appeal is dismissed. The bail bonds of the Appellant are cancelled and he is directed to surrender forthwith or be taken into custody for serving out the remaining period of sentence.

Sd/-
(Navin Sinha)
CHIEF JUSTICE

Sd/-
(P. Sam Koshy)
JUDGE