

HIGH COURT OF CHHATTISGARH, BILASPUR**CRIMINAL APPEAL NO. 1085 OF 2001**

Rajesh Patel, S/o Shivnath Patel,
aged 21 years, R/o Village- Pirda,
P.S. Tumgaon, Tahsil & District Raipur.

... Appellant**Versus**

State of Chhattisgarh

... Respondent

For Appellant	:	Mr. Malay Kumar Bhaduri, Advocate.
For Respondent-State	:	Mr. U.K.S. Chandel, Panel Lawyer.

Hon'ble Shri Navin Sinha, Chief Justice**Hon'ble Shri Justice P. Sam Koshy****Judgment on Board****Per NAVIN SINHA, C.J.****01/02/2016**

1. The Appellant stands convicted under Section 376 and 506 IPC read with Section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as 'the SC/ST Act') to life imprisonment with fine of Rs. 1000/-. In the event of failure to pay the fine, he was required to undergo one month further rigorous imprisonment and six month rigorous imprisonment under Section 506 IPC, as ordered by the Special Judge, Raipur, in Special Sessions Trial No. 70 of 2001, on 27.9.2001.

2. FIR, Exhibit P-1, was lodged by the Prosecutrix, PW-1, aged about 13½ years on 16.2.2001 with regard to the occurrence dated 14.2.2001 at about 6:00 p.m. in the evening. She was on her terrace. The Appellant was a tenant in the neighboring house and was a student. He came and sexually assaulted her. She did not say anything to anybody for two days out of fear. The medical examination of PW-1, Exhibit P-17, was carried out on 17.2.2001 by PW-12, Doctor Smt. N. Mukherjee, who stated that secondary sexual characteristics were not

fully developed but declined to give any clear opinion with regard to any sexual assault. The medical examination of the Appellant was also done on 14.3.2001, Exhibit P-4, by PW-6, Doctor G.P. Dewangan who found him capable of sexual intercourse but did not find any injuries or scratches on his penis.

3. Learned Counsel for the Appellant submits that there is absolutely no evidence whatsoever with regard to the accusation under the SC/ST Act and neither is there any statement with regard to the applicability of the same in the FIR. It was next submitted that there has been a delay of two days in lodging the FIR. This becomes important in the background of the defence taken by the Appellant of a false implication because PW-3, Parwati Bai, mother of the Prosecutrix, did not wish to repay the loan she had taken from the Appellant. Learned Counsel further submitted that PW-12, Doctor Smt. N. Mukherjee, who conducted the medical examination of the Prosecutrix three days later did not find signs of any injury on her and did not confirm that she had been subjected to sexual intercourse forcibly recently. If the Appellant, who was a full grown male aged about 21 years, allegedly assaulted the Prosecutrix who was barely 13½ years old and could not pass the single finger test also, there should have been some injuries or scratches on his penis. The medical report, Exhibit P-4, states that there was no injury on his person. It was lastly submitted that if the Prosecutrix had suffered injuries as deposed by her mother, PW-3, Parwati Bai, and had taken her for treatment to one Doctor Sahay, the said Doctor was a crucial and important witness whose evidence should have been led by the prosecution. In absence of any evidence of the said Doctor Sahay coupled with the lack of other evidence produced by the prosecution including any forensic evidence with regard to semen or

blood on the underwear of the Prosecutrix, the possibility of false implication cannot be ruled out and the Appellant is entitled to acquittal. Reliance was placed on 1972 (3) SCC 759 (Rahim Beg v. State of U.P.) relying upon in 2001 (2) M.P.L.J. 308 (Shyamlal Mathuralal v. State of M.P.) in support of the submission that the absence of any injuries on the penis of the Appellant falsifies the allegations.

4. Learned Counsel for the State opposing the appeal submitted that the Appellant was examined nearly one month after the occurrence on 14.3.2001. The injuries, if any, may reasonably have healed by then. Mere absence of any confirmatory opinion by PW-12, Doctor Smt. N. Mukherjee whether the Prosecutrix had been subjected to sexual intercourse or not cannot be given finality to the extent of absolving the Appellant. It stands to reason that the Prosecutrix and her parents would not put her to ignominy of ridicule in society associated with loss of reputation without just cause. The Appellant has taken a false defence of wrong implication because of a money dispute. The lone defence witness, DW-1, Shivnath Patel, father of the Appellant, has not mentioned the purpose for which the loan was given and what was the amount of the same. It is a false and frivolous defence. Under Section 313 Cr.P.C., the Appellant despite saying that he wanted to lead evidence, led no further evidence in support of the plea of false implication by reason of the loan by placing any material or evidence with regard to the same.

5. We have considered the submissions on behalf of the parties and perused the evidence on record also.

6. There is no allegation against the Appellant under Section 3(2)(v) of the SC/ST Act. To invoke the provision, there had to be specific accusation that the Appellant was aware of the scheduled caste status

of the Prosecutrix and intentionally assaulted her with knowledge of the same being in a position to dominate her will because of her scheduled caste status to sexually exploit her. No evidence was led by the prosecution in this regard. Neither the FIR nor any prosecution witness has said anything to attract the provisions of the SC/ST Act. The conviction of the Appellant to that extent is therefore held to be unsustainable.

7. The Prosecutrix was a minor aged 13½ years. She was on the terrace at about 6:00 p.m. in the evening. The Appellant, a full grown male aged 21 years, was a tenant in the neighbours house staying as a student. He came on the terrace, accosted the prosecutrix, lifted her skirt, pulled down her underwear and sexually assaulted her. The prosecutrix has stated that he entered her. That is sufficient to constitute rape. Full penetration is not necessary to attract the offence. The fact that PW-12, Doctor Smt N. Mukherjee may not have given any conclusive opinion of rape or that the finger could not penetrate is not considered very relevant in the facts of the case. The two finger theory has not been considered forensically conclusive as observed in (2013) 14 SCC 643 (Lillu v State of Haryana). When a minor aged sixteen to seventeen years was sexually assaulted and the Doctor declined a conclusive opinion and also stated that the tip of one finger was admitted with difficulty, conviction was sustained on basis of all surrounding evidence.

8. The fact that full penetration was not necessary to constitute rape was considered in (1992) 3 SCC 204 (Madan Gopal Kakkad v. Naval Dubey) observing :-

“37. We feel that it would be quite appropriate, in this context, to reproduce the opinion expressed by *Modi in Medical Jurisprudence and Toxicology* (Twenty-first Edition) at page 369 which reads thus:

“Thus to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. *Rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one.*”

9. The delay of two days in lodging the FIR is well explained when the prosecutrix states that she did not tell anyone out of fear as the accused had threatened to kill her in that event. When the pain and swelling increased and she was not able to walk properly because of the injuries caused, her mother PW-3, Parawati Bai noticed the same. Only then the prosecutrix told her the entire story on 16.2.2001 after which the FIR was lodged. Merely because Doctor Sahay, referred to by PW-3, Parwati Bai, mother of the Prosecutrix, has not been examined cannot falsify the entire accusation of the Prosecutrix. There is no justifiable reason why a 13½ year old girl would falsely implicate the Appellant without any rhyme or reason and in the process invite social ridicule for herself and her family in a rural environment for having been sexually violated, a stigma which could have affected her throughout her life including her marriage prospects unless there was an iota of truth behind it. Nothing has been placed before us to doubt the

Prosecutrix evidence in any manner. PW-3, Parwati Bai, the mother of the Prosecutrix has referred to swelling on the private parts of the Prosecutrix. Absence of evidence of Dr. Sahay is considered inconsequential in the nature of the accusation.

10. The fact that in the medical examination of the victim done one month later on 14.3.2001 no injuries may have been found on his penis is of no benefit to the Appellant. Injuries if any may well have healed during this period. In (2001) 6 SCC 71 (State of H.P. v. Gian Chand) the victim was five and half years old. It was observed :-

“15.Slightest penetration of penis into vagina without rupturing the hymen would constitute rape (see *Madan Gopal Kakkad v. Naval Dubey*)..... Secondly, why would the girl or her mother implicate the accused, charging him with rape, if the injury was caused by a fall? There is nothing to draw such an inference, not even a suggestion, to be found on record.So is the case with the absence of external marks of violence on the body of the victim. In case of children who are incapable of offering any resistance external marks of violence may not be found. (See *Modi's Medical Jurisprudence*, 22nd Edn., p. 502.) It is true that marks of external injury have not been found on the person of the accused but that by itself does not negate the prosecution case. Modi has opined (see *Modi*, *ibid*, p. 509) that even in the case of a child victim being ravished by a grown-up person it is not necessary that there should always be marks of injuries on the penis in such cases. Further, it is to be noted that about two days had elapsed between the time of the incident and medical examination of the accused within which time minor injuries, even if caused, might have healed.”

Reliance on Rahim Beg or Shyamlal Mathuralal (*supra*) is therefore not relevant in the facts of the present case.

11. The Appellant has taken a false defence of implication due to the money dispute which he has not been able to establish much less mentioning the amount even. This becomes an incriminating factor against the Appellant.

12. Rape of a minor constitutes a despicable offence and societal interest requires that the offender is brought to book by stern sentence. The occurrence leaves a scar on the individual which may not be erased for her entire life and can have disastrous consequences for the victim. We find no reason why the mother of the victim would have made false accusations and the victim also would have risked her own reputation and ignominy for life in a rural environment unless she had actually suffered the pain.

13. At this stage, Learned Counsel for the Appellant submitted that it was a folly of youth by the Appellant. The sentence is too harsh which may be reconsidered. We have considered the submission and find no merit in it. Merely because the Appellant may have been 21 years of age and after his conviction finding himself helpless seeks remorse by invoking sympathy is no reason for interference. The loss of reputation suffered by the Prosecutrix and the ignominy suffered by her perhaps cannot be compensated. We are therefore not satisfied that merely on basis of sympathy leniency of sentence can be considered. The plea is therefore rejected. Sentencing for child rape was considered in Madan Gopal Kakkad (supra) observing that no sympathy was called for as follows :-

“57. Before parting with the judgment, with deep concern, we may point out that though all sexual assaults on female children are not reported and do not come to light yet there is an alarming and shocking increase of sexual offences committed on children. This is due to the reasons that children are ignorant of the act of rape and are not able to offer resistance and become easy prey for lusty brutes who display the unscrupulous, deceitful and insidious art of luring female children and young girls. Therefore, such offenders who are menace to the civilised society should be mercilessly and inexorably punished in the severest terms.

58. We feel that Judges who bear the Sword of Justice should not hesitate to use that sword with the utmost severity, to the full and to the end if the gravity of the offences so demand.”

14. The appeal is allowed only to the extent indicated and dismissed on other grounds. The bail-bonds of the Appellant are cancelled and he is directed to surrender forthwith and/or be taken into custody for serving out the remaining period of his sentence.

Sd/-
(Navin Sinha)
Chief Justice

Sd/-
(P. Sam Koshy)
Judge

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