

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.38 of 2010

Vishnu Kumar, S/o Kirtan Lal Yadav, aged about 19 years, R/o Village Kuranda, Police Station Baradwar, District Janjgir-Champa, Chhattisgarh

---- Appellant

versus

State of Chhattisgarh, through District Magistrate, Janjgir-Champa, District Janjgir-Champa, Chhattisgarh

---- Respondent

For Appellant	:	Ms. Indira Tripathi, Advocate
For State/Respondent	:	Ms. Madhunisha Singh, Panel Lawyer

Hon'ble Shri Deepak Gupta, Chief Justice

Judgment on Board

18.11.2016

1. This case starkly exemplifies how the poor and downtrodden citizens of this country can be subjugated and forced to submit to the most heinous of crimes without any protest.
2. This appeal by the accused is directed against the judgment dated 31.12.2009 passed by the Additional Sessions Judge, Sakti, Sessions Division Janjgir-Champa in Sessions Trial No.135 of 2009, whereby the accused/Appellant has been held guilty for having committed an offence under Section 376(2)(f) of the Indian Penal Code and sentenced to undergo rigorous imprisonment for 10 years and to pay fine of Rs.500/-, in default of payment of fine, to further undergo rigorous imprisonment for 3 months.
3. The prosecution story is reflected in the First Information Report (Ex.P-2) lodged at the instance of Borbai (PW-1), mother of the victim.
English translation of FIR (Ex.P-2) reads as follows:

“I live in Village Mohgaon. I am engaged in agricultural and cultivation work. Today on Saturday (9.5.2009), at about 4:00 p.m., I was at home. My husband Teejram

Sahu had gone towards *Basti* (locality). My daughter (name withheld), age 6½ years, along with her friends Khushboo and Radha, had gone to see *Barat-Baja* (marriage party) in the vicinity. The marriage party had come to the house of Jyoti Mahant from Village Kurda. After sometime, my daughter's friends Khushboo and Radha came to my house and told me that one *Barati Babu Laika* (Boy) had taken my daughter towards the agricultural fields. Then I, having taken Sakrelheen with me, calling for my daughter, went towards Bichhiya Khar. Then I saw that one boy was committing rape (sexual intercourse) with my daughter in the fields of Awadh Sidar. On seeing me, the boy fled away towards the village. My daughter was bleeding profusely. I shouted loudly that that boy (*Babu Laika*) had committed rape with my daughter and is fleeing. Hearing my cries, villagers Vijay Netam, Santu Sidar, Devbhushan and others caught hold of that boy. On questioning, he revealed his name Vishnu Kumar Yadav, resident of Kurda and accepted having committed rape with my daughter. Thereafter, I along with my daughter and villagers Vijay Netam, Santu Sidar, Devbhushan and others, have come to lodge my report. Kurda resident Vishnu Yadav has committed rape with my daughter. He had given her Rupees ten also. I lodge the report. Action may be taken. On return of my husband to home, I have told him also about the incident. My report has been read over to me. It is written as was told by me.”

4. The allegation in the FIR is crystal clear that the victim, who was only 6½ years old, had gone to see the *Barat* which had come in the village and according to the averments made in the FIR, she was allured from the place taken to the fields and raped. After the FIR was lodged, the

victim was medically examined and the report (Ex.P-25) is as follows:

“She is conscious, co-operative, well oriented & mentally sound. Her secondary sexual characters like axillary hairs, pubic hairs, breast, labia minora & majora are not developed. On external examination oral — her throat is congested & slight bleeding through left last molar teeth. On perineal examination (1) Abrasion over left labia minora 1 o'clock position 2 cm x 0.1 cm (2) Lacerated wound over 10 o'clock position $\frac{1}{2}$ x $\frac{1}{2}$ cm in labia minora (3) Contusion over posterior half from 3 o'clock to 9 o'clock position of labia minora. Her introitus does not admit any finger. Bleeding present through these injuries. Two vaginal smear slide made by use of disposable ear buds under sedation. For age determination she is advised x-ray Rt. Knee jt – Ap, – lat, elbow jt – Ap, – lat & wrist jt – Ap, – lat & referred to CHC Sakti for radiological opinion.

Opinion—Forcible attempt of intercourse may have been done by this girl. All injuries are simple in nature, caused by hard & blunt object within 24 hrs., will heal in 15 days.”

The victim was in great pain and was administered a sedative injection.

5. The police investigated the matter, recorded the statements of the witnesses including the parents of the victim, the victim and her friends and other villagers. Thereafter, challan was filed in Court. Surprisingly, in Court, all the witnesses including the parents of the victim turned hostile. They did not support the prosecution version. The level to which the witnesses have gone to tell lies is apparent from the fact that the child witnesses, i.e., Khushboo, PW-16 and

Radha, PW-17, who are the girls who are stated to have accompanied the victim to see the *Barat* have been tutored to the extent of saying that they even did not know the victim though they belong to the same village. These are not hostile witnesses, but obviously child witnesses, who have been pressurised to say something which is incorrect. These are two small girls who went with the victim. How the occurrence took place is a different matter, but these girls say that they do not know the victim, which is even contrary to the statement of the mother of the victim. Even the statements of the hostile parents is that their daughter along with her two friends had gone to see the *Barat* and that they were running away after picking up the money thrown by the members of the *Barat* and the victim fell down in the fields and sustained the incident.

6. This is a very unusual case and in my judicial experience of 38 years, I have never come across a case of this nature where even the parents of 6½ years old girl who had been subjected to rape turn hostile. It is obvious that they must have been either pressurised or bought over. They have not only turned hostile but have also filed two applications for compounding the offence. It is indeed shocking that an Advocate has signed the applications. Any counsel having any basic knowledge of law should know that the offence of rape is not compoundable and should not prepare or sign such an application. Members of the Bar are also officers of the Court. It is expected that they behave with a certain sense of decorum and should know the basics of law. No counsel having even the basic knowledge of law could sign or draft an application of this nature. In view of the fact that all the witnesses have turned hostile, I am only dealing with the statement of the victim herself.

7. A child witness is inherently honest. A child is basically truthful. Till a

child is exposed to realities of life, he or she remains honest. It is circumstances and our corrupt system which turns honest people dishonest. Since the statement of the child is the most relevant, I am referring to the same in detail. In the opening para of the statement, the child states that she does not recognise the accused. According to her, about 7 months earlier, she along with her friends Khushboo, PW-16 and Radha, PW-17, had gone to see the *Barat*. The *Baratees* were dancing and money was being thrown. She collected some money and ran away and she struck against the boundary of the field and received injuries in her stomach and blood came out. Khushboo, PW-16 and Radha, PW-17 were present at the spot. Victim's mother and grandmother came to the spot and at that time the accused left her and ran away from the spot. She went home and washed the blood which was on her underwear. Then the victim was taken by her mother to Police Station, Sakti and then they went to Janjgir for medical examination. The victim was declared hostile at this stage. Even before she was declared hostile, the 7-year old girl (victim) stated that she had never seen the accused, but later on stated that when her mother came to the spot, the accused left her and ran away. It is more than obvious that the accused was present at the spot. When this victim was cross-examined by the prosecution, she admitted all the suggestions made to her. She admitted that the accused had asked her to accompany her and had told her that he would give her 10 rupees. She admitted that the accused took her to the fields. She also admitted the suggestion that when she was taken to the fields, the accused took off her underwear, made her lie down and committed sexual intercourse with her. She has described everything in great lurid detail and I do not find it necessary to give all the details in this judgment. She in the last portion of her cross-examination also stated that the accused was caught by the villagers

there and then. Thereafter, this 7 years old child (victim) was cross-examined by the counsel for the defence Shri Manoj Agrawal, Advocate. When she was being cross-examined, she admitted whatever suggestion was put by Shri Manoj Agrawal, Advocate. She now again stated that she was collecting money which was being thrown in the *Barat* and she ran away after picking up a 10-rupee note. Another suggestion has been put to her that she does not know who took her towards the fields, which means that she herself was not going towards the fields but somebody had taken her away towards the fields. She also admitted the suggestion that she received injuries when she struck against the boundary of the fields. Another suggestion was put to her that she ran away because the people playing music were objecting to her picking up the money and they made her run away from the spot.

8. It would be pertinent to mention that this child witness at this stage voluntarily stated that she is making the statements as has been asked to do by Advocate Shri Manoj Agrawal. Thereafter, on the suggestion of Shri Manoj Agrawal, Advocate, she stated that she had seen the accused for the first time in the Court and she had never seen him earlier. Paragraph 6 of her statement in cross-examination by the counsel for the accused reads as follows:

“It is correct that the accused who was present in Court did not insert his penis into my private part. In my examination-in-chief, I have stated that the accused inserted his penis into my private part and that statement is correct. In cross-examination, I have stated at the asking of the counsel that the accused had not inserted his penis into my private part and that statement is incorrect.”

9. This settles the matter beyond any doubt because this witness has

clearly stated what is the truth and the truth is that the accused had committed rape with her. The truth as emanating from the statement of tender girl is shocking. She has only been subjected to rape, but her own family members have not provided any mental support to her.

10. I may also refer to the medical examination in detail. Dr. (Smt.) Anita Shrivastava, who examined the victim, was examined as PW-15 and the statement of the doctor fully corroborates the version of the victim as set out in paragraph 6 of the statement extracted hereinabove. Merely because all other witnesses have turned hostile and even the victim has been influenced to give a wrong statement is not sufficient in this case to acquit the accused. One cannot even imagine the trauma which the child victim in the present case must be undergoing. This 6½ years old girl was subjected to the most heinous of crime and then she was not even supported by her parents. It is obvious that for reasons of poverty they had agreed to withdraw the case and settle the matter with the accused. These matters cannot be permitted to be settled. The Trial Court was fully justified in convicting the accused only on the basis of that portion of the statement of the victim which inspires confidence.
11. Other than deciding the case there are very many other important and crucial issues which arise in the matter. The first is how the statement of a child witness should be recorded. It is not sufficient to hold proceedings in camera only, especially when the statement of a child victim of 6½ years is being recorded. The child must be made comfortable by the Presiding Officer of the Court. In such cases, the Judge should preferably not sit on the dais and should come down from the dais, intermingle with the child witness and ensure that the child is comfortable and states the truth.
12. The role of any Judge or Court is always to search for the truth. The

words “सत्यमेव जयते” are part of the National Emblem of our country. If justice and truth are to prevail sometimes decision will have to be taken where strict rule of evidence need not be followed.

- 13.** It is the duty of all the Presiding Officers of the Court dealing with such offences including offences under the Protection of Children from Sexual Offences Act, 2012 (henceforth 'the Protection Act') to ensure that children freely give evidence in Court. It is to deal with such like eventualities that the Legislature had to intervene for protection of the child and the Protection Act was enacted. Though this Act does not have retrospective effect I am only referring to the provisions of this Act for guiding Judicial Officers now dealing with offences under the Protection Act. Section 36 of the Protection Act provides that the Special Court shall ensure that the child is not exposed in any way to the accused at the time of recording of the evidence while at the time same ensuring that the accused is in a position to hear the statement of the child witness and communicate with his Advocate. The purpose behind this is to ensure that the child is free of any trauma of seeing the person who has committed a ghastly offence on the child. A 6½ years old child who has been sexually abused merely on seeing the offender would be scared of telling the truth and in a case like the present one, where the parents have sold their honour to the perpetrator of the crime, one cannot even imagine what mental trauma the child would be undergoing. In such a case, it is the duty of the Court to ensure that the child is first assured about the child's safety and then only the statement should be recorded. If necessary, the statement may be recorded after 3-4 hours or on the next day, but it is the duty of the Judge to ensure that the child is comfortable and is free of any influence of any side either the parents or the accused while making the statement. The danger is that a child witness can easily be influenced to tell lies by the persons who have control over the

child. No doubt, a child witness is a competent witness under Section 118 of the Evidence Act, if the child can understand the questions put to her. The law is well settled that if the witness is a child then her evidence, as a matter of prudence, should be scrutinised closely. It is not the law that if testimony of the child witness is reliable then also it must be rejected. The law is only that the statement of a child witness should be evaluated more carefully and with great circumspection. The reason for this is that a child witness is susceptible and amenable to be influenced by family members and others under whose care and guidance she lives. At the same time, we must remember that children are honest. They are not dishonest. A child would normally tell the truth unless he or she is influenced or forced by others to tell lies. The reason why the evidence of a child witness has to be scrutinised closely is that a child cannot live independently and is dependent on the others. She can be easily influenced by others who have control over her to make a statement in a particular fashion. It is a rule of prudence and caution and not a rule of evidence that the statement of a child witness should be scrutinised carefully. Therefore, it is incumbent upon the Presiding Officer of the Court to ensure that the child is made comfortable.

- 14.** When a small child is to depose, the Presiding Officer can offer toys, sweets and befriend the child before recording the statement. If necessary, the Judge can even get out of his robes and wear ordinary clothes and sit along with the child witness before recording statement in such cases. The child must not feel that he or she is in a majestic place. The majesty of the Court will not be lowered because a Presiding Officer gets down from his dais or changes his dress to make the child comfortable. This will in fact enhance the majesty of law. The quest for truth is more important than majesty and in this process, if the Judicial Officer has to make few sacrifices, it should not

be a problem. It is not only a part of his job but it is his or her duty to do so.

15. Another aspect of the matter is the role of the Bar. The Bar and Bench are, as often said, the two wheels of the chariot of justice and if justice is to be achieved, they must move in unison. Members of the Bar are also officers of the Court. No doubt, they owe a duty to their clients and they must perform their duty, but no part of their duty to their clients empowers them to tutor any witness and tell them what to say. In this case, I have no reason to doubt the statement of the victim (PW-2) that whatever she has stated in the Court was at the behest of Shri Manoj Agrawal, Advocate. This conduct on his behalf is unacceptable and reprehensible.
16. A copy of this judgment shall be sent to the Chhattisgarh State Bar Council, which shall take action against Shri Manoj Agrawal, Advocate after giving him due notice and hearing as provided under the Advocates Act and the rules framed thereunder. The State Bar Council shall submit a report to this Court within six months from the date of receipt of a copy of this judgment. I am refraining from initiating criminal action against Shri Manoj Agrawal, Advocate even though *prima facie* I am of the view that he is guilty of a very serious offence of fabricating false evidence, but I do hope that the State Bar Council will perform its duty and take necessary action in the matter.
17. A copy of this judgment be circulated to all the Judicial Officers in the State.
18. The appeal is dismissed.

Sd/-

(Deepak Gupta)
CHIEF JUSTICE