

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 1661 of 2000**

Dhiraj Singh son of Behar Singh aged about 22 years R/o Sonumuda Navapara, Raigarh M.P. (now Chhattisgarh)

---- Appellant

Versus

The State of M. P. (now Chhattisgarh), Through the District Magistrate, Raigarh M.P. (now Chhattisgarh)

---- Respondent

AND**Criminal Appeal No. 1687 of 2000**

Kamal Kumar Verma S/o Jai Prakash Verma aged about 45 years Residence of Turkapara, District Raigarh M.P. (now Chhattisgarh)

---- Appellant

Versus

State of M. P. (Now Chhattisgarh)

---- Respondent

For Appellants :	Smt. Indira Tripathi, Advocate
For Respondent/State :	Shri Lav Sharma, Panel Lawyer

Hon'ble Shri Justice Rajendra Chandra Singh Samant**Judgment on Board****01/03/2017**

1. Both the appeals have arisen out of a common judgment passed in Sessions Trial No.85 of 1998 by the First Additional Sessions Judge, Raigarh on 28.6.2000 convicting the Appellants in both the appeals for the offence punishable under Section 376 (2)(g) IPC and sentenced

them to undergo rigorous imprisonment for 10 years along with fine of Rs.500/- each, with default stipulations.

2. The case of the prosecution in brief is this, that prosecutrix (PW6) (name withheld) and her friend Mayawati (PW13) came to Raigarh from their village Bade Hardi without informing their parents. Age of the prosecutrix on the date of incident was 13 years. On arrival at Raigarh, both of them were on way to the residence of sister of Mayawati (PW13) who resided in Madhubanpara at Raigarh, when they met with Vijaydas (since deceased). Vijaydas took them to Tara Studio where both the girls were photographed. Then all of them had some snacks in a hotel. At about 8.00 pm in the night, on pretext of taking the prosecutrix and her friend to their destination, Vijaydas and Dukalu Ram Sidar took them to a field nearby the pond. Vijaydas raped the prosecutrix and Dukalu Ram Sidar at the same time took Mayawati (PW13) in another field and raped with her. After this incident, while they were coming back they were stopped by five boys and on their threatening, Vijaydas and Dukalu Ram Sidar fled from the spot. One of the boys i.e. Sukhdeo and another was Dhiraj. Both of them took prosecutrix (PW6) and her friend Mayawati (PW13) towards the field. Dhiraj took the prosecutrix (PW6) separately and committed rape with her and Sukhdeo took Mayawati (PW13) separately on the field and forcefully committed rape with her. After this incident, prosecutrix (PW6) and her friend Mayawati (PW13) were brought and left in the bus-stand and from there somehow, they reached to the residence of Anju (PW4) i.e. sister of Mayawati (PW13). Later on, prosecutrix (PW6) came to the Police Station, Raigarh for lodging the First Information Report vide

Exhibit P/11.

3. Investigation was conducted. Prosecutrix was medically examined by Dr. (Smt.) Arti Nande (PW17) vide report Exhibit P/24 which was positive for sexual intercourse. Ossification test of prosecutrix was conducted by Dr. M.D. Joshi (PW5) vide his report Exhibit P/8. He opined that age of the prosecutrix (PW6) was between 15 to 16 years. He also examined Appellant Dhiraj Singh and Sukhdeo vide Exhibits P/9 and P/10 about their competence to indulge in sexual intercourse and gave positive report. Some articles were seized from accused Vijaydas vide Exhibits P/1 and P/2. Underwear of Appellant Dhiraj Singh was seized vide Exhibit P/3. Undergarment of the prosecutrix was seized vide Exhibit P/14. Vaginal slides prepared by Dr.(Smt.) Arti Nande (PW17) were seized vide Exhibit P/5. In proof of age, photocopy of mark-sheet of the prosecutrix was seized vide Exhibit P/18(c). Photographs of the prosecutrix (PW6) and her friend Mayawati (PW13) were seized vide Exhibits P/12, P/13 and P/14. Statement of the prosecutrix under Section 164 CrPC was recorded on 4.4.1998 in which she stated that accused Kamal Kumar Verma had committed rape with her. On completion of the investigation, both the Appellants and co-accused Vijaydas were charge-sheeted.

4. Trial Court framed charges under Section 376 (2)(g) IPC against the Appellants and co-accused Vijaydas. On denial of charges, prosecution has examined as many as 17 witnesses. On examination under Section 313 CrPC, Appellants in both the cases denied all the incriminating evidence against them, pleaded innocence and false

implication. One witness was examined in defence. Impugned judgment was passed, by which Appellants in both the cases have been convicted and sentenced as aforementioned. Co-accused Vijaydas expired during the pendency of trial, hence, the case against him was abated.

5. The grounds of appeal in both the cases are that there had been no evidence with the prosecution to hold conviction against the Appellants. Judgment of conviction and order of sentence passed by the trial Court is not based on legal admissible evidence and the Appellants have been falsely implicated in the case. Therefore, Appellants are entitled for acquittal.

6. Learned Counsel for the Appellants submits that the statement of the main witness i.e. prosecutrix (PW6) does not inspire confidence. Statement of Mayawati (PW13) does not disclose anything about the incident which took place with the prosecutrix. Statements of other prosecution witnesses are not reliable as well as they do not specifically allege anything against the Appellants. In Criminal Appeal No.1687 of 2000, it is argued that Appellant Kamal Kumar Verma has falsely been implicated at a later stage. His name was not mentioned in the FIR Exhibit P/11 and neither any statement was given against him in by the prosecutrix which was recorded under Section 161 CrPC. Later, his name was mentioned in the statement of the prosecutrix recorded under Section 164 CrPC with a purpose. Further it is submitted that it was a single case which has been split into two cases. The other case was registered on the basis of FIR lodged by Mayawati (PW13). The

trial Court convicted the accused persons in a parallel case. The appeal of those Appellants namely, Sukhdeo and Dukalu Ram Sidar has been decided by this Court on 23.1.2017 in Criminal Appeal Nos.997 of 2000 and 1597 of 2000, in which both the Appellants have been acquitted. The facts in both the cases are same, hence, for this reason, the Appellants are also entitled for acquittal.

7. Learned Counsel for the State/Respondent has opposed the grounds in appeal and arguments submitted on behalf the Appellants in both the cases. It is submitted that prosecution has successfully proved the case against both the Appellants beyond all reasonable doubt and the impugned judgment cannot be interfered with.

8. Considering the material on record and the arguments submitted by both the sides the question in this appeal is, whether the conviction against the Appellants is supported with the evidence of prosecution and has been proved beyond all reasonable doubt?

9. The main witness i.e. prosecutrix (PW6) has stated, that on the date of incident i.e. 11.3.1998, after arriving at Raigarh with her friend Mayawati (PW13), they met with Vijaydas who took them to Badal Mahal where he gave them some snacks and locked them in a room. Later on, Vijay Das took them on a rikshaw to go to the place of photographer. At the photographer's place, they were photographed. She was again called inside the photo studio. She was not willing to go inside but she was forced to do so and then photographer forcefully committed sexual intercourse with her. After this incident, Vijaydas took both the them on a cycle to a hotel, where had some snacks. They also

went to Gopi Talkies but the Talkies was closed at that time. Then, both of them were taken towards the field where Vijaydas had committed sexual intercourse with her and Dukalu had committed sexual intercourse with her friend Mayawati (PW13). After this incident, while they were coming back, they were stopped by five boys and on their threatening, Vijaydas and Dukalu Ram Sidar fled from the spot. Amongst those boys, one was Sukhdeo and another was Dhiraj. Both of them took the prosecutrix (PW6) and her friend Mayawati (PW13) towards the field. Dhiraj took the prosecutrix (PW6) separately and committed rape with her and Sukhdeo took Mayawati (PW13) separately in the field and forcefully committed rape with her. Thereafter, both the boys left the prosecutrix and her friend Mayawati (PW13) to the Bus stand from where they reached the residence of sister of Mayawati and then came to the Police Station for lodging the FIR (Exhibit P/11).

10. In cross-examination, prosecutrix (PW6) has denied that she and Mayawati (PW13) came from their home after having a quarrel. She admitted that Mayawati (PW13) knew the place of residence of her sister. Further, she admitted that she and her friend went alongwith Vijaydas to Badal Mahal without any objection. Then they also went to Photo Studio and stayed there for about one hour. She admitted that both of them went to Gopi Talkies, had some snacks in a hotel and stayed there for about half an hour. This is an improvement in her statement before the Court that Vijaydas took them to Badal Mahal and locked them inside. Her statement before the Court was, that she was not willing to go to the Photographer's place but she was forcefully

photographed. This is also an improved statement and this statement is negated by her statement in admission and cross-examination. She admitted that she had numerous opportunities to raise alarm, but she and her friend did not raise any alarm. She has denied the suggestion that Appellants have been falsely implicated. Similarly, the statement about the incident inside the Photo Studio, though improved during the investigation, is clearly a development from her previous stand that she took while recording the FIR and statement under Section 164 CrPC. Further, she admitted that if she and her friend would have wanted, they could have reached the place of sister of her friend by hiring a rickshaw or auto.

11. The other important witness Mayawati (PW13) has stated similarly about their arrival at Raigarh and then being accompanied by a person who took them to Badal Mahal. She has not recognized the person who took them to Badal Mahal and thereafter to a shop of photographer. She has neither narrated of any incident having taken place in the Photographer's shop nor she has narrated about the incident of rape in a field nearby the pond at the first instance. She has stated that Dukalu and Vijaydas took them near a pond where Dhiraj and Sukhdeo took them in their charge. After that, both of them, were left in the bus stand from where they arrived at the Police Station. In the Police Station, she found her father. Then, she stated that Dukalu and Vijaydas had committed sexual intercourse with her. Later on, Vijaydas also committed sexual intercourse with her friend i.e. prosecutrix. Father of the prosecutrix was also present in the Police Station.

12. Mayawati (PW13) in her cross-examination has admitted that she knew the way to the residence of her sister in Madhubanpara at Raigarh. She and prosecutrix had been on way to Madhubanpara and arrived near Rajmahal from where the road straightway went to Madhubanpara. Further, she admitted that she cannot recognize the person who had committed sexual intercourse in the field nearby the pond because it was dark.

13. Radheshyam (PW2), father of prosecutrix (PW6) has stated he came to Raigarh for search of his daughter. He came to the Police Station where he found Basant Patel, Vijaydas and Dukalu. On their interrogation, he came to know about the incident that his daughter was raped by the Appellants. Later on, prosecutrix (PW6) and Mayawati (PW13) also informed him about the incident. In cross-examination, there is no such statement so as to contradict his statement in his examination-in-chief. In total, his statement is completely hearsay. The information received on interrogation from the accused persons is not admissible in evidence but the information given by the prosecutrix (PW6) and Mayawati (PW13) may have some relevance if statements of both the witnesses are found to be trustworthy.

14. Damrudhar (PW12), father of Mayawati has stated that his daughter and the prosecutrix (PW6) left the village without informing anybody. He came to Raigarh in search of them. When he was sitting in the Police Station, he saw his daughter and prosecutrix coming there in a auto rikshaw. Both of them told about their activities in Raigarh but they did not inform about the incident of rape. He was declared hostile.

15. Anju (PW4) sister of Mayawati has stated that Mayawati (PW13) and prosecutrix (PW6) came to her residence and asked her to take them to the Police Station. Then she sent both of them to the Police Station in an auto rickshaw. No statement has been given by her regarding any incident of rape with the prosecutrix (PW6) and Mayawati (PW13).

16. After recording the FIR (Exhibit P/11), prosecutrix (PW6) was medically examined by Dr. (Smt.) Arti Nande (PW17) on 12.3.1998. On the basis of findings of inspecting the person of prosecutrix, she opined that sexual intercourse had taken place with her vide report Exhibit P/24. In cross-examination, she admitted that she did not found any injury on the body of the prosecutrix (PW6) and also admitted that in case of resistance during sexual intercourse, there is likelihood of sustaining injury on body. Further, she stated that she cannot opine whether the sexual intercourse with prosecutrix took place without her consent. Thus, the finding of the medical examination is positive only to the extent that prosecutrix (PW6) was subjected to sexual intercourse. On the basis of opinion of this witness, such finding cannot be given that the act of sexual intercourse was forceful and without consent of the prosecutrix. Such finding can be arrived at only on the basis of the evidence of prosecutrix (PW6) which has been examined and shall be further examined.

17. The age of the prosecutrix (PW6) is material in this case. Dr. M.D. Joshi (PW5) has conducted ossification test of the prosecutrix for determination of her age. On the basis of X-Ray test, he has opined

vide Exhibit P/8 that age of the prosecutrix was between 15-16 years. In cross-examination, he has admitted that there is a margin of error in the finding which can be three years either way.

18. Statement of Radheshyam (PW2) regarding the age of the prosecutrix is, that her daughter was aged about 13 years on the date of incident. In cross-examination, he has admitted that he does not remember the exact date of birth of prosecutrix. He stated that his marriage took place 19-20 years before. The prosecutrix was born after 3-4 years of his marriage and prosecutrix is his eldest daughter. Considering this statement, it is clear that Radheshyam (PW2) has stated about the age of prosecutrix just on the basis of assumption and he is unable to state about her exact date of birth.

19. Sukhmati Gupta (PW15) has been examined to prove the entry in the school register regarding date of birth of the prosecutrix. On the basis of entry in the school admission register, she stated that date of birth of the prosecutrix (PW6) is 21.9.1985. In cross-examination, she has stated that she is posted in that school since 8.12.1995 and the entry in school register was not made by her. She could not make any specific statement regarding that on what basis the entry of date of birth was made in the register.

20. The evidence of prosecution regarding the age of the prosecutrix is discrepant. On the one hand, prosecution has relied on the evidence of school admission register and on the other hand, placed reliance on the report of ossification test. The evidence of school admission register cannot be accepted as conclusive evidence because other details

regarding the entry of date of birth and the basis on which it was recorded in the school admission register and the person informing about the same are not available. The evidence of Sukhmati Gupta (PW15) has simply produced the register in her possession before the Court and was unable to answer the questions put to her by the defence in this respect. It is the duty of the prosecution to prove its case beyond all reasonable doubt. The age of the prosecutrix (PW6) on the date of incident had been below 16 years had to be specifically proved by the prosecution but the prosecution has failed to do so.

21. It appears that the date of incident is 11.3.1998 and on the relevant date, provision of rape defined under Section 375 IPC provided, that in case of sexual intercourse with a woman below the age of 16 years, her consent would be immaterial. Thus, according to that provision, the age of consent was above 16 years. In these state of things especially when prosecution has failed to prove that the age of prosecutrix was below 16 years, her competency to give consent becomes material and can be considered if the circumstances in the evidence presents the case in such manner.

22. The other witnesses examined by the prosecution, namely, Shyamlal Patel (PW1), Ranglal (PW7), Meetsingh (PW8) and Manohar (PW11) are witnesses of investigating procedure and there is no need to consider the statements given by them. The evidence regarding Test Identification Parade of Appellant Kamal Kumar Verma has relevance in this case. M.K. Donge (PW9), Executive Magistrate has stated that he conducted the Test Identification Parade in jail at Raigarh where

Appellant Kamal Kumar Verma was made to stand amongst nine other persons and he was identified by the prosecutrix (PW6) and Mayawati (PW13). Memorandum (Exhibit P/17) was recorded in this regard. In cross-examination, his statement has remained unrebutted. There is nothing in his deposition to suggest that the identification was not conducted in compliance of Section 9 of the Indian Evidence Act. Witnesses to the Test Identification Parade are Lootanram Dewangan (PW10) and Janakram (PW14). They have not made any statement in support of the prosecution.

23. Rajendra Kumar (DW1) has been examined for defence of Appellant- Kamal Kumar Verma. He has stated the the Photo Studio of Appellant- Kamal Kumar Verma is styled as 'New Photo Studio'. This evidence has been brought to contradict the statement of the prosecutrix (PW6) who stated that she and her friend were taken to Prabhat Photo Studio, whose proprietor was Kamal Kumar Verma.

24. Considering all the facts and circumstances of the case, it is apparent that on the basis of evidence of prosecution, the prosecutrix (PW6) and her friend Mayawati (PW13) came to Raigarh after some quarrel in her house without informing anybody. On their arrival at Raigarh, their destination was the house of Anju (PW4) sister of Mayawati and they knew the way to her residence. Both of them willfully opted to go with Vijaydas (since deceased) and in his company, both of them went to the Photo Studio and thereafter to the hotel for having some snacks and to Gopi Talkies. Further, they also went to the field nearby the pond and as alleged, where prosecutrix (PW6) was raped by

Vijaydas. Thereafter, on arrival of other boys, Vijaydas and Dukalu fled from the spot and then the prosecutrix (PW6) was raped by Appellant-Dhiraj. As per the development during investigation and also brought in the evidence before the Court, prosecutrix (PW6) was also raped by Appellant- Kamal Kumar Verma in the Photo Studio at Raigarh.

25. Considering the narration about the series of events, it seems that prosecutrix (PW6) and Mayawati (PW13) had number of opportunities to apprise the people around them about their plight of being forcefully taken and incident that took place with them. But none of the opportunity was availed by them. On the contrary, it appears that prosecutrix (PW6) and Mayawati (PW13) accompanied Vijaydas and Dukalu and others on their own freewill without ever raising any objection and seemingly not to be in any trouble for all the time. The statement about forceful sexual intercourse has not been made with emphasis and not supported by the medical evidence. Thus, the statements of these witnesses are full of discrepancies, omissions, contradictions and improvements which do not inspire confidence in any manner and cannot be made a basis for conviction. Apart from that, this was certainly not a case of gang rape. Even if the allegation against the Appellants in both the case are taken as it is, then the first incident of rape took place in the afternoon of 11.3.1998 at Photo Studio of Appellant- Kamal Kumar Verma and later on, the second incident of rape took place in the field nearby the pond at about 8.00 pm in the night. Both are two different incidents. The incident of gang rape has to be covered under the *Explanation* to Section 376 IPC.

26. Further the evidence adduced by the prosecution cannot be regarded as trustworthy for the reasons mentioned above. Hence, in conclusion the finding is given that the conviction of Appellants in both the cases is against the facts, circumstances and law, which are liable to be set-aside. Therefore, both the appeals are allowed. Impugned judgment against the Appellants is hereby set-aside. Appellants are on bail. Their bail bonds shall remain operative for a period of six months in view of the provisions of Section 437-A of the CrPC.

Sd/-

(Rajendra Chandra Singh Samant)
Judge