

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.502 of 2003

Siya Ram, S/o Dukalu, aged 20 years, Calculation Agriculture, R/o Village Achhoti,
P.S. Kurud, Distt. Dhamtari (C.G.)

---- Appellant

Versus

State of Chhattisgarh, Through P.S. Kurud, Distt. Dhamtari (C.G.)

---- Respondent

For Appellant:	Miss Nirupama Bajpai, Advocate.
For Respondent/State:	Mr. Dilman Rati Minj, Deputy Govt. Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

17/03/2018

1. This criminal appeal is directed against the judgment of conviction recorded for offence under Section 376 of the Indian Penal Code and sentence awarded i.e. RI for ten years and fine of Rs.1,000/- and in default of payment of fine further RI for one year, by the convicted accused.
2. Case of the prosecution as unfolded during the course of trial is as under: -
 - 2.1) Jageshwar (PW-3) – father of the prosecutrix lodged FIR on 28-11-2001 (Ex.P-3) stating that prior to seven months from 26-10-2001 at 5 p.m. the appellant threatened her daughter / prosecutrix and took her to the courtyard and committed rape on her. It was further stated that on the said date, she was minor and thereafter, the appellant committed sexual intercourse repeatedly by which she became pregnant and was carrying pregnancy of seven months on the date of FIR which was informed to him and thereafter, the meeting of his community was convened and the matter was enquired and FIR is being lodged.
 - 2.2) Police Station Kurud registered offence under Sections 376 and 506 of the IPC against the appellant herein and spot map Ex.P-2 was prepared by the

investigating officer. Nazri naksha was also prepared by the Patwari vide Ex.P-3. The accused/appellant was sent for medical examination vide Ex.P-5 and he was medically examined by Dr. V.K. Pandey (PW-10) in which he has opined that the accused was capable of performing sexual intercourse. The prosecutrix was also sent for medical examination vide Ex.P-6 and she was medically examined by Dr. (Mrs.) A. Tripathi (PW-9) in which she has opined that the prosecutrix was carrying pregnancy of eight months. Attendance register Ex.P-4 was produced stating the date of birth of the prosecutrix to be 5-6-1986. The jurisdictional police produced the charge-sheet in which the accused person abjured the guilt and entered into defence. Charges under Sections 376 and 506 Part-II of the IPC were framed against the appellant.

2.3) The prosecution examined as many as ten witnesses in support of its case and exhibited eleven documents, whereas the defence examined Sukhram (DW-1) and Bhikham (DW-2) in support of its case. The trial Court after appreciation of oral and documentary evidence on record, convicted the appellant herein and sentenced in the aforesaid manner finding inter alia that the accused is guilty of committing sexual intercourse with the prosecutrix who was below 16 years on the date of offence. Questioning the said conviction and sentence, this appeal has been preferred.

3. Miss Nirupama Bajpai, learned counsel appearing for the appellant, would submit that the judgment of conviction recorded and sentence awarded is unsustainable and bad in law. She would further submit that admittedly, the prosecutrix (PW-1) is a dumb witness, but she has not been examined in accordance with the provisions contained in Section 119 of the Indian Evidence Act, 1872 (for short, 'the Evidence Act') and her mother Surja Bai (PW-2) was appointed as interpreter to which she was interested to get the appellant convicted and it is natural for a mother to be interested in case of

her daughter (PW-1) being raped, therefore, the testimony of the prosecutrix (PW-1) cannot be relied upon to convict the appellant for offence under Section 376 of the IPC. She would finally submit that even otherwise, date of birth of the prosecutrix has not been proved beyond doubt, as only a teacher from the school to prove Ex.P-4 attendance register has been examined and as such the source of entering the date of birth is not proved beyond doubt. Therefore, the impugned conviction and sentence awarded deserve to be set aside.

4. Mr. Dilman Rati Minj, learned Deputy Govt. Advocate appearing for the State/ respondent would support the impugned judgment of conviction and sentence and submit that it is well merited and the prosecution has been able to bring home the offence and the accused appellant has rightly been convicted for the aforesaid offence.
5. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also gone through the record with utmost circumspection.
6. The question for consideration would be, whether the prosecution has been able to prove the offence under Section 376 of the IPC beyond reasonable doubt, against the appellant.
7. PW-1 is the prosecutrix. Undisputedly, she is a dumb witness. She is able to hear loud voice and talks by signs. The Court appointed her mother Surja Bai (PW-2) as interpreter and Surja Bai (PW-2) was administered oath and in the language of interpreter (PW-2), in Hindi, the statement of the prosecutrix (PW-1) was recorded.
8. Section 118 of the Evidence Act deals with the competency of a witness. By virtue of this provision, all persons are competent to testify unless the Court considers that because of tender years, extreme old age, disease whether of body or mind, or any other cause of the same kind they are prevented from

understanding questions put to them or from giving rational answers. All grounds of incompetency have been swept away by this provision. Thus, the competency of witnesses is the rule and their incompetency is an exception. The sole test is whether the witness has sufficient intelligence to depose or whether he can appreciate the duty of speaking truth.

9. Section 119 of the Evidence Act provides for witnesses who are unable to communicate verbally and states as under: -

“119. Witness unable to communicate verbally.—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:

Provided that if the witness is unable to communicate verbally, the Court shall take the assistance of an interpreter or a special educator in recording the statement, and such statement shall be videographed.”

10. The aforesaid provision clearly provides that 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 be with the assistance of an interpreter. The Supreme Court in the matter of **State of Rajasthan v. Darshan Singh alias Darshan Lal**¹ has clearly held that in case the witness can read and write, it is most desirable to adopt that method being more satisfactory than any sign language. It was further held that the law required that there must be a record of signs and not the interpretation of signs and also held as under: -

“18. ... However, in case a person can read and write, it is most desirable to adopt that method being more satisfactory than

1 AIR 2012 SC 1973

any sign language. The law required that there must be a record of signs and not the interpretation of signs.

20. 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. To sum up, a deaf and dumb person is a competent witness. If in the opinion of the Court, oath can be administered to him/her, it should be so done. Such a witness, if able to read and write, it is desirable to record his statement giving him questions in writing and seeking answers in writing. In case the witness is not able to read and write, his statement can be recorded in sign language with the aid of interpreter, if found necessary. In case the interpreter is provided, he should be a person of the same surrounding but should not have any interest in the case and he should be administered oath.

22. In the instant case, there is sufficient material on record that Geeta (PW.16) was able to read and write and this fact stood proved in the trial court when she wrote the telephone number of her father. We fail to understand as to why her statement could not be recorded in writing, i.e., she could have been given the questions in writing and an opportunity to reply the same in writing.

23. Be that as it may, her statement had been recorded with the help of her father as an interpreter, who for the reasons given by the High Court, being an interested witness who had assisted during the trial, investigation and was examined without administering oath, made the evidence unreliable. In such a fact-

situation, the High Court has rightly given the benefit of doubt and acquitted the respondent.”

11. From the aforesaid decision, it is quite clear that a dumb witness must be administered oath by appropriate means or with the help of the assistance of the interpreter and there must be record of signs and not interpretation of signs and interpreter must not be the interested person and such statement must be video-graphed.
12. Reverting to statement of the prosecutrix (PW-1), she has been examined to convict the appellant herein. She being a dumb witness, her statement has been interpreted by Surja Bai (PW-2) – mother of the prosecutrix and alleged interpreter. A careful perusal of the statement of the prosecutrix (PW-1) shows that the prosecutrix was only informed to speak truth and to translate the signs correctly. The learned trial Court did not record the signs made by the prosecutrix in answer to the questions put to her and also the manner in which the prosecutrix was made to understand by the interpreter. The learned trial Court appears to have recorded only the interpretation of signs/meaning of such signs which in my considered opinion complete non-compliance of the provisions contained in Section 119 of the Evidence Act and the principles of law laid down by the Supreme Court in **Darshan Singh's** case (supra) in which it has already been held that there must be a record of signs. Her statement has also not been video-graphed as per the proviso to Section 119 of the Evidence Act. Not only this, though Surja Bai (PW-2) being mother of the prosecutrix (PW-1) was familiar with the prosecutrix, but she being the mother of the prosecutrix, is naturally interested with the case of the prosecution and it is highly improbable that she will speak the truth and also for the reason that she has also been examined as PW-2 and that makes the evidence of the prosecutrix (PW-1) unreliable. Thus, the record of such signs made by the prosecutrix (PW-1), dumb witness, must have been maintained by the learned trial Court as held by the Supreme Court in **Darshan Singh's**

case (supra). In absence of such record, the statement of the prosecutrix (PW-1) alone is not worth reliance for conviction of the accused for an offence of rape.

13. There is one more reason for not upholding the judgment of conviction. In order to hold that the prosecutrix (PW-1) was minor on the date of offence, document Ex.P-4 attendance register has been placed and marked as Ex.P-4. Ex.P-4 records the date of birth of the prosecutrix as 5-6-1986. In order to prove Ex.P-4, Pachkor (PW-5) – Assistant Teacher has been examined. He has simply stated that Ex.P-4 is the attendance register in which date of birth of the prosecutrix is recorded as 5-6-1986. In the same breath, he has stated that entry has been made by Head Master Duryodhan Singh Kamalwanshi, but he has not been examined. By virtue of Section 35 of the Evidence Act, the attendance register being the entry made in performance of duty, is clearly admissible. But the question is what is the evidentiary value of the said document. The Supreme Court in the matter of **Birad Mal Singhvi v. Anand Purohit**² has held that the date of birth mentioned in the scholars' register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. The same is the legal proposition reiterated by the Supreme Court in the matter of **Narbada Devi Gupta v. Birendra Kumar Jaiswal**³ in which it has been held that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the “evidence of those persons who can vouchsafe for the truth of the facts in issue”. The proposition of law laid down in **Birad Mal Singhvi** (supra) and **Narbada Devi Gupta** (supra) has been reiterated and followed by the Supreme Court in **Alamelu and another v. State, Represented by Inspector of Police**⁴ clearly holding as under: -

² 1988 (Supp) SCC 604

³ (2003) 8 SCC 745

⁴ AIR 2011 SC 715

“40. In our opinion, the aforesaid burden of proof has not been discharged by the prosecution. The father says nothing about the transfer certificate in his evidence. The Headmaster has not been examined at all. Therefore, the entry in the transfer certificate cannot be relied upon to definitely fix the age of the girl.”

14. In the instant case, undisputedly, entry of date of birth of the prosecutrix in *dakhil kharij* register was made by Head Master Duryodhan Singh Kamalwanshi, who has not been examined though he is available and was posted in the same school from where the attendance register Ex.P-4 has been produced. No reason has been assigned for not examining Duryodhan Singh Kamalwanshi, Head Master.
15. Apart from this, neither mother of the prosecutrix Surja Bai (PW-2) nor father of the prosecutrix Jageshwar (PW-3) has stated the date of birth of the prosecutrix to be 5-6-1986. There is no other evidence reliable forthcoming on the record to confirm the date of birth of the prosecutrix. As such, on the aforesaid ground also, it cannot be held that the prosecutrix was minor on the date of offence.
16. Apart from this, there is inordinate delay in lodging the FIR, as the offence is said to have been committed eight months prior to the date of lodging the FIR i.e. 28-11-2001 and no plausible explanation has been offered by the prosecution in lodging the FIR. Only when the prosecutrix became pregnant, their communication meeting took place and the FIR was lodged.
17. Thus, examining the matter from any of the angles, it cannot be held that the prosecution has been able to bring home the offence beyond reasonable doubt. Evidence recorded is not sufficient to bring home the offence i.e. particularly rape and the prosecutrix being minor on the date of offence.
18. As a fallout and consequence of the aforesaid legal analysis, the appeal is allowed. Impugned judgment dated 21-2-2003 passed by the Additional Sessions Judge, Dhamtari in Sessions Trial No.33/2002 convicting and

sentencing the appellant for the offence under Section 376 of the IPC is hereby set aside. The accused / appellant is acquitted of the said charge levelled against him. He is reported to be on bail. He need not surrender. However, his bail bonds shall remain in operation for a period of six months as per the provisions contained in Section 437-A of the CrPC.

Sd/-
(Sanjay K. Agrawal)
Judge

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