

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 496 of 2014

1. Surendra Singh @ Nanku, Aged about 24 years, S/o. Nohar Singh,
By caste Gond, R/o. Murma (Farikapani)
2. Mahendra Kumar, Aged about 24 years, S/o. Ramlal, By caste
Gond, R/o. Kasra (Gaontiyapara)

Both Thana Patna, District Koriya (C.G.)

---- Appellants

Versus

State of Chhattisgarh through Police Station Patna, District Koriya,
Chhattisgarh

---- Respondent

For the Appellants :- Mr. Atanu Ghosh, appears under
instruction of Mr. Ashok Kumar
Shukla, Advocate

For the Respondent :- Mr. Suryakant Mishra, Panel Lawyer

Hon'ble Shri Justice Manindra Mohan Shrivastava
Hon'ble Smt. Justice Vimla Singh Kapoor,

Judgement on Board By
Manindra Mohan Shrivastava, J.

16.04.2019

1. This appeal is directed against the impugned judgment of
conviction and order of sentence dated 05.05.2014 passed By
the Additional Sessions Judge (FTC), Baikunthpur, in Sessions
Trial No. 04/2013, wherein and whereunder, the appellants have

been held guilty for commission of offence under Sections 376 D IPC, Section 6 of the Protection of Childrens from Sexual Offences Act, 2012 and sentenced to undergo rigorous imprisonment for 20 years and to pay fine of Rs. 5000/- under Section 376 D IPC and Rigorous imprisonment for 10 years and to pay fine of Rs. 5000/- under Section 6 of the Protection of Childrens from Sexual Offences Act, 2012 with default stipulations.

2. The prosecution story, as is unfolded from the record of the case and the impugned judgment is that the prosecutrix (PW-1) (name is not being disclosed) had gone to attend a marriage in the house of one Deendayal on 06.05.2013. After attending the marriage, when she was coming back to her house in the midnight, the appellants obstructed her on the way and caught hold of her and, thereafter, she was subjected to rape. The prosecutrix (PW-1) informed this fact to her parents and thereafter she was taken to the Police Station next morning for lodging FIR (Ex.P-1). The prosecutrix (PW-1) was subjected to medical examination. The clothes of the prosecutrix (PW-1) were seized. As the allegations were against the appellants, they were also taken into custody and their clothes were also seized. The investigation eventually culminated in filing of a charge sheet against the appellants for alleged commission of offence of gang rape punishable under Section 376 D IPC as also under Section 6 of the Protection of Children from Sexual Offences Act on the allegation of having committed aggravated

sexual assault on the minor prosecutrix (PW-1). Learned trial Court framed charges. The appellants abjured their guilt and were therefore, put to trial.

3. During trial the prosecution examined as many as 9 witnesses including the prosecutrix (PW-1) herself. In their 313 CrPC statement the appellants stated that they have not committed the offence and they have been falsely implicated. In order to lay credence to their defence story that the appellants have stated that in the night where the prosecutrix (PW-1) was seen with a boy named Pradeep and they had raised objection, they were falsely implicated, a solitary defence witness was also examined.
4. Learned trial Court however, relying upon the evidence of the prosecutrix and disbelieving the defence version, held the appellants guilty of commission of offence of gang rape and sentenced as described above.
5. Assailing legality and validity of impugned judgment of conviction and order of sentence, learned counsel for the appellants would argue that the evidence of prosecutrix (PW-1) does not inspire confidence because it suffers from material contradictions and omissions. Further submission is that the manner in which the incident is said to have happened and that the prosecutrix was traveling in the midnight, itself, is highly improbable. Learned counsel for the appellants would argue that according to the prosecutrix(PW-1), she was accompanied by her friend Rajkumari (PW-3) but the evidence of Rajkumari

(PW-3) that she was also present with the prosecutrix is doubtful because of complete omission in her diary statement Ex.D-3 regarding she being present at the time of incident. Further submission is that even according to the prosecutrix (PW-1), at the time of alleged commission of offence, she was in the company of two other ladies but they have also not been examined by the prosecution. Next submission of learned counsel for the appellants is that, though, the prosecutrix (PW-1) alleged that she was subjected to gang rape, the medical evidence does not support the prosecution case inasmuch as no injury has been found on any part of the body of the prosecutrix including her private part.

6. As far as appellant Mahendra is concerned, additional submission has been made that involvement of Mahendra in the alleged commission of offence is liable to be disbelieved because neither in the FIR nor in the diary statement of the prosecutrix (PW-1), it has been alleged that Mahendra had actually committed the offence and only allegation is that when he attempted to catch hold of the prosecutrix, the prosecutrix somehow escaped and ran away. Learned counsel for the appellants would argue that the evidence of the prosecutrix has been recorded treating her as minor therefore, the Court should have first satisfied itself that the prosecutrix was able to understand the question and also to ensure that she was not tutored. It is also argued that no ossification test was conducted to prove that the prosecutrix was minor and reliance placed on

school record and the oral evidence itself is flawed. He would next submit that the defence story as elicited in the cross examination of the prosecution witnesses is corroborated from the evidence of the prosecutrix herself that in the night, the appellants had objected to a girl and a boy seen in the night. In support of his submission, learned counsel for the appellants placed reliance in the matter of **Alamelu and another v. State represented by Inspector of Police 2011(2) SCC 385, K. Venkateshwarlu v. State of Andhra Pradesh 2012 CrLJ 4388, Radhu v. State of Madhya Pradesh, JT 2007 (11) SCC 91 and Joseph S/o. Kooveli Poulo V. State Of Kerala AIR 2000 SC 1608.**

7. On the other hand, learned State counsel, supporting the judgment of conviction and order of sentence, would argue that the conviction of the appellants is founded on reliable testimony of prosecutrix (PW-1), a minor, who has clearly stated in her deposition that she was caught hold of by the appellants when she was returning from the house of Deendayal and then she was ravished. It is next submitted that the defence has not been able to bring anything on record as to why the prosecutrix would implicate the accused/appellants in a false case. It is next submitted that the law does not require that in all cases the prosecution case of rape should necessarily be supported from the medical evidence. It is next submitted that if the evidence of the prosecutrix(PW-1) is otherwise reliable, it can be relied upon without seeking any independent corroboration either

from any other witnesses or from any medical evidence. Lastly, it is submitted that as far as Mahendra is concerned, the prosecutrix (PW-1) has emphatically stated that she was subjected to rape by Mahendra also which is corroborated from the evidence of Rajkumar (PW-3).

8. We have heard learned counsel for the parties and perused the record.
9. The FIR has been lodged by the prosecutrix (PW-1) herself in the concerned Police Station at 12.30 PM on 07.05.2013. According to the FIR, the incident happened in the midnight around 2.30 PM. The prosecutrix (PW-1) has deposed that when she returned home, she informed the incident to her father, mother and her brother-in-laws Ramesh Toppo and Dharampal, thereafter they had gone to Police Station and report was lodged (Ex.P-1). We find that the incident happened in the midnight and report was lodged in the police station. Therefore, we find that the report cannot be said to be unduly delayed so as to create doubt over the prosecution story only on this count.
10. In the FIR (Ex.P-1), it has been recorded that on 06.05.2013, when the prosecutrix (PW-1) was returning her home after attending the marriage of her cousin, at about 2.30 in the night, she was stopped by appellants Nanku and Mahendra. Appellant Nanku caught hold of her and she was dragged on one side, she tried to escape and raised alarm, but the appellants

threatened to assault. Thereafter, she was taken to nearby field and first Nanku raped her and when she started feeling thirsty, Nanku went to fetch water and the prosecutrix requested Mahendra to take her to the house. Mahendra went ahead to some extent, on the way, he also started making attempt to commit rape asking the prosecutrix (PW-1) to remove her cloth. The prosecutrix (PW-1) on this pretext rescued herself and escaped, though, she was chased by him. In the house, her brother-in-laws Rajesh Toppo and Dharam Lal Uraon had also come then, she informed regarding incident to her father Sukhlal and mother Rajendri Bai.

11. In her Court statement, the prosecutrix(PW-1) has narrated the incident by stating that on 06.05.2013 she had gone to attend the marriage of one Pinky, her cousin. After attending the marriage, in the night, when she was returning with Rajkumari, near the field of one Gendi Gond, appellants arrived and started catching them up. As they could not catch hold of Rajkumari, she escaped but then the prosecutrix was caught, her mouth was gagged and she was taken towards the field of one Isron. Thereafter, she was subjected to rape by Nanku. When she started fainting and asked for water, Nanku went away to fetch water, leaving her in the clutches of Mahendra. When she requested Mahendra to take her to the house, Mahendra assured her and while taking her to the house, she somehow escaped. According to her, the incident was reported by the prosecutrix (PW-1) to her parents where her brother-in-laws

Rajesh Toppo and Dharamlal were present and then they lodged FIR on the next day in the Police station. She has been subjected to cross examination and confronted with her case diary statement Ex.D-1 in which certain contradictions have been elicited. We have gone through the case diary statement Ex.D-1, there are some discrepancies with regard to minute detail of the manner in which she was intercepted and caught hold of her. But from the prosecutrix evidence with regard to she being intercepted, caught hold of and subjected to rape by appellant Nanku is not shaken. There is admission on her part that because of fear of mother and father, she has disclosed the incident. However, upon being asked by the Court, she clearly stated that as the incident had actually happened she disclosed. The prosecutrix has stated in her cross examination that she kept sitting with Rajkumar, Bijli and Soni in front of the house of her aunt and it was 2.30 AM in the night and they had spent about a quarter of an hour there. She has also stated that Bijli and Soni had come along with her and that while coming from the house of Deendayal, house of Bijli and Soni would reach first and thereafter, her own house. Suggestions that the appellants have not committed any act has been denied.

12. The evidence of the prosecutrix (PW-1) with regard to place and time of incident and the manner in which she was subjected to rape has substantially remained coherent and we do not find any material contradictions and omissions with regard to what

she has narrated while lodging the FIR and giving her diary statement Ex.D-1.

13. Rajkumari (PW-3) is another important prosecution witness. According to the prosecutrix while she was coming back, Rajkumari was also with her. Rajkumari has deposed in her Court statement regarding the incident similar to what has been stated by the prosecutrix herself. She has stated that she somehow escaped and ran away from the spot. According to her, because of threat administered to her, she had not disclosed the incident. We, however, find that in her cross examination, she has been confronted with her diary statement Ex.D-3 in which there is complete omission with regard to she having accompanied the prosecutrix (PW-1) in the night till both of them were caught by the appellants. According to her diary statement, the incident was told to her by the prosecutrix (PW-1) next day in the morning regarding what happened with her and how she was raped. Therefore, because of this important omission on the part of the witness Rajkumar, it is doubtful whether she was actually present at the time when the prosecutrix was intercepted and caught hold of by the appellants. But then her evidence to the extent that she was informed by the prosecutrix in the morning itself that the incident of rape by the appellants had happened is reliable. That means next morning the prosecutrix has disclosed the incident to Rajkumari.

14. It is not a case where the appellants have come out with the story of defence that the prosecutrix has consensual sex and later on, they being falsely implicated. The defence which has been taken, as emerges from the cross-examination of prosecution witnesses and the evidence is that the appellants were coming in the night and the prosecutrix was seen with a boy named Pradeep which was objected to by them therefore, the prosecutrix falsely implicated. The suggestion given by the defence to the prosecutrix has been denied. The sole defence witness DW-1, though states that in the night at about 2.30 AM, a boy was found talking to a girl but she could not be identified. He states that he had seen the appellants going behind them and scolding also. In the cross-examination, he admits that he has not lodged any report nor could identify anyone because it was dark in the night. He admits that because there was a crowd, he does not know who was talking to whom which shows that the place of incident according to him was the marriage place.

Except this, there is no clinching evidence on record led by the defence to establish that on the date of incident, the prosecutrix was seen with some other boy and upon being objected to and scolded by the appellants, she falsely implicated the appellants.

15. A doubt on the prosecution story and the evidence of the prosecution has been raised on the submission that according to the prosecutrix herself, she was sitting in the house of her

aunt along with Bijli, Soni, while coming back to her house along with Rajkumar and the time of prosecutrix sitting in the house of her aunt is the same as the time which has been stated by her with regard to the incident of rape. We have carefully scrutinized the evidence of the prosecutrix and other evidence and find that what prosecutrix has stated is that while coming back from the house of Deendayal after attending the marriage, she along with Rakumari, had stayed in the house of Soni and Bijli for about half an hour to 45 minutes. However, in the evidence of the prosecutrix herself, it has stated that while approaching her house, the place where she met Soni and Bijli is earlier to her house, meaning thereby that house is somewhere between the house of the prosecutrix and the place of marriage. Therefore, the mere fact that while coming back, the prosecutrix had stayed in the house of her aunt and met with Bijli and Soni, does not by itself, render her story improbable or false. It is not that the prosecutrix has stated regarding the presence of Bijli and Soni at the place of incident. Therefore, their non-examination would not make the evidence of prosecutrix doubtful.

16. Though, learned counsel for the appellants has empathetically argued that the medical evidence brought on record by the prosecution does not support the prosecution case, as no injuries have been found on the private part of the prosecutrix, in our considered opinion, it is not the requirement of law that in all cases the prosecutrix statement of she having been raped

must unnecessarily be corroborated from the medical evidence. The prosecutrix herself is a girl of tender age and she was caught in the night by two persons and when she attempted for escape and tried for help she was threatened of assault. The commission of offence of rape followed only thereafter. In this back ground, the evidence of the prosecutrix cannot be discarded only because that no injuries were found in her private part. There is nothing in the evidence of the prosecutrix to show that she had sustained any injuries.

17. The decisions cited by the learned counsel for the appellants with regard to the prosecution case being doubtful are essentially those where in the peculiar circumstances and upon scrutiny of the evidence of the prosecutrix, the Court found that the prosecutrix statement suffered from such discrepancy which render her statement doubtful. In the present case, having gone through the evidence of the prosecutrix, we have recorded findings that though there are certain minor contradictions, there are no major contradiction, omission with regard to the time, place and manner of offence. More over, when the defence of the appellants is not found to be trustworthy, in the absence of there being motive on the part of the prosecutrix falsely implicating, the evidence of the prosecutrix has to be relied upon.

18. As far as appellant Mahendra is concerned, we find that in the FIR as well as in the diary statement both, the role alleged against Mahendra is that after Nanku committed rape on the

prosecutrix and when the prosecutrix requested Mahendra to take her home, Mahendra while taking her along with him, also attempted to commit rape on her but prosecutrix somehow escaped. In her Court statement, PW-1 has stated regarding role played by Mahendra. She has stated that first Nanku committed rape and thereafter Mahendra also committed rape. But then we find that the prosecutrix has not stated regarding commission of rape on her by Mahendra either while lodging FIR or even in the case diary statement Ex.D-1. The allegation as contained in the FIR and in the case diary statement that appellant Mahendra attempted to rape but the prosecutrix somewhere escaped. Therefore, the prosecutrix evidence as against Mahendra that she was raped by Mahendra becomes doubtful. But then, it is proved that Mahendra was very much present at the time of commission of rape on the prosecutrix by Nanku. He aided in commission of offence, though, himself did not commit the offence of rape on the prosecutrix.

19. Learned counsel for the appellants has also argued, relying upon decision in **2012 Cr.L.J 4388**, to buttress his submission that the prosecutrix being minor, and her evidence having being taken without administering oath, the learned trial court ought to have first verified regarding her ability to understand and to ensure that she was not tutored. In the present case, the prosecutrix appears to be aged about 14 years as stated by her. It is not that she is of so tender age that it was necessary to inquire about her ability to understand. The evidence of the

prosecutrix, as we have seen is quite coherent and there is nothing to infer that either she was not able to understand the question put to her or that she appeared to be tutored.

20. As far as the findings of the trial Court with regard to the age of the prosecutrix is concerned, we find that in order to come to the conclusion that the prosecutrix was below 18 years of age, the trial Court has taken into consideration the evidence of the prosecutrix and her father both, in addition to documentary evidence in the form of entry made in the school record. The prosecutrix (PW-1) has stated that at the time of incident she was studying in class-7th. She has categorically declared her date of birth is 12.08.1999. In her cross-examination, it has been elicited that she was declaring her date of birth as per entry made in the mark sheet. It has also been elicited that she does not remember the date of birth of her other three brother and sister nor in which year her parents were married.

21. PW-2 father of the prosecutrix has also categorically declared the age of the prosecutrix as 12.08.1999. In his cross-examination, it has been elicited that he had four issues, he was married in the year 1986 and four issues were born one after the other with a gap of 1 to 2 years. It has also been elicited that the prosecutrix was born out of his second wedlock. The prosecution has come out with the documentary evidence in the form of entry made in the school record as proved by the headmaster PW-5, who had produced the relevant record in which at entry No. 61 dated 1st July 2004, the

age of the prosecutrix was recorded as 12 August 1999. He, however, admits in his cross-examination these entries were not made by him nor the record clearly state as to what basis these entries were made. He also admits that the signature of the guardian are not on the record. We find that during the examination of this witness a prayer was made before the Court for calling the relevant records of birth register and later on, relevant birth register of Primary School of Goutiyapara was also summoned in the Court.

22. Kailash Nath Kushwaha (PW-5) has deposed in the Court that the declaration with regard to the age was given by the father of the prosecutrix and he has also signed the register Ex.P-15, photocopy of the same placed on record as Ex.P-15 C. In the cross-examination, it has been elicited those signatures were not made in his presence.

The father of the prosecutrix has clearly stated in paragraph-6 of his evidence that when he got his daughter Singeet admitted in class-1 in village Khasra, he got her date of birth registered in the school.

23. From the aforesaid evidence, particularly the oral evidence of the prosecutrix and her father and that the entry regarding date of birth in the school register were made on the basis of the declaration given by the father of the prosecutrix as stated by PW-2, the father which evidence has remained controverted, there is no manner of doubt that the prosecution has proved

that the prosecutrix date of birth was 12.08.1999. It is therefore, apparent that on the date of commission of offence the prosecutrix was around 14 years of age.

24. We find, that In the present case, the prosecutrix, a minor was raped by appellant Nanku, though, the prosecution story of Mahendra actually committing rape appears to be doubtful, the overt act against Mahendra also proved that he shared common intention because the prosecutrix was caught hold by both the appellants and she was taken to the field. More over, the prosecutrix has stated that when Naku went away to fetch water, she was caught hold of by Mahendra, though later on, she somehow escaped. The provision contained in section 376 D IPC provides for punishment of offence of gang rape where a woman is raped by one or more person constituting a group or acting in-furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape, therefore, the criminal overt act of the appellants, even though he actually not committed the offence of rape, renders him liable for commission of offence of gang rape.

25. In the result, we do not find any good ground to interfere with the impugned judgment of conviction and order of sentence, appeal is therefore, dismissed.

Sd/-

Manindra Mohan Shrivastava
Judge

Sd/-

Vimla Singh Kapoor
Judge