

HIGH COURT OF CHHATTISGARH, BILASPURCriminal Appeal No.28 of 2011

Vikas Mandal S/o Anand Mandal, Aged about 26 years,
Occupation Agriculturist, R/o Village PV-27, Police
Station Pankhanjur, District Kanker (CG)

----- Appellant

Versus

State of Chhattisgarh Through Station House Officer,
Police Station Pankhanjur, District Kanker (CG)

----- Respondent

For Appellant:	Mrs.Itu Rani Mukherjee, Advocate
For Respondent/State:	Mr.Animesh Tiwari, Deputy Advocate General and Mr.Ghanshyam Patel, Government Advocate

Hon'ble Shri Justice Sanjay K. Agrawal and
Hon'ble Shri Justice Arvind Singh Chandel

Judgment on Board
(29.10.2021)

Sanjay K. Agrawal, J.

1. This criminal appeal under Section 374(2) of the CrPC is directed against the judgment of conviction recorded for offences punishable under Section 376 and 506 Part-II of the IPC and sentence awarded under Section 302 of the IPC is imprisonment for life and fine of ₹10,000/-, in default of payment of fine, to further undergo rigorous imprisonment for one year and also sentenced to undergo rigorous imprisonment for two years for offence under Section 506 Part-II of the IPC (both sentences to run concurrently) by the Additional Sessions Judge, Uttar Bastar, Kanker by the impugned judgment dated 16.12.2010 in Sessions Trial

No.114/2008.

2. Case of the prosecution, in brief, is that on 30.1.2008 at about 5 p.m. near forest of village Nawanreki, Police Station-Pankhanjur, District-Kanker, the appellant herein committed sexual intercourse against wishes the prosecutrix (PW-10) and threatened to kill her and thereby committed the aforesaid offences. It is further case of the prosecution that on the date of incident i.e. 30.1.2008 at about 5 p.m. the prosecutrix (PW-10) had gone to village Nawanreki to look after her field and after she reached her field, her brother Vishwanath Mishtri came back to Pankhanjur market, thereafter the accused committed sexual intercourse with her. At 6 p.m. the prosecutrix came back to the house from field and she being dumb by sign informed that the appellant by lying her on the field committed sexual intercourse with her and thereafter absconded from the place of incident, by which she suffered external injuries. Thereafter, her sister Vithika Mandal (PW-6) lodged the report to the Police Station-Pankhanjur, which was subject-matter of Crime No.10/2008 and pursuant to which, FIR (Ex.P-8) was registered and the matter was taken for investigation. Statements of the witnesses under Section 161 of the CrPC were recorded. The prosecutrix was also medically examined and report is Ex.P-4. Her clothes and vaginal slides were sent for chemical examination. Clothes were seized vide Ex.P-13 and that was sent for chemical

examination vide Ex.P-14 and chemical examination report is Ex.P-15. Thereafter, charge-sheet was filed for the aforesaid offences against the appellant / accused.

3. In order to bring home the above-stated offences, the prosecution examined as many as 14 witnesses including the prosecutrix (PW-10), who is deaf and dumb witness. Statement of the accused/appellant under Section 313 of the CrPC was recorded, in which he denied guilt. However, the accused examined none in his defence. The prosecutrix was partly examined on 23.3.2010 and during the course of examination, the public prosecutor sought time to ask questions from the prosecutrix, which was granted and thereafter, the prosecution filed an application on 20.5.2010 for asking leading questions in examination-in-chief, which was granted by the trial Court on 24.5.2010 to ask leading questions in examination-in-chief from the prosecutrix through translator and accordingly, on 28.7.2010 she was subjected to leading questions through interpreter, in which she supported the case of the prosecution.
4. The trial Court after appreciating oral and documentary evidence available on record, by its judgment dated 16.12.2010, convicted the appellant herein for offences under Sections 376 and 506 Part-II of the IPC and sentenced him as aforementioned.
5. During the pendency of this criminal appeal, this Court

by order dated 15.11.2018 directed the trial Court to re-examine the prosecutrix with proper assistance of an officer / interpreter to be provided on the recommendation of the officer of the district level dealing with deaf and dumb persons and forward the evidence of the prosecutrix to this Court. The prosecutrix was again examined by the trial Court on 2.3.2019 and her statement was forwarded by learned trial Court to this Court, which is also being considered by this Court.

6. Mrs. Itu Rani Mukherjee, learned counsel for the appellant, would submit that the trial Court committed grave legal error in convicting the appellant herein for offences under Sections 376 and 506 Part-II of the IPC stating inter-alia that the prosecutrix (PW-10) has not supported the case of the prosecution and only leading question put to her by order dated 20.5.1010 through the translator in which she has supported the case of the prosecution, which is inadmissible in evidence in view of proviso to Section 142 of the Indian Evidence Act, 1872 as the prosecutor cannot put leading questions on material part of evidence that too in examination-in-chief which a witness intends to give against accused. She would further submit that apart from this, there is no other material evidence to implicate the accused for the aforesaid offences as her sister Vithika Mandal (PW-6) has become hostile and she has not supported the case of the prosecution and

Smt.Dr.Nisha Navratan (PW-4) who examined the prosecutrix as also Sumti (PW-1), Nirranjan (PW-2), Sapan Vishwas (PW-7), Ganiyaram (PW-8), Vishwanath (PW-12) and Smt.Aruna (PW-13) have also not supported the case of the prosecution and as such, the impugned judgment of conviction recorded and sentence awarded deserves to be set-aside.

7. On the other hand, Mr.Animesh Tiwari, learned Deputy Advocate General assisted by Mr.Ghanshyam Patel, learned Government Advocate of the respondent / State, would submit that since the prosecutrix (PW-10) was deaf and dumb witness and she was not able to give her statement in writing, which is recorded by the trial Court in the order-sheet dated 24.5.2010, therefore, the prosecution sought permission to put leading question from the prosecutrix during examination-in-chief, which was ultimately granted by the trial Court and thereafter leading question was asked from the prosecutrix through interpreter, in which she has categorically stated the fact of sexual intercourse having been committed by the appellant, which is corroborated by medical evidence particularly Ex.P-5 proved by Smt.Dr.Nisha Navratan (PW-4), as such, the appeal is liable to be dismissed.
8. We have heard learned counsel for the parties, considered their rival submissions made hereinabove and also went through the records with utmost

circumspection.

9. The question for consideration would be whether the prosecution has been able to bring home the offences under Sections 376 and 506 Part-II of the IPC beyond reasonable doubt against the appellant herein.
10. The prosecutrix (PW-10) was admittedly deaf and dumb witness. The trial Court appointed Smt. Uma Dewangan as interpreter and she was also administered oath and in the language of interpreter, in Hindi, the statement of the prosecutrix (PW-10) was recorded.
11. 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.
12. 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."

13. 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 Lal¹ 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 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

1 AIR 2012 SC 1973

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."

14. 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.

15. From perusal of statement of the prosecutrix (PW-10), it appears that she has been examined to prove the case of the prosecution and she being deaf and dumb witness, her statement has been recorded by alleged interpreter Smt. Uma Dewangan (not examined as prosecution witness). A careful perusal of statement of the prosecutrix (PW-10) would show that the prosecutrix was only informed to speak truth. 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 our 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 clearly been held that there must be a record of signs. Thus, the record of such signs made by the prosecutrix (PW-10), dumb witness, must have been maintained by the learned trial Court as held by the Supreme Court in **Darshan Singh's** case (supra). However, records of signs have not been maintained by learned trial Court, which is in complete violation of the the provisions contained in Section

119 of the Evidence Act and is in teeth of decision rendered by their Lordships of the Supreme Court in the matter of Darshan Singh (supra).

16.As noticed hereinabove, the prosecutrix (PW-10) was examined on 23.3.2010, in which by answering some questions she stated that the accused touched her body and also torn her clothes and certain other objectionable acts were done by the accused and thereafter the public prosecutor sought time to file application seeking permission to ask leading question from the prosecutrix and ultimately, he made an application on 20.5.2010, which was granted by learned trial Court on 24.5.2010 and permission to ask leading question from the prosecutrix was accorded through interpreter already appointed by the trial Court, in which in para-2 the interpreter through signs indicated as to whether sexual intercourse has been committed to her or not, then she replied "yes", which has been recorded by the trial Court on 28.7.2010, which states as under:-

"(2) अभियुक्त ने ही मेरे साथ बलात्कार किया था (टिप-अनुवादक ने उपस्थित गवाह को अपने शरीर को झुकाकर और अपने बाये हाथ को मोड़कर और दांये हाथ के उंगली को बांये हाथ के उंगलियों को गोल बनाकर गोले वाले स्थान में दांये हाथ की उंगलियों को घुसाकर और इशारा करके बलात्कार के ढंग को उंगली से इशारा करते हुये अभियुक्त की ओर इशारा करके पुछा गया था तब उपस्थित जुथिका मिस्त्री प्रकरण की पीढित अभियोत्री है उसके साथ अभियुक्त द्वारा बलात्संग करने के इशारा को समझकर उपरोक्त उत्तर दिया है)।"

17.Mrs.Itu Rani Mukherjee, learned counsel for the

appellant, would submit that admittedly and undisputedly, the prosecutrix (PW-10) was not declared as hostile witness, therefore, as stated in proviso to Section 142 of the Evidence Act, leading questions should be confined as to matters which are introductory or undisputed, on or which have been already sufficiently proved. The prosecutor could not have asked leading questions from the prosecutrix (witness) on material part of evidence which a witness intends to give against accused. Therefore, para-2, which is the only evidence, which the prosecutrix has supported to prove the fact of sexual intercourse with her by the accused / appellant is inadmissible in evidence.

18. In order to consider the plea, it would be appropriate to notice Sections 141, 142 and 143 of the Evidence Act which state as under:-

"141. Leading questions.-Any question suggesting the answer which the person putting it wishes or expects to receive, is called a leading question.

142. When they must not be asked.-Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court.

The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

143. When they may be asked.-Leading questions may be asked in cross-examination."

19. Section 142 of the Evidence Act provides that leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-

examination, except with the permission of the Court and as such, leading questions cannot be asked in examination-in-chief except with the permission of the Court. Further, the Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved. The rule is to guard against the bias of the witness in favour of the side in support of which evidence is sought.

20. In this regard, para-12 of the decision rendered by the Supreme Court in the matter of **Gura Singh v. State of Rajasthan**² has held that the Court can however permit leading questions as to the matters, which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

21. However, proviso to Section 142 of the Evidence Act is absolutely clear and clearly mandates that the Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved. The prosecutor cannot put the leading questions on material part of evidence which a witness intends to give against accused.

22. Their Lordships of the Supreme Court in the matter of **Varkey Joseph v. State of Kerala**³ have clearly held that prosecutor cannot put the leading questions on

² (2001) 2 SCC 205

³ AIR 1993 SC 1892

material part of evidence which a witness intends to give against accused. Such leading questions offend right to accused to fair trial enshrined under Article 21 of the Constitution of India. It is not curable irregularity. It was observed as under:-

"11. Leading question to be one which indicates to the witnesses the real or supposed fact which the prosecutor (plaintiff) expects and desires to have confirmed by the answer. Leading question may be used to prepare him to give the answer to the questions about to be put to him for the purpose of identification or to lead him to the main evidence or fact in dispute. The attention of the witness cannot be directed in Chief examination to the subject of the enquiry/trial. The Court may permit leading question to draw the attention of the witness which cannot otherwise be called to the matter under enquiry, trial or investigation. The discretion of the court must only be controlled towards that end but a question which suggest to the witness, the answer the prosecutor expects must not be allowed unless the witness, with the permission of the Court, is declared hostile and cross-examination is directed thereafter in that behalf. Therefore, as soon as the witness has been conducted (sic) to the material portion of his examination, it is generally the duty of the prosecutor to ask the witness to state the facts or to give, his own account of the matter making him to speak as to what he had seen. The prosecutor will not be allowed to frame his questions in such a manner that the witness by answering merely "yes" or "no" will give the evidence which the prosecutor wishes to elicit. The witness must account for what he himself had seen. Sections 145 and 154 of the Evidence Act is intended to provide for cases to contradict the previous statement of the witnesses called by the prosecution. Ss. 143 and 154 provides the right to cross-examination of the witnesses by the adverse party even by leading questions to contradict answers given by the witnesses or to test the veracity or to drag the truth of the statement made by him. Therein the adverse party is entitled to put leading questions but S. 142 does not give such power to the prosecutor to put leading questions on the material part of the evidence which the witness intends to speak against the accused and the prosecutor shall not be allowed to frame

questions in such a manner to which the witness by answer merely "yes" or "no" but he shall be directed to give evidence which he witnessed. The question shall not be put to enable the witness to give evidence which the prosecutor wishes to elicit from the witness nor the prosecutor shall put into witness's mouth the words which he hoped that the witness will utter nor in any other way suggest to him the answer which it is desired that the witness would give. The counsel must leave the witness to tell unvarnished tale of his own account. Sample leading questions extracted hereinbefore clearly show the fact that the prosecutor led the witnesses what he intended that they should say the material part of the prosecution case to prove against the appellant which is illegal and, obviously unfair to the appellant offending his right to fair trial enshrined under Art. 21 of the Constitution. It is not a curable irregularity."

23. Reverting to the facts of the present case in light of principle of law laid down by the Supreme Court in Varkey Joseph (supra), it is quite vivid that leading question as asked by the prosecutor through interpreter as noticed hereinabove to the prosecutrix (PW-10) about the fact of sexual intercourse in examination-in-chief is about the material part of evidence which a witness intends to give against accused and it is clearly impermissible and beyond the scope of proviso to Section 142 of the Evidence Act and runs contrary to the principle of law laid down by the Supreme Court in Varkey Joseph (supra) and therefore, that part of evidence of the prosecutrix stating that the appellant has committed sexual intercourse with her becomes inadmissible in evidence and surprisingly in cross-examination, she has in clear terms refused the fact of sexual intercourse with her by the accused and has not

supported the case of the prosecution of sexual intercourse by the appellant herein and other prosecution witnesses have not supported the case of the prosecution.

24. Not only this, this Court by order dated 15.11.2018 permitted the prosecution to examine afresh the prosecutrix with proper assistance of an officer / interpreter, then also in her entire statement before the trial Court, she has not stated anything about the fact of sexual intercourse by the appellant with her, as such, the fact of sexual intercourse by the appellant with her is not supported by the prosecutrix in her examination pursuant to order of this Court and there is no ocular evidence on record at all qua the fact that sexual intercourse has been committed by the appellant with the prosecutrix (PW-10) to connect and convict him in the above-stated offences.

25. There is one more lacuna in the prosecution case. Smt. Uma Dewangan was appointed as translator / interpreter by the trial Court and the prosecutrix (PW-10) was examined through her, but Smt. Uma Dewangan has not been examined as prosecution witness, in our considered opinion, it is fatal to the prosecution. She being interpreter / expert ought to have been examined as prosecution witness.

26. At this stage, Mr. Animesh Tiwari, learned Deputy Advocate General for the respondent / State, would

submit that there is medical evidence of Smt.Dr.Nisha Navratan (PW-4), who had examined the prosecutrix, which shows that there is sign of forceful sexual intercourse with the prosecutrix and there is also sign of external injuries in external part of body, which goes to show that sexual intercourse has been committed with her. The fact remains that unless it is established by the prosecution that sexual intercourse has been committed by the accused, merely on the basis of medical evidence, the appellant cannot be convicted as medical evidence is always corroborative piece of evidence and conviction cannot rest on the basis of medical evidence in case of rape.

27.Thus, examining the matter from any of the angles, it cannot be held that the prosecution has been able to bring home the offence under Section 376 and 506 Part-II of the IPC beyond reasonable doubt as evidence brought on record is not sufficient to bring home the offences against the appellant / accused herein.

28.As a fallout and consequence of the aforesaid legal analysis, the appeal is allowed. Impugned judgment dated 16.10.2010 passed by the Additional Sessions Judge, Uttar Bastar, Kanker in Sessions Trial No.114/2008 convicting and sentencing the appellant for the offences under Section 376 and 506 Part-II of the IPC is hereby set aside. The accused / appellant is acquitted of the said charges 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

Sd/-

(Arvind Singh Chandel)
Judge

B/-