

**THE HIGH COURT OF MADHYA PRADESH
BENCH GWALIOR**

SB:- Hon'ble Shri Justice G. S. Ahluwalia

CRA No.547/2007

Kamlesh

Vs.

State of MP

=====

Shri RK Sharma, Senior Advocate with Shri MK Chaudhary,
counsel for the appellant.
Shri Girdhari Singh Chauhan, Public Prosecutor for the
respondent/ State.

=====

JUDGMENT

(Delivered on 04/10/2018)

This criminal appeal under Section 374 of CrPC has been filed against the judgment and sentence dated 30th June, 2007 passed by Second Additional Sessions Judge (Fast Track Court), Sheopur in Sessions Trial No.49/2006, by which the appellant has been convicted under Section 376(1) of IPC and has been sentenced to undergo the rigorous imprisonment of seven years and a fine of Rs.2,000/- with default imprisonment.

(2) The necessary facts for the disposal of the present appeal in short are that the prosecutrix on 03/02/2006 at about 06:00 in the morning, had gone to answer the call of nature. After noticing the prosecutrix, the appellant came nearer to her and gagged her mouth and dragged her in the field where the mustard crop was standing and committed rape on her after throwing her on the

ground. When the prosecutrix raised alarm, then the appellant ran away towards his house and the relatives of the prosecutrix, namely, Mukesh, Phoola Bai and Kailash Rathor noticed that the appellant is running away. The entire incident was narrated by the prosecutrix to her husband. Thereafter, the prosecutrix lodged the report, which was registered as Crime No.43/2006, ExP3. Spot map Ex.P4 was prepared. The prosecutrix was sent for medical examination. The statements of the witnesses were recorded. The appellant was arrested vide arrest memo Ex.P8. The appellant was got medically examined and his MLC report is Ex.P1, whereas the MLC report of the prosecutrix is Ex.P2. The slide was prepared. The petticoat and underwear of the prosecutrix were seized. Constable Nasib Bano brought the aforementioned articles from the Hospital and handed over to Head Constable Sambu Dayal Verma (PW7), which were seized vide seizure memo ExP5. The semen slide of the appellant was seized vide seizure memo Ex.P6. The seized articles were sent to Forensic Science Laboratory, vide Ex.P11 and the FSL report is Ex.P12. After completing the investigation, the police filed charge-sheet for offence under Section 376 of IPC.

- (3) The trial Court by order dated 12/12/2006 framed the charge under Section 376(1) of IPC.
- (4) The appellant abjured his guilt and pleaded not guilty.
- (5) The prosecution, in order to prove its case, examined Dr. A.R

Karoriya (PW1), Dr.Seema Lakra (PW2), Nasib Bano (PW3), prosecutrix (PW4), Mukesh Rathor (PW5), Manoj Rathor (PW6), Sambu Dayal Verma (PW7), Mahavir Singh (PW8) and Hukum Singh Yadav (PW9). The appellant examined Ramcharan Vaishnav (DW1), Amarlal Mali (DW2) and Prem Shanker Sen (DW3), in his defence.

(6) The trial Court by judgment and sentence dated 30th June, 2007 passed in Sessions Trial No.49/2006, convicted the appellant for offence under Section 376(1) of IPC and sentenced him to undergo the rigorous imprisonment of seven years and a fine of Rs.2,000/- with default imprisonment.

(7) Challenging the judgment and sentence recorded by the trial Court, it is submitted by the counsel for the appellant that if the evidence of the prosecutrix is considered in proper perspective, then it would be clear that either she was a consenting party or the appellant has been falsely implicated. In order to prove the false implication, the appellant had taken a defence that since the prosecutrix was in habit of easing herself near the house of the appellant, therefore, on the date of incident, there was a hot talk between the wife of the appellant and the prosecutrix, therefore, the prosecutrix has falsely implicated.

(8) *Per contra*, it is submitted by the counsel for the State that the prosecution has proved its case beyond reasonable doubt. Although it is true that the prosecution has to stand on its own legs

and can not take advantage of the weakness of the defence, but in the present case almost the entire prosecution story has been admitted by the appellant except that the prosecutrix was subjected to rape. It is the case of the prosecutrix that when she went to ease herself, she was caught by the appellant and was subjected to rape, whereas it is the defence of the appellant that when the prosecutrix was about to ease herself then it was objected by the wife of the appellant and because of that, the appellant has been falsely implicated. Thus, it is submitted that it is not the case of weakness of the defence but in fact, the defence itself has accepted almost the entire prosecution story. Furthermore, when the prosecutrix has stated that the rape was committed without her consent, then there is no reason to disbelieve the same and the conviction of the accused can be recorded on the basis of sole testimony of the prosecutrix.

(9) Heard the learned counsel for the parties.

(10) Dr. AR Karoriya(PW1) had medically examined the appellant and the MLC report of the appellant is ExP1. According to this witness, there was no external injury on the body of the appellant and smagma was absent and further the semen slide of the appellant was prepared and was handed over to a Constable in a sealed condition for Forensic Examination. So far as the absence of smagma is concerned, undisputedly the appellant was medically examined on 27/07/2006 whereas the incident took place on

03/02/2006, therefore, the absence of smagma is of no consequences.

(11) Dr. Seema Lakra (PW2) had medically examined the prosecutrix. She has stated that there was no external or internal injury on the body of the prosecutrix. However, the vaginal slide was prepared. The MLC report is Ex.P2.

(12) The prosecutrix(PW4) has stated that on the date of incident, she had gone to the field of one Bheru Mali at about 06:00 in the morning in order to ease herself and when she was about to sit in order to ease herself, the appellant came there, gagged her mouth and dragged her in the field where the mustard crop was standing. She was thrown on the ground and the appellant committed rape on her. Thereafter, she raised an alarm. Her cries were heard by her elder brother-in-law (jeth) Mukesh, mother-in-law Phoola Bai and Kailash Rathor. They immediately came on the spot. They saw the appellant running away from the place of incident. The incident was narrated to her husband Manoj and thereafter she, her father-in-law, elder brother-in-law (jeth) Mukesh and husband Manoj went to Police Station Sheopur and lodged the report Ex.P3. She was sent for medical examination. The spot map Ex.P4 was prepared. This witness was cross-examined in detail. In cross-examination, this witness has admitted that sometimes she goes to the fields of other persons in order to ease herself and sometimes she goes to the field of Bheru Mali and on the said incident, she had gone to

the field of Bheru Mali and house of the appellant is situated at a distance of about 30-40 feet from the place where she was about to sit in order to ease herself and the appellant had dragged her for a distance of about 30 feet. She has stated that as the appellant is elder to her, therefore, she could not resist efficiently and he committed the offence for about five minutes and as her mouth was gagged by the appellant, therefore, she could not raise an alarm when the offence was being committed. However, she was trying to offer assistance at the time when she was being subjected to rape. She further admitted that as her mother-in-law, elder brother in law (jeth) and Kailash were also going to ease themselves, therefore, they came towards the place of incident after hearing her shouts, they saw the appellant running away. She has further stated that while coming back after the incident she brought her utensils along with herself. She has further stated that about three to four days prior to the incident, she had eased herself near to the house of the appellant and it was objected by the appellant and her wife that she should not discharge her excreta because of foul smell.

(13) Mukesh Rathor (PW5) is the elder brother-in-law (jeth) of the prosecutrix whereas Manoj Rathor(PW6) is the husband of the prosecutrix, who have supported her.

(14) Challenging the evidence of the prosecutrix, it is submitted by the counsel for the appellant that as it has been submitted by the

prosecutrix that father-in-law, mother-in-law and elder brother-in-law (jeth) of the prosecutrix had reached on the spot, therefore, it is clear that the prosecutrix might have been noticed by them in a compromising position with the appellant and, therefore, a false report has been lodged. Furthermore, when the prosecutrix was dragged for about 30 feet, then she must have sustained injuries, which were not found. Thus, the allegation of commission of rape by the appellant is false and in fact, the prosecutrix herself was a consenting party and a false FIR has been lodged because she was noticed by her in-laws.

(15) If the evidence of the prosecutrix as well as the evidence of Mukesh Rathor (PW5) and Manoj Rathor (PW6) is considered in the light of defence witnesses examined by the appellant, then it is clear that most part of the prosecution story has been admitted by the appellant. Facing such tough situation, it is submitted by the counsel for the appellant that the prosecution has to stand on its own legs and cannot take advantage of the weakness of the defence and, therefore, if the evidence led by the prosecution leads to an inference that the prosecutrix might be a consenting party, then merely because there was some weakness in the defence witnesses would not be sufficient to hold the appellant guilty.

(16) Considered the submissions made by the counsel for the appellant.

(17) It is true that the prosecution has to stand on its own legs and the weakness of the defence of the accused cannot be a ground for convicting the appellant. However, it is equally important to note that it is well-established principle of law that the defence evidence has to be treated at par with the prosecution evidence and the evidence of defence witnesses cannot be discarded lightly without giving due weightage which is given to the prosecution witnesses.

The Supreme Court in the case of **Munshi Prasad & Others vs. State of Bihar** reported in **(2002) 1 SCC 351** has held as under:-

"3..... Before drawing the curtain on this score, however, we wish to clarify that the evidence tendered by the defence witnesses cannot always be termed to be a tainted one by reason of the factum of the witnesses being examined by the defence. The defence witnesses are entitled to equal respect and treatment as that of the prosecution. The issue of credibility and trustworthiness ought also to be attributed to the defence witnesses on a par with that of the prosecution - a lapse on the part of the defence witnesses cannot be differentiated and be treated differently than that of the prosecutor's witnesses."

(18) Thus, if the evidence of the defence witnesses, namely, Ramcharan Vaishnav (DW1), Amarlal Mali (DW2), Prem Shanker Sen (DW3) is considered in the light of the defence taken by the appellant under Section 313 of CrPC, then it would be clear that Ramcharan Vaishnav (DW1), Amarlal Mali (DW2) and Prem Shanker Sen (DW3) have stated in one voice that it was around 06:00- 06:30 in the morning and a hot talk was going on between

the wife of the appellant as well as the prosecutrix. Thus, the evidence of the prosecutrix that at about 06:00 in the morning she had gone towards the field in order to ease herself is corroborated by these three defence witnesses as they have also stated that some hot talk was going on between the prosecutrix and the wife of the appellant at about 06:00 am. Thus, the allegation with regard to the time when the offence is alleged to have been taken place, has been admitted by the appellant by leading defence evidence. Furthermore, Amarlal Mali (DW2) and Prem Shanker Sen (DW3) have stated that as the prosecutrix was sitting near the house of appellant Kamlesh for easing herself, therefore, it was objected by the wife of the appellant. The allegation of the prosecutrix is that at about 06:00 am she had gone to ease herself and when she was about to sit in order to ease herself, then she was subjected to rape, was partially accepted by the defence witnesses in their examination in chief that nearer to the house of the appellant, the prosecutrix was sitting in order to ease herself and at that time, some hot talk was going on between the prosecutrix and wife of the appellant. Thus, it is clear that the appellant by examining Ramcharan (DW1), Amarlal Mali (DW2) and Prem Shanker Sen (DW3) has admitted that at about 06:00 am, the prosecutrix had gone nearer to the house of the appellant and was sitting/about to sit in order to ease herself.

(19) Now, the only question which remains to be decided is that

whether the prosecutrix was subjected to rape or whether some hot talk took place between the wife of the appellant and the prosecutrix as a result of which the prosecutrix has made false allegation of rape against the appellant. The appellant in his statement under Section 313 of CrPC has stated that when the prosecutrix came to a place nearer to his house, then he and his wife objected to it. Further in his statement under Section 313 of CrPC he admitted his presence on the spot, when the prosecutrix had come to ease herself. Whereas Prem Shanker Sen (DW3) and Amarlal Mali (DW2) have not spoken about the presence of the appellant on the spot when the hot talk was going on between the wife of the appellant and the prosecutrix. This Court is conscious of the fact that the admission in the statement under Section 313 of CrPC cannot be used as a substantive piece of evidence but in view of the admission made by the appellant in his statement under Section 313 of CrPC that he had not committed rape on the prosecutrix but he had merely compelled the prosecutrix to go away from the spot, clearly shows that the appellant had also admitted his presence on the spot when the prosecutrix at about 06:00 am had come to the field in order to ease herself. Thus, it is clear that when the prosecutrix at about 06:00- 06:15 am had gone to the field of Bheru Mali in order to ease herself, then the appellant was also there, as it has been admitted by the appellant in his statement under Section 313 of

CrPC.

(20) The prosecutrix (PW4) in her cross-examination has stated that the house of the appellant is situated at a distance of 30-40 ft from the place where she was about to sit in order to ease herself. The incident took place at 06:00 am and the FIR was lodged on 03/02/2006 itself at about 02:00 pm and the distance of police station from the place of incident is 25 kilometers. In cross-examination, the prosecutrix has stated that one bus goes from Sothwa to Sheopur at about 08:00 am and another bus goes at about 09:00 am and thereafter, third bus goes at about 12:00 pm and takes 45 minutes for reaching Sheopur from Sothawa. She has further stated that they reached the police station at about 12:00 pm but the SHO was not in the police station and they waited for him for about one and a half hour in the Police Station itself and before lodging the FIR, they had not met any influential person. She denied that they have taken any suggestion from any influential person. Thus, considering the distance of the place of incident from the police station coupled with the explanation given by the prosecutrix that when they reached the police station the SHO of Police Station was not there and the prosecutrix was made to wait for about one and a half hour in the police station itself and time taken for reaching Sheopur because of lack of public convenience from Sothwa to Sheopur, this Court is of the view that the FIR was lodged with promptness. Furthermore, the

appellant as well as the prosecutrix were sent for medical examination and vaginal swab, pubic hair as well as petticoat and underwear of prosecutrix were seized and similarly, semen slide of the appellant was seized. As per FSL report Ex.P11, all these articles were found containing human sperms and semen stains. Thus, the FSL report clearly shows the presence of human sperms and semen in the vaginal slide, swab and pubic hair of the prosecutrix along with her clothes. The appellant has taken a stand that as there was a hot talk between the wife of the appellant and the prosecutrix on the question of discharge of excreta near the house of the appellant, therefore, the appellant has been falsely implicated, then under these circumstances, the wife of the appellant was the best witness to come forward and depose in the matter. However, for the reasons best known to the appellant, the wife of the appellant has not been examined in his defence. Thus, it is clear that the appellant has failed to prove his defence but on the contrary, the appellant by leading his defence evidence, has admitted almost the entire prosecution case except the allegation of commission of rape. The timing of the incident, the fact that prosecutrix had gone to a place nearer to the house of the appellant in order to ease herself, has been duly admitted by the appellant by leading defence evidence. Even otherwise, the appellant in his statement under Section 313 of CrPC had admitted his presence at the time of incident.

(21) In the present case, the prosecutrix has not only proved her allegation against the appellant but even the appellant has admitted the prosecution case by examining his defence witnesses and the fact that human sperm and semen were found on the vaginal slide, swab and petticoat as well as other clothes of the prosecutrix and the FIR was lodged with promptness and the appellant has failed to establish any enmity for falsely implicating him, this Court is of the considered opinion that the prosecution has succeeded in establishing the guilt of the appellant beyond reasonable doubt. Merely because the prosecutrix has stated that she was dragged by the appellant for a distance of 30 feet and since no external injury was found on the body of the prosecutrix, would not mean that the allegations made by the prosecutrix are to be thrown over the board. Admittedly, the mustard crop was standing in the field and the prosecutrix was wearing clothes, therefore, if the prosecutrix did not sustain any external injury because she was dragged for a distance of 30 feet, would not mean that she was a consenting party or her evidence is liable to be discarded/disbelieved. Under these circumstances, this Court holds that the prosecution has succeeded in establishing the guilt of the appellant beyond reasonable doubt and accordingly, he is held guilty of committing an offence under Section 376(1) of IPC.

(22) So far as the question of sentence is concerned, the trial Court has awarded the jail sentence of rigorous imprisonment of

seven years. The minimum sentence provided for offence under Section 376(1) of IPC is seven years and accordingly, this Court is of the considered view that the jail sentence awarded by the trial Court, does not call for any interference.

(23) Accordingly, the judgment and sentence dated 30th June, 2007 passed by Second Additional Sessions Judge (Fast Track Court), Sheopur in Sessions Trial No.49/2006 is hereby affirmed.

(24) The appellant is on bail. His bail bonds and surety bonds are hereby cancelled. The appellant is directed to surrender immediately before the trial Court for undergoing the remaining jail sentence.

(25) Appeal fails and is hereby **dismissed**.

(G. S. Ahluwalia)
Judge

MKB