

HIGH COURT OF MADHYA PRADESH**BENCH AT GWALIOR****SINGLE BENCH****PRESENT:****HON'BLE MR. JUSTICE G.S. AHLUWALIA****Criminal Appeal No. 469 OF 2009****Narendra Singh****-Vs-****State of M.P.**

Shri H.K. Shukla, counsel for the appellant.

Shri Girdhari Singh Chauhan, Public Prosecutor for the respondent/State.

J U D G M E N T
(16/02/2017)

This criminal appeal has been filed under Section 374 of Cr.P.C. against the judgment dated 1.6.2009 passed by Second Additional Sessions Judge, Gwalior in S.T.No. 328/2008 by which the appellant has been convicted for offence punishable under Section 376 of IPC and has been sentenced to undergo the sentence of ten years R.I. and a fine of Rs. 1,000 with default imprisonment.

The necessary facts for the disposal of the present appeal are that the prosecutrix lodged a FIR on 10.8.2008 alleging that at about 1:30 PM she had gone to the shop of one Jal Singh. When she was coming back to her house at that time the appellant caught hold of her hand and forced her to go to his house and after closing the door he threw her on the cot and after removing her clothes he committed wrong work (गलत काम) with her. When she tried to shout, her mouth was gagged and after sometime the appellant allowed her to go. The entire incident was narrated by the prosecutrix to her mother and when her father came back then she lodged the FIR.

The prosecutrix was sent for medical examination. Spot map was prepared and accused was arrested. He too was got medically examined and after completing the investigation the police filed the charge sheet against the appellant for offences punishable under Section 376 of IPC.

The Trial Court by order dated 12.11.2008 framed charge under Section 376 of IPC.

The appellant abjured his guilt and pleaded not guilty.

The prosecution in order to prove its case examined the prosecutrix (PW-1), Munna Singh Tomar (PW-2), Meenu (PW-3), Rama Devi Tomar (PW-4), V.S. Tomar (PW-5), Gajendra Singh Tomar (PW-6), Vijay Singh (PW-7), Suman Pal (PW-8), Rajaram Singh (PW-9), Anirudh Singh (PW-10), Badan Singh Yadav (PW-11), M.S. Jadon (PW-12), Hari Narayan (PW-13), Irfan Khan (PW-14), Ratiram Singh Gurjar (PW-15), Dr. Anjani Jalaj (PW-16) and Dr. H. Shakya (PW-17).

The appellant examined Kripal Singh (DW-1) and Narendra Singh Tomar (DW-2) in his defence.

Dr. Anjani Jalaj (PW-16) in the medical examination found that anus of the prosecutrix was absent and stool was passing through vagina of the prosecutrix since birth and she was feeling pain during passing of stool since birth and, therefore, she had advised for fisrogram report. The history of the patient given by this witness is Ex.P/7. In her cross-examination, this witness has specifically stated that she had not physically examined the prosecutrix.

Dr. H.Shakya (PW-17) had medically examined the prosecutrix. She has stated that on external examination no external injury was seen over the body. Similarly, no external injury was seen on the private part of the prosecutrix. The anus of the prosecutrix was absent from her birth and she was passing motion from vagina. Hymen membrane was already absent and no definite opinion could be given on congenital analysis. The MLC report of the prosecutrix prepared by this witness is Ex.P/8.

In cross-examination, this witness has stated that she is not in a position to state that whether the prosecutrix was fit for sexual intercourse or not. She further admitted that the hymen was already damaged.

From the medical report of the prosecutrix it is clear that her anus was absent and she was passing stools from her vagina from her birth and in these circumstances if the hymen membrane is found absent then it cannot be said that she was habitual to sexual intercourse. Under the peculiar physical deformity of the prosecutrix, possibility of external injury on her private part was remote. No questions were put either to Dr. Anjani Jalaj (PW-16) and Dr. H. Shakya (PW-17) with regard to absence of any external injury on the private part of the prosecutrix. However, under these peculiar circumstances merely because no external injury was found on the private part of the prosecutrix, that by itself would not be sufficient to hold that the prosecutrix was not subjected to sexual assault, therefore, under these circumstances the evidence of the prosecutrix becomes important.

The age of the prosecutrix was assessed as 14 years by the Court. Unfortunately, for the reasons best known to the prosecution it has neither chosen to file the birth certificate/the school certificate to prove her age nor they got the ossification test of the prosecutrix conducted. Under these circumstances there is nothing on record to show that what was the age of the prosecutrix. However, when the prosecutrix appeared before the Court, her age was assessed to be 14 years by the Court itself and in view of the provision of Section 118 of Evidence Act certain questions were put to the prosecutrix by the Court to find out that whether she is able to understand the proceedings of the Court or not. After confirming that the prosecutrix is able to not only understand the proceedings but she is also able to answer the questions, the Court proceeded with the examination of the prosecutrix.

The prosecutrix in her evidence has stated that on Sunday she had gone to the shop of one Jal Singh for purchasing Cream Role. At about 1:00-1:30 P.M. while she was coming back to her house at that time the appellant by catching hold of her hand took her to his house and after removing her clothes committed bad work (गंदा काम) with her. She has further stated that the appellant after removing her clothes as well as after removing his clothes committed rape on her. There was nobody in the house and when she tried to shout, her mouth was gagged by him. After committing rape the appellant allowed her to go and also extended the threat that in case if she narrates this incident then he will kill the prosecutrix as well as her father. After coming back to her house, she narrated the incident to her parents and thereafter she lodged the FIR Ex.P/1. The spot map Ex.P/2 was prepared by the police which bears the signature of the prosecutrix. Her statement was recorded and thereafter she was sent for medical examination. This witness further clarified that by inserting his male organ in her vagina, the appellant had committed rape on her. The prosecutrix was cross-examined in detail. She has stated that the appellant was known to her as he is also residing in the same locality. The parents of the appellant had already expired and he is all alone in his house. The house belongs to the appellant and prior to the incident she had never gone to the house of the appellant. She further stated that the appellant asked her to accompany him to his house and on her refusal the appellant caught hold of her hand and took her to his house. She further admitted that it is a public way but clarified that nobody was there on the road. The appellant had closed the doors of his house and he committed rape on her for about 1 ½ hours and she was allowed to go back at about 3:00 PM. The incident was narrated by her to her mother. At about 6:00 PM they reached to the Government Hospital where her parents and relatives were present. She had narrated the incident to the doctor. She fairly conceded that she had not received any injury

or abrasion at the time of rape. However, she stated that blood was oozing out from her private part. The FIR was lodged at the police station itself. She further stated that she is the student of Class-10th. Her clothes were seized. She further stated that she had mentioned in the FIR that she was raped by inserting the male organ in her private part but this fact is not mentioned in the FIR then she cannot explain the same. She further denied that her father had given any loan to the appellant. She further denied that under the garb of recovery of loan amount, the father of the prosecutrix wants to grab the house of the appellant. She further admitted that after the incident, the father of the prosecutrix had beaten the appellant. She denied that a false FIR has been lodged with an intention to grab the house of the appellant.

Munna Singh Tomar (PW-2) has stated that at about 1:30-2:00 PM he was on his duty. When he came back at around 3:00-3:30 PM he was informed by the prosecutrix that the appellant after catching hold of her hand had taken her to his house and has committed rape on her. Thereafter he went to the police station and lodged the FIR. The spot map Ex.P/2 was prepared by the police. The appellant was arrested by arrest memo Ex.P/3 and after the FIR was lodged, the prosecutrix was sent for medical examination. This witness was cross-examined in detail. He stated that he is employed in Modern Gas Agency and leaves for his duty about 7:30 in the morning and there is no fixed time for coming back from the duty. The incident is dated 10.8.2008 and at about 7:30 in the morning he had gone on his duty. However, he could not specify that in how many houses he had supplied the gas cylinder. On the date of incident he had come back at 3:00-3:30 P.M. and at that time his wife, other relatives and the neighbors were present in the house. His statement was recorded in the police station. He denied that he had given some loan to the father of the appellant and he wants to grab the house of the appellant because of failure on his part

to repay the loan amount.

Meenu (PW-3) has also stated that at about 1:30 PM the prosecutrix had gone to the shop for purchasing the cream roll. At about 2:30-3:00 PM she came back and informed that the appellant has committed rape on her and a threat was extended that in case if the incident is narrated to anybody then he would kill her father as well as the prosecutrix. In the cross-examination, this witness has stated that the house of the appellant is situated after 2-3 houses from the house of this witness. She further stated that the appellant is not related to her. The prosecutrix had returned at about 3:00-3:30 PM. She further denied that as the father of the appellant had taken loan, therefore, in order to grab the house of the appellant, false report has been lodged.

Rama Devi Tomar (PW-4) has stated that the prosecutrix is her niece and had gone at about 1:30 PM for purchasing some article from the shop of Jal Singh. When she did not come back they tried to search her but could not find her. Thereafter, the prosecutrix came back to her house and informed the incident of committing rape by the appellant. This witness too was cross-examined by the appellant. This witness specifically stated that she was cleaning utensils when the prosecutrix came back and she was informed by the prosecutrix about the incident. She further denied that the father of the prosecutrix wants to grab the property of the appellant and, therefore, false report has been lodged.

Gajendra Singh Tomar (PW-6) is an independent witness. He has stated that when he went to the house of the prosecutrix, lot of persons were standing there and when he went inside, then found that the prosecutrix was narrating the incident to her parents about the commission of rape by the appellant. In cross-examination, this witness has admitted that he also belongs to the same caste and today he has come to the Court on the information given by the parents of the prosecutrix. However, he

denied that a false evidence has been given by him.

Vijay Singh (PW-7) is also an independent witness. He has stated that when he went to the house of the prosecutrix he found that the prosecutrix was narrating the incident to the persons present over there and she was crying. In cross-examination, he admitted that he and the complainant belongs to one caste but he stated that he has come to the Court on receipt of summons.

V.S. Tomar (PW-5) had examined the appellant and had found following injuries on his body:-

- (i) Red contusion over the right cheek.
- (ii) Red contusion over upper lip.
- (iii) Semi lunar abrasion over chest.
- (iv) Right contusion over left ear.

The MLC report is Ex.P/4. So far as the injuries which were found on the body of the appellant are concerned, the same have been explained by the prosecutrix by admitting the fact that her father had beaten the appellant on the next day of the incident. It is worth notice that no such question of beating was put to Munna Singh Tomar (PW-2). Even if the admission made by the prosecutrix about the beating of the appellant by her father on the next day of the incident is considered then it cannot be said that it was the unnatural conduct on the part of the father. If a person has beaten a person who has raped his daughter, then the appellant cannot get any advantage of the injuries found on his body. On the contrary, the natural conduct of the father of the prosecutrix of beating the appellant on the next day of the incident clearly shows the annoyance of the father of the prosecutrix towards the appellant. When a daughter has been raped then such an annoyance of her father is natural and in fact it shows that the incident of rape had really taken place.

Suman Pal (PW-8) is a lady constable who had taken the prosecutrix to the hospital for getting her medically examined. A sealed packet of clothes on which the name of the prosecutrix

was written, a sealed slide and two samples of seal were given to her by the Doctor for taking the same to the police station. Thereafter, she handed over the articles to Hari Narayan and the seizure memo is Ex.P/5. In cross-examination, she admitted that she had not opened the packet.

Rajaram Singh (PW-9) had taken the appellant for getting him medically examined to J.A. Hospital, Gwalior. A sealed packet containing the undergarment of the appellant was handed over to him by Dr. Tomar. The said packet was handed by this witness to Harnarayan Head Constable which was seized by seizure memo Ex.P/6. In cross-examination, this witness has admitted that he had not opened the packet and had also not seen the undergarment.

Anirudh Singh (PW-10) is a witness of seizure memo of undergarment of the appellant and his signatures are on seizure memo Ex.P/6.

Badan Singh Yadav (PW-11) has stated that on 11.8.2008 the Constable Sumanpal had handed over a sealed packet of clothes, sealed slide and two specimen of seal of prosecutrix which were seized by Head Constable Harnarayan and the seizure memo is Ex.P/5 and his signature is on B to B.

M.S. Jadon (PW-12) is the person who had recorded the FIR. He stated that the FIR Ex.P/1 was recorded as per the information given by the complainant.

Hari Narayan (PW-13) has seized the sealed packet containing the clothes of the prosecutrix, a sealed slide and two specimen of seal by seizure memo Ex.P/5 and had also seized one sealed packet containing the undergarment of the appellant by seizure memo Ex.P/6.

Irfan Khan (PW-14) is a witness of seizure memo Ex.P/5.

Ratiram Singh Gurjar (PW-15) had investigated this case. He had sent the prosecutrix for medical examination. Spot map Ex.P/2 was prepared. The statement of father of the prosecutrix was recorded. On 11.8.2008 the appellant was arrested as he

was brought by the witnesses themselves to the police station. The arrest memo is Ex.P/3. Thereafter the appellant was sent for medical examination. The statements of the witnesses were recorded and after completing the investigation he had filed the charge sheet.

The appellant in his statement under Section 313 of Cr.P.C. had taken a defence that the father of the prosecutrix had falsely claimed that the father of the appellant had taken loan of Rs. 20,000/- from him and in order to grab the property he has lodged a false case.

Kripal Singh (DW-1) has stated that he is the neighbor of the appellant as well as the father of the prosecutrix. The father of the appellant had expired in the year 1994 and his mother has also expired. The father of the prosecutrix had threatened that in case if his amount is not returned then he would grab his house.

Narendra Singh Tomar (DW-2) had also stated that the father of the prosecutrix used to come to the house of the appellant for recovery of loan amount and on one day he had beaten the appellant and had threatened that he would get him falsely implicated in a case and would send him to jail.

If the evidence of the defence witnesses are considered then it would be clear that except making a vague statement, they have not clarified that on what date the father of the prosecutrix had beaten the appellant and had extended the threat of false implication. Even there is nothing on record to show that what action was taken by the appellant against the father of the prosecutrix. Furthermore, the case of defence witnesses is that the father of the appellant had taken certain loan from the father of prosecutrix. The incident is alleged to have taken place in the year 2008 whereas according to Kripal Singh (DW-1), the father of the appellant had already expired in the year 1994. Thus, it is clear that if any loan was taken by the father of the appellant then it has to be prior to 1994. It is not a natural conduct that for 14 long years the father of the

prosecutrix would wait for recovery of the loan amount. Thus, the defence which has been taken by the appellant that for recovery of loan amount he has been falsely implicated does not appear to be plausible and hence it is rejected.

Considering the prosecution evidence, it is clear that the prosecutrix while she was coming back from the shop of Jal Singh, was taken by the appellant forcibly in his house and committed rape on her after removing the clothes. It is submitted by the counsel for the appellant that undisputedly no external injury was found on the body of the prosecutrix and, therefore, had it been a case of forcible sexual intercourse then the prosecutrix should have received some external injury. The submission made by the counsel for the appellant is misconceived in the light of the specific evidence to the effect that the appellant after removing the clothes of the prosecutrix had thrown her on the cot and not on the ground. Under these circumstances, the possibility of receiving any external injury is ruled out. Even the prosecutrix has specifically stated that she had not received any external injury during this incident. Had it been a case of false implication then the prosecutrix would have given some exaggerated version but she was honest enough to state that she had not received any external injury. This Court has already pointed out that the physical deformity with which the prosecutrix was suffering and, therefore, if no external injury was found on her private part then that by itself would not rule out the possibility of sexual assault.

It is further submitted by the counsel for the appellant that according to the prosecution case the appellant had dragged the prosecutrix from the street to his house and, therefore, non receipt of the external injuries would show that the evidence of the prosecutrix is not worth reliance.

The submission made by the counsel for the appellant is misconceived and cannot be accepted. It is not the case of the prosecutrix that she was dragged from the street to the house of

the appellant. On the contrary, her statement is that by catching hold of her hand, the appellant had taken her to his house. There is no evidence that she was dragged from the street to the house of the appellant and, therefore, under these circumstances if the prosecutrix has not received any external injury then it would not mean that no incident of rape had taken place. The prosecutrix has also stated that when she was being taken to the house of the appellant at that time there was nobody in the street. Admittedly the incident has taken place sometime in between 1:00-1:30 P.M. and, therefore, the statement of the prosecutrix that at that time there was nobody in the street appears to be correct.

It is further submitted by the counsel for the appellant that as the prosecution has failed to prove the age of the prosecutrix, therefore, an inference has to be drawn that she was major and she was a consenting party, therefore, no offence is made out.

True it is that for the reasons best known to the prosecutrix, neither the school certificate nor the birth certificate of the prosecutrix has been filed. Even the ossification test was not got conducted by the prosecution to ascertain the age of the prosecutrix. However, the Court had assessed the age of the prosecutrix as 14 years and therefore had proceeded in accordance with Section 118 of Evidence Act. The age of the prosecutrix was never challenged by the appellant. No question was put either to the prosecutrix or to her parents with regard to the age of the appellant. Under these circumstances, non-seizure of school certificate/birth certificate of the prosecutrix, non holding of ossification test of the prosecutrix her age can be said to be a defective investigation, and it is well established principle of law that the accused cannot get advantage of a defective investigation if the circumstances otherwise proves his guilt. In the present case in the assessment of the Court the age of the prosecutrix was 14 years. This has not been challenged by the appellant. Under these circumstances, this Court is of the view

that the prosecutrix was aged about 14 years on the date of incident and she was minor.

So far as the question of consent of the prosecutrix is concerned, if the entire allegations of committing rape and the subsequent conduct of the prosecutrix is considered then it would be clear that the prosecutrix was taken by the appellant to his house by catching hold of her hand while she was returning back from the shop after purchasing cream roll. There was nobody in the house of the appellant as he is residing there all alone. His parents have already expired. It is not the case of the defence that somebody had seen the prosecutrix in the company of the appellant, therefore a false story has been cooked up by the prosecutrix. It is apparent from the record that immediately after coming back to the house, the prosecutrix narrated the incident to her parents and relatives. Had she been a consenting party then the prosecutrix would not have disclosed this fact to anybody. Under these circumstances, it is clear that the prosecutrix was not a consenting party and in fact she was forcibly taken to the house of the appellant where the appellant committed rape on her after removing her clothes.

The counsel for the appellant by relying upon the judgment in the case of **Jafar & Anr. vs. State of U.P.** reported in **2010(3) Crimes 168 (All.)** and a judgment passed in the case of **Sultan Singh vs. State of Haryana** reported in **2011(3) Crimes 789 (P&H)** submitted that since the prosecutrix had not received any external injuries, therefore, it would not be safe to hold that the offence of rape was committed. So far as the judgment passed in the case of **Sultan Singh (supra)** is concerned, the allegation was that the prosecutrix was dragged in a sugarcane field but no external injuries were found. In the present case the allegations are that the rape was committed in the house by throwing the prosecutrix on a cot, therefore, the possibility of sustaining injury is ruled out. It cannot be held as a universal rule that whenever the injuries are not found on the

body of the prosecutrix then only one conclusion is to be drawn that no offence has been made out. Presence of the external injuries as well as absence of the external injuries would depend on facts and circumstances of each case.

In the present case the offence was committed inside the house as well as looking to the physical deformity with which the prosecutrix was suffering, the absence of the external injury would not make the evidence of the prosecutrix unreliable. Thus, this Court is of the view that the evidence of the prosecutrix is worth reliance. Further, her evidence is corroborated by the evidence of Munna Singh Tomar (PW-2), Meenu (PW-3), Rama Devi Tomar (PW-4), Gajendra Singh Tomar (PW-6) and Vijay Singh (PW-7) before whom the prosecutrix had narrated the incident.

Accordingly, the appellant is held guilty of committing rape on the prosecutrix and thus it is held that he has committed an offence punishable under Section 376 of IPC.

So far as the question of sentence is concerned, it is submitted by the counsel for the appellant that the sentence of 10 years is on a higher side and the same should be reduced to the period already undergone.

Considered the submission made by the counsel for the appellant.

The Supreme Court in the case of **Purushottam Dashrath Borate & Anr. vs. State of Maharashtra** reported in **(2015) 6 SCC 652** has held as under:-

"27. It is an established position that law regulates social interests and arbitrates conflicting claims and demands. Security of persons is a fundamental function of the State which can be achieved through instrumentality of criminal law. The society today has been infected with a lawlessness that has gravely undermined social order. Protection of society and stamping out criminal proclivity must be the object of law which may be achieved by imposing appropriate sentence. Therefore, in this

context, the vital function that this Court is required to discharge is to mould the sentencing system to meet this challenge. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused and all other attending circumstances are relevant facts which would enter into the area of consideration. Based on the facts of the case, this Court is required to be stern where it should be and tempered with mercy where warranted."

The Supreme Court in the case of **Alister Anthony Pareira vs. State of Maharashtra** reported in **(2012) 2 SCC 648** has held as under:-

"84. Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straitjacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.

85. The principle of proportionality in sentencing a crime- doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime- doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence."

Thus, while considering the quantum of sentence the nature of the offence, the manner in which it is committed are

some of the important factors which are to be taken into consideration. In the present case, a minor girl who is suffering from physical deformity was subjected to rape by the appellant. Under these circumstances, this Court is of the view that the sentence of rigorous imprisonment of 10 years imposed by the Trial Court is proper and does not call for any interference.

Accordingly, the judgment and sentence passed by the Trial Court are hereby affirmed. Consequently, this appeal fails and is hereby **dismissed**.

(G.S. AHLUWALIA)
Judge

(alok)