

HIGH COURT OF MADHYA PRADESH: BENCH AT INDORE
SINGLE BENCH:HON'BLE SHRI JUSTICE ALOK VERMA
Criminal Appeal No.19 / 1999

Mir Yusuf s/o Mir Imamuddin

Vs.

State of M.P.

Shri Vivek Singh, learned counsel for the appellant.

Shri C.S. Ujjainiya, learned counsel for the
respondent/State.

ORDER
(Passed on 21/03/2017)

Being aggrieved by judgment passed by learned Special Sessions Judge, West Nimar, Mandleshwar in Special Sessions Trial No.66/98 dated 29/12/1998, this criminal appeal is filed challenging the conviction and sentence awarded on the present appellant under Section 366, 376(1) and 506-B and sentence of 3 years R.I. and fine of Rs.3,000/- under Section 366 IPC, R.I. of 7 years and fine of Rs.5,000/- under Section 376(1) IPC and R.I. of 1 year and fine of Rs.1,000/- under Section 506-B IPC with default stipulation.

2) It was admitted before learned Trial Court that the prosecutrix belong to *Barela* caste, which falls in the category of Scheduled Tribes and the present appellant is a *Lohar* and *Muslim* by religion and is not a member of Scheduled Castes and Scheduled Tribes.

3) The prosecution story before learned Trial Court

was that the prosecutrix was a resident of village Julvaniya. On 14/06/1998, she went to her brother's house in Pansemal. On that very day, she was coming back to her village – Julvaniya. At about 8.00 p.m. she was standing at Sendhwa bus stand. There, the present appellant came on a motorcycle and informed her that her husband met with an accident and he was admitted in the hospital at Sendhwa. On the pretext of taking her to hospital, he took the prosecutrix towards the hospital but instead of stopping the motorcycle at the hospital, he took the motorcycle on a *Kachcha Road* towards *Nallah*. The appellant was followed by four persons on two different motorcycles, who were not known to the prosecutrix and whose faces could not be seen by the prosecutrix because of the darkness. After sometime, the appellant stopped the motorcycle. The other four persons were standing at some distance, and there, by removing her clothes, the present appellant committed rape on her. After the incident, she was threatened not to disclose the incident to anybody, otherwise she would be killed. Thereafter, she came back to Sendhwa bus stand walking and there she waited for 10 to 15 minutes and, as she could not get a bus to go back, she stayed in a lodge nearby and in the morning she went to *Nagalwadi*, where her parents reside and there her husband came on Saturday and thereafter they went to *Julvaniya* village and narrated the incident to *Sarpanch* – Rajendra Gadge, and thereafter, she went to *Khargone* and lodged the report with her husband. *Sarpanch* – Rajendra Gadge, Sampat s/o Ganiya Barela and Sursingh s/o Rupla Barela also went to police station and the report was lodged in AJK Cell at Khargone. She was medically examined

and thereafter, completing the normal investigation, the charge-sheet was filed.

4) Learned Sessions Judge did not find the charge under Sections 3(1)(12) and 325 of SC/ST (Prevention of Atrocities) Act and acquitted the present appellant from the charges under this section. However, he found him guilty under Sections 366, 376(1) and 506-B IPC and convicted and sentenced him as aforesaid.

5) Being aggrieved by this order of conviction and sentence, the present appeal is filed on the ground that the appellant was falsely implicated. He was not present in *Sendhwa* on the date of alleged offence. It is also stated that the prosecutrix and her husband were working as labourer for the appellant. They took some money from him and to save themselves from repaying the loan, they falsely implicated the appellant. It is also one of the ground of this appeal that the story of the prosecution is unnatural and in alternative, it is submitted that even if, it is assumed that sexual intercourse took place between the prosecutrix and present appellant, it took place with consent of the prosecutrix and no offence under Section 376(1) IPC is made out.

6) Learned counsel appearing for the respondent/State supports the impugned order and submits that the appeal should be dismissed and impugned conviction and sentence of the present appellant should be confirmed.

7) The question that arises for consideration is whether the impugned judgment requires any interference by this Court.

8) Case of the prosecution is based entirely on sole

testimony of the prosecutrix. It is true that there is a presumption in favour of the prosecutrix that if she states on oath that rape was committed on her, her statement should be taken as true unless and until it is rebutted by cogent evidence produced by opposite party. Section 114-A of Evidence Act as stands today is as under :-

“114-A. *Presumption as to absence of consent in certain prosecutions for rape.* –In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section (2) of Section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.”

However, it is trite law that when the case of prosecution depends on sole testimony of a witness, the testimony of the witness should be examined minutely and only when the statement is found reliable in all respects, the conviction should be based on such sole testimony of prosecution witness.

9) In this view of the matter, testimony of the prosecutrix should be examined to see, whether her statement is reliable. Only when her statement is found to be reliable, it may be presumed that she did not consent for the physical intercourse.

10) Learned counsel appearing for the appellant points out that there is one major discrepancy in her statement is that she changed the place of incident. In the Fir (EX.P/2), she stated that the present appellant took her on *Kachcha Road* meant for bullock cart and there he committed rape on her. He points out that in the spot map prepared by Investigating

Officer – Prem Babu Sharma, who was Sub Divisional Officer, Police, the spot is shown on right side of *Sendhwa Borli* Road, which is in front of the hospital, however, in her Court statement, which is recorded on 29/10/1998, she stated that she was taken behind the hospital. Similarly, he pointed out that in the FIR, she stated that four persons followed the present appellant on two other motorcycles, who stopped at the place, where the present appellant committed offence, threatened her that she should not raise any cry, otherwise they would kill her, however, in her Court statement, she changed the version and stated that those four persons did not stop at that point and went away and waited at some distance. According to learned counsel for the appellant, this is a major discrepancy, which makes her statement unreliable.

11) The next discrepancy he points out is that in cross-examination, she said that her bangles were broken, when she was raped, however, no such bangles were found on the spot. Trial Court observed that the spot map was prepared after 10 days of the incident and it was not possible that pieces of bangles would remain there. However, learned counsel for the appellant points out that pieces of bangles were not made by such material, which can disintegrate within 10 days and nobody would take away the broken bangles from the spot. He further points out that according to the prosecutrix, she started from her brother's place at *Pansemal* for *Sendhwa* at 4.00 p.m. and reached *Sendhwa* bus stand when darkness was already set in. However, from the statement of Gul Mohammad (PW/7), she reached at the lodge at 11.00 p.m. in the night and went away at about 7.00 a.m. in the morning

next day. He also pointed out that the prosecutrix stated that after coming back from the place of incident, she waited for 10 to 15 minutes at bus stand and when she realized that there would not be any bus available to go to her village, she went to the lodge and stayed there. He further points out that she admitted that during night, In-charge of Police Station *Sendhwa* came to the lodge and he searched all the rooms, as he was searching some accused in other case and he came in room of the prosecutrix and asked about lodging lonely in the room and she only stated that as there was no bus to go to her village, she stayed in the lodge. According to him, she could have narrated the incident to the police. Thereafter, he further points out that when her husband came on next Saturday, they still choose to go to their village and narrated the incident to *Sarpanch* – Rajendra Gadge and thereafter, they went only on Monday to report the incident. During this period, the concoction of prosecution story can not be ruled out.

12) So far as the motive of false implication is concerned, the present appellant pointed out that the prosecutrix and her husband (PW/3) admitted that they were working for the appellant for some time. Presently, the appellant is a neighbouring farmer. Though, it is denied by all the prosecution witnesses that there was any dispute between the appellant and said Ramesh Gadge or Kailash, in whose field the prosecutrix and her husband allegedly sowing and it is also true that no evidence is produced by defence in this respect. However, there is possibility that the present appellant was falsely implicated to avoid the repaying of loan that received from the present appellant. Even, the present

appellant in his statement under Section 313 Cr.P.C. did not give any detail of any dispute pending with said Ramesh Gadge or Kailash. He further points out that in medical examination, no external injury was found on her body or on her private parts. He lastly points out that names of many persons, with whom the prosecutrix went to police station for lodging the report were written in the FIR but no such person was examined except Rajendra Gadge (PW/4). Learned counsel for the appellant further argues that the prosecutrix is a married lady having three children. She is major. She was allegedly raped on a raw surface and even if it is assumed, she was habitual to sexual intercourse, it is not possible that she sustained no injury, if she was forcibly raped by the appellant.

13) Learned counsel for the respondent/State submits that the prosecutrix supported the prosecution case in major details. The discrepancies pointed out by learned counsel for the appellant are minor in nature and does not make the whole statement of the prosecutrix unreliable and he further points out that there is presumption in favour of the prosecutrix and therefore, the inferences drawn by learned Trial Court should not be interfered with and should be confirmed.

14) I have gone through the statements of the prosecutrix (PW/2) and her husband Bhairam (PW/3). I found that their statements are not reliable. Firstly, the major discrepancy is change of spot of commission of crime. Secondly, though she was raped on a bare ground, no injury was found on her body and thirdly, she reached in the lodge at about 11.00 p.m., while she started from her brother's house at 4.00 O'clock. The prosecution has not proved that whether this

much time was required for her to reach *Sendhwa* in commission of crime and reaching back to the lodge. This was the duty of the prosecution officer to investigate this aspect of the case in detail and submit cogent evidence to show that looking to the distance the time taken by the prosecutrix to reach the lodge at 11.00 p.m. night is natural. Further, her conduct after the incident is also not natural. She did not narrate the real reason for staying in the lodge to the police, which came to her room in connection with some other crime. Thereafter, she went to her parents house next day at Village *Nagalvadi* and no reason was given by her for not going to her village, where her children reside and going back to her parents house instead. There also, she did not narrate the incident to her mother, which was very natural for any woman in rural area and she kept quite. Even, when her husband reached at *Sendhwa*, instead of going back to *Sendhwa* and reporting the matter immediately they went back to their village *Julvaniya* and there again they remained silent for two days and matter was reported only on Monday that to at *Khargone* and not at *Sendhwa* and lastly, the Investigating Officer – Prem Babu Sharma was not examined by prosecution. Though, only this aspect is not fatal for the prosecution, however, this must have caused serious prejudice to the prosecution because Hariprasad Raipuria (PW/8) was not Investigating Officer in this case. He was examined in place of Ram Babu Sharma and only recognized sign of the investigating Officer on various documents. In para 7, he stated that he had no knowledge of the spot, where the incident was committed, as he never went to that place and

only on the basis of record, he proved EX.-P/6, the spot map. The spot map is important document for prosecution. The spot map is prepared by Investigating Officer after visiting the spot himself and he observed the various things like nature of surface of the ground whether it was rough or smooth etc. In Para 7, he stated that he was not knowing whether there is any road to go behind the hospital, where there is forest.

15) Taking all these discrepancies and shortcomings in the case of prosecution in totality, I find that prosecution has failed in this case to prove that the offence allegedly committed by the present appellant and therefore, in considered opinion of this Court, this appeal deserves to be allowed and accordingly **allowed**.

16) The conviction and sentence passed on the present appellant under Sections 366, 376(1) and 506-B IPC is set-aside. The present appellant is acquitted from the charges under Sections 366, 376(1) and 506-B of IPC. The bail and bonds furnished by the appellant are discharged and fine deposited by him, if any, may be refunded to him.

Certified copy as per rules.

(Alok Verma)
Judge