HIGH COURT OF MADHYA PRADESH

BENCH AT INDORE

SINGLE BENCH : Hon'ble Shri Justice Ved Prakash Sharma

Criminal Appeal No.1367/2014

Sanju @ Sanjay Thakur
Vs.
State of M.P.

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Shri Praveen Newalkar, learned counsel for the appellant.
Shri Peyush Jain, learned Public Prosecutor for the respondent-State.

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JUDGMENT

(Delivered on 17th day of April, 2017)

This appeal preferred through Superintendent, Central Jail, Indore is directed against judgment and order dated 13.03.2014 rendered by VII Additional Sessions Judge, Indore in Special ST No.112/13, whereby appellant Sanjay @ Sanju Thakur has been found guilty under Section 376(2)(i) of IPC r/w Section 5(m)/6 of Prevention of Children from Sexual Offences Act, 2012 (for short 'the Act') and has been sentenced to suffer 10 years RI and to pay a fine of Rs.5000/- with a further stipulation that in default of payment of fine, he will suffer additional imprisonment of 2 years.

2. The prosecution case, as having emerged during trial, briefly stated, is that on 04.09.2013, Pushpa (P.W.1), who was residing in a rented accommodation in Mayur Nagar, Lane No.5, Indore with her husband Subash Kochle (P.W.3) and two

daughters including the prosecutrix (P.W.1), aged about 6 years, had gone to her office; her husband was also away from the house. When around 5 p.m. Pushpa (P.W.2) came back to her house, the prosecutrix (P.W.1) narrated to her that around 2 p.m. during the day when she went to the room of appellant Sanjay Thakur situated nearby for having some guidance with regard to homework, he kissed her and bitten her on the cheeks and thereafter, removing her undergarment and after undressing himself by taking out of his pant, inserted his penis in her private part. Allegedly, on cry being raised, the appellant pressed her mouth and further threatened to kill her if she revealed anything about the incident to anyone. When around 7 p.m. Subash Kochle (P.W.3) came back to the house, Pushpa (P.W.2) apprised him of the whole incident. She further told to her landlord Rakesh and his wife Rita about the incident and thereafter, same day at around 8.35 p.m. lodged First Information Report (Ex.P/1) in this regard with Police Station Azad Nagar, Indore, on the basis whereof a case under Section 376 of IPC and Section ¾ of 'the Act' was registered against the appellant.

3. The investigation was put in motion. B.P. Verma (P.W.9), the then Station House Officer, Police Station-Azad Nagar proceeded with investigation and next day, after visiting the spot prepared spot map (Ex.P/2). The prosecutrix was also sent for medical examination. Dr. Jagrati Punchi (P.W.4), who was posted at the relevant time in M.Y. Hospital, Indore as R.S.O. (Gynec) examined her and, vide report Ex.P/4 found the hymen membrane slightly torned on upper margin, however, no injury or bleeding was noticed. She further collected the

undergarment and nail clippings of the prosecutrix and also prepared a slide of her vaginal smear. All these articles after being sealed were handed over to the police. Dr. Jagrati Punchi (P.W.4) expressed inability to give any definite opinion regarding rape, however, she advised for X-Ray examination. Next day, Dr. Nirmal Bhilala (P.W.5) conducted X-Ray of wrist and sterno-clavicular joint of the prosecutrix and, vide report Ex.P/7 opined that she was between 6-9 years of age as epiphyses of head of radius had appeared but not fused and the epiphyses of olecranon process and iliac crest had not appeared. The appellant was apprehended, vide arrest memo Ex.P/13 on 05.09.2014. He was also sent for medical examination and was found fit for sexual intercourse. His undergarments were obtained. A slide of his semen was also prepared and these articles were handed over to the police in a sealed cover. The seized articles, vide memo Ex.P/15 were sent to Regional F.S.L. Laboratory, Indore. The Assistant Chemical Examiner, vide report dated 27.09.2013, reported presence of sperms over the slide of semen prepared by the doctor at the time of examination of the appellant. The witnesses were interrogated.

3. After usual investigation, a charge-sheet was laid before the concerned Magistrate, who after compliance of Section 207 of 'the Code' committed the case to the Court of Sessions from where it was made over to the 7th Additional Sessions Judge, Indore for trial.

4. A charge under Section 376 (2)(i) of IPC read with Section 5(m)/6 of 'the Act' was framed by the learned trial Court against the appellant, who abjured the guilt and pleading

innocence claimed to be tried.

5. The prosecution, in order to bring home the guilt, examined as many as 10 witnesses including the prosecutrix (P.W.1), her parents – Pushpa (P.W.2), Subhash Kochle (P.W.3), and Investigating Officer – B.P. Verma (P.W.5). Dr. Jagrati Punchi (P.W.4) and Dr. Nirmal Bhilala (P.W.5) have conducted the medical examination of the prosecutrix. Apart this, documents Ex. P/1 to P/17 were marked in evidence.

6. The incriminating circumstances appearing against the appellant in the prosecution evidence were brought to his notice during his examination u/s. 313 of 'the Code' so as to enable him to explain, however, the appellant either denied such circumstances or expressed his innocence. The plea on behalf of the appellant was of false implication. In defence, solitary witness Savita, who claims to be sister of the appellant, was examined.

7. The learned trial Court on appreciation of evidence vide the impugned judgment found the appellant guilty u/s. 376(2)(i) of the IPC read with Section 5(m)/6 of 'the Act') and accordingly, convicted and sentenced him, as stated hereinabove in Para 1.

8. The finding of conviction and sentence has been challenged in this appeal on multiple grounds. It is submitted by learned counsel for the appellant that the prosecutrix (P.W.1) being a child witness was prone to be tutored, therefore, the learned trial Court seriously erred in placing implicit reliance on

her testimony. It is further submitted that the prosecution has not been able to establish that there was 'rape' within the meaning of Section 375 of the IPC because there is no evidence about complete penetration. It is also submitted that on the date of alleged incident, the appellant was not present at his residence situated at Indore, therefore, the question of committing rape by him does not arise. Lastly, it is submitted that the learned trial Court has overlooked the material omissions and contradictions and has committed a grave error in arriving at a finding of guilt.

9. Per contra, it is submitted by the learned Public Prosecutor that the learned trial Court on proper appreciation of evidence has recorded the finding of guilt and that, no ground is made out to interfere with the conviction and sentence recorded against the appellant.

10. Heard the learned counsel for the parties and perused the record. The question that arises for consideration is, whether the conviction and sentence recorded by the learned trial Court is in accordance with law and evidence ?

11. Though defence witness Sarita (D.W.1) has deposed that the appellant, who happens to be her brother, had gone on 4.9.2013 to Dewas as his wife was quick with the child and that he stayed there for 3 to 4 days, however, her statement stands belied by the answer put forth by the appellant during his examination u/s. 313 of 'the Code' in response to question No.34, in which, he has stated that he left his house at around 1 pm. As a matter of fact, the stand of the appellant as regards his presence in his house has been quite dubious. While in response

to Question No.17, he stated that he was not present in his house, contrarily, in response to Question No.32, he says that he was present in his house. Here, it is noticeable that no suggestion was given to Pushpa (P.W.2) and Subhash Kochle (P.W.3) respectively, the mother and father of the prosecutrix (P.W.1), that on the date of alleged incident, the appellant was not present in his room and had already left for his in-law's house at Dewas. Therefore, the testimony of Sarita (D.W.1) is not found to be at all inspiring and clearly appears to be an after thought. Hence, the plea of alibi is not sustainable.

12. There is a serious challenge to the testimony of the prosecutrix (P.W.1), aged about 6 years, on account of her age, hence, before proceeding further, it has to be examined as to whether her testimony is inspiring and can be relied upon. As per Section 118 of the Evidence Act, a person, who is not prevented from understanding the questions put to him or from giving rational answers to such questions is a competent witness. Of course, a reasonable degree of caution and circumspection is required while dealing with testimony of a child witness. (See: ***Rajaram vs. State of Bihar, (1996) 9 SCC 287***). However, if on a close and careful scrutiny, such evidence is found to be reliable, the Court can act upon the same. In the instant case, the prosecutrix (P.W.1), a child of 6 years, has been examined without administering oath. The learned trial Judge has put a number of questions to this witness in order to ascertain whether she is having ability to understand the questions put to her and can give rational answers to such questions. The prosecutrix (P.W.1) has given clear answers to

Question Nos. 1 to 6 which have been put to her to examine her capacity to depose. Therefore, considering that the prosecutrix (P.W.1) has given rational answers to the questions put to her, it is found that she has capacity to understand the questions and to answer the questions in a rational manner.

13. The prosecutrix (P.W.1) has clearly deposed that on the date of incident, when she went to the room of the appellant for studies, he bolted the room from inside and thereafter, had bitten her lips and subsequently removed her undergarments so also his own undergarments and thereafter inserted something in her private parts and thereafter, ejaculated. Though, this witness has not been able to state the date of incident, however, she has specifically stated that the incident occurred at 2 pm. She has further explained that she went to the room of the appellant, who was residing in the close vicinity, as she was having some difficulty in solving a question. During cross-examination, this witness has further explained that in the evening, she used to go to the appellant for studies and that some other children also used to come to the appellant, however, at the time of incident, she was alone. A close and careful scrutiny of the testimony of this witness reveals that she has given quite rational replies to most of the questions. Her answers are quite clear and to the point. No material omission or contradiction has emerged so as to indicate that she has been tutored or is interested in falsely deposing against the appellant for some extraneous reasons. The learned trial Court on due appreciation of testimony of this witness has found her reliable. I don’t find any reason to differ with the view taken in this matter by the learned trial Court.

14. From the aforesaid, it is clear that on the date of the incident, in the afternoon, at around 2 pm., the prosecutrix went to the room of appellant situated nearby her house and that the appellant misusing his position undressed her and after removing his own clothes committed sexual assault upon her by putting his private parts in the private parts of the prosecutrix (P.W.1).

15. The learned counsel for the appellant inviting attention to the MLC report, Ex. P/4 prepared by Dr. Jagrati Punchi (P.W.4) on examination of prosecutrix (P.W.1), submits that no injury has been found on the person or private parts of the prosecutrix (P.W.1) and, therefore, a case of rape is not made out against the appellant. To appreciate the contention raised in this regard, it is necessary to examine the legal position with regard to rape.

16. In the case of ***Ranjit Hazarika vs. State of Assam, 1998 (8) SCC 635***, the apex Court held that to constitute the offence of rape, penetration, however slight, is sufficient. While dealing with this aspect, the apex Court observed as under (para-5) :

> "5. The argument of the learned counsel for the appellant that the medical evidence belies the testimony of the prosecutrix and her parents does not impress us. The mere fact that no injury was found on the private parts of the prosecutrix or her hymen was found to be intact does not belie the statement of the prosecutrix as she nowhere stated that she bled per vagina as a result of the penetration of the penis in her vagina. She was subjected

> to sexual intercourse in a standing posture and that itself indicates the absence of any injury on her private parts. To constitute the offence of rape , penetration, however slight, is sufficient. The prosecutrix deposed about the performance of sexual intercourse by the appellant and her statement has remained unchallenged in the cross-examination. Neither the non-rupture of the hymen nor the absence of injuries on her private parts. therefore, belies the testimony of the prosecutrix particularly when we find that in the cross-examination of the prosecutrix nothing has been brought out to doubt her veracity or to suggest as to why she would falsely implicate the appellant and put her own reputation at stake. The opinion of the doctor that no rape appeared to have been committed was based only on the absence of rupture of the hymen and injuries on the private parts of the prosecutrix. This opinion cannot throw out an otherwise cogent and trustworthy evidence of the prosecutrix. Besides the opinion of doctor appears to be based on 'no reasons'."

17. In ***Madan Gopal Kakkad vs. Naval Dubey, (1992) 3 SCC 204***, the apex Court had an occasion to consider whether the complete penetration is necessary to constitute rape within Section 375 of the IPC. Referring to various authorities on the point, apex Court held that slightest degree of penetration of the vulva by the penis with or without emission of semen is sufficient to constitute the rape.

18. Again, the issue was dealt with by the apex Court in ***Aman Kumar vs. State of Haryana, AIR 2004 SC 1497*** and it was held as under :

> "The rupture of hymen is by no means

> necessary to constitute the offence of rape. Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of the hymen is not necessary. Vulva penetration with or without violence is as much rape as vaginal penetration. The statute merely requires evidence of penetration, and this may occur with the hymen remaining intact. The actus reus is complete with penetration. To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendu with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable under Section 376 IPC."

19. In ***Koppula Venkat Rao vs. State of A.P., AIR 2004 SC 1874***, the apex Court held as under :

> "The sine qua non of the offence of rape is penetration, and not ejaculation. Ejaculation without penetration constitutes an attempt to commit rape and not actual rape. Definition of 'rape' as contained in Section 375 IPC refers to 'sexual intercourse' and the Explanation appended to the section provides that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Intercourse means sexual connection."

20. In ***Rajendra Datta Zarekar vs. State of Goa, (2009) 1 SCC (Cri.) 892***, the apex Court referring to Modi's "Medical Jurisprudence and Toxicology" and Parikh's "Medical Jurisprudence and Toxicology", opined that to constitute an offence u/s. 376 of the IPC, it is not necessary that the hymen should be ruptured. It is further held that sexual intercourse

means slightest degree of penetration of the vulva by the penis with or without emission of semen.

21. A review of all the aforesaid authorities will make it abundantly clear that to constitute rape within Section 375 of the IPC, neither it is necessary that there should be complete penetration nor it is necessary that there should be rupture of hymen or other injuries on the person or private parts of the prosecutrix. The slightest penetration with or without emission may constitute rape. In the instant case, Dr. Jagrati Punchhi (P.W.4) has deposed that on examination of private parts of the prosecutrix (P.W.1), she found that the margin of the hymen membrane was slightly torn form one side though the same was not completely ruptured. This finding clearly indicates towards sexual assault and penetration to some degree, therefore, it can be safely concluded that the appellant subjected the prosecutrix - a girl child of 6 years, to rape.

22. Though a faint plea with regard false implication on account of alleged dispute of Subhash Kochle (P.W.3) with the appellant with regard to payment of money has been taken during cross-examination, however, the same appears to be a concoction because no reasonable person in the capacity of father will try to implicate a person by making a false allegation of rape qua his daughter. Therefore, the plea taken in this regard deserves to be rejected.

23. The next contention is that the testimony of prosecutrix is not corroborated from an independent source, therefore, the same cannot be relied upon. The plea raised in this

regard is devoid of merit because by now, it is well settled that victim of sexual assault is not treated as accomplice and as such, her evidence does not require corroboration from any independent source. In this regard, we can usefully refer to the decision of apex Court in ***Moti Lal vs. State of M. P., 2008 Cri LJ 3543*** and in ***State of U.P. vs. Munshi, 2009 Cri LJ 393***.

24. In ***State of Punjab v. Gurmit Singh, (1996) 2 SCC 384***, the apex Court dealing with the plea with regard to corroboration of the testimony of the prosecutrix in a rape case, observed as under :

> "The Courts must, while evaluating evidence, remain alive to the fact that in a case of rape , no self-respecting woman would come forward in a Court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless, the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise, reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should

the evidence of a girl or a woman who complains of rape or sexual molestation be viewed with doubt, disbelief or suspicion ? The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the change levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a women or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, takes as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable."

25. From the aforesaid discussion and analysis it is found to be proved beyond reasonable doubt that the appellant misused his position as neighbor and his acquaintance of the prosecutrix (P.W.1) and to gratify his lust committed rape upon her. Therefore, the conviction recorded against him by the learned trial Court for offence u/s. 376(2)(i) with Section 5(m)/6 of 'the Act' cannot be faulted.

26. As regards sentence, the apex Court in ***Motilal*** (supra) has held that the measure of punishment in a case of rape cannot depend upon the social status of the victim or the accused, rather it must depend upon the conduct of the accused, the state and age of the sexually assaulted female and the gravity of the criminal act. The apex Court emphasized that crimes of violence upon women need to be severely dealt with and that, the socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy because protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence. It was further observed that the Courts must hear the loud, cry for justice by the society in cases of the heinous crime of rape on innocent helpless girls of tender years, married women and respond by imposition of proper sentence.

27. In view of the aforesaid legal position, the sentence of 10 years rigorous imprisonment as imposed against the appellant by the learned trial Court, in the considered opinion of this Court, cannot be said to be unreasonable or excessive.

28. Having regard to the aforesaid, this appeal having no merit deserves to be and is accordingly, hereby dismissed.

(VED PRAKASH SHARMA)
JUDGE.

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