

HIGH COURT OF MADHYA PRADESH, PRINCIPAL
SEAT AT JABALPUR
(SINGLE BENCH : HON'BLE SHRI JUSTICE J.P.GUPTA)
Criminal Appeal No.1717/1998

Boodhe @ Roop Singh

Vs.

The State of Madhya Pradesh

Shri Shahnawaz Khan, Advocate for the appellant.
Shri Sharad Sharma, G.A. for the respondent / State.

Whether approved for reporting : (Yes / No).

J U D G M E N T
(Delivered on 29/11/2018)

The appellant has preferred the present appeal being aggrieved with the judgment dated 20.7.1998 passed by the Sessions Judge, Damoh, in S.T.No.169/1997 whereby the appellant has been convicted for the offence under Sections 376(1) of the IPC and sentenced to undergo RI for 8 years with fine of Rs.5,000/-, in default of payment of fine, further R.I. of six months.

2. The prosecution case, in brief, is that on 16.7.1997 at about 4 PM, when the prosecutrix, PW1 alone was going towards garden to answer the call of nature in village Jhagri on the way near a tree she met with the accused armed with axe, who stopped her with bad intention asked that he wants sexual intercourse with her. Prosecutrix, PW1, scolded him, then appellant accused caught hold her right hand, threw away his axe, threw down the prosecutrix, lifted the saree of the prosecutrix and committed rape with her. The prosecutrix screamed, then appellant threatened to

kill her by axe due to which she did not shout. After committing rape, appellant fled away. The prosecutrix returned back to her house and narrated the entire incident to his mother-in-law Kashibai, PW2 and sister-in-law Kallubai, PW3. Her husband was not at home, when he came back next day i.e. 17.7.1997, information of the incident was given at Police Station Pathariya, on the basis of which First Information Report, Ex.P/1, was lodged and crime no.138/1997 was registered against the appellant for the offence punishable under sections 341, 376 and 506-B of the I.P.C. and the matter was investigated. The prosecutrix was sent for her medico legal examination. Dr.Mithilesh Shrivastava (PW-6) examined her at W.S.District Hospital, Damoh and gave her report Ex.P-6. Spot map was prepared. Appellant was arrested on 24.7.1997 and his medical examination was conducted by Dr.D.P.Sharma, PW4. He gave his report, Ex.P/4. One axe was recovered at the instance of the appellant vide seizure memo, Ex.P/7. After due investigation, a charge sheet was filed before the concerned JMFC, who committed the case to the Court of Sessions. The court of Sessions Judge, Damoh, framed the charge against the appellant for the offence under sections 376(1) of the I.P.C. The appellant abjured the guilt and claimed to be tried. His defence was that he has been falsely implicated on account of enmity with the family of the prosecutrix.

3. The learned court below after appreciating the oral as well as documentary evidence on record arrived at the conclusion that the appellant has committed sexual intercourse with her without her consent and will. Hence, convicted the appellant under section 376(1) and sentenced him, as mentioned above.

4. Learned counsel for the appellant submitted that the finding of the learned court below is contrary to law. The allegation of commission of rape with the prosecutrix has not been established

beyond reasonable doubt by the prosecution. The conviction of the appellant is based on the sole testimony of the prosecutrix. Other witnesses viz. Kashibai, PW2, mother-in-law of the prosecutrix and Kallo, PW3, sister-in-law of the prosecutrix are not independent witnesses, therefore, their version cannot be relied upon. The incident of commission of rape with the prosecutrix also does not find support from the statement of Dr.Deepika, PW7, who examined the prosecutrix immediately after the incident. As per medical report, no external or internal injury was found on the private part of the prosecutrix. She further opined that the prosecutrix was habitual of sexual intercourse, therefore, no definite opinion can be given whether rape has been committed or not. There is one day delay in lodging of the FIR. The investigation is also faulty. There is no corroboration from the FSL report. In the circumstances, the possibility of false implication of the appellant cannot be ruled out. The statement of the prosecutrix without any corroboration cannot be relied. The learned trial court without appreciating the evidence has mechanically recorded the findings which are not sustainable. Hence, the appeal be allowed and conviction and sentence be set aside.

5. On the other hand, learned Govt. Advocate has contended that the finding of the learned court below is based on legal and proper appreciation of the evidence, which does not require any interference, therefore, the appeal be dismissed.

6. The question for consideration is that whether the prosecution has established beyond the reasonable doubt that the appellant committed sexual intercourse with the prosecutrix without her consent or will ?

7. Having considered the contention advanced by learned counsel for the parties and on perusal of record it is found that the conviction of the appellant is based on the testimony of the pros-

ecutrix, PW1, which got corroboration with the testimony of her mother-in-law Kashibai (PW-2) and sister-in-law Kallo Bai (PW-3) to whom she narrated the entire incident. The prosecutrix (PW-1) categorically stated that the appellant met her on the way with axe in his hand. He stopped her and told her that he wants to have sex with her. He caught hold of her right hand, threw the axe and threw her down and lifter her clothes and committed rape with her. The prosecutrix screamed, then appellant threatened to kill her by axe due to which she did not shout, then the appellant ran away. The prosecutrix returned back to her house and narrated the entire incident to her mother-in-law and sister-in-law. When her husband came back in the evening, she narrated the incident to him and the next day she went to lodge report at Police Station Pathariya and then was sent for medical examination.

8. Mother-in-law Kashibai (PW-2) and sister-in-law Kallo Bai (PW-3) of the prosecutrix, have stated that prosecutrix came weeping to her house and narrated the incident to them. R.K. Pandey ASI (PW-5) stated that on 17.7.1997 he recorded the FIR at Police Station Patharia and sent the prosecutrix for medical examination and on 24.7.1997 appellant was taken into custody and one axe was recovered from his possession and seizure memo Ex-P/8 was prepared and also sent for medical examination. Dr. Mithilesh Shrivastava (PW-6) stated that he examined the prosecutrix on 18.7.1997 and as the prosecutrix was a married lady, there was no sign on her person in connection with forceful intercourse with her. Dr. D.P. Sharma (PW-4) has stated that he examined the appellant on 31.7.1997 and found that the appellant was physically capable to commit sexual intercourse and prepared the report Ex.P/4.

9. The learned trial Court after appreciating the evidence that has come on record, found that the statement of the prosecutrix

(PW-1) is reliable and established the fact that the appellant committed sexual intercourse with the prosecutrix without her consent and will.

10. Learned counsel appearing on behalf of the appellant has assailed the aforesaid finding firstly on the ground that FIR Ex.P/1 was delayed by one day and there is no reasonable explanation hence, the case of the prosecution is doubtful.

11. In the considered opinion of this court, the aforesaid contention advanced by learned counsel for the appellant has no substance. The prosecutrix (PW-1) has explained the fact that her husband was not at home. He returned in the evening and thereafter on the next date FIR was lodged. In the case of sexual offence, such delay is immaterial and is not sufficient to discard the testimony of the prosecutrix. In this regard, the Hon. Apex Court in the case of ***State of Himachal Pradesh vs. Prem Singh (2009) 1 SCC 420*** had held as under :-

“So far as the delay in lodging the FIR is concerned, the delay in a case of sexual assault cannot be equated with the case involving other offences. There are several factors which weigh in the mind of the prosecutrix and her family members before coming to the Police Station to lodge a complaint. In a tradition-bound society prevalent in India, more particularly rural areas, it would be quite unsafe to throw out the prosecution case merely on the ground that there is some delay in lodging the FIR”.

12. In the case of ***Sri Narayan Saha vs. State of Tripura (2004) 7 SCC 775*** Hon. The Apex Court has held :-

“ In India if the prosecutrix is a married women, she will not do anything in relation to the wrong done unto her without informing the husband. Merely because the complaint was lodged less than promptly, does not automatically raise the question that the complaint was not a genuine one.”

13. Learned counsel for the appellant further submitted that medical expert Dr. Mithilesh Shrivastava (PW-6) has not found any mark of resistance on the person of the prosecutrix and there

is no other physical circumstance for corroborating the testimony of the prosecutrix. As per the prosecution story and the evidence of the prosecutrix, the appellant had axe in his hands at the time of incident he threatened the prosecutrix to kill her. On account of fear she did not make any resistance and surrendered herself with a view to save her life. In the circumstances, there is no question of sustaining the mark of resistance on her body. Similarly, she was a married lady, hence, on physical examination it is not possible to found any mark of resistance on her private parts. The testimony of the prosecutrix cannot be discarded merely on the ground that there is absence of medical evidence with regard to commission of forceful intercourse and absence of mark of resistance. See **State of Maharashtra vs. Chandraprakash Kewal Chand Jain (1990) 1 SCC 550 and State of Punjab vs Gurmit Singh (1996) 2 SCC 384 & State of Rajasthan vs. N.K. The Accused (2000)5 SCC 30.**

14. Learned counsel for the appellant further submitted that as per the prosecution story, the incident had taken place on the public way and at such place, no one can make such attempt and this situation make the prosecution story suspicious.

15. In the considered opinion of this Court, the aforesaid contention is not sufficient to hold the testimony of the prosecutrix doubtful. The prosecutrix has categorically replied during the cross-examination that at the time of incident, there was no one present on the way. Investigating office R.K. Pandey (PW-5) has stated that the spot map Ex.P/2 was prepared at the instance of the prosecutrix and it was found that the place of the incident was not the actual way but it was situated near that way and it can be possible to commit such misdeed at such hidden place.

16. Learned counsel for the appellant has also contended that the facts and circumstances of the case show that it may be the

case of consent and placed reliance on the judgment of Apex Court in ***Mohanlal vs. State of Rajasthan*** reported in (2002) 10 SCC 14, whereby Hon'ble Supreme court has held that there was no injury found on the person of the prosecutrix and the fact of absence of circumstances of using force and the conduct of the prosecutrix of hiding herself, reflects unnatural conduct of the prosecutrix. Considering the aforesaid circumstances it is held that the possibility of consent cannot be ruled out. The facts and circumstances of the present case are not similar, therefore, no benefit can be given to the appellant on the basis of the aforesaid judgment.

17. Similarly, learned counsel for the appellant placed reliance on the judgment of the Apex Court in ***Kuldeep vs. State of Bihar (1998(6) SCC 420)*** in which it is held that :-

“11. Then coming to the conviction of the appellant under [Section 376](#) IPC, although both the courts below have held after accepting the evidence of prosecutrix being truthful held that the appellant has forcibly committed the rape, we are of the opinion that the said fining is unsustainable. The prosecutrix had sufficient opportunity not only to run away from the house at Ramgarh but she could have also taken the help of neighbours from the said village. The medical evidence of Dr. Maya shankar Thakur - P.W.2 also indicates that there were no injuries on the person of the prosecutrix including her private part. her entire conduct clearly shows that she was a consenting party to the sexual intercourse and if this be so, the conviction of the appellant under [Section 376](#) IPC cannot be sustained. there is one more additional factor which we must mention that it is not the case of the prosecutrix that she was put in physical restraint in the house at Ramgarh, with the result her movements were restricted. This circumstance also goes to negative the case of forcible intercourse with the prosecutrix by the appellant.

18. Hon. the Apex Court considering the peculiar facts of the aforesaid case, acquitted the accused considering that it may be a case of consent, but the fact of the present case is totally different and on the basis of the aforesaid judgment it cannot be said that the present case is also the case of consent. In the aforesaid case, the prosecutrix was a consent party.

19. Learned counsel for the appellant also placed reliance on the judgment of the Apex Court in **Bibhishan vs. State of Maharashtra (2007 (12) SCC 390)** in which the girl was unmarried and 18 years old but the medical expert opined that she was habitual of having sexual intercourse and there was no injury on the body of the prosecutrix and no sign of semen on the private part of the prosecutrix and also no clothes were torned therefore, possibility of consent of the prosecutrix cannot be ruled out. But so far as the present case is concerned, the facts are different. In the present case on the point of axe, the prosecutrix was subjected to fear due to which she was unable to make any physical resistance and surrendered herself, therefore, there is no question of such sign or mark on her body.

20. Learned counsel for the appellant also submitted that in this case investigation was faulty. Neither the sample of vaginal swab of the prosecutrix and slide of semen of the appellant were collected and sent to FSL and nor the statements of the persons who resided near the place of incident have been recorded. Hence, the investigation cannot be said to be fair and it caused prejudice to the appellant.

21. In view of this Court, the aforesaid contention also has no substance. The appellant has failed to point out the name of any person who was residing near the place of incident.

22. So far as the allegation with regard to not taking any action for getting FSL report is concerned, during cross-examination by the investigating Officer, on behalf of the appellant no question has been put forth so that he could explain the reason for non-compliance of the same. In the present case, the prosecutrix is a married lady, therefore, no much importance is given to the FSL report. The Apex Court in the case of **Zindar Ali Sheikh vs. State of West Bengal (2009)3 SCC 761)** has held that merely

shabby investigation cannot rescue the accused as the defence cannot be allowed to take advantage of bad investigation where clinching evidence is available to the prosecution.

23. In the present case, the appellant has failed to establish the fact which may be considered as motive of false implication by the prosecutrix and other witnesses Kashi Bai (PW-2) and Kallo Bai (PW-3). He has failed to prima facie establish the case that there was any enmity between him and the family of the prosecutrix. In the absence of any motive of false implication, merely on the basis of statement of the prosecutrix whose statement otherwise found to be credible, the appellant can be convicted for the commission of offence. In this regard Hon. Apex Court in the case of **State of Maharashtra vs. C.K. Jain (1990) 1 SCC 550** has held :-

16. A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circum-

stances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence. We have, therefore, no doubt in our minds that ordinarily the evidence of a prosecutrix who does not lack understanding must be accepted. The degree of proof required must not be higher than is expected of an injured witness.

24. In view of the aforesaid discussions, it cannot be said that in this case the prosecutrix was a consenting party. In the circumstances, in view of this Court, the finding of the trial court is in accordance with law and the prosecution has established the charge beyond the reasonable doubt against the appellant. Hence, this appeal deserves to be dismissed being devoid of merit. Accordingly, the appeal is dismissed.

25. The appellant is on bail. He is directed to surrender immediately before the trial Court and in case of non-compliance, the trial Court shall issue warrant of arrest against him and send him to jail for undergoing the remaining sentence.

26. A copy of this judgment be sent to the trial court for information and compliance.

(J.P.GUPTA)
JUDGE

**HIGH COURT OF MADHYA PRADESH : PRINCIPAL
SEAT AT JABALPUR**

1	Case Number	Cr.A. No.1717/1998
2	Parties Name	Boodhe @ Roop Singh Vs. The State of M.P.
3	Date of Judgment	29/11/2018
4	Bench Constituted of	Hon'ble J.P Gupta, J.
5	Judgment delivered by	Hon'ble Shri J.P Gupta
6	Whether approved for reporting	Yes
7	Name of the counsel for parties	Shri Shahnawaz Khan, Advocate for the appellant. Shri Sharad Sharma Government Advocate for the respondent/State,
8	Law laid down	The Evidence Act nowhere says that evidence of the prosecutrix cannot be accepted unless it is corroborated by any material particulars. The requirement of material for corroboration depends on the facts and circumstances of each case applying the rule of prudence. But if the prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence.

**(J.P Gupta)
Judge**