

HIGH COURT OF MADHYA PRADESH: JABALPUR**(Division Bench)****Criminal Appeal No. 596/2010****Sukhdeen s/o Mangi Adiwasi**Appellant

Versus

State of Madhya PradeshRespondent**CORAM:****Hon'ble Shri Justice Huluvadi G. Ramesh,
Hon'ble Shri Justice C.V. Sirpurkar****APPEARANCE:**

Shri Prem Narayan Verma, appears as Amicus Curiae assisted by
Shri S.K. Patel, Advocate for the appellant.

Shri Ravikant Patidar, Govt. Advocate for the Respondent/State.

Whether Approved for Reporting: Yes**Law Laid Down:**

- Merely because a witness is a child witness, his evidence cannot be discarded. On perusal of the deposition-sheet of Neeraj (PW-8) it is evident that the learned Trial Judge has put certain questions and tested his intelligence to answer those questions and has satisfied itself with regard to his competence to depose. Hence, his statement is relevant under Section 118 of the Evidence Act.

Significant Paragraphs: 12 & 13**JUDGMENT (Oral)****(25.02.2019)****Per: Huluvadi G. Ramesh, J.:**

Feeling aggrieved by the judgment of conviction and order of sentence dated 29.01.2010 passed by the learned First Additional Sessions

Judge, Panna in Sessions Trial No.140/2009, convicting the appellant under 376(2)(f) of IPC and sentencing him to suffer imprisonment for life and fine of Rs.50,000/-; in default of payment of fine to undergo additional five years R.I., the appellant has preferred this appeal under 374(2) of Cr.PC.

2. The case of the prosecution, in brief, is that complainant Kishanlal used to live with his children on his land situate at Khairai Har by constructing a hut (*Tapariya*) and take care of his agricultural field and cattle. On 05.08.2009, at about 12.00 noon, Kishanlal was in *Har* (grazing land) and his son Arvind and daughter "R" aged about three years were playing in the hut situate at the field. Lalitabai wife of Kishanlal had left for village Majhauri at about 9.00 a.m. to clean her house on the occasion of festival of Rakhi. The complainant was towards the side of his cattle. At about 12.00 noon, upon hearing the screaming sound of his daughter, complainant rushed to his hut to see his children and found that the accused was lying over the prosecutrix "R". He challenged the accused whereupon he ran away. Kishanlal chased him but he could not catch him. Then he came back to see his daughter and found that blood was oozing from her private part and her back and chest had abrasion marks. His son Arvind has also seen the incident. His wife Lalita, brother Hariprakash and Chowkidar were also informed about the incident. Thereafter, he along with his wife Lalita, brother Hariprakash and daughter "R" made the report at Police Station Amanganj. On the basis of the said report, a case was registered against the accused for the offence punishable under Section 376 of IPC.

3. After registering the case, the prosecutrix was referred for medical examination where she was examined by a lady doctor. In furtherance to his

investigation, the Investigating Officer prepared the spot map; arrested the accused and got him medically examined; sent the articles received from the hospital for FSL examination; recorded the statements of the witnesses and after completion of the investigation, a charge-sheet was submitted against the appellant in the competent Court, which on its turn committed the case to the Court of Session and from where it was received by the Trial Court for trial.

4. The learned Trial Judge after perusing the charge-sheet, framed the charge punishable under Section 376(2)(f) of Indian Penal Code against the appellant. The appellant abjured his guilt and pleaded complete innocence and that he has been falsely implicated on account of family dispute over the land and the witnesses have deposed against him with revengeful attitude. However, the appellant did not adduce any evidence in defence.

5. In order to prove the charge, prosecution examined as many as 14 witnesses and placed the documents Exhibits P-1 to Exhibit P-11 on record. Learned Trial Judge having dilated the evidence on record found that appellant has committed the offence for which he was charged as a result of which, convicted him and passed the sentence, as noted above. In this manner this appeal has been filed by the appellant challenging the impugned judgment.

6. Learned counsel appearing for the appellant has submitted that if the evidence of the prosecution is considered in proper perspective, no case against the appellant is made out. There is no eyewitness to the incident. Lalitabai (PW-1) and Kishan (PW-2) were not present at the spot and they have not seen the incident. They are highly inimical and interested witnesses

in the background of previous enmity over land dispute and therefore, their testimony cannot be relied upon. Therefore, it has been prayed that the learned Trial Court has erred in convicting the appellant.

7. On the other hand, learned counsel appearing for the respondent-State argued in support of the impugned judgment.

8. After having heard learned counsel for the parties, we are of the view that this appeal deserves to be dismissed.

9. Constable Ashok Sharma has been examined as PW-3, who is the witness of seizure of vaginal slide of the prosecutrix and sample seal (Ex. P-3) from hospital Amanganj. Devnarayan Pathak (PW-4), Constable is the witness of seizure of underwear of the accused from District Hospital, Panna in a sealed packet and another packet containing semen slide of the accused through seizure memo (Ex.P-4). J.R. Sharma, Head Constable (PW-5) is the another witness of seizure of vaginal slide of the prosecutrix through Ex.P-3 and seizure of underwear, pant, semen slide of the accused from District Hospital, Panna in sealed packet through Ex.P-4. Chandraprakash Tiwari (PW-6) is the Investigating Officer, who has proved the report Ex.P-8 and spot map Ex.P-5.

10. Lalitabai (PW-1) is the mother of the prosecutrix. She has deposed that she has four children out of which Arvind is 6-7 years and prosecutrix is aged three years. On the date of incident, on account of festival of Rakhi, she had gone to her village Majhauri to clean the house. She has deposed that at about 1 – 2 p.m., her son Arvind came to her and informed that a person is beating Buiya (younger sister). Thereafter, she reached the spot and found that the prosecutrix had scratch marks inflicted by nails on her chest, face,

head and back. The blood was also oozing from her private part and chest. According to her, her husband told that appellant has violated their daughter.

11. Kishan (PW-2) is the father of the prosecutrix. He has deposed that at the time of incident, he was grazing the cattle at some distance from his field and his daughter (prosecutrix) and son Arvind were there in the hut. At about 12 – 1.00 p.m., he heard the shrieks of the prosecutrix, whereupon, he immediately reached the spot and there he saw the appellant violating the prosecutrix. He challenged the appellant. Thereupon, the appellant ran away and thereafter, he chased the appellant but due to injury in his leg, he could not catch hold of the appellant. Kishan (PW-2) has been cross-examined on behalf of the appellant but nothing has been revealed in his cross-examination to disbelieve his testimony.

12. The evidence of Kishan (PW-2) is corroborated by Neeraj (PW-8), who has deposed that at the time of incident he was at his hut in the agricultural field. At about 12-1 p.m. appellant came to him and asked for water. The appellant gave him water but he threw it. Thereafter, the appellant asked him to go away and went to the hut (*Madaiya*) where prosecutrix and Arvind were sitting. The appellant slapped Arvind and forced him also to go away and thereafter, climbed over the prosecutrix. Neeraj (PW-8) has further deposed that he was watching the appellant whereupon he ran to beat him. Thereafter, he rushed to call Kishan (PW-2).

13. Learned counsel for the appellant submitted that Neeraj (PW-8) being a child witness, his testimony could not have been relied upon. In this regard, it is relevant to note that merely because a witness is a child witness, his evidence cannot be discarded. The evidence of child witness is relevant

under Section 118 of the Evidence Act, which provides that all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. In the present case, on perusal of the deposition-sheet of Neeraj (PW-8) it is evident that the learned Trial Judge has put certain questions and tested his intelligence to answer those questions and has satisfied itself with regard to his competence to depose and therefore, we do not find any force in the said argument raised by the learned counsel for the appellant.

14. The evidence of Kishan (PW-2) and Neeraj (PW-8) clearly establishes the fact of presence of the appellant at the place of occurrence at the time of incident and commission of rape by the accused on the prosecutrix aged about three years. The version of these two witnesses is also supported by medical evidence. Dr. Vijeta Verma (PW-7) who medically examined the prosecutrix has found that the prosecutrix had sustained four abrasion marks caused by nails on her chest and several marks of biting on left side of her chest. She has further found several abrasions marks on her chest measuring 3x2, 4x3, 5x3 cm. She has opined that those abrasion marks could be due to rubbing of the back on the floor. On examining the private part, she found that hymen was ruptured; labia minora was tightly covered with labia majora; swelling and redness over labia majora, on separation hymen was found ruptured and torn (fresh) and mild bleeding from the private part was observed. She has clearly opined that the prosecutrix was forcibly violated. The report is Ex.P-9. On X-ray examination, the prosecutrix was found to be aged between 3 to 5 years and the report is Ex.P-10.

15. Dr. N.K. Jain (PW-9), who medico-legally examined the appellant on 06.08.2009, has deposed that the appellant is capable of performing the sexual intercourse.

16. Prakash (PW-11) is the Chowkidar. He has stated that Kishan (PW-2) came to him along with the prosecutrix and his wife and asked to come along to make a report to the police as the appellant has violated their daughter. He has further deposed that appellant is the man with bad habits and earlier also he has committed two-three offences. Anandi (PW-14) has also deposed that on the date of incident, at about 2 – 2.30 p.m. he was standing at his agricultural field when he saw the accused running towards the jungle.

17. On going through the evidence as noted above, especially the eyewitness account of Kishan (PW-2) and Neeraj (PW-8) coupled with the evidence of Dr. Vijeta Verma (PW-7), who has examined the prosecutrix, there is nothing to take any different view than that the appellant committed the rape on the innocent child of aged three years. There is corroborating medical evidence and two eyewitness account of the incident. There is no iota of evidence to the contrary to interfere with the well reasoned judgment passed by the learned Trial Court in convicting and sentencing the appellant. However, while affirming the judgment of conviction and order of sentence, we are inclined to reduce the amount of fine imposed upon the appellant from Rs.50,000/- to Rs.5,000/- and default sentence to undergo one year's R.I.; both sentences to run concurrently. The appeal fails and is hereby **dismissed.**

18. Before parting, we put on record our appreciation for the assistance rendered by learned Amicus Curiae in this case. The High Court Legal Services Committee shall remit fee of Rs.4,000/- to the learned Amicus Curiae for assisting the Court.

(HULUVADI G. RAMESH)

Judge

(C.V. SIRPURKAR)

Judge

S/