

HIGH COURT OF MADHYA PRADESH : JABALPURCriminal Appeal No.3334/2013*Shiva Salame**-Versus-**State of Madhya Pradesh*

Single Bench : Hon'ble Shri Justice Vijay Kumar Shukla, Judge.

Shri B.R. Vijaywar, learned counsel for the appellant.
Shri Aditya Jain, learned Dy. Government Advocate, for the
Respondent/State

Whether approved for reporting?	Yes
Law laid down	<ul style="list-style-type: none"> ➤ <i>In the case of rape where the prosecutrix was examined by a lady Doctor but she was not examined, which is very material, hence conviction is liable to be set-aside.</i> ➤ <i>In the case of rape where the vaginal swab and undergarments of the prosecutrix was sent for chemical examination but the chemical examination report is not produce, adverse inference has to be drawn.</i>
Significant paragraph Nos.	14

JUDGMENT
(Jabalpur dt.: 15.12.2018)

Instant appeal is filed under Section 374(2) of the Code of Criminal Procedure, challenging the order of conviction and sentence dated 28.06.2013, passed by the First Additional Sessions Judge, Balaghat in S.T.No. 59/2013, whereby the appellant has been convicted and sentenced as under:-

Conviction U/s	Sentence
363 of I.P.C.	Rigorous Imprisonment for 7 years & fine of Rs.2000/-. In default of payment of fine additional Rigorous Imprisonment for one year.
U/s 366 of I.P.C.	Rigorous Imprisonment for 10 years & fine of Rs.2000/-. In default of payment of fine additional Rigorous Imprisonment for two years.
376 (2)(i) of I.P.C.	Rigorous Imprisonment for 10 years & fine of Rs.2000/-. In default of payment of fine additional Rigorous Imprisonment for two years and six months.
3/4 of Protection of Children from Sexual Offences Act, 2012.	Rigorous Imprisonment for 7 years & fine of Rs.5000/-. In default of payment of fine additional Rigorous Imprisonment for one year.
All the sentences shall run concurrently.	

2. On 18.02.2013 at about 08:00 p.m. the incident is said to have taken place. It is alleged that the appellant had kidnapped and abducted a 7 years old child from lawful guardianship with intention to outrage her modesty. According to the complainant her daughter who was 12 years old, informed that she was sexually violated by the appellant and when she refused and shouted the appellant gave her a slap and threatened her not to say anything to anyone. The prosecutrix came back to home and disclosed the incident to her maternal aunt (Mami) where she washed her frock at 09:00'O Clock then her mother came and had taken her to her house. On second day, at about 06:00 p.m. late F.I.R. was lodged in the Police Station Kotwali, Balaghat.

3. The appellant was arrested on 18.02.2013. Investigation was carried out and after completion of the

investigation, the challan was filed and the charges were framed under Sections 363, 366A, 376(2)(i) of the I.P.C and under Section 3/4 of Protection of Children from Sexual Offences Act, 2012. The accused abjured his guilt and pleaded not guilty. After trial the appellant has been convicted and sentenced as mentioned in the preceding paragraphs.

4. Learned counsel for the appellant argued that the conviction and sentence of the appellant is erroneous. There was delay in lodging the F.I.R. and the appellant has falsely been implicated in the case because of quarrel with the appellant and maternal aunt of the prosecutrix. He also argued that the testimony of the child witness is not supported by the medical evidence. In the medical report Ex. P-13, the Doctor has said that no definite opinion can be given about the rape. It is further submitted that no external or internal injury was found on the person of the prosecutrix. It is also argued that the prosecution has failed to examine the Doctor who had examined the prosecutrix. On the aforesaid grounds, it is stated that the prosecution has failed to prove its case beyond the reasonable doubt.

5. Learned counsel for the appellant also submitted that the accused has already undergone the jail sentence of about 3

years which is 2 years, 10 months and 23 days as on 12.10.2018. In support of this submission, he produced the copy of the communication dated 12.10.2018 obtained under the R.T.I. Act.

6. Per-contra, learned Dy. Government Advocate for the State submits that the conviction and sentence is legal and valid.

7. The prosecutrix who has been examined as P.W-14. She is a child witness and before recording her statement, the Court has satisfied about the competency of the said witness. The Court found that she is able to understand the quarries and thereafter recorded her statement. The prosecutrix has stated that the accused is know to her and when she was playing with her sister in the courtyard, the accused came to her and said that her father is laying in the forest inebriated condition. She had gone alongwith him and thereafter the accused gagged her mouth and sexually violated her. She has stated that he had removed her garments and also his undergarments and thrust his private part in to her private part. Her private part has become wet. She did not state the aforesaid incident to anyone, neither to her maternal aunt nor to her mother. The report was lodged on the next day in the

evening after 06:00 p.m. by Sahnaz Begum (PW-7). The reason for delay has been disclosed that the child had disclosed the aforesaid incident in the next day and when her father came back, thereafter, the report was lodged.

8. So far as the age of prosecutrix is concerned, the prosecution has proved the age of the prosecutrix by producing the admission register and also examining Smt. Sandhya Tiwari (PW-5) In-charge/Principal of the School. The prosecutrix was sent for medical examination and she was examined by Dr. Sujata Gajbhiye and the report is Ex.P-13. She found that there was no external injury over the body. There was no sign of rape and therefore, she could not give any definite opinion about the rape. She had taken vaginal slide from the private part and the frock. Slides etc. were handed over to the Investigating Officer.

9. The prosecution did not examine Dr. Sujata Gajbhiye. However, Dr. Smt. Sujata Gedam was examined as PW-19, she stated that she recognizes the signature of Dr. Sujata Gajbhiye. She stated that as per the report, there was no external injury on the person or on the private part. No definite opinion could have been given of the rape.

10. The seized articles and vaginal slides were sent for

the chemical examination but no F.S.L. report has been produced by the prosecution before the trial Court.

11. As per the version of the prosecutrix she was taken to the forest and there she was sexually assaulted by the accused. It was the forest and the surface was rough but no external injury has been found. She has further stated that the intercourse was committed but as per the medical report Ex.P-13, there was no sign of any intercourse and therefore, no definite opinion of rape has been given by the Doctor. The prosecution has failed to produce the F.S.L report which was seized by the Doctor and handed over for chemical examination. As per the medical report, the samples were sent to the F.S.L. vide letter dated 21.02.2013 but there is no report.

12. From the testimony of the prosecutrix and the statement of PW-7, it is evident that she remained in the night with her mother and father but did not inform the incident to her parents. Her father had come to the house in the night and thereafter, he had gone in the morning again but still she did not disclose the incident to anyone. The report has been lodged on the next day at about 06:00 p.m.. A suggestion was given that the appellant has been falsely implicated because they are resident of the same village and the mother of the prosecutrix

did not like friendship with the appellant and her husband due to illegal relation with some other person with prosecutrix mother. It is true that the prosecutrix has stated about the sexual assault and is a child witness, but there is no corroboration by the medical evidence and further the prosecution has not examined the Doctor who had conducted the medical examination of the prosecutrix. The prosecution has further failed to produce the F.S.L. report.

13. The report was lodged after more than 36 hours and the delay has not been properly explained by the prosecution.

14. I have considered the medical report of the prosecutrix and the Doctor has found no injury either on the person or on her private part. The prosecution has also not examined the said lady doctor and the vaginal swab and the undergarments of the prosecutrix though were sent for chemical examination but the chemical examiner report was not produced by the prosecution hence, I am of the considered view that the evidence of prosecutrix does not inspire any confidence and therefore, conviction of the appellant cannot be sustained, further the prosecution has concealed the material piece of evidence of chemical examination report and therefore, adverse inference has to be drawn against the prosecution. This View of

mine gets fortified by the judgment passed by the co-ordinate Bench of this Court in the case of **Lakhan Singh Vs. State of M.P. 2004(2) MPHT 153** where it has been held that where the prosecutrix was examined by lady Doctor but the prosecution has not examined her which is in the case of rape is very material and the conviction was set aside. Further in the case of **State of M.P. Vs. Daya Ram 1987 JLJ 681 (DB)** and in the case of **Lakhan Singh (Supra)**, it has been held that the vaginal swab and petticoat of the prosecutrix has been sent for chemical examination but the chemical examination report was not produced by the prosecution, thus the prosecution concealed the material piece of evidence. Hence, adverse inference should be drawn.

15. In view of the aforesaid assimilation of entire facts and evidence, the appeal is allowed. Order of conviction and sentence is set-aside. The appellant be released forthwith if not warranted in any other case. Accordingly, the appeal is **allowed**.

(VIJAY KUMAR SHUKLA)
JUDGE

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Jabalpur Dated: 15.12.2018

Shri B.R. Vijaywar, learned counsel for the appellant.

Shri Aditya Jain, learned Dy. Government Advocate, for
the Respondent/State

Judgment passed separately.

Signed and dated.

(VIJAY KUMAR SHUKLA)
JUDGE