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MS. S

v.

SUNIL KUMAR & ANR.

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(Criminal Appeal No. 1581 of 2009)

APRIL 10, 2015

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**[PINAKI CHANDRA GHOSE AND  
UDAY UMESH LALIT, JJ.]**

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*Penal Code, 1860: s.376(2)(f) – Rape – Trial Court recorded finding that statements of prosecution witnesses established the fact that prosecutrix was subjected to rape, however the prosecution witnesses failed to identify respondent no.1 – Although prosecutrix identified accused-respondent in court, trial court observed that in the absence of any prior test identification parade, such identification in court for the first time was not sufficient and acquitted accused-respondent – Held: Normally identification of the accused in a test identification parade lends assurance so that the subsequent identification in court during trial could be safely relied upon – However, even in the absence of such test identification parade, the identification in court can in given circumstances be relied upon, if the witness is otherwise trustworthy and reliable – In the instant case, testimony of prosecutrix was completely trustworthy and reliable – Immediate reporting and consequential medical examination supported her testimony – Case against the accused-respondent was proved – Respondent was liable to conviction – Test Identification Parade.*

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*Criminal law: Identification by prosecutrix for the first time in court – Reliability of.*

Allowing the appeal, the Court

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**HELD:** In the present case the appellant was subjected to sexual intercourse during broad day light. The fact that she was so subjected at the time and in the manner stated by her stood proved. Three witnesses had immediately come on the scene of occurrence and found that she was raped. The immediate reporting and the consequential medical examination further supported her testimony. By very nature of the offence, the close proximity with the offender would have certainly afforded sufficient time to imprint upon her mind the identity of the offender. Furthermore, the appellant had gone to the extent of stating in her first reporting that she would be in a position to identify the offender and had given particulars regarding his identity. The clothes worn by the offender were identified by her when called upon to do so. In the circumstances there was nothing wrong or exceptional in identification by her of the accused in court. Her testimony was completely trustworthy and reliable. Consequently, the case against Respondent No. 1 stood proved. He is convicted for having committed the offence under Section 376(1) IPC and sentence him to undergo imprisonment for seven years. [Paras 11, 12] [281-D-F; 282-B, D-E, F]

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*Ashok Debbarma @ Achak debbarma v. State of Tripura* (2014) 4 SCC 747: 2014 (4) SCR 287; *Malkhansingh v. State of M.P.* (2003) 5 SCC 746: 2003 (1) Suppl. SCR 443 – relied on.

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#### Case Law Reference

2014 (4) SCR 287                      relied on.              para 9  
2003 (1) Suppl. SCR 443              relied on.              para 10

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A            **CRIMINAL APPELLATE JURISDICTION : Criminal**  
Appeal No. 1581 of 2009

From the Judgment and Order dated 28.11.2007 of the  
High Court of Chattisgarh at Bilaspur in Cr. Rev. No. 550 of  
B 2007

Kanhaiya Priyadarshi, for the Appellant.

Shashi Juneja, C. D. Singh, Vanshaja Shukla (A.C.) for  
C the Respondents.

The Judgment of the Court was delivered by

**UDAY UMESH LALIT, J.** 1. This appeal by special  
leave challenges the judgment and order dated 20.11.2007  
D passed by the High Court of Chhattisgarh dismissing Criminal  
Revision No.550 of 2007 preferred by the Appellant through  
her natural guardian. By dismissing said criminal revision the  
High Court affirmed the view taken by the trial court acquitting  
E Respondent No.1 herein of the charges under Section 376(2)(f)  
of the IPC and Section 3(2)(V) of the Scheduled Castes and  
Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short  
"the Act"). Though the present appeal has been filed in the  
name of the Appellant, in view of Section 228A of the IPC we  
F direct that the cause title shall stand amended and be read as  
"Ms. S. versus Sunil Kumar and another".

2. The case of the prosecution is that in the forenoon of  
14.01.2006 while the Appellant was guarding her crops, a  
G person aged about 20-22 years wearing a shirt with red stripes  
and black trouser came. He called the Appellant by making a  
signal, whereupon she started running. He ran after her, caught  
her and after removing her undergarments committed sexual  
intercourse. He also bit the lip of the Appellant. She shouted  
H for help which attracted the attention of three persons, namely,

PWs 2, 4 and 6 (the names of these witnesses are not being given as one of them is the brother of the Appellant and they shall hereafter be referred to by their designation in the trial). PW-4 i.e. the brother of the Appellant ran for catching that person but was unable to catch him and the person ran away.

3. The reporting in respect of the aforesaid incident was immediately made by the Appellant in Patharia Police Station and FIR Ext.P-1 was registered under Section 376 IPC. In the first information report itself the Appellant had stated the complexion of the man to be "sanwla", that he was wearing shirt with red stripes and that he was unable to speak. She further stated that she would be able to identify that man. The Appellant was immediately sent for medical examination. PW-7 Dr. Vibha Sindur did the medical examination and found following features:

1. The age of the prosecutrix was about 10 years.
2. There was a cut injury on the lower lip and a swelling on the upper lip.
3. There was an aberration of 3 x 5 cms in the waist.

**On internal examination**

1. The hymen was freshly ruptured and it was bleeding.
2. Two slides of the vagina were prepared and were handed over to the IO for chemical examination.
3. According to the doctor the prosecutrix was subjected to sexual intercourse."

4. During the course of investigation the blood-stained soil and the plain soil from the place of occurrence was seized vide Ext.P-14. The caste certificate (Ext.P-13) of the Appellant

A was also seized. Respondent No.1 was arrested vide arrest  
panchnama Ext.P-18 and was sent for medical examination.  
PW-13 Dr. D.R. Singraul found him capable of having sexual  
intercourse. The shirt with red stripes and black trouser were  
also seized from Respondent No.1 vide Ext.P-17. These  
B garments were then produced for identification before the  
witnesses including the Appellant who identified said garments.  
Though the Appellant had clearly stated that she would be able  
to identify the man, no test identification parade was conducted.  
C During the investigation the age of the Appellant was found to  
be between 10-14 years by PW-9 Dr. Anil Pratap Singh upon  
X-Ray examination.

5. After completion of investigation Respondent No.1  
D was charged for having committed offences under the  
aforesaid Sections and sent for trial. The Appellant was  
examined as PW-1 who stated about the incident in question  
and re-iterated the contents of the FIR. She also identified  
Respondent No.1 in court though she did not know the name  
E of Respondent No.1, nor the village that he belonged. PWs 2,  
4 and 6 who after hearing the shouts for help had arrived at the  
place of incident, supported her version as regards the fact  
that she was subjected to rape. However none of these  
witnesses could identify Respondent No.1. The Investigating  
F Officer was examined as PW-10 who accepted that from the  
first information report it appeared that the offence was  
committed by some unknown person but could not give reason  
why test identification parade was not conducted. In his cross  
examination, a suggestion was given by the defence that  
G Respondent No. 1-Accused was unable to speak. He explained  
that on an earlier occasion, a complaint was made by the  
maternal grandfather of Respondent No. 1 stating about his  
disability, that he was lost and that Respondent No. 1 was found  
H in pursuance of such complaint.

6. The trial court after considering the entire material on record came to the conclusion that the age of the Appellant was 10-13 years of age and that she was minor at the time of incident. It was held that the medical evidence on record clearly showed that she was subjected to sexual intercourse. Though the statements of the Appellant and PWs 2, 4 and 6 clearly established the fact that she was subjected to sexual intercourse at the time and in the manner alleged, the trial court observed that PWs 2, 4 and 6 had failed to identify Respondent No.1. Despite the fact that the Appellant had identified Respondent No.1 in court, the trial court observed that in the absence of any prior test identification parade such identification in court for the first time was not good enough.

Though the finding was recorded that the Appellant belonged to Scheduled Caste community nothing was discussed whether the offence under Section 3(2)(V) was otherwise made out. Giving him benefit of doubt on the question of identification, Respondent No.1 was acquitted of the charges leveled against him, vide judgment of the trial court dated 27.02.2007 in Special Session Case No.68 of 2006.

7. The Appellant being aggrieved filed Criminal Revision under Section 397 read with 401 of the Cr.P.C. in the High Court. The High Court affirmed the view taken by the trial court that since no test identification parade was arranged, the identification by the Appellant for the first time in court was not sufficient. For the lapses committed by the Investigating Officer in not arranging the test identification parade, the High Court recommended departmental action against him but went on to observe that the acquittal by the trial court was on sound reasoning and that there was no illegality or infirmity in the judgment of acquittal. The High Court therefore dismissed the revision. It appears that there was delay of 81 days in

A filing the revision and the revision was dismissed both on merits as well as on delay.

8. The present appeal has been preferred by the prosecutrix/ Appellant through Supreme Court Legal Services Committee. Despite service of notice upon Respondent No.1 no appearance was entered on his behalf and as such this Court appointed Ms. Vanshaja Shukla, learned advocate as Amicus Curiae to assist the court on behalf of Respondent No.1. We must place on record appreciation for the assistance rendered by her.

9. Mr. Kanhaiya Priyadarshi, learned advocate appearing for the appellant submitted that the testimony of the Appellant was cogent and supported by the other evidence on record. There was immediate reporting and the fact that she was subjected to sexual intercourse was well established. Three witnesses had immediately arrived pursuant to her shouts who corroborated the factum of rape. The Appellant in her first reporting had clearly stated that she would be able to identify the person and had given sufficient indication regarding his identity. Her identification in court, in the circumstances was not flawed on any count and ought to be accepted. His submissions were well supported by Ms. Shashi Juneja, learned advocate appearing for the State who invited our attention to ***Ashok Debbarma @ Achak Debbarma v. State of Tripura***<sup>1</sup> and submitted that the identification for the first time in court is good enough and can be relied upon if the witness is otherwise trustworthy and reliable. Ms. Vanshaja Shukla learned Amicus Curiae fairly accepted that it is only as a matter of prudence that the courts require and insist upon test identification parade and that it would entirely depend upon facts and circumstances if the testimony of the witness is otherwise found to be trustworthy and reliable.

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1 (2014) 4 SCC 747

10. It has consistently been held by this Court that what is substantive evidence is the identification of an accused in court by a witness and that the prior identification in a test identification parade is used only to corroborate the identification in court. Holding of test identification parade is not the rule of law but rule of prudence. Normally identification of the accused in a test identification parade lends assurance so that the subsequent identification in court during trial could be safely relied upon. However, even in the absence of such test identification parade, the identification in court can in given circumstances be relied upon, if the witness is otherwise trustworthy and reliable. The law on the point is well-settled and succinctly laid down in **Ashok Debbarma** (supra).

11. In the present case the Appellant was subjected to sexual intercourse during broad day light. The fact that she was so subjected at the time and in the manner stated by her, stands proved. Three witnesses had immediately come on the scene of occurrence and found that she was raped. The immediate reporting and the consequential medical examination further support her testimony. By very nature of the offence, the close proximity with the offender would have certainly afforded sufficient time to imprint upon her mind the identity of the offender. In **Malkhansingh v. State of M.P.**<sup>2</sup> in a similar situation where identification by prosecutrix for the first time in court was a matter in issue, this Court had observed:

“She also had a reason to remember their faces as they had committed a heinous offence and put her to shame. She had, therefore, abundant opportunity to notice their features. In fact on account of her traumatic and tragic experience, the faces of the appellants must have got imprinted in her memory, and there was no chance of

A her making a mistake about their identity.”

12. Furthermore, the appellant had gone to the extent of stating in her first reporting that she would be in a position to identify the offender and had given particulars regarding his  
B identity. The clothes worn by the offender were identified by her when called upon to do so. In the circumstances there was nothing wrong or exceptional in identification by her of the accused in court. We find her testimony completely trustworthy and reliable. Consequently we hold that the case against  
C Respondent No.1 stands proved. Since the trial court had found the age of the Appellant to be 10-13 years of age, we take the age to be on the maximum scale i.e. 13 years. In our considered view, the High Court was not justified in dismissing the revision. No other view was possible and the case therefore  
D warrants interference by this Court. We accordingly allow the appeal and convict Respondent No.1 for having committed the offence under Section 376(1) IPC and sentence him to undergo imprisonment for seven years and also impose a fine of Rs.5,000/- which in its entirety shall be made over to the  
E Appellant. In the event such fine is not deposited, Respondent No.1 shall undergo further sentence of simple imprisonment for six months. We, however, confirm the acquittal of Respondent No.1 for the offence under Section 3(2)(V) of the  
F Act. Respondent No.1 shall be taken into custody forthwith to undergo the sentence as aforesaid.

Devika Gujral

Appeal allowed.

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