

STATE OF MADHYA PRADESH

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v.

PREETAM

(Criminal Appeal No. 2229 of 2011)

AUGUST 29, 2018

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[R. BANUMATHI AND VINEET SARAN, JJ.]

Penal Code, 1860 – s.376– Prosecutrix raped by respondent-accused– Trial court convicted the respondent– High Court reversed the conviction and acquitted the respondent– On appeal, held: In the present case evidence of prosecutrix (PW-1) is supported by medical evidence and also by the evidence of PW-4, who saw the accused running away from the scene of occurrence– Delay in registration of F.I.R. was properly explained– This was not considered by High Court– Judgment of High Court set aside and that of trial court convicting the respondent restored– However, in the instant case, the occurrence was of the year 1993 i.e. about 25 years ago– Having regard to the passage of time and discretion vested with the Court as per proviso to s.376(1) (prior to 2013 amendment) to impose imprisonment for a term less than seven years, the sentence of imprisonment of seven years imposed on the respondent is reduced to four years– Criminal Law (Amendment) Act, 2013.

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Penal Code, 1860 – s.375, Sixthly – Rape – Consent of victim – When not relevant – Held: Under s.375, Sixthly, a man is said to commit rape with or without the consent of prosecutrix, when she is under sixteen years of age – Prosecutrix being aged 12 years at the time of the occurrence, her consent or otherwise was of no relevance.

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Evidence – Rape – Age of victim – School documents as proof for – Appreciation of.

Evidence – Rape – Absence of external injuries on the person of the rape victim – Effect of – Held: Absence of injury on the person of the rape victim does not lead to an inference that the incident had taken place with the consent of the prosecutrix – It depends upon the facts and circumstances of each case – Further, even in the absence of external injury, the oral testimony of the prosecutrix that she was subjected to rape, cannot be ignored.

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A **Allowing the appeal, the Court**

HELD: 1.1 In the absence of external injury on the person of the prosecutrix, it cannot be concluded that the incident had taken place with the consent of the prosecutrix. It depends upon the facts and circumstances of each case. Absence of injury on the person of the victim of rape does not lead to an inference that the accused did not commit forcible sexual intercourse. Even in the absence of external injury, the oral testimony of the prosecutrix that she was subjected to rape, cannot be ignored. In the present case, evidence of prosecutrix (PW-1) is supported by the medical evidence and also by the evidence of PW-4, who saw the accused running away from the scene of occurrence. [Paras 9-10] [630-G-H; 631-A-B]

1.2 The school registers are the authentic documents being maintained in the official course, entitled to credence of much weight unless proved otherwise. Considering the evidence of PW-8, Head master/Head teacher of Primary School and the school certificate produced by him i.e. Ex.P/13-A, age of the victim has to be taken as 12 years at the time of occurrence. As per Section 375 IPC, a man is said to commit rape, *Sixthly* - "With or without her consent, when she is under sixteen years of age". The prosecutrix being aged 12 years at the time of the occurrence, her consent or otherwise was of no relevance to bring the offence within the meaning of Section 375 IPC. The High Court ignored the material evidence adduced by the prosecution and erred in reversing the conviction of the respondent-accused. [Paras 12, 13] [631-G; 632-A-B]

1.3 The delay in registration of the FIR was properly explained, which was not considered by the High Court. The judgment of the High Court is set aside and that of the trial court is restored. [Paras 14, 15] [632-D-E]

1.4 Prior to the Criminal Law (Amendment) Act, 2013 (w.e.f. 3rd February, 2013) under Section 376(1) IPC, the sentence of imprisonment for a term shall not be less than 7 years extending for life. However, as per the proviso to Section 376(1) IPC (prior to amendment) discretion is vested with the Court to impose imprisonment for a term of less than seven years for adequate and special reasons to be recorded in the judgment. In

this case, the occurrence was of the year 1993 i.e. about 25 years ago. Having regard to the passage of time and other facts and circumstances of the case, the sentence of imprisonment of seven years imposed on the respondent-accused is reduced to a period of four years. [Para 16] 632-F-G] A

B.C Deva @ Dyava v. State of Karnataka (2007) 12 SCC 122 : [2007] 8 SCR 509 – relied on. B

Case Law Reference

[2007] 8 SCR 509 relied on Para 9

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal C
No. 2229 of 2011.

From the Judgment and Order dated 06.01.2010 of the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal No. 228 of 1995.

Ms. Swarupama Chaturvedi, B. N. Dubey, Ms. Devika Gulati, D
Ms. Vaishali Verma, Advs. for the Appellant.

Ms. Nidhi, Adv. for the Respondent.

The Judgment of the Court was delivered by

R. BANUMATHI, J. 1. This appeal arises out of judgment and E
order dated 6th January, 2010 passed by the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal No.228 of 1995 in which the High Court reversed the verdict of the conviction under Section 376 I.P.C. and also the sentence of imprisonment of seven years and acquitted the respondent-accused.

2. Despite service of notice, the respondent has not chosen to F
appear and contest this appeal. Accordingly Ms. Nidhi, Advocate, has been appointed by the Supreme Court Legal Services Committee as amicus to contest the appeal on behalf of the respondent.

3. We have heard Ms. Swarupama Chaturvedi, learned counsel G
appearing for the appellant-State and Ms. Nidhi, learned amicus, and also perused the impugned judgment and the evidence/materials on record.

4. The facts of the case in a nutshell are as follows. On
6th March, 1993 at about 9.00 p.m. the prosecutrix (PW-1) along with

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A her two sisters i.e. Hirkanbai (PW-3) and Anitabai had gone outside the village to a field to attend nature's call and while returning back the respondent-accused is alleged to have forcibly taken the prosecutrix to the field and committed rape on her.

B 5. Since the Moti Ram (PW-2) who is father of Hirkanbai (PW-3) and also uncle (*chacha*) of the prosecutrix was not in the village, on his return a complaint was lodged on 8th March, 1993. The prosecutrix was medically examined on 9th March, 1993 by Dr. U.S. Vasnik (PW-6), who has noted that the hymen of prosecutrix was torn; swelling was present on the edges of torn hymen. Dr. U.S. Vasnik (PW-6) has
C opined that though vagina of the prosecutrix was admitted two fingers easily, the prosecutrix felt pain and the doctor (PW-6) has opined that the prosecutrix was subjected to sexual intercourse within 2-3 days of examination.

D 6. Based upon the evidence of prosecutrix (PW-1) and Mangrual (PW-4) who went to the place of occurrence after having been told by Anita and saw the accused running from there and also on the evidence of Dr. U.S. Vasnik (PW-6), the trial court convicted the respondent-accused under Section 376 I.P.C. and sentenced him to undergo imprisonment for a period of seven years.

E 7. On appeal, the High Court has reversed the verdict of conviction on the grounds:- (i) There was no external injury on the person of prosecutrix (PW-1) which is indicative of her consent for the sexual intercourse and, therefore, the story of forcible rape does not find support from the medical evidence; (ii) There was delay in registration of the FIR.

F 8. As pointed out earlier as per PW-6-Dr. Vasnik's evidence the hymen of the prosecutrix (PW-1) was torn and swelling was present in the vagina having redness. Doctor has noticed that even though vagina admitted of two fingers, the prosecutrix felt pain which is suggestive that the prosecutrix was subjected to sexual intercourse only in the
G occurrence.

9. It is fairly well-settled that in the absence of external injury on the person of the prosecutrix, it cannot be concluded that the incident had taken place with the consent of the prosecutrix. It depends upon the facts and circumstances of each case. In B.C. Deva alias Dyava v.

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State of Karnataka, (2007) 12 SCC 122, this Court has held that absence of injury on the person of the victim of rape does not lead to an inference that the accused did not commit forcible sexual intercourse. It was further held that even in the absence of external injury, the oral testimony of the prosecutrix that she was subjected to rape, cannot be ignored. A

10. In the present case evidence of prosecutrix (PW-1) is supported by the medical evidence and also by the evidence of Mangrual (PW-4) who saw the accused running away from the scene of occurrence. Insofar as the consent of the prosecutrix (PW-1) pointed out by the High Court is concerned, we find it difficult to agree with the view taken by the High Court. In her chief examination, Dr. U.S. Vasnik (PW-6) has stated that the age of the victim could be between 13 and 17 years. Of course in her cross-examination, Dr. Vasnik has agreed to the suggestion that the age of the victim could be 17 years. B C

11. In our considered view, the answer elucidated in the cross-examination of Dr. Vasnik (PW-6) cannot be taken as a final opinion on the age of the prosecutrix (PW-1). It is to be relevant to note that before the trial court the prosecution has examined Bhaulal (PW-8), Head master/Head teacher of Primary School Chor Pind Ke Par, District Balaghat. In his evidence, Bhaulal (PW-8) has stated that the date of birth of the prosecutrix (PW-1) was 16th May, 1981 which means that on the date of the occurrence i.e. 6th March, 1993, the prosecutrix (PW-1) was only aged about 12 years. The trial court has neither acted upon the evidence of Bhaulal (PW-8) nor on the school certificate on the ground that the person who has admitted the prosecutrix in the school was not examined. D E

12. In our considered view, the approach of the trial court was not correct. In each and every case the prosecution cannot be expected to examine the person who has admitted a student in the school. The school registers are the authentic documents being maintained in the official course, entitled to credence of much weight unless proved otherwise. In our view, considering the evidence of head master, Bhaulal (PW-8), and the school certificate produced by him i.e. Ex.P/13-A, age of the victim has to be taken as 12 years at the time of occurrence. F G

13. Of course, Dr. U.S. Vasnik (PW-6) in her chief examination has stated that the age of the prosecutrix would be between 13 and 17

A years. At the most, adopting the doctor's evidence, age of the prosecutrix at the relevant point of time can only be around 15 years. As per Section 375 I.P.C. a man is said to commit rape, *Sixthly* - "With or without her consent, when she is under sixteen years of age". The prosecutrix being aged 12 years at the time of the occurrence, her consent or otherwise was of no relevance to bring the offence within the meaning of Section 375 I.P.C. In our considered view the High Court ignored the material evidence adduced by the prosecution and erred in reversing the conviction of the respondent-accused.

14. So far as the other ground of acquittal – delay in registration of the F.I.R. is concerned, it has come on the record that the uncle of the prosecutrix, Moti Ram (PW-2), was not in the village and returned back to the village only on 8th March, 1993 and on his return his daughter-Hirkanbai (PW-3), has narrated the whole incident to him as to what happened to the prosecutrix (PW-1) and a complaint was lodged on the same day i.e. 8th March, 1993. After medical examination of the prosecutrix (PW-1) on 9th March, 1993, F.I.R. was registered on 10th March, 1993 and the delay in registration of the F.I.R. has been properly explained, which has not been considered by the High Court.

15. The impugned judgment of the High Court reversing the conviction of the respondent to acquittal, cannot be sustained and the same is liable to be set aside and the judgment of the trial court convicting the respondent under Section 376 I.P.C. is to be restored. The trial court has sentenced the respondent-accused to undergo imprisonment for a period of seven years.

16. Prior to the Amendment Act 13 of 2013 (w.e.f. 3rd February, 2013) under Section 376(1) I.P.C. the sentence of imprisonment for a term shall not be less than 7 years extending for life. However, as per the proviso to 376(1) I.P.C. (prior to amendment) discretion is vested with the Court to impose imprisonment for a term of less than seven years for adequate and special reasons to be recorded in the judgment. In this case, the occurrence was of the year 1993 i.e. about 25 years ago. Having regard to the passage of time and other facts and circumstances of the case, the sentence of imprisonment of seven years imposed on the respondent-accused is reduced to a period of four years.

17. Accordingly the appeal preferred by the State is allowed and the conviction of the respondent-accused under Section 376 I.P.C. as

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passed by the trial court is restored. However, the period of sentence of seven years, as noted above, is reduced to four years. A

18. In case the respondent has not already undergone the sentence of imprisonment of four years, he is to surrender to custody within a period of four weeks from today to serve the remaining sentence failing which he shall be taken to custody. B

19. A copy of this order be sent to the concerned trial court for necessary action.

Divya Pandey

Appeal allowed.