REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1156 of 2010

Dilip …Appellant

Versus

State of Madhya Pradesh …Respondent

O R D E R

1. This appeal has been preferred against the impugned judgment and order dated 4.11.2006 in Criminal Appeal No.1228 of 1992 of the High Court of Madhya Pradesh at Jabalpur, by way of which it reversed the judgment and order of the Sessions Judge, Seoni, Madhya Pradesh dated 16.7.1992 in Sessions Trial No.82 of 1990, by which the appellant stood acquitted of the charges punishable under Sections 376 and 450 of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC').

2. Facts and circumstances giving rise to this appeal are that :-

A. The appellant is younger brother of the brother-in-law of the prosecutrix-Diplesh. The appellant came to the house of the prosecutrix on 13.6.1990. Her parents and elder brother left for the market leaving the prosecutrix and her younger brother in the house. The appellant found the prosecutrix alone as her brother was merely a child and raped her. The prosecutrix fainted and on regaining her consciousness, the prosecutrix narrated the incident to her father who lodged the FIR with the police on the same day.

B. The appellant was arrested on 15.6.1990 and after investigation, the prosecution filed chargesheet against the appellant under Sections 376 and 450 IPC.

C. The Sessions Court in Sessions Trial No. 82 of 1990 acquitted the appellant vide judgment dated 16.7.1992, on the ground that the prosecution failed to prove that prosecutrix was below 16 years of age, and secondly that she had consented for having sexual intercourse with the appellant.

D. Aggrieved, the State preferred Criminal Appeal No.1228 of 1992, before the High Court. The High Court reversed the judgment of the Sessions Court, convicted the appellant for the said offences

and awarded punishment of 7 years on both counts. The State appeal has been allowed.

Hence, this appeal.

3. Shri Ashok Mahajan and Shri B. Sridhar, learned Amicus Curiae have submitted that there is nothing on record to show that at the relevant time, the prosecutrix was below 16 years of age. The trial Court had rightly came to conclusion that it was a case of consent and such a finding was based on evidence on record. There was no occasion for the High Court to reverse the said finding as there was no perversity in it. Hence, the appeal deserves to be allowed.

4. Per contra, Ms. Vibha Datta Makhija, learned Standing counsel for the State has submitted that the trial Court erred in understanding the meaning of consent and reached a wrong conclusion that the prosecutrix was not below 16 years of age. The High Court has considered the case in correct perspective and reached the correct conclusion that the prosecutrix was below 16 years of age. Thus, the consent, even if it was so, looses its significance. Thus, the appeal is liable to be dismissed.

5. We have considered the rival submissions made by the learned counsel for the parties and perused the record.

6. Sawan Lal (PW-2), father of the prosecutrix while lodging an FIR stated that the prosecutrix was 15 years of age. The Investigating Officer inspected the place of occurrence and found bangles and also recovered blood stained underwear, saree and petikot of the prosecutrix and also the blood stained earth and plain earth. Dr. Kiran Katre (PW-8) examined the prosecutrix medically and opined that the prosecutrix was about 14-15 years of age. According to Dr. Katre, it was difficult even to put the little finger in the vagina of the prosecutrix. She was referred to the Radiologist, however, no such report was made available. The prosecutrix was examined in the Court on 12.11.1991 as PW-1 and the learned Sessions Judge assessed her age on the basis of her appearance as about 14 years. In addition thereto, one Kabir Das (PW-4) who was a Teacher in the night school where the prosecutrix was studying, deposed that according to the school register, her date of birth was 7.3.1975 and thus, her age was about 14 years. The said date of birth had been recorded several years

prior to the incident. It was in view thereof that Kabir Das (PW-4) had issued a Certificate, Exh.P/5, and he proved the said Certificate in the Court.

7. The trial Court came to the conclusion that the prosecutrix was not less than 16 years at the relevant time, on the ground that Dr. Katre (PW-8) had referred her for Radiologist test and she had not been examined by the Radiologist. Withholding such an evidence would give rise to draw an adverse inference against the prosecution. Secondly, the school certificate could not be relied upon as it was not a strong and material evidence. More so, such an entry had been made in the school register on the basis of the information furnished by Sawan Lal (PW-2), father of the prosecutrix who deposed in the court that such an entry was based on an entry made in her horoscope which stood destroyed in the fire.

8. In view of the above, the trial Court examined the second issue in respect of consent. The court found certain discrepancies and contradictions in the statement of the prosecutrix made under Section 161 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.'), and her deposition recorded in court. In her statement

before the police she had told that the appellant had threatened to kill her if she shouted. In court, she deposed that the appellant had filled the cloth in her mouth, thus, it was not possible for her to shout.

The trial Court further observed that when her saree, petikot and even her panty were removed, she did not resist with full force as it was not possible for the accused to remove her panty unless she extended her cooperation. In case she had not given the consent she could have resisted the same with her full power. But, she has not deposed in court that she resisted with full power when her panty was being removed. The prosecutrix was supposed to attack the appellant like a wild animal, but she did not even resist. Thus, her conduct suggested only and only, her consent and will.

The court further held that as per the medical evidence even a single finger went inside her vagina with difficulty then it was bound to be some injury in her vagina by forcible intercourse, but the Doctor did not find any injury on the person of the prosecutrix apart from certain injuries mentioned in the medical report. Therefore, there could not be any question of forcible intercourse.

9. The trial Court while recording such finding had taken note of the fact that because of the sexual intercourse lot of blood oozed out of her vagina and as a result of the same she became unconscious.

10. The High Court re-appreciated the entire evidence on record and particularly, the medical report which contained the following features:-

(a) Her gait was painful.

(b) There was also blood clot near her vagina.

(c) Her forcet had a tear of 1/2cm x 1/2cm.

(d) There was also an abrasion of 1/2cm above urethra.

(e) Her hymen tear was in 3-9 'o' clock position.

(f) Even small finger could not be admitted in her vagina without pain to her.

(g) Her posterior fornix also had a tear of 1cm and blood clot was also present.

11. Medical report as well as Dr. Katre (PW-8) opined that it could be a case of rape. The FSL report Exh.P/12 revealed that underwear, petikot and saree of the prosecutrix were having blood stained and

human spermatozoa. Similarly, in the slides as well as in the underwear of accused-appellant, the blood stains and human spermatozoa were found. The said clothes had been seized from the prosecutrix and the appellant soon after the occurrence. So far as the issue of determining the age is concerned, in the instant case Doctor has found that prosecutrix was having only 28 teeths, 14 in each jaw. Such an issue was considered by this Court in **Bishnudayal v. State of Bihar,** AIR 1981 SC 39, wherein the court appreciated the evidence as under:

> "8. The evidence with regard to the age of the girl was given by the prosecutrix (P.W.9), and her father. Jagarnath (P.W.4) and Dr. Asha Prasad (P.W. 14). P.W.9 and P.W.4 both stated that Sumitra (P.W.9) was 13-14 years of age at the time of occurrence. Dr. Asha Prasad opined that the girl was only 13 or 14 years of age on July 6, 1967 when the witness examined her. The Doctor based this opinion on physical facts, namely, that the examinee (P.W.9) **had 28 teeth, 14 in each jaw**, smooth pubic hair and axillary hair, which means the hair, according to the opinion of the Doctor, had just started appearing **at the age of 14.**"
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> (Emphasis added)

Similar view has been reiterated by this Court while deciding Criminal Appeal No.1962 of 2010, **Kailash @ Tanti Banjara v. State of M.P.**, vide judgment and order dated 10.4.2013, wherein

relying upon several other factors for determining the age, this very Bench has taken a view that as the prosecutrix therein had only 28 teethes considering the other sexual character, she was only 14 years of age. Therefore, in view of the above, we do not find any fault with the finding recorded by the High Court so far as the issue of age is concerned.

12/13.In case, the prosecutrix was below 16 years of age at the relevant time, the issue of consent becomes totally irrelevant. Even the issue of consent is no more *res integra* even in a case where the prosecutrix was above 16 years of age.

In **State of H.P. v. Mange Ram**, AIR 2000 SC 2798, this Court, while dealing with the issue held:

> "Submission of the body under the fear or terror cannot be construed as a consented sexual act. Consent for the purpose of Section 375 requires voluntary participation **not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent.** Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances." (Emphasis added)

14. In **Uday v. State of Karnataka**, AIR 2003 SC 1639, a similar view has been reiterated by this Court observing :

> "……We are inclined to agree with this view that there is no strait jacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the Courts provide at best guidance to the judicial mind while considering a question of consent, but the Court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them."

15. In **Pradeep Kumar Verma v. State of Bihar & Anr,** AIR 2007 SC 3059, this Court held as under:

> "9.The crucial expression in Section 375 which defines rape as against her will. It seems to connote that the offending act was despite resistance and opposition of the woman. IPC does not define consent in positive terms. But what cannot be regarded as consent is explained by Section 90 which reads as follows:

"consent given firstly under fear of injury and secondly under a misconception of fact is not consent at all."

That is what is explained in first part of Section 90. There are two grounds specified in Section 90 which are analogous to coercion and mistake of fact which are the familiar grounds that can vitiate a transaction under the jurisprudence of our country as well as other countries. The factors set out in first part of Section 90 are from the point of view of the victim and second part of Section 90 enacts the corresponding provision from the point of view of the accused. It envisages that the accused has knowledge or has reason to believe that the consent was given by the victim in consequence of fear of injury or misconception of fact. Thus the second part lays emphasis on the knowledge or reasonable belief of the person who obtains the tainted consent. The requirements of both the parts should be cumulatively satisfied. In other words, the Court has to see whether the person giving the consent has given it under fear or misconception of fact and the court should also be satisfied that the person doing the act i.e. the alleged offender is conscious of the fact or should have reason to think that but for the fear or misconception, the consent would not have been given. This is the scheme of Section 90 which is couched in negative terminology. As observed by this Court in **Deelip Singh** @ Dilip Kumar v. **State of Bihar** (2005 (1) SCC 88), Section 90 cannot be considered as an exhaustive definition of consent for the purposes of IPC. The normal connotation and concept of consent is not intended to be excluded.

10. In most of the decisions in which the meaning of the expression consent under the IPC was discussed, reference was made to the passages occurring in Strouds Judicial Dictionary, Jowitts Dictionary on English Law, Words and Phrases, Permanent Edn. and

other legal dictionaries. Stroud defines consent "as an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side". Jowitt, while employing the same language added the following:

> "Consent supposes three things a physical power, a mental power and a free and serious use of them. Hence it is that if consent be obtained by intimidation, force, meditated imposition, circumvention, surprise, or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind."

11. In Words and Phrases, Permanent Edn., Vol. 8-A, the following passages culled out from certain old decisions of the American courts are found:

> "...adult females understanding of nature and consequences of sexual act must be intelligent understanding to constitute consent."

Consent within penal law, defining rape, requires exercise of intelligence based on knowledge of its significance and moral quality and there must be a choice between resistance and assent..."

16. In view of the above, we do not find fault with the impugned judgment and order. The appeal is liable to be dismissed and is accordingly dismissed.

17. Before parting with the case, we would like to express our anguish that the prosecution could have been more careful and the

trial Court could have shown more sensitivity towards the case considering its facts and circumstances.

In **Delhi Domestic Working Women's Forum v. Union of India & Ors.**, (1995) 1 SCC 14, this Court found that in the cases of rape, the investigating agency as well as the Subordinate courts some times adopt totally a indifferent attitude towards the prosecutrix and therefore, this court issued following directions in order to render assistance to the victims of rape:

> "(1) The complainants of sexual assault cases should be provided with legal representation. It is important to have someone who is well-acquainted with the criminal justice system. The role of the victim's advocate would not only be to explain to the victim the nature of the proceedings, to prepare her for the case and to assist her in the police station and in court but to provide her with guidance as to how she might obtain help of a different nature from other agencies, for example, mind counselling or medical assistance. It is important to secure continuity of assistance by ensuring that the same person who looked after the complainant's interests in the police station represent her till the end of the case.
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> (2) Legal assistance will have to be provided at the police station since the victim of sexual assault might very well be in a distressed state upon arrival at the police station, the guidance and support of a lawyer at this stage and whilst she was being questioned would be of great assistance to her.

(3) The police should be under a duty to inform the victim of her right to representation before any questions were asked of her and that the police report should state that the victim was so informed.

(4) A list of advocates willing to act in these cases should be kept at the police station for victims who did not have a particular lawyer in mind or whose own lawyer was unavailable.

(5) The advocate shall be appointed by the court, upon application by the police at the earliest convenient moment, but in order to ensure that victims were questioned without undue delay, advocates would be authorised to act at the police station before leave of the court was sought or obtained.

(6) In all rape trials anonymity of the victim must be maintained, as far as necessary.

(7) It is necessary, having regard to the Directive Principles contained under Article 38(1) of the Constitution of India to set up Criminal Injuries Compensation Board. Rape victims frequently incur substantial financial loss. Some, for example, are too traumatised to continue in employment.

(8) Compensation for victims shall be awarded by the court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction has taken place. The Board will take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if this occurred as a result of the rape."

18. Undoubtedly, any direction issued by this Court is binding on all the courts and all civil authorities within the territory of India.

In addition thereto, it is an obligation on the part of the State authorities and particularly, the Director General of Police and Home Ministry of the State to issue proper guidelines and instructions to the other authorities as how to deal with such cases and what kind of treatment is to be given to the prosecutrix, as a victim of sexual assault requires a totally different kind of treatment not only from the society but also from the State authorities. Certain care has to be taken by the Doctor who medically examine the victim of rape. The victim of rape should generally be examined by a female doctor. Simultaneously, she should be provided the help of some psychiatric. The medical report should be prepared expeditiously and the Doctor should examine the victim of rape thoroughly and give his/her opinion with all possible angle e.g. opinion regarding the age taking into consideration the number of teeths, secondary sex characters, and radiological test, etc. The Investigating Officer must ensure that the victim of rape should be handled carefully by lady police official/officer, depending upon the availability of such official/officer. The victim should be sent for medical examination at the earliest and her statement should be recorded by the I.O. in the presence of her family members making the victim comfortable

except in incest cases. Investigation should be completed at the earliest to avoid the bail to the accused on technicalities as provided under Section 167 Cr.P.C. and final report should be submitted under Section 173 Cr.P.C., at the earliest.

We request the learned Chief Secretary of the State of M.P. to examine the aforesaid observations made by us and issue comprehensive guidelines in these regards, at the earliest.

A copy of this judgment be sent to the learned Chief Secretary, M.P. through Ms. Vibha Datta Makhija, learned Standing counsel for the State.

…….....J.
(DR. B.S. CHAUHAN)

……..... J.
(FAKKIR MOHAMED IBRAHIM KALIFULLA)

NEW DELHI;
APRIL 16, 2013