IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR
BEFORE
JUSTICE SUJOY PAUL
&
JUSTICE VIVEK JAIN
ON THE 24TH OF JANUARY 2024
CRIMINAL APPEAL No. 789 OF 2013

BETWEEN :-
PAPPU ALIAS JALIKH

..APPELLANT

(*BY SHRI VIVEK AGRAWAL - ADVOCATE*)

AND

THE STATE OF MADHYA PRADESH THROUGH P.S. CHHOLA MANDIR, BHOPAL (MADHYA PRADESH)

..RESPONDENT

(*BY SHRI A.N. GUPTA - GOVERNMENT ADVOCATE*)

This criminal appeal coming on for hearing this day, ***Justice Sujoy Paul,*** *passed the following :*

J U D G M E N T

This Criminal Appeal filed under Section 374 of the Code of Criminal Procedure, 1973 takes exception to the judgment dated

15.02.2013 passed in Session Trial No. 453/12 decided by learned VIIth Additional Sessions Judge, Bhopal.

2. The appellant, father of the prosecutrix, faced the rigmarole of a trial which resulted into judgment of conviction and imposition of sentence of life imprisonment with fine of Rs. 10,000/- with default stipulation. The conviction and sentence is mentioned in tabular form which reads as under:-

CONVICTION	SENTENCE
U/s 376 of IPC	Life imprisonment & Fine of Rs. 10,000/- & in default of payment of fine additional imprisonment for 6 months.
U/s 506 Part-II of IPC	R.I. for 01 year and fine of Rs. 1000/- & in default of payment of fine additional sentence for 2 months

(Both sentence to run concurrently.)

3. In short, the story of prosecution is that on 21.03.2012 the complainant/ victim lodged a report in police station that she resides with her family in a slum near '*Udiya Basti*'. The prosecutrix's mother was not in the house on 18.03.2012. She was residing with her small brothers and sisters. On 19.03. 2012, the prosecutrix after taking dinner slept with her younger sister in the hut. At around 11 in the night, her father forcibly took her to adjacent hut and sexually assaulted her. The appellant threatened her that if she narrates the incident to her mother or anybody else, she will be killed. Out of the said fear, the victim did not narrate the incident to anybody. On 20.03.2012, at around 10 in the night, the appellant again intended to commit similar act with the prosecutrix but she could fled away from the hut and reach the house of her maternal grand father Ghasiram. She narrated the entire incident

to Ghasiram. Thereafter with Ghasiram she reported the matter in police station which was registered as Crime No. 131/2012 for committing offence under Section 376 and 506 of IPC.

4. During the investigation, the appellant was arrested. After completion of investigation the challan was filed and in due course matter came up before the trial court. The appellant abjured the guilt and prayed for a full fledged trial. The court framed two questions for its determination, recorded statements of 8 prosecution witnesses. The appellant took a clear stand in his statement recorded under Section 313 of Cr.P.C.

5. After recording the evidence and hearing the parties, the Court below passed the impugned judgment dated 15.02.2013 and held the appellant as guilty for committing offence under Sections 376 and 506 (Part-II) of IPC and directed him to undergo the sentence mentioned hereinabove.

Contention of appellant:-

6. Shri Vivek Agrawal, learned counsel for the appellant submits that the FIR was lodged on 21.03.2012 whereas the incident has taken place on 19.03.2012. There is a variation in the date of incident recorded in the ossification report (Ex.P-2) and in the FIR. The FIR contains the date of incident as 19.03.2012 whereas the ossification test report contains the statement of prosecutrix wherein she stated that the date of incident is 18.03.2012. There appears to be an overwriting also in the ossification report (Ex.P-2).

7. Learned counsel for the appellant submits that a conjoint reading of FIR, MLC and the ossification test report shows that appellant

nowhere stated that she asked for any help or cried in protest when incident had taken place. Pertinently in MLC dated 21.03.2012 there is no mention about any sexual assault at all.

8. By taking this Court to the statement of prosecution witnesses one by one, the learned counsel for the appellant submits that Dr. Bhoomika Jagwani (PW-1) did not give any finding about the sexual assault with the prosecutrix. She, on the contrary, deposed that victim's secondary sexual characters were fully developed. There were no external injuries found on the body of prosecutrix.

9. The next reliance is on the statement of Dr. Neelam Shrivastava (PW-2). In this statement she did not depose that the victim informed her about any kind of sexual assault. The deposition suggests that on 18.03.2012 when appellant asked the prosecutrix to remove the clothes, she fled away, reached to the police station and lodged the report. Thus, this statement nowhere suggests about sexual assault being committed with the victim.

10. The prosecutrix herself entered the witness-box as PW-3. By taking this Court to her statement it is pointed out that she candidly admitted that in one room her five brothers/sisters and parents used to sleep. If any incident takes place in the house, all will come to know about it. In para-4 of the deposition, she admitted that she had romantic relation with one boy and she even developed physical relation with the said boy. It is further admitted by her that appellant had seen her and said boy talking on several occasions and for that act father scolded her also. Heavy reliance is placed on para-5 of the cross-examination wherein she admitted that when father scolded her, she

along with the said boy lodged report in the police station. She candidly admitted that her father/appellant has not developed any physical relation with her. She clarified that her physical relations were only with the said boy.

11. Shri Agrawal further submits that although a note was appended to this statement by the Court which shows that she again took a different view. Hence, her statement does not inspire confidence. In addition, the statement shows that after lodging the report, the report was not read over to her. The last para of deposition shows that when father asked her to remove the clothes, she fled away and father did not commit any offence with her nor he threatened her.

12. Ghasiram with whom victim allegedly approached the police station and lodged the report is examined as (PW-4). This witness has turned hostile and did not support the prosecution story. The statement of victim's younger sister (PW-5) is relied upon to show that this witness not only turned hostile, in clear terms deposed that nothing happened with her sister/victim. Appellant has not done anything with victim and police has not conducted any investigation so far this witness is concerned.

13. Further more, statement of victim's mother (PW-6) is relied upon who deposed that although victim informed her about the incident of alleged rape by father, she could not believe it. In cross-examination she deposed that no such incident had taken place and victim made an incorrect statement. She also admitted that appellant being father cannot commit such offence with her daughter.

14. The next witness is Kashiram (PW-7) whose statement is relied upon to show that he merely recorded the FIR but did not notice any torn clothes or injuries of the victim.

15. The stand of Shri Vivek Agrawal, learned counsel for the appellant is regarding improbability of the incident in the presence of four younger brothers/sisters by the father. He submits that the statement of victim is shaky and cannot be said to be of sterling quality. By placing reliance on two judgments of this Court passed in **CRA. No. 728/2019 (Dinesh Yadav Vs. State of M.P.)** decided on 12.04.2023 and **CRA. No. 6781/2021 (Ajay Vs. State of M.P.)** decided on 06.07.2023 it is submitted that on the basis of unreliable statement of the prosecutrix, the conviction cannot sustained judicial scrutiny.

16. The MLC and FSL report do not support the case of the prosecution is the next contention of Shri Agrawal. It is submitted that in the MLC report there is nothing to suggest that prosecutrix was sexually assaulted by the appellant. So far FSL report is concerned, it is submitted that the said report merely suggests that in the underwear (Ex.A1) and slide (Ex.B) spermatozoa was found but there is nothing to suggest that it was appellant's spermatozoa. It is submitted that the persons in the presence of whom the said material was allegedly collected and sealed were not called in the witness-box.

17. By taking this Court to question No.37 of the statement of appellant recorded under Section 313 of Cr.P.C., Shri Agrawal submits that it contains multiple questions and appellant was not categorically subjected to the incriminating portion of FSL report. The question is

not correctly framed and it is not clear as to which portion of FSL report is incriminatory which needs to be explained by the appellant. Such cryptic question based on FSL report cannot be said to be inconsonace with the principles of natural justice. In support of this argument, he placed reliance on the judgment of this Court in **CRA. No. 6620/2021 (Dashrath Dekhware Vs. State of M.P.) decided on 3rd May, 2023.**

18. *Lastly,* it is submitted that for not conducting the DNA test the adverse inference should be drawn against the prosecution, reliance is placed on the judgment of Supreme Court in **CRA. No. 361-362 of 2018 (Chotkau Vs. State of Uttar Pradesh)** decided on 28th September, 2022.

Stand of the prosecution:-

19. Shri A.N Gupta, learned counsel for the State supported the impugned judgment. He submits that a prompt FIR was lodged by the victim. The victim supported the prosecution story while entering the witness box. The same is supported by the FSL report. Other witnesses also to some extent supported the story of prosecution.

20. Parties confined their argument to the extent indicated above.

21. Heard the learned counsel for the parties at length and perused the record.

The ocular evidence:-

22. The prosecutrix herself is the star witness in this case. Moreso, when Ghasiram with whom she allegedly reached police station and lodged report has turned hostile. The prosecutrix (PW-3) in her examination-in-chief narrated the same story which was reduced in

writing in the shape of FIR. However, her cross-examination is very important. In the cross examination, she admitted that she has five brothers and sisters. All of them reside in one room. If any incident takes place in the room, everybody will notice the same. In Para-4 & 5 of her cross-examination, she in no uncertain terms admitted that she had romantic and physical relations with a boy and her father has seen her talking with that boy on many occasions. The father expressed his displeasure and scolded her for said reason. Due to said scolding, she along with that boy decided to lodge report in police station. She further admitted that her father has not developed any sexual relation with her and her relation of that kind is only with the said boy. No doubt, Court at this stage inserted a 'note' and asked certain clarificatory question from the prosecutrix and she gain took a U-turn. In this backdrop, it is necessary to examine the point raised by Shri Vivek Agrawal, learned counsel for the appellant whether the statement of the victim can be said to be of unimpeachable character and can form sole basic for conviction. The point is no more *res integra*. This Court in the case of **Ajay (supra)** and **Dinesh Yadav (supra)** has considered this aspect in great detail. The Apex Court in the case of **Rai Sandeep vs. State (NCT of Delhi)** reported in **(2012) 8 SCC 21** held as under:

> **"22.** In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement

> made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. ”
>
> **(Emphasis supplied)**

23. A plain reading of this judgment leaves no room for any doubt that the statement of a prosecutrix alone can be a basis provided the said statement is of unimpeachable character and inspires confidence of the Court. If the statement of prosecutrix is tested on the anvil of the principles laid down in the case of **Rai Sandeep (supra),** it will be clear like noon day that her statement by no stretch of imagination can be said to be of “sterling quality”. We say so because the statement of prosecutrix is not of high quality. It is pregnant with inconsistencies or in other words, there exists consistency of inconsistency in her deposition. The prosecutrix could not withstand cross examination. The story so narrated by her does not seem to be natural and it appears that the appellant was roped in because he raised eye-brows about the conduct of his daughter. Thus, we find substance in the argument of

Shri Vivek Agrawal that impugned judgment to the extent it is based on the statement of prosecutrix is liable to be interfered with.

24. The other witnesses, as noticed above did not support the prosecution story. Both the doctors who entered the witness box did not depose about any internal or external injury. On the contrary, Dr. Bhumeka Jagvani (PW-1) deposed that there were no external injuries found on the body of the prosecutrix.

25. As pointed out, grandfather of victim (PW-4), sister (PW-5) and mother (PW-6) did not support the prosecution story. It was rightly pointed out that the seizure witnesses in whose presence alleged material which was sent to FSL were also not examined. Thus, it could not be established with accuracy that the material so examined was the same material which was seized by the prosecution. We also find substance in the argument of Shri Vivek Agrawal that there exists no thread relation between the finding of FSL report with that of the sample allegedly collected from the appellant or from the victim. The appellant cannot be held guilty on the basis of surmises and conjunctures.

26. In para-21 of the impugned judgment, the Court below opined that although victim could not sustain cross-examination and took U-turn, it appears that she has done so because of pressure of the family. There is no *iota* of evidence to suggest the same. Thus, finding of Court below in this regard is based on extraneous reason which cannot be permitted to stand.

Statement u/s 313 Cr.P.C.

27. Question No.37 recorded under Section 313 of Cr.P.C. and appellant's answer reads thus :-

> ''प्रश्न 37– इसी साक्षी का यह भी कहना है कि तत्पश्चात प्रकरण में विवेचना के दौरान जब्तशुदा आर्टिकल पुलिस अधीक्षक महोदय के माध्यम से परीक्षण हेतु एफ0एस0एल0 भेजा था, जिसके ड्राफट की प्रति प्र0पी0 08 है। एफ0एस0एल0 की पावती प्र0पी0 09 है । एफ0एस0एल की रिपोर्ट प्र0पी0 10 है। तुम्हारा क्या कहना है?
>
> उत्तर– मालूम नहीं।''

28. A plain reading of the said question shows that it is infact not one question but multiple questions mentioned in the form of one question. This procedure was disapproved by the Supreme Court in **(2019) 18 SCC 161 Samsul Haque vs. State of Assam.** Para-22 of this judgment reads as under :-

> "**22**. It is trite to say that, in view of the judgments referred to by the learned Senior Counsel, aforesaid, the incriminating material is to be put to the accused so that the accused gets a fair chance to defend himself. This is in recognition of the principles of *audi alteram partem.* Apart from the judgments referred to aforesaid by the learned Senior Counsel, we may usefully refer to the judgment of this Court in Asraf Ali v. State of Assam [Asraf Ali v. State of Assam, (2008) 16 SCC 328 : (2010) 4 SCC (Cri) 278] . The relevant observations are in the following paragraphs : (SCC p. 334, paras 21-22)
> "21. Section 313 of the Code casts a duty on the court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. It follows as necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced.

> 22. The object of Section 313 of the Code is to establish a direct dialogue between the Court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it. Where no specific question has been put by the trial court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Of course, all these are subject to rider whether they have caused miscarriage of justice or prejudice. This Court also expressed a similar view in S. Harnam Singh v. State (Delhi Admn.) [S. Harnam Singh v. State (Delhi Admn.), (1976) 2 SCC 819 : 1976 SCC (Cri) 324] while dealing with Section 342 of the Criminal Procedure Code, 1898 (corresponding to Section 313 of the Code). Non-indication of inculpatory material in its relevant facets by the trial court to the accused adds to the vulnerability of the prosecution case. Recording of a statement of the accused under Section 313 is not a purposeless exercise."
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> **(Emphasis supplied)**

29. A plain reading of this judgment leaves no room for any doubt that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately. Failing which, it amounts to a serious irregularity vitiating the trial. In our opinion, the question so put to the appellant was cryptic and was not in consonance with the scheme envisaged in Section 313 of Cr.P.C. Section 313 Cr.P.C. is infact a codification of principles of natural justice in a statutory form. The Court below in a mechanical manner framed the said question. The incriminatory portion of FSL report was not pointed out.

30. Another thing which needs attention is the defence of appellant reduced in writing in answer to question No.38 recorded under Section

313 of Cr.P.C. The appellant in clear terms deposed that since he had seen his daughter in an objectionable condition with her friend and scolded her, she got annoyed and lodged the report. This defence of appellant gets credence from Para- 4 & 5 of cross-examination of prosecutrix. The Court below has miserably failed to examine the aforesaid material aspect and defence of the appellant.

31. Although during the course of argument, learned counsel for the appellant argued about the necessity of conducting DNA test and placed reliance on a judgment of Supreme Court in **Chotkau (supra),** we do not see any merit in the said contention in view of the judgment of Supreme Court reported in **(2017) 4 SCC 393 Sunil vs. State of M.P.** and **(2022) 8 SCC 668 Veerendra vs. State of M.P.** The *ratio decidendi* of these judgments were followed by this Court in **Dinesh Yadav (supra)** and **Ramswaroop vs. State of M.P. (CRA No.2630 of 2015)** decided on 02/08/2023. In nutshell, we are unable to hold that merely because DNA test was not conducted, any adverse inference, as a rule of thumb can be drawn against the prosecution.

32. In view of foregoing analysis, in our opinion, the prosecution could not establish the 'foundational facts' against the appellant. Putting it differently, the prosecution could not establish its case beyond reasonable doubt. Since, 'foundational facts' itself could not be established, presumption under Sections 29 & 30 of the POCSO Act cannot be drawn against the appellant. This Court has considered catena of judgments on this aspect and in Para-73 of judgment of **Dinesh Yadav (supra)** reads as under :-

> "**73.** The common string running through these judgments is that Section 29(2) of POCSO Act is

> almost pari-materia to Section 35(2) of NDPS Act. No doubt, Sections 29 and 30 of POCSO Act are couched in a particular way and creates a presumption, such presumption depends on the ability of prosecution to establish the foundational facts. When no foundational facts could be established by the prosecution, by taking aid of presumption flowing from Sections 29 and 30 of POCSO Act, an accused cannot be held guilty. We are in respectful agreement with the view taken by the aforesaid High Courts. As noticed above, prosecution in the instant case, could not establish the foundational facts with necessary clarity and beyond reasonable doubt. On the contrary, the accused by cross-examining the prosecution witnesses could establish about the improbability of the incident, lack of medical evidence, serious procedural flaws in sample collection and questioning the appellant in the Court under Section 313 of Cr.P.C. and conjoint effect of all such factors is that it cannot be said that prosecution could establish its case beyond reasonable doubt before the Court below. Thus, presumption clause of the statute will not improve the case of the prosecution."
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> **(Emphasis Supplied)**

33. In view of the foregoing analysis, the appellant deserves to be acquitted. Unfortunately and sadly appellant remained in custody from 21/03/2012. The prosecution has miserably failed to establish its case on merits. Resultantly, the impugned judgment dated 15/02/2013 passed in Sessions Case No.453/2012 is **set aside**. If presence of appellant in the custody is not required for any other case, he be released *forthwith*. The appeal is **allowed.**

(SUJOY PAUL)
JUDGE

(VIVEK JAIN)
JUDGE

MISHRA