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STATE OF HIMACHAL PRADESH

v.

MANGO RAM

AUGUST 24, 2000

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[DR. A.S. ANAND, CJ., R.C. LAHOTI AND K.G. BALAKRISHNAN, JJ.]

Penal Code, 1860—Sections 375 and 376—Rape—Proof of offence—Consent for sexual act—Held, the offence is committed; submission under fear of terror cannot be construed as a consented sexual act.

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Respondent-accused, aged about 17 years, committed rape of his niece, a minor girl. The girl told her father about the incident, who reported the matter to the police. The accused was arrested. Trial Court acquitted the accused on the ground that the offence of rape had not been established by the prosecution; that she was above the age of 16 years; and that there was consent by her for the sexual act. High Court confirmed it. Hence the appeal by the State.

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State contended that there was sufficient evidence, including medical evidence, to prove that the accused had committed the offence of rape; that the offence was committed after she was physically over-powered by the accused; that she was below the age of 16 years; and that there was no consent from her for the sexual act.

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The respondent-accused contended that the absence of spermatozoa in the clothes of the prosecutrix and the accused, as revealed in the chemical examination, showed that the accused had not committed any sexual act; that there were no marks of violence over the breasts, nipples or cheeks and lips or other external genitals of the prosecutrix; that the prosecutrix had not deposed anything about the extent of penetration; that it is only an attempt to outrage the modesty; and that a false case was filed to get his property.

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Disposing of the appeal, the Court

HELD : 1.1. There is evidence of the Doctors, who examined the prosecutrix after taking note of physical features to the effect that prosecutrix must be of the age between 13 to 14 years. This view is more strengthened by the family history which showed that she was born in the year 1979. Therefore, in all probability, the age of the prosecutrix at the time of occur-

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rence was about 14 years. The certificate of the Medical Officer-cum-Radiologist, also gives only the probable age of the prosecutrix. Therefore, the finding of the Trial Court that the prosecutrix was above 16 years is based on faulty reasons and is not supported by evidence. [632-A-B]

1.2. The reasons attributed by the Trial Court that she had given consent for the sexual act are not true. According to the prosecutrix, she resisted the accused by scratching him with nails but as no nail marks were found on the body of the accused, the Sessions Judge assumed that there was consent on the part of the prosecutrix. The accused was examined on 20.4.1993. As the incident occurred on 17.4.1993, even if there were any marks of violence on the body of the accused, the same would have been obliterated and were not so prominent so as to be noticed by the medical officer who examined him. Therefore, the absence of nail marks or minor injuries on the body of the accused is of not much significance. From the oral evidence of the prosecutrix, it is proved that the accused caught her from behind and he lifted her and pushed her down and despite her attempt to cover herself with the salwar, the accused pulled it down. She also stated that the accused gagged her mouth when she attempted to cry aloud. The subsequent conduct of the prosecutrix also shows that she was very much resistant to the sexual onslaught on her. She came to her father immediately and told the entire incident as to how she was ravished by the accused. The evidence as a whole indicates that there was resistance by the prosecutrix and there was no voluntary participation by her for the sexual act. Submission of the body under the fear of terror cannot be construed as a consented sexual act. Consent for the purpose of Section 375 I.P.C. requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but also after having fully exercised the choice between the resistance and assent. From the evidence on record, it cannot be said that the prosecutrix has given consent and thereafter she turned round and acted against the interest of the accused. There is a clear credible evidence that she resisted the onslaught and made all possible efforts to prevent the accused from committing rape on her. Therefore, the finding of the Trial Court that there was consent on the part of the prosecutrix is without any basis. [632-C-H]

1.3. The medical certificate issued by the doctor clearly indicated that there was laceration of the hymen and clotting of blood at the vaginal orifice. This item of medical evidence is to be appreciated in the background of the oral evidence given by the prosecutrix. She deposed that

A accused lifted down her salwar and had sexual act with her. It is not known whether these clothes were washed before they were subjected to chemical examination. A piece of cloth which was recovered from the place of occurrence and the wearing apparel worn by the prosecutrix were stained with blood. The Sessions Judge made a casual observation that these blood stains might have been caused due to the menstruation of the prosecutrix.

B PW-2 stated that she had no history of menstruation and there was no suggestion also on the part of the accused as to whether the prosecutrix sustained injury on account of any other violent act. The evidence of PW-2 on these facts are not seen challenged in cross-examination. [633-D-F]

C 1.4. In view of the evidence of the prosecutrix, which is corroborated by medical evidence and other item of evidence and in the absence of any consent on the part of the prosecutrix, it is clearly established that the accused had committed rape on the prosecutrix and is liable for the offence punishable under Section 376 I.P.C. The finding given by the Trial Court is not based on proper appreciation of evidence and, therefore, unreasonable and it has dealt with the case lightly. The offence of rape being a serious one, the case should have received careful attention. The Trial Court and High Court should have shown greater sensitivity to such type of cases. The evidence should have been appreciated on broader probabilities and not to be carried away by insignificant contradictions. [633-G-H]

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E 1.5. The finding of the Trial Court, which was confirmed by the High Court is reversed and the accused is held guilty of the offence punishable under Section 376 I.P.C. [634-B]

F 2. As regards the sentence, a lenient view is taken for the reason that the prosecutrix and the accused are related. They were both teenagers with an age difference of about 2-3 years. Both were immature and young. The incident happened in 1993. After the acquittal, by passage of time, the members of the two families must have buried their hatchet, if any, arisen on account of this incident. Thus the sentence already undergone by the accused is sufficient to meet the ends of justice. [634-C-D]

G CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 790 of 1996.

From the Judgment and Order dated 5.12.95 the Himachal Pradesh High Court in CrI.M.P.(M) No. 1089 of 1995.

H J.S. Attri, Anil Soni for Ms. Meenakshi Arora for the Appellant.

U.U. Lalit and Ms. Aprajita Singh for the Respondent.

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The Judgment of the Court was delivered by

BALAKRISHNAN, J. This appeal has been filed by the State of Himachal Pradesh against the acquittal of the accused for the offence under Section 376 I.P.C. The respondent-accused was tried by the Court of Sessions Judge, Chamba Division of Himachal Pradesh alleging that he committed rape of a girl aged 13 years.

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The prosecution case is that the prosecutrix was the eldest daughter of Jagia Ram. Jagia Ram is a small agriculturist residing with his wife Smt. Pinji and children in a village by name Kuthed. He is a native of neighbouring village Bhadhad. The accused is his brother-in-law being the brother of his wife, Smt. Pinji. The accused was aged about 17 years and was the student of VIIIth standard during the relevant time. On 17.4.1993, Smt. Pinji asked her daughter to go to village Bhadhad and get the plough kept in the house of Jagia Ram. Prosecutrix left for Bhadhad at about 6.00 p.m. on 17.4.1993. Accused also accompanied the prosecutrix. When she entered her father's house at Bhadhad to get the plough, accused followed her and when she reached the cow-shed, she was caught by the accused from behind. Prosecutrix tried to extricate herself from him but she was over-powered by the accused and was made to lie on the floor of the cow-shed. The accused then untied the knot of her salwar and lifted it down and thereafter, committed sexual act. There was a bleeding from her private part. The prosecutrix returned home immediately and told her father Jagia Ram about the incident. Jagia Ram went to PW 8, Sh. Devi Chand, Pradhan of the Gram Panchayat of the area who, in turn, advised to lodge a complaint to the police. Jagia ram reported the matter to the police. As the prosecutrix was having a severe pain and uncomfot, she did not accompany her father to the police station.

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The police registered the case and investigation was commenced. Prosecutrix was subjected to medical examination by the PW 2, Dr. Veena Sehgal. The accused was arrested and PW 1, Dr. Hemant Sharma examined him. Police visited the place of occurrence and recovered a blood stained piece of cloth. The salwar and kameez worn by the prosecutrix at the time of the occurrence were also recovered. In the course of investigation, the police collected a family history book which indicated the age of the prosecutrix and the accused.

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The piece of cloth recovered from the place of occurrence and the

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A kameez worn by the prosecutrix were found to be stained with blood and on serological test found to have blood of A +ve group. Even though, there were some blood stains on the salwar, the grouping could not be made. The undergarments worn by the accused during the relevant time were also recovered and subjected to chemical examination and it neither contained blood nor spermatozoa.

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The prosecutrix was medically examined by PW 2 Dr. Veena Sehgal. She observed as under:-

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“She was a girl of average built, conscious, well oriented in place and time. Height 4’-10 1/2”, weight 31 kg. Breasts and papilae were elevated as small mounds and there was enlargement of areolas diameter. Axillary hairs were not developed. Pubic hairs were not developed. She was referred to Dentist for examining her dental age. There were no marks of violence over the breasts, nipples, cheeks and lips. No marks of violence were seen on the external genitals, perineum, abdomen, chest, back, limbs, neck and face. Menarche not yet attained.

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Perineal examination:

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There were no marks of injury over vulva. Hymen found intact with a small laceration at 6’o clock position. Clotted blood was seen at vaginal orifice, which admitted tip of the finger with great difficulty”.

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“From the above, it was difficult to say whether intercourse has taken place or not. Vaginal swab slide was prepared and got examined microscopically in the District Hospital, Chamba under which no dead or alive sperms were seen. Her blood group was A +VE. She was also referred for X-ray to determine her radiocal age”.

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PW2 Dr. Veena Sehgal was of the view that the age of the prosecutrix at the time of the examination would have been 13 years or 14 years. PW 3 Dr. Lokender Badotra, a Senior Medical Officer(Dental) opined that the prosecutrix was about 13 years of age and issued a certificate. PW 13, Medial Officer-cum-Radiologist, based on X-Ray examination of prosecutrix, stated that the age of the prosecutrix must be within 14 to 16 years.

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Fourteen witnesses were examined on the side of the prosecution. The prosecutrix was examined as PW 5 and her father Jāgia Ram was examined at PW 7. Both of them firmly supported prosecution. The other items of evidence include the medical evidence.

The Sessions Court acquitted the accused on the ground that the ingredients of the offence of rape had not been established and there was no penetration as alleged by the prosecution. The learned Sessions Judge was of the view that the prosecutrix must have been above the age of 16 years and the evidence as a whole indicated that there was a consent on the part of the prosecutrix to have the sexual act. The learned Single Judge before whom the appeal was filed by the State did not interfere with the findings of the learned Sessions Judge by holding that a view taken by the Trial Court was not either perverse or grossly wrong. The learned Single Judge also observed that the medical evidence did not positively point out the commission of the alleged offence on the prosecutrix.

The above findings are challenged before this Court. We heard the Counsel for the appellant and also Mr. U. U. Lalit, for the accused who was appointed as *amicus curiae*. The Counsel for the appellant contended that the findings entered by the learned Sessions Judge which were confirmed by the learned Single Judge are unsustainable and that there was ample evidence to show that the accused had committed the offence of rape. It was contended that the prosecutrix was below the age of 16 years and there was no consent on her part for any sexual act and she was physically over-powered by the accused and medical evidence clearly indicated that she was ravished by the accused. Whereas the Counsel for the respondent-accused contended that the absence of spermatozoa either in the clothes worn by the prosecutrix or in the undergarment of the accused which were subjected to chemical examination clearly showed that the accused had not committed any sexual act. The Counsel for the accused-respondent submitted that this is a false case filed against the accused to get at his property.

We carefully considered the rival contentions and also perused the records and the impugned judgments. The verdict of not guilty has been entered by the learned Sessions Judge mainly based on two grounds that the prosecutrix was aged above sixteen years and if at all there was any sexual act, it must have been with her consent. Both these findings are erroneous and incorrect.

As regards age of the prosecutrix, there is evidence of PW 2 Dr. Veena

A Sehgal who examined the prosecutrix and after taking note of physical features stated that prosecutrix must be of the age between 13 to 14 years. PW 3 Dr. Lokender Badotra, who examined the prosecutrix also supported this version. This view is more strengthened by the family history which showed that she was born in the year 1979. Therefore, in all probability, the age of the prosecutrix at the time of occurrence was about fourteen years. The certificate of PW 13, B the Medical Officer-cum-Radiologist, also gives only the probable age of the prosecutrix. Therefore, the finding of the learned Sessions Judge that prosecutrix was above the age of sixteen is based on faulty reasons and is unsupported by evidence.

C Even if it is assumed that the prosecutrix was above 16 years, the reasons attributed by the learned Sessions Judge to prove that she had given consent for the sexual act are not true. According to the prosecutrix, she resisted the accused by scratching him with nails but as no nail marks were found on the body of the accused, the learned Sessions Judge was of the view that for this reason, it is to be assumed that there was consent on the part of the prosecutrix. D The accused was examined on 20.4.1993. As the incident occurred on 17.4.1993, even if there were any marks of violence on the body of accused, the same would have been obliterated and were not so prominent so as to be noticed by the medical officer who examined him. Therefore, the absence of nail marks or minor injuries on the body of the accused is of not much significance. From E the oral evidence of the prosecutrix (PW 5), it is proved that the accused caught her from behind and he lifted her and pushed her down and despite her attempt to cover herself with the salwar, the accused pull it down. She also stated that the accused gagged her mouth when she attempted to cry a loud. The subsequent conduct of the prosecutrix also shows that she was very much resistant to the sexual onslaught on her. She came to her father immediately and told F the entire incident as to how she was ravished by the accused. The evidence as a whole indicates that there was resistance by the prosecutrix and there was no voluntary participation by her for the sexual act. Submission of the body under the fear of terror cannot be construed as a consented sexual act. Consent for the purpose of Section 375 requires voluntary participation not only after G 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 the resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances. From the evidence on record, it cannot be said that the prosecutrix had given consent and thereafter H she turned round and acted against the interest of the accused. There is a clear

credible evidence that she resisted the onslaught and made all possible efforts to prevent the accused from committing rape on her. Therefore, the finding entered by the learned Sessions Judge that there was consent on the part of the prosecutrix is without any basis.

The learned Counsel for the accused argued that there were no marks of violence over the breasts, nipples or cheeks and lips or other external genitals of the prosecutrix and that she herself had not deposed anything about the extent of penetration and this would indicate that there was no commission of the offence. It was argued that the absence of the spermatozoa in the clothes worn by the prosecutrix and the accused also indicated that there was no sexual act and at the most this would have been only an attempt to outrage the modesty of the girl. We are not inclined to accept this contention.

The medical certificate issued by PW 2 Dr. Veena Sehgal clearly indicates that there was laceration of the hymen at 6'o clock position and clotting of blood was seen at the vaginal orifice. This item of medical evidence is to be appreciated in the background of the oral evidence given by PW 5, the prosecutrix. She deposed that accused lifted down her salwar and had sexual act with her. It is not known whether these clothes were washed before they were subjected to chemical examination. A piece of cloth which was recovered from the place of occurrence and the wearing apparel worn by the prosecutrix were stained with blood. The learned Sessions Judge made a casual observation that these blood stains might have been caused due to the menstruation of the prosecutrix. PW 2 Dr. Veena Sehgal stated that she had no history of menstruation and there was no suggestion also on the part of the accused as to whether the prosecutrix sustained injury on account of any other violent act. The evidence of PW 2 Dr. Veena Sehgal on these facts are not seen challenged in cross-examination.

In view of the evidence of prosecutrix (PW 5), which is corroborated by medical evidence and other item of evidence and in the absence of any consent on the part of the prosecutrix, it is clearly established that the accused had committed rape on the prosecutrix and is liable for the offence punishable under Section 376 I.P.C. The finding given by the learned Sessions Judge is not based on proper appreciation of evidence and, therefore, unreasonable and we are of the view that the Sessions Court dealt the case so lightly. The offence of rape being a serious one, the case should have received careful attention and that the learned Sessions Judge and the learned Single Judge should have shown greater sensitivity to these type of cases. The evidence should have been

A appreciated on broader probabilities and not to be carried away by insignificant contradictions.

In view of the foregoing conclusions, we reverse the findings of the learned Sessions Judge which was confirmed by learned Single Judge and find that the accused is guilty of the offence punishable under Section 376 I.P.C.

B As regards the sentence, we take a lenient view for the reason that the prosecutrix and accused are related. They were both teenagers with an age difference of about 2-3 years. Both were immature and young. Evidence indicates no marks of violence at all on any part of the body of the prosecutrix. The incident happened in 1993. After the acquittal by passage of time, the members of the

C two families must have buried their hatchet if any arisen on account of this incident. The learned Counsel for the respondent argued that a further order for custodial sentence at this distance of time may cause rapture to social harmony in the village life and may only help to rekindle the flames of anger which have been smouldering for so long between near relatives. Having regard to all these

D matters, we hold that sentence already undergone by the accused would be sufficient to meet the ends of justice, and we do accordingly.

The appeal is accordingly disposed of.

B.S.

Appeal disposed of.