

**Dev Kishan and ors. Vs. State of Rajasthan**

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**Court :** Rajasthan

**Decided On :** Jul-25-2002

**Reported in :** 2003CriLJ11118; RLW2003(4)Raj2606

**Judge :** A.C. Goyal, J.

**Acts :** Indian Penal Code (IPC) - Sections 366A and 376(2); [Evidence Act, 1872](#) - Sections 114A

**Appeal No. :** S.B. Criminal Appeal No. 220 of 1998

**Appellant :** Dev Kishan and ors.

**Respondent :** State of Rajasthan

**Advocate for Def. :** Madhav Mitra, Adv.

**Advocate for Pet/Ap. :** Ashwin Garg, Adv.

**Judgement :**

**Goyal, J.**

1. This appeal through Central Jail, Kota, is directed against the judgment dated 21,10.1997 is sessions case no 16/1997, whereby the learned Additional Sessions Judge, Baran convicted and sentenced three accused appellants Dev Kishan, Ramkumar and Meghraj with 10 years rigorous imprisonment and a fine of Rs.

5000/-, in default one year rigorous imprisonment under Section 376(2)(g) I.P.C., and 5 years R.I. and fine of Rs. 500/-, in default one month R.I. and fine of Rs. 500/-, in default one month R.I. under Section 366-A I.P.C. Both the sentences were ordered to run concurrently.

2. The prosecution case in brief is that PW 8 Ramcharan, alongwith his daughter Anar Bai lodged a written report Ex. P 10 at police station Nahargarh at 7 p.m. on 21.1.1997 with the averments that on 10.1.1997 his daughter went to her 'Nanihal'along with her maternal uncle Chauthmal. Sh. Chauthmal came and informed him on 18.1.1997 that Anar Bai is missing since 17.1.1997. it was further stated in Ex. P 10 that his daughter returned home along with Nand Kishore and Gajendra Singh at 7 p.m. on 19.1.1997 and according to his daughter she was forcibly taken by Dev Kishan ram Kumar, both residents of village Maharajpura and Meghraj resident of village Ramilabs from the field of her maternal uncle where she had gone with meals for her grandmother (Nani). It was also informed by her that she was taken to forest and all the three accused persons committed rape on her. Again all the three accused persons committed rape with her in the night. In morning of Sunday, she was taken to Baran by Dev Kishan and Ramkumar and there her uncle nand Kishore and brother-in-law Gajendra Singh came and took her to home. The accused persons ran away, it is also stated in Ex. P 10 that they went to lodge a report at police station Mothpur on Monday, but they were informed that this occurrence took place within the area of police station Nahargarh.

3. Formal F.I.R. No. 12/1997 Ex. P 11 was registered under Sections 366, 363 and 376 I.P.C. and after usual investigation charge-sheet came to be filed. In due course, this case came up for trial before learned Additional Sessions Judge, Baran. Charges under Sections 366-A and 376(2) were framed against the accused appellants. They pleaded not guilty and claimed trial. The prosecution examined as many as 15 witnesses. Thereafter, the accused appellant were examined as provided under Section 313 Cr.P.C. They denied the prosecution evidence and produced two witnesses in defence DW 1 Bhagwan bai and DW 2 Harnarayan. After hearing learned counsel for the parties, the learned Trial Judge convicted and sentenced the accused appellants as stated hereinabove.

4. I have heard learned counsel for the appellants and the learned Public Prosecutor and have scanned the entire evidence.
  
5. Learned counsel for the appellant contended that the age of the victim was not below 19 years at the time of occurrence. He has referred Ex.D 5, a certificate issued by the Head Master of Government Primary School, Maharajpura. Learned counsel contended that this certificate Ex. D5 was admitted by Additional Public Prosecutor, hence it was unnecessary on the part of the accused appellants to summon the concerned Head Master. Learned Public Prosecutor supported the impugned judgment on the point of the age of the victim. In view of the provisions of Section 366-A and 375 I.P.C., the age of the girl assumes much significance. According to the provisions of Section 366-A, whoever, by any means whatsoever, induces any minor girl under the age of 18 years to go from any place or to conduct any act with intent that such girl maybe, or knowing that it is likely that she will be, forced or seduced to illicit inter-course with another person shall be punishable with imprisonment which may extend to 10 years and shall also be liable to fine. Section 375 defines the offence of rape. The relevant provisions for the purpose of deciding the present appeal are that a man is said to commit rape who has sexual inter-course with a woman against her will, or without her consent or with her consent, when such consent was obtained by putting her in fear of death or of hurt and with or without her consent, when she is under 16 years of age. The learned Additional Sessions Judge came to the conclusion (at page 10 of his judgment) that the age of the victim was not more than 16 or 17 years. At page 12 and 13 it was observed that the age of the victim was not more than 17 years. Therefore, the learned Trial Judge found the age of the girl not below 16 and not more than 17 years at the relevant time.
  
6. P.W. 7 is the victim. Her statement was recorded on 20.8.1997 before the Trial Court. She stated her age 15 years. She also stated that she never went to the school. She denied the suggestion that her date of birth was 2.12.1978 and she got the education in the school but admitted this suggestion that there is no other girl of her name in their village, her father PW 8 Ramcharan stated that her daughter at the relevant time was 13 to 14 years and she was never admitted in any school. He clarified in cross-examination that her daughter learnt how to sign

in literacy campaign. PW 13 Dr. Jagdish Yadav examined her on 22.1.1997. She was x-rayed and Ex.P. 16 is her X-ray reported. In the opinion of Dr. Jagdish Yadav, the age of the girl was between 16 to 17 years. In cross-examination, he stated that she was not 2 years below from 16 years and 2 years above from 17 years, but this opinion cannot be accepted as no reasons for this opinion were given by Dr. Yadav. In *Bhoopram v. State of U.P.* AIR (1), the Hon'ble Supreme Court held that on the point of proof of age, school certificate is the best evidence and so far as the medical certificate is concerned, the same is based on estimate and possibility of error cannot be ruled out. It is true that medical evidence in respect of age cannot be exact and the determination of age is with reference to certain lower and higher margins and the benefit of outer margin must be given to the accused. Keeping in view the entire evidence, the age of the victim was not found proved below 18 years, particularly in view of the birth certificate of the victim which is Ex. D.5. This birth certificate was issued by the Head Master on 17.7.1997, which was issued on the basis of the entries made in the admission register of the school wherein her date of birth is mentioned 2.12.1978. The learned Trial Judge observed in this regard that this certificate Ex. D 5 was not proved that he over looked this fact that this school certificate Ex. D 5 was admitted by learned Additional Public Prosecutor and this fact was specifically recorded by the learned Trial Judge in the order-sheet dated 18.10.1997 also. Since the certificate Ex.D/5 was admitted by learned Additional Public Prosecutor, there was no occasion or necessity on the part of the defence to summon the concerned Head Master for proving the same According to this admitted document Ex.D/5, the date of birth of the victim comes to 2.12.1978 and thus, at the time of occurrence she was more than 18 years. At the cost of the repetition, it is mentioned here the PW 7, the victim, herself admitted in cross-examination that there is no other girl of her name in their village. In view of this entire discussion, it is held that the age of the victim was not proved to be below 18 years at the time of occurrence. Hence, offence u/Sec. 366-A IPC is not made, Out as it was essential to prove her age below 18 years.

7. The second offence is that gang rape under Section 376(2)(g) IPC. Learned counsel for the appellants raised the first objection in this regard that First Information Report was lodged after considerable delay and no explanation was

given and it creates doubt. It is the case of prosecution that the victim was taken from her field at about 8 p.m. on 17.1.1997 and the First Information Report Ex.P 10 was lodged at 7 p.m. on 21.1.1997. but this delay has been explained. A missing report of the girl was lodged at this police station on 19.1.1997 by Sh. Chauthmal, PW 9, who is material uncle of the girl. This oral report was recorded in 'Rojnamcha' at serial No. 492 and the true copy of the same is Ex. P 11. This has been proved by PW 9 Chauthmal and PW 15 Investigation Officer Sh. Ramchandra Sharma. Another explanation is that when the victim returned home on 19.1.1997, PW 8 Ramcharan and PW 12 Gajendra Singh, both went to report this matter at police Station Mothpur on the next day, i.e. 20.1.1997, but they were asked to go to concerned police station Nahargarh. Thereafter, they reported this matter at police station nahargarh on 21.1.1997. Apart from this explanation, some suggestions were put to the victim in cross-examination to show that she accompanied the accused appellant Dev Kishan at her own and therefore, in view of these facts delay in lodging F.I.R. does not create any doubt in this case.

8. Learned counsel for the appellants next contended that according to the statement of the victim she remained in the company of the accused appellants from 17.1.1997 to 19.1.1997 and she was taken from one place to another and during that period she did not make any hue and cry and it goes to show that she was a consenting party from the very beginning. Learned Public Prosecutor contended that the accused appellants were there in number and they forcibly took her and thus she could not raise any hue cry. he also referred the medical evidence and Section 114-A of the Indian [Evidence Act, 1872](#).

9. To appreciate the evidence and the submissions, it is necessary to reproduce the provisions of Section 114-A of the Indian Evidence Act, which are as under:-

114 A. Presumption as to absence of consent in certain prosecutions for rape. - In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of Sub-section (2) of Section 376 of the Indian Penal Code, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the court that she did not consent, the Court

shall presume that she did not consent.

A bare perusal of the said provision shows that where sexual inter-course by the accused is proved and the woman alleged to have been raped states that she did not consent, the court shall presume that she did not consent,. Obviously, this offence of rape falls within clause (g) of Sub-section (2) of Section 376 I.P.C. Now coming to the oral testimony, PW 7 victim stated before the Trial Court that on the date of occurrence she had gone in the evening to the field with meals for her grand-mother and she was lying on a 'Khat' In a hut. At that point of time all the three accused persons came and forcibly took her to a forest which was about 7 to 8 Kms. away from that place. This . distance is also mentioned in the site plan Ex. P 7. She further stated that all the three accused persons had sexual inter-course with her one-by-one and thereafter she became unconscious. She further stated that all the three accused person again committed rape one-by-one in the night. According to her, they all stayed in that forest for the whole day and two nights and thereafter she was taken to Baran under threat. . According to her, they wanted to take her to Chittor but at Baran, her uncle Nand .Kishore, P.W. 10 and brother-in-law Shri Gajendra Singh P.W. 12 came. Therefore, the accused ran away and she was taken to her village. PW.10 nand Kishore and PW 12 Gajendra Singh supported the said version of the victim. The oral testimony of the victim finds corroboration form the medical evidence also. According to PW 13 Dr. Jagdish Yadav, he examined her on 21.1.1997. He noted two abrasions and one lacerated wound on the person of the victim. He also found tenderness on the lower part of the abdomen. In the opinion of Dr. Yadav, the injuries were 4 to 5 days old and thus, the duration of the injuries tally with the time of occurrence. While proving medical report Ex.P. 15, he stated that her public hair were malted with blood and sominal fluid. Labia, majora and minora seperated to each other. Tenderness present

on the Labia Majora and Minora. The bleeding was present on the labia majora and Minora. Fourcheet and perineum are intact. Hymen reptured, edges torn, segments swollen, red, tender, bleeding present on the radiate tears. Vagina was hot, swollen, tender, two finger dilated mucous membrane was red. Rygosed, bleeding was present in the vagina, and also bleeding was present in the vulva

and vagina. On the basis of these findings, P.W. 13 Dr. Yadav opined that on physical and medical examination, signs of sexual assault were present and duration of sexual assault was 4 to 5 days. Dr. Yadav categorically stated before the trial Court that in his opinion, signs of forcibly sexual inter-course were present. This, the statement of the victim regarding sexual intercourse with her stands fully corroborated by medical evidence and there is no reason to disbelieve her evidence corroborated by medical evidence. In view of the mandatory provisions of Section 114-A of the Indian evidence Act, the court shall presume that the victim did not consent, This, the learned Tribal Judge rightly held that accused appellants guilty for the offence under Section 376(2)(g) I.P.C.

10. Consequently, this appeal is partly allowed. While acquitting the accused appellants for offence under Section 366-A I.P.C., the conviction and sentences awarded to the appellants under Section 366-A I.P.C. are set aside. But the conviction and sentences under Section 376(2)(g) I.P.C. are maintained.

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