

(1992) 01 MP CK 0012

**Madhya Pradesh High Court****Case No:** Criminal Appeal No. 260 of 1988

Shatrughan and Another

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

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**Date of Decision:** Jan. 7, 1992**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 293
- Evidence Act, 1872 - Section 114A
- Penal Code, 1860 (IPC) - Section 376(2)

**Citation:** (1993) CriLJ 120**Hon'ble Judges:** S.K. Chawla, J**Bench:** Single Bench**Advocate:** R.P. Chopra, for the Appellant; Gangrade, Government Advocate, for the Respondent**Final Decision:** Allowed

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**Judgement**

S.K. Chawla, J.

Both the appellants, who are aborigines being Gonds, have been convicted by Sessions Judge, Mandla of the offence u/s 376(2)(g) of the Indian Penal Code with committing gang rape on a girl of their own village and community named Shantibai (PW 1) and have been sentenced to R.I. for 10 years and a fine of Rs. 250/- each, in default to further imprisonment of three months. The learned Sessions Judge has omitted to direct if the imprisonment in default, would be simple or rigorous.

2. The prosecution story briefly stated was that on 5-2-1986 Shantibai (PW1), an unmarried Gond girl, aged 16 years or little more, had gone in the company of two women named Kamlo and Mantibai to collect fuel wood in the forest of adjoining village. In noon time at about 1.30 p.m. the two appellants came in the forest. They made the two accompanying women to leave helping them to place load of fuel wood on their heads. The two appellants then committed rape turn by turn on

Shantibai, the one holding down the girl when the other raped. Gorelal (PW3) happened to spot the appellants ravishing the girl and he raised out-cries. The appellants threatened him with dire consequence if spoke about the incident to anybody.

3. The learned Sessions Judge held the prosecution story to be established on the evidence of prosecutrix Shantibai (PW1). He pressed into service the presumption contained in Section 114A of the Evidence Act to believe the evidence of the prosecutrix that she was not a consenting party. The evidence of Basorilal (PW5), a Panch of the Village Panehayat, who deposed that both the appellants had made extra-judicial confession in the Panehayat admitting their guilt, was also relied upon.

4. On being taken through the entire prosecution evidence this Court is clearly Of the view that the prosecution story about gang rape was so thoroughly improbable and unnatural that it was improper to convict the appellants in the manner done by the trial Court. First of all, there was the circumstance that Shantibai (PW1) made a report of the alleged offence nine days after its alleged commission. The offence, as may be recalled, was alleged to have been committed on 5-2-1986 in day time at 1.30 p.m. while the report, Ex.P-1 thereof was made on 14-2-1986 at 4.30 p.m. Shantibai (PW1) explained that a Village Panehayat was convened at the instance of her father on the day following the date of the incident i.e. on 6-2-1986. In that Panehayat father of appellant No. 1 Shatrughan by name Dadulal had agreed to get his son married to Shantibai. Dadulal also performed ceremony of "faldan" " in that connection in the said Panehayat. Shantibai (PW1) added that if appellant No. 1 Shatrughan had married her, she would not have reported about the alleged incident at all. However, on the very next day i.e. on 7-2-1986 the father of appellant No. 1 openly declined to get his son married to the prosecutrix. It was for this reason that report about the incident was made by her. Even in that situation why was the report delayed by another seven days, since the father of appellant No. 1 had admittedly declined to get his son married on 7-2-1986. There is absolutely no explanation for this delay of seven days and the possibility that some sort of incident was twisted to give it a shape of gang-rape in the report, Ex.P-1, cannot reasonably be discounted.

5. The girl Shantibai (PW1) went on to admit that she was eager to be married to appellant No. 1 Shatrughan and hence was not willing to make any report. She admitted that because she was taken by her parents to the police, she had to report. This would indicate that she unwillingly made a report on pressure of her parents.

6. It has come in the evidence that appellant No. 1 Shatrughan and the girl Shantibai (PW1) are not neighbours. It has also appeared in the evidence that appellant No. 1 "s father is maternal uncle of the girl. The girl Shantibai (PW1) admitted in her evidence that among Gonds marriage of a girl is permissible with her maternal uncle"s son, which is exactly the relationship between appellant No. 1 and the prosecutrix. The evidence of Pancham (PW6) would show that he lives in the

neighbourhood of the house of the parties. According to him, there existed love affair between the prosecutrix and appellant No. 1 Shatrughan and both wanted to marry each other. Shantibai had in fact come to him prior to the present alleged incident and had expressed to him that she wanted to marry Shatrughan (Appellant No. 1). Shantibai's father also used to tell him to get his daughter married to Shatrughan. However, the grand-mother of appellant No. 1 Shatrughan spoils the entire plan because she stoutly came in the way and did not allow the marriage to materialise. It is highly unlikely that sexual relationship of a lover placed in the position of appellant No. 1 Shatrughan in relation to the prosecutrix would amount to rape much less would such lover be a party to a gang-rape on his beloved.

7. It was the prosecution case that Gorelal (PW3) had happened to witness the act of alleged gang-rape and had raised out-cries. Gorelal (PW3) sabotaged the prosecution story completely. He deposed that he had, met both the appellants in the jungle but they had not said to him anything. He had also met the girl Shantibai in the jungle but she too had not said to him anything. He denied that he had seen the appellants committing rape on Shantibai. No doubt, Gorelal was declared hostile by the prosecution and contradicted with his contrary police statement Ex.P-3. Hostile witness is not necessarily a false witness. There is absolutely nothing to show that Gorelal was mixed with the accused persons and therefore deposed falsely in Court. What is more, is also the fact that the prosecution did not examine either of the two ladies named Kamlo and Mantibai who were accompanying the prosecutrix sorrietirne prior to the alleged incident. Shantibai (PW1) admitted that at the time of leaving the jungle at the instance of the appellants, the two ladies Kamlo and Manti started laughing and so laughingly they went away. Why did Shantibai not protest at that time on the alleged act of appellants detaining her and making her two women companions to part? There was something fishy in the whole affair.

8. The conduct of the prosecutrix was also no less suspicious. It is doubtful if she made any kind of complaint regarding the alleged incident. She admitted that she did not directly tell anything about the alleged incident to her father Pirma Gond (PW4). Her evidence was that she complained about the incident to Jeeja, Ramsingh (PW2). Her evidence further was that her Jija in his turn informed about the incident to her mother. Her mother again in her turn informed about the incident to her father. It was thus the version of the prosecutrix that it was only in an indirect manner that her father, who got a Panchayat convened, was informed about the incident. The father had something else to say in the matter. Pirma (PW4) deposed that neither his daughter nor his wife told him about the incident. If so, how was he informed of the incident? According to him, he was informed through Ramsingh, the girl's Jija. But on the evidence of girl Shantibai (PW1), as already indicated, Ramsingh did not directly inform to Pirma. This makes it all doubtful whether Shantibai made any kind of complaint and also whether what reached the ears of her father Pirma was properly traceable to what Shantibai allegedly initially stated.

9. The making of alleged extra-judicial confession by the appellants at the Panchayat was a false prop given to the prosecution story. The evidence of Shantibai (P. W. 1) and Panch Basorilal (PW-5) in support of the story of alleged extra-judicial confession said to have been made by the appellants in the Panchayat, was completely belied by the evidence of no other person than the girl's father Pirma (PW-4). He categorically admitted that although the appellants were present in the Panchayat, neither of them stated anything, much less admitted any guilt in the Panchayat. Pancham (-PW-6), on the other hand, deposed that appellants Shatrughan and Dashrath expressly denied in the Panchayat about having anything to do in the alleged affair. The false evidence about extra-judicial confession given by the prosecutrix makes her an unreliable witness, whose word could never be safely given reliance.

10. There is in the file of committal Courts, record an unexhibited report of Chemical Examiner. A reading of that report would show that no seminal stains and spermatozoa could be detected on Article-A i.e. Shantibai's Sari. It is further stated in the report that vaginal slides of the girl were not received by the Chemical Examiner although it was mentioned in the memo of the S.P. that those were also sent to Chemical Examiner for Chemical Examination. The story of Shantibai (P.W. 1) was that her Sari has got soiled by acts of discharges during the course of incident by the appellants. She had gone to the length of producing the soiled Sari at the time of making her report. That Sari was seized by the police and sent for chemical examination. The report of the Chemical Examiner, already indicated, contra-indicates the story of any sexual intercourse having taken place with the prosecutrix. The law with respect to unproved prosecution documents appears to be that although the prosecution cannot be allowed to use them, the defence cannot be denied their use if those documents support the defence in any manner. In the case AIR 1938 394 (Nagpur) , the FIR was not proved by the prosecution. It was held that the defence could not be shut out from using that document, merely because the prosecution had not formally proved it. If the prosecution wished to imply that FIR was a garbled document, it should have given evidence to that effect. In the absence of such evidence, the defence could legitimately make use of that document. Another case Samedas v. State of M.P. 1969 LJ, S.No. 54, also related to unproved FIR. It was not proved and hence could not be exhibited in the case. It was held that the prosecution could not be allowed to use it because it had remained unproved. But even so it was open to the defence to make use of it, if it supported the defence in any manner. In the present case the unexhibited report of the Chemical Examiner did not in fact require to be formally proved by any witness. It was a document which proved itself u/s 293, Cr. P.C. and should have been exhibited even if it was not referred to in the deposition of any witness. That report stood on an obviously better footing than an unproved FIR. The defence could be legitimately allowed to make use of it. When so considered, it militates against the prosecution story about any sexual intercourse having taken place with the prosecutrix.

11. The learned trial Judge also pressed into service the presumption contained in Section 114A of the Evidence Act to enable him to hold that the prosecution story was established. That presumption says that in a prosecution for rape confined to certain clauses of Sub-section (2) of Section 376, IPC. including clause (g) relating to gang-rape, with which we are presently concerned, if 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 gives evidence in Court that she did not consent then the Court shall presume that she did not consent. It is not discretionary with the Court whether to draw that presumption or not. If the conditions given in the provision are satisfied, the Court shall presume about the absence of consent on the part of the prosecutrix. That presumption is rebuttable by contrary evidence. It is however clear that before that presumption can be drawn, there should be reliable evidence amounting to proof to hold that sexual intercourse took place between the accused and the woman concerned. If there is no satisfactory evidence on that question, it would be clearly wrong to resort to the presumption and to hold that the woman did not consent, since that would be begging the question if sexual intercourse at all took place. In the facts and circumstances of the present case, it is doubtful if any sexual intercourse took place with the prosecutrix at the time of the alleged incident. The presumption was therefore not attracted.

12. Considering the large number of infirmities in the prosecution evidence, which have been adverted to above, the story of alleged gang-rape was of most suspicious and doubtful character. The learned trial Judge appeared to be obsessed by the gravity of the offence, because of the label it bore of gang-rape, and by long and laboured reasoning unjustly tried to meet the infirmities in the prosecution case. It is clear that there was no case to warrant the conviction of the appellants for the alleged offence of gang-rape.

13. For the foregoing reasons, the appeal deserves to be, and is hereby allowed. The conviction and sentence of the appellants are set aside. They are acquitted of the offence u/s 376(2)(g) of the Indian Penal Code. It is rather unfortunate that the appellants have already suffered sentence of 3 years since their conviction by the trial Court. Before their conviction, they were on bail. It is directed that the appellants" shall be set at liberty forthwith, if not required in any other case. Fines, if any, paid by them shall be refunded to them.