CASE NO.:
Appeal (crl.) 175 of 2003

PETITIONER:
Dastagir Sab & Anr.

RESPONDENT:
State of Karnataka

DATE OF JUDGMENT: 22/01/2004

BENCH:
Doraiswamy Raju & S.B. Sinha.

JUDGMENT:
J U D G M E N T

S.B. SINHA, J :

The appellants herein have been found guilty of commission of offence under Section 376(2)(g) of Indian Penal Code and sentenced to undergo rigorous imprisonment for five years as also imposition of a fine of Rs. 10,000/-.

On 31.10.1993, father of PW1 and PW6, her brother had gone to cultivate their agriculture land. Around 11.30 a.m. when PW 1 was attending to her household works and nobody was at home, the appellants came to the house and asked her about the availability of a spray pump. She told the appellants that she did not have any. A little later again the appellants approached her and asked for water whereupon she gave them water for drinking. After some time again the appellants went to her and asked her to give the cycle pump whereupon she told them that she did not have any cycle pump, whereafter they went away. Around 12.30, PW 1 went to a nearby nala to fetch water for the purpose of washing clothes. While she was returning from the canal, both the accused persons came and took her forcibly to the cotton fields by gagging her mouth and committed forcible sexual intercourse with her against her consent. She was unable to cry as the cloth used was put in her mouth. Later, however, she removed the cloth put in her mouth and cried aloud. Hearing her cries, her father and her brother came running to the spot and found the accused persons running away at a distance. Her father made an attempt to apprehend them, but they made good their escape. He also approached one Mahantesh Patil PW 19 who is an influential person of the village and requested him to see that something is done in this regard. PW 19 promised him that he will send for the accused and a panchayat will be held. The father of the prosecutrix, thereafter, informed the factum of commission of the offence to a number of persons including PW 2 Krishna Veni, PW 3 Krishna Murthy and PW 14 Sadashiva Rao. All of them gathered in the hut of PW 1 and made enquiries whereupon she narrated the acts committed by the accused persons. After 4 days of the incident the father of the prosecutrix lodged a First Information Report before the Sirwar Police Station.

Both the Courts below found the appellants guilty of commission of the said offence.

The principal ground urged by the learned counsel

appearing on behalf of the appellants are that:

(i) the identification of the appellants in the Court for the first time by the prosecutrix without a prior Test Identification Parade having been held, the judgment of sentence must be held to be bad in law;
(ii) having regard to the fact that the place of occurrence being an agricultural field and the stuff of the agricultural produce was found to be as high as 5 feet to 6 feet, the absence of injury on her person is not probable;
(iii) in view of the medical evidence, no finding as regard commission of the offence can be held to have been established.

The prosecution in support of its case has examined as many as 26 witnesses. The prosecutrix Malleshwari examined herself as P.W. 1. She in her evidence detailed the circumstance in which the offence is said to have been committed. She also disclosed enough materials to show that she had the occasion to see the accused persons at least on three occasions almost immediately prior to the commission of offence and also when she was intercepted and forcibly committed sexual assault on her. It is further borne out from records that immediately upon hearing her cries when the appellants allegedly took to heels, her brother P.W. 6 Rambabu saw the appellants running away from the spot. The other witnesses including the father of the prosecutrix, the other labourers who were working in the field i.e. Gobindamma w/o Malappa, resident of Athnoor Village, Kabir Jayamma w/o Gangappa Malad, Laxmi w/o Amaresh Malad, Nagaraj s/o Gangappa Malad, Viresh s/o Gangappa Malad, Subamma w/o Rahiman Choudhary of Solapur, Ramjanamma w/o Bhandenawaz, Hussain s/o Choudhary Abi Sab, Mohammed s/o Lal Sab came immediately to the place of occurrence. The father of the prosecutrix got hold of the accused persons and allegedly they confessed their guilt but they refused to come with him. When the incident was narrated to the labourers and others including the P.Ws. 2, 3, 6 and 14, they expressed their anguish and wanted the boys to be punished. One Subamma went to the village and assaulted the appellant No. 1 with her chappal.

The fact that immediately after the incident the matter was narrated to PWs 2 and 3 is not in dispute. They supported the prosecution case. Further, PW 6 Rambabu who was then aged about 12 years also saw two persons running away from the spot. He knew the accused persons.

It is also not in dispute that the accused were arrested on 6.11.1993 and according to the investigating officer they were shown to her to ensure that they have arrested the correct persons and in that view of the matter it was impracticable to hold a Test Identification Parade. In view of the peculiar facts and circumstances of this case we are of the opinion that non-holding of a Test Identification Parade cannot be said to have vitiated the trial. The learned counsel appearing on behalf of the appellants, however, would submit that the prosecutrix in her evidence categorically admitted that she did not know the accused persons earlier but despite the same they have been named in the First Information Report. A bare perusal of the First Information Report would show that therein it had merely been stated "I came to know that the boy who has

raped me is Dastagir and the boy who has held me and put the cotton in my mouth is Rajasab and both of them are of Athnoor village, if shown to me I can identify them".

It is, therefore, not difficult to perceive that before the First Information Report which was lodged on 5.11.1993 the names of the appellants were disclosed and the prosecutrix came to know thereabout.

No law states that non-holding of Test Identification Parade would by itself disprove the prosecution case. To what extent and if at all the same would adversely affect the prosecution case, would depend upon the facts and circumstances of each case.

In the facts of this case, holding of T.I. Parade was wholly unnecessary. Had such T.I. Parade been held, the propriety thereof itself would have been questioned before the Trial Court.

In State of H.P. Vs. Lekh Raj and Another [(2000) 1 SCC 247], this Court emphasized the purpose for holding test identification parade in the following terms:

"3...During the investigation of a crime the police agency is required to hold identification parade for the purposes of enabling the witness to identify the person alleged to have committed the offence particularly when such person was not previously known to the witness or the informant. The absence of test identification may not be fatal if the accused is known or sufficiently described in the complaint leaving no doubt in the mind of the court regarding his involvement. Identification parade may also not be necessary in a case where the accused persons are arrested at the spot. The evidence of identifying the accused person at the trial for the first time is, from its very nature, inherently of a weak character. This Court in Budhsen v. State Of U.P. ((1970) 2 SCC 128 : 1970 SCC (Cri) 343) held that the evidence in order to carry conviction should ordinarily clarify as to how and under what circumstances the complainant or the witness came to pick out the particular accused person and the details of the part which he allegedly played in the crime in question with reasonable particularity. In such cases test identification is considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them. There may, however, be exceptions to this general rule, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely without such or other corroboration. Though the holding of

identification proceedings are not substantive evidence, yet they are used for corroboration purposes for believing that the person brought before the court was the real person involved in the commission of the crime. The identification parade even if held, cannot, in all cases, be considered as safe, sole and trustworthy evidence on which the conviction of the accused could be sustained. It is a rule of prudence which is required to be followed in cases where the accused is not known to the witness or the complainant."

(See also Dana Yadav alias Dahu and Others Vs. State of Bihar (2002) 7 SCC 295)

Yet again in Malkhansingh and Others Vs. State of M.P. [(2003) 5 SCC 746] this Court observed:

"16. It is well settled that the substantive evidence is the evidence of identification in Court and the test identification parade provides corroboration to the identification of the witness in Court, if required. However, what weight must be attached to the evidence of identification in Court, which is not preceded by a test identification parade, is a matter for the Courts of fact to examine. In the instant case the Courts below have concurrently found the evidence of the prosecutrix to be reliable and, therefore, there was no need for the corroboration of her evidence in Court as she was found to be implicitly reliable. We find no error in the reasoning of the Courts below. From the facts of the case it is quite apparent that the prosecutrix did not even know the appellants and did not make any effort to falsely implicate them by naming them at any stage. The crime was perpetrated in broad day light. The prosecutrix had sufficient opportunity to observe the features of the appellants who raped her one after the other. Before the rape was committed, she was threatened and intimidated by the appellants. After the rape was committed, she was again threatened and intimidated by them. All this must have taken time. This is not a case where the identifying witness had only a fleeting glimpse of the appellants on a dark night. She also had a reason to remember their faces as they had committed a heinous offence and put her to shame. She had, therefore, abundant opportunity to notice their features. In fact on account of her traumatic and tragic

experience, the faces of the appellants must have got imprinted in her memory, and there was no chance of her making a mistake about their identity..."

In Ashfaq Vs. State (Govt. of NCT of Delhi) [2003 (10) SCALE 732], this Court observed:

"...Though as a matter of general principle, the point urged with reference to the omission to conduct earlier the test identification Parade may be correct, the question as to whether there is any violation of the same in a given case would very much depend on the facts and circumstances of each case and there cannot be any abstract general formula for universal and ready application in all cases..."

In the instant case, as noticed hereinbefore, PW 1 gave sufficient particulars of the persons committing the offence of criminal assault on her. They had been identified by their description by her brother. The appellants were chased and they were caught and allegedly they had made a confession of their guilt. The relatives of the prosecutrix and other persons had also approached Mahantesh Patil, PW 19 to see that the culprits are brought to book and assurance in that behalf had been given. It was only when despite repeated attempts their grievances were not met, the First Information Report was lodged. Furthermore, in this case the names of the appellants have been mentioned in the First Information Report.

It has been brought on record that immediately after the incident the father of the prosecutrix went in search of the accused where he also met PW 19 Mahantesh Patil who had promised that he would send for the accused and see that justice is done but since he was not available subsequently for 2-3 days, the complaint was filed.

Further, it is well settled that absence of injuries on the person of the prosecutrix would not by itself be sufficient to discard the prosecution case.

The incident took place on 31.10.1993. PW 1 was examined by the Medical Officer at 4.15 p.m. on 5.11.1993. Dr. H. Vadiraj PW25 categorically stated that any abrasion or marks of violence would be visible for 24 hours and thereafter the same may disappear. Admittedly, according to the doctor, rupture of hymen of PW1 took place about one year prior to the occurrence and that may lead to the possible explanation as to why no visible injury was found on her private part.

In the cross-examination, it is elicited from this witness that while taking brief history of the incident from the victim, she clearly stated that she had been raped by Dastagir Sab, aged about 28 years and Rajasab, aged 25 years of Athnoor village on 31.10.1993 at 12 noon. Furthermore, the witness failed to state as to whether physical exercise also can lead to rupture of hymen.

The learned Session Judge having regard to the

materials on record observed:

"She was wearing at the relevant point of time, one Lahanga, one Davani and a blouse. The two hooks on the top have been torn and the clothes which P.W. 1 was wearing at the relevant point of time were seized by the Investigating Officer subsequent to the complaint filed by P.W. 1 and they were subjected to the chemical analysis by the Investigating Officer. The chemical analysis report is available at Ex. P.29, item No. 1 is a sealed cloth packed said to contain one Lahanga. The result of the analysis disclosed that the presumptive chemical tests for the presence of seminal stains was found positive for item No. 1 and 5(1). Item No. 5(1) refers to dhoti which was subsequently seized from the possession of A-1. Therefore, the chemical analysis test positively proves that there was seminal stain both on Lahanga of the victim and the dhoti of A-1."

We may notice that the appellant No. 1 was examined by Dr. Chikkareddy PW 20 on 6.11.1993 whereupon the following injuries were found:

"1. Abrasion on the right side of the neck =" x =" with crest formation.

2. Abrasion on the lt. Side of cheek 3/4" x 3/4" crest formation."

Those injuries, according to the opinion of the doctor could be caused by scratching with nails.

So far as the alleged absence of injury on her body having regard to place of occurrence, as urged by the learned counsel for the appellant, is concerned, suffice it to point out that the learned Session Judge noticed that 'there were dried up cotton plants at the spot where the incident took place'. It was further noticed that when the prosecutrix made her lay on a land where there were cotton plants, it is natural that she would not sustain any visible injury.

The spot mahazar MO-1 showed that at the place of occurrence there were dried up cotton plants. Having regard to the aforementioned materials, both the learned Session Judge as also the High Court negatived the submission of the appellant to the effect that absence of injury on the back of the prosecutrix would lead to the conclusion that prosecution case should not be relied upon.

In Narayanamma (Kum) etc. Vs. State of Karnataka and Others etc. [(1994) 5 SCC 728], this Court inter alia observed:

"4(i) According to the prosecutrix, she had been bodily lifted by Muniyappa and Venkataswamy, respondents, taken to the

field of Gopalappa where Somanna already present in waiting raped her while she was forcibly laid on the matted jowar crop. Since there were no marks of injury on the back of the prosecutrix and the field was reported to be having stones on the surface, the word of the prosecutrix was doubted by the High Court about the manner in which the crime was committed. The High Court unfortunately did not appreciate the importance of the use of jowar stalks, which in the month of October, when the occurrence took place, would have been more than a man's height and when trampled upon and matted would provide sufficiently a cushion for the crime being committed without the prosecutrix receiving any injury on her back. The surrounding crop would also provide a cover obstructing visibility to a casual passer-by. Thus we view that the absence of injuries on the back of the prosecutrix can be of no consequence in the circumstances."

The presence of semen on the cloth of the victim also corroborates the evidence of the prosecutrix.

Injury on the body of the person of the victim is not a sine qua non to prove a charge of rape. Absence of injury having regard to overwhelming ocular evidence cannot, thus, be the sole criteria for coming to a conclusion that no such offence had taken place.

This Court in Rafiq Vs. State of Uttar Pradesh [AIR 1981 SC 559 : (1980) 4 SCC 262] observed:

"5...The facts and circumstances often vary from case to case, the crime situation and the myriad psychic factors, social conditions and people's life-styles may fluctuate, and so, rules of prudence relevant in one fact-situation may be inept in another. We cannot accept the argument that regardless of the specific circumstances of a crime and criminal milieu, some strands of probative reasoning which appealed to a Bench in one reported decision must mechanically be extended to other cases. Corroboration as a condition for judicial reliance on the testimony of a prosecutrix is not a matter of law, but a guidance of prudence under given circumstance. Indeed, from place to place, from age to age, from varying life-styles and behavioural complexes, inferences from a given set of facts, oral and circumstantial, may have to be drawn not with dead uniformity but realistic diversity lest rigidity in the shape of rule of law in this area be introduced through a new type of presidential

tyranny. The same observation holds good regarding the presence or absence of injuries on the person of the aggressor or the aggressed."

In Sheikh Zakir Vs. State of Bihar [AIR 1983 SC 911: (1983) 4 SCC 10], this Court observed:

"8...Insofar as non-production of a medical examination report and the clothes which contained semen, the trial court has observed that the complainant being a woman who had given birth to four children it was likely that there would not have been any injuries on her private parts. The complainant and her husband being persons belonging to a backward community like the Santhal tribe living in a remote area could not be expected to know that they should rush to a doctor. In fact the complainant has deposed that she had taken bath and washed her clothes after the incident. The absence of any injuries on the person of the complainant may not by itself discredit the statement of the complainant. Merely because the complainant was a helpless victim who was by force prevented from offering serious physical resistance she cannot be disbelieved. In this situation the non-production of a medical report would not be of much consequence if the other evidence on record is believable..."

A question furthermore would arise as to why she would falsely implicate the appellants. Both the Session Judge as also the High Court had rejected the defence plea raised in this behalf by the appellants. The learned Session Judge found:

"The PW1 has withstood the test of cross-examination and consequently her evidence need not be corroborated by any other eye witnesses or any other witnesses. There is no reason to doubt the evidence of PW 1 in any manner. The only motive suggested is that since Veerbhadra wanted to drive away Mohammed who was cultivating the property, a false complaint was filed against the accused persons. At any stretch of imagination, this motive suggested on the part of accused persons against the evidence of PW 1 cannot be accepted. This Mohammed in no way connected to accused persons. He is not the father of A-1 and A-2; he is not the brother of A-1 and A-2 and the accused persons are not residing in the house of said Mohammed. At any point of time, prior to the incident, Mohammed and the

accused persons were not found together in any place. They have no common interest. Consequently, it is not possible to believe that by filing false case against accused persons, CW2 \026 Veerbhadra can evict the Mohammed from the land. Therefore, such a motive is there is one's imagination and consequently, such evidence cannot be accepted."

We agree with the said findings recorded by the learned Session Judge.

In Pramod Mahto and Others Vs. The State of Bihar [AIR 1989 SC 1475], this Court observed:

"9...We found no merit in those contentions because even if communal feelings had run high, it is inconceivable that an unmarried girl and two married women would go to the extent of staking their reputation and future in order to falsely set up a case of rape on them for the sake of communal interest..."

In State of Rajasthan Vs. Shri Narayan [AIR 1992 SC 2004], this Court held:

"5. The accused was a distant relative whom the prosecutrix had met for the first time about 5 or 6 years before at the wedding of her sister-in-law. Thereafter she had not many occasions to meet him. Her relations with the accused were not strained. The relations of her husband with the accused were also not strained. In the circumstances there was no motive or reason for the prosecutrix or her husband to falsely involve the accused in the commission of a crime which would not put her chastity at stake. Her husband had come to celebrate Diwali with his wife and family members and quarrel with anyone, more so a relative, would be farthest from his thought. Even the complaint filed by the accused on the 23rd was a fall out of the incident at which he was beaten. Unless the evidence discloses that she and her husband had strong reasons to falsely implicate the accused, ordinarily the court should have no hesitation in accepting her version regarding the incident..."

For the reasons aforementioned, we do not find any merit in this appeal, which is dismissed accordingly.