

A.F.R

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Court No. -29

Case :- CRIMINAL APPEAL No. - 28 of 1998

Appellant :- Madan

Respondent :- State of U.P.

Counsel for Appellant :- R.Murtaza,Aishwarya Mishra,Alok Singh,Md.Altaf Mansoor,Prince Lenin,Rishad Murtaza,Shamim Khan,Syed Ali Jafar Rizvi

Counsel for Respondent :- Govt. Advocate,Shadab Waheed

And

Case :- CRIMINAL APPEAL No. - 726 of 1997

Appellant :- Bhaggu @ Masum Ali

Respondent :- State of U.P.

Counsel for Appellant :- R.Murtaza

Counsel for Respondent :- Govt. Advocate

Hon'ble Mrs. Renu Agarwal,J.

1. The present appeals are filed against the impugned judgment and order dated 05.12.1997 passed by the Additional Sessions Judge, Kheri in Sessions trial No. 53 of 1996 whereby the appellants are convicted under Section 376 read with Section 34 IPC and sentenced to undergo rigorous imprisonment for ten years and to pay fine of Rs. 5,000/- each and in default of payment of fine to further undergo rigorous imprisonment for five months. The appellants were also convicted under Section 3(1)(2) of SC/ST Act and have been sentenced to undergo rigorous

imprisonment for one year and to pay fine of Rs. 2,000/- each and in default of payment of fine to undergo further imprisonment for two months.

2. In light of the judgment of Hon'ble Supreme Court, the victim has been denoted as "A".

3. Wrapping the facts in brief, the victim was raped by the present appellants when she had gone for defecation in the fields on 11.09.1995 at about 6:30 p.m. On the alarm raised by victim, witnesses Chattrapal and Prabhu came and saved her. It is also mentioned in the FIR that the accused possessed weapons therefore, the complainant could not lodge FIR immediately.

4. On the basis of written report FIR was registered as Case Crime No. 197 of 1995 and investigation was entrusted upon R.P. Saroj. The Investigating Officer recorded the statement of witnesses, visited the place of occurrence, prepared site plan. Further investigation was conducted by Station House Officer Bal Govind Sonker who get the victim medically examined and submitted charge-sheet against the accused persons.

5. The case was committed by Magistrate to Sessions Court. The Sessions Court framed and read over charges against the accused appellants. The accused appellants abjured from the charges and claimed to be tried. In support of their case the prosecution produced the following witnesses:

(1) P.W.-1 Victim;

(2) P.W.-2 Kedari Lal husband of the victim.

(3) P.W.-3 Constable Abdul Salim: formal witness.

(4) P.W.-4 Investigating Officer R.P.Saroj.

6. Investigating officer Bal Govind did not appear in the case to prove the charge-sheet though endeavours were made by the court. Witnesses Chattrapal and Prabhu were discharged by ADGC and not produced in Court as they refused to appear in witness box under the influence of the appellants.

7. Learned trial court after hearing rival submissions and perusal of record arrived at a conclusion that the delay in lodging the FIR has been properly explained and on the basis of case law laid down by Hon'ble Supreme Court,

learned trial court believed the sole testimony of victim and convicted the accused appellants.

8. Aggrieved with the judgment and order above mentioned, the present appeals have been filed by the appellants Madan, Maksood Ali, Munna and Bhaggu @ Masum Ali during the pendency of appeal the appellant Maksood had passed away and the appeal stood abated in respect of appellant Maksood vide order dated 20.09.2021.

9. It has been submitted by the learned counsel for the appellants that the finding of learned trial court is perverse, the investigation of the case is tainted. Prosecution has failed to prove its case beyond reasonable doubt; medical report do not support the prosecution case, no independent witness appeared in the witness box to support the prosecution story, learned trial court erred in disbelieving the defence version of appellants, therefore, it is prayed to set aside the judgment and order dated 05.12.1997 and acquit the accused appellants.

10. On the contrary learned A.G.A argued that the appellants committed rape on the victim and she herself support the case of the prosecution beyond reasonable

doubt, therefore, the impugned judgment and order of the learned trial court is liable to be upheld.

11. Before analysing the evidence of the witnesses, it would be desirable to recapitulate them in brief:

12. P.W.-1 victim appeared and proved the FIR and stated on oath that when she went for defecation in the fields the accused person came and dragged her in the field and committed rape. She has further stated that the appellants stuffed her mouth with cloth, therefore, she could not raise alarm. When the witnesses Chattarpal and Prabhu came, all the four accused took to their heels.

13. P.W.-2 Kedar Lal, husband of the victim stated on oath that his wife was brought by Chattarpal and Prabhu in fainted situation and her wife told him that all the four accused persons had committed rape. The witnesses Prabhu and Chattarpal saved her. P.W 2 proved the written report and identified his thumb impression on written report.

14. P.W.-3 Constable 546 C.P.C Abdul Saleem stated on oath that he was posted as constable clerk in P.S Dharorha in the year 1995. On 15.09.1995 he registered the FIR (Ex Ka-1) on the basis of written report and Constable Kushi

Ram endorsed the same in G.D. No. 22 at 16:45 and prove the same as Ex.Ka-3.

15. P.W-4 R.P.Singh is the Investigating Officer of the case who deposed that FIR was lodged in his presence and investigation was entrusted upon him. He recorded the statement of witnesses copied the chik report and G.D. He produced the victim before medical officer and recorded her statement and sent her back as there was no female constable at the police Station. Thereafter, he visited the place of occurrence and prepared site plan. The witness proved the site plan as (Ex.Ka-4), thereafter the investigation was transferred to Station House Officer Bal Govind who submitted charge-sheet against the accused. The witness proved the charge sheet as secondary evidence which is Ex. Ka-5. It has also been mentioned that the witness of incident Chattrapal and Prabhu did not appear in court as they have become hand in glove with the appellants and, therefore, the only witness is P.W.-1 is produced to prove the prosecution case.

16. P.W.-1 the victim reiterated the facts of FIR in her statement and stated that Chattrapal and Prabhu had brought her home in fainted position. P.W.-2 Kedari Lal

also stated on oath that his wife was brought in the state of unconsciousness by witnesses Chattrapal and Prabhu. Both the independent witnesses did not dare to appear in the court and support the prosecution case.

17. P.W.-2 Stated in his cross-examination that his wife was brought on cot in the state of unconsciousness and she narrated the whole story after she became conscious but the said fact is not narrated in the FIR. It is stated, for the first time, in court that she was brought on cot by P.W.2. This fact is developed later on during the trial. Therefore, this fact creates doubt on the story of the prosecution.

18. It is also stated by victim during her cross-examination that her wrist was injured by broken bangle during the incident. It is also stated by the victim that she sustained injuries from country made pistol (katta) also and she showed these injuries to the doctor. She also informed about these injuries to the constable present at police station at that time.

19. I have perused the medical report. None of the said injuries has been mentioned in the injury report. Learned trial court did not weighted the evidence of the victim in

the light of her statement which was later on developed during cross-examination.

20. P.W.-2 Kedari Lal stated on oath that his wife told him that one of the appellants had a country-made pistol while the other accused were having lathi and spares in their hands. However, the medical report does not correspond to the injuries sustained and the alleged weapons used in the incident. No broken bangle was recovered from the place of occurrence. It is also worth mentioning here that the victim deposed in court that she washed her petticoat, blouse and sari and the clothes were not provided to the investigating officer. P.W.4 stated at page no. 9 and 10 that no broken bangles were found at the place of occurrence and the clothes of the victim were not taken into custody as she told that she had washed the clothes.

21. The victim was medically examined on 11.09.1995 at 6:30 p.m. and the doctors opined that no opinion of rape can be given.

22. In these circumstances the FIR is belated by five days and no plausible reason is given for lodging the FIR after five days, no injury is found on the body of the victim,

however, four persons are said to have raped the victim, no injury is found on her wrist, no broken bangles were found at the place of occurrence, the clothes worn by the victim were not taken into custody by the investigating officer for forensic science laboratory report, no injury of lathi and danda, ballan or country made pistol was found on the body of the victim, the statement of victim was developed during the cross-examination in court, the independent witnesses did not appear in court to support the prosecution version, hence, sole testimony of victim do not inspire confidence to the extent to convict the accused appellants.

23. Learned trial court tried to obliterate the lacuna on the ground that the victim was married and she could not be equated with the victim in other cases, on the basis of **Karnel Singh Vs. State of M.P.** reported at **1986 SC page No. 139**

24. It is true that the victim of rape cannot be equated with the victim of other offences but prosecution is under legal obligation to prove the case beyond reasonable doubt.

25. Learned counsel for the appellants also relied upon **Surjan and others Vs. State of M.P. reported at (2002) 10 SCC 214** wherein Supreme Court held that

“Though it cannot be laid down as a proposition of law that the uncorroborated testimony of the prosecutrix is not sufficient for entering conviction for an offence under Section 376 IPC, but then the evidence of that solitary witness should inspire confidence in the judicial mind, and be of such a nature that the court must be able to certify that the testimony is wholly reliable. In this case the inordinate delay in lodging the complaint before the police i.e. 10 days, has not even been attempted to be explained. Even when she was examined as a witness in the court, no question was put to her on that long delay. In a case where six indicated persons should be visited with a minimum sentence of 10 years’ RI the court cannot afford to act on the uncorroborated testimony of the prosecutor unless the said evidence is wholly reliable. Looking to the testimony of the prosecutor from different angles it is not possible to hold that the testimony is wholly reliable. In such situation, material for corroborating the testimony of prosecutor could not be obviated. But there is none. Therefore, the conviction and sentence passed on the appellants under Section 376 cannot be confirmed.”

26. Supreme Court held in (2011) 6 SCC 394: **Bhaiyamiyan @ Jardar Khan and another Vs. State of Madhya Pradesh** that:

“ 9.We first see that the first information report had been lodged after about 60 hours of the incident. The prosecution case is that P.W.-1

accompanied by her parents had gone to Police Post Pathriay attached to Police Station Unarasital immediately after the incident but had found no police officials present therein and had then gone to police station Sironj and lodged a report 12 noon the next day. We find that the explanation for this delay is somewhat difficult to believe.....”.

27. The facts of the above mentioned case too fit to the facts of the instant case as the delay in lodging of FIR is not properly explained and no plausible explanation for delay is given by prosecution except the fear from the appellants.

28. Learned counsel for the appellants also relied upon **(2013) 3 SCC 791 Rajesh Patel Vs. State of Jharkhand** wherein the Supreme Court held that;

“Considering the evidence in the present case it is found that the prosecution case is not natural, consistent and probable to sustain the conviction of the appellant for the alleged offence said to have been committed by him. The courts below should have appreciated the evidence on record with regard to delay of 11 days in filing of FIR by the prosecutorix and non-examination of the complainant witnesses viz the doctor and the IO which has not only caused prejudice to the case of the appellant but also the case of the prosecution, has created reasonable doubt. Therefore, the benefit of doubt must enure to the appellant. The testimony of prosecutorix is most unnatural and improbable and therefore it does not inspire confidence.”

29. Learned counsel for the appellants also relied upon **(2001) 9 SCC 453 Dilip and another Vs. State of M.P** wherein Hon'ble Supreme Court has held as under:

“The law is well settled that prosecutrix in a sexual offence is not an accomplice and there is no rule of law that her testimony cannot be acted upon and made basis of conviction unless corroborated in material particulars. However, the rule about the admissibility of corroboration should be present to the mind of the Judge. In State of H.P. Vs. Gian Chand on a review of decisions of this Court, it was held that conviction for an offence of rape can be based on the sole testimony of the prosecutrix corroborated by medical evidence and other circumstances such as the report of chemical examination etc. if the same is found to be natural, trustworthy and worth being relied on. This Court further held: if evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court find it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with case involving sexual molestations.”

30. The facts of the aforestated case also squarely applies to the facts of the present case. There are contradictions in the statement of prosecutrix as well as P.W.-2. P.W.-1 did not state that she became unconscious but she merely

mentioned that she felt fainted after the incident however, P.W-2 stated that she was brought on cot in unconscious state however, no injuries were found on her body.

31. It is further stated by the learned counsel for the appellant that P.W.-2 is not eye-witness of the incident and his evidence is only based upon hearsay evidence. The eye-witnesses of the incident did not appear in court to support the prosecution case. Witnesses are alleged to have seen and save the victim both of them are not produced in court, therefore, the only evidence that remains is that of the victim. The injury of the victim were not corroborated by medical evidence, evidence of prosecutorix is improbable and inconsistent as four persons are stated to have raped the victim but no injury is found on her private parts.

32. It is also submitted by the learned counsel for the appellants that P.W.-2 stated in his statement that after lodging the FIR he did not return home. Whereas P.W.-4 investigating officer stated that immediately after the first information report he reached the place of occurrence along with two constables and inspected the spot at 7 p.m. in presence of P.W.-1 and P.W-2 which creates doubt in the prosecution version that P.W-4 investigating officer

inspected, prepared site plan on the pointing out of the prosecutorix as well as husband of the victim. Therefore, the submission of P.W-2 is highly improbable and is unworthy to rely upon.

33. It is also argued on behalf of the appellants that the incident took place in abadi whereas there are constructed houses and flour mills of one Guddu is also situated. Buses also ply on road. The place is thickly populated therefore it is improbable story of the prosecutorix that the incident took place in highly dense place for one hour.

34. It is also argued by the learned counsel for the appellants that enmity between the family of the prosecutorix and accused person existed as the accused family supported one Mata Prasad who had contested the election of village pradhan and prosecutorix and her family supported his opponent Shiv Kumar who has lost the election. P.W-2 admitted that Shiv Kumar is her cousin and she supported Shiv Kumar in election. It is also submitted by learned counsel that appellant Bhaggu @ Masum Ali had made complaint of the husband of the victim to the Senior Superintendent of Police and complainant was

envious against them they are roped in false cases due to enmity also.

35. Learned trial court while appreciating the evidence of prosecution tried to fill up the lacuna left by prosecution and it tried to patch up the delay in lodging the FIR, absence of medical evidence and did not appreciate the evidence in the light that prosecution failed to produce any evidence as to the fact that no injury is found on the private part or any other part of the body of the prosecutrix. Independent witnesses resiled and did not appear in court to support the prosecution version. FIR is delayed by five days which create suspicion. The case is later on embellished during the course of cross-examination by prosecution which is not as such proved by material evidence as broken bangle are not recovered from the place of occurrence. The clothes of victim were not taken by investigating officer, there is inconsistency and contradiction in the statement of prosecutrix and learned trial court convicted the appellants swayed away by the fact that this is case against woman. Before parting it will be worth mentioning that learned trial court has convicted the appellants under Section 3(1) (2) S.C./S.T. Act however,

the victim or P.W.-2 no where stated that the victim was raped for the reason of her being a member of Scheduled Caste community. Not a single word was uttered to the fact that she was harrassed as she belongs to Scheduled Caste community there is no evidence to show that that she was addressed by caste to humiliate her. Therefore, there is no evidence to convict the appellant under the SC/ST Act also.

36. In the light of the above discussion the appeal is liable to be allowed and the judgment and order dated 05.12.1997 is liable to be set aside. The appeal is allowed and the judgment and order dated 05.12.1997 is set aside.

37. The appellants are acquitted of the charges levelled against them under Section 376 read with Section 34 IPC and 3(1) (2) of S.C/S.T. Act. Accused are on bail they need not surrender their bail bond are discharged.

38 Having been acquitted by this Court in the above noted case, the appellant shall furnish bail bond with sureties to the satisfaction of the court concerned in terms of provision of Section 437-A Cr.P.C.

40. Let a copy of this judgment and order as well as records of the trial court be transmitted to the trial court concerned

forthwith for necessary information and compliance of this order.

(Renu Agarwal,J.)

Order Date :- 06.07.2023

Nadeem