

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU
(Virtual mode)

Case : CrI A (D) No. 61/2022
CrIM No. 1861/2022

Pronounced on:19.12.2023

1. Rinku Kumar, Age 29 years,
S/o Gopal Krishan,
R/o Village Hansli, Tehsil Katra, District Reasi.
2. Kuldeep Kumar, Age 36 years,
S/o Tara Chand
R/o Village Hansli, Tehsil Katra, District Reasi. ...Appellant(s)..

Through:- Mr. Gagan Basotra, Sr. Advocate with
Mr. Hamza Hussaini, Advocate.

V/s

Union Territory of Jammu and Kashmir,
Through Station House Officer,
Police Station, Katra. ...Respondent(s)..

Through:- Mr. Dewakar Sharma, Dy.A.G.

CORAM: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE
HON'BLE MR. JUSTICE PUNEET GUPTA, JUDGE

JUDGMENT

PER PUNEET GUPTA-J:

1. The appellants, Rinku Kumar and Kuldeep Kumar, faced trial for offences under Sections 366/376-D/109/34 RPC and found guilty for commission of offence under Section 366/376-D RPC read with Section 109/34 RPC, convicted and sentenced to undergo rigorous imprisonment of fifteen years for offence under Section 376-D RPC and rigorous imprisonment of two years for commission of offence under Section 366 RPC along with fine as mentioned in the Judgment and Order passed by the learned Principal Sessions Judge, Reasi vide Judgment and Order dated

22.10.2022. The sentences are to run concurrently. In default of fine, the appellants to further undergo rigorous imprisonment of two years.

2. It is suffice to mention herein that the appellants along with Sonu and Raj Kumar had been charge sheeted by the Police. The said accused Sonu and Raj Kumar have been proceeded under Section 512 Cr.P.C. The appellants herein shall be referred to as accused in the appeal for discussion purposes. The learned trial court has mentioned the name of prosecutrix in the judgment which appears to be unintentional mistake.
3. The complainant-prosecutrix along with her mother Sushma Devi filed a written application addressed to IGP for registration of an FIR against the accused Sonu, Kuldeep, Rinku and Raj Kumar on 28.08.2018 stating therein that prosecutrix was in her house and at about 11 PM when she left her house to urinate she was caught hold of and her mouth was closed and made to sit in a Van that was parked near the gate of her house. She identified the accused in the Van. The accused took her to forest near Bhumika Temple where accused-Sonu tore her clothes and caught hold of her by breast forcibly and committed rape upon her. She managed to escape from their clutches and in the dark taking benefit of bushes etc. She reached her house and narrated the story. The FIR No. 182/2018 came to be lodged for commission of offences under Section 376, 363 and 109 RPC with Police Station, Katra. The application was initially presented in the office of IGP which was forwarded to SP concerned who marked the same to SHO Katra for necessary action. PW-Nazarat Hussain Shah investigated the matter. The usual investigations took place. The statement of the prosecutrix under Section 164-A Cr.P.C was also recorded during investigation and the seizures were also effected. On completion of investigation, the charge sheet was presented against the accused

under Sections 376-D, 366, 109/34 RPC. The charges were framed against the appellant-accused for the aforesaid offences after the challan was committed by the Magistrate to the Sessions Court. The accused denied charges and claimed trial. The prosecution produced evidence in support of its case. On the closure of prosecution evidence, the statements of the accused under Section 342 Cr.P.C were recorded wherein they denied the prosecution evidence. The accused also produced evidence in defence.

4. Mr. Gagan Basotra, learned Senior counsel appearing for the appellants has argued that the learned trial court has grossly erred in holding the accused guilty for the offences which they did not commit. The statement of the prosecutrix is itself was not trustworthy. The medical evidence on record also belies the prosecution version that the prosecutrix was subjected to rape. The other attending circumstances also do not inspire confidence which shakes the prosecution case.
5. Mr. Dewakar Sharma, learned Deputy Advocate General appearing for the respondent has argued that the case of the prosecution was proved beyond shadow of doubt which resulted into the conviction of the accused for the offences in which they faced trial. The statement of the prosecutrix was itself believed by the trial court and rightly so. The discrepancies, if any, in the prosecution evidence are not material which can said to affect the prosecution case. The appeal is required to be dismissed being without any merit.
6. It is trite proposition of law that the sole statement of the prosecutrix is sufficient to convict the accused in an offence under Section 376 RPC provided the statement inspires confidence in the court and is without any blemish. The attending circumstances, however, cannot be overlooked while deciding the prosecution plea

that the accused committed offence against the prosecutrix.

7. As the statement of the prosecutrix is the key one in the case in hand, as such, the statement of the prosecutrix is to be seen.
8. The prosecutrix in her statement has deposed that on 27.08.2018 at about 11 PM she went for toilet outside and when she came out after easing herself the accused gagged her mouth, abducted her and took her near Bhumika Temple, Katra in a vehicle and then was made to alight from the vehicle and taken to Nallah and made to lay on grass. The accused tore off her clothes and also of self and raped her. During the rape committed by Sonu, she was caught hold off by other accused who also pushed their private parts in her mouth and touched her breast also. The prosecutrix further deposed that she was raped by other accused also. She gave slip to the accused on the pretext of easing herself and then hid herself in bushes. The accused looked for her for half-an-hour and when she could not be found they left the place. She wore the torn clothes and reached her house where she narrated the occurrence to her mother who gave clothes to her. The clothes she was wearing at the time of occurrence were put in a bag. The witness was medically examined at Katra Hospital. The statement of the witness was also recorded under Section 164-A Cr.P.C at Katra Court. The application addressed to IGP is exhibited as EXT-P2. The prosecutrix admits the contents of her statement recorded under Section 164-A Cr.P.C as well as the signatures on the same. The witness has specifically mentioned in her statement that on 17.09.2018 she was again raped and was threatened to be eliminated if she approaches the police. During cross-examination, the witness has deposed that she visited IG office as the accused had earlier sprinkled chili powder in her eyes but the police officials did not take notice of the same. She did not give her statement before the Magistrate under pressure. The witness has

also deposed that the application was got written in the Court. She has not seen clothes in the court. She had recorded the name of Rahul also in the statement recorded under Section 164-A Cr.P.C. It takes about 20 minutes to reach Bhumika Temple from her house. The statement given by her at Katra is correct. The toilet was outside the house and the house is open from all sides and there is no gate. She does not remember if the pathway towards the mohalla was having any electricity at the time of occurrence. She was sleeping with her sisters. It was 11 PM when she went for toilet. The sisters were sleeping at that time. She reached her house in the morning at 4 and narrated the incident to her mother in the room.

9. The statements of three other witnesses, relations of prosecutrix are also to be taken note of.
10. PW-6 Sushma Devi is the mother of the prosecutrix and has stated that she was present in her house at Hansali on 28.08.2018. Her daughter came to house weeping and her clothes were torn off and she changed the clothes of her daughter. The daughter disclosed regarding the occurrence that she was driven in a vehicle to Bhumika Temple near Nallah and was raped turn by turn by the accused persons and the accused badly treated her. The witness has also deposed of her approaching IG office along with daughter with an application which was marked to SSP, Katra and the registration of the case by Police Station, Katra. The witness during cross-examination has stated that no one was sleeping in her room on the day of occurrence. She is not aware as to when her daughter went for toilet and the accused abducted her. The daughter came back to the house at 4 AM and told of the occurrence. Her daughter-Shimla Devi was also sleeping in the room where the prosecutrix was sleeping. She does not know if Shimla Devi had knowledge about the occurrence. The witness was also cross-

examined on the family affairs and the dispute between her family and that of the accused.

11. PW-7 Renu Devi, as per the witness, the prosecutrix is daughter of her maternal aunt. On 28th of August at 4 AM, the mother of the prosecutrix had raised hue and cry and on that prosecutrix informed that she had gone to washroom at 11 PM and the accused Raj Kumar and Sonu had gagged her mouth and took her to Bhumika Temple and raped her. She noticed the injuries on the person of the prosecutrix. The witness has of course no personal knowledge of the occurrence. She had noticed the clothes of the victim being torn and the injuries on the chest of the prosecutrix.
12. PW-8 Shimla Devi is the sister of the prosecutrix and has deposed that on 17.08.2018 she along with her two sisters was sleeping in the room. At 4 in the morning when she went to bathroom she did not find the prosecutrix and saw her mother coming out of the house searching for the prosecutrix. She and her mother noticed the prosecutrix in torn clothes and who also told them about the occurrence. The witness has indeed no personal knowledge of the occurrence. The prosecutrix was wearing green clothes which were torn and the prosecutrix was having injuries on her body and blood was oozing out from the injuries. It takes about 15 minutes to reach Bhumika Temple from her house. She admits of having dispute between the accused and her family with respect to house.
13. The statement of the prosecutrix is indeed required to be analyzed initially as the case of the prosecution case mainly hinges upon her statement.
14. Learned Senior Counsel appearing for the accused has argued that the statement of the prosecutrix itself demolishes the prosecution case. The statement of the witness is not of sterling quality and cannot be believed.

15. The other side has of course submitted that there is no major discrepancy in the statement of the prosecutrix which affects the prosecution case as a whole.
16. The statement of the prosecutrix itself inspires confidence and creditworthy is required to be seen in the first instance. The prosecutrix in her statement has deposed that all the four accused took the victim forcibly in a vehicle near Bhumika Temple where the accused including appellants committed rape upon her. The accused Sonu was the first to commit rape upon the victim as per the statement of the victim herself. It is important to mention herein that in the application EXT-P2 filed before IGP and on which the FIR was registered the accused Sonu is the one who committed rape upon her. There is no mention in the application that the appellants-accused also committed rape upon the victim. The application is typed one meaning thereby that the prosecutrix had enough time to record her grievance for the occurrence which allegedly happened. It is unlikely that the victim who alleges rape by the appellants in the court will not mention the same in the application filed by her before the police. The victim has only recorded in the application the names of the appellants-accused but did not mention the role played by the appellants during the period she was abducted from her house till she managed to escape from the clutches of the accused persons. Not only that, the statement recorded by the prosecutrix before the Magistrate also does not mention of the appellants-accused having committed rape upon her. The accused other than Sonu are stated to have touched the breast of the victim and put organ in the mouth. This particular assertion is quite vague one when read qua the statement recorded by the prosecutrix in the court. In the court she has deposed that the rape was committed by the accused-Sonu and by the other accused after her clothes were torn by the accused-Sonu.

17. The Court finds force in the argument of the counsel for the appellants that there is no explanation as to what prevented the prosecutrix from naming the appellants herein for having committed rape upon her while recording her statement under Section 164-A Cr.P.C before the Magistrate and which the prosecutrix admits to be true. The victim who is sexually assaulted by a person would name him at the very first instance. The court cannot be oblivious of the omission of the names of the accused-appellants from the application and the statement recorded by the prosecutrix under Section 164-A Cr.P.C regarding the act of rape committed by them. The absence of the alleged act of rape in the application and in the statement recorded under Section 164-A Cr.P.C creates a genuine doubt in the mind of the court regarding their involvement in the commission of offence. It is not that the prosecutrix is to be given leverage or any benefit for not mentioning the name of the accused at the very initial stage, when the application was filed and also when the statement under Section 164-A Cr.P.C was recorded by the prosecutrix. The alleged act of rape attributed to crime doers is conspicuously absent. The prosecution case gets weakened on the aforesaid score. The learned trial court has not taken care of this very crucial factor while holding the accused guilty. The court is not to get swayed by the mere assertion of the prosecutrix that she was raped by the accused when the statement otherwise does not appears to be convincing in the facts and circumstances of the case. The learned trial court just appeared to be satisfied with the statement of the prosecutrix without analyzing the same in its right perspective.
18. Another factor which makes this Court to view the statement of the prosecutrix with suspicion is that the prosecutrix in the statement recorded before the court has also specifically deposed that she was raped again on 17.09.2018 and was threatened to keep silent and if

she approaches the police she would be killed. There is no report of this act of the accused persons with the police by the prosecutrix. In the statement she also names other persons, who along with the accused committed rape upon her on that date. The witness simply tries to justify for keeping the incident under wrap on the ground that she was threatened by the accused if the matter was reported to the police. The same is not believable. The victim who alleges to have suffered earlier also of heinous crime committed by the accused and has courage to report the matter directly to the IGP will not remain silent to the later alleged occurrence when the same accused are stated to be involved in the crime. The Court cannot overlook this vital aspect of the matter by taking it as a just exaggeration by the prosecutrix against the accused. The victim was about 20 years of age when the alleged occurrence took place and was mature enough to report the second alleged incident also. She does not state that the second incident was even revealed to her mother. The prosecutrix deposing of the second occurrence but without offering any justification as to why it was not reported, the same seriously affects the credibility of the statement of the prosecutrix regarding the case in hand also. The court cannot rely upon the statement of the prosecutrix which is indeed fatal for the prosecution case.

19. The statement of the prosecutrix being held to be not reliable, the other evidence produced by the prosecution in a way pales into insignificance. However, the statements of other witnesses, namely, PW-6 Sushma Devi, PW-8 Shimla Devi and PW-7 Renu Devi only reflect as to what the victim told these witnesses. The statements of these witnesses otherwise also do not help the prosecution in any manner.
20. The prosecution witnesses state that the distance between Bhumika Temple and house of the prosecutrix is just of 15 minutes. The

victim and the other witnesses state that the victim returned to her house at 4 AM. If the statement of the victim is to be taken as it is that would mean the prosecutrix hid herself in the forest area for a considerable time after the accused had already left the place. The victim has stated that after the accused committed rape she escaped from their clutches. The accused left the place after searching her for half-an-hour. It is improbable that the victim would remain in the jungle area alone for such a long time.

21. The other aspect of the case is that PW-6 Sushma Devi, the mother of the victim, has deposed that her daughter narrated the incident to her when she came to the house. PW-8 Shimla Devi, sister of the prosecutrix, has deposed that she found the prosecutrix missing at 4 PM when she went to bathroom and at that time she found her mother searching for prosecutrix. Both the statements apparently do not reconcile with each other. This may appear to be a minor contradiction but it is not so when the other circumstances are taken into consideration of which the mention is made in the preceding discussion. PW-7 Renu Devi has only deposed that she came to know of the occurrence on 28th at 4 AM when mother of the prosecutrix raised a noise.
22. The other crucial evidence in a case like the present one is the medical evidence. The victim was examined on 28th of August, 2018 itself i.e. within 24 hours of the occurrence. The statement of the doctor in the present case is very relevant more so when the prosecutrix has alleged that she has been raped by four persons. The victim has been medically examined by PW-9 Dr. Sanjogita Atri on 28.08.2018 at Sub-District Hospital, Katra. As per the statement of the doctor on examination of genitals of prosecutrix no mark of sexual assault/violence was found on vaginal organs or body. Her pregnancy test was also conducted and was found negative. The certificate issued by the doctor is marked as EXT-P9.

As per the doctor, three slides were taken from her posterior farnix of vagina along with pubic hair and sent to FSL for histopathological examination. The act of sexual assault could have been confirmed from FSL opinion. As per the doctor no seminal stains have been found on the posterior farnix of vagina or pubic hair. On being examined by the court, the witness has stated that non-presence of spermatozoa stains on pubic hair or farnix of vagina does not mean that the victims has not been subjected to sexual assault. The statement of PW-Mushtaq Ahmed from FSL has also been recorded. He has conducted examination of underwear and plastic cord and on examination did not find any seminal stains on the underwear. The certificate is exhibited as EXT-M.

23. The learned Senior counsel appearing for the appellants has argued that the statement of the doctor itself negates the sexual assault on the alleged victim.
24. The learned Deputy Advocate General has submitted that the statement of the doctor does not rule out the sexual assault on the victim. In any case it is not necessary that any injury mark on the person of the victim or presence of spermatozoa have to be essentially present.
25. The Court is of the view that the statement of the doctor does not support the contention of the prosecution that the victim was raped during the alleged occurrence. The victim alleges that she was raped by the four accused including the appellant-accused. However, the doctor has not found any violence on the body of the victim or genitals. As per the witness, no seminal stains were found on the posterior farnix of vagina or pubic hair of the victim. The report from FSL regarding underwear mentions that no seminal stains were detected on the underwear. No doubt the witness has

also stated on being questioned by the court that the absence of spermatozoa does not mean that the victim has not been subjected to sexual assault. This observation of the doctor only refers that even in the absence of spermatozoa the sexual assault cannot be ruled out on a victim of rape. It is unlikely that the victim who had been stated to have been subjected to rape by four persons and that too in a jungle on a hard surface, as per the statement of I.O, the victim will not receive any bodily injury during the course of occurrence. No injuries are mentioned in the certificate issued by the doctor though the prosecution witnesses deposed that the victim was having injuries on the body and was bleeding. The medical evidence ruling out the rape upon the victim cannot be brushed aside.

26. In (2006) 9 SCC 713 titled '*Yerumalla Latchaiah v. State of A.P.*', the Hon'ble Supreme Court acquitted the accused on the sole ground that the evidence of doctor, who examined the prosecutrix immediately after the occurrence did not find any sign of rape upon the prosecutrix.
27. In (2007) 12 SCC 390 titled '*Bibhishan v. State of Maharashtra*', the Hon'ble Supreme Court acquitted the accused on the ground that the medical evidence did not show any injury on the body or any sign of semen on the private part of the prosecutrix.
28. The statements of other witnesses who have deposed in the case do not require elaborate analysis.
29. PW-10 Sham Singh is Naib Tehsildar who has only sealed the packet brought before him and issued certificate. PW-3 Balvinder Singh, PW-4 Rano Devi and PW-5 Jatinder Singh are the police witnesses to the seizures effected during the course of occurrence or of superdnama of ring.

30. PW-Nazarat Hussain Shah is the investigating officer of the case and has deposed of the investigations carried out by him. As per the witness, the place of occurrence is hard surface in the bushes. Dupatta which was seized from the spot is not shown to him in the court. The witness has deposed of other steps taken by him during the course of investigation.
31. The learned counsel for the appellants has also argued on another aspect of the case including that the dupatta which is alleged to have been seized from the spot is not shown in the site plan prepared by the I.O. The Van has not been recovered during investigation nor is there any explanation regarding the same from the I.O.
32. There is no dispute with the proposition of law that the prosecution case cannot fail only on account of defect in the investigation if the circumstances which are brought on record otherwise do inspire confidence in the court. It appears from the record that the investigating officer did not seriously make any effort in tracing the vehicle or driver, if any, of the said vehicle in which the victim was allegedly taken near Bhumika Temple and where the alleged rape was committed upon the victim. The whereabouts of the vehicle could be easily known from the arrested accused during the course of investigation but that has not happened in the present case.
33. The victim moving out of her house for toilet at 11 PM and the accused appearing just outside the house of the prosecutrix at that time in a vehicle and then forcibly taken her from her house appears to be highly improbable as if the accused had prior knowledge that at 11 PM the prosecutrix would come out of her house for toilet and the accused would wait for her outside the house. The victim was sleeping with her sisters in the room and the

mother was also sleeping in another room. The victim moving out of the house at 11 PM and without being noticed or informing the sisters cannot be digested.

34. The accused have also produced evidence in defence. The statements of V.K.Roy and Shakti Devi who is sister of accused Kuldeep Kumar have been recorded. The statement of DW-V.K.Roy is just regarding the good character of the accused persons. DW-Shakti Devi has deposed regarding the dispute between the parties and having civil and criminal cases. It may be mentioned herein that the prosecution witnesses have also deposed of the disputes between the families of the prosecutrix and the accused and also of the house where the prosecutrix is residing along with her mother. Irrespective of what has been deposed by the defence witnesses, the prosecution has to stand on its own legs as it is for the prosecution to prove its case beyond shadow of doubt. The learned counsel for the accused had also laid much stress on the motive which led to the filing of false case against the accused by the prosecutrix and her mother. The disputes preceding the alleged occurrence are stated to be the reason behind the case in hand as per the appellants. The Court is of the view that without going into this aspect of the matter in detail the other crucial factors in the prosecution evidence have not been believed by the court as discussed above. At the cost of repetition, the prosecution case is held to be doubtful.
35. In the light of the aforesaid discussion, the Court is convinced that the prosecution has not been able to prove its case against the appellants-accused beyond shadow of doubt for the offences in which the accused have faced trial. The appeal is allowed and the impugned judgment and order are set aside. The appellants-accused, Rinku Kumar and Kuldeep Kumar, are acquitted of the charges framed against them under Sections 363/376-D/109/34

RPC and are set at liberty. The trial court shall proceed against the other accused who are proceeded under Section 512 Cr.P.C as per law.

(Puneet Gupta)
Judge

(Sanjeev Kumar)
Judge

Jammu:
19.12.2023
Pawan Chopra

