

**Neutral Citation No. - 2023:AHC:199535-DB**

**Court No. - 46**

**Case :-** CRIMINAL APPEAL No. - 2833 of 2002

**Appellant :-** Durwesh Kumar

**Respondent :-** State of U.P.

**Counsel for Appellant :-** G.P. Dikshit, Purushottam Dixit

**Counsel for Respondent :-** Govt. Advocate

**Hon'ble Ashwani Kumar Mishra, J.**

**Hon'ble Syed Aftab Husain Rizvi, J.**

1. This criminal appeal, by the accused-appellant, Durwesh Kumar son of Hoti Lal, has been filed against judgement and order dated 12.07.2002, passed by Special Judge (SC/ST Act)/Additional Session Judge, Etawah, in Session Trial No.579 of 1998 (State of U.P. Versus Durwesh Kumar) arising out of Case Crime No.3 of 1998 under Sections 376, 506 I.P.C. and 3(1)(12) of SC & ST (PA) Act, Police Station Saifai, District Etawah. The appellant has been convicted and sentenced to life imprisonment under Section 376 I.P.C. read with 3(2)(5) of SC & ST (Prevention of Atrocities) Act; to undergo two years rigorous imprisonment for the offence under Section 506 I.P.C. The accused appellant was also imposed fine of Rs.10,000/- for the offence under 376 I.P.C. and default thereof, to undergo three years simple imprisonment.

2. The victim, in the present case, is informant, who has lodged the report Ext.Ka-1, as per which, she had gone to ease herself in the mustard field of Idal, at about 4.30, in the evening, on 04.01.1998. The accused armed with countrymade pistol came and held her and on the gun point committed sexual assault on the victim. On hearing the scream of the victim Chandrapal son of Tej Singh and Pratap Singh, working in their fields, rushed to the place of occurrence, challenged the accused who fled wielding the firearm. On the basis of said report, the F.I.R. came to be registered at 10.30, in the night of the occurrence. The distance between the police station and place of the occurrence is 3 kms. Investigation proceeded in the matter and petticoat, worn by the victim, was recovered vide Ext-Ka-4. The victim was medically examined on the next day, i.e. 05.01.1998. In the medical examination report, no internal or external injury has been found on the

victim. The age of the victim was held to be above 18 years, and she was habituated to sexual intercourse. Supplementary medical report has also been placed on record on the basis of vaginal smear slides prepared of the victim wherein no dead or alive spermatozoa has been found. Ultimately, the investigation concluded with submission of charge-sheet against the accused under Sections 376, 506 I.P.C. read with Section 3(1)(12) of SC/ST Act.

3. Cognizance was taken by the Magistrate in the matter and the case was committed to the court of Sessions wherein it got registered as Session Trial No.579 of 1998. The charges were read over to the accused under Sections 376, 506 I.P.C. as well as 3 (1)(12) of SC/ST Act, on which he denied his implication and demanded trial.

4. The victim appeared as PW1 and supported the prosecution case in Chief-Examination, as per which, she had gone to attend the nature's call at 4.30 p.m. on the date of the incident when the accused grabbed her and on gun point committed sexual assault upon her. On her raising alarm, Chandrapal and Pratap Singh came on the spot, and challenged the accused, who fled.

5. In the cross-examination, PW1 has stated that field of Idal is of five bighas which is towards the west of village abadi. There were four-five fields between her house and the mustard field of Idal, but she was not aware as to who owned them. She was carrying a Lota, and as soon as she sat to ease herself, the accused grabbed her from behind, and on her scream her sister Pushpa Devi and brother-in-law Greesh Babu came. On her arriving at her house, 10-20 persons also came. She also stated that Chandrapal and Pratap Singh were working in nearby fields who also came to the spot. PW1, in her cross-examination, has stated that the accused has pressed her neck and she sustained nail scratches. She also sustained injuries as her bangles had broken and caused injuries on her wrist. She had shown the said injuries to the Investigating Officer. She further stated that written report was scribed by Nirdosh Singh who is resident of village Haimara. Since the victim did not know reading and writing, therefore, she visited village Haimara, from

her house, crossing Saifai, where the police station is situated. The victim did not stop at the police station, and lodged the report on her return. She has denied the suggestion that a fight had taken place with the accused as the passage has been stopped by her. PW1 has also stated that PW2 and PW3, namely, Pratap Singh and Dayal Singh are her cousins.

6. PW2 is Pratap Singh, who claims that he was working in his field, and arrived at the place of occurrence on hearing scream of the victim. When he arrived in the mustard field of Idal, he found that the accused, after committing sexual assault, was leaving. The accused also threatened him and was carrying a countrymade pistol. He tried to apprehend the accused, but on account of firearm with him, the witness could not catch him. PW2 was not cross-examined on 06.12.2000 when he was produced before the court. However, an application was filed subsequently on 28.05.2001. PW2 was recalled, so that he could be cross-examined. PW 2, however, did not appear for the cross-examination, and the court below, vide order dated 05.07.2002, held that his evidence will not be read against the accused. Testimony of PW2, therefore, cannot be relied upon against the accused.

7. PW3 has stated that he was working in his field, and on hearing screams of the victim, came to the field of Idal and found that the victim has been grabbed by the accused. PW3 challenged the accused whereafter Pratap, Arvind and Onkar also arrived. The accused left the victim and fled. In cross-examination, PW3 denied that there was any fight between the husband of the informant and the accused. In his cross-examination, he has further stated that he had not seen the accused committing any act on the victim, and had only seen him running from the place of occurrence. He has also stated that he had not seen any injury on the victim. Husband of the victim was not in the village, therefore, he had taken her to the police station. He stated that sun had set at the time he left for the police station.

8. The Investigating Officer, who has conducted the investigation, has been not produced. Head Constable Omveer Singh was produced as PW4, who has proved the recovery of petticoat.

9. PW5 is Dr Sudha Goyal, who has proved the medico-legal report of the victim, as per which, there was no external or internal injury on her. She found no existence of dead or alive spermatozoa in the supplementary medical report . She has stated that the victim was major and was habituated to physical relations.

10. The incriminating materials collected during trial have been confronted to the accused for recording his statement under Section 313 Cr.P.C. wherein he claimed to have been falsely implicated.

11. The trial court, on the basis of evidence led in the matter, has ultimately convicted and sentenced the accused, as per above.

12. Learned counsel for the appellant submits that though the accused has been convicted and sentenced for the offence under Section 3(2)(5) of SC/ST Act, but no such charge in fact was framed against him, and the accused-appellant has otherwise been acquitted of the charge framed under Section 3(1)(12) of SC/ST Act. It is further submitted that it is a case of false implication on account of enmity between the husband of the victim and the accused. The entire incident is nothing, but a figment of imagination. Learned counsel further submits that the medical examination report does not corroborate any sexual assault on the victim, and her testimony is not reliable nor can she be treated to be a sterling witness whose statement could be relied, even without any corroboration.

13. Learned A.G.A., appearing for the State, on the other hand, submits that the testimony of PW1 is reliable as there are specific evidence of prior enmity proved by the accused. The plea of false implication also cannot be sustained.

14. We have heard Sri Purushottam Dixit, assisted by Sri Jitendra Kumar, learned counsel for the appellant, Mrs Archana Singh, learned A.G.A., appearing for the State, and perused the materials on record, including the original records of trial court.

15. First and foremost, it is noticed that the trial court has convicted and sentenced accused-appellant for life imprisonment for the offence under

Section 3(2)(5) of SC/ST Act, but at the commencement of trial in fact no charge was framed against the accused under aforesaid section. Even the charge-sheet has not been submitted by the Investigating Officer under Section 3(2)(5) of SC/ST Act. In the absence of any charge, having been framed under Section 3(2)(5) of SC/ST Act, the conviction and sentence of the appellant under such section would clearly be impermissible in the law. Law is settled that unless an accused is charged of a particular offence under Section 216 Cr.P.C., and the evidence is led in that regard, the accused will not have an opportunity to put his defence in that regard, and in such circumstances the conviction and sentence of the accused-appellant under Sections 3(2)(5) of SC/ST Act without framing any charge or holding any trial, in that regard, would clearly be unsustainable.

16. The facts of the case have already been noticed which clearly reveals that as per the prosecutrix she was subjected to sexual assault while she had gone to ease herself in the mustard field of Idal at about 4.30 p.m. The prosecution case is primarily supported by PW1 and PW3, apart from medico-legal report of the victim.

17. So far as medico-legal report of the victim is concerned, the same is duly exhibited as Ext-Ka-6/8 and 5, which are duly proved by Dr Sudha Goyal (PW5). In the medical examination report, there is no external or internal injuries found on the victim. In supplementary medical report also, no spermatozoa has been found. The medical examination report, therefore, does not constitute a material to corroborate the prosecution case.

18. The evidence that survives in support of the prosecution case is her own testimony as PW1 and testimony of PW3. PW1, although has specifically supported the prosecution case, but her statement that she sustained injuries on her neck or on her wrist have not been corroborated by the medical evidence on record. PW1 has stated that she has shown injury sustained by her on her wrist to the Investigating Officer, but such injuries are not noticed in the medical examination of the victim conducted on the very next day i.e. 05.01.1998.

19. PW1 has stated that when she raised alarm her sister and brother-in-law rushed to the place of occurrence, but these persons have not been produced in evidence. The only person, who has supported the testimony of PW1, is PW3, who admittedly is her cousin.

20. We have carefully perused the site-plan in which the place of occurrence is shown as "A", being the mustard field of Idal. The field of Idal is surrounded by the fields of Natthu Singh, Gulab Singh, Virendra Singh and Chunni Lal. None of whom have been produced in evidence. In the site-plan, the field of PW3 has not been shown to be situated near the field of Idal. PW1, in her testimony, has stated that she could not object to the act of sexual assault upon her as the accused pressed her neck, on account of which, she could not speak. She later raised alarm, and from the condition of the victim in the light of her statement, it can be assumed that those working in the nearby fields alone could have heard her. Field of PW3 is not shown to be situated anywhere near the field of Idal. PW3 has not specified as to how far is his field from the field of Idal which is the place of the incident. We are, therefore, not impressed by the testimony of PW3, as his presence at the place of occurrence, seems doubtful. PW3 is otherwise cousin of the victim and being an interested person, his testimony requires careful analysis.

21. So far as the testimony of PW1 is concerned, we find that her statement does not inspire much confidence inasmuch as her plea that she sustained injuries on her neck and wrist, finds no corroboration from the medical examination report proved by PW5. No external injuries have otherwise been found on the victim during her medical examination. The supplementary medical report shows no signs of dead or alive spermatozoa in the vaginal smear slide prepared of the victim. PW1, moreover, has stated that on hearing her scream, it was her sister and brother-in-law who came first, but they have not been produced. Specific suggestion has also been given to PW1 and PW3 about the fight having occurred between the accused and the husband of the victim. The suggestion was also given that the

passage had been blocked by the informant, which led to this fight. The reasons for false implication have, therefore, been probalized.

22. Upon evaluation of evidence, led in the matter, by the parties, we find that the testimony of PW1 is not entirely reliable inasmuch as her version finds no corroboration from the medical evidence, and the presence of PW3 is otherwise doubtful. In the facts and circumstances of the present case, we, therefore, are of the opinion that the accused-appellant is entitled to the benefit of doubt.

23. This criminal appeal, therefore succeeds and is allowed. Accused-appellant Durwesh Kumar son of Hoti Lal, is on bail, therefore, his bail bonds shall be discharged. He need not surrender. He shall file personal bond and surety bonds in compliance of Section 437A Cr.P.C. to the satisfaction of trial court within a period of four weeks.

24. The office is directed to transmit the lower court record along with a copy of the judgement to the trial court which shall ensure the compliance.

**Order Date :- 16.10.2023**

MN/-