

Neutral Citation No. - 2023:AHC:202430-DB

Reserved On: 3.10.2023

Delivered On: 19.10.2023

Court No. - 46

Case:- CRIMINAL APPEAL No. - 7094 of 2009

Appellant :- Subhash Chandra

Respondent:- State of U.P.

Counsel for Appellant:- G.P. Dikshit, Amit Tripathi, Seema Pandey, Siddharth Yadav

Counsel for Respondent:- Govt. Advocate

Hon'ble Ashwani Kumar Mishra, J.

Hon'ble Syed Aftab Husain Rizvi, J.

1. Heard Ms. Seema Pandey the Ld. Amicus Curiae for the appellant and Sri Rahul Asthana learned AGA for the State.

2. This criminal appeal has been filed against the judgment and order dated 13.11.2009 passed by the Additional District & Sessions Judge, court no.7, Etawah in Special Sessions Trial no.361 of 2008. The accused-appellant has been convicted of U/s 376 IPC Act and sentenced to life imprisonment with a fine of Rs.50,000/-. In default of payment of fine to undergo rigorous imprisonment of one year.

3. The first information report of this case was lodged on 01.05.2008 at 15:50 on written information alleging therein that today on 01.05.2008 the four-year-old grand daughter (Natin) of the first informant had gone to take a bath at the tube well of Radhey Shyam Rajpoot behind Janta Inter College Puthan Sakrauli. When she did not return for a long time, the first informant with Ramjeet and Bhagirath started to search her. At about 3:00 pm when they reached near the tube well of Radhey Shyam they heard the screams of the victim. On hearing the screams all of them ran towards it. They saw Subhash Jatav committing sexual assault on the victim. On seeing them, he ran away to the fields. On hearing the noise, several persons gathered there. It was noticed that the victim was bleeding from her private parts. She was in a serious condition. Crime no.163 of 2008, U/s 376 IPC was registered against Subhash Jatav vide GD No.24.

4. S.I. Om Prakash Singh was entrusted with the investigation of the case. He recorded the statement of the informant. The victim was sent to the hospital where her medical examination was conducted by Dr. Nirupama

Dixit. The victim was referred to a Surgeon and shifted to the operation theatre, thereafter she was referred to AIIMS, Agra for further treatment. The Investigating Officer inspected the place of occurrence and prepared the site plan at the instance of the informant and also collected the blood-stained and plain earth. The accused was also arrested on the same day and his medical examination was also conducted by Dr. M.P. Verma on 02.05.2008. Thereafter the Investigating Officer on different dates recorded the statements of the victim and other witnesses and after completing the investigation, submitted the charge sheet on 01.06.2008.

5. After taking cognizance, the learned Magistrate committed the case to the court of sessions on 13.08.2008. The court of sessions framed charges against the accused-appellant under section 376 IPC. The accused-appellant pleaded not guilty and claimed for trial.

6. The prosecution has produced the two eyewitnesses, the informant as (P.W.-1) and Bhagirath (P.W.-2). Dr. Nirupama Dixit (P.W.-3), Head Constable Maheshpal Singh (P.W.-4), S.I. Om Prakash Singh the Investigating Officer (P.W.-5), and Dr. M.P. Verma (P.W.-7) have also been produced. The aforesaid prosecution witnesses have proved nine prosecution papers.

7. The statement of the accused was recorded U/s 313 Cr.P.C. and incriminating prosecution evidence was put to him. He has denied the prosecution version and has stated that the witnesses deposed against him due to rivalry. He has further stated that he used to work as a cobbler in a shop for 10 years. One Ram Babu was forcibly removing his shop, he also assaulted him and took illegal possession of the shop. He has been falsely implicated. However, no defence evidence has been produced by the accused.

8. The learned trial court after hearing the arguments of both the parties by the impugned judgment and order has held the accused-appellant guilty for offence U/s 376 IPC and has sentenced him as above.

9. The victim was medically examined on 01.05.2008 at about 4:15 pm by Dr. Nirupama Dixit (P.W.-3) Medical Officer, Womens Hospital, Etawah.

According to the medical examination report Ex.Ka-2, in physical examination, the victim was conscious, her height was 90 cm, her weight was 15 kg, teeth were 10/10. In the internal examination, the injury was seen on the perineal region, and blood stains were seen in both thighs and legs. A vaginal smear was taken with a little finger and sent for pathological examination. The internal examination was done under local anesthesia. P. tear was present on both lateral walls of the vagina with the posterior vaginal wall, oozing present. The victim was referred to a surgeon for repair, a slow I/V drip started and the patient was shifted to Operation Theatre. Blood-stained clothes were sealed and handed over to the accompanying constable. For age determination, X-ray was advised. In the opinion of the doctor, the injury was caused by a hard and blunt object and the duration was fresh. A supplementary report was also prepared by Dr. Nirupama Dixit (P.W.-3) on the basis of the pathological report and X-ray report. According to the supplementary report (Ex. Ka.-3), the age of the victim was above three years and below four years. Dr. Nirupama Dixit (P.W.-3) has further stated that in her opinion it was possible that the victim was subjected to sexual assault by an adult male.

10. The medical examination of the accused was conducted on 02.05.2008 by Dr. M.P. Verma (P.W.-7). The witness has stated that the following injuries were found on his body:

i. Abrasion 3 cm x 1 cm on the right side (outside) of the abdomen just above the iliac crest. Blood stains were present over the inner side of underwear and white spots at places were seen.

In the opinion of the doctor, the injury was simple in nature and may have been caused by friction. The underwear was sealed and handed over to the accompanying constable. Doctor M.P. Verma (P.W.-7) has further stated that if an attempt is made to commit rape with a minor girl of 3-4 years, there is a possibility of the above injuries. He has further opined that the injuries of the accused may be of 01.05.2008 while committing sexual assault on a 3-4 year girl. The witness has proved the injury report Ex.Ka.-9.

11. The informant has been examined as P.W.-1. The witness has stated that her grand daughter was aged about 3- 4 years. On 01.05.2008 she had gone to take a bath at the tube well of Radhe Shyam Rajpoot which is situated behind Janta Inter College. When she did not return for a long time the informant with Bhagirath and Ramjeet went in search of her. At about 3:00 pm they reached the tube well of Radhye Shyam, they heard her screams from the south of the tube well. On this, they reached there and saw that the accused Subhash Jatav was sexually assaulting the victim. On seeing them he fled from the spot. Several persons gathered there. The victim was bleeding from her private parts. The witness has further stated that he got the report scribed from Ram Kishan. The witness has identified his signatures on the first information report Ex. Ka.1. The witness has also stated that he accompanied the victim to the police station from where she was sent to District Hospital for medical, as her condition was serious, she was referred to Agra and thereafter she was also treated at AIIMS Delhi. She is still under treatment and the operation of her private parts has been advised. The accused Subhash was a cobbler and was well known to the informant. He is also present in the court.

12. Bhagirath (P.W.-2) in his examination in chief, has stated that he had gone with Ram Babu and Ramjeet in search of the victim. When they reached the tube well of Radhey Shyam, they heard the screams of the victim from the southern side of the tube well. There they saw, accused Subhash Jatav committing sexual assault on the victim. On their exhortation, the accused ran towards the field. The victim was bleeding from her private parts. He has also accompanied the victim to the hospital.

13. HCP Maheshpal Singh (P.W.-4) has written the chik FIR and entered its description in the GD. The witness has stated that on the written report of the informant, he had registered chik crime no.163 of 2008 U/s 376 IPC and referred it in the GD No.24 at 15:55. The witness has proved both the documents as Ex.Ka-4 and Ex.Ka-5.

14. S.I. Om Prakash Singh (P.W.-5) is the Investigating Officer. The witness in his examination in chief has stated that on 01.05.2008 he was

posted as S.O, P.S.- Civil Lines Etawah on that date a case crime no.153 of 2008 U/s 376 IPC was registered against Subhash Jatav. He recorded the statement of the informant and sent the victim to the hospital as she was in a very serious condition and was bleeding from her private parts. Thereafter he came to the place of occurrence and also sent an information to the higher authorities and to restore law and order, called extra force, PAC and QRT. He made an inspection of the place of occurrence at the pointing out of the informant. The witness has proved it as Ex.Ka-6. He has also collected blood-stained and plain earth from the place of occurrence and prepared its memo Ex.Ka-7. On the same day, he arrested the accused Subhash, recorded his statement, and sent him for a medical examination. On 04.05.2008 he recorded the statements of witnesses Ramjeet and Bhagirath. On 05.05.2008 he recorded the statement of Dr. Nirupama Dixit. On 06.05.2008 he recorded the statement of the victim who was under treatment at AIIMS Agra. A copy of her medical prescription was handed over to him by her family members. After completing the investigation, he submitted the charge sheet against the accused on 01.06.2008. The witness has proved it as Ex.Ka.-8.

15. Constable Aditya Kumari (P.W.-6) in her examination in chief has stated that on 01.05.2008, she was posted at police station civil lines, Etawah, on that day she took the victim to District Women's hospital, Etawah for medical examination where the victim was medically examined. Her blood-stained clothes were sealed and handed over to the witness. She deposited it at the police station. The witness has proved the blood-stained undergarment and one scarf (angaucha) as Ex. 1 & 2.

16. The learned counsel for the appellant contended that the appellant is innocent and has been falsely implicated only on the basis of suspicion and enmity. The victim has not been examined by the prosecution. So there is no cogent evidence against the appellant. The informant (P.W.-1) is an interested witness while Bhagirath (P.W.-2) is his friend. There is no independent witness to the incident. The learned trial court has erred in relying upon the oral testimony of interested witnesses in the absence of the main witness (victim). It is further contended that there is no forensic

evidence against the appellant which connects him with the offence. The evidence produced by the prosecution is not of the standard of beyond reasonable doubt and the appellant-accused was entitled to the benefit of doubt. The learned trial court has failed to appreciate the evidence and other material on record and has erred in convicting him.

17. Per-contra, the learned AGA submitted that the victim is a child of the tender age of 3-4 years who has been subjected to sexual assault in a brutal manner causing her serious injuries. The two public witnesses Radhey Shyam (P.W.-1) and Bhagirath (P.W.-2) are the eyewitnesses of the incident who have seen the occurrence. The prosecution case stands corroborated by the medical evidence. The appellant-accused was also arrested on the same day and he was also medically examined. His medical examination report also supports the prosecution version and establishes his guilt. There is no serious infirmity or consistency in the prosecution evidence, the guilt of the accused-appellant stands proved from the prosecution evidence and the learned trial court has rightly held him guilty. The punishment awarded is also appropriate.

18. The victim in this case is a child of tender age of about 3-4 years. She is not competent to depose before the Court. The prosecution had relied on the ocular testimony of two witnesses informant (P.W.-1) and Bhagirath (P.W.-2). The informant P.W.-1 is the grandfather of the victim. Supporting the allegations of the FIR the witness has stated that on 01.05.2008 the victim had gone to take a bath at the tube well of Radhey Shyam behind Janta Inter College. When she did not return for a considerable time the informant with Bhagirath and Ramjeet went in her search and at about 3:00 pm they reached the tube well of Radhey Shyam, they heard the screams of the victim, they ran towards it and saw accused Subhash committing sexual assault on the victim. The accused fled from the spot, seeing the informant and his companions. The witness has also stated that the victim was seriously injured and was bleeding from her private parts. Bhagirath (P.W.-2) has also supported the testimony of informant (P.W.-1) and has stated that on the date of the incident, he with the informant, and Ramjeet went in search

of the victim and when they reached near the tube well of Radhey Shyam at about 3:00 p.m., they heard the screams of the victim. They ran in that direction and saw the accused Subhash committing sexual assault upon the victim. On their exhortation Subhash ran away, the victim was bleeding from her private parts. Both these witnesses have been cross-examined at length by the defence but there is no serious infirmity or inconsistency in their statements.

19. From the evidence on record, it is also established that the victim was taken to the police station by the informant while lodging the FIR, the Investigating Officer saw her in a serious condition and sent her for medical examination with female constable Aditya Kumari who has been examined as P.W.-6. This witness has also supported the prosecution case, she has also stated that after the examination of the victim by the doctor, her blood-stained undergarment and one blood-stained scarf were handed over to her, and she has deposited it at the police station.

20. The ocular testimony of the aforesaid two witnesses also stands corroborated with the medical evidence. Dr. Nirupama Dixit (P.W.-3) who conducted the medical examination of the victim stated that the injury was seen in the perineal region and blood spots were present in the thighs and legs. The internal examination of the victim was conducted after administering local anesthesia. The vaginal walls were torn and blood was oozing. The victim was referred to a surgeon and was shifted to operation theatre. The doctor has also supported the prosecution version that the injury of the victim may be caused due to sexual assault by an adult.

21. The victim was also referred for an ossification test. Dr. Nirupama Dixit (P.W.-3) on the basis of radiological report has opined that the age of the victim was above three years and below four years. So it is also stand proven that the victim was a child of about 3-4 years.

22. The medical examination of the accused has also been conducted on 02.05.2008 by Dr. M.P. Verma (P.W.-7). One abrasion on the iliac crest was noted. There were also blood and white spots on the underwear of the accused. The witness has also supported the prosecution version that if any

person commits sexual assault on a minor girl then such type of injuries may come. In the cross-examination of the aforesaid two witnesses, there is nothing to contradict the prosecution story or support the defence in any manner.

23. The First Information Report was promptly lodged at 3:50 P.M., ruling out any possibility of false implication after consultation and deliberation.

24. The Investigating Officer has also collected the blood-stained soil from the place of occurrence which also proves the place of occurrence.

25. The allegations made in the FIR are quite natural and appealing and all the prosecution witnesses have fully corroborated the prosecution version. There is no serious infirmity or contradiction which makes it unreliable. The testimony of eyewitnesses is consistent and it also stands corroborated with medical evidence, so there is no reason to disbelieve it. The victim of this case is a girl of tender age and not competent to depose. So her non-examination is for valid reasons and has no adverse effect.

26. The defence plea taken by the accused in his statement U/s 313 Cr.P.C. appears to be imaginary. No evidence either oral or documentary has been produced by the accused. So there is no reason for false implication.

27. We have also gone through the judgment of the learned trial court. The learned trial court has elaborately discussed and analyzed the entire evidence and relied upon the oral testimony of the eye witnesses which stands supported by the medical evidence and has held the accused guilty. There is no illegality or perversity in the finding of guilt referred by the trial court.

28. The conviction of the accused under section 376 IPC recorded by the learned trial court is liable to be upheld.

29. Learned counsel for the appellant contended that the appellant is in jail since his arrest and remain in jail during trial and after conviction. He has served more than 15 years of actual imprisonment. He has no criminal antecedents. The minimum sentence provided is of 10 years. However, the learned trial court has imposed maximum sentence of life imprisonment with

fine. Learned counsel further submitted that the appellant accused may be punished for the period of imprisonment already undergone.

30. The provisions of Section 376 (2) (f) IPC which were applicable at the relevant time read as follows:

Section 376. Punishment for rape___

(2) Whoever,-

(f) commits rape on a woman when she is under twelve years of age, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine.

Provided that the court may, for adequate and special reasons to be mentioned in judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

The simple reading of Section shows to say that the act provides for a minimum sentence of 10 years which may be upto life imprisonment along with fine, with a proviso that for adequate and special reasons to be recorded in the judgment a sentence of imprisonment of either description for a term less than 10 years can also be provided.

31. The settled law is that the punishment should always be proportionate/ commensurate to the gravity of offence. The court has to decide the punishment after considering all aggravating and mitigating factors and the circumstances in which the crime has been committed. Conduct and state of mind of the accused and age of the victim and the gravity of the criminal act are the factors of paramount importance. The court must exercise its discretion in imposing the punishment objectively considering the facts and circumstances of the case.

32. In a recent judgment of *Kashi Nath Singh vs. State of Jharkhand* (2023)7 SCC 317, the accused-appellant was held guilty for rape and murder of a minor and was sentenced for life imprisonment without any benefit of remission. The Apex Court considering the fact that the appellant was 26 years of age when the offence was committed and there may be chances of his reformation, modified it to the fix term sentence for a period of 30 years without any benefit of remission.

33. In this case, the age of the appellant accused as recorded in his statement U/s 313 Cr.P.C. is 21 years. The appellant accused has no criminal history and is first offender, there may be chance of his reformation.

34. In section 57 Cr.P.C. it is provided that in calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for 20 years.

35. Considering all the facts and circumstances of the case, the relevant criminal provision applicable at the time of occurrence, we are of the view that the ends of justice will be served if the appellant-accused is punished with imprisonment of 20 years without remission. The appellant accused shall be released from jail after undergoing full sentence of 20 years including the period of imprisonment already undergone. The sentence liable to be modified to the above extent and the appeal is liable to be allowed in part to that extent.

36. The appeal is accordingly allowed in part. The conviction of the appellant-accused under section 376 IPC is sustained. However, the sentence is modified to the extent indicated below.

The imprisonment for life provided by the trial court is modified with fixed term sentence for a period of 20 years without any benefit of remission. However, the fine and the default sentence imposed by the trial court is maintained. The fine, if any, deposited shall be paid to the victim. The order be communicated all concerned for necessary compliance.

37. Copy of this judgment and order along with lower court records be transmitted to the trial court immediately for necessary compliance.

38. We appreciate the assistance provided by the learned Amicus Curiae, she is entitled to her legal remuneration as provided by the High Court, Legal Service Committee.

Order Date:- 19.10.2023

C. MANI