

Neutral Citation No. - 2023:AHC:209652-DB

Court No. - 46

Case :- CRIMINAL APPEAL No. - 3928 of 2016

Appellant :- Jhuluva

Respondent :- State of U.P.

Counsel for Appellant :- Deepak Kumar
Kulshrestha, Chandra Shekhar Garg, Mithilesh Kumar
Mishra, Umesh Chandra Tiwari

Counsel for Respondent :- G.A.

Connected with

Case :- CRIMINAL APPEAL No. - 3927 of 2016

Appellant :- Raju

Respondent :- State of U.P.

Counsel for Appellant :- Deepak Kumar
Kulshrestha, Chandra Shekhar Garg

Counsel for Respondent :- G.A.

Hon'ble Ashwani Kumar Mishra, J.

Hon'ble Ms. Nand Prabha Shukla, J.

1. These two appeals have been preferred by the accused appellants Jhuluva and Raju against the judgment and order of conviction and sentence dated 24.05.2016, passed by the Special Judge SC/ST (PA) Act/Additional Sessions Judge, Court No.IV, Chitrakoot in Session Trial No.46 of 2011 (State of U.P. vs. Jhuluva and another) arising out of Case Crime No.296 of 2010, Police Station Raipura, District Chitrakoot, whereby both the accused appellants have been convicted and sentenced to 10 years rigorous imprisonment under section 376(2)(g) IPC with fine of Rs.3,000/- each and in default of payment of fine they are to further undergo two years additional

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imprisonment. The accused Jhuluva has further been convicted and sentenced to rigorous life imprisonment under section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 with fine of Rs.3,000/- and in default of fine he is to further undergo two years additional imprisonment. All the sentences are to run concurrently.

2. Prosecution case proceeds on a written report (Ex.Ka.1) of Sushil Kumar (PW-5), who happens to be the brother of victim (PW-5). As per this report the informant is a resident of Village Bhakharwar, Police Station Raipura, District Chitrakoot and belongs to Scheduled Caste. On 20.5.2010, at about 12:00 in the afternoon, informant's sister (victim) aged about 15 years had gone to attend the nature's call, when suddenly accused appellants Jhuluva and Raju came and caught hold of her. These two accused then gagged the victim and subjected her to sexual assault. After committing the offence, the two accused fled away towards the river. The victim came back home weeping and informed of the incident to the family members. The informant alongwith the victim left for the police station to lodge a report but they were not allowed to do so as they were obstructed on the way by influential persons of village who pressurize them to resolve the issue amicably. The informant insisted that a report be lodged. He came to the police station on 21.5.2010 and gave a written report on which the police personnels informed him that a report would be lodged. The report was got scribed by a villager but it did not contain the true disclosure of the incident. Consequently, neither proper report was lodged nor any medical examination was conducted of the victim and the informant was returned on the assurance that necessary action would be taken. The police instead of doing the needful

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pressurized the informant and his family members to settle the matter.

3. It is thereafter that the informant got a report scribed on the basis of which a First Information Report came to be lodged as Case Crime No.296 of 2010, against the two accused, under section 376 IPC read with section 3(2)(5) SC/ST Act at Police Station Raipura on 23.5.2010 at 06.45 pm. The Investigating Officer proceeded with the investigation and recovered the trouser (salwar) worn by the victim vide Ex.ka.7. The undergarments worn by two accused were also recovered vide Ex.ka.8.

4. The victim was medically examined by Dr. Qadira Sultana (PW-7) at 03.00 pm on 24.5.2010 at District Hospital, Chitrakoot. In the internal examination, the victim's hymen was found torn and she complained of swelling and pain. Two vaginal slides were got prepared of the victim. A supplementary report has also been prepared by PW-7, according to which, no semen was found on the vaginal slides prepared on the victim. In the opinion of the doctor the age of the victim was above 18 years. This contradicted the statement of informant as per which victim's age was 15 years.

5. The investigation proceeded further with the recording of statement of witnesses and ultimately a chargesheet came to be submitted against two accused by the Investigating Officer under section 376 IPC read with Section 3(2)(v) SC/ST Act. The Magistrate took cognizance on the chargesheet on 19.7.2010 and committed the case to the Court of Sessions where it got registered as Session Trial No.46 of 2011. The Special Judge (SC/ST Act) framed the charges against the two

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accused appellants under section 376 IPC and 3(2)(v) SC/ST Act on 11.05.2011. The contents of the charges were read out to the two accused, who denied the accusations made against them and demanded trial.

6. The prosecution in order to prove its case has produced documentary evidence in the form of written report as Ex.Ka.1; First Information Report as Ex.Ka.2; medical examination report of victim as Ex.Ka.4; supplementary medical examination report as Ex.Ka.5; recovery memo of trouser (salwar) of victim as Ex.Ka.7; recovery memo of undergarments of two accused as Ex.Ka.8; and chargesheet as Ex.Ka.9.

7. In addition to above exhibited documentary evidence, the prosecution has produced the oral testimony of victim as PW-1. She has supported the prosecution case. She specifically asserted that two accused are resident of her village. Accused Jhuluva is Yadav by caste while the other accused Raju is Dhobhi. The incident occurred on 20.05.2010 at 12.00 in the afternoon. The victim claims to have gone to ease herself in the watercourse (nala) outside the village and after she eased herself, the accused appellants came and gagged her mouth by inserting cloth, whereafter the accused Jhuluva committed sexual assault on the victim while the other accused Raju held her. Later, accused Jhuluva gagged her and accused Raju committed sexual assault upon her. According to the victim she could not raise an alarm for such reasons and that the accused appellants also threatened her of dire consequences if she reported the incident to anyone. PW-1 has also stated that while she was going to the police station the influential persons of the village obstructed their approach to the police station and insisted that the matter be

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resolved amicably. She claims that her clothes (i.e. salwar and undergarments etc.) were recovered by the Investigating Officer from her house.

8. In the cross-examination, the victim remained firm. She has stated that she has two brothers and and four sisters. She is the youngest. The victim never attended any school. On the date of incident she had gone to the fields to attend nature's call at about 09.00 in the morning. She also identified the place where incident occurred. According to the victim, when she went to ease she was alone and her sister-in-law (Bhabhi) came later carrying water from river in a bucket. The victim stated that she was dragged by the two accused and bite marks existed on her face and she sustained other injuries. The victim has denied the suggestion that a false case has been lodged only to receive compensation.

9. PW-2 is Phool Kumari, who happens to be the mother of the victim. She has admitted that she has not seen the incident and she was informed of the incident by her daughter-in-law Sunita. This witness has also supported the prosecution case. She has however admitted that the Investigating Officer never recorded her statement and that the incident has been disclosed for the first time by her before the court and not before anyone else.

10. PW-3 is Sunita, who happens to be the sister-in-law of the victim. She has supported the prosecution case of sexual assault upon the victim on the date of incident at 12.00 in the afternoon. In the cross-examination PW-3 has stated that she has not seen the incident and was at home. According to PW-3, the place of incident is across the river near watercourse (Nala) and that she had herself not seen the place of incident.

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PW-3 has also alleged that the shoulder's skin of victim was peeled. Apart from it no other injuries were caused to the victim.

11. PW-4 Shiv Kumar is the father of victim, who has supported the prosecution case. He has also disclosed the manner in which the report has been lodged and has proved the written report. This witness has denied the suggestion that a false report has been lodged only to receive compensation.

12. PW-5 Sushil Kumar is the informant and the brother of the victim. He has fully supported the prosecution case and proved the written report Ex.Ka.1. He has also stated that the incident was narrated to him by the victim on the basis of which the report itself was lodged. He has also stated that the medical examination of victim was got conducted by him. In the cross-examination, PW-5 has been questioned on the alleged lodging of previous report, as is mentioned in the written report.

13. PW-6 is Constable Ram Dev Shukla, who has proved the chik FIR as well as the G.D. entry in respect of lodging the FIR.

14. PW-7 is Dr. Qadira Sultana, who has conducted the medical examination of the victim. She stated that the victim had sustained injuries on her private parts and her hymen was found torn and the victim complained of swelling and pain.

15. PW-8 Arjun Singh is the Investigating Officer, who has proved the recovery of clothes of the victim and the accused appellants as also the chargesheet submitted in the matter.

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He has stated that age of the victim has been found above 18 years and no documents were furnished to him in respect of minority of the victim.

16. The accused appellants have been confronted with the above incriminating materials produced by the prosecution during trial for recording their statement under section 313 Cr.P.C. The accused appellants have stated that they have been falsely implicated in the present case and they are innocent.

17. It is on the basis of such evidence led during trial by the prosecution and upon consideration of the explanation furnished by the accused appellants under section 313 Cr.P.C. that the court below has come to the conclusion that the prosecution has established its case beyond reasonable doubt against the accused appellants, inasmuch as the victim was found trustworthy and allegations found corroboration from the injury report of the victim, which has been duly exhibited by PW-7. The court below has returned a finding of guilt against the two accused appellants and ultimately convicted and sentenced them vide impugned judgment and order. Thus aggrieved, the accused appellants are before this Court in the present appeals.

18. Sri Chandra Shekhar Garg, learned counsel for the accused appellants submits that the appellants have been falsely implicated in the present case. Submission is that the prosecution case is full of contradictions, inasmuch as the time of incident as disclosed by the victim is 09.00 in the morning, whereas the written report as also the testimony of other witnesses specify the time of incident to be 12.00 in the afternoon. It is also submitted that the supplementary

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medical report does not demonstrate existence of spermatozoa on the vaginal slides prepared of the victim. It is urged that the recovery of clothes of victim as well as the undergarments of accused appellants have not been established by production of any independent witness. Learned counsel further submits that the FSL report although shows existence of semen and sperm on the trouser (salwar) worn by the victim as well as the undergarment of accused Jhuluva but its classification has not been found feasible as per the FSL report on account of which the scientific opinion cannot be relied upon against the accused appellants. It is further submitted that the two accused appellants otherwise have no criminal history and have already undergone incarceration of more than 8 years with remission.

19. Learned counsel for the appellants also contends that though accused Jhuluva has been convicted and sentenced for life under section 3(2)(v) SC/ST Act but in fact no evidence has been adduced during trial by the prosecution to demonstrate that the offence upon the victim was committed by the accused, on account of her caste identity, as a member of scheduled caste, and in its absence the necessary ingredients are not made out to attract offence under section 3(2)(v) SC/ST Act.

20. Per contra, Sri Rahul Asthana, learned A.G.A. for the State submits that there is no evidence or plausible suggestion furnished by the two accused appellants of their false implication in the matter. It is further submitted that the testimony of victim of sexual assault is required to be treated as equivalent to the testimony of an injured witness and her testimony is entitled to accord weight. Learned A.G.A. further contends that the allegation of sexual assault upon the victim

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clearly finds corroboration from the medical report proved by the PW-7, as also the FSL report and, therefore, the conclusion of guilt arrived at by the court below merits no interference. It is also urged that the prosecution has succeeded in establishing the guilt of two accused appellants beyond reasonable doubt.

21. We have heard learned counsel for the parties and have perused the materials brought on record, including the original records of the court below.

22. The facts relating to offence committed upon the victim have already been noticed above. The incident has taken place on 20.05.2010. The report in respect of incident, however, has been lodged only on 23.05.2010. Learned counsel for the appellants submitted that the delay of three days have not been specifically explained.

23. We have examined such contention in this regard but on the basis of evidence adduced in the matter we are not inclined to accept such submission. It is worth noticing that the informant has categorically stated in his testimony that the family members attempted to lodge report on the very day of incident but they were prevented from doing so on account of intervention of influential persons of the village. It is not in issue that the victim belongs to marginalized section of the society and it is not unusual in villages for influential persons to resist lodging of such reports, particularly when the perpetrators of crime are from more efficient classes. The father of victim as also the victim herself and informant have explained, in detail, the steps taken by them to lodge the report and in view of the evidence led we are inclined to hold that the delay of three days, occasioned in lodging of FIR is

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adequately explained. Law is otherwise settled that the delay in lodgement of report regarding sexual assault offences otherwise do not impact the case of the prosecution as generally the family takes time to react to the situation and lodgement of report is not immediate, particularly on account of adverse impact which it carries not only for the victim but also for the family as a whole.

24. The victim in the present case has clearly identified the two accused and has specifically stated that she was subjected to gang rape by them when she had gone to attend nature's call during day time. Though there is some dichotomy in the prosecution version with regard to timing of the incident but we are not inclined to attach much importance to it, inasmuch as the victim herself is an illiterate lady and is not expected to be aware of the exact time when the incident occurred, particularly when she had undergone a traumatic experience. She, nevertheless reported the incident to her family members immediately after returning home. This may have led to differences in the time of incident disclosed by the victim viz-a-viz other prosecution witnesses. In the facts of the case, we are thus not inclined to discredit the testimony of victim only on account of difference in the time of incident disclosed by her vis-a-vis the version of other prosecution witnesses. The victim has been specific in implicating the two accused appellants for the offence of gang rape committed upon her and has also explained the manner in which offence has been committed.

25. We find from the testimony of PW-7 that when the victim got medically examined on 24.05.2010 in the afternoon she had complained of swelling and pain and her hymen was found torn. Although the supplementary report does not find

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existence of spermatozoa but that in itself would not be conclusive, particularly when there was substantial time gap between the incident and the time when vaginal slides were prepared of the victim. The delay of 4-5 days would clearly eliminate the possibility of spermatozoa found in the vaginal slides. We, moreover, find that the clothes worn by the victim and the two accused were also recovered and sent for forensic examination to the FSL at Lucknow. The FSL report dated 20.08.2010 clearly records existence of semen on the trouser (salwar) of victim as also on the underwear of accused Jhuluva. The allegation of sexual assault levelled by the victim, therefore, finds corroboration from the medical report as also the FSL report. We also find that the victim has been consistent throughout in implicating the two accused appellants as being the perpetrators of offence of gang rape.

26. Apart from a failed suggestion or the statement made under section 313 Cr.P.C. of false implication, no other evidence whatsoever has been led by the defence to substantiate its plea of false implication. The testimony of victim is, therefore, found wholly trustworthy in the facts of the case. It finds corroboration from the medical report and FSL report. We are thus inclined to place the testimony of victim in the category of sterling witness which otherwise does not require any corroboration.

27. Law is settled that the testimony of a victim of sexual assault is akin to the testimony of an injured witness and is entitled to considerable weight.

28. In view of the above deliberations and discussions on the aspect of commissioning of offence of gang rape upon the victim we are inclined to endorse the conclusions drawn by

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the court below that the two accused appellants have committed offence of gang rape upon the victim under section 376(2)(g) IPC. The findings returned by the court below with regard to commissioning of offence of gang rape by the accused appellants, upon the victim, under section 376(2)(g) IPC is, therefore, sustained.

29. So far as the sentence of accused appellants under section 376(2)(g) IPC is concerned, the law prescribed a minimum punishment of ten years for offence of gang rape on a victim. In such circumstances, the judgment and order of the court below to the extent of awarding sentence upon the accused appellants under section 376(2)(g) IPC of ten years rigorous imprisonment with fine of Rs.3,000/- each and default punishment on account of non payment of fine is upheld.

30. Coming to the aspect of conviction of accused appellant Jhuluva under section 3(2)(v) SC/ST Act we find substance in the argument advanced on behalf of the said accused that apart from the narration in written report that the victim belongs to scheduled caste there is no evidence or material led by the prosecution, during trial, to demonstrate that the offence of gang rape was committed upon the victim on account of her caste identity. We have carefully scanned the testimony of prosecution witnesses. None of the witnesses has even suggested that the offence was committed upon the victim only on the ground that she belongs to scheduled caste. In the absence of any evidence led by the prosecution to prove that the offence was committed upon the victim on account of her caste identity, we are of the considered opinion that the conviction and sentence of accused appellant Jhuluva

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under section 3(2)(v) SC/ST Act cannot be sustained and it is, accordingly, reversed.

31. We, however, make it clear that any benefit given to the victim towards compensation etc., under the scheme of State, on account of her being member of scheduled caste community shall not be recovered/withdrawn from her.

32. As a result of discussions held above, Criminal Appeal No.3928 of 2016 filed by accused appellant Jhuluva succeeds and is partly allowed. The judgment and order of conviction and sentence dated 24.05.2016 is set aside to the extent of his conviction and sentence under section 3(2)(v) SC/ST and he is acquitted of the charges. The appellant is reported to be in jail and he shall serve the remaining sentence. Criminal Appeal No.3927 of 2016 filed by the accused appellant Raju fails and is dismissed. The said appellant is also reported to be in jail and he shall serve the remaining sentence.

33. Copy of this judgment shall be communicated to the Chief Judicial Magistrate concerned as also the concerned Superintendent of Jail for necessary compliance.

Order Date:- 01.11.2023

Ashok Kr./Lalit Tripathi