

Neutral Citation No. - 2023:AHC:203027-DB

Judgement Reserved on 26.09.2023

Judgement Delivered on 18.10.2023

Court No. - 46

Case :- CRIMINAL APPEAL No. - 6421 of 2017

Appellant :- Anmol And Another

Respondent :- State of U.P.

Counsel for Appellant :- Deepak Kumar Srivastava, Mohit Singh, Ritesh Singh, Suresh Singh

Counsel for Respondent :- G.A.

Hon'ble Ashwani Kumar Mishra, J.

Hon'ble Syed Aftab Husain Rizvi, J.

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. This criminal appeal has been filed against judgment and order dated 14.09.2017, passed by Special Judge (POCSO Act)/Additional Session Judge, Court No.6, Shahjahanpur, in Special Case No.24 of 2015 (State Versus Anmol and another) arising out of Case Crime No.4 of 2015 under Sections 376(d) I.P.C. and 5(Chha)/6 of The Protection of Children From Sexual Offences Act, Police Station Garhiya Rangeen, District Shahjahanpur. The appellants have been convicted for the offences under Sections 376(d) I.P.C. and 5(Chha)/6 of The Protection of Children From Sexual Offences Act and sentenced to undergo life imprisonment for the offence under Section 376(d) I.P.C along with a fine of Rs.75,000/- each and in default of payment of fine, to undergo two months additional simple imprisonment and undergo imprisonment for fifteen years each, for the offence under Section under 5(Chha)/6 of The Protection of Children From Sexual Offences Act along with a fine of Rs.25,000/- each and in default of payment of fine, to undergo one month's additional simple imprisonment. All the sentences were directed to run concurrently.

2. Case Crime No.04 of 2015 under Sections 376(d) I.P.C. and 5(Chha)/6 of The Protection of Children From Sexual Offences Act was

registered on 08.01.2015 at 10.30 a.m. at Police Station Garhiya Rangeen, District Shahjahanpur on the written information alleging therein that yesterday, at 6.30 p.m., the daughter of the informant had gone to ease herself in the nearby field, where Anmol and Pappu caught hold of her and at the point of country-made pistol, sexually assaulted her, turn-by-turn. The age of the victim is 15 years.

3. S.O. Udaiveer Singh (PW3) took up the investigation, and recorded statements of the informant and the victim. He also collected a Salwar and an undergarment of the victim which she had worn at the time of the incident, sealed it, and prepared its memo. He also inspected the place of occurrence and prepared its site plan. The victim was also sent for a medical examination on the same day. The Investigating Officer collected the medical examination reports, recorded the statements of other witnesses, and after arresting the accused recorded their statements, and on conclusion of the investigation submitted a charge-sheet against both the accused named in the F.I.R.

4. Special Judge/Additional Sessions Judge took cognizance of the charge-sheet. Charges under Sections 376(d) I.P.C. and 5(Chha)/6 of The Protection of Children From Sexual Offences Act were framed against the accused-appellants Anmol and Pappu. The accused pleaded not guilty and claimed to be tried.

5. The prosecution has produced four witnesses, including the informant and the victim in oral evidence. These witnesses have proved 11 prosecution papers marked as Exts. Ka-1 to Ka-11.

6. The statements of the accused were recorded under Section 313 Cr.P.C. The incriminating materials of the prosecution evidence were put to them. Both the accused have denied it. They have also stated that the witnesses have deposed against them due to enmity, the victim has deposed under the pressure of her parents. They have also stated that they are innocent and have been falsely implicated due to village rivalry. The accused have also produced Munna Lala (DW-)1 and Darshan Singh (DW-2) as the

defence witnesses. However, no documentary evidence has been produced by them.

7. The learned Trial Court, after hearing the arguments of both the parties, by the impugned judgment, held both the accused-appellants guilty, and sentenced them as above.

8. The informant has deposed as (PW-1). In his examination-in-chief, he has stated that his daughter aged about 15 years had gone to ease herself, where she was caught hold by the accused, Anmol and Pappu. They dragged her inside a wheat field and sexually assaulted her. When she came back, she told him about the incident. The witness further stated that he could not go to the police station in the night as it was foggy and the accused also extended death threats to him. On the next day, he went to the police station and gave a self-written application. The witness has proved the written report as Ext. Ka-1.

9. In his cross-examination, the witness narrated the topography and details of the crops standing in the fields at the time of the incident. The witness further stated that at the time of the incident, he and his wife were in his field. His daughter had come back to the house earlier to them. The witness has also stated that Man Singh is the Village Pradhan. Lalta Prasad is his related brother. Sukhram is his related nephew. The niece of Sukhram was kidnapped and the father of Anmol was an accused in this case. The witness has denied the suggestion that the victim was married at the time of the incident. The witness has also denied the suggestion that he has falsely implicated the accused due to old enmity at the instance of his related brothers and nephews.

10. The victim has been examined as (PW-2). In her examination-in-chief, she stated that on the date of the incident, she had gone to ease herself in the field of Mahipal at about 6.30 p.m. Anmol and Pappu caught hold of her, gagged her mouth and both sexually assaulted her for 15 minutes. Thereafter, she returned to her house and told about the incident to her uncle and aunt. Her parents were not present at the house. They were at the field. When they came back after half an hour, she also told them about the

incident. As the dusk had settled and it was foggy, she could not go to the police station. On the next day, she went to the police station where a report was lodged by her father. Her medical examination was conducted on the same day. Her statement was also recorded by the Investigating Officer. The witness has also verified her statement recorded under Section 164 Cr.P.C. marked as Ext. Ka-2.

11. In her cross-examination, the witness stated about the topography of the place of the incident. She has told her age about 15 years. She has also stated that she is not aware of the basis for recording her age. The witness has stated that the accused met her at the field of Mahipal. They were hiding in the sugarcane field of Dhanpal situated in the west. She further stated that Anmol caught hold of her. Both the accused were armed with countrymade pistols and both assaulted her sexually. She is not aware whether she has received injuries or not. Firstly Anmol sexually assaulted her. Pappu also sexually assaulted her. No one came to rescue her. In her efforts to flee, she slipped, causing injuries on her legs. She also received injury on her private parts. She did not know whether the wheat crop was damaged in the incident. The witness has correctly identified Anmol in the dock identification. She has further stated that her clothes were stuck with soil, her Kurti was stained with blood, and the remaining clothes were not blood-stained as they were put off. She remained at the house in the night and went to the police station without taking a bath. The witness has admitted that Ashok is her uncle. She has shown ignorance about the fact that Ashok has sexually assaulted a cousin of Pappu. The witness has also stated that Anmol is married while Pappu is unmarried. The witness had denied the suggestion that she has studied up to Class-V in Primary School, Madai. She has also feigned ignorance about the date of birth recorded in school as 07.04.1997. She further stated that her parents came after 10-15 minutes when she reached the house. When she had gone to ease herself, her parents were at the field. Her statement before the Magistrate was recorded on the next day. Her medical examination was conducted on the day when the report was lodged.

12. S.I. Udaiveer (PW-3) is the Investigating Officer. The witness has stated that on 08.01.2015, he took up the investigation of the case, and recorded statements of the informant, the victim, and formal witnesses. He also collected the clothes of the victim and prepared its memo Ext. Ka-3. He visited the place of the occurrence and prepared the site plan Ext. Ka-4. He also recorded the statements of two other witnesses. The witness further stated that on 10.01.2015, he recorded the statement of the mother of the victim. On 12.01.2015, he collected the medical reports. The witness further stated that he arrested the accused persons, recorded their statements, and after completing the investigation, submitted charge-sheet Ext. Ka-5. The witness has also proved the chik F.I.R. and copy of the G.D. No.13, at 10.30 a.m. of 08.01.2015 in the handwriting of Constable Clerk Ajit Baliyan and marked as Ext. Ka-6 and Ext. Ka-7.

13. Dr Kiran Gupta, (PW-4) has conducted a medical examination of the victim. The witness stated that on 08.01.2015 at 3.10 p.m., she medically examined the victim. Axillary and pubic hairs were present. Breasts were developed. The victim neither changed her clothes nor took a bath. In external examination, no mark of injury was found. In the internal examination, the right side of the hymen was partially torn, but no blood was present. A vaginal swab was taken, the slide was sent for pathological examination and the victim was referred for an ossification test. The witness has proved the medical examination report, Ext. Ka-8.

The witness further stated that on 12.01.2015 at about 2.15 p.m. she had prepared a supplementary medical report on the basis of the reports of the radiologist and pathologist. No spermatozoa was found in the pathological report. According to the ossification report, her age was about 15 years. No definite opinion about sexual assault could be given. The witness has proved the supplementary medical examination report marked as Ext. Ka-9. The witness has also proved pathological report as Ext. Ka-10 and X-ray report as Ext. Ka-11.

The witness, in her cross-examination, stated that injury of partially torn hymen can be caused by a fall or by running.

14. The defence witness Munna Lala (DW-1), in his examination-in-chief, has stated that Mahesh is his related uncle while Lalta Prasad is his related grandfather. The victim of this case is his cousin. Her marriage had been solemnized about one year ago. The witness has further stated that he is a member of B.D.C. Sukhram is father of accused Anmol. There is an old enmity between Lalta Prasad and Sukhram and at the instance of Lalta Prasad, the informant has lodged a false report against Anmol. No such incident has occurred with the victim. In his cross-examination, this witness stated that he did not know whether the victim was literate or not. The witness has denied the suggestion that due to village rivalry, he is giving false statements.

15. Darshan Singh (DW-2) has also been produced by the defence. This witness has stated that his house is situated about 100 meters from the house of the victim. The victim is his sister in village relation. There is an old enmity between Ashok, the informant, and Pappu and at the instance of Ashok, the informant has falsely implicated Pappu. In his cross-examination, the witness stated that he belongs to the Yadav community while the accused belongs to the Jatav community. The witness has stated that his mother has contested the election of Pradhan, but she lost. The witness stated that he did not know whether any litigation was going on between the informant and the accused. The witness also stated that he had not seen the incident. The witness has also admitted that the incident of murder of six persons had occurred in the village of Mahoriya. A specific question was asked as to whether any member of his family was accused in that case, the witness has given an answer that he did not know about it. The witness has denied the suggestion that he is wilfully giving a false statement. The witness has also denied the suggestion that he is giving false statements due to election rivalry.

16. Learned counsel for the appellant-accused submitted that the court below has not properly appreciated the facts and evidence on record. The medical report does not support the case of the prosecutrix since no mark of external injury has been found on the body of the victim. No stains of semen

or blood were found on the clothes of the victim. The report of vaginal smear is also negative. Therefore, it creates serious doubt about the credibility of the victim. It is further submitted that in the absence of injury, the story put forth by the victim is not believable. It is further contended that except the deposition of the victim which has not been corroborated by the medical evidence, there is no other evidence to connect the accused with guilt. Even the doctor has categorically said that there is no physical or pathological evidence of rape. Lastly, it is contended that the trial court has materially erred in convicting the accused.

17. Per contra, learned A.G.A. contended that the victim has fully supported the case of the prosecution. Ordinarily, the evidence of rape victims should not be suspected and should be believed and if the evidence is reliable, no corroboration is necessary. It is further contended that the doctor has noted internal injury in the form of a partially torn hymen, which supports the deposition of the prosecutrix. It is further submitted that in the facts and circumstances of the case, no error has been committed by the trial court in convicting the accused for an offence under Section 376(d) I.P.C. and 5(chha)/6 of The Protection of Children From Sexual Offences Act.

18. In all four witnesses have been produced by the prosecution to prove its case, out of whom three witnesses are formal in nature. The informant PW1, who is the father of the victim, has lodged the F.I.R. and has scribed it as per narration of the incident by the victim. He is not an eye-witness. He has simply proved the written report as Ext. Ka.-1.

19. S.I. Udaiveer, PW3 is the Investigating Officer. He has stated the steps taken during the course of the investigation and has proved various papers prepared during the investigation.

20. Dr. Kiran Gupta, PW4 is also a formal witness who has proved the medico-legal report and the supplementary medical report of the victim.

21. The prosecution case is wholly dependent on the sole testimony of the victim who has been examined as (PW-2). It is a settled legal position that the evidence of a rape victim stands at par with evidence of an injured

witness and the accused can be convicted on the basis of the sole testimony of the victim without further corroboration provided the evidence of the victim inspires confidence and appears to be natural and truthful. As per the settled proposition of law, there could be a conviction on the basis of the sole testimony of the victim, however, she must be found to be reliable and trustworthy. In **Krishna Kumar Malik Versus State of Haryana (2011) 7 SCC 130**, it is held that no doubt it is true that to hold an accused guilty for the commission of offence of rape, the solitary evidence of the prosecutrix is sufficient, provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality.

22. In **Rai Sandeep alias Deepu Versus State (NCT of Delhi), (2012) 8 SCC 21**, the question as to who can be said to be a “sterling witness” has been considered. Relevant paragraph 22 is extracted, as under:-

“In our considered opinion, the “sterling witness” should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a “sterling witness” whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of

the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.”

23. The sole testimony of the victim (PW-2) is to be scrutinized in the light of aforesaid observations and principles laid down.

24. The victim, in her examination-in-chief, has supported the prosecution case, but there are serious discrepancies in her testimony. The witness has stated that when she came to ease herself in the field of Mahipal, the accused, Anmol and Pappu caught hold of her, gagged her mouth, and physically and sexually assaulted her. In her cross-examination, she reiterated that both the accused physically assaulted her, but she gave an evasive reply to the question as to whether she had suffered any physical injury or not. She stated that she did not know whether she had suffered any injury or not. The medical examination report, Ext. Ka-8 does not support the aforesaid statement of the victim. In the medical examination report, the doctor found no mark of injury on her body. The witness further stated that at the time of the incident, she was wearing a Kurti, Salwar, and one panty. When she was subjected to sexual assault, she was bleeding from her private parts. She has further stated that the accused had not taken off her Kurti when they were sexually assaulting her and Kurti was stained with blood on the front side as well as the backside. It is also established from the oral evidence as well as medical examination report that the victim went to the police station in the same clothes that she was wearing at the time of the incident and from the police station she was sent to District Women Hospital for medical examination. The doctor categorically mentioned in the medical examination report that the victim had not changed her clothes and had not taken her bath. The blood-stained Kurti has not been recovered and sealed by the Investigating Officer, instead of it Salwar and undergarment of the victim have been recovered and sealed while there is a specific statement of the victim that when she was subjected to sexual assault her Salwar and undergarment were taken off by the accused persons, so they have no blood-

stains. There is no forensic report on record about the examination of Salwar and the undergarment of the victim recovered by the Investigating Officer. Even in the recovery memo, Ext. Ka.-3, it is not mentioned that the clothes recovered have any blood stains or any other kind of spot on it. The pathology report is also negative. Dr. Kiran Gupta, (PW-4) has stated that no spermatozoa was found in the slide of the vaginal smear. She has stated that no definite opinion about rape can be given. In the medical examination report, the doctor has recorded that the right side of the hymen was partially torn, but at the same time, it was also recorded that there was no bleeding. The doctor has also stated in her cross-examination that a partial tear in the hymen may be caused by running or by fall causing stretch in the legs. This injury may also be caused by a fall from a bicycle. The doctor has also categorically stated that no bleeding from the vagina was found. So, the medical examination report does not corroborate the oral testimony of the victim, (PW-2).

25. It is also evident from the analysis of the oral testimony of (PW-2) that she has not responded to some material questions and has given evasive replies and has shown ignorance about the material facts. She has stated that she does not know the distance of the place of occurrence from the village abadi. She does not know how much time after the incident, she reached home. She does not know the distance of her house from the place of occurrence. She does not know the length of country-made pistols that the accused were holding at the time of the incident.

26. The alleged incident has occurred on 7th January 2015, at about 6.15 p.m., and according to the victim the incident of physical and sexual assault occurred for 15 minutes. Thereafter, she first came to the house of her uncle and disclosed the facts about the incident to her uncle and aunt, then went to her house. At that time her parents were not present in the house as they had gone to the field. The witness has categorically stated that they had gone to harvest the wheat crop. This statement is quite unnatural and unbelievable because the wheat crop is not matured for harvesting in the first week of January. The witness has also failed to tell the distance of the field in which

her parents were harvesting wheat crops while she has admitted that she has seen all her fields.

27. Perusal of the site-plan reveals that the place of occurrence is the southeast corner of the wheat field of Mahipal. There is a Rasta in the east and south of the place of occurrence and in the east of this Rasta there is the field of Bhutan Lal, the brother of the informant, thereafter the field of the first informant and, adjacent to it in the north there is Chakki and Baithak of the informant. All these fields and the Chakki and Baithak of the informant are in the east of Rasta which lies towards the east of the wheat field of Mahipal Singh. The victim PW2 has also admitted in her cross-examination that Chakki and Baithak are situated adjacent to each other. The Chakki belongs to her uncle Ashok and villagers often visit there. She has further admitted that in the west of the Chakki, there is a Rasta towards the north-south which is used for plying tractors, cars, scooters, and other vehicles. This Rasta is in the west of her Baithak and after there is the field of Mahipal. She has also stated that when she was physically and sexually assaulted, she cried and screamed and her Baithak and Chakki were in the neighbourhood of the place of the occurrence, but no one came to rescue her. So from the evidence on record, it is fully established that the place of occurrence is very near to the Baithak and Chakki of the informant as well as abadi and if a person makes a noise then it could be heard by the people present at the Chakki and Baithak of the informant. There is a specific statement of the victim that she made a noise. In the background of these facts and circumstances, the testimony of the victim becomes highly doubtful that she was physically and sexually assaulted for 15 minutes and no one came to her rescue, despite her making a noise.

28. The victim, (PW-2) in her statement also stated that the accused persons came from the sugarcane field of Dhanpal. They were hiding there. But in the site-plan, Ext. Ka.-4, the Investigating Officer has shown that the accused came to the place of the occurrence from the southeast through the wheat field of Harpal Singh while the sugarcane field of Dhanpal is just in the opposite direction i.e. towards the west.

29. So there are major contradictions and inconsistencies in the oral testimony of (PW-2) which makes her testimony unreliable and she cannot be categorized as a sterling witness, making her sole testimony to base the conviction.

30. The defence has also produced two witnesses Munna Lal, (DW-1) and Darshan Singh, (DW-2). (DW-1) has stated that the victim is his cousin sister and there is litigation and enmity between Lalta Prasad and Sukhram. Sukhram is the father of Anmol, the accused while Lalta Prasad is the grandfather of the witness. It is further stated that at the instance of Lalta Prasad, the informant has falsely implicated Anmol and no such incident has occurred.

31. Darshan Singh, (DW-2) has also stated about facts of the enmity between two families. The witness has stated that there is an old enmity between the first informant and accused Pappu. At the instance of Ashok, Pappu has been falsely implicated by the informant. This witness has also stated that no such incident has occurred with the victim.

32. From the statements of the informant (PW-1) and the victim, (PW-2), it also appears that there is some litigation and enmity between the informant's family and the family of the accused persons. So, the probability of false implication of the accused cannot be ruled out.

33. It also appears that the Investigating Officer has not conducted the investigation in a proper manner. The informant, the father of the victim, is not an eyewitness of the incident. He has only lodged the report on the disclosure made by the victim, but the Investigating Officer has prepared the site-plan on the pointing out of the first informant.

34. It is clear from the analysis of the evidence on record that there are serious discrepancies and major contradictions in the prosecution evidence. The sole testimony of the victim does not find support from the medical evidence. No mark of external injuries has been found on the body of the victim while it is in the version of the victim that she was physically assaulted. The doctor has also opined that the injury of a partially torn

hymen may be caused by a fall or from a stretch. No bleeding has been found. So, the sole testimony of the victim is not of the standard which brings her into the category of a sterling witness on the basis of which without any corroboration, the prosecution case can be treated as proved beyond reasonable doubt. The evidence of the victim is not inspiring, natural, and truthful. We are of the considered opinion that from the evidence on record, the prosecution case does not stand to be proved beyond reasonable doubt.

35. The learned trial court has not meticulously appreciated the evidence on record and has committed an error in relying on the sole testimony of the victim to base the conviction.

36. The finding of guilt recorded by the trial court is not sustainable and the appeal is liable to be allowed.

37. The appeal is allowed. The conviction and sentence of the accused appellants, Anmol and Pappu recorded by the trial court are hereby set aside. The accused appellants are in jail. They shall be set at liberty subject to compliance of Section 437-A, Cr.P.C., if they are not wanted in any other case.

38. The office is directed to send a copy of the judgment to all concerned forthwith for necessary compliance. Records of the court below be transmitted back immediately.

Order Date:- 18.10.2023

MN/-

(Syed Aftab Husain Rizvi, J.) (Ashwani Kumar Mishra, J.)