

Neutral Citation No. - 2023:AHC-LKO:45254

A.F.R.

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Case :- CRIMINAL APPEAL No. - 1119 of 2001

Appellant :- Devanand Pandey

Respondent :- State of U.P.

Counsel for Appellant :- Avinash Srivastava

Counsel for Respondent :- Govt. Advocate

Hon'ble Manjive Shukla, J.

1. Heard Mr. Avinash Srivastava, learned counsel appearing for the appellant and Mr. Balram Singh, learned Additional Government Advocate appearing for the State.
2. Appellant through this criminal appeal has challenged the judgment and order dated 28.11.2001 passed by 11th Additional Sessions Judge, Faizabad in **Sessions Trial No.90/93** whereby the appellant has been convicted for offence punishable under Section 376 IPC and has been sentenced for rigorous imprisonment of 10 years with fine of Rs.5,000/- with rider that in the event of failure to deposit the amount of fine, he will undergo six months' rigorous imprisonment.
3. Complainant (brother of the victim) lodged an FIR in Police Station Tarun, District Faizabad which was registered as **Case Crime No.218 of 1992 under Section 363/366 IPC**. The complainant in the aforesaid FIR has stated that accused appellant son of Suryabhan Pandey and Rohit Kumar Pandey son of Ram Bahor Pandey, residents of Village Vidyapur Gayaspur, P.S. Tarun, District Faizabad had enticed his sister and thereby took her away. The complainant in the FIR has further stated that his sister is aged

about 14 years and is a minor. In the FIR, it has further been stated that his sister had also taken away cash and jewellery with her. The complainant in the FIR has said that he tried to search out his sister but she is untraceable, therefore the First Information Report be lodged and the police may search out his sister.

4. After lodging of the aforesaid FIR, the police of the concerned police station started investigation. On 5.1.1993 at about 7 p.m. in presence of witnesses Madan Mohan Mishra and Mohd. Junaid Khan, the police found that the victim was going on the road near the south Kabristan of village Saidpur towards village Pandey Ka Purwa and thereafter she was questioned and her bag was searched out, then it was found that jewellery was in the bag. The recovery memo was prepared and the victim after medical examination was handed over to her father.

5. The police after completing the investigation submitted charge sheet against accused appellant under Sections 363, 366, 376 IPC and against accused Rohit Kumar Pandey under Section 363/34 and 366/34 IPC.

6. The trial court framed charges against accused appellant under Sections 363, 366, 376 IPC and against accused Rohit Kumar Pandey under Sections 363/34 and 366/34 IPC. During trial, testimony of PW-1 (brother of the victim), PW-2 (victim), PW-3 Dr. Meera Srivastava, PW-4 Dr. D.R. Bhuwan and PW-5 Sub Inspector M.L. Khan was recorded.

7. Thereafter, statements of both the accused were recorded under Section 313 CrPC.

8. PW-1 (brother of the victim) in his testimony recorded during trial has deposed that in the night of 2/3.11.1992 he was sleeping outside his house and his sister was sleeping inside the house.

When he woke up in the night and went inside the house, he found that his sister was not there and at that time it was about 2.30 a.m. in the night. PW-1 in his testimony has further deposed that the age of his sister was 14 years and he tried to search out his sister but she could not be traced. He has further stated that accused Rohit Kumar Pandey and accused appellant are the residents of his village and both used to come to his house and also used to talk to his sister. He also deposed that he had instructed them not to talk to his sister. He said that when his sister could not be traced out, then he became confident that Rohit and accused appellant had enticed his sister and further his sister along with her had also taken away Rs.200/- cash and jewellery. When his sister could not be traced out, then on the next day he went to the police station and lodged the FIR. He has also said that at the time of incident his mother and father were not present in the house as his mother had gone to Ayodhya and his father was in Surat on his service.

9. PW-1 complainant in his cross examination has deposed that at the time of incident his age was about 25 years. He has further said that he has two younger sisters namely Saroj Kumari and victim. Saroj Kumari was two years younger to him and victim was two years younger to Saroj Kumari.

10. PW-2 (victim) in her testimony recorded before the trial court has deposed that she knows accused appellant and Rohit, who are residents of village Vidyapur and marriage of accused appellant had already taken place. She has further deposed that her father is in service at Surat. PW-2 in her testimony has also stated that accused appellant and Rohit by extending threat to her had taken her away with them. The accused appellant and Rohit used to come to her house frequently before the incident and accused appellant is the distant brother of her father. The marriage of

accused appellant had already taken place one year back but accused appellant used to say that he loves her a lot and his marriage has been done at a wrong place and he further used to say that he will marry with victim. The mother of PW-2 came to know about the talks between accused appellant and victim and then she instructed the accused appellant not to come to her house. On the date of incident her mother was in Ayodhya. PW-2 in her testimony has further deposed that on the date of incident at about 2.00 a.m. in the night, there was knock at the door and she opened the door, then the accused appellant extended threat to her and forcibly took her on his bicycle to Faizabad and Rohit also went with him. She has also said that due to threat given by the accused appellant she took Rs.200/- cash and jewellery with her. Rohit stopped at Faizabad and thereafter the accused appellant took her on bicycle to Ayodhya and then took her to Hanuman temple and forcibly put *Sindoor* in her hair. PW-2 has further stated that in the night she and the accused appellant stayed at Ayodhya station and next day he took her to Barabanki and there she stayed at station and on 5.11.1992 he took her to the court compound at Barabanki and said that they should marry in writing and further said that she should tell her age as 20 years and he will not tell anything about his first marriage. In the court the accused appellant by extending threat to the victim took her signatures on some plain papers. Thereafter, the accused appellant took PW-2 to Delhi and there he went in a room in some colony and in the night of the same day when the accused appellant found PW-2 alone, he extended threat to her and against her will did sexual intercourse. PW-2 in her statement has further stated that whenever he used to protest, the accused appellant extended threat and said that he will go leaving her alone. PW-2 in her statement has also said that after the date of incident she remained with the accused appellant for

about two months and during the period when she stayed in the colony every night the accused appellant forcibly used to do sexual intercourse with her. After two months he brought her to Barabanki from Delhi and said her to take tempo and to go to village Saidpur and there to contact his Mause Ram Kumar who will arrange her stay at the house of some one known to him and further the accused appellant for arranging money went to his house at village Vidyapur and asked that he will come tomorrow. PW-2 has also said that after leaving tempo while she was moving towards village Pandey Ka Purwa, then the Inspector of the police station along with her father came and with the help of Jeep light they caught her and thereafter memo of recovery was prepared and she after her medical examination was handed over to her father.

11. It is to be noted here that though PW-2 (Victim) in her testimony recorded during trial has not said anything about her age at the time of incident but her statement under Section 164 CrPC was recorded on 16.1.1993 and in the said statement she has said that her age was 15-16 years.

12. PW-3 Dr. Meera Srivastava, Emergency Medical Officer, Woman Hospital, Faizabad in her testimony recorded during trial has said that she had conducted medical examination of the victim on 7.1.1993 and in the medical examination it has been found that her hymen was old torn and two fingers can easily be inserted in her private part. PW-3 has further stated that as per the x-ray report the age of the victim was 18 years and further no opinion can be given in respect of rape as the girl was used to sexual intercourse.

13. PW-4 Dr. D.R. Bhuwan, Senior Medical Officer (X-Ray) in his testimony recorded during trial has deposed that the x-ray of right elbow and right wrist of the victim was carried out on 8.1.1993 and

on the basis of the x-ray report the age of the victim was found to be 18 years.

14. Lastly, testimony of PW-5 Sub Inspector M.L. Khan, Incharge Chowki Shahjadpur, Kotwali Akbarpur has been recorded and he has proved different papers submitted by the police.

15. Thereafter, the statements of accused under Section 313 CrPC were recorded. Accused appellant in his statement has categorically stated that he had neither extended any threat to the victim nor had enticed for taking her away and further she had gone with him with her free will. Accused appellant has also stated that he did not extend any threat to the victim for having sexual intercourse with him and whenever sexual intercourse took place it was with her consent. Accused appellant has also stated that the victim on the date of incident was major and after the incident she had also filed one Complaint Case No.3219/92 in the court of Chief Judicial Magistrate, Barabanki against the brother of the victim and others wherein her statement under Section 200 CrPC was recorded on 27.11.1992. In the aforesaid statement recorded under Section 200 CrPC the victim has stated that her age is 19 years and she has also stated that she had married with the accused appellant with her free will. The accused appellant has also filed certified copy of the statement of the victim recorded under Section 200 CrPC in Case No.3219/92, Victim vs. brother of the victim and others filed in the court of Chief Judicial Magistrate, Barabanki. For convenience, the aforesaid statement recorded under Section 200 CrPC is reproduced as under:-

"नकल बयान अन्तर्गत 200 CrPC.....(पीड़िता)

.....(पीड़िता) उम्र 19 साल निवासिनी मो० काशीपुर कस्बा व थाना रुदौली जिला बाराबंकी ने सशपथ बयान किया कि मेरे पिता रामचन्द्र वाहर सूरत में रहते हैं जिनकी बिना इजाजत के मेरे भाई सुधीर कुमार

पाण्डेय व मेरे चाचा सत्यनारायन व मेरी माँ परमेश्वरी एक अज्ञात आदमी के हाथ बेच देना चाहते थे इसके लिए मैं तैयार नहीं थी, मेरा मूल रूप से निवास विद्यापुर थाना तारुन जिला फैजाबाद है लेकिन मुल्जिमान बराबर दबाव डाल रहे थे कि मेरी मर्जी के हिसाब से चलो नहीं तो मार डालेंगे। इसी डर के कारण मैं दिनांक 2.11.92 को अपनी मर्जी से बिना किसी जोर दबाव के अपने एक रिस्तेदार मो० काशीपुर कस्बा व थाना रुदौली जिला बाराबंकी के घर आ गई और उनसे मैंने घटना बाकयदा बतायी और अपने रिस्तेदार से अनुरोध किया कि अब हम मुल्जिमानों के घर नहीं जायेंगे क्योंकि मेरे पिता जी घर पर नहीं हैं। तब मेरे रिश्तेदारों ने देवानन्द पुत्र सूर्यभान जो मेरे गांव विद्यापुर के रहने वाले हैं को रुदौली बुलाया और सबके सामने देवानन्द से शादी करना तय कर लिया और मैंने गवाहों के सामने अपनी मर्जी से शादी कर लिया।

आज से 15 दिन हुए जब शाम पांच बजे उपरोक्त मुल्जिमान मेरे रहने के स्थान मो० काशीपुर आये इनके साथ तीन अज्ञात आदमी भी थे और फिर दबाव डाला और मर्जी के खिलाफ मुल्जिमानों ने थप्पड़ों से मारा और मार कर लापता करने की धमकी दिया। मुझे मुल्जिमानों से जान का खतरा है। देवानन्द ने मुझे भगाया नहीं बल्कि मैंने अपनी मर्जी से उनसे शादी किया है। इस घटना की रिपोर्ट मैंने पुलिस कप्तान को दिया है।

सुनकर तस्दीक किया।

ह०-.....(पीड़िता)

ह०-

कोर्ट सर्टी०

मुख्य न्यायिक

सी.जे.एम

दण्डाधिकारी बाराबंकी

बाराबंकी

27.11.92

27.11.92

16. Learned trial court has considered the testimonies of the prosecution witnesses and the statements of the accused recorded under Section 313 CrPC. Learned trial court has found that though the victim in her testimony has said that the accused appellant and Rohit had extended threat to her and enticed her and thereby took her away but the facts of the case clearly reveal that the victim while going with the accused appellant took away Rs.200/- cash

and jewellery from her house. Thereafter, she went on the bicycle of the accused appellant to Faizabad and further she went on bicycle from Faizabad to Ayodhya. At Ayodhya, the accused appellant and the victim went to Hanuman temple and there the accused appellant had put *Sindoor* in her hair. The victim in the night stayed at Ayodhya station and the next day came with the accused appellant to Barabanki and stayed at station. Thereafter, on 5.11.1992 she along with the accused appellant went to the court and there she signed on some plain papers. Thereafter, the victim went to Delhi with the accused appellant and stayed in a room in some colony at Delhi and there sexual intercourse took place and after staying for some time in Delhi, accused appellant took her back to Barabanki and while she was going from Barabanki to some place she was caught by the police and was handed over to her father. During the aforesaid travel from village to Faizabad, Faizabad to Ayodhya, Ayodhya to Barabanki, Barabanki to Delhi and Delhi to Barabanki, the victim was with the accused appellant and must have passed through many places having presence of several persons but she never made any attempt either to make a cry or to contact any person to tell that the accused appellant had extended any kind of threat and she had gone with the accused appellant under the threat extended by him. Therefore, in the facts and circumstances of the case, learned trial court found that there was no threat extended by the accused appellant and the victim was moving with accused appellant with her free will.

17. Learned trial court has considered the entire evidence available on record in respect of the age of the victim on the date of incident and though the brother of the victim and the victim herself in her statement recorded under Section 164 CrPC have stated

that the victim was minor on the date of incident but the medical examination conducted by the doctors clearly reveals that on the date of medical examination the victim was aged about 18 years and further the brother of the victim in his statement and the cross examination has categorically stated that on the date of incident his age was about 25 years. He has two younger sisters, next sister is two years is younger to him and the victim is two years younger to the next sister, as such, the age of the victim on the date of incident as per version of his brother was 21 years. In view of the aforesaid evidence, learned trial court has concluded that the victim on the date of incident was major.

18. Learned trial court in view of the aforesaid conclusions ultimately has acquitted the accused appellant and Rohit for the offences punishable under Sections 363 and 366 IPC.

19. Learned trial court thereafter has considered that the victim in her testimony recorded during trial has said that accused appellant did sexual intercourse with her without her consent and even she was extended threat by accused appellant and the learned trial court has concluded that once the victim has said that accused appellant had done sexual intercourse with her without her consent and by putting her to threat, then there is no reason to disbelieve her version and accordingly, accused appellant is liable to be convicted for offence punishable under Section 376 IPC and thus, the learned trial court has convicted the accused appellant under Section 376 IPC and sentenced him for rigorous imprisonment of 10 years and fine of Rs.5,000/-.

20. Learned counsel appearing for the appellant has vehemently argued that the testimony of the prosecution witnesses recorded during trial categorically demonstrates that PW-1 and PW-2 all along have narrated an absolutely false story. Even the trial court

has concluded that the testimony given by the victim in respect of threat extended to her by the accused appellant for running away with him and to marry him is absolutely false as she travelled at many places with the accused appellant and she never raised any alarm or she never asked any help from other persons present on the roads. Learned trial court has also found the version of the prosecution and the statement of the victim in respect of her age to be absolutely false as in the medical report the doctors have found the age of the victim to be 18 years and further as per the testimony of her brother, she was of 21 years of age on the date of incident.

21. Learned counsel for the appellant has further argued that once the testimony of the victim in respect of threats extended to her for running away and in respect of her age has been found to be unbelievable, then the part of her testimony that she was put to sexual intercourse by the accused appellant under threat and without her consent cannot be believed unless there is some corroborative evidence and in the present case there is only piece of testimony of the victim and there is no other corroborative evidence and therefore, learned trial court while convicting the appellant for offence punishable under Section 376 IPC has committed manifest illegality.

22. On the other hand, learned Additional Government Advocate appearing for the State has argued that since the victim has said that sexual intercourse was done by the accused appellant under threat and without her consent, as such the learned trial court has rightly convicted the accused appellant for offence punishable under Section 376 IPC.

23. I have considered the submissions advanced by the learned counsels for the parties and I have also perused the record of the case.

24. I find that the victim in her testimony recorded during trial has deposed that she was extended threat and enticed by the accused appellant and Rohit and thereby she went with the accused appellant. She has further stated that she went from her house to Faizabad with the accused appellant on bicycle. Thereafter, from Faizabad to Ayodhya on bicycle and then in Ayodhya she along with the accused appellant went to Hanuman temple where the accused appellant extended threat and put '*Sindoor*' in her hair. She has further said that from Ayodhya she came to Barabanki and in Barabanki she along with the accused appellant went to the court compound and there under threat she signed on some plain papers. She has further stated that thereafter she along with the accused appellant went to Delhi and stayed there in a room in some colony for some days and there the accused appellant under threat and without her consent did sexual intercourse with her.

25. No doubt, in cases lodged under Sections 363, 366 and 376 IPC, testimony of the victim girl is of paramount importance and once the testimony of the victim is without contradiction, then the said testimony itself is sufficient to convict the accused but where it is found that the story narrated by the victim is absolutely improbable and from the very beginning the victim is giving false statement, then her testimony definitely has to be looked by the court with extra care and in the said circumstance, other corroborative evidence is also necessary to convict the accused for offences punishable under Sections 363, 366 and 376 IPC.

26. I find that initial version of the victim that she was put to threat and was enticed by the accused appellant to run away with him

has been found to be unbelievable by the learned trial court as the circumstances narrated in the prosecution story make it absolutely improbable that if a girl is being taken away by extending threat by only one man and she is passing through roads having heavy traffic and persons, then she will not make any hue and cry and will not make complaint to any person and accordingly, learned trial court has acquitted the accused appellant and Rohit for offence punishable under Section 366 IPC.

27. I also find that learned trial court has also concluded that the testimony of PW-1 and PW-2 regarding the age of the victim on the date of incident is absolutely false as in the medical examination the victim has been found to be 18 years of age and as per version of her brother given in his cross-examination she on the date of incident was aged about 21 years and further the victim herself has filed a Complaint Case No.3219/92 in the court of Chief Judicial Magistrate, Barabanki wherein in her statement recorded under Section 200 CrPC she has categorically said that her age is 19 years and thereby learned trial court has acquitted the accused of the offence punishable under Section 363 IPC.

28. From the aforesaid, it can be very easily deduced that the victim's testimony recorded during trial all along has been found to be unbelievable/improbable by the trial court itself and therefore, there is hardly any occasion to rely upon a small piece of her testimony and to convict accused appellant for offence punishable under Section 376 IPC. It is also a very important piece of evidence which was on record in the trial court and even the accused in their statement recorded under Section 313 CrPC have also stated about the said evidence that the victim herself after the incident in question had filed a Complaint Case No.3219/92, Victim vs. brother of the victim and others i.e. against her brother in which her

statement under Section 200 CrPC was recorded on 27.11.1992 and in the said statement she has categorically said that her age is 19 years and she has married to the accused appellant with her free will. The aforesaid statement of the victim recorded under Section 200 CrPC in different complaint case categorically demonstrates that her marriage took place with the accused appellant with her free will.

29. The facts when seen in totality clearly demonstrate that the testimony of the victim recorded during trial does not inspire confidence and has been found to be absolutely unbelievable/improbable, therefore in these circumstances one piece of her testimony that the accused appellant extended threat to her and did sexual intercourse with her without her consent, that too without there being any corroborative evidence regarding threat and sexual intercourse without consent of the victim, can also not be relied upon and therefore, the trial court while relying upon a piece of her testimony without any corroborative evidence has committed manifest illegality.

30. Once it is found that from the very beginning the victim is giving false evidence, then a very small piece of her evidence cannot be relied upon unless there is some other corroborative evidence. In the present case, from the very beginning the entire prosecution story has been found to be false by the trial court itself, therefore unless there is some other clinching corroborative evidence, the accused cannot be convicted only by relying upon a very small piece of testimony of the witness recorded during trial.

31. The Hon'ble Supreme Court in its judgment rendered in the case of **Baldeo Sao vs. State of Jharkhand, reported in 2007 (CrLJ) 3992** has categorically held that once the prosecution version has been found to be unbelievable/improbable, then the

accused cannot be convicted solely relying on a small piece of evidence of the victim. Relevant portion of the aforesaid judgment is extracted as under:-

“4. The present appeal has been preferred mainly on the grounds that the learned trial Court has not considered the improbability of the prosecution case. It was also asserted that the doctor (PW 3) did not find any sign of rape and in absence of probable witness of the occurrence, the reliance placed by the learned trial Court on sole statement of the prosecutrix is misplaced. Mr. P.P.N. Roy, learned senior counsel appearing on behalf of the appellant, submitted that the reason behind this false prosecution has been admitted by PW 1 and PW 2 during their statements before the trial Court. According to learned Counsel, further in absence of the investigating officer, the defence has been prejudiced. Therefore, the appellant may be acquitted to the charges.

5. I have gone through the evidence on record. The prosecution story depends upon the sole statement of PW 1, the victim. According to her, the appellant alongwith Dilip Sao entered in the house on pretext of water and forcibly committed rape while nobody was in her house. She has given the details of the occurrence and thereafter stated that she became unconscious. According to her version, when her bhabhi returned after few hours, she was made conscious when she narrated the entire incident to her bhabhi and brother. She further admitted that the same night they went to Ichak Police Station where her statement was recorded by Ranvijay Singh vide Ext. 1. However, she admitted during cross-examination that her brother PW 2 Hemjraj Turi was an accused in a case under Section 395 the Indian Penal Code in which the father of the appellant. Tulsi Turi, has given evidence against his brother. She admitted vide paragraph-20 that her parents as well as two other brothers were alive. According to her version, she has got this experience of sexual intercourse for the first time and she got injured during rape. However, this fact has been disputed by PW 3 Dr. Kalpana Sharan, who found hymen with old rupture admitting two fingers and no sign of rape on 13.4.1996. She did not find any injury on other parts of her body PW 2, brother of the prosecutrix is hearsay witness of the occurrence. According to him vide paragraph-11, the father of the appellant has got a case registered against him for theft. He supported prosecutrix regarding her injuries on her body. He named four persons to have accompanied the victim to Police Station. However, no other witness has been examined before the trial Court though named in the chargesheet.

6. The learned trial Court has considered all these facts and discussed vide paragraphs-9 to 11. However, he has relied upon the sole evidence of prosecutrix and convicted the appellant in spite of the fact that PW 1 and PW 2 have admitted enmity between the families for a criminal case against PW 2 in which the father of the appellant has deposed against him. The trial Court has disbelieved the version regarding the offence under Section

3/4 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, but accepted the prosecution version from prosecutrix claiming that she has been subjected to sexual intercourse for the first time, the doctor (PW 3) contradict her. The doctor did not find any mark of violence on her private parts, which is against the prosecution version.

7. In the facts and circumstances discussed above where previous enmity between the families is admitted and in absence of any evidence to support the prosecution version that PW 1 has been subjected to rape by two persons, I find and hold that the prosecution in the facts of present case has not been able to prove beyond all reasonable doubts the charges against the appellant. Accordingly the present appeal has got merit and deserves to be allowed.

32. The Hon'ble Supreme Court in its judgment dated 14th February, 2020 rendered in the case of **Santosh Prasad @ Santosh Kumar vs. State of Bihar, reported in (2020) 3 SCC 443** has considered the issue of conviction of the accused based on the sole testimony of the prosecutrix and has held that where the story narrated by the prosecutrix has been found to be under the cloud of suspicion, then one piece of her testimony cannot be made the basis for conviction of the accused under Section 376 IPC. The Hon'ble Supreme Court has categorically held that the testimony of the prosecutrix has to pass test of 'sterling witness' and only then the said testimony can be made the basis for conviction of the accused. Relevant portion of the aforesaid judgement of the Hon'ble Supreme Court is extracted as under:-

"5. We have heard the learned counsel for the respective parties at length.

5.1 We have considered in detail the impugned judgments and orders passed by the High Court as well as that of the learned trial Court convicting the accused. We have also considered in detail the evidence on record, both oral as well as documentary.

5.2 From the impugned judgments and orders passed by both the courts below, it appears that the appellant has been convicted solely relying upon the deposition of the prosecutrix (PW5). Neither any independent witness nor even the medical evidence supports the case of the prosecution. From the deposition of PW1, it has come on record that there was a land dispute going

on between both the parties. Even in the cross-examination even the PW5 – prosecutrix had admitted that she had an enmity with Santosh (accused). The prosecutrix was called for medical examination by Dr. Renu Singh – Medical Officer and PW7 – Dr. Renu Singh submitted injury report. In the injury report, no sperm as well as RBC and WBC were found. Dr. Renu Singh, PW7 – Medical Officer in her deposition has specifically opined and stated that she did not find any violence marks on the body of the victim. She has also categorically stated that there is no physical or pathological evidence of rape. It is true that thereafter she has stated that possibility of rape cannot be ruled out (so stated in the examination- in-chief). However, in the cross-examination, she has stated that there was no physical or pathological evidence of rape.

5.3 As per the FSL report, the blood group on the petticoat and the semen on the petticoat are stated to be inconclusive. Therefore, the only evidence available on record would be the deposition of the prosecutrix. It cannot be disputed that there can be a conviction solely based on the evidence of the prosecutrix. However, the evidence must be reliable and trustworthy. Therefore, now let us examine the evidence of the prosecutrix and consider whether in the facts and circumstances of the case is it safe to convict the accused solely based on the deposition of the prosecutrix, more particularly when neither the medical report/ evidence supports nor other witnesses support and it has come on record that there was an enmity between both the parties. 5.4 Before considering the evidence of the prosecutrix, the decisions of this Court in the cases of Raju (*supra*) and Rai Sandeep @ Deepu, relied upon by the learned Advocate appearing on behalf of the appellant-accused, are required to be referred to and considered.

5.4.1 In the case of Raju (*supra*), it is observed and held by this Court in paragraphs 11 and 12 as under:

“11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration.

12. Reference has been made in Gurmit Singh case [(1996) 2 SCC 384 : 1996 SCC (Cri) 316] to the amendments in 1983 to [Sections 375 and 376](#) of the Penal Code making the penal provisions relating to rape more stringent, and also to [Section](#)

114-A of the Evidence Act with respect to a presumption to be raised with regard to allegations of consensual sex in a case of alleged rape. It is however significant that Sections 113-A and 113-B too were inserted in the Evidence Act by the same amendment by which certain presumptions in cases of abetment of suicide and dowry death have been raised against the accused. These two sections, thus, raise a clear presumption in favour of the prosecution but no similar presumption with respect to rape is visualised as the presumption under Section 114-A is extremely restricted in its applicability. This clearly shows that insofar as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally, her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined.” 5.4.2 In the case of Rai Sandeep alias Deepu (supra), this Court had an occasion to consider who can be said to be a “sterling witness”. In paragraph 22, it is observed and held as under:

“22 In our considered opinion, the “sterling witness” should be of a very high quality and calibre 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 every one 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 such similar tests to be applied, can it 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.” 5.4.3 In the case of [Krishna Kumar Malik v. State of Haryana](#) (2011) 7 SCC 130, it is observed and held by this Court that no doubt, it is true that to hold an accused guilty for commission of an 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. 5.5 With the aforesaid decisions in mind, it is required to be considered, whether is it safe to convict the accused solely on the solitary evidence of the prosecutrix? Whether the evidence of the prosecutrix inspires confidence and appears to be absolutely trustworthy, unblemished and is of sterling quality?

6. Having gone through and considered the deposition of the prosecutrix, we find that there are material contradictions. Not only there are material contradictions, but even the manner in which the alleged incident has taken place as per the version of the prosecutrix is not believable. In the examination- in-chief, the prosecutrix has stated that after jumping the fallen compound wall accused came inside and thereafter the accused committed rape. She has stated that she identified the accused from the light of the mobile. However, no mobile is recovered. Even nothing is on record that there was a broken compound wall. She has further stated that in the morning at 10 O'clock she went to the police station and gave oral complaint. However, according to the investigating officer a written complaint was given. It is also required to be noted that even the FIR is registered at 4:00 p.m. In her deposition, the prosecutrix has referred to the name of Shanti Devi, PW1 and others. However, Shanti Devi has not supported the case of the prosecution. Therefore, when we tested the version of PW5 -prosecutrix, it is unfortunate that the said witness has failed to pass any of the tests of “sterling witness”. There is a variation in her version about giving the complaint. There is a delay in the FIR. The medical report does not support the case of the prosecution. FSL report also does not support the case of the prosecution. As admitted, there was an enmity/dispute between both the parties with respect to land. The

manner in which the occurrence is stated to have occurred is not believable. Therefore, in the facts and circumstances of the case, we find that the solitary version of the prosecutrix – PW5 cannot be taken as a gospel truth at face value and in the absence of any other supporting evidence, there is no scope to sustain the conviction and sentence imposed on the appellant and accused is to be given the benefit of doubt.”

33. The law laid down through the aforesaid judgments of the Hon'ble Supreme Court, in clear terms, provides that if the testimony of the prosecutrix has been found to be full of contradictions, then the conviction cannot be based on certain piece of testimony of the prosecutrix unless there is corroborative evidence to support the version of the prosecutrix.

34. In the present case, learned trial court has found that the testimony of the prosecutrix is unbelievable/improbable, therefore, in absence of any corroborative evidence, learned trial court has committed manifest error of law and facts both while convicting and sentencing the appellant for offence punishable under Section 376 IPC.

35. I find and hold that the prosecution in the facts of the present case has not been able to prove charges against the appellant beyond reasonable doubt. Accordingly, the present appeal has got merit and deserves to be allowed.

36. In view of the aforesaid reasons, this criminal appeal is **allowed**. The judgment and order dated 28.11.2001 passed by 11th Additional Sessions Judge, Faizabad in Sessions Trial No.90/93 convicting appellant for offence punishable under Section 376 IPC and sentencing him for rigorous imprisonment of 10 years with fine of Rs.5,000/-, is hereby set aside. The appellant is acquitted of the charge levelled against him for offence punishable under Section 376 IPC.

37. The appellant is already on bail, therefore, his bail bonds are cancelled and sureties are discharged.

38. Let lower court record be sent back to the trial court concerned along with a copy of this order for necessary compliance.

Order Date :- 12.7.2023

Salim