

Court No. - 13

Case :- CRIMINAL APPEAL No. - 350 of 2000

Appellant :- Raees

Respondent :- The State Of U.P.

Counsel for Appellant :- Kailash Nath Mishra

Counsel for Respondent :- Govt Advocate

Hon'ble Karunesh Singh Pawar,J.

1. Heard Sri Kailash Nath Mishra, learned counsel for the appellant, Ms. Mamta Pandey, learned A.G.A. for the State-respondents and perused the record.

2. This criminal has been filed against the judgment and order dated 19.04.2000 passed by Sessions Judge, Balrampur in Sessions Trial No.7 of 1999, arising out of Case Crime No.07/1996, Police Station Kotwali Jarwa, District Balrampur whereby the appellant has been convicted for offence under Section 376 IPC and sentenced to undergo rigorous imprisonment for seven years with fine of Rs.1,000/- and in default of making payment of fine, appellant would further undergo simple imprisonment for a period of one month.

3. Prosecution case as given in the written report is that the complainant aged about 18 years belongs to scheduled caste. On 18/19 February, 1996 in the mid night while she was sleeping along with her brother and mother after taking dinner at her home, then at around 11:00 pm accused Raees came inside *chhappar* and by gagging the mouth of the complainant raped her. After that incident, when the complainant raised alarm, her mother and brother woke up and after seeing them, the accused Raees started fleeing. The brother of the informant, Jokhu, Badri and several others of the village have chased the accused in the torch light,

however, he ran away towards north after abusing and threatening them. Right foot leather sandal of the accused was left on the spot which was given by the complainant at the time of registering the F.I.R. A written report was given thereafter, on the basis of which chik F.I.R. was registered.

4. The Investigating Officer got the complainant/victim medically examined, prepared the site plan, took the statement under Section 161 Cr.P.C. and after completing the formalities filed the charge-sheet.

5. Prosecution to prove its case has produced PW-1 Prema Devi, PW-2 Ram Dev, brother of the victim, PW-3 Dr. S. Dixit, PW-4 Sub Inspector R.P. Arya, Investigating Officer of the case.

6. As documentary evidence following materials were given:-

- "1. लिखित सूचना (प्रदर्श क।)
2. पूरक रिपोर्ट प्रेमादेवी (प्रदर्श क-2)
3. रेडियोलॉजिस्ट की रिपोर्ट (प्रदर्श क-3)
4. स्थल चित्र (प्रदर्श क 4)
5. फर्द पेट्रीकोट (प्रदर्श क-5)
6. फर्द देबरी (प्रदर्शक 6)
7. फर्द टार्च (प्रदर्श क-7)
8. फर्द चप्पल (प्रदर्श क 8)
9. प्रथम सूचना रिपोर्ट (प्रदर्श क- 9)
10. नकल रपट नं०-24 (दैनिकी) (प्रदर्श क 10)
11. आरोप-पत्र (प्रदर्श क॥)"

7. In the statement under Section 313 Cr.P.C. the defence of the accused is of denial. He has submitted that he has been falsely implicated. Specific reason has been assigned by him as to why he has been falsely implicated. He stated that his father had fought the election of Gram Pradhan in which Ram Dev PW-2 had supported his father's opponent.

8. PW-1 in her examination in chief has repeated the prosecution story and stated that the accused broke into her house, gagged her mouth and forcibly raped her, and when he ran away she raised alarm. Upon that, her brother came. Her mother was also sleeping on the same *puwal*. Since her mouth was gagged, therefore, she could not awake her. She woke up on her alarm. While running, the appellant left one of his sleepers on the spot. Hearing the alarm Badri, Pherai, Malik Ram and others have come. They have seen the accused in the torch light. Her brother and Badri caught hold of the accused by hand, however, he ran away by extending threat to kill. The *peticoat* worn by her was given to the police along with sleeper of the accused.

In the cross, she stated that the room in which she and her mother were sleeping was 10 hand long and 6 hand width. She was at a distance of three hands although was sleeping on the same *puwal*. The brother was sleeping in the north house which is adjacent. As long as the accused remained with her, her mother did not wake up. The *peticoat* which the victim wore at the time of incident had stains of semen at two places which were shown to the Investigating Officer. She was raped for half an hour. She further stated that while fleeing away there was fight between the accused and her brother PW-2 for a period of 10 minutes. She has admitted that she received Rs.25,000/- from the government as compensation in such incident. She admitted that there is *partybandi* in the village.

Likewise, PW-2 Ram Dev, brother of the victim has also supported the prosecution story. In the examination in chief he has contradicted the statement of PW-1 to the extent that she is the scribe of written report. He has stated that he had written the written report and P.W.1 had put her thumb impression on it.

In the cross, he has stated that he was beaten by

Taluqdar, father of the appellant, however, he stated that this incident has not been written in the written report because of fault of the police. He saw the appellant running away. The witness further stated that PW-1 told him that she was raped by appellant. He further admitted that he is an accused in the murder trial and has lodged one case against Taluqdar, father of the appellant.

PW-3 Dr. S. Dixit who medically examined the victim has found in the internal examination that vagina accepted two fingers easily, and hymen was torn, there was no mark of injury on the private part of the victim. According to ossification test, the victim was found above 19 years of age and was habitual of sexual intercourse, and no opinion can be given regarding rape.

PW-4 is the Investigating Officer who got the victim medically examined, produced her for statement under Section 164 Cr.P.C. and after conducting the investigation has filed the charge-sheet.

In the cross, he has admitted that the recovered material such as *peticoat*, *dhebri*, torch and *chappal* have not been produced before the court.

9. Learned counsel for the appellant submits that prosecution story is highly improbable. In a house of such short dimension and on the same bed when the mother is also sleeping along with victim, it is totally improbable that the victim is being raped for a period of 30 minutes but still the mother could not know about the incident.

His second submission is that after the offence was committed, it is the prosecution case that mother woke up upon alarm being raised by the victim and has seen accused running away. The mother of the victim and the three other persons namely Badri, Phere, Malik Ram

who are allegedly said to have seen the incident have not been produced by the prosecution; rather they have been withheld. No plausible reason has been assigned by the prosecution for withholding such eye witnesses, thus, adverse inference should be taken against the prosecution for such inaction.

He submits that *peticoat* which is Ex.ka-5 as well as the other recovery made by the Investigating Officer, such as torch, dhebri etc. have not been produced before the court. In fact, nothing has been produced before the court. He submits that the *peticoat* of the victim does not bear any semen as is alleged by the victim in her statement before the court. Thus, the statement of the victim does not inspire confidence. He further submits that victim in her statement has submitted that oral *tehrir* was given by her and upon that F.I.R. was registered. This testimony of the victim PW-1 has been contradicted by PW-2 who has stated that he himself is scribe of the written report and PW-1 had put her thumb impression thereon.

He further submits that medical does not corroborate the prosecution case. PW-3 doctor has not given any opinion regarding rape. In the ossification test, the age of the victim was found 19 years and no injury has been found on the private part of the victim. He further submits that as per the statement of P.W.1 and P.W.2, the appellant was caught hold by P.W.2 and there was a fight between them, but still neither the appellant nor P.W.2 has been medically examined and this again makes the testimony of P.W.1 doubtful. There is no corroborative material to support the testimony of P.W.1.

10.. Learned A.G.A. has opposed the contention and submits that the testimony of the victim is intact and on the basis of such testimony alone without there being any corroboration, the accused can be convicted.

11. I have heard learned counsel for the appellant and perused the record.

A perusal of statement of PW-1 shows that the offence has been committed in a narrow room of the dimension ranging 10 hands long and 6 hands width. It is also stated by PW-1 that her mother was also sleeping on the same *puwal* on which she was sleeping. According to PW-1 she was raped for half an hour and all this time, the mother did not wake up. The statement of PW-1 that she has informed the police orally and on the basis of that the F.I.R. was registered had been contradicted by PW-2. He stated in his statement that he is the scribe of the written report and PW-1 is the signatory. Further PW-1 in her statement has stated that for a period of 10 minutes, the appellant and PW-2 had fought but still they have not been medically examined. She has further stated that her *peticoat* was recovered by the police on which at two places semen was found. Perusal of the recovery memo Ex.ka-5 shows that there is no such spot of semen present on the recovered *peticoat*. All this makes the statement of PW-1 highly improbable and thus makes the prosecution case as doubtful. Statement of the PW-1 does not inspire confidence. There is no corroborative material or something sort of corroboration in support of the prosecution case. The mother who has seen the accused while fleeing away along with Badri, Phere, Malik Ram and others, who are the very important eye witnesses have been withheld by the prosecution without assigning any reason. Withholding of such important witnesses would warrant to draw an adverse inference against the prosecution. The Supreme court in **Takhaji Hiraji vs. Thakore Kubersing Chamansing & Ors.**: (2001) 6 SCC 145 (paragraph-19) has held as under :-

"So is the case with the criticism levelled by the High Court on the prosecution case finding fault therewith for non-examination of independent witnesses. It is true that if a material witness, which would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or

made good by examining a witness which though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the Court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the Court ought to scrutinise the worth of the evidence adduced. The court of facts must ask itself whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the Court can safely act upon it uninfluenced by the factum of non-examination of other witnesses. In the present case we find that there are at least 5 witnesses whose presence at the place of the incident and whose having seen the incident cannot be doubted at all. It is not even suggested by the defence that they were not present at the place of the incident and did not participate therein. The injuries sustained by these witnesses are not just minor and certainly not self-inflicted. None of the witnesses had a previous enmity with any of the accused persons and there is apparently no reason why they would tell a lie. The genesis of the incident is brought out by these witnesses. In fact, the presence of the prosecution party and the accused persons in the chowk of the village is not disputed. How the vanity of Thakores was hurt leading into a heated verbal exchange is also not in dispute. Then followed the assault. If the place of the incident was the chowk then it was a sudden and not pre-meditated fight between the two parties. If the accused persons had reached their houses and the members of the prosecution party had followed them and opened the assault near the house of the accused persons then it could probably be held to be a case of self-defence of the accused persons in which case non-explanation of the injuries sustained by the accused persons would have assumed significance. The learned Sessions Judge has on appreciation of oral and circumstantial evidence inferred that the place of the incident was the chowk and not a place near the houses of the accused persons. Nothing more could have been revealed by other village people or the party of tight rope dance performers. The evidence available on record shows and that appears to be very natural, that as soon as the

melee ensued all the village people and tight rope dance performers took to their heels. They could not have seen the entire incident. The learned Sessions Judge has minutely scrutinised the statements of all the eye-witnesses and found them consistent and reliable. The High Court made no effort at scrutinising and analysing the ocular testimony so as to doubt, if at all, the correctness of the several findings arrived at by the Sessions Court. With the assistance of the learned counsel for the parties we have gone through the evidence adduced and on our independent appreciation we find the eye-witnesses consistent and reliable in their narration of the incident. In our opinion non-examination of other witnesses does not cast any infirmity in the prosecution case."

12. From the above discussion and the defence taken by the accused in his statement under Section 313 Cr.P.C. coupled with the fact that the victim has accepted the compensation of Rs.25,000/-, I find that possibility of false implication cannot be ruled out. The prosecution has utterly failed to prove its case beyond reasonable doubt.

I further find the trial court without application of mind and without taking note of the statement of PW-4, *fard peticoat* Ex.ka-5 as well as the fact that the other recovered articles such as *chappal*, torch, *dhibri*, sleeper of the accused have not been produced before the court, has convicted the appellant for the offence under Section 376 I.P.C. on the basis of those un-produced articles.

13. Thus, in view of the aforesaid discussion, the prosecution has failed to prove its case beyond reasonable doubt. Every part of the testimony of the prosecutrix is infirm, doubtful and contradictory as well as improbable which does not pose confidence. There is no corroborative evidence in support of the testimony of the prosecutrix. The important witnesses have been withheld by the prosecution from the Court, therefore, it is hard to convict the appellant on this quality of evidence and it is a fit case to draw adverse inference against the prosecution for withholding such important

eye-witnesses from the Court.

14. In view of what has been stated hereinabove, the criminal appeal is allowed and the judgment and order of conviction and sentence dated 19.4.2000 (supra) is set aside. The appellant is acquitted of the charges levelled against him.

This Court by its order dated 18.5.2000 had admitted the appellant to bail. He be discharged of his bail bonds.

15. Let a copy of this judgment be transmitted to the learned trial Court as well as Superintendent, Jail concerned, for compliance. The lower court records be also sent back to the lower court.

Order Date :- 15.12.2023

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