

Neutral Citation No. - 2023:AHC-LKO:68113-DB

**High Court of Judicature at Allahabad
(Lucknow)**

Reserved on: 26.09.2023

Delivered on: 17.10.2023

Reserved

Case :- GOVERNMENT APPEAL No. - 41 of 2004

Appellant :- State of U.P.

Respondent :- Shyam Lal @ Dev Narain @ Nauwa

Counsel for Appellant :- B.R. Tripathi

Counsel for Respondent :- G.A.

Hon'ble Rajan Roy,J.

Hon'ble Karunesh Singh Pawar,J.

(Per: Rajan Roy, J.)

1) This is an appeal by the State under Section 378 Cr.P.C. challenging the judgment and order passed by Ninth Additional Sessions Judge, Faizabad dated 18.09.2003 in Session Trial No.254 of 2000 arising out of Case Crime No.219 of 1999 under Section 376 I.P.C., P.S.-Tarun, District-Faizabad.

2) The prosecution case is that on 01.12.1999 in the evening, the victim-girl was going to relieve herself towards north of her house towards the sugarcane fields of Thakur when the respondent-Shyam Lal caught hold of her hand and took her inside the sugarcane crops and raped her. On her shouts, Drig Pal-P.W.2 and other villagers as also her father

i.e. P.W.1-Ram Pher came, whereupon the respondent-Shyam Lal left her and ran away. This report was submitted on the next day i.e. on 02.12.1999 at 12:05 P.M.

3) After investigation, chargesheet was filed against the respondent and charges were framed under Section 376 I.P.C. The respondent denied the charges, therefore, trial was held.

4) In the medical examination, the doctor did not find any injuries on the private parts of the victim-P.W.3 or her thighs or lower portions. There were no external injuries on any part of her body. Hymen was old torn and from medical examination it was found that she was habitual of sexual intercourse. The said doctor i.e. P.W.5 has proved the medical reports. Thus, from the medical reports, rape is not proved.

5) Based on medical examination, her age was determined as 18 years.

6) The case of prosecution is based on direct evidence of P.W.1 i.e. father of the victim, P.W.2 i.e. maternal uncle and P.W.3 i.e. the victim herself. The trial court has disbelieved the testimony of these witnesses on account of inconsistencies in their testimonies regarding the events. P.W.1-Ram Pher has stated that he had gone to relieve himself along with his brother-in-law i.e. Drig Pal at the time of commission of the crime near the 'Talab' and heard the shouts of her daughter from there whereupon they ran and reached the scene of crime. Contrary to this, P.W.2 i.e. Drig Pal has stated in his cross-examination that when they i.e. P.W.1 and P.W.2 heard the commotion, both of them were sitting at the house on a 'Charpai' and were smoking 'Bidi'. The inconsistency in the narration of events is apparent which creates a doubt about

their presence at the scene of crime at the time of its commission. The scene of crime being two/ two and a half bighas away from the house of P.W.1-Ram Pher as per testimony of P.W.2 and it was quite far even as per P.W.1 and especially as there were at least fifteen houses in between the scene of crime and the house of Ram Pher, therefore, it was not possible to hear the shouts of the victim from the scene of crime at the said house and therefore, the testimony of P.W.2 creates a doubt as to the presence of P.W.1 and P.W.2 and their reliability & credibility and moreover, it is highly improbable that after covering such distance and reaching the scene of crime, P.W.1 and P.W.2 would have seen commission of the crime after hearing the shouts especially in view of sugarcane crops existing on the agricultural fields around the scene of crime which were spread over an area of ten bighas.

7) The prosecution case has also been disbelieved for the reason that it has come in the testimony that inspite of the commotion, the accused still remained at the scene of crime till the witnesses i.e. P.W.1 and P.W.2 reached the spot and was seen by them running away, which is highly improbable. In this context, the trial court has considered the testimony of P.W.1 that on the shouts of the girl, he could not recognize her but when he went close then he recognized her and found that the victim was lying in the field.

8) Moreover, P.W.2-Drig Pal who is brother-in-law of P.W.1 and maternal uncle of P.W.3 has stated that he had come to the village just by chance and therefore, he is a chance witness. Accordingly, his testimony is to be considered with a great deal of circumspection and based thereon, it is not found

to be reliable. The presence of P.W.1 and P.W.2 at the scene of crime is doubtful.

9) After disbelieving the testimonies of P.W.1 and P.W.2 and their presence at the scene of crime, the trial court has evaluated the testimony of P.W.3 i.e. the victim and has disbelieved the same. P.W.3 has testified that she did not know the names whose houses were near the place where she had gone to relieve herself although it was 'Abadi'. She has also stated that she does not know the villagers and if she did not know the villagers then how she knew the respondent and identified him. The trial court has also taken into consideration the fact that as per medical examination, her age was 18 years and not 15 years as mentioned in the F.I.R. Medical evidence also shows that she was habitual of sex and there were no external injuries on her body nor any injuries on her private parts and thighs though she has alleged sexual assault and rape and also that she had scratches and blood on her clothes which was not found by the Investigating Officer nor in medical examination which itself creates a doubt on the prosecution case and her testimony especially in view of the fact that even if the F.I.R. was lodged the next date, such injuries would have been there or some sign of forcible sexual intercourse must have been there but there is no such medical evidence, which is indicative of the fact that no rape took place. The trial court has disbelieved the testimony of P.W.3 also, rightly so.

10) The trial court has also taken into consideration the physical infirmity of the accused as admitted in the testimony of prosecution witnesses that the accused was having a 'hump'

on his back and also that he could not run fast as stated by P.W.3 i.e. the victim herself, who has also stated that she was physically fit and could run faster than the accused which belies the statement of P.W.2 -Drig Pal that he chased the respondent from a distance of fifteen steps but could not catch him. Therefore, the trial court has rightly disbelieved the prosecution case and the said testimony.

11) The trial court has also considered the contradictions in the place of occurrence and has rightly recorded the finding that place of occurrence itself could not be fixed. In the F.I.R. itself, it is mentioned that the victim had gone to relieve herself towards north of her house in the agricultural field of Thakur. This has been stated in the statement under Section 161 Cr.P.C. also, but, in the testimony before the court , P.W.1, P.W.2 and P.W.3 all have stated that she had gone towards east of the house in the agricultural field of Ganna. The site-plan, however, mentions the scene of crime towards the north of the house which goes to show that Investigating Officer did not conduct any investigation as to the place of occurrence. The contradictions in this regard create a doubt as to the scene of crime itself. The trial court has considered relevant aspects of the matter extensively based on the testimonies and evidence on record and has rightly recorded a finding about uncertainty as regards the scene of crime.

12) The trial court has also referred to the lack of light available at the time when the crime is alleged to have been committed so as to enable the victim etc to see the respondent as the crime was committed in the month of December in the evening at about 6 / 7 P.M., in a place which was surrounded

by sugarcane. Considering the time, it would have been difficult to identify the respondent-accused. There is no mention of source of light in the testimony of any of the witnesses for the prosecution.

13) While it is true that ocular evidence is to be given primacy vis-a-vis the medical evidence, we find from an assessment on the evidence on record that the trial court has rightly disbelieved the ocular testimony of P.W.1, P.W.2 and P.W.3, especially P.W.3, and medical evidence on record supports this finding, as already discussed. The presence of P.W.1 and P.W.2 at the scene of crime is itself highly doubtful. P.W.2 is a chance witness and the trial court has rightly not disbelieved his testimony. There is no medical evidence of sexual assault. Statement of P.W.3 is also not reliable. The inconsistencies in the ocular evidences are such that can't be ignored.

14) We, therefore, find that the trial court has not committed any error in acquitting the respondent of the charge under Section 376 I.P.C. The view taken by the trial court is a possible view, therefore, we see no reason to interfere in this appeal under Section 378 Cr.P.C.

15) Accordingly, the appeal is **dismissed**.

(Karunesh Singh Pawar,J.) (Rajan Roy,J.)

Order Date :- 17.10.2023

Shanu/-