

In Chamber

Case :- CRIMINAL APPEAL No. - 563 of 2000

Appellant :- Gudun and others

Respondent :- The State of U.P.

Counsel for Appellant :- Balram Yadav, Ashwini Kumar Tripathi, Indra Pratap Singh, Umesh Kumar Yadav

Counsel for Respondent :- Govt. Advocate

Hon'ble Umesh Chandra Sharma, J.

1. Heard Sri Indra Pratap Singh, learned counsel for the appellants, Ms. Anupriya Jaiswal, learned AGA for the State and perused the record.

2. This appeal has been preferred by the convicts Gudun, Suresh, Jangay and Harish Chandra to set aside the judgment and order of conviction and sentencing dated 03.06.2000 passed by the XI-Additional Sessions Judge, Faizabad in ST No.827 of 1997 (State Vs. Gudun and others) arising out of Case Crime No.55 of 1997, under Sections 376, 354, 506 IPC, Police Station Khandasa, District Faizabad whereby the accused persons had been convicted under Section 376/511 IPC for five years rigorous imprisonment and fine of Rs.2,000/- each and in case of non-payment of fine to undergo six months additional incarceration; under Section 354 IPC for one year's rigorous imprisonment each; under Section 506(2) IPC for one year's rigorous imprisonment each. It was also directed that all the sentences shall run concurrently.

3. In brief, facts of the case are that informant Shreepal lodged an FIR on 08.03.1997 that in the night of 03.03.1997 at about 09:00 p.m. his daughter had gone

outside the house to attend the call of nature. Gudun and Musey sons of Radhey Shyam, Suresh son of Jagram, Harish Chandra son of Salikram and Jangay son of Keshri threw his daughter on the ground. Gudun caught her breast and when Harish Chandra opened her saree with ill intentions, she cried, upon which Ram Dulare Yadav, Ramdev and Chandrika Prasad Tiwari and some other persons of his village reached on the spot and saw the accused escaping therefrom. As the matter was about his daughter, he did not approach the police but when they started threatening to kill him, he requested to lodge an FIR and protect him.

4. In this case the accused 'Musey' was declared juvenile and his case was transmitted to the Juvenile Justice Board, Faizabad for trial. The case of rest of the accused persons was committed and the charges were framed under Sections 376/511, 354, 506 IPC. Accused persons denied the charges and sought trial.

5. Prosecution examined following witnesses in its support:-

1	PW-1	Shreepal, informant
2	PW-2	Smt. Kusuma
3	PW-3	Dr. P. Nath
4	PW-4	Ramesh Chand Tiwari, constable moharrir
5	PW-5	SI Ram Nagina Yadav
6	PW-6	Dr. Sushma Singh

6. Following documentary evidences have been adduced by the prosecution:-

1	Ex.Ka-1	Written complaint
2	Ex.Ka-2	Injury report of the victim
3	Ex.Ka-3	Chik FIR
4	Ex.Ka-4	Carbon copy kaymi GD
5	Ex.Ka-5	Map
6	Ex.Ka-6	Charge sheet
7	Ex.Ka-7	Age determination report of the victim

(I) Grounds of Appeal

7. The grounds taken by the accused persons are that: (i) the trial court failed to examine and evaluate the evidence on record correctly and judicially and has mistaken in passing the impugned order; (ii) the trial court could not consider that the story of the case was concocted and the same could not be substantiated by the prosecution; (iii) the impugned judgment has been passed on conjunctures and surmises; (iv) the trial court could not come to the conclusion that it was a malicious prosecution on account of enmity, the evidences are itself contradictory and the story is imaginary, the trial court failed to appreciate the main evidence which is falsifying the whole case; (v) the punishment is excess and the judgment and order is illegal and arbitrary and is not sustainable in the eyes of law. Hence, the impugned

judgment and order of conviction and sentencing be set aside and the appeal be allowed.

(II) Brief discussion on the statements of prosecution witnesses

8. PW-1, informant, Shreepal has deposed that at about 09:00-10:00 p.m. on the date of incident when he was making jaggery, Ram Dulare and Chandrika were sitting at the house of Rampal, he heard the screams of his 14-15 years old daughter to save her. He ran there with a torch. Ram Dulare, Chandrika, Rampal and Ramdev had also reached after him and saw that accused Musey was doing dirty things with his daughter and accused Gudun had caught her hand and breast on the point of a country-made pistol. Harish Chandra had opened her saree and she was lying in naked position. This incident had taken place in the field of Ram Jiyavan. His daughter told that accused Musey raped her. Rest of the accused persons were doing bad things with her. The girl narrated the story in front of her mother Dashrath Dei, Ram Dulare, Chandrika Tiwari and Ramdev. This witness has testified/recognized the signature on the written complaint Ex.Ka-1.

9. PW-2, Kusuma has deposed that the incident occurred about one year and ten months ago. It was 10 o'clock in the night she had gone outside the house to attend the call of nature in Ram Jiyavan's field. Accused Harish Chandra, Gudun, Chandrika, Musey and Suresh

residents of her village reached and first caught her and threw her on the ground. Gudun was threatening with a country-made pistol. Accused Musey committed misdemeanour with her by his penis in her urethra/urinary tract. When he was doing that thing, rest of the accused persons had held her. When she raised alarm, her father and thereafter her mother and wife of Chhote Lal, Ram Dulare, Ramdev, Rampal and Baba reached there. First of all, Gudun had lit the torch. Her father also had lit the torch. When they approached the accused, they ran away. Her father had opened her tied legs.

10. PW-3, Dr. P. Nath had examined the victim and found hard crust in an area of 0.5cm x 0.5cm on the base behind the little finger of the right hand and opined that it would have come from a blunt object. It may also occur if any one is thrown on the ground.

11. PW-4, Chandrika Tiwari has proved chik FIR Ex.Ka-3 and carbon copy kaymi GD Ex.Ka-4 regarding lodging of the FIR.

12. PW-5, SI Ram Nagina Yadav has deposed that the case was lodged in his absence. He had copied the chik FIR and GD, recorded the statements of Ram Dulare, Ramdev and mother of the victim. Prepared map Ex.Ka-5 and recorded the statement of the informant and the victim on 18.03.1997, copied the medical report and added Section 376 IPC, arrested the accused Harish

Chandra, Musey Yadav and Gudun and recorded their statements and after finding sufficient evidence submitted the charge sheet Ex.Ka-6 under Sections 376, 354, 506 IPC.

13. PW-6, Dr. Sushma Singh has deposed that she had medically examined the victim on 10.03.1997 at about 06:00 p.m. The victim was telling injury to be on her right hand. There was no injury on her private part. Hymen was old torn and healed. Two fingers were easily entering into her vagina. Vaginal smear was collected and sent to the pathologist. The victim was referred to the CMO who determined her age to be 17 years. (No pathological report regarding presence of live or dead sperm was produced/found).

(III) Discussion on Merit

14. The first argument advanced by the learned counsel for the appellants is that there is undue delay in lodging the FIR. According to the prosecution, the offence occurred in the night of 03.03.1997 and the FIR had been lodged in the night of 08.03.1997. As per the FIR it was mere a case of molestation and an attempt to commit rape but after investigation the charge sheet was submitted under Section 376, 354, 506(2) IPC. The informant deposed that on 04.03.1997 he went to the concerned SHO but he did not lodge the FIR and when he moved an application to the DIG only then FIR could be lodge but in support of these facts no independent oral evidence has

been produced. So far as the submission of written report to the DIG is concerned, no such report has been proved during the examination-in-chief. However, during the course of cross-examination the witness was asked about the application submitted to the DIG in which some different facts have also been mentioned which is not the case of the prosecution. It has also come out that according to this witness he had already moved an FIR which had been torn by the SHO and when he moved another FIR it was considered for sending her daughter for medical examination. However, in absence of proof of letter to DIG in accordance with law, it can be said that when there was enmity between both the parties the case was lodged after an unreasonable delay though in cases of rape and molestation five days' delay is not fatal for the prosecution but the circumstances in which the concerned FIR has been lodged would also to be considered before concluding as to whether the FIR has been lodged with an unreasonable delay or not.

15. This Court has also considered the fact that in this case all the alleged witnesses of the FIR (who have not been examined in the court) were either relatives or the residents of remote distance. Out of the witnesses mentioned in the FIR, Ramdev Yadav was brother-in-law (*bahnoi*) of the informant who stated in his statement under Section 161 CrPC that he had not seen the occurrence. He had heard that the accused threw the victim on the ground. Chandrika Prasad Tiwari was residing 10 kms away from his village. Ram Dulare was

the resident of his village but he has not been examined in the court. He has not supported the prosecution version in his statement under Section 161 CrPC but has stated that he saw the victim coming with her mother from the fields. He did not see any one escaping from the spot. He heard that accused persons had thrown the victim on the ground for molesting her.

16. Though, the victim of such case is at par to the injured witnesses and her evidence should be considered if she is found to be trustworthy and a sterling witness but it is not so and the circumstances and the medical evidence are not in support of the prosecution case, therefore, corroboration from the independent evidence would be necessary to convict the accused.

17. In this case all the accused persons are the family members and there was enmity on account of a civil case with the informant. Out of them Musey and Gudun were the real brothers. According to this Court, such offence cannot be committed by the two real brothers together in presence of their senior family members. In this regard defence has submitted documentary evidence regarding the civil case pending between the parties i.e. Case No.64 of 1984 which was instituted by the father of the accused Gudun and Musey against the family members of the informant. The enmity is double edged weapon. On account of enmity an offence can be caused and an innocent person may also be falsely implicated in a false and concocted case. In this case considering the facts,

circumstances, medical and oral evidence and improvement from the original case, during the course of trial, it can be safely concluded that on account of enmity the accused persons have falsely been implicated as father of the accused Musey and Gudun had purchased a land which was claimed by the informant as his *sahan* land.

18. According to this Court, if the victim had gone to the fields lonely and accused Musey wanted to rape and molest her, there was no need of any other person. A young boy is strong enough to overpower a girl of tender age for molesting and committing rape upon her. Involving all the family members and assigning role to all of the accused persons that one has caught hold her one hand, another caught hold her second hand, some other accused had caught hold her left leg, her right leg and the accused Musey was committing rape with the victim in presence of his elder brother and his other elder family members, appears to be a concocted story away from the reality.

19. It has also been argued that the victim was not a girl of good moral character. She had illicit relation with a boy of her village. On the day of occurrence she was seen in an inebriated/objectionable condition with him for which a propaganda spread in the village, therefore, only to save the honour of the victim this false story had been concocted by the informant taking the victim and her mother into confidence with the assistance of his brother-

in-law, Ramdev Yadav. In this regard Section 53 of the Indian Evidence Act, 1872 (in short 'the Act, 1872') is material. For ready reference Section 53 of the Act, 1872 reads as under:-

"53. In criminal cases, previous good character relevant.—In criminal proceedings, the fact that the person accused is of a good character, is relevant."

20. It is noteworthy that it is a case of molestation and attempt to commit rape as the charge was framed under Section 376/511 IPC, therefore, amended Section 53A of the Act, 1872 which was inserted by the Act of 2013 would not apply.

21. At this score Section 155 of the Act, 1872 is relevant and the same is reproduced herein below:-

"155. Impeaching credit of witness.—The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him—

(1) by the evidence of persons who testify that they, from their knowledge of the witness believe him to be unworthy of credit;

(2) by proof that the witness has been bribed, or has [accepted] the offer of a bribe, or has received any other corrupt inducement to give his evidence;

(3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted."

22. Since it is a case of the year 1997, therefore, the sub-section (4) of Section 155 of the Act, 1872 which was deleted by Amendment Act of 2002 would be relevant and applicable which reads as under:-

“(4) When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.”

23. Thus, this Court is of the view that sub-section (4) of Section 155 of the Act, 1872 was into existence at the time of commission of the alleged crime, therefore, this case would have also to be seen in the light of the omitted sub-section (4) of Section 155 of the Act, 1872 because the medical report and the evidence of PW-3 and PW-6 are not in support of the prosecution version.

24. It would be expedient to discuss the norms regarding rape as defined under Section 375 IPC which is punishable under Section 376 IPC. Sections 375 and 376 IPC reads thus:-

*“**375. Rape.**—A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—*

(First) — Against her will.

(Secondly) — Without her consent.

(Thirdly) — With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

(Fourthly) — With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

(Fifthly) — With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

(Sixthly) — With or without her consent, when she is under sixteen years of age. Explanation.—Penetration is

sufficient to constitute the sexual intercourse necessary to the offence of rape.

(Exception) —Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

376. Punishment for rape.—(1) *Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the women raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.*

(2) Whoever,—

(a) being a police officer commits rape—

(i) within the limits of the police station to which he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) on a woman in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) commits rape on a woman knowing her to be pregnant; or

(f) commits rape on a woman when she is under twelve years of age; or

(g) commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine: Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

Explanation 1.—Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

Explanation 2.—“Women’s or children’s institution” means an institution, whether called an orphanage or a home for neglected woman or children or a widows’ home or by any other name, which is established and maintained for the reception and care of woman or children.

Explanation 3.—“Hospital” means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation.”

25. Section 375 IPC requires two essentials; (i) sexual intercourse with a woman; (ii) sexual intercourse must be under the circumstances following under any of the six clauses of the aforesaid section.

26. It is not a case of consent though in 1993 the age of consent was above 16 years as per description six of Section 375 IPC. Hence, the age of the victim is immaterial though according to PW-6, the victim was about 17 years old. The intention or expression or even an indecent assault upon a woman does not amount to attempt to rape unless the determination of accused to

gratify his passion at all events and in spite of the resistance is established.

27. In **Aman Kumar Vs. State, AIR 2004 SC 1497** the Apex Court held that in order to find an accused guilty of an attempt with intent to commit rape, court has to be satisfied that the accused, when he held hold of the prosecutrix, not only desired to gratify his passion but that he intended to do so at all events, and notwithstanding any resistance on her part. Indecent assaults are often magnitude into attempt of rape in order to come to the conclusion that the conduct of the accused was indicative of a determination to gratify his passion at all events, and in spite of resistance. Material must exist. Surrounding circumstances many times through becon light that aspect. To convict a accused under Section 376 IPC the prosecution must prove; (i) that the accused had sexual intercourse with a woman in question; (ii) that the act was done under circumstances falling under any of the six descriptions specified in Section 375 IPC; (iii) that such woman was not the wife of the accused or, if she was his wife, she was under 15 years of age; (iv) that there was penetration (Explanation-I of Section 375 IPC).

28. As per second explanation there is no need of full penetration of penis with emission of semen and rapture of hymen. Partial penetration within a labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape.

(IV) Burden of Proof

30. In **Tukaram Vs. State of Maharashtra, AIR 1979 SC 185** it has been held that in a case of rape, the onus is always on the prosecution to prove affirmatively each ingredient of the offence it seeks to establish and such onus never shifts.

31. In **Nilambar Goudo Vs. State of Orissa, 1982 Cri LJ NOC 172 (Ori)** it was held that it is duty of the defence to explain as to how and why in a rape case the victim and her mother have falsely implicated the accused. The evidence of prosecution witnesses cannot be accepted merely because an accused persons has not been able to say as to why they have come forward to depose against them.

32. In **Joginder Singh Vs. State of Punjab, 1974 CrLJ 117** it is held that however the great suspicion against the accused and however strong the moral belief and conviction of the judge, unless the offence of the accused is established beyond reasonable doubt or beyond the possibility of reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for the offence. There is an initial presumption of innocence of the accused and the prosecution has to bring the offence whom to the accused by reliable evidence, the accused is entitled to the benefit of every reasonable doubt. In the instant case, it could not be established beyond doubt that the sexual intercourse was

committed by the accused with the victim girl without her consent or against her will. Consequently the offence under Section 376 IPC was not established.

33. Here the appellants have not taken the defence that an offence of attempt to commit rape or an offence of rape had been committed by either of the accused.

(V) Medical Evidence

34. In this case no medical examination of any accused had been conducted even Musey who alleged to have committed the offence has also not been medically examined to establish the commission of crime by him. The accused is entitled to say that if medical examination of the vital or the material part of his body would have been conducted, he would have been in a position to show that the condition of those parts negated the possibility of his guilt, **(Ram Kali Vs. State of UP, AIR 1947 All 191)**.

35. It is difficult to believe that after prolonged forcible sexual intercourse no injury might be caused to the private parts or other parts of the prosecutrix. However absence of injury on person of the accused and particularly penis cannot be sole ground for discarding prosecution evidence.

36. The absence of the injuries on the body of the prosecutrix, generally, gives rise to an inference that she was consenting party to coitus.

37. In **Tuka Ram** (supra) it had been held that in absence of any injury on the person of the victim indicates that the alleged intercourse was a peaceful affair and the story of a stiff resistance put up by the prosecutrix is false or an afterthought.

(VI) Evidence of the Prosecutrix

38. It is no doubt that true law in conviction of an accused on the basis of a testimony of the prosecutrix alone is permissible but that is in a case where the offence of a prosecutrix inspires confidence and appears to be natural and truthful, (**Vimal Suresh Kambley Vs. Chaluverapinake, AIR 2003 SC 818**).

39. Similar principle was laid down in **State of Rajasthan Vs. Biram Lal, 2005 CrLJ 2561 (SC)** the Apex Court has held that in several cases that once the statement of the prosecutrix inspires confidence and is expected by the courts as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Minor contradictions or insignificant discrepancies should not be a ground for throwing out and otherwise reliable prosecution case. In practice a conviction for rape almost entirely depends on the credibility of the woman. All that is required is that there must be some additional evidence rendering it probable that the story of the complainant is true and that

it is reasonably safe to act upon it. However, if the court of facts may find it difficult to accept the version of the prosecutrix on its face value it may search for evidence, direct or substantial, which may lend assurance to her testimony. The court has first to assess the trustworthiness of the evidence adduced and available on record and if the court finds the evidence adduced worthy of being relied on then the testimony of prosecutrix has to be accepted and acted on though there may be other witnesses available who could have examined but were not examined. Conviction for an offence of rape can be based on the sole testimony of the prosecutrix corroborated by the medical evidence and other circumstantial evidence such as the report of chemical examination, etc. The evidence, no doubt, should not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with the crime. Corroboration may be by the facts and circumstances.

40. In **State of Karnataka Vs. Manjanna, AIR 2000 SC 2231** it was held that the narration of the incident to so many independent witnesses without any discrepancy soon after the incident was held correctly admitted by the court under Section 157 of the Act, 1872 as corroborative of prosecutrix's testimony. Here the informant and the victim have changed their case from time to time. Initially it was a case of molestation and attempt to rape which had been converted later on into a case of rape with molestation which was not accepted by the concerned

court and the charge under Section 376 read with Section 511 IPC had been framed against which no revision had been preferred by the informant or the State and accepting the modification done by the concerned court the informant and the prosecutrix have adduced the evidence which is against the *factum* of charge framed by the concerned court. It has also been established that there was enmity on account of civil litigation between both the family members and no local witness or witness of remote area came forward to testify himself in support of the prosecution version.

41. On the other hand, the medical evidence is also not in support of the prosecution except a healed injury on the base of the little finger of the right hand of the victim, no injury even simple in nature such as abrasion or contusion were found on the person of the victim. Even no injury was found on the private parts of the victim but PW-6 found that the victim was habitual of sexual intercourse and two fingers were easily entering inside the vaginal cavity. It was also not found in a tightened position. On account of observation made by PW-6, Dr. Sushma Singh it can be concluded that the alleged offence has not been corroborated with the medical or an independent evidence even the prosecution story and the evidence has been improved from time to time which creates doubt and the court is bound to accept the defence version that due to enmity on account of civil litigation between the parties two real brothers alongwith other senior family members of the same family have been falsely implicated in a case

of rape or attempt to commit rape. Even the prosecution is not clear that as to whether it is a case of attempt to rape or is a case of rape.

42. In **Santosh Prasad @ Santosh Kumar Vs. State of Bihar, (2020) 3 SCC 443** it was alleged that after committing an offence of house trespass accused committed rape with a married lady. There were material contradictions in deposition of the prosecutrix. Neither the indecent witness nor the medical witness was supporting the prosecution case. FSL report was also not supporting prosecution case. There was variation in prosecutrix's version about the given complaint. Prosecutrix failed to pass test of becoming "sterling witness". There is also delay in lodging the FIR. There was also enmity/dispute between both the parties with respect to land. Any other supportive evidence and the accused was given benefit of doubt and conviction was reversed. The fact of the aforesaid case and the case in hand are almost similar except the fact that the victim of this case was not a married lady but it has been concluded by PW-6, Dr. Sushma Singh that she was habitual of sexual intercourse, therefore, two fingers were easily entering and the vagina was found to be loose.

43. In **Lalta Prasad Vs. State of MP, AIR 1979 SC 1276**, it could not be established that the prosecutrix was ever subjected to any sexual intercourse by the accused against her will. On the other hand, there was the evidence of the Doctor that when she was examined after

the occurrence, the Doctor found old torn hymen and no sign of any rape or any forcefully intercourse with her. That being so, the conviction of the appellant under Section 376 IPC was set aside.

44. In **Charan Singh Vs. State of Haryana, (1988) 3 Crimes 85 (P&H)** it was case of a girl above 16 years who was allegedly raped. In this case also the question was whether when she admitted of having suffered some injuries on her back during the incident and when the same were not found then what had to be done. The lady doctor, however, who examined her did not find any injury on her private parts or on her body during the medico legal examination. No tenderness, swelling or blood was found in the vagina. She further found that two fingers could easily be admitted into the vagina. During the cross-examination, she rightly admitted that the prosecutrix would have suffered tenderness and swelling of the vagina if she was subjected to rape by two young boys. The gap between the occurrence and her medico legal examination ruled out any possibility of any abrasion being healed. Giving the benefit of doubt the accused were acquitted.

45. In **Zahoor Ali Vs. State of UP, 1989 CrLJ 1177 (All)** the doctor did not find any recent injury on the private parts of the girl. Hymen was found to be torn from before and healed. Therefore, the charge was held to be not proved.

46. In **Sakariya Vs. State of MP, 1991 CrLJ 1925 (MP)** there was an allegation of rape upon a married women who was alleged to have been dragged towards the place of occurrence and then raped but the report of medical examination was in the negative so far as the seminal stains and presence of spermatozoa in the vagina was concerned and to top it all there was not even a scratch on her body and the accused was acquitted.

47. In **Maharashtra Vs. Abdul Hafees Faroki, 1998 CrLJ 3603 (SC)**, eight persons were accused for raping a girl twice by turns and pushing the girl out of the running train. However, when no serious injury was found on the person of the girl and evidence showed that there was possibility of prosecutrix going with the accused willingly, the acquittal of the accused was held proper.

48. In **Joseph Vs. State of Kerala, 2000 CrLJ 2467 (SC)**, the dhoti of the accused contained no blood or semen stains and there was no injury caused to the private part of the body of the victim. The conviction was sought to be proved by the fact that vaginal smear's examination confirmed the presence of semen and spermatozoa. It was held that this was not a ground for conviction of accused for the offence of rape and the accused was entitled to acquittal on the basis of benefit of doubt.

49. In **Sampad Vs. State of Orissa, 2001 CrLJ 793 (Ori)**, there was charge of gang rape against the accused

persons who allegedly had forcibly lifted the victim to a nearby river bank on knife point and had committed sexual intercourse with her but no sign of forcible intercourse or mark of violence was found either on the spot or during the medical examination of prosecutrix. It was held that in the absence of a proper proof they could not be convicted under Section 376 (2)(g).

50. In **State of State of Orissa Vs. Rama Swain and others, 2007 CrLJ 714 (Ori)** the accused persons were alleged to have committed a rape forcibly on the prosecutrix one after another but the evidence showed that there was dispute between the victim and the accused persons regarding damage of crop by the cattle of the victim over the land cultivated by the accused persons. There was no semen stain on the apparels of the victim found. Thus the evidence of prosecutrix did not inspire confidence and the judgement of acquittal was upheld.

51. In **Goverdhan Vs. State of MP, 2006 CrLJ 4118**, the parties were not keeping good relations in the past and had lodged FIRs against each other. Medical report did not corroborate the version given by the prosecutrix. It was held that guilt was not proved and conviction was improper.

52. Similarly due to non support of medical report, in **Mansingh Vs. State of MP, 2007 CrLJ 201 (MP)**, the

conviction of the accused was set aside as the prosecution case was not supported by the medical report.

53. In **State of Maharashtra Vs. Rameshwar Sridhar Jaware, 2008 CrLJ 675 (Bom)**, the accused persons were alleged to have committed rape on a girl of 16 years. Medical report as well as the report of the chemical analyst was contrary to the evidence of prosecutrix. It was held that the possibility of a false accusation could not be ruled out and the accused was entitled to acquittal.

54. In **Suresh Govinda Nagdeve Vs. State of Maharashtra, 2008 CrLJ 2943 (Bom)**, the allegation was that the prosecutrix was subjected to rape by three accused person. It was alleged that in the night, the crime was committed in an open field but no injury on the private part or on the back of the prosecutrix was found and the Doctor could not confirm the theory of sexual intercourse. Similarly no corresponding injury was there on the private parts or on the body of the accused. Giving the benefit of doubt, the accused persons were acquitted.

55. All the above judicial pronouncements are applying in favour of the appellants and against the prosecution.

(VII) Material improvement and embellishment and non-examination of material and independent witnesses

56. The FIR had been lodged for commission of the offence of molestation and attempt to commit rape on the

victim. Witnesses Ram Dulare (not examined) has given a hearsay statement to the investigating officer (IO) that he had heard that accused persons had thrown the victim on the ground for humiliation. Ramdev (not examined) has also given similar statement. Mother of the victim (not examined) has also given a hearsay statement to the IO that when she reached on the spot she found her daughter lying in the field who informed that some persons of the village had thrown for humiliating her. Hearing her screams she reached there. Only her daughter may disclose the real name of the accused persons. She refused to have seen any person fleeing from the spot. She also stated that her husband has lodged FIR after a thoughtful consideration. Thus, upto the stage of recording statement after lodging the FIR this case was only with regard to throwing the victim on the ground for humiliating her. If accused persons would have committed rape or an attempt to commit rape, the victim would certainly have informed her mother first about the incident occurred with her but she was willingly not examined by the prosecution in the court. In this context Section 114(g) of the Indian Evidence Act, 1872 is material which reads as under:-

“114 Court may presume existence of certain facts.

—X X X

(g) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.”

57. After few days delay the victim has stated in her statement under Section 164 CrPC that at 10 p.m. on

03.03.1997 when she had gone outside the house to attend the call of nature, Harish Chandra reached and shut her mouth, Gudun kept country-made pistol at her breast and threatened that if she screamed, he would shoot her, Suresh tied her leg from the jute. Jangay caught hold her hands and threw her on the ground. Her saree was lifted by Musey and he started committing rape with her. After finding opportunity, she cried for help, on which her father and villagers and wife of Chhotelal reached there. Accused persons had run away as soon as she screamed. It is noteworthy that generally ladies in a village do not go out of their house to attend call of nature at 10:00 p.m. Generally villagers go for defecation in the evening or maximum upto 07:00 or 08:00 o'clock and young girls or women generally used to go in a group. Unless and until there is no dysentery, a young lady does not go for defecation at 10:00 p.m. and in case of emergency she would certainly be accompanied by another female member. It is not a case of the prosecution that there was indigestion or dysentery to the victim. Similar statement has given by the victim under Section 161 CrPC.

58. There is a contradiction about reaching of the victim's father or her mother on the spot. According to her mother Dashrath Dei she had reached on the spot and the victim had been taken back by herself. It is nowhere mentioned in the FIR that the informant had a torch in his hand and neither such torch had been produced by the informant to the IO nor the IO had taken such torch in

possession. The victim has deposed that before reaching her father, the accused persons had run away while making an improvement, the informant PW-1 has deposed that he saw that the accused Musey was committing rape with his daughter and all the accused persons were performing their allocated act as alleged in the FIR. PW-1 informant admitted that he had not written in the complaint that he had seen the incident after reaching on the spot. Further, he admitted that IO has not written in his statement that he was having a torch at the time of the incident. It has also not been written in the FIR that the legs of the victim had been tied with jute. Even this fact has not been deposed by the informant PW-1 in his examination-in-chief. Contrary to the fact already deposed regarding watching the incident, the informant PW-1 has deposed at page-9 that when he reached near the place of occurrence, accused had run away when he was 15 steps away from them. He admitted that all the accused persons belonged to the same family.

59. PW-2, the victim had deposed that first of all the accused persons caught her and threw her on the ground. Gudun threatened to kill her with a country-made pistol if she screamed. Accused Musey had committed rape with her. At the time of commission of rape, accused Harish Chandra, Suresh and Jangay had caught hold her. The victim has denied any intercourse before commission of the alleged offence but this fact is falsified from the evidence of PW-6 who has deposed that her vagina was found to be loose, hymen was found to be old torn and

already healed and two fingers were easily entering in the vagina and she was habitual to the sexual intercourse, (that time two finger test was prevalent but not now). Thus, it has been established that the victim was telling a lie.

60. On the basis of above discussion and considering the fact that none of the independent witnesses came forward in support of the prosecution version; that all the accused persons belonged to the same family with whom there was enmity on account of civil litigation with the informant; that there was delay in lodging the FIR; that the medical evidence was not in support of the prosecution version and there was no injury on the external or internal part of the victim except a crust on the base of little finger of the right hand rather it has been established that she was habitual of sexual intercourse as concluded in paragraph-59; that generally the two real brothers may not commit such offence together; that the time of occurrence and going alone out of the house for defecation at 10:00 p.m. by the victim appears to be concocted and fixed for the purposes of false implication of the appellants. Therefore, some roles have been assigned to all of the appellants. Thus, this Court is of the conclusion that the prosecution has been miserably failed in establishing and proving the prosecution case against the appellants regarding commission of the alleged crime. The Sessions Judge has been miserably failed in properly assessing the prosecution story and the evidence and in applying the

correct proposition of law. Thus, there is force in this appeal and it deserves to be allowed and the impugned order of conviction and sentencing passed by the learned trial court is liable to be set aside.

61. Accordingly, this appeal is **allowed**.

62. The judgment and order of conviction and sentencing dated 03.06.2000 passed by the XI-Additional Sessions Judge, Faizabad in ST No.827 of 1997 (State Vs. Gudun and others) arising out of Case Crime No.55 of 1997, under Sections 376/511, 354, 506 IPC is set aside.

63. The appellants would be set free, if they are in jail and if they are not wanted in any other criminal case.

64. The lower court record alongwith a copy of this judgment be sent back to the court concerned for its consignment.

Order Date :- 22.08.2023
Shahroz

(Umesh Chandra Sharma,J.)