

High Court of Judicature at Allahabad
(Lucknow)

Neutral Citation No. - 2023:AHC-LKO:72387-DB

Reserved on: 13.10.2023

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Reserved

Case :- JAIL APPEAL No. - 604 of 2015

Appellant :- Aftab Ansai

Respondent :- State of U.P.

Counsel for Appellant :- Govt. Advocate Inperson, Dilip Kumar Singh, Rajesh Kumar Dwivedi

Hon'ble Rajan Roy, J.

Hon'ble Ajai Kumar Srivastava-I, J.

(Per: Rajan Roy, J.)

1) Heard Sri Rajesh Kumkar Dwivedi, learned *Amicus* for the appellant and Sri Umesh Chandra Verma, learned A.G.A. for the State.

2) This is an appeal under Section 374 of the Code of Criminal Procedure, 1973 challenging the judgment and order dated 26.11.2014 passed by Addl. Session Judge, Court no.11, Lucknow in Session Trial No.16/2013 arising out of Case Crime No.325 of 2013 under Sections-376(2)f/323, 506 I.P.C. & Section 3/4 of the POCSO Act, Police Station-P.G.I, District-Lucknow.

3) The prosecution case in nutshell is that on 17.09.2013, the victim/ prosecutrix submitted a report at Police Station-P.G.I, Lucknow alleging rape/ attempt to rape by her father on

various occasions and lastly on 16.09.2013 at about 07:00 P.M. whereupon the prosecutrix ran away from the house and hid in Kalindi Park where she spent the night and on the next day reached the police station and lodged the aforesaid report.

4) The F.I.R. was lodged on 17.09.2013 at 07:15 P.M.

5) The medico-legal examination of the prosecutrix was conducted in the night intervening 17/18.09.2013 at about 1:15 A.M. and the same is Ex.Ka.6/1. According to medico-legal examination report, there were scratch marks present on her back. As per Ex.Ka.6/2 which is part of Medico-legal examination report, her hymen was old, torn and healed. The report indicated that she had repeated sexual intercourse. However, the doctors opined that no definite opinion could be formed regarding sexual assault. She was also medically examined to ascertain her age which according to Ex.Ka.7 was about 16 years. Smear slides were prepared and sent for examination but as per Ex.Ka.9 no spermatozoa either died or active was seen in the slide.

6) Pink Salwar worn by the prosecutrix was recovered on 19.09.2013. Recovery memo in this regard is Ex.Ka.3 which was sent for forensic examination and as per report dated 17.05.2014, sperm and semen were found thereon but no blood was found.

7) Ex.Ka.12 is the siteplan pertaining to the site of crime. Ex.Ka.8 is the X-Ray report. Recovery of pink salwar has been proved by P.W.2 who is a witness to the recovery and signed

the recovery memo apart from the fact that the victim has also testified about it.

8) After conducting the investigation, chargesheet was filed by the police against the appellant herein and charges were framed against him by the trial court on 23.01.2014 under Section 376(2)(f), 323 and 506 I.P.C. as also Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'the Act, 2012'. The appellant denied the charges and demanded trial, therefore, he was put to trial.

9) The prosecution examined as many as five witnesses. P.W.1 is the victim / prosecutrix; P.W.2-Smt. Shabnam is the niece of the appellant & cousin of the victim (P.W.1); P.W.3-Dr. Manjari Tandon is the doctor who had examined the victim; P.W.4 – Praveen Krishna Mishra is the Head Muhrir who had made requisite entries in the police records and lodged the F.I.R. on the tehrir of the victim and P.W.5-Sri Amit Kumar Tomar is the then S.O. of Police Station-P.G.I, Lucknow who is the Investigating Officer.

10) P.W.1-the victim and daughter of the appellant has proved her tehrir i.e. Ex.Ka.1. She has stated that she was uneducated and she can just sign. Her mother died several years ago. Her father-the appellant herein used to coerce, beat her up and used to rape her. He had been doing this after death of her mother. She had told her Bua-Murtin Khatoon about this fact. On 16.09.2013 also her father had raped and beaten her up with a belt. She ran away towards Kalindi Park and hid herself there. She remained hidden in the night and on the next day, she went to the police station after inquiring about it from

passersby. After death of her mother, her father-appellant herein had been continuously beating and raping her and committing forcible sexual intercourse with her. He had threatened her that if she disclosed this fact to anybody, he would kill her. Her testimony discloses that she fully understands what is meant by rape/ forcible sexual intercourse. She asked the court to impose severest of punishment on her father for the crime committed on her.

11) In cross-examination, she reiterated her story and the defence has not been able to impeach her credibility in any manner. She has stated that while her mother was alive, her father had never committed rape or forcible sexual intercourse with her. He had started doing it after few days of the death of her mother and had been repeatedly doing it. He used to rape her in the day, in the night whenever he wanted to. Nobody used to come to her house earlier. Off late, her Bua, who resided in Nepal, had started coming to her house. Nobody lives around her house. She reiterated that a day prior to lodging of the report, her father had beaten her up and raped her. Her brother and sister were in the house at that time. She had run away to the Kalindi Park and thereafter, lodged the report as already mentioned in her examination-in-chief. She has stated that she had not disclosed these facts to Hasina her Bua nor to Shabnam (P.W.2) her cousin. She has denied that she had filed a false report on the instigation of Shabnam.

12) P.W.2 -Shabnam has stated that victim-P.W.1 was the daughter of her Mama i.e. the appellant herein. Whenever she visited his house she found that the victim was always fearful.

P.W.1-victim had told her about ill-treatment by the appellant when she reached the police station. She has proved the recovery of pink salwar and her signatures on the recovery memo. The custody of P.W.1-victim as she was a minor was given to P.W.2 and she has proved the *Supurdginama* Ex.Ka.14 in this regard. The application for *Supurdginama* is Ex.Ka.5.

13) In the cross-examination, she has stated that the appellant is son of maternal uncle of her mother. She used to visit his house as she had to purchase medicine from Lucknow. P.W.1-the victim told her about rape by the appellant at the police station. Prior to it, she had been told about this fact by her Bua. From her testimony, it is clear that P.W.1 had never told her about rape but in fact, P.W.2 came to know about it from her Bua and thereafter for the first time, P.W.1 told her about it when P.W.2 reached the police station after the F.I.R. had been lodged and after she had been medically examined. She has denied the suggestion in cross-examination by the defence that she had taken a lot of money from the appellant for sending her husband abroad and has also denied that on account of failure to pay back the said loan and with intent to usurp the property of the appellant, she had got a false report lodged through the victim after instigating her in this regard.

14) The contention of learned *Amicus* was that medical evidence does not prove rape. No D.N.A. samples were collected to prove that semen/ sperm found on the pink salwar recovered from the victim was of the appellant. Most important, in the tehrir and in her statement before the Magistrate under Section 164 Cr.P.C., the victim had stated only about an

attempt to rape on 16.09.2013 but before the court, an improvement was made and it was submitted that she in fact had been raped on 16.09.2013 which makes her statement unreliable. Further, in her tehrir and her statement under Section 164 Cr.P.C., she had spoken about being beaten by 'belt' and being raped on 16.09.2013 but before the court, she has stated that she had been beaten-up by a 'danda'. This contradiction makes her testimony untruthful and unreliable. She also contended in her statement before the Magistrate under Section 164 Cr.P.C. that the incident had occurred on 16.09.2013 at about 07:00 P.M. whereas in her testimony before the court, she had stated about the incident having taken place on the said date at 4/5 P.M. This contradiction in her testimony belies the prosecution case and creates a doubt about the credibility of the witness.

15) Learned A.G.A. has submitted that a daughter/ victim has testified against her father. Her testimony is itself sufficient to prove the guilt of the appellant who has rightly been convicted by the trial court. The crime is a gruesome one which has been proved beyond reasonable doubt. The medical report shows that the victim had been subjected to repeated sexual intercourse. The fact that the doctor could not opine as to whether she had been subjected to rape or not is inconsequential in view of the testimony of the victim. The defence of the appellant that he had been falsely implicated by his daughter on the instigation of P.W.2-Shabnam to whom he had advanced a lot of money for sending her husband abroad has not been proved and, in fact, the testimony of P.W.1 and P.W.2 belie such a plea. Semen and Sperm were found on the pink salwar recovered

from the body of the victim and the appellant did not offer any acceptable explanation in his statement under Section 313 Cr.P.C. in this regard.

16) The appellant has been convicted of the offence under Section 376(2)(f) I.P.C. and sentenced to life imprisonment etc. apart from fine. He has also been convicted of the offence under Section 4 of the Act, 2012 and sentenced to life imprisonment along with the fine. In addition to it, he has also been sentenced under Sections 323 and 506 I.P.C.

17) As per testimony of P.W.1, she was subjected to rape and beating by the appellant-her father immediately after the death of her mother. The date of death of her mother has not been mentioned. However, the last incident is alleged to have taken place on 16.09.2013 in the evening. The definition of rape as contained in Section 375 I.P.C. underwent a change by the Act, 13 of 2003 which came into retrospective effect from 03.02.2013. Therefore, the said amended definition is attracted in the case at hand. Likewise, the amendments in Section 376 I.P.C. by the said Act No.13 of 2013 as effective from 03.02.2013 would apply. Section 4 of the Act, 2012 was amended by the Act No. 25 of 2019 w.e.f. 16.08.2019, therefore, this amended provision would also be attracted.

18) Further as per Section 29 of the Act, 2012 where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections- 3, 5, 7 and Section 9 of the Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved. Thus, there is a

presumption as to the commission of offence under the said provisions. Section 4 of the Act, 2012 is the provision prescribing the sentence for the offence of penetrative sexual assault as defined in Section 3 of the Act, 2012. Therefore, the conviction and sentence under Section 4 of the Act, 2012 is for the offence committed by the appellant as alleged under Section 3 of the Act, 2012. Therefore, the presumption under Section 29 of the Act, 2012 applies.

19) Although the medico-legal examination report and the statement of the doctor is that no definite opinion regarding sexual assault can be given but the medico-legal examination report clearly mentions that there were scratches on the back of the victim and the said report also indicates that she had repeated sexual intercourse. Now, it is not the case of the defence that the victim was in a relationship with any other person voluntarily and for that matter had been caught red handed in a compromising position with somebody else which could give rise to a possibility of her having been habitual of sexual intercourse with somebody else. The mother of the victim had died and as per her testimony, since her death, she had been repeatedly subjected to physical assault as also forcible sexual intercourse amounting to rape. The age of the victim/ prosecutrix is about sixteen years, therefore, she was a minor on the date of such crime, thereby attracting the provisions of the Act, 2012 as also the relevant provisions in this regard under Section 376 (2)(f) and (3) I.P.C. The case of prosecution is based on the testimony of P.W.1 and P.W.2. P.W.1 is the victim herself and on a reading of her testimony, it is proved that the appellant who was her father physically

abused her repeatedly after the death of her mother. Not only he beat her up but also subjected her to forcible sexual intercourse taking advantage of his relation with the victim and the authority exercised over her i.e. his minor daughter. She has specifically stated in her examination-in-chief about being repeatedly subjected to physical assault and forcible sexual intercourse by the appellant on various occasions. In cross-examination also, she has held her ground and the defence has not been able to impeach her credibility in any manner. In fact, she has also stated that severest of punishment should be awarded to her father for the crime committed by him. She has clearly stated that on 16.09.2013 also, her father beat her up and then physically/ sexually abused her. Much emphasis was laid by learned counsel for the appellant on the fact that in her statement under Section 164 Cr.P.C. she had stated about an attempt by the appellant to sexually assault her whereas in her statement before the court she has stated about the appellant having actually had forcible sexual intercourse with her. This contradiction in her statement was relied upon to impeach her credibility, however, we find that she was never confronted in cross-examination on this point and therefore, it is not open for the appellant's counsel to take this plea before this Court. Even otherwise, we find that in her statement under Section 164 Cr.P.C. which was recorded on 20.09.2013, no doubt, she has stated that he attempted to sexually assault her but in her tehrir lodged by her three days ago on 17.09.2013, she has clearly stated that when the appellant started forcible sexual intercourse with her she declined whereupon she was beaten up. Now, minor discrepancy in this regard as to whether she

was beaten by the 'belt' or by the 'danda' as stated in the tehrir and under Section 164 Cr.P.C. or for that matter in her statement before the court is inconsequential. Before the court, she has categorically stated that she was beaten by the 'belt' which tallies with the statement in her tehrir, therefore, there is no reason to disbelieve this version and the reference to a 'Danda' in her statement under Section 164 Cr.P.C. by itself does not create any doubt about the reliability of her statement before the court.

20) These aspects have to be considered in the light of the amendments to the definition of rape under Section 375 I.P.C., according to which, full penetration and actual intercourse till the end is not necessary. As per the amended definition, a man is said to commit "rape" if he- (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the seven descriptions mentioned therein such as against her will and without her consent. In this case, P.W.1 has clearly testified that this intercourse was against her will and without her

consent. The act committed by the appellant on 16.09.2013 in the evening amounts to rape as per the aforesaid definition.

21) In the context of the offence alleged to have taken place on 16.09.2013, we may also refer to Section 3 of the Act, 2012 which defines penetrative sexual assault and the definition of the said Act is similar to the amended definition contained in Section 375 I.P.C. as referred hereinabove and it reads as under:-

"3- A person is said to commit "penetrative sexual assault" if--

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person."

22) Considering the testimony of P.W.1 in the light of definition of rape in Section 375 I.P.C. and definition of penetrative sexual assault in Section 3 of the Act, 2012, we have no doubt that the appellant is guilty of having committed the aforesaid offences.

23) This apart, she has clearly stated of having been repeatedly beaten up and subjected to forcible sexual intercourse several times soon after the death of her mother. Therefore, there is no reason to disbelieve her statement in this regard and on every such occasion, the appellant had committed the offence of rape. As regards the earlier acts i.e. prior to 16.09.2013, the allegation is not of attempt to rape but

of having actually raped her. Therefore, her testimony in this regard by itself is sufficient to prove the guilt of rape by the appellant of the victim. No daughter would falsely implicate her father for having committed such an offence. It seems human depravity and perversion know no bounds. There can be no other explanation for such an act on the part of appellant.

24) As regards the plea taken that he had been falsely implicated by his daughter on the instigation of P.W.2-Shabnam whom he had given huge amount of money for sending her husband abroad, firstly, there is no evidence to show that money was given to P.W.2 and secondly, it has come in the testimony of P.W.1 that she had not told P.W.2 about the crimes of the appellant but had only told her Bua about it and P.W.2 has also stated that she came to know about the said acts from P.W.1 for the first time when she went to the police station after the F.I.R. has been lodged and medical examination of P.W.1 had taken place. Prior to it, she came to know about it from the Bua of P.W.1 and not from P.W.1 herself. P.W.2 has specifically denied having received money from the appellant for sending her husband abroad or of having planned the false implication of the appellant by instigating her daughter. P.W.1 has also denied this suggestion, therefore, there is no evidence in this regard. As already stated, no daughter would falsely implicate her father merely on the instigation of somebody not even a relative such as P.W.2 who was only her cousin.

25) Once again, we may refer to the presumption under Section 29 of the Act, 2012 as regards the offence of

penetrative sexual assault defined in Section 3 for which punishment is prescribed in Section 4 i.e. the provision under which the appellant has been convicted in addition to the offence under Section 376 (2)(f) I.P.C. This presumption of commission of offence under Section 3 is clearly attracted and the appellant has not been able to lead any evidence and prove to the contrary.

26) The testimony of prosecutrix by itself is sufficient to prove all the offences with which the appellant has been charged and the said offences have been proved by the prosecution beyond reasonable doubt.

27) In view of the above discussion, we find that the trial court has rightly convicted the appellant of the offence under Sections-376(2)(f) I.P.C. As regards the offences under Section 323 and 506 I.P.C., the same are also proved from the testimony of P.W.1. Considering the fact that the appellant is father of the victim and had committed the ghastly and abhorrent act of rape upon her daughter, the sentence of life imprisonment imposed upon him under Section 376(2) and Section 4 of the Act, 2012 is apt and does not require any interference so is the sentence imposed by the trial court for the offence under Section 323 & 506 I.P.C. which requires no interference.

28) The appeal lacks merit and it is accordingly, **dismissed**.

29) The original records shall be remitted back to the trial court for necessary action, if any.

30) Learned Amicus, Sri Rajesh Kumar Dwivedi shall be entitled to Rs.21,000/- (Rupees Twenty One Thousand Only) from the High Court as fee for his services.

(Ajai Kumar Srivastava-I,J.) (Rajan Roy,J.)

Order Date :- 03.11.2023

Shanu/-