

**IN THE HIGH COURT OF JAMMU & KASHMIR AND
LADAKH AT SRINAGAR**

Reserved on: 19.12.2024

Pronounced on: 27.12.2024

CrlA(S) No.05/2023

IRSHAD AHMAD MALIK

...APPELLANT(S)

Through: - Mr. Ahmad Javaid, Advocate.

Vs.

UT OF J&K

...RESPONDENT(S)

Through: - Mr. Mubashir Majid Malik, Dy. AG.

CORAM:HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) Instant appeal is directed against judgment dated 29.05.2023 passed by learned 2nd Additional Sessions Judge, Srinagar (hereinafter referred to as “the trial court”) whereby the appellant has been convicted of offence under Section 376 RPC in a case arising out of FIR No.33/2012 of P/S Soura, Srinagar. Challenge has also been thrown to order 31.05.2023 passed by the trial court, whereby the appellant has been sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.25,000/-. In default of payment of fine, the appellant has been directed to undergo simple imprisonment for a further period of six months.

2) As per case of the prosecution, on 18th May, 2012, PW-1, Habibullah Teli, lodged a written report with Police Station, Soura, alleging therein that the appellant, who lives as a tenant in the house of one Ghulam Qadir Wani in his neighbourhood, was being visited by his

minor daughter (“the prosecutrix”). It was further alleged that his aforesaid daughter a few days back complained of pain in her abdomen and when he took her to doctor for treatment, certain tests were conducted upon her, whereafter the doctor told him that the prosecutrix was pregnant. It was also reported that when the complainant and his wife enquired from the prosecutrix, she disclosed that the appellant, a resident of Rajouri, who resides in their neighbourhood, has committed rape upon her on several occasions.

3) On the basis of the aforesaid report, the police registered FIR No.33/2012 offence under Section 376 RPC and investigation of the case was set into motion. During investigation of the case, statements of the witnesses were recorded. The statement of the prosecutrix under Section 164-A of Cr. P. C was recorded by the Magistrate and she was subjected to medical examination. As per the certificate issued by the doctor, the age of the prosecutrix was found to be 14 years and it was also found that she was carrying a child in her womb. The appellant/accused was subjected to potency test and he was found to be capable of performing sexual intercourse. Thus, the investigating agency found the appellant/accused involved in the commission of offence under Section 376 RPC and, accordingly, the challan was laid before the trial court.

4) On 23.06.2012, the learned trial court framed charge for offence under Section 376 RPC against the appellant. The appellant denied the charge and claimed to be tried. Accordingly, the prosecution was directed to lead evidence in support of the charge. In order to prove its

case, the prosecution examined 8 out of 9 witnesses listed in the challan. Besides this, the prosecution also examined one more witness, namely, Dr. Shabir Ahmad of Medical College, Srinagar, after it was permitted to produce the said witness pursuant to order dated 16.11.2017 passed by the trial court while exercising its powers under Section 540 Cr. P. C.

5) After completion of the prosecution evidence, the statement of the appellant/accused under Section 342 of J&K Cr. P. C was recorded. In his statement the appellant/accused claimed that a false case has been lodged against him. According to the appellant/accused, the prosecutrix, while making her statement under Section 164-A of Cr. P. C, had named one Ishtiaq Ahmad, a resident of Rajouri, but he has been un-necessarily involved in the present case. He claimed that the actual perpetrator of the crime had fled away from the locality and he has been wrongly implicated. The appellant also claimed that he has undergone sterilization, as such, he was not capable of committing sexual intercourse. The appellant/accused sought time to produce evidence in defence.

6) The appellant thereafter moved an application before the trial court with a prayer that the illegitimate child born from the womb of the prosecutrix may be subjected to DNA test in order to ascertain his paternity but the said application was dismissed by the trial court in terms of order dated 26.05.2018. The learned trial court thereafter closed the evidence of the defence as the appellant/accused could not produce any witness in support of his case despite availing a number of opportunities.

7) The learned trial court, after hearing the parties and after appreciating the evidence on record, came to the conclusion that charge for offence under Section 376 RPC is established against the appellant/accused. Accordingly, in terms of the impugned judgment he has been convicted of aforesaid offence.

8) The appellant has challenged the impugned judgment of conviction on the grounds that investigation in the instant case has not been conducted properly, inasmuch as the actual culprit has not been identified by the investigating agency. It has been contended that during the pendency of trial, the appellant had made an application before the trial court seeking DNA test of the child born out of the womb of the victim girl so as to ascertain paternity of the said child in order to conclusively prove as to whether or not the appellant was the father of the said child but the said application was declined by the learned trial court without cogent reasons. It has been further contended that there has been delay in lodging of the FIR which has not been properly explained by the complainant. It has been further contended that the appellant has not been given proper opportunity of producing evidence in defence. It has been further contended that the learned trial court has not properly appreciated the evidence on record and that the appellant has not been given opportunity to explain the incriminating circumstances appearing in the prosecution evidence against him.

9) I have heard learned counsel for the parties and perused the grounds of appeal, the impugned judgment and the evidence recorded by the trial court.

10) At the very outset, it appears from a perusal of the statement of the appellant/accused recorded under Section 342 of J&K Cr. P. C that all the incriminating circumstances appearing in the prosecution evidence have not been put to him to seek his explanation. It is clear that the statements of the doctors, namely, Dr. Masooda Jan, Dr. Sheikh Fayaz and Dr. Shabir Ahmad, have not been put to the appellant for seeking his explanation. In fact, statement of Dr. Shabir Ahmad, witness to the potency test of the appellant has been recorded after the statement of the appellant/accused under Section 342 of J&K Cr. P.C, was recorded, as such, the same has not been put to him for seeking his explanation.

11) It is a settled law that it is the duty of the trial court to put each material circumstance to the accused specifically, distinctively and separately. The failure on the part of the trial court to put the material circumstances to the accused amounts to an irregularity and it will vitiate the trial if it is shown that it has grossly prejudiced the accused. The law on this issue has been settled by the Supreme Court and by this Court in a number of judgments. The Supreme Court in a recent case of **Raj Kumar vs. State (NCT of Delhi)**, 2023 SCC Online SC 609, has, while analyzing its previous judgments on the subject, summarized the principles in the following manner:

16. The law consistently laid down by this Court can be summarized as under:

- (i) *It is the duty of the Trial Court to put each material circumstance appearing in the evidence against the accused specifically, distinctively and separately. The material circumstance means the circumstance or the material on the basis of which the prosecution is seeking his conviction;*
- (ii) *The object of examination of the accused under Section 313 is to enable the accused to explain any circumstance appearing against him in the evidence;*
- (iii) *The Court must ordinarily eschew material circumstances not put to the accused from consideration while dealing with the case of the particular accused;*
- (iv) *The failure to put material circumstances to the accused amounts to a serious irregularity. It will vitiate the trial if it is shown to have prejudiced the accused;*
- (v) *If any irregularity in putting the material circumstance to the accused does not result in failure of justice, it becomes a curable defect. However, while deciding whether the defect can be cured, one of the considerations will be the passage of time from the date of the incident;*
- (vi) *In case such irregularity is curable, even the appellate court can question the accused on the material circumstance which is not put to him; and*
- (vii) *In a given case, the case can be remanded to the Trial Court from the stage of recording the supplementary statement of the concerned accused under Section 313 of CrPC.*
- (viii) *While deciding the question whether prejudice has been caused to the accused because of the omission, the delay in raising the contention is only one of the several factors to be considered”.*

12) From the foregoing analysis of law on the subject, it is clear that failure to put material circumstances to the accused amounts to a serious irregularity and it can even vitiate the trial if it is shown that the accused has been prejudiced. It is also clear that each material circumstance appearing in the evidence against the accused has to be specifically,

distinctively and separately put to the accused for seeking his explanation before placing reliance upon such circumstance or the material for recording his conviction.

13) Now advertng to the facts of the present case, as already noticed, the statement of Dr. Masooda Jan, who has proved the certificate, EXT-PD, which relates to proof of pregnancy of the prosecutrix, has not been put to the appellant/accused. Similarly, statement of Dr. Sheikh Fayaz Ahmad, Dental Surgeon, who has proved the certificate, EXPW-7, according to which age of the prosecutrix was assessed as 14 years, has also not been put to the appellant/accused. Similarly, the statement of Dr. Shabir Ahmad, who has proved the certificate, EXCW-1, according to which the appellant/accused was potent and capable of performing sexual intercourse, has also not been put to the appellant/accused. Even the statement of PW Mst. Saleema, the mother of the prosecutrix, to the extent that the prosecutrix was aged 12 years only, has not been put to the appellant/accused while recording his statement under Section 342 of the J&K Cr. P. C.

14) One of the important circumstances, on the basis of which the appellant/accused has been convicted, is the minority of the prosecutrix. According to the prosecution case, she was minor at the time of occurrence. To prove this, the evidence produced by the prosecution is in the shape of statement of her mother to this effect and the statement of Dr. Sheikh Fayaz, who has issued the certificate, EXPW-7. Both these pieces of evidence have not been put to the appellant/accused to seek his

explanation. The learned trial court, while recording conviction against the appellant/accused, has used both these pieces of evidence in holding that the age of the prosecutrix was less than 18 years at the time of the occurrence. This has persuaded the learned trial court to hold that the appellant has committed rape upon her.

15) Similarly, the statement of Dr. Masooda Jan is also an important piece of evidence that has been used by the learned trial court while recording conviction of the appellant/accused. According to her statement the prosecutrix was carrying a child in her womb when she was examined by her. This is an important circumstance on the basis of which the learned trial court has come to the conclusion that the prosecutrix was subjected to sexual intercourse by the appellant/accused.

16) In his statement under Section 342 of J&K Cr. P. C, the appellant had taken a definite stand that he had undergone sterilization and, as such, was incapable of committing sexual intercourse and could not have fathered a child. To rebut this defence of the appellant, the prosecution examined Dr. Shabir Ahmad to prove the certificate, EXC.W-1, but this certificate has not been put to the appellant for his explanation. The learned trial court, while recording conviction against the appellant/accused, has used the aforesaid certificate as evidence against him.

17) The omission on the part of the trial court to put the aforesaid pieces of incriminating circumstances to the appellant/accused for his explanation has caused grave prejudice to him, which is a serious

irregularity. The question that arises for consideration is as to whether on account of this irregularity, the appellant deserves to be acquitted or the matter should be remanded to the trial court for recording further statement of the appellant/accused under Section 342 of J&K Cr. P. C

18) In the instant case, the incident has taken place in the year 2012. Although 12 years have elapsed since the date of the incident, yet we are dealing with a case where allegation against the appellant/accused is relating to sexual assault upon a minor girl, who, prima facie, appears to have supported the prosecution case. The only question which remains to be determined is whether the prosecutrix, was minor at the relevant time and whether the appellant/accused was capable of performing sexual intercourse at the relevant time. If the appellant/accused, in these circumstances, is acquitted of the charge on the basis of a technicality, it may result in failure of justice. Conversely, if the appellant/accused is given a chance to explain the material circumstances as indicated hereinbefore, he will be able to put up his defence and explain these circumstances and there would be no failure of justice even from the perspective of the appellant/accused.

19) In view of the fact that all the material circumstances appearing in the prosecution evidence have not been put to the appellant/accused while recording his statement under Section 342 of J&K Cr. P. C, the impugned judgment of conviction and the order of sentence passed by the learned trial court are set aside. The case is remanded to the learned trial court with a direction to record further statement of the

appellant/accused under Section 342 of the J&K Cr. P. C for seeking his explanation regarding incriminating circumstances appearing in the prosecution evidence, as enumerated hereinbefore. After recording further statement of the appellant under Section 342 of J&K Cr. P. C, he shall be afforded an opportunity to produce evidence in defence, whereafter the learned trial court shall pass fresh judgment in accordance with the law. The needful shall be done by the learned trial court within a period of six months from the date a copy of this judgment is received by it.

20) Till such time a fresh judgment is passed by the learned trial court, the appellant is admitted to bail subject to the following conditions:

- I. *That he shall furnish personal bond in the amount of Rs.50,000/ with one surety of the like amount to the satisfaction of the learned trial court;*
- II. *That he shall appear before the trial court on each and every date of hearing;*
- III. *That he shall not leave the territorial limits of Union Territory of J&K without prior permission of the learned trial court;*

21) The trial court record along with a copy of this judgment be sent back.

(Sanjay Dhar)
Judge

Srinagar

27.12.2024

“Bhat Altaf-Secy”

Whether the order is reportable: **Yes/No**