

Court No. - 80

Case :- CRIMINAL APPEAL No. - 898 of 2021

Appellant :- Mukesh

Respondent :- State of U.P. and Another

Counsel for Appellant :- Durgesh Kumar Tiwari, Pavan Kumar Maurya, Sarvajeet Singh, Shiv Sharan Tripathi, Vinod Singh

Counsel for Respondent :- G.A.

Hon'ble Samit Gopal, J.

1. This appeal has been preferred against the judgement and order dated 25.01.2021 passed by the Special Judge (POCSO Act) / Additional Sessions Judge, District Sambhal at Chandausi in Special Sessions Trial No. 846 of 2017 (State of U.P. vs. Mukesh) by which, the accused-appellant Mukesh has been convicted and sentenced for offences under Section 452 I.P.C. for two years rigorous imprisonment, a fine of Rs.2,000/-, in default of payment of fine to six months additional imprisonment, Section 506 I.P.C. to one year rigorous imprisonment, a fine of Rs.2,000/- and in default of payment of which to further three months imprisonment, Section 376 I.P.C. to ten years rigorous imprisonment and a fine of Rs.20,000/-, in default of payment of which to further undergo two years imprisonment and under Section 4 of Protection Of Children From Sexual Offences Act, 2012 to ten years rigorous imprisonment with fine of Rs.20,000/- and in default of payment of which two years further imprisonment. The sentences have been ordered to run concurrently. The trial court has further ordered that the benefit of set off under Section 428 Cr.P.C. be extended to the accused. Further, the trial court has ordered that out of the fine of Rs.44,000/- as ordered to be realized from the accused-appellant Rs.22,000/- be paid as compensation to the victim. The present appeal has thus been preferred by the accused-appellant which stood admitted vide order dated 15.03.2024 by another Bench of this Court.

2. The victim is hereby addressed as the victim 'X' in view of the directions of the Apex Court in various judgements and Section 218 I.P.C. also.

3. The occurrence in the present matter is reported to be of 14.06.2017 at about 9:00 p.m. in the house of the informant and the victim 'X'. The first information report of the present matter was lodged on 16.06.2017 at about 14:00 hours by Nekram against the accused-appellant Mukesh on the basis of typed application, alleging therein that on 14.06.2017, he had gone to village Mehuwa Ki Nagaliya for extraction of Mentha Oil and was not at the house. The incident is of 14.06.2017 at about 9:00 p.m. when his wife Kalawati had gone to ease herself and his son Leeladhar had gone to give fodder to the animals wherein finding opportunity, the accused-appellant Mukesh entered in the house and committed rape on his minor daughter victim 'X' aged about 15 years, after catching hold of her and threatening her by putting the country made pistol on her chest. On shout and shriek of victim 'X' his wife Kalawati, he himself and Leeladhar his son reached there wherein, the accused while extending threats to them and other family members ran away. When he reached his house after getting the oil of mentha extracted, his minor daughter victim 'X' told him of the entire incident after which, he took his daughter and was going to Gunnaur on which, on the way, they were followed by the accused, who forcibly made them return back and did not let them go to the police station. He has somehow, come for lodging the first information report along with his minor daughter. His report be lodged and medical examination of his daughter to conducted. The application for the F.I.R. is marked as Exhibit Ka-1 to the records. On the basis of the said application, a first information report was lodged as Case Crime No. 0425 of 2017, under Sections 452, 376, 506 I.P.C., P.S. Gunnaur, District Bheem Nagar. The Chick F.I.R. is Exhibit Ka-5 to the records.

4. The victim 'X' was medically examined on 17.06.2017 by Dr. Sarika Agrawal, who did not find any injuries over her private part and on her body. The vaginal swab was prepared and handover for pathological examination. The victim 'X' was referred to the C.M.O. Sambhal for certification of her age. The medical examination report of the victim 'X' is marked as Exhibit Ka-2 to the records. The pathological report dated 20.06.2017 was given by the pathologist District Hospital,

Moradabad with his opinion that no spermatozoa alive or dead was seen in the received smear. The C.M.O., Sambhal vide his report dated 21.06.2017 opined the age of victim 'X' as 14 years.

5. The Investigating Officer prepared a site plan on 07.07.2017 on the description given by the victim 'X'. The same is Exhibit Ka-3 to the records. Another site plan was prepared by the Investigating Officer on 16.06.2017 on the information given by the first informant. The same is marked as Exhibit Ka-4 to the records. The statement of victim 'X' under Section 164 Cr.P.C. was recorded on 28.06.2017 by the Civil Judge (Junior Division), Budaun. The same is Exhibit Ka-7 to the records.

6. The investigation concluded and a charge sheet No. 261 of 2017 dated 29.07.2017 under Sections 452, 376 and 506 I.P.C. and Section 3/4 Protection Of Children From Sexual Offences Act was submitted against the accused Mukesh. The same is Exhibit Ka-6 to the records. The court concerned took cognizance upon the same vide its order dated 17.08.2017.

7. The Additional Sessions Judge, Chandausi, District Sambhal at Chandausi vide order dated 05.09.2018 framed charges against the accused-appellant Mukesh for offences under Sections 452, 376 and 506 I.P.C. and Section 3/4 Protection Of Children From Sexual Offences Act. The accused pleaded not guilty and claimed to be tried. Defence evidence was led.

8. The trial in the matter started in which, Nekram, the first informant and father of the victim 'X' was examined as P.W.-1, Leeladhar son of first informant and brother of the victim was examined as P.W.-2, Smt. Kalawati, wife of first informant and mother of victim 'X' was examined as P.W.-3, Smt. Vijay Kumari, the wife of Leeladhar (P.W.-2), daughter-in-law of first informant and Bhabhi of victim 'X' was examined as P.W.-4, Dr. Sarika Agarwal, the doctor who conducted the medical examination of victim 'X' was examined as P.W.-5, victim 'X' was examined as P.W.-6 and Rakshpal Singh, the Investigating Officer of the matter was examined as P.W.-7. The accused led defence evidence by producing Ramveer Singh son of

Ganpath Singh as D.W.-1 and Ramesh son Bharat Singh as D.W.-2.

9. The trial in the matter concluded holding the accused appellant guilty and he was convicted by the trial court concerned as stated above.

10. Heard Sri Pawan Kumar Maurya, learned counsel for the appellant and Sri Birendra Pratap Singh, learned counsel for the State and perused the records.

11. The trial court records were also summoned which have been received and are tagged with the file of the present appeal which have also been perused.

12. P.W.-1 Nekram is the first informant and father of the victim 'X'. He states that on 14.06.2017 at about 9:00 p.m., when the ladies of his house had gone to ease themselves, his son had gone to give fodder to the animals and he had gone to the another village for extraction of mentha oil, the accused-appellant entered in his house and threatened his daughter with a country made pistol, by that time he had returned back. The accused-appellant while threatening his daughter victim 'X' with country made pistol, committed rape upon her. He, his wife and his son, on shouts and shriek of his daughter reached there and saw the accused running away while extending threat to them and other family members. He with his daughter then proceeded towards the police station for lodging a report after being informed about the incident by his daughter but on the way, the accused-appellant met him and made them return back on which they came back. Then on the next day, he got an application typed and went to the police station and got the first information report lodged. He proves the first information report. He states that his daughter was got medically examined by the police after 2-3 days. He further states that the Investigating Officer interrogated him during investigation.

13. P.W.-2 Leeladhar, the son of the first informant and brother of the victim 'X' stated that on 14.06.2017, his father had gone for extraction of mentha oil to another villager. He, his wife Smt. Vijay Kumari, victim 'X' and other brother and sisters were present in the house. His wife was unwell, she with his mother went to

ease themselves, his sister victim 'X' was all alone in the house and finding her as such the accused-appellant entered in the house. He had gone to give fodder to the buffalos. His two other brothers, namely, Prempal and Ramgopal had also gone with him. The accused-appellant Mukesh then committed rape on his sister. At that time, his wife, mother and sister returned from the field and on reaching the door of the house saw the accused and shouted on which, he ran away after coming out of the house. While running away, the accused-appellant was carrying a country made pistol and was also holding his pant in his hand. When they entered inside the house, they found victim 'X' lying naked and crying. She then told them about the incident. The accused and his family members then threatened him and his family members due to which, they did not go to the police station. The F.I.R. was got lodged by his father. He was interrogated during investigation.

14. P.W.-3 Smt. Kalawati the wife of first informant and mother of victim 'X' states that at about 9:00 p.m. on the date of incident, she along with her daughter-in-law Smt. Vijay Kumari went to ease themselves. Her son Leeladhar had gone to give fodder to the animals, her husband Nekram had gone to another village for extraction of mentha oil. Her daughter victim 'X' was alone in the house and finding her such, the accused-appellant entered into the house and committed rape on her. Her daughter raised a shout, on which she, her daughter-in-law and her daughter Premwati came inside the house, at that time, her husband Nekram also reached there. The accused-appellant then while flashing a country made pistol ran away. Her husband and victim 'X' were going for lodging of the F.I.R. but the accused-appellant and his family members stopped them on the way and did not let them go to the police station. On the next day also they had surrounded her house but subsequently, after finding way, on the third day her husband, victim 'X' and her son went to the police station for lodging of the F.I.R. She was interrogated during investigation.

15. P.W.-4 Smt. Vijay Kumari is the wife of Leeladhar and Bhabhi / sister-in-law of victim 'X'. She also gives the statement as given by the P.W.-3 Smt. Kalawati. She

also states to have been interrogated by the Investigation Officer.

16. P.W.-5 Dr. Sarika Agarwal is the doctor, who conducted the medical examination of the victim 'X'. She states that the incident of the matter is stated to be 14.06.2017 at about 2100 hours of which the first information report was lodged on 16.06.2017 at 1400 hours. The victim 'X' was brought to her by lady police constable for medical examination. She examined her on 17.06.2017 at 1:40 p.m. The victim 'X' was not married. She was not having any bodily injury. Her hymen was found to be old torn and healed. There was no injury to her internal organs. She prepared a slide of the vaginal swab and sent it to the District Hospital for examination. She referred the victim to the C.M.O., Sambhal for ascertainment of her age. She proves the medical examination report prepared by her.

17. P.W.-6 victim 'X' stated that the incident is of about 9:00 p.m. Her mother Kalawati, sister Premwati and Bhabhi Vijay Kumari had gone to the jungle for easing themselves. Her brother had gone to give fodder to the animals. Her father Nekram had gone to another village for extraction of mentha oil. She was all alone in the house. The accused-appellant Mukesh came once in the house and inquired about her parents and then went back. He came thereafter for second time carrying a country made pistol and then while placing the same on her chest and threatening her took out her cloths and committed rape upon her. Her mother, sister and bhabhi then returned from jungle, behind them, her brother Leeladhar and father also came back home. The accused-appellant then while flashing his weapon, threatened them and made way and while threatening them ran away. She and other persons then could come out of the house on third day only since, the accused-appellant Mukesh and his persons had surrounded the village from all sides. Her father got the report lodged of the incident. She was interrogated by a lady police. Her medical examination was conducted. Her statement was also recorded before the court. She was aged about 15 years at the time of incident. The site plan of the place of occurrence was prepared on the version given her by the Investigating Officer. She identifies the accused-appellant Mukesh present in court as a person who had

committed rape upon her. Her statement recorded under Section 164 Cr.P.C. was also opened before her and it stated by her to have been given before the court wherein, she identifies her photographs and thumb impression affixed by her.

18. P.W.-7 Sub-Inspector Rakshpal Singh is the Investigating Officer of the case. He states that after lodging the first information report, the investigation of the same was handed over to him. He proceeded with the investigation, recorded the statements of the witnesses and prepared the site plan on the instructions of the first informant. He searched for accused-appellant Mukesh. Subsequently, the medical examination of victim 'X' was got done and in C.D. No. 3, he then finding her to be a minor added Section 3/4 Protection Of Children From Sexual Offences Act in the matter. The statement of the victim 'X' under Section 164 Cr.P.C. was made available to him, the certificate of the C.M.O. concerned regarding the age of the victim 'X' was also given to him. On the information and instructions of the victim 'X', he prepared another site plan on 16.06.2017. The accused-appellant then surrendered before the court concerned on 28.07.2017, who was interrogated and then a Charge Sheet No. 261 of 2017 dated 29.07.2017 was filed by him.

19. The accused-appellant in his defence produced Ramveer Singh D.W.-1 and Ramesh D.W.-2. Both the said witnesses stated that on the date of incident at about 9:00 p.m. while they were crossing the house of Nekram, they saw Mukesh having an accident with Nekram, in which Nekram received some injuries which could not be seen and there was a dispute going on between them, many people had collected there, who then consoled them and then they disbursed. They further stated that some days prior to the present incident, the election of village Pradhan was also conducted in which Vijay Singh, the nephew of Nekram was one of the candidates and another candidate was Hrides, who was the cousin brother of family of Mukesh. During election Nekram and Mukesh had a scuffle due of which Nekram was having enmity and was enmical to Mukesh. They stated that due to the said reason, the present case was got lodged.

20. The accused in his statement recorded under Section 313 Cr.P.C. denied the

prosecution case and claimed false implication.

21. The trial court after considering the documents on record, statements of witnesses and arguments of learned counsels for the parties, came to a conclusion that the prosecution has proved its case beyond reasonable doubt and thus proceeded to hold the accused-appellant Mukesh guilty of the offences against him and convicted him as above. The present appeal has thus been filed before this Court.

22. Learned counsel for the appellant submitted as under :-

(i) The incident in the present case is stated to have taken place on 14.06.2017 at about 9:00 p.m. of which the first information report was lodged on 16.06.2017 at about 2:00 p.m. wherein the distance between the place of occurrence and the police station was about 4 Km. The lodging of the F.I.R. is delayed without any plausible explanation.

(ii) The prosecution case is of the accused-appellant threatening the victim 'X' at the first instance with a country made pistol and committing rape upon her, under the said threat and then after the arrival of the alleged witnesses, flashing the said country made pistol and making way and running away but no such weapon was recovered during investigation. The said story is thus false story just to give the case a serious colour.

(iii) There are serious contradictions in the statements of P.W.-1, P.W.-2, P.W.-3, P.W.-4 and P.W.-6 with regards to the incident inasmuch as, the time of incident is not fixed and there are different version of the incident as the first information report starts with the version of the incident to have taken place at 9:00 p.m. after which the victim 'X' states in her statement under Section 164 Cr.P.C. states it to have taken place at about 10 - 11 p.m. and as per the said prosecution witnesses the incident has taken place at about 9 p.m. It is submitted that as such there is sharp contrast with regard to the time of incident given by the victim 'X' in her statement

under Section 164 C.P.C. and the other entire prosecution evidence.

(iv) The medical evidence does not corroborate with the prosecution story inasmuch as the doctor did not find any injury on the victim 'X' either externally on her body or on her internal parts. Even the pathological report of the vaginal smear was negative for the presence of semen or spermatozoa. The doctor who conducted the medical examination being Dr. Sarika Agarwal P.W.-5 did not state that the victim was raped.

(v) There are two site plans prepared by the Investigating Officer. One on 07.07.2017 which is marked as Exhibit Ka-3, which was prepared on the instructions of victim 'X' and the other on 16.06.2017 Exhibit Ka-4 which was prepared on the instructions of the first informant Nekram. Both the site plans show different topography of the house inasmuch as the number of rooms in the house are shown to be different.

(vi) The first information report of the present incident as given by the first informant P.W.-1 Nekram is a typed report and he being an illiterate person could not have dictated the same and could not have got it prepared. The reading of the F.I.R. would go to show that the same is complete in all senses which is impossible for an illiterate man to do.

(vii) The Chief Medical Officer concerned has opined the age of the victim to be 14 years which is also unnatural as the said age should have been an estimation but the report of the C.M.O. concerned states of specific age of the victim as 14 years, which is also very unnatural.

(viii) D.W.-1 Ramveer Singh and D.W.-2 Ramesh were produced by the accused in his defence, who have given a natural version of the accused-appellant having an accident with P.W.-1 at the date and time of the present incident, after which there was a fight between them which got disbursed on intervention of persons of the locality and other villagers and further the enmity of the P.W.-1 with Mukesh due to

election of village Pradhan in which they had scuffle. The trial court wrongly disbelieved the said witnesses and proceeded to hold the accused appellant guilty.

(ix) The accused-appellant has been falsely implicated in the present case. The implication is due to enmity. The medical evidence does not support the prosecution case. The conviction is sever.

(x) The present appeal thus deserves to be allowed and the judgement and order of conviction deserves to be set aside.

23. Learned counsel for the State submitted as under :-

(i) The prosecution witnesses being Nekram / P.W.-1, Leeladhar / P.W.-2, Kalawati / P.W.-3, Vijay Kumari / P.W.-4 are natural and eye witnesses of the incident. They live in the same house along with victim 'X'. Ample explanation has been given by them as to when they reached the place of occurrence, they heard shreak and cry of the victim 'X' and on reaching the place of occurrence, they saw the accused carrying a country made pistol in one hand and carrying his pant in his other hand, who then making place between them while threatening them with country made pistol ran away.

(ii) The eye witnesses have supported the prosecution case in whole. There is no contradiction or improvement in their statements at all. The facts regarding their reaching the place of occurrence, seeing the victim 'X' lying naked, seeing the accused running away with country made pistol and a pant in his hand is consistent version of all the four eye witnesses.

(iii) Although, the Investigating Officer has prepared two site plans, one on the direction and instructions of the victim and the subsequent one on the direction and instructions of the first informant but there is no material difference in the site plan with regard to the actual place of occurrence. The place of occurrence remains the same in both the site plans. The Investigating Officer has proved them. He was not cross-examined by the defence with regard to any such difference in the site plan or

the topography of the house. The site plans thus show the actual place of occurrence and the other relevant features necessary for a case to proceed for investigation.

(iv) There is no delay in lodging of the first information report. The incident in question took place on 14.06.2017 at about 9:00 p.m. after which, the first informant and victim 'X' made an attempt to reach the police station but on the way, they were stopped by the accused-appellant and his persons, who were successful in sending them back to their house. Subsequently, the accused-appellant and his family members and his other persons surrounded the village and house of the first informant / victim 'X' which prevented them from going again to the police station immediately. Subsequently on 16.06.2017 finding way the first informant, his wife, victim 'X' and other persons could manage reaching the police station with an application for lodging of the first information report. The said facts have been clearly stated by P.W.-1 Nekram, Smt. Kalawati P.W.-3 and even the victim 'X' P.W.-6. There is as such no delay in lodging of the first information report and the first information report has been lodged immediately after finding place and way at the first instance to reach the police station.

(v) The judgement of the trial court is well considered and reasoned judgement and order which takes into consideration, the evidence recorded in the trial and also its discretion therein. The trial court has reached a justifiable conclusion based on the materials collected during investigation and before it and has thus convicted and sentenced the accused-appellant as above. The case has been proved against the accused-appellant beyond all reasonable doubts. The present appeal is thus without any force and merit and deserves to be dismissed.

24. After having heard the learned counsel for the parties and perusing the records, it is evident that the appellant is named in the first information report. He is a resident of the same village of the first informant and the victim. There is no dispute regarding his identity. The case of the prosecution right from very inception is of the accused-appellant entering in the house of the informant, where the victim

was lying and then threatened her with a country made pistol and committing rape upon her. The age of the victim has been opined to be 14 years by the C.M.O. concerned. The first information report states of her being about 15 years of age. The same thus, does not in any manner has much difference.

25. The prosecution story has remained consistent through out the statement of the witnesses. There is no such variation in the time of the incident. The place of occurrence as per the site plans and the witnesses, is the same. The mere fact that no country made pistol was recovered subsequent to the arrest of the accused cannot be considered to be such glaring fact which would make the entire prosecution story false and untrustworthy.

26. The delay in lodging of the first information report, although is their but the same is well explained by the first informant, the victim 'X' and the other witnesses. The testimony of the victim 'X' is consistent and without any embellishment. Merely, the medical examination not giving an opinion of rape cannot be the basis to discard the entire prosecution case. The testimony of a prosecutrix / victim of rape stands as that of an injured witnesses.

27. The same has been held by the Apex Court in the case of **State of Maharashtra Vs. Chandraprakash Kewalchand Jain : (1990) 1 SCC 550** in para 16 which is extracted herein:

"16. A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court

is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence. We have, therefore, no doubt in our minds that ordinarily the evidence of a prosecutrix who does not lack understanding must be accepted. The degree of proof required must not be higher than is expected of an injured witness. For the above reasons we think that exception has rightly been taken to the approach of the High Court as is reflected in the following passage:

"It is only in the rarest of rare cases if the court finds that the testimony of the prosecutrix is so trustworthy, truthful and reliable that other corroboration may not be necessary."

With respect, the law is not correctly stated. If we may say so, it is just the reverse. Ordinarily the evidence of a prosecutrix must carry the same weight as is attached to an injured person who is a victim of violence, unless there are special circumstances which call for greater caution, in which case it would be safe to act on her testimony if there is independent evidence lending assurance to her accusation.

(emphasis supplied)

28. Looking to the facts of the case, the testimonies of the witnesses including that of the victim. 'X', the nature of evidence and also the fact that there is no reason for false implication, the present appeal fails and is dismissed.

29. The conviction and sentence as awarded to the accused-appellant by the trial court is upheld. The appellant is in jail. He shall continue to remain in jail to serve out the entire sentence as awarded to him by the trial court.

30. Copy of this judgement along with the trial court records be sent to the trial court concerned forthwith for communication and necessary action.

(Samit Gopal,J.)

Order Date :- 3.12.2024 / Manoj