

Court No. - 86**Case :-** JAIL APPEAL No. - 839 of 2017**Appellant :-** Deepak**Respondent :-** State of U.P.**Counsel for Appellant :-** From Jail, Ravi Shankar Prasad**Counsel for Respondent :-** A.G.A.**Hon'ble Nalin Kumar Srivastava, J.**

1. This jail appeal has been preferred on behalf of the appellant Deepak s/o Sompal Singh, who has been convicted under Sections 366, 376 IPC vide judgment and order dated 7.5.2016 passed by Additional District & Sessions Judge, Fast Track Court No.2, Moradabad in Sessions Trial No.509 of 2013 (State Vs. Indrapal s/o Sanjay & Others) arising out of Case Crime No.37 of 2013 under Sections 363, 366, 376 (2g) IPC, Police Station Civil Lines, District Moradabad and sentenced to undergo rigorous imprisonment for five years and a fine of Rs.5000/- under section 366 IPC and in default of payment of fine, three months additional rigorous imprisonment has been awarded and to undergo rigorous imprisonment for seven years and a fine of Rs.5000/- under section 376 IPC and in default of payment of fine, six months additional rigorous imprisonment has been awarded against the appellant. It was further directed that all the sentences shall run concurrently.

2. Prosecution story, as unfolded in the F.I.R., is that the informant Shamli Devi moved a written report before the Senior Superintendent of Police, Moradabad narrating therein that her daughter was enticed away by Indrapal, Deepak, Rakesh and Deepak-II on 14.1.2013 at about 7:00 P.M. The police did not

lodge the F.I.R., but subsequently on 15.1.2013 at 7:00 P.M., one Deepak left the girl from an auto. By order of Senior Superintendent of Police, Moradabad, the F.I.R. was lodged under Sections 363, 366 IPC and investigation took place.

3. During investigation, the Investigating Officer of the case recorded the statement of the prosecutrix and witnesses, prepared the site plan and the prosecutrix was medically examined and subsequently charge-sheet under Sections 363, 366, 376 (2g) IPC was submitted before the Court against all the four named accused persons. During trial, the statement of the victim under Section 164 Cr.P.C. was recorded under orders of the Court.

4. The case, being exclusively triable by the Session Court, was committed by the Chief Judicial Magistrate, Moradabad to the Session Court on 24.5.2013.

5. The Court of Additional Sessions Judge, Court No.3, Moradabad proceeded to frame charges under Sections 363, 366, 376 (2g) IPC against the accused Indra Pal, Deepak s/o Dileep, Rakesh and Deepak s/o Sompal Singh. The accused persons denied of all the charges and claimed for trial.

6. The prosecution, in order to prove its case, relied upon the oral testimonies of P.W.1 Shamli Devi, the informant, P.W.2 Head Moharrir 18 Chanchal Sirohi, the scribe, P.W.3, the prosecutrix, P.W.4 Dr. Monica Agarwal, P.W.5 Rajendra and P.W.6 Ravi, the witnesses of fact and P.W.7 S.I. Satish Kumar, the Investigating Officer of the case.

7. To corroborate the oral deposition of the aforesaid witnesses, prosecution has also relied upon documentary

evidence and written report (Ex.Ka.-1), chik F.I.R. (Ex.Ka.-2), case registration G.D. (Ex.Ka.-3), medical reports (Exs.Ka.-4,5, 6 &7), sketch maps (Ex.Ka.-8 & 9) and charge-sheet (Ex.Ka.-10) has been proved in evidence.

8. After completion of prosecution evidence the incriminating evidence and circumstances were put forward to the accused persons and they have stated in their statement under Section 313 Cr.P.C. that the entire prosecution story and the statement of P.W.1 are false and fabricated and they are innocent. Accused Deepak s/o Sompal has also stated that on account of animosity, he has been falsely implicated in this matter. No defence evidence was adduced by the accused persons.

9. Since in this matter a charge under Section 363 IPC has also been framed, it was obligatory upon the prosecution first of all to prove that the prosecutrix, on the date of the incident, was a minor girl.

10. P.W.1, the informant, in her testimony before the Court has stated that her daughter was aged about 16 - 17 years at the time of the occurrence. Although in the written report (Ex.Ka.-1), it is nowhere mentioned as to whether the prosecutrix on the date of alleged kidnapping was a minor girl or not, but it is notable that no cross-examination of P.W.1, the informant, has been conducted by the defence on this point.

11. P.W.3, the prosecutrix has disclosed her age as 18 years before the Court and P.W.4, who has proved the supplementary medical report (Ex.Ka.-5), which is based upon the radiologist report (Ex.Ka.-7), has stated that at the time of the occurrence the age of the prosecutrix was 17 years and in her cross-

examination she has admitted that there might be a chance for a difference of 2 years either side.

12. P.W.7, the Investigating Officer, has not stated even a single word as to whether the prosecutrix was minor on the date of incident or not. However, the trial court, on the basis of statement of P.W.4 Dr. Monica Agarwal, has drawn a conclusion that since there might be a difference of 2 years either side in the age of the prosecutrix which was 17 years on the basis of medical evidence, the age of the prosecutrix is 19 years and on the basis of the aforesaid observation it was concluded that offence under Section 363 IPC is not made out in the case in hand.

13. The Hon'ble Supreme Court in the case of **Rajak Mohammad Vs. State of Himachal Pradesh, 2018 (9) SCC 248**, acquitted the accused on the ground that the prosecutrix remained in company of the appellant for 12 days and she had freely moved around with the accused appellant. In the course of such movement she had come across many people at different points of time yet she did not complain of any criminal act on the part of the accused appellant to anyone. It has further been held by the Hon'ble Apex Court that where the age of the prosecutrix was found 17-18 years, she was considered to be major giving the margin of two years on the higher side.

14. On the basis of the evidence on record and the law applicable to the case in hand it can safely be concluded that the victim on the date of occurrence was a major girl and on this point this Court finds no illegality in the finding arrived at by the trial court.

15. Learned counsel for the convict appellant Deepak s/o Sompal vehemently submitted that on the basis of the same set of evidence the other co-accused persons namely, Indrapal, Deepak s/o Dileep and Rakesh have been acquitted by the trial court, but the same set of evidence was taken as adverse in the case of the present appellant and he is also entitled for acquittal.

16. In view of the aforesaid submissions, the prosecution evidence requires to be scrutinized minutely.

17. P.W.3, the prosecutrix, in her statement before the Court, has made a categorical statement that on the date of incident, Deepak s/o Sompal enticed her away from her house and committed sexual offence with her. Other accused Deepak s/o Dileep, Indrapal and Rakesh did not entice her away and they never committed any rape to her and she did not disclose the name of the aforesaid three accused persons to the Investigating Officer in her statement recorded under section 161 Cr.P.C. The prosecutrix on this point has been declared hostile by the prosecution and she has consistently corroborated her statement made in the examination-in-chief in respect of guilt of co-accused persons Deepak s/o Dileep, Indrapal and Rakesh and has made a complete denial to the suggestion that due to the enmity of the locality, she was naming the accused Deepak s/o Sompal.

18. It is notable that no statement under section 164 Cr.P.C. of the prosecutrix was recorded during the course of investigation and the same was recorded at the stage of argument by order of the trial court. However, the said statement does not help the prosecution so far as the guilt of co-accused persons Deepak s/o Dileep, Indrapal and Rakesh is concerned, but however in

respect of the present appellant, positive assertions may be found in the said statement.

19. The trial court has elaborately discussed the evidence of P.W.1, the informant. She has given her statement on the facts of the case in her examination-in-chief and written report (Ex.Ka.-1) has been proved by her, but in the cross-examination, there is a clear admission on this point that when the offence of kidnapping was committed, she was not present at home and her daughter had told her the name of accused persons Indrapal and Deepak. In her cross-examination, P.W.1 has also admitted that her daughter never told her the name of co-accused persons namely, Deepak s/o Dileep, Indrapal and Rakesh as participators in the crime of kidnapping and rape.

20. P.W.7, the Investigating Officer of the case, has proved the proceedings of investigation in her testimony before the Court and has stated that on the basis of the evidence collected during investigation, he had submitted the charge-sheet against all the accused persons. He has also proved the Site Plan of the place of kidnapping and also the sketch of the place of occurrence where the rape is said to be committed and has proved them as Ex.Ka.-8 & 9 respectively.

21. The trial court has also gone through and scrutinized the evidence on the point whether rape was committed with the prosecutrix or not. The prosecutrix here as P.W.3 made a categorical statement before the Court that rape was committed with her by the accused Deepak s/o Sompal. This fact is to be taken into account that the prosecution claims that the prosecutrix was kidnapped on 14.1.2013 and subsequently she was left to her house on 15.1.2013, which means that for a

period of about one day, she was kept by the accused appellant with him.

22. P.W.4 Dr. Monica Agarwal has proved the medical examination report (Ex.Ka.-4) wherein she found that the hymen was old torn and there was no mark of injury on the private part of the prosecutrix and no mark of injury was found over the body of the girl as well. Two fingers were easily accessible in the vagina, but however she has further stated that no spermatozoa was found in the pathology report Ex.Ka.-6.

23. Learned counsel for the appellant has placed reliance upon the statement of P.W.4 and on the basis of the medical evidence it has been argued that no rape in fact was committed to the prosecutrix of this case.

24. The aforesaid submission made on behalf of the counsel for the appellant requires consideration and the Court has to see the relevant provisions of Indian Penal Code and also the law applicable to this case.

“Section 366. Kidnapping, abducting or inducing woman to compel her marriage, etc.—Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid.”

“Section 375. Rape.— 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 following seven 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 eighteen years of age.

Seventhly.—When she is unable to communicate consent.

Explanation 1.— For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2.— Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act: Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.— A medical procedure or intervention shall not constitute rape.

Exception 2.— Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.”

“Section 376. Punishment for rape.— (2) Whoever.— (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.

25. The case in hand appears to be a case where no injury was found on the external or private part of the prosecutrix, but the prosecutrix of this case supported the prosecution case on the point that rape was committed to her by the appellant and the evidence of the prosecutrix (P.W.3) has been consistent during her entire testimony. Now the legal position in a situation where the prosecutrix with whom rape was committed affirms the factum of crime but at the same time the medical evidence draws contrary conclusion is to be ascertained on the basis of law applicable to the case in hand.

26. Reliance has been placed upon the following case laws on behalf of the appellant :

- (i) **Raja Vs. State of Karnataka, (2016) 10 SCC 506**
- (ii) **Ganga Singh Vs. State of MP, AIR 2013 SC 3008**
- (iii) **State of U.P. Vs. Chottey Lal, AIR 2011 SC 697**

27. From the co-joint reading of the above cited case laws relied upon in this case, the conclusion which can be relied upon is that in a case of rape, it is really not necessary to insist for corroboration if the evidence of the prosecutrix inspires confidence and appears to be credible. An accused can be convicted on the basis of sole testimony of the prosecutrix without any further corroboration provided the evidence of the prosecutrix inspires confidence and appears to be natural and truthful. Woman or girl raped is not an accomplice and to insist for corroboratoin of the testimony amounts to insult to womanhood. On principle the evidence of victim of sexual assault stands on par with evidence of an injured witness just as a witness who has sustained an injury (which is not shown or believed to be self-inflicted) is the best witness in the sense that he is least likely to exculpate the real offender. The evidence of a victim of a sex-offence is entitled to great weight, absence of corroboration notwithstanding. Corroboration in the form of eye-witness account of an independent witness may often be forthcoming in physical assault cases but such evidence cannot be expected in sex offences having regard to the very nature of the offence. It would therefore be adding insult to injury to insist on corroboration drawing inspiration from the rules devised by the courts in the Western World. If the evidence of the victim does not suffer from any basic infirmity, and the

“probabilities factors” does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from the medical evidence where having regard to the circumstances of the case, medical evidence can be expected to be forthcoming subject to this qualification that corroboration can be insisted upon when a woman having attained majority is found in a compromising position and there is a likelihood of her having leveled such an accusation on account of the instinct of self-preservation or when the probability factor is found to be out of tune.

28. In the above cited cases, it has been further clarified by the Hon’ble Supreme Court that even where no external or internal marks of injury on the private part of the victim of rape was found in medical examination, the testimony of the prosecutrix that she was raped by the accused cannot be discarded. Where observations recorded by doctor during medico-legal examination of the prosecutrix clearly making out prosecutrix having been subjected to rape and the doctor as PW stating in response to a suggestion put to her by defence that injury of the nature found on the hymen of prosecutrix could be caused by a fall does not lead to court any where. Why would the girl or her mother charge the accused (near relation) with rape if the injury was caused by the fall particularly when the prosecutrix in her deposition had spoken of “penetration”. Discovery of SPERMATOOZOA in the private part of the victim is not a must to establish penetration. There are several factors which may negative the presence of spermatozoa. Slightest penetration of penis into vagina without rupturing the hymen would constitute rape.

29. In **Kaini Rajan Vs. State of Kerala, (2013) 9 SCC 113**, it has been held by the Hon'ble Supreme Court as under :

“Consent” is stated to be an act of reason coupled with deliberation. It denotes an active will in the mind of a person to permit the doing of an act complained of. “Consent”, for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances. An inference as to consent can be drawn if only based on evidence or probabilities of the case.”

30. It is trite law that if the prosecutrix is the sole and reliable witness of offence of rape, on this ground alone her evidence never be discarded.

31. Hon'ble Supreme Court in **Sham Singh Vs. State of Haryana, (2018) 18 SCC 34** held that -

“Testimony of the victim in rape cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury.”

32. So far as accessibility of two fingers in the vagina of the prosecutrix is concerned as founded in the medical report of the victim in this case by the doctor, the two finger test has now

been declared unconstitutional by the Hon'ble Supreme Court in **Lillu @ Rajesh & Another versus State of Haryana, (2013) 14 SCC 643** (Criminal Appeal No.1226 of 2011 decided on 11.4.2013) and **State of Jharkhand versus Shailendra Kumar Rai @ Pandav Rai 2022 LiveLaw (SC) 890** (Criminal Appeal No. 1441 of 2022; October 31, 2022) holding therein that the test violates the right of rape survivors to privacy, physical and mental integrity and dignity.

33. In **State (NCT of Delhi) Vs. Pankaj Chaudhary, (2019) 11 SCC 575**, Hon'ble Supreme Court held that “*Promiscuity / habituation to sexual intercourse of prosecutrix cannot be a ground to justify rape. Prosecutrix has equal right to privacy and protection of law. No presumption of her being a woman of loose moral character can be drawn merely on basis of some material showing she was habituated to sexual intercourse. Her evidence cannot also be discarded solely on ground of her unchastity.*”

34. Two witnesses of fact P.W.5 Rajendra and P.W.6 Ravi were also examined by the prosecution to prove the fact of the commission of crime, but however both the witnesses were declared hostile by the prosecution. During their entire deposition, they do not assist the prosecution case in any manner and even after being declared hostile when they were cross-examined by the prosecution, they again relied upon their testimony made in their examination-in-chief and if their evidence is taken into entirety, the prosecution is not in a position to get even an iota of assistance from the testimony of P.W.5 and P.W.6.

35. So far as the F.I.R. of this case is concerned, albeit it has been lodged belatedly, but this fact cannot lose sight of that initially the police did not lodge the F.I.R. of kidnapping of the minor girl and when the matter was reported to the Senior Superintendent of Police, Moradabad by the informant, then only F.I.R. was lodged on the next day and subsequently the prosecutrix was medically examined. Hence, delay in lodging the F.I.R. has been sufficiently explained in the circumstances of this case. Moreover, delay in lodging the F.I.R. in sexual offence cases like rape is never material. In this case whereas P.W.1, the informant proves the written report as Ex.Ka.-1, P.W.2 Head Moharrir Chanchal Sirohi, the scribe, on the other hand proves chik F.I.R. and case registration G.D. as Ex.Ka.2 & 3 respectively.

36. On the basis of the aforesaid evidence and after elaborately scrutinizing and analysing the evidence on record, the conviction of the present appellant was recorded by the learned trial court. Since the prosecutrix does not make even a single statement regarding the guilt of co-accused persons namely, Indra Pal, Deepak s/o Dileep and Rakesh, they were rightly acquitted by the learned trial court. On the other hand, the prosecutrix, being the star witness of the prosecution, is a reliable witness so far as her statement against the present appellant is concerned. Since rape was committed to her by the present appellant as per the testimony of the prosecutrix herself, medical evidence in this regard cannot prevail over the evidence of the victim / prosecutrix. It is also proved that she was kidnapped by the appellant in order that she may be forced or seduced to illicit intercourse. Although the learned trial court

has concluded that the prosecutrix was not minor on the date of the occurrence and she was very well major, but this fact can never dilute the crime committed by the accused appellant. Physical intercourse was committed to the victim of this case against her will and without her consent by the appellant and she has never been a consenting party. Although a case of gang rape is not found to be proved, but despite that the offence of rape is complete when the physical relation was made with the prosecutrix by the appellant against her will and without her consent as well and the case undoubtedly falls within the ambit of definition of rape, as provided under section 375 IPC. There is no evidence on record that the prosecutrix left her house on her own accord and she willingly / voluntarily went with the appellant and she had been a consenting party to the physical relationship made between her and the appellant.

37. The Trial court found the age of the prosecutrix as 19 years as per medical evidence at the time of incident. It further found that the appellant has kidnapped the victim and committed rape upon her. The trial court has recorded the finding that there is no reason to disbelieve the victim and this Court also finds that her evidence has been consistent throughout and she comes into the category of 'sterling witness'. The trial court held the appellant guilty and convicted and sentenced him for offence under Sections 366 and 376 I.P.C. In the present case there is ample evidence on record that the victim was deceitfully abducted and raped by the accused appellant.

38. Hence, analysing the evidence on record and considering the settled legal position in the backdrop of the facts and

circumstances of the present case, in my considered view the conclusion arrived at by the trial Court in the impugned judgement and order is totally in accordance with law and evidence available on record. Thus this Court finds that the prosecution has established the guilt of the accused appellant under Sections 366, 376 I.P.C. beyond reasonable doubt and to the satisfaction of the judicial conscious of the Court. Therefore, this Court is not inclined to grant any relief to the accused appellant and there is no ground to allow the present appeal. The impugned judgement and order of conviction bears no illegality, ambiguity or perversity and sentence awarded is proper in the facts and circumstances of this case and deserves no interference by this Court. The criminal appeal, therefore, is liable to be dismissed.

39. Since the sentence imposed upon the appellant by the learned trial Court to undergo rigorous imprisonment for a period of five years under Section 366 I.P.C. along with fine of Rs.5000/- with default sentence and to undergo seven years rigorous imprisonment under Section 376 I.P.C along with fine of Rs.5000/- with default sentence is proper and sufficient in the facts and circumstances of this case, there is no ground to intervene with the same as well by this Court. The appeal resultantly deserves to be dismissed.

40. One material fact is brought to the notice of this Court that the convicted appellant Deepak s/o Sompal Singh has already completed the total incarceration period imposed upon him by the impugned judgement alongwith the default sentence and a report from the Senior Superintendent, District Jail, Moradabad to this effect is available on record, hence, it is not

required at all to send the appellant again to jail to serve the period of incarceration as imposed upon him by the impugned judgement and order. The appellant is free, he need not to surrender or to deposit any amount of fine. The Jail Appeal is dismissed accordingly and impugned judgment and order is confirmed.

41. Ms. Seema Pandey, learned amicus curiae, who appeared for the appellant, shall be paid Rs.10,000/- for the assistance and legal service provided by her in conducting this appeal for the appellant.

42. Let the record of the trial court be sent back along with copy of this judgment to the court concerned for information and necessary compliance.

Order Date :- 5.7.2024

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