

Court No. - 16

Case :- CRIMINAL APPEAL No. - 488 of 2004

Appellant :- Rajendra Maurya

Respondent :- State of U.P.

Counsel for Appellant :- Anil Srivastava, Brijesh Kumar, Lalla Ji Maurya, Vimal Shukla

Counsel for Respondent :- Govt. Advocate

Hon'ble Mohd. Faiz Alam Khan, J.

1. Heard Shri Vimal Shukla, learned counsel for the appellant as well as learned AGA for the State and perused the record.

2. The instant appeal has been preferred by the appellant- **Rajendra Maurya** against the impugned judgment and order dated 24.2.2004 passed by the Court below in Session Trial No.94 of 2000 "*State Vs. Rajendra*" arising out of Case Crime No.755 of 1999, under Section 376 I.P.C., Police Station- Ayodhya, whereby the trial Court has convicted the appellant for committing offence under Section 376/ 511 I.P.C. and has sentenced him for seven years rigorous imprisonment and Rs.5,000/- fine with default clause.

3. The brief facts necessary for the disposal of this appeal appears to be that the informant of this case, namely, *Ram Balak Das* has lodged first information report on 15.12.1999 at about 22.30 hours (10.30 PM) at Police Station- Kotwali Sadar, Ayodhya (Faizabad) alleging therein that his residence is adjacent to the office of the Hydel and on 15.12.1999 at about 09.00 PM, his daughter aged about 13 years was alone and at that point of time, the appellant, who is posted at the office of the Electricity Department, Naya Ghat, entered into his house and after tying the mouth of the prosecutrix, committed rape on her.

4. It is further stated that he had witnessed the sexual assault when he had come

to his house from his tea stall and when he objected to the illegal act being committed by the appellant, he also assaulted him by which he (informant) became unconscious and taking advantage of the same, the appellant fled away.

5. On the basis of this written information, the F.I.R. at Case Crime No.755/1999, under Section 376 I.P.C. was registered and subess of which was entered into the G.D. of the same date and time.

6. The investigation of the said case was entrusted to Sub-inspector *Avadhesh Kumar Pandey*, who got the prosecutrix medically examined, prepared the site plan and arrested the appellant and finding sufficient material submitted charge sheet against the appellant under Section 376 I.P.C. On the case being committed to the Court of Sessions, the charges under Section 376 I.P.C. were framed against the appellant to which he denied and claimed trial.

7. The prosecution in order to prove its case beyond reasonable doubt has produced prosecution witness victim as P.W.-1, informant as P.W.-2, Dr. Sushama Gupta who had medically examined the victim as P.W.-3, Dr. Kedar Nath Kaushal who had examined the informant as P.W.-4, Adya Prasad Chaubey (scribe of the F.I.R.) as P.W.-5 and Sub-inspector Avadhesh Kumar Pandey, Investigating Officer of the case as P.W.-6. Apart from the above mentioned oral evidence, the prosecution has also relied on documentary evidence e.g. *Tehreer* (Exhibit Ka-1), Chik F.I.R. (Exhibit Ka-5), cite plan (Exhibit Ka-7), Medical Reports pertaining to the victim (Exhibit Ka-2), Report of the C.M.O. and supplementary report (Exhibit Ka-3), injury report pertaining to informant (Exhibit Ka-4) and the seizure memo of the clothes of the victim (Exhibit Ka-8), carbon copy of G.D. Kaymi (Exhibit Ka-6) as well as the charge sheet (Exhibit Ka-9).

8. After completion of the evidence of the prosecution, the statement of the accused-appellant was recorded under Section 313 Cr.P.C., wherein he denied the evidence produced by the prosecution and it is further stated that he is working in the electricity department and as electricity theft was being committed by the informant and when this was objected to by appellant/ accused

person and he (appellant) had taken with him the electric wire, which was being used for stealing electricity, a false case has been registered against him.

9. The trial Court after perusing and appreciating the evidence available on record found the case of the prosecution proved beyond reasonable doubt to the extent of offence under Section 376 I.P.C. read with 511 I.P.C. and has convicted the appellant for the same and has sentenced him in the manner described in the second paragraph of the judgment.

10. Learned counsel for the appellant while drawing the attention of this Court towards the impugned judgment and order vehemently submits that the trial Court has committed manifest illegality in appreciating the evidence available on record, while it was the established case of the prosecution that the victim has been subjected to rape, which has also been acknowledged by the victim herself in her statement recorded before the trial Court. The trial Court had developed a new case, which was not the case of any party that it is a case pertaining to the attempt of making sexual assault. It is vehemently submitted that this course was not available to the trial Court when it has not been alleged by the prosecution.

11. It is vehemently submitted that it is in the jurisdiction of the trial Court to have accepted or reject the case of the prosecution, but a case which has not been placed by the prosecution cannot be developed by the trial Court.

12. It is further submitted that the story as cooked up by the informant and victim in order to falsely implicate the appellant is so improbable, which could not be believed by any prudent person. In this regard, the attention of this Court has been drawn on the fact that the alleged incident is shown to have occurred in the night of 15.12.1999 and it was the next day, the prosecutrix was medically examined by the doctor, however, not a scratch or abnormality of any kind has been found on the person of the prosecutrix and so much so the informant had chosen not to examine himself by any doctor and it was after many days of the alleged incident, he was examined by the doctor on 20.12.1999 and no injury of any kind has been found on his person belying the whole story as cooked up against the appellant.

13. It is further submitted that the trial Court has not appreciated this aspect of the matter that there is material contradictions between the statement of the prosecutrix, informant vis a vis the evidence of the Investigating Officer with regard to the place of occurrence, however, this material contradiction has not been appropriately appreciated by the trial Court.

14. It is vehemently submitted that it is a case where the prosecution has miserably failed to prove its case beyond reasonable doubt and a manifest illegality has been committed by the trial court in convicting the appellant, thus the impugned order be set aside.

15. Learned AGA on the other hand submitted that the evidence of the prosecutrix is akin to the statement of an injured person and therefore, the same is to be kept at a higher pedestal than other prosecution witnesses and since the allegations of committing rape has been fortified by the prosecutrix/ victim in her in-chief-examination, it was within the jurisdiction of the trial Court to have convicted the accused person of crime in appropriate penal sections, which is emerging after the cross examination of the prosecution witnesses and it is not obligatory on the part of a trial Court to either believe or reject the case of the prosecution and the trial Court can safely take those facts, as has been proved before it and may also convict the accused person for the lesser offence which is emerging to have been committed by him, thus, no illegality has been committed by the trial Court in convicting the appellant for committing offence under Section 376 I.P.C. read with Section 511 I.P.C.

16. Having heard learned counsel for the parties and having perused the record, in nutshell, the story as alleged by the prosecution against the appellant is to the tune that on 15.12.1999 at about 09.00 PM, the informant had come to his house in order to take some sugar as he is running a tea stall somewhere and at that point of time, he had seen the appellant committing sexual assault (rape) with her daughter, who at that point of time was aged about 12-13 years and when he objected to the said illegal act, he was assaulted by the appellant and became unconscious and the appellant taking advantage of the situation, fled away from the scene.

17. It is to be recalled that to convict a person for committing any offence especially the offence which is punishable with many years of imprisonment, a case beyond reasonable doubt is to be proved by the prosecution and even if there are certain provisions provided in the Evidence Act for the presumption of certain facts, in the considered opinion of this Court, these presumptions could also not exonerate the prosecution to prove these basic facts, which are necessary to draw any presumption.

18. The law in this regard is well settled, if the reasonable doubt is emerging itself out of the evidence of the prosecution without any meticulous exercise, the benefit of the same must go to the accused of the crime. One more thing, which is required to be highlighted is that it is within the jurisdiction of the trial Court to believe on the part of the evidence of the witnesses while rejecting other part, which according to the trial Court is not emerging as truthful. Reference in this regard may be taken of the law laid down by the Hon'ble Supreme Court in **Vadivelu Thevar V/s state of Madras; AIR 1957 SC 614, Appabhai and Ors. vs. State of Gujarat, MANU/SC/0028/1988, Bharwada Bhoginbhai Hirjibhai v State of Gujarat as reported in AIR 1983, 753, MANU/SC/0090/1983 and Manak Chand @ Mani Vs. State of Haryana 2023 LiveLaw (SC) 937**, which for the convenience is being reproduced as under:-

*"Hon'ble Apex Court in **Vadivelu Thevar V/s state of Madras; AIR 1957 SC 614** held as under:-*

"The contention that in a murder case, the Court should insist upon plurality of witnesses, is much broadly stated."

"The Indian Legislature has not insisted on laying down any such exceptions to the general Rule recognized in Section 134 quoted above. The Section has enshrines the well recognized maxim that "Evidence has to be weighed and not counted." Our Legislature has given statutory recognition to the fact that administration of justice may be hampered if a particular number of witnesses were to be insisted upon."

" Even as the guilt of an accused person may be proved by the testimony of a single witness, the innocence of an accused person may be established on the testimony of a single witness, even though a considerable number of witnesses may be forthcoming to testify to the truth of the case for the prosecution."

"Generally speaking oral testimony in this context may be classified

into three categories, namely (1) wholly reliable (2) wholly unreliable (3) neither wholly reliable nor wholly unreliable. In the first category of proof, the Court should have no difficulty in coming to its conclusion either way- it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the Court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses. Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The Court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is reliable and free from all taints which tend to render oral testimony open to suspicion, it becomes its duty to act upon such testimony."

Vadivelu Thevar case (*supra*) was referred to with approval in many cases thereafter and it was held that as a general rule the court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. It is what the essence of Section 134 of the Indian Evidence Act, 1872. But, if there are doubts and suspicion about the testimony of such a witness the courts will insist on corroboration. Therefore, it is not the number and the quantity, but the quality which is material. The time tested principle is that evidence has to be weighed and not counted. The test is whether the evidence has a ring of truth around it, is cogent, credible and trustworthy, or otherwise.

In **Appabhai and Ors. vs. State of Gujarat**, MANU/SC/0028/1988 it was observed that :-

"A witness though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him -perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.

Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all important "probabilities-factor" echoes in favour of the version narrated by the witnesses."

Honble Supreme Court in **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** as reported in AIR 1983, 753, MANU/SC/0090/1983 while appreciating evidence of witnesses in the background of minor discrepancies laid down following principles:-

"(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

(2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guesswork on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

(6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the Court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him - perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment."

In the case of *Manak Chand @ Mani Vs. State of Haryana* 2023 LiveLaw (SC) 937, the Hon'ble Supreme Court has held as under :-

*"5. The evidence of a prosecutrix in a case of rape is of the same value as that of an injured witness. It is again true that conviction can be made on the basis of the sole testimony of the prosecutrix. All the same, when a conviction can be based on the sole testimony of the prosecutrix, the courts also have to be extremely careful while examining this sole testimony as cautioned in **State of Punjab v. Gurmit Singh, (1996) 2 SCC 384:***

"If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may

lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations."

*This was reiterated in **Sadashiv Ramrao Hadbe v. State of Maharashtra and Another** (2006) 10 SCC 92:*

"It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix."

19. Both the prosecutrix as well as the accused have a right for a fair trial, and therefore when the statement of the prosecutrix does not inspire confidence and creates a doubt, the court must look for corroborative evidence. Relying upon the case of **Gurmit Singh** (*supra*), this court in **Raju and others v. State of Madhya Pradesh** (2008) 15 SCC 133 held as under:

"10. The aforesaid judgments lay down the basic principle that ordinarily the evidence of a prosecutrix should not be suspected and should be believed, more so as her statement has to be evaluated on a par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. Undoubtedly, the aforesaid observations must carry the greatest weight and we respectfully agree with them, but at the same time they cannot be universally and mechanically applied to the facts of every case of sexual assault which comes before the court.

11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration."

20. The star witness of this crime is the informant himself, who has claimed to have seen the alleged sexual assault. In chief examination of the P.W.-2 (father of the prosecutrix/ informant) is specific and well defined so far as the fact is concerned that at the relevant time, when he came to his house, he saw the appellant committing sexual intercourse with her daughter. He has also stated that when he objected to the illegal act being committed by the appellant, he (appellant) assaulted him (informant) with an electricity wire, which was quite thick and he became unconscious by the assault and could not caught hold of him and when he gained his consciousness after ten minutes, he went to the police station.

21. In cross examination this witness has admitted that the injury which has been sustained by him was a 'swelling' and no blood was oozing out from it. The statement of P.W.-2, informant, was taken by the Investigating Officer on the same, however, significantly, he could only be medically examined on 20.12.1999 at about 12.15 PM. In the whole of his statement recorded before the trial court, no explanation has been given by this witness as to why, when he had sustained an injury on his head, why he was not get himself medically examined. In the medical examination report of the informant, which has been proved by the doctor as Exhibit Ka-4, there is no visible injury and even no mark of any injury has been seen, while the informant has stated that he is feeling pain on the left side of his face.

22. In the considered opinion of this Court, the sustaining of injury on his face was the core of the prosecution story as it has been stated in categorical terms by the informant that as he was assaulted by the appellant with a thick electricity wire, by which he lost his consciousness, thus, in all probability, the injury might have been inflicted is such a nature by which the appellant might have lost his consciousness and when no injury or any mark of injury has been noticed by the doctor on the face of the appellant on 20.12.1999, the same is certainly making a dent in the story of the prosecution.

23. The prosecutrix, who is shown to be aged about 13-14 years at the time of the alleged incident has corroborated the allegations of F.I.R. in his examination-in-chief recorded before the trial Court. She categorically stated that her *Salwar* was torn apart by the appellant in the process of committing sexual intercourse with her and thereafter, the appellant had committed sexual intercourse. The Investigating Officer in his statement has categorically admitted not to have found any tear in the *Salwar* collected by him pertaining to which a seizure memo has also been prepared and which has been proved as Exhibit No.9 before the trial court, thus, there is no evidence on record which may suggest that in the process of committing rape, the clothes of the prosecutrix were torn apart.

24. In order to prove the factum of rape by the appellant with the prosecutrix certainly the evidence of the victim of sexual assault is at par with the evidence

of an injured witness, but even to accept the evidence of an injured witness, it has to be proved by the prosecution that he has sustained injury in the commission of the incident and simply the presence of the injury itself may *ipso facto* may not be deemed to have been caused during the occurrence of the incident alleged by him. Likewise the evidence of a prosecutrix or victim of sexual assault may always not be taken as a gospel truth and the same is to be proved on the parameters of proof beyond reasonable doubt. The clear case of the prosecutrix/ victim is that she was subjected to sexual assault in its real sense, meaning thereby, the appellant has committed sexual intercourse with her and the said sexual intercourse was done against her will. Admittedly, there are no signs of resistance noted by the Dr. Sushama Gupta at the time of medical examination of the victim. Dr. Sushama Gupta has been testified before the trial Court as P.W.-3. She has categorically stated that no opinion may be given pertaining to the sexual assault committed on the prosecutrix. She also stated in categorical terms that she did not find any injury on any part of the body of the prosecutrix. It also appears to be an admitted situation that clinical reports of the prosecutrix are also clean, thus, what is evident from the record is that the prosecutrix did not sustain any injury and there was no adverse clinical reports pertaining to the slides prepared and she was also found habitual of sexual intercourse. All these significant findings, which were proved before the trial Court in the considered opinion of this Court throws a cloud of suspicion over the whole prosecution story as stated by these two witnesses, namely, P.W.-1 and P.W.-2 (victim and informant).

25. It also appears to be a settled legal situation that the rule of *falsus in uno falsus in omnibus* is not applicable to our country, as the witnesses are in a habit of aggravating the factual situation in order to gain the sympathy of the Court, but in cases where the witnesses are neither fully reliable nor fully unreliable, but they are partly reliable and partly unreliable, a duty is cast on the trial Court to separate the grain from the chaff or in simple words to separate the truth from the falsehood, but if the truth and falsity are so inter-mixed that they cannot be separated even by a due and diligent exercise by the trial Court, the safest course available for the trial court is to discard the testimony of those witnesses, which

in the considered opinion of this Court has not been done by the trial Court in the instant case. This Court is not having any hesitation in branding the testimony of both the star witnesses of this crime, namely, P.W.-1 and P.W.-2 (informant and prosecutrix/ victim) as not reliable and therefore, the trial Court has committed manifest illegality in accepting their testimony and for the reasons mentioned hereinbefore, the impugned judgment and order may not withstand the test of law and is hereby set aside.

26. In result, the appeal is **allowed**.

27. The appellant is reportedly on bail. He needs not to surrender anywhere. His sureties are discharged, however, in compliance of Section 437-A of the Cr.P.C., he shall file before the trial Court his personal bond and two sureties of Rs.25,000/- within 30 days from today in order to secure his presence before hon'ble the Supreme Court in case, the instant judgment and order is assailed before the Hon'ble Supreme Court.

28. A copy of this order be sent to the trial Court through the Sessions Judge concerned for information, along with the record of the trial court.

Order Date :- 27.5.2024

Gurpreet Singh