

High Court of Judicature at Allahabad (Lucknow)

Neutral Citation No.2024:AHC-LKO:77377-DB

Judgment Reserved on 30.07.2024

Judgment Delivered on 22.11.2024

Court No.-1

Case :- CRIMINAL APPEAL No. - 2013 of 2016

Appellant :- Shiv Prasad @ Chhottan

Respondent :- State of U.P.

Counsel for Appellant :- Nagendra Mohan

Counsel for Respondent :- Govt. Advocate

Hon'ble Attau Rahman Masoodi,J.

Hon'ble Ajai Kumar Srivastava-I,J.

(Per : Ajai Kumar Srivastava-I,J.)

1. Heard Shri Nagendra Mohan, learned counsel for the appellant, Shri Umesh Chandra Verma, learned A.G.A. for the State and perused the entire record.

2. Under challenge in this criminal appeal is the impugned judgment and order dated 15.11.2016 passed by the learned Additional Sessions Judge/Fast Track, Court No.1, Bahraich in Sessions Trial No.48 of 2015 arising out of Crime No.354 of 2010, under Sections 376(g), 506 and 304 of the Indian Penal Code¹, Police Station Ikauna, District Bahraich

¹ hereinafter referred to as "I.P.C."

(Shrawasti) whereby the appellant has been convicted and sentenced to undergo life imprisonment for the offence under Section 376(g) I.P.C. with a fine of Rs.25,000/- and in default of payment of fine, he has further been directed to undergo six months' simple imprisonment. He has further been convicted and sentenced to undergo ten years' imprisonment for the offence under Section 304 I.P.C. with a fine of Rs.15,000/- and in default of payment of fine, he has further been directed to undergo three months' imprisonment. He has also been convicted and sentenced to undergo two years' imprisonment for the offence under Section 506 I.P.C.

3. The case of the prosecution, in nutshell, is that on 20.03.2010, at about 12:00 noon, the victim, aged about 7 years old, had gone to the field to collect coriander leaves. The appellant, Shiv Prasad alias Chhotan and co-accused, Santosh Kumar, residents of village Asanhwa, Police Station Ikauna, Tehsil and District Bahraich, who were already lying in ambush, closed the mouth of the victim and dragged her beside the trolley filled with sugarcane in the informant's field. Both of them raped the victim. When one of the accused persons' hand slipped from mouth of the victim, she screamed and started crying. Both the accused pulled the victim back and threatened to kill her if she told about this incident to anyone. The victim somehow came to her house and remained silent. She

did not tell anyone about the incident. On 22.03.2010, at 9:00 AM, when mother of the victim asked her to go to school, she started shivering and told that she will not go to school as the aforesaid accused persons shall kill her. She had also stated that both the accused persons raped her and she also showed her bloodstained undergarment to her mother. When the grandfather of the victim, first informant, came to know about this incident, he submitted written report Ext. Ka-1.

4. On the basis of aforesaid written report, Ext. Ka-1 submitted by the first informant, Ram Baran Tripathi, the first information report, Ext. Ka-14 came to be lodged against the accused/ appellant under Sections 376 and 506 I.P.C.

5. As the victim had died, the inquest proceeding for ascertaining prima facie cause of death started on 31.03.2010 at 13:15 P.M. and got concluded on 31.03.2010 at 03:30 P.M. The inquest report has been duly proved by P.W.-6, Rama Shankar Tiwari, S.I. as Ext. Ka.5.

6. The Investigating Officer recorded the statements of the witnesses under Section 161 of the Code of Criminal Procedure². He visited the place of occurrence and prepared a site plan thereof as Ext. Ka-13.

² hereinafter referred to as " Cr.P.C"

7. The postmortem report of the deceased has been conducted by Dr. R. K. Jayant, P.W.-3, which has been proved by him as Ext. Ka-2. According to the postmortem report, Ex. Ka- 2, the cause of death of the deceased is reported to be shock as a result of Anaemia and Septicaemia.

8. Upon conclusion of investigation, the Investigating Officer submitted a charge sheet under Sections 376(g), 506 and 304 I.P.C., Ex. Ka-12 against the accused/ appellant.

9. Charges for the offences under Sections 376 (g), 506 and 304 I.P.C. were framed against the accused/ appellant, who denied the charges and claimed to be tried.

10. In order to bring home guilt of the accused/ appellant, the prosecution has examined Ram Baran Tripathi, complainant as P.W.-1, Smt. Ram Kumari Devi as P.W.-2, Dr. R. K. Jayant as P.W.-3, Dr. Rajiv Ranjan as P.W.-4, Dr. Rabiya Sultana as P.W.-5, S. I. Rama Shankar Tiwari as P.W.-6 and S.I., Brij Lal Yadav as P.W.-7, Head Moharir, Shiv Das Verma as P.W.-8 and S. I. Janki Prasad Pathak as P.W.-9.

11. The accused/ appellant, in his statement recorded under Section 313 Cr.P.C., has stated the prosecution story to be false. He has also stated to

have been falsely implicated in this case. He also claimed to be innocent.

12. No evidence in defence was adduced by the accused/ appellant before the learned trial court.

13. The learned trial court, after appreciating the evidence available on record, rendered the impugned judgment and order dated 15.11.2016 whereby the accused/ appellant came to be convicted as aforesaid.

14. Aggrieved by the aforesaid impugned judgment and order dated 15.11.2016, the accused/ appellant has preferred the instant criminal appeal.

15. Learned for the accused/ appellant has submitted that the finding of guilt of the accused/ appellant arrived at by the learned trial court is perverse and contrary to the evidence available on record.

16. His further submission is that the appellant was falsely implicated in this case due to prior enmity. It is also submitted that the first information report in this case was lodged after an inordinate and unexplained delay of about two days, only to falsely implicate the appellant after due consultation. He has also submitted that there are material contradictions in the testimonies of PW-1, Ram Baran Tripathi, the first informant, and PW-2, Ramkumari Devi, the mother of

the victim/deceased, which were not appreciated by the learned trial court in the correct perspective while giving the finding of guilt against the appellant. He has drawn the attention of this Court to the fact that there is no evidence whatsoever establishing the offence under Section 376(g) I.P.C. Therefore, the conviction of the appellant under Sections 376(g) and 304 I.P.C. and the sentences awarded therefor are palpably illegal and deserve to be set aside.

17. He has also submitted that there is no medical evidence to corroborate the prosecution case to the effect that the rape upon the victim was committed and that too by the present appellant, therefore, also his conviction for the offence under Section 376(g) and 304 I.P.C. deserves to be set aside.

18. He has also contended that the incident-in-question occurred on 20.03.2010. The provisions contained in Section 376(g) IPC, as it then existed, provided for a minimum sentence of ten years' rigorous imprisonment. It also provided that the court, in appropriate cases, could impose a sentence of imprisonment for a period of less than ten years, by recording reason(s) therefor. His further submission is that the learned trial Court did not advert to the aforesaid legal issue and proceeded to impose maximum sentence provided for the offence, which is unsustainable being excessive and disproportionate.

19. Learned for the accused/ appellant has, thus, prayed to set aside the impugned judgment and order dated 15.11.2016 and to acquit the accused/ appellant accordingly.

20. Per contra, learned A.G.A. for the State has submitted that the accused/ appellant rightly came to be convicted vide impugned judgment and order dated 15.11.2016, which is well discussed and reasoned. The accused/ appellant was named in the first information report. The prosecution has proved its case beyond reasonable doubt on the basis of cogent and reliable testimonies of prosecution witnesses.

21. His further submission is that although the first information report was lodged after a delay of two days, the prosecution has offered proper and sufficient explanation in this regard, which has been rightly appreciated by the learned trial court. Having regard to the nature of the offence, undue significance cannot be attached to such delay. He further submits that the suggestion from the side of the accused-appellant that the victim was injured by falling on a hard and blunt object is one that deserves to be rejected and was rightly not appreciated by the learned trial court. He also submitted that the learned trial court, after due appreciation of the testimonies of PW-1, Ram Baran Tripathi, the first informant, and PW-2, Ramkumari Devi, the mother of the victim/deceased, coupled with

other corroborative evidence such as the postmortem report of the victim/deceased, has rightly given the finding of conviction of the appellant. Therefore, interference by this Court is neither warranted nor justified. He, accordingly, prays for dismissal of the instant criminal appeal.

22. At the outset, it is relevant to mention here that S.I., Ramashankar Tiwari has been examined as PW-6, who has proved the panchayatnama as Ext. Ka-5 and CMO's letter as Ext. Ka-10. He has also proved challan of the deceased as Ext. Ka-8 and photo of cadaver as Ext. Ka-6. S.I. Brijlal Yadav, has been examined as PW-7, who has proved proved site plan as Ext. Ka-13. Dr. R.K. Jayant has been examined as PW-3, who proved the postmortem report as Ext. Ka-2.

23. Having heard learned counsel for the accused/appellant and the learned A.G.A. for the State, and upon perusal of the record, it transpires that the written report, Ext. Ka-1, was lodged by the first informant, PW-1, Ram Baran Tripathi, the grandfather of the deceased, two days after the alleged incident. A close scrutiny of the statements of witnesses of fact i.e. PW-1 Ram Baran Tripathi and PW-2 Smt. Ram Kumari Devi, reveals that although PW-1, Ram Baran Tripathi is the first informant, the fact that the victim was raped by the appellant was informed to her mother, PW-2 Smt. Ram Kumari Devi, by the deceased. PW-1, Ram Baran Tripathi also states that he knew about the

incident through PW-2, Smt. Ram Kumari Devi, the mother of the deceased.

24. PW-2, Smt. Ram Kumari Devi, deposed that on the day of the incident, the victim had gone to fetch green coriander leaves from the field at around 12:00 noon. The victim returned after an hour and went to rest in a room. In the evening, when this witness called the victim, she began crying and had a fever. She was given medicine, which provided some relief to her. On the third day after the incident, when this witness asked her daughter to go to school, the victim refused, saying that the appellant and one Santosh would kill her. She then revealed that when she went to the field to fetch green coriander leaves, she was raped by the appellant, Shiv Prasad and Santosh. The victim also showed her blood-stained underwear to this witness. This witness stated that she informed her father-in-law, PW-1, Ram Baran Tripathi, who inquired about the incident from the victim. The victim repeated the same account to her grandfather, PW-1, Ram Baran Tripathi.

25. PW-1, Ram Baran Tripathi, the grandfather of the deceased, went to the concerned police station to lodge a report on the same day, however, the police personnel asked him to return the next day. However, his report was not registered the following day either. Ultimately, the report was lodged on the third day after the incident. The victim was initially sent to the Primary

Health Centre, Ikauna, and later, due to her deteriorating condition, she was referred to the District Hospital, Bahraich, on 24.03.2010, where she was discharged on 26.03.2010. She was called back for examination on 29.03.2010 and was subsequently brought home. However, due to further deterioration in her condition on 30.03.2010, she was again taken to the Primary Health Centre, Ikauna, where she was advised to go to the District Hospital, Bahraich. On 31.03.2010, while PW-1, Ram Baran Tripathi was taking the victim to the District Hospital, Bahraich, she succumbed to injuries caused by the rape committed by the appellant and another person, Santosh.

26. A careful scrutiny of the entire testimonies of PW-1, Ram Baran Tripathi and PW-2, Smt. Ram Kumari Devi reveals the consistent prosecution case to the effect that the victim, who was of tender age about 7 years, had informed her mother PW-2, Smt. Ram Kumari Devi about this incident, who in turn had informed this fact to her father-in-law, PW-1, Ram Baran Tripathi. Except existence of some dispute between the family members of the deceased and the present appellant nothing else could be elicited from the testimonies of PW-1, Ram Baran Tripathi and PW-2, Smt. Ram Kumari Devi to discredit the fact that on 20.03.2010, the victim had not informed about this incident to her mother i.e. PW-2, Smt. Ram Kumari Devi and in turn this witness had not informed this fact

to PW-1, Ram Baran Tripathi. This fact also gets supported and corroborated from the postmortem report of the deceased which reveals that the deceased died due to shock as a result of anaemia and septicaemia.

27. The victim of a tender age of about 7 years died due to shock as a result of anaemia and septicaemia, which was caused by excessive pus in the pouch of Douglas, which corroborates the manner of commission of this offence. The fact that no live or dead spermatozoa or gonococci were seen does not have any material bearing on this case to infer that the victim was not raped. This is because the examination was conducted on 24.03.2010, while the incident is stated to have occurred on 20.03.2010. Furthermore, the prosecution's case is that the victim remained at home. She must have gone to attend to nature's call during this period of about three days, therefore, absence of spermatozoa or gonococci remaining in the vaginal swab is not very unusual fact and infact such absence does not make any dent in the otherwise proved prosecution story.

28. Insofar as the contention of learned counsel for the appellant regarding the delay in lodging the First Information Report is concerned, it would be worthwhile to refer to a judgment rendered by the Hon'ble Supreme Court in **State of Rajasthan v. N.K.,**

(2000) 5 SCC 30, which holds that a mere delay in lodging the first information report cannot be a ground by itself for throwing the entire prosecution case overboard. The court has to seek an explanation for delay and test the truthfulness and plausibility of the reason assigned. If the delay is explained to the satisfaction of the court it cannot be counted against the prosecution.

29. In the light of aforesaid, we find that the victim was aged about 7 years. She was raped on the date of incident who came back to her home and went to sleep in isolation. She only informed about this incident on 22.03.2010 to her mother, PW-2, Smt. Ram Kumari Devi.

30. Insofar as the testimonies of PW-1, Ram Baran Tripathi grandfather of the deceased and PW-2, Smt. Ram Kumari Devi, mother of the deceased are concerned before adverting to the aforesaid statements of PW-1, Ram Baran Tripathi and PW-2, Smt. Ram Kumari Devi we find it appropriate to quote Section 32 of Indian Evidence Act, which is as under :-

32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant.—Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the

case appears to the Court unreasonable, are themselves relevant facts in the following cases:—

(1) When it relates to cause of death.—When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

(2) Or is made in course of business.—When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him; or of the date of a letter or other document usually dated, written or signed by him.

(3) Or against interest of maker.—When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

(4) Or gives opinion as to public right or custom, or matters of general interest.—When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the

existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen.

(5) Or relates to existence of relationship.—When the statement relates to the existence of any relationship 40[by blood, marriage or adoption] between persons as to whose relationship 41[by blood, marriage or adoption] the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

(6) Or is made in will or deed relating to family affairs.—When the statement relates to the existence of any relationship 42[by blood, marriage or adoption] between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.

(7) Or in document relating to transaction mentioned in Section 13, clause (a).—When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in Section 13, clause (a).

(8) Or is made by several persons and expresses feelings relevant to matter in question.—When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

31. We may also mention that any former statement made by a witness/victim at or about the

time when the incident took place, becomes usable as of corroborative value under Section 157 of the Evidence Act; and whether the statement was made at or about the time of the incident can be deciphered from the facts of each case and if there was no inordinate delay in making such statement, the statement made by the witness can be used for corroborating his own testimony as enumerated in Section 157 of the Evidence Act as held by Hon'ble Supreme Court in **Rameshwar v. State of Rajasthan : AIR 1952 SC 54** and **Nathuni Yadav v. State of Bihar : 1998 SCC (Cri) 992**.

32. There is no hard and fast rule about the "at or about" condition in Section 157 of the Evidence Act obviously because the main test is whether the statement was made as early as can reasonably be expected in the circumstances of the case and before there was opportunity for tutoring or concocting. Moreover in **State of T.N. v. Suresh : 1998 SCC (Cri) 751**, the Hon'ble Supreme Court held that mere fact that there was an intervening period of a few days may not be sufficient to exclude the statement from the use envisaged in Section 157 of the Evidence Act, which in real sense envisaged two categories of statements of witnesses for being used to as to seek corroboration firstly a statement made by a witness to any person 'at or about the time' 'when the fact took place', and secondly, a statement made by him to any

authority legally bound to investigate the fact. Thus in case the statement is made to an authority competent to investigate fact, such statement gains admissibility, no matter that it was made long after the incident and if the statement is made to a non authority it loses its probative value due to lapse of time.

33. Likewise, Hon'ble Supreme Court in **Rattan Singh v. State of H.P., (1997) 4 SCC 161** has held as under :-

11. One of the most important items of evidence in this case is what the deceased had uttered immediately before she was fired at. When her mother-in-law sensed that somebody had intruded in the courtyard during the odd hours, the deceased (near whom the intruder was standing then) spoke out that appellant was standing nearby with a gun. In a split second the sound of firearm shot was heard and in a trice the life of Kanta Devi was snuffed off.

12. If the said statement had been made when the deceased was under expectation of death it becomes dying declaration in evidence after her death. Nonetheless, even if she was nowhere near expectation of death, still the statement would become admissible under Section 32(1) of the Evidence Act, though not as dying declaration as such, provided it satisfies one of the two conditions set forth in the sub-section. This is probably the one distinction between English law and the law in India on dying declaration. In English law, unless the declarant is under expectation of death his statement cannot acquire the

passport of admissibility, (Sharad Birdhichand Sarda v. State of Maharashtra [(1984) 4 SCC 116 : 1984 SCC (Cri) 487 : AIR 1984 SC 1622] ; Tehal Singh v. State of Punjab [1980 Supp SCC 400 : 1979 SCC (Cri) 722 : AIR 1979 SC 1347]).

(Emphasis supplied by us)

34. When we advert to the testimonies of PW-1, Ram Baran Tripathi, grandfather of the deceased, and PW-2, Smt. Ram Kumari Devi, mother of the deceased, we find that, according to the prosecution, the incident occurred on 20.03.2010. The victim, aged about seven years, came back to her home after the incident and remained silent. She did not tell anyone about this incident. On 22.03.2010, she told her mother, i.e., PW-2, Smt. Ram Kumari Devi, about the incident. Having regard to the tender age of the victim and the manner of commission of offence committed with such a young victim, we find that whatever she stated about this incident implicating the appellant would fall under the category of a statement under Section 32 of the Indian Evidence Act. PW-1, Ram Baran Tripathi, the grandfather of the deceased, has also been consistent insofar as the prosecution story, in respect of the commission of this offence and the narration of this fact by the victim to her mother, PW-2, Smt. Ram Kumari Devi, is concerned. The postmortem report of the deceased/victim, Ext. Ka-2, which has been duly proved by Dr. R. K. Jayant, P.W.-3, also corroborates the manner of commission of the offence. Thus, we do

not find any cogent reason for the false implication of the appellant in this case.

35. The upshot of overall discussion is that the prosecution has successfully proved its case against the appellant on the basis of reliable evidence which is corroborated by medical evidence also. The learned trial Court has duly appreciated the prosecution evidence in its correct perspective while holding the appellant guilty of the offence under Sections 376(2)(g), 304 and 506 I.P.C. as it existed on the date of occurrence, We do not find any illegality, irregularity or perversity in such finding. **The finding of guilt of the appellant under Sections 376(2)(g), 304 and 506 I.P.C. is, therefore, affirmed.**

36. However, we notice that the learned trial Court has awarded maximum sentence which has been provided for the offence under Section 376(2)(g) I.P.C. For ready reference Section 376(2)(g) I.P.C., as it existed on the date of occurrence, is quoted hereinbelow :-

376. Punishment for rape

1

2

(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.

(Emphasis supplied by us)

37. Having regard to the fact that there is no prior criminal history of the appellant of the similar kind of offence, his age, possibility of reform as also the fact that the appellant is in jail since 31.03.2010 and by now, he has already served out more than 14 years. We, in the facts and circumstances of this case, deem it appropriate to modify the sentence awarded by the learned trial Court for the offence under Section 376(2)(g) I.P.C. Therefore, while upholding the conviction of the appellant under Sections 376(2)(g), 304 and 506 I.P.C., the appellant is awarded ten years' rigorous imprisonment and a fine of Rs.25,000/- for the offence under Section 376(2)(g) I.P.C. and the same shall be deposited by the appellant within four weeks from the date of his release. The said amount of fine shall be given to the mother of the victim/deceased as compensation without any delay. All the sentence awarded are directed to run concurrently.

38. It is also directed that the period already undergone by the accused-appellant, Shiv Prasad @ Chhottan, in the aforesaid Sessions Trial, either as under trial or post-conviction, shall be adjusted towards

the sentence awarded by this Court in terms of Section 428 Cr.P.C.

39. In case, the accused-appellant has already undergone the sentence awarded by this Court as aforesaid, he shall be released from jail forthwith, if he is not wanted in any other case.

40. It is directed that the accused-appellant shall furnish personal bond and two sureties in the like amount to the satisfaction of the court concerned within four weeks from the date of his release from jail in compliance with the provisions of Section 437A Cr.P.C.

41. For the aforesaid overall reasons, the present criminal appeal is **partly allowed**.

42. Let the trial court record along with a copy of this judgment be transmitted forthwith to the learned trial Court concerned for information and necessary compliance through fax/ e-mail.

(Ajai Kumar Srivastava-I, J.) (Attau Rahman Masoodi, J.)

Order Date :- 22.11.2024
A.Dewal