

Court No. - 45

Case :- CRIMINAL APPEAL No. - 4019 of 2011

Appellant :- 'D'

Respondent :- State of U.P.

Counsel for Appellant :- D K Maurya,Hemant Kumar,Raj Kumar Singh

Counsel for Respondent :- Govt. Advocate

Hon'ble Saumitra Dayal Singh,J.

Hon'ble Sandeep Jain,J.

1. Heard Sri Rahul Saxena learned Amicus Curiae, Sri Vikas Goswami learned AGA for the State.

2. Present Criminal Appeal arises from the judgment and order dated 27.05.2011 passed by Ms. Deepa Jain, Additional Sessions Judge, Court No.5, Allahabad in Sessions Trial No. 1026 of 2010 (State vs. Deendayal), arising out of Case Crime No. 252 of 2010, under Sections 376 IPC, Police Station Handia, District Prayagraj. By that order the learned trial court has convicted the appellant and sentenced him to undergo life imprisonment and to pay fine Rs. 15,000/- for the offence under Section 376 IPC and in default of payment of fine to further undergo simple imprisonment of six months.

3. The criminal trial emerged on the F.I.R. dated 27.07.2010 (Ex.Ka.9) registered on the Written Report of that date (Ex.Ka.1) lodged by the victim 'X', young niece of the present appellant, aged about 13 years. She narrated that the appellant had repeatedly committed rape

on her in inebriated state. On her raising protest, she was assaulted by the appellant, with sticks. On some such occurrences, she had earlier run away from her home. Last, she ran away from her home on 19.07.2010 and reached Allahabad Railway Station. On help offered by Childline, she lodged the above described Written Report, through the scribe Dharamraj.

4. On such F.I.R. being registered, victim 'X' was subjected to medico legal examination. It resulted in preparation of Injury Report dated 28.07.2010 (Ex.Ka.5), Medico Legal Report dated 30.07.2010 (Ex.Ka.8) and Injury Report dated 02.08.2010 (Ex.Ka.6) prepared by Dr. Vandana Srivastava (PW-3 at the trial) and a Supplementary Report prepared by Dr. Vandana Srivastava dated 02.08.2010 (Ex.Ka.6). A Pathology Report dated 30.07.2010 was also submitted (Ex.Ka.7). In those injury reports, no mark of external injury was noted. On internal examination, it was observed as below:-

“Vaginal orifice admitting two fingers with absolute ease. No marks of any injury anywhere on the private parts. Hymen torn. Vaginal smears drawn.”

The doctor could not offer any definite opinion as to commission of rape. It was only observed, the victim was habitual to sexual intercourse. Her age was indicated between 14-15 years. During the investigation, statement of the victim was recorded under Sections 164 Cr.P.C. In that she maintained the allegation of rape against the appellant, the last occurrence described, 10 days earlier,

from 03.08.2010. In such circumstances, Charge Sheet was submitted upon conclusion of the investigation. Upon committal, following charge was framed against the appellant:-

"यह कि दिनांक 19-7-2010 को समय अज्ञात बजे बहद स्थान ग्राम बरौत अन्तर्गत थाना हंडिया जनपद इलाहाबाद के क्षेत्राधिकार में आपने वादी मुकदमा 'X' के साथ विना उसकी सहमति व इच्छा के विरुद्ध शारीरिक दुराचार किया इस प्रकार आपने ऐसा अपराध कारित किया जो भारतीय दण्ड संहिता की धारा 376 के अधीन दण्डनीय है और न्यायालय के संज्ञान में है।"

5. At the trial, besides the above documentary evidence, prosecution led oral evidence of the victim 'X' (PW-1 at the trial), Dr. Vandana Srivastava (PW-3 at the trial). Further, the Investigating Officer A.N. Tiwari was examined as PW-2 while Dr. V.K. Sahu, the Radiologist was examined as PW-4 at the trial. Last Sri Satya Narain Tiwari, the Head Moharrir, who proved the registration of the F.I.R. and also the check F.I.R. etc., was examined as P.W.5.

6. During her examination-in-chief as also during her cross-examination, victim 'X' maintained her stand as disclosed in the F.I.R., consistent to her statement recorded under Section 164 Cr.P.C. Thus, she maintained that she was living with the accused being her near relative in her unfortunate circumstance, where her father who was a drunkard used to assault her mother, forcing her to flee from the house leaving behind her five children namely 'X', her two younger sisters and two younger brothers. The children used to live with the

appellant who is their real uncle ('*Chacha*') and their grand-mother 'CD'. In such circumstance, she disclosed that the appellant had repeatedly committed rape upon her in inebriated state. If she protested, she was subjected to physical assault, with sticks. On many earlier occasions, she had fled from the house to save herself, only to return to be met with similar behaviour again. However, she could not and she did not seek to establish each individual occurrence of rape or the number of times she has suffered the sexual assault. During her cross-examination, no doubt emerged as to her stand as disclosed. On being questioned, she further clarified that she suffered rape at the hands of the present appellant always inside the house, whether she chose to sleep with her grand-mother 'CD' or alone on the terrace. Further, she specifically stated, if her grand-mother 'CD' intervened (on her behalf) to save her from such sexual assault, she too was beaten by the appellant - her son.

7. Dr. Vandana Srivastava (PW-3) proved the medical examination of the victim 'X', conducted by her. Similarly, Dr. V.K. Sahu (PW-4) proved the radiological report to determine the age of victim 'X'. The Investigating Officer, A.N. Tiwari (PW-2) and other formal witness led evidence to establish the registration of the F.I.R. and conduct of the investigation.

8. Thereafter, upon closure of prosecution evidence, statement of the appellant was recorded under Section 313

Cr.P.C. Besides making a bald denial, no other suggestion of defence is contained in that statement.

9. Thereafter, the defence examined 'CD' the grandmother of victim 'X' as DW-1. During her examination-in-chief, she maintained that the victim 'X' was a run away child to the extent, earlier she had repeatedly run away from her house only to return after a few days (on each occasion). As to the family relations, during her examination-in-chief itself she clarified neither she nor other used to worry about victim 'X' when she fled from the house on earlier occasions. Victim 'X' would return on her own. According to her, appellant has been falsely implicated for reasons not known. However, during her cross-examination, she made a telling statement. We consider it worthwhile to reproduce the same, here:

*“यह सही है जो हो गया व हो गया मेरा लड़का दीन दयाल बच जाय।
दीन दयाल ने जो भी गलती की उसको मैं माफ कर दिया मैं यह भी
चाहती हूँ की दीन दयाल अब जेल से बाहर आ जाय।*

यह कहना सही है कि दीन दयाल मेरा लड़का है मैं उसको बचाना चाहती हूँ।”

10. In such circumstances, learned Amicus Curiae has advanced two submissions. First, he has submitted, the appellant has been wrongly convicted. Victim 'X' was suffering a dysfunctional family inasmuch as she herself had stated that her mother had fled from the house owing to the conduct offered by her father. Also, her father never took care of her. In such circumstances, she alongwith her five siblings were dependant on and were

living with their uncle and paternal grand-mother. The appellant himself was a manual labourer. In such circumstances, victim 'X' may have fallen in bad company. On reprimand being offered by the appellant, who was her guardian, she felt offended. In such circumstances, she used to run away from her home only to return later. The fact that the appellant never took any action against victim 'X' arising from such conduct, shows that he remained cognizant of his guardian duties.

11. For reason of bad company found by victim 'X', she may have suffered sexual intercourse with others, outside her home. That fact has been corroborated by medical evidence. According to Dr. Vandana Srivastava (PW-3), in the first place victim 'X' was habitual to sexual intercourse and second, there were no marks of external or internal injuries. No serological or D.N.A. report exists to corroborate sexual assault caused by the appellant. Therefore, reasonable doubt exists if the appellant had committed any offence. In that regard, reference has also been made to the examination-in-chief of 'CD' (DW-1). Also, it has been stated, the victim 'X' filed an affidavit and made statement inconsistent to her first stand.

12. Second, it has been submitted, in any case even if the appellant is to be convicted for the offence of rape, award of life sentence without any adequate reasoning given by the learned court below (to award that maximum sentence), requires intervention by this Court. Arising

from the occurrence, the appellant has remained confined since 28.07.2010 i.e. the next day of the F.I.R. being lodged. He may have thus, remained confined for almost 14 years and 9 months. At the time of occurrence, he was about 31 years of age. Today he would be about 46 years of age. In absence of any criminal history and further in absence of any other circumstances, some leniency may be observed on the issue of sentence.

13. On the other hand, learned A.G.A. would submit, so far as the conviction order is concerned, it calls for no interference. It is a case of direct evidence. The victim who is a minor girl and a person with whom the appellant enjoyed absolute trust has spoken out the truth. The truthfulness of the statement made by victim 'X' is writ large on the face of record. In the first place, the F.I.R. came to be lodged upon help provided by Child Helpline. The victim 'X' had no motive whatsoever to make any false accusation. Remarkably her first narration contained in the F.I.R. as to the occurrence remained wholly consistent throughout. First, in her statement recorded under Section 164 Cr.P.C. and then at the trial, despite elaborate cross-examination, she maintained the same nature of occurrence caused by the appellant. Thus, she consistently described the occurrence of repeated rape committed by the appellant in an inebriated state and also of assault. Being fed up, she often ran away from home. Being of tender age and without help, she returned home

after a few days. In that she also described that she had earlier sought help from her maternal aunt (*'Mausi'*). Unfortunately, she was met with reprimand even from that close family relation. Being helpless, she returned to suffer more at the hands of the appellant. As to the actual occurrences, she has also described that the same was often caused when the appellant used to be in an inebriated state, it took place whether she slept with her grand-mother or alone on the terrace. She has specifically mentioned that her grand-mother was not able to protect her as the appellant used to assault her too, if she stood up to protect the victim 'X'. As to her parents, she described that her father was also a drunkard, who often used to stay away from home and her mother had been driven away from home by him, earlier. As to her siblings, she described them to be younger to her.

14. Then any doubt that may exist as to the involvement of the present appellant, the defence evidence itself is inculpatory to the extent the mother of the appellant 'CD' did not support his defence, during her cross-examination, and indicated otherwise.

15. As to sentence, it has been submitted that the offence committed is an aggravated offence on three grounds. (i) it has been committed on a minor; (ii) it has been committed by a person, who enjoyed a position of trust with the victim 'X', being her uncle; and (iii) it has been committed repeatedly. Therefore, no leniency may be

observed. Learned court below has rightly awarded the maximum sentence to the appellant.

16. Having heard learned counsel for the parties and having perused the record, insofar as the substance of charge is concerned, we find that the F.I.R. was lodged in 2010 whereas the occurrence may have taken place over duration of time prior to the F.I.R. being lodged. That duration may run to about six months. Therefore, the F.I.R. cannot be described to be belated. Second, in the occurrence of the nature described, issue of delay may not be relevant. Here victim 'X' was a minor without any family support. Practically, she was a vulnerable destitute living in the offender's house, ostensibly in this case. Only other adult in the house was her grand mother 'CD'. Clearly, she never could help her enough. She neither could prevent 'X' from assault by the appellant and remained at the receiving end of his physical assault, when she tried to intervene. The maternal aunt of 'X' also did not help her lodge the F.I.R. Therefore, it would have taken courage and external help to her, to lodge a complaint specially when her own paternal grand-mother and her maternal aunt were not supporting her.

17. Thus, the fact such help did not immediately became available to her was duly proved by victim 'X', during the course of her statement. No doubt emerged during her examination if she had approached her paternal grand-

mother and her maternal aunt for help. However, as a fact, no such help came.

18. Then it is also a fact that the mother of the victim had fled from her house on the conduct offered by the father of 'X'. The fact was also proven. She also disclosed that her mother eloped with one Umesh. Insofar as the father of the victim 'X' is concerned, he was a person who may be described as wayward and irresponsible. He also did not visit the victim 'X' for long durations and no evidence emerged at the trial to establish that he ever took any care of his family or children. He was not examined, by either sides, perhaps for that reason. Therefore, the issue of alleged delay in lodging the F.I.R. does not exist.

19. Coming to the substantive allegation, again victim 'X' established, the occurrence unambiguously. Repeated occurrence of rape was described to have been suffered by her inside the house of the appellant, both during day hours as also night hours, whether victim 'X' slept alone or with her grand-mother, either in the courtyard or on the terrace. At the same time the truthfulness of her allegation is reflected from the further statement that it is not as if the appellant would commit rape upon her on a regular frequency but that he committed repeated rape as per his own volition, mostly in an inebriated state.

20. As to why resistance may not be offered by her, she further explained that her resistance was met with physical assault with sticks. Once the spirit of such a vulnerable child was thus broken, it is not for this Court to accept the submission being advanced that inherent falsity exists in the prosecution story, because she did not suffer any physical injury. The spirit shattered on prolonged abuse suffered, she may never be expected to act in the manner suggested.

21. Then though not directly relevant, it may be considered that on such occurrence being caused, victim 'X' further disclosed, on earlier occasions she had fled from the house but found herself vulnerable in the world outside as well and therefore returned to suffer more. In that, she described having run to her maternal aunt who refused to help. This fact was corroborated by none other than DW-1.

22. As to the defence theory that victim 'X' had fallen in bad company and thus suffered sexual assault, was not proven to any extent. Other than the self serving statement made by DW-1 'CD', no evidence was led. Then, as noted earlier, DW-1 'CD' herself made a statement loaded with a suggestion that the appellant had caused such occurrence. We find no good reason to doubt the prosecution story that rape had been caused by the appellant, on repeated occasions on victim 'X' while she

was practically in his guardianship, the appellant being her real uncle (*'Chacha'*).

23. Thus, we do not find good ground to interfere with the order of conviction. The learned court below has not committed any error in passing the order impugned. The order of conviction is thus confirmed.

24. On the issue of sentence, we find that the appellant was 31 years of age at the time of occurrence. He does not have any criminal history of like or other cases. Considering his age to be about 46 years today, we feel some scope exist in awarding sentence, other than minimum or maximum.

25. Accordingly, while for reason of the appellant having committed repeated rape on his minor niece, he is not entitled to punishment close to minimum punishment, at the same time for other reason noted above, we modify the award of sentence to 20 years without remission. Appellant is in jail. He shall be released after undergoing the sentence of 20 years.

26. Appeal stands **partly allowed**, as above. The conviction of appellant under Section 376 I.P.C. is maintained and the quantum of sentence is reduced from life imprisonment to twenty years, without remission. Fine and default sentence imposed by the trial Court is maintained.

27. A copy of the judgment be sent to the trial Court and Central Jail, Naini, Allahabad for compliance. Original record of the trial Court be sent back by the office.

28. Let Rs. 25,000/- be paid out to Shri Rahul Saxena, learned Amicus Curiae for the appellant by the High Court Legal Services Committee, Allahabad High Court for his valuable assistance to the Court.

29. Office is directed to take necessary steps to ensure that the name of the appellant is not commonly reflected in the computerized record as is visible to the public. Only in the event of certified copy of this order being applied for by the appellant (and not by others), the same may be issued disclosing the full name particulars of the appellant. Otherwise, the appellant may only be described as 'D'.

Order Date :- 23.4.2025
Jitendra

(Sandeep Jain, J.) (S.D. Singh, J.)