

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

Crl.A.No.1533 of 2005

JUDGMENT :

This criminal appeal is preferred by the accused challenging the judgment dt.07.10.2005 in S.C.No.80 of 2004 on the file of Assistant Sessions Judge, Adilabad convicting appellant/accused for the offence under Section 376 (f) I.P.C. and sentencing him to undergo rigorous imprisonment for nine years and to pay a fine of Rs.2,000/-.

2. The case of prosecution is that appellant/accused is a resident of Ghotkuri Village. PW.2 is the daughter of PW.1, aged 8 years and they also belong to the same village. On 08.04.2003 PW.1, a washerman by profession, along with his son and another daughter went to Dhobi Ghat to wash the clothes of the villagers. On the same day, his other daughter, viz., PW.2, went to school as she was studying second class in the primary school at Gotkuri Village. At about 11:30 a.m., PW.2 was returning to her house from her school with a view to bring a plate to take mid-day meals. The appellant, who is a resident of B.C. Colony of the same village, attended the field work on that day along with his father, mother and sisters and returned to the house at 10:00 a.m. and washed his bulls. He called PW.2, while she was going on the way, took her to the kitchen room and raped her. This resulted in heavy

bleeding from the private parts of PW.2. When PW.2 started crying, the appellant left her and fled away. PW.2 came out from the house crying and then PWs.3, 4, 5, 6 and 7 enquired from her about the bleeding and she revealed that the appellant raped her and fled away. PW.3 went to PW.1 and informed him about the incident. PW.1 immediately came to the house and saw PW.2 and enquired her and then came to know that appellant had raped her. He then PW.1 changed the blood-stained clothes and immediately shifted her to Government Hospital and later came to the Police Station and lodged a report.

3. On receipt of report given by PW.2, Crime No.16/03 under Section 376 IPC was registered. PW2 was also examined in the Government Hospital, Adilabad and her statement was recorded. The Medical Officer who treated PW.2 referred her to the Medical College, Hospital, Yeovathmal for better treatment. The Circle Inspector arrested the appellant on 11.04.2003 at his house at Gotkur Village, seized the underwear and lungi used by him at the time of offence. The said articles contained blood and semen stains. He then produced the appellant before the Judicial First Class Magistrate, Hyderabad. The appellant was then examined by PW.15 who opined that there is nothing to suggest that the appellant was not capable of sexual intercourse. The material objects seized

were sent to RFSL, Warangal, along with a letter of advice through court and an analysis report, Ex.P.17 was received.

4. The accused was then charged of committing an offence under Section 376(f) of IPC in Sessions Case No.80 of 2004 before the Assistant Sessions Judge, Adilabad.

5. When the charge was put to the accused, he denied it and demanded to be tried.

6. The prosecution examined PWs.1 to 16 and marked Exs.P.1 to P.18 and MOs.1 to 5.

7. Before the Court below, PWs.1, 2, 3, 4, 5, 6, 7, 9, 10, 11 and 12 turned hostile. However, PW.2, the victim in cross-examination by the Additional Public Prosecutor stated as under :

"We used to take Lunch everyday at School. We used to take out plates from the house. I stated to the police on 08.04.2003 at about 11.00 a.m. while I was taking my place and going to school, accused found me at borewell the accused asked me to bring water. I took a glass of water to the house of accused. The accused was alone present in his house and there were nobody present. After I handed over glass of water to accused, the accused closed the house and took me to the kitchen. The accused removed my underwear and also removed his clothes. The accused raped me. The accused was wearing lungi by that time. The accused forcibly had a sexual intercourse with me. I got pain and bleeding from my private part (vagina). After sometime the accused went away. I came outside the house in a weeping condition. I did not disclose anything about the offence to the persons who were present in the street. I did not disclose the offence to my father. It is not

true to say that I disclosed the offence to my father, Renuka Bai, Vijaya and others. It is not true to say that I am deposing false. It is not true to say that accused did not cut me with a sickle."

8. By judgment dt.07.10.2005 the appellant was convicted of having committed offence under Section 376(f) IPC and sentenced to nine years rigorous imprisonment and also a fine of Rs.2,000/-.

9. The court below rejected the plea of appellant that in view of conflicting evidence of PW.2 and the fact that PW.1, the father of PW.2, did not support the prosecution case, it was foisted against appellant to extract money; that even if witnesses had become hostile, the court can still consider whether their evidence is more probable and relevant either to prosecution or to defence; so the evidence of PWs.1 and 2 cannot be entirely brushed aside.

10. It noted that PW.1 stated he received information from PW.3 on the date of incident; that PW.2 was weeping and there was bleeding from the body of PW.2; that it was the prosecution case also that PW.3 informed the incident to PW1 and PW.1 admitted to have given Ex.P.1 report; PW.1 also admitted that MO.1 was the frock worn by PW2 on that date; although PW.1 did not support the prosecution case with regard to the fact that victim informed him about the commission of rape by appellant, the evidence of PW.1 to the extent that PW.3 informed

him on the date of incident that PW.2 was weeping near the house of appellant and there was bleeding from her body corroborates the prosecution version regarding presentation of Ex.P.1 report and handing over of MO.1 frock to police.

11. It held that the evidence of PW.2 extracted above, did support the prosecution case to some extent. It accepted the contention of prosecution that PW2 turned hostile because of some compromise outside the court and that under the influence of the said compromise, PW.2 did not state the offence in the chief-examination; that although PW.2 stated in her evidence that the accused cut her private part with a sickle, there is no injury to PW.2 with sickle as stated by Medical Officer – PW.13; that Ex.P.1-FIR shows that appellant had threatened the victim with a sickle; the evidence of PW.2 that appellant had cut her private parts with a sickle is not correct and there was no injury to PW.2 with a sickle on her private parties; PW.2 might have stated that accused cut her private part with sickle in chief-examination obviously, because she was under the influence of the compromise; and in view of her categorical statement in cross-examination that accused forcibly had sexual intercourse with her causing her pain and bleeding from her private parts, the prosecution case can be accepted.

12. It also took note of the fact that PW.13 had

examined PW.2 at 01:20 p.m. on 08.04.2003, shortly after the incident took place at 11:30 a.m. and the mention of the age of PW.2 as 18 years in the evidence of PW.13 was a typographical mistake, since PW.13 in Ex.P.10 certificate issued by her showed that PW.2 was aged about 8 years; that PW.13 had asserted that hymen was ruptured; that there was active bleeding and the hymen tear of 1/4th was present; and this evidence of PW.13 was corroborated by PWs.1 and 2 regarding the bleeding. It noted that PW.13, having examined the victim, immediately within a short time after the incident, referred her to Yeovathmal Medical College; that PW.13 had stated in her cross-examination categorically that she found profuse bleeding on the inner aspect of vagina of PW.2 and bleeding was also found on the posterior vagina. It therefore concluded that the medical evidence established that there was no sickle assault committed on PW.2 and this corroborated the evidence of PW.2 which showed the accused forcibly had sexual intercourse with her and she got pain and bleeding.

13. It held that the FSL report Ex.P.17 showed the presence of semen and spermatozoa on M.O.6-underwear of the appellant; that human blood was present on M.O.Nos.1, 2 and 3, which included the frock of victim, and therefore concluded that the report of FSL also corroborated the prosecution case.

14. It held that although mediators and corroborating witnesses did not support prosecution case, this was obviously on account of the compromise outside the court, but there was nothing in the cross-examination of investigating officer to discredit his evidence regarding the seizure of material objects and arrest of accused; that the panch witnesses in their evidence admitted the signatures of Exs.P.8, the scene observation report containing signature of PW.9 and Ex.P.9, panchanama prepared by PW.10 and that there was no motive to the investigating officer PW.16 to create a panchanama from the material objects. It also noted that examination of the appellant by PW.15-Medical Officer was 10 days after the incident and because of that there might not be a possibility of abrasion on the penis of appellant and it therefore did not consider the evidence of PW.15.

15. Having regard to the above findings, it convicted the appellant under Section 376(f) IPC.

16. Challenging the same, this appeal is filed.

17. It is the contention of the counsel for appellant that the court below should have acquitted the accused in view of the fact that not only PW.2, the victim, but also her father PW.1 and several other witnesses have turned hostile; that PW.2 gave three conflicting versions regarding the commission of the offence upon her; the mediators with regard to observation of scene of the

offence, and seizure of material objects, did not support the prosecution case; therefore, statement of PW.2 in her chief-examination that appellant had cut her private part with a sickle ought to have been accepted and the appellant should have been given benefit of doubt instead of being convicted under Section 376(f) of the Act; and relied upon a judgment in **Babbu alias Babulal v. State of M.P.** ^[1] of the Madhya Pradesh High Court.

18. On the other hand, the learned Public Prosecutor contended that the evidence on record clearly established guilt of appellant notwithstanding the fact that some of the witnesses had turned hostile and did not support the case of prosecution; that the witnesses had turned hostile possibly on account of an out-of-court compromise; and there is no warrant to interfere with the judgment of court below. There is no suggestion by the accused to any of the prosecution witnesses that the victim or her father had any motive or previous enmity with accused to involve him in the instant case; and that even if a witness had turned hostile, evidence of such a witness cannot be totally rejected and it is permissible to use that portion of evidence which is consistent with the prosecution case or the defence case after subjecting it to close scrutiny.

19. I have noted the submissions of both sides.

20. PW.1 is the father of PW.2 and he is a washerman by profession. He admitted that he gave Ex.P.1 report to

the police and that the said report bears his thumb mark. In his chief-examination, he stated that on the day of the incident, PW.3 came to him and informed him that his daughter, PW.2, was weeping near the house of the appellant; that there was bleeding from the body of PW.2; that he came to PW.2 and brought her to the Government Hospital, Adilabad. He stated that MO1 was the frock worn by PW2 on that day. No doubt he was declared hostile by prosecution and cross examined. But his evidence in chief corroborates the prosecution version regarding the presentation of the report Ex.P1 on receipt of information from PW3 about the incident and the handing over of MO.1, i.e., the frock to the police. His evidence also indicates that PW.2 was found near the house of the appellant with injuries on her private parts.

21. There is no dispute that at 01:20p.m. on the date of the incident, PW.13 examined PW.2 and issued Ex.P.10 certificate. In the said certificate, she clearly mentions as follows :

“Hymen was ruptured, active bleeding present, hymen tear present. 1/4th present. No other injury noted on the body or private parts. Clinical examination reveals sexual assault has been committed on her. The patient was referred to Yeovathmal Medical College. Vaginal smear handed over to PC 7771 of PS Tamsi”

22. In the cross-examination, PW.13 also stated that she found profuse bleeding on the inner aspect of vagina of PW.2; there was bleeding found on the posterior vagina

also; and there were no cut injuries on any part of the body of PW.2.

23. Nothing is elicited in the cross-examination of PW.13 to discredit her evidence. This evidence of PW 13 is inconsistent with the plea of the accused that he had cut the private parts of PW2 with a sickle and the said theory therefore cannot be accepted.

24. The question to be considered is whether the Court below was right in relying on the evidence given by PW2 when she was cross-examined by the prosecution, after being declared hostile and convict the accused on that basis.

25. The mere fact that a witness is declared hostile by the party calling him and allowed to be cross-examined, does not make him an unreliable witness so as to exclude his evidence from consideration altogether. (see

Rabindra Kumar Dey v. State of Orissa^[2])

26. In **Karuppanna Thevar and others v. State of Tamil Nadu**^[3], the Supreme Court held that that evidence of a hostile witness cannot be rejected outright but the court has to atleast be aware that *prima facie*, a witness who makes different statements at different times has no regard for truth. The court should therefore be slow to act on the testimony of such a witness and, normally, it should look for corroboration to his evidence.

27. In **Bhagwan Singh v. State of Haryana**^[4], the Supreme Court held that the evidence of a hostile witness remains admissible in the trial court and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence.

28. In **Mohan Lal v. State of Punjab**^[5], the Supreme Court held that :

“8. A witness is a responsible citizen. It is his duty to support the case of the prosecution and should depose what he knows about the case. In the instant case, it is shocking that the mother of the prosecutrix had turned hostile and she repeatedly told the court that there had been some talks of compromise. In a case where an offence of this nature had been committed, we fail to understand as to how there can be a compromise between the parties. The conduct of the mother herself is reprehensible.

9. It is a settled legal proposition that statement of a hostile witness can also be examined to the extent that it supports the case of the prosecution. The trial court record reveals a very sorry state of affairs, inasmuch as no step had ever been taken by the prosecution or the investigating officer, to prevent the witnesses from turning hostile, as it is their solemn duty to ensure that the witnesses are examined in such a manner that their statement must be recorded, at the earliest, and they should be assured full protection.”

29. In **Lahu Kamlakar Patil v. State of Maharashtra**^[6], the Supreme Court held :

*“15. It is settled in law that the evidence of a hostile witness is not to be rejected in toto. In **Rameshbhai Mohanbhai Koli v. State of Gujarat**, reiterating the principle, this Court has stated thus: (SCC p. 117, paras 16-*

17)

“16. It is settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof. (Vide Bhagwan Singh v. State of Haryana, Rabindra Kumar Dey v. State of Orissa, Syad Akbar v. State of Karnataka and Khujji v. State of M.P.)

17. In State of U.P. v. Ramesh Prasad Misra, this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde v. State of Maharashtra, Gagan Kanojia v. State of Punjab, Radha Mohan Singh v. State of U.P., Sarvesh Narain Shukla v. Daroga Singh and Subbu Singh v. State.”

16. Recently, in Bhajju v. State of M.P., a two-Judge Bench, in the context of consideration of the version of a hostile witness, has expressed thus: (SCC p. 341, para 35)

“35. ... Normally, when a witness deposes contrary to the stand of the prosecution and his own statement recorded under Section 161 CrPC, the prosecutor, with the permission of the court, can pray to the court for declaring that witness hostile and for granting leave to cross-examine the said witness. If such a permission is granted by the court then the witness is subjected to cross-examination by the prosecutor as well as an opportunity is provided to the defence to cross-examine such witnesses, if he so desires. In other words, there is a limited examination-in-chief, cross-examination by the prosecutor and cross-examination by the counsel for the accused. It is admissible to use the examination-in-chief as well as the cross-examination of the said witness insofar as it supports the case of the prosecution.”

(emphasis added)

17. In Manu Sharma v. State (NCT of Delhi), while discussing about the evidence of a witness who turned

hostile, the Bench observed that his evidence to the effect of the presence of the accused at the scene of the offence was acceptable and the prosecution could definitely rely upon the same.”

30. In **Attar Singh v. State of Maharashtra**^[7], the Supreme Court held that if some portion of the statement of a hostile witness inspires confidence it can be relied upon and the evidence cannot be termed as wholly unreliable and that merely because the witness becomes hostile, it does not result in throwing out the prosecution case, but the court must see the relative effect of his testimony. It also held that if the evidence of a hostile witness is corroborated by any evidence, there is no legal bar to convict the accused and that the testimony of a hostile witness is acceptable to the extent it is corroborated by that of a reliable witness. It also held that it is open to court to consider the evidence and there is no objection to a part of that evidence being made use of in support of the prosecution or in support of the accused.

31. In her evidence PW2 stated that she was taken to the house of the appellant by him. In the cross-examination by the Additional Public Prosecutor, PW.2 clearly stated that on 08.04.2003 at 11:30 a.m. when she was taking her plate and going to school, the accused found her at a borewell and asked her to bring water; that she took a glass of water to the house of accused; that he was alone present in the house and nobody else was

there; after she handed over the glass of water to the accused, he closed the house and took her to the kitchen, removed her underwear and also removed his clothes and then raped her by forcibly having sexual intercourse with her which caused pain and bleeding from her private parts and then he went away.

32. The above evidence of PW.2, in my opinion, is consistent with evidence of PW 13, who examined her shortly after the incident, that she was subjected to forcible sexual intercourse and there was no assault on her with sickle. PW 13's evidence is inconsistent with the case of defence that the accused had cut her private parts with a sickle.

33. In his Sec.313 examination, the accused did not explain how the injuries found on body of the victim were caused even though his counsel suggested to PW2 during her cross-examination that these could have been caused by a sickle. It was for the accused to give a plausible explanation in the S.313 examination for the injuries found on the body of the victim when he was alone with her in his house. No such attempt was made except denying the prosecution case. This is inconsistent with his innocence.

34. PW 15 categorically stated that the accused was not incapable of sexual intercourse. Ex.P-17, report of FSL shows the presence of Human Semen and

spermatozoa on the underwear of the accused MO6 seized by PW16 from the house of the accused on 11.4.2003. Human Blood was present on MO.1,2 and 3. So FSL report also corroborated the prosecution case.

35. Although no abrasion was found on the penis of the accused by PW15, this is probably because he was examined by PW15 10 days after the incident on 17.4.2003. After such a lapse of time, the possibility of finding any abrasion is not there.

36. It is true that PW.1 had stated in his chief-examination that he did not enquire from PW.2 what has happened because she lost her consciousness, and even PW.2 had stated in her chief-examination that her father did not ask her anything. This conduct on the part of PWs.1 and 2 is most unnatural, since the first thing a child aged 8 years like PW.2 would do, if she is hurt by any person, would be to tell the truth to parents and it is also natural for the parent to enquire from his child as to how she was hurt. It is important to note that in the report Ex.P.1-FIR given by PW.2, he has specifically stated that he had enquired from PW.2 and she told her how the offence had been committed by appellant. Even in his statement under Section 161 Cr.P.C., he reiterated this. Obviously, on account of some inducement, threat or compromise or some compromise outside the court, he felt compelled to turn hostile, and probably forced PW.2

also to turn hostile.

37. In this regard, it is important to note that the investigating officer PW.16 had stated that he had prepared Ex.P.8-scene observation report, containing the signatures of PW.9 and PW.12, and both PWs.9 and 12 admitted to have signed Ex.P.8 report. No doubt, they also turned hostile and this could also possibly be on account of the out-of-court compromise. But evidence of PW16 can be accepted regarding the seizure of M.Os. Ex.P.8 mentions that the seizure of MO.1, a blood-stained gown, worn by PW.2 on the day of the incident.

38. In my opinion, having regard to the above findings, prosecution was able to prove each of the chain of circumstances relating to the commission of the offence by the accused, that the evidence on record is consistent with the guilt of accused and that the court below has rightly held that the guilt of the accused under Sec.376 (f) IPC has been proved beyond reasonable doubt by the prosecution.

39. I do not find any merit in the appeal. It is accordingly dismissed confirming the judgment dt.07.10.2005 in S.C.No.80 of 2004 on the file of Assistant Sessions Judge, Adilabad.

40. As a sequel, miscellaneous applications pending, if any in this appeal, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 03-02-2015

Ndr/*

[\[1\]](#) 2000 Cri.L.J. 1123

[\[2\]](#) AIR 1977 SC 170

[\[3\]](#) (1976) 1 SC 31=AIR 1976 SC 980

[\[4\]](#) (1976) 1 SC 389=AIR 1976 SC 202

[\[5\]](#) (2013) 12 SCC 519

[\[6\]](#) (2013) 6 SCC 417

[\[7\]](#) (2013) 11 SC 719