

**A.F.R.**

**Reserved on : 12.2.2020**

**Delivered on : 6.8.2020**

**In Chamber**

**Case :-** CRIMINAL APPEAL No. - 414 of 1991

**Appellant :-** Santosh And Another

**Respondent :-** State

**Counsel for Appellant :-** Ravindra Singh, Akhilesh Singh, Shivam Yadav

**Counsel for Respondent :-** A.G.A.

**Hon'ble Suresh Kumar Gupta, J.**

1. This criminal appeal has been preferred by the appellants-Santosh and Bhagwan Das against the judgement and order dated 7<sup>th</sup> March, 1991 passed by the learned Special Judge (Dacoity Affected Area, Mainpuri) in S.T. No. 471 of 1987 whereby the appellants have been convicted under section 376 IPC for 10 years rigorous imprisonment and under Section 366 IPC for 7 years rigorous imprisonment. Both the sentences run concurrently.

2. Brief facts of this case is that PW 1, Ranno Devi lodged the FIR on 28.9.1987 at 11:30 a.m. against the appellants with allegations that one month prior to the FIR when the complainant was going to her paternal home to in-laws house alongwith her husband, due to being late from his parental house it was too dark for him to reach at Jasrana. She stay at the Garden outside of Jasrana bus stand. Victim went to the grooves due to urination where victim was overpowered by three accused persons namely, Baghwan Das, Santosh Badhai and Jogendar Lodha had committed gang rape upon her one by one.

When the victim become unconscious, all the accused persons took her away to Aligarh and detained to victim at Aligarh hotel upto 26.9.1987 for about one month and she came back to his mother house at Vangaon District Etah after getting opportunity. It is also alleged in the FIR that the accused persons also taken her *payal, kardhani and kundal*. When the victim have got an opportunity to escape from the custody of the accused after a lapse of one month, victim was returned back to her parental house at Etah and written report Exhibit Ka 1 typed by victim and submit the written report to S.S.P. Etah and under direction of S.S.P. Etah chik FIR Exhibit Ka-8 was registered against the appellants under Sections 392, 366 and 376 IPC at P.S. Jasrana.

3. Investigation of this case was entrusted to Khem Singh (PW 3), Station House Officer and during investigation he recorded the statement of victim and on the pointing out of the victim prepared site plan, Exhibit Ka-4. After that victim was medically examined by (PW-4) Dr. Vimla Sharma who prepared medical examination report, Exhibit Ka-7 for determination of the age of the victim. She was referred to radiologist for x-ray. Dr. S.C. Dubey (PW 5) prepared x-ray report, Exhibit Ka-9. After completing the formalities of investigation, Investigating Officer submitted the charge sheet, Exhibit Ka-5 against the appellant Santosh on 9.11.1987 and against Bhagwan Das on 4.12.1987 under Sections 366, 376, 392 IPC. Investigating Officer also filed the charge sheet against co-accused Jugendra as absconder. On the basis of this charge sheet, cognizance was taken by the Magistrate and after committal before the sessions court, this case was transferred to Special Judge. (Dacoity Affected Area), Mainpuri for trial wherein the charges against the appellants-Santosh and Bhagwan Das were framed

under Sections 366, 376 and 392 IPC. Charges were read over and explained to the accused in 'hindi'. The appellants denied the charges levelled against them and claimed to be tried.

4. During trial following witnesses were examined:-

(PW-1) is the victim-Ranno Devi. (PW-2) is Om Prakash who is reported to be the brother in law and eye-witness (PW-3) is the Investigating Officer Khem Singh and (PW-4) Doctor Vimla Sharma and (PW-5) Doctor S.C. Dubey and (PW-6) is constable Tahir Singh who proved the chik FIR as Exhibit Ka-8.

5. After examination of all the witnesses, statement of accused persons were recorded, in which, appellants denied the charges and submitted that the false evidence adduced by the witnesses and further stated that they have previously used to visit the house of the complainant's father and appellants have been implicated due to suspicion and old enmity.

6. After hearing both the parties learned sessions judge convicted the appellants under Sections 366, 376 IPC and exonerated the appellants under Sections 392 IPC.

7. Being aggrieved with the order of the learned trial court, this appeal has been preferred by the appellants.

8. I have heard the learned counsel for the appellants and learned AGA Sri J.P. Tripathi and perused the record.

9. Learned counsel for the appellants submitted that no time and date has been mentioned in the first information report and it is further submitted that the FIR lodged against the appellants is after one month of the incident. But there is no plausible explanation on behalf of prosecution. As per prosecution, during

one month she remained with the appellants but during this period, she never raised any alarm at any place. In this period victim travels from bus and nowhere, she has made the protest against the accused persons whereas she had ample opportunity to raise the alarm against the accused which shows that the victim was consenting party, she was major at the time of incident and she visited several places on her own volition. It is next submitted that this occurrence was happened when husband of the victim-Kunwar Pal left the victim in Jasrana bus stop but neither Kunwar Pal lodged any FIR regarding kidnapping or abduction nor prosecution did examine Kunwar Pal. It is also submitted by the learned counsel for the appellants that PW 1-victim has also specifically stated in her statement that her cloths i.e. *patikot, blouse and dhoti* were stained with blood when the alleged incident was taken place. But the same was neither handed over to the Investigating Officer during the course of investigation nor any recovery memo was prepared which shows that the whole concocted and fabricated story was narrated by the victim.

10. Learned counsel or the appellants further contended that PW-2 Om Prakash has stated in his statement that the husband of the victim-Kunwar Pal met him and he clearly stated that his wife has gone elsewhere and he saw all the accused with his wife, so, he should made the protest in query but it is surprising that he did not made any protest, which shows that the PW-2 has not seen the occurrence. It is further submitted that the Investigating Officer PW-3 Khem Singh in his statement stated that husband of the victim-Kunwar Pal has lodged simple NCR under Section 498 regarding the incident which shows that the entire prosecution story is highly doubtful. It is also submitted that the conduct of the

victim is highly doubtful which shows that she was voluntarily entered into the relationship with the accused-appellants and when the victim has returned back to her parental house then on the behest of parents she lodged the false and frivolous FIR against the appellants in order to show his innocence. It is also submitted that PW-4 Doctor Vimla Sharma who has medically examined the victim she clearly stated that the victim was pregnant of 12 weeks and she was also found habitual of sexual intercourse. As per statement, it clearly shows that no force or fraud or coercion was used against the victim which shows that prosecution story of rape is absolutely false, frivolous and baseless. It is also submitted that neither the victim nor PW-2 Om Prakash has mentioned in his statement, the date and time of the incident.

11. It is further submitted that prosecution has failed to establish the prosecution story and version of the prosecution is not supported with documentary evidence. It is also submitted that there are material contradictions in the statement of victim. Prosecution has failed to prove the case beyond the shadow of doubt. The version narrated by the victim is highly improbable, false and frivolous. So the appeal of the appellants is liable to be allowed.

12. Learned AGA vehemently opposed the prayer of appellants counsel and submitted that the learned trial court properly appreciated the evidence. Delay of lodging the FIR in rape cases is not unnatural. The victim was sexually harassed by the appellants and the appellants committed gang rape upon the victim without her consent and against her will. Main argument on behalf of the State is that it is matter of committing gang rape and prosecutrix cannot be consenting party to several persons simultaneously.

13. Submission of learned AGA is that absence of injuries on private parts cannot be ground to hold that the appellants cannot be convicted.

14. It is also submitted by the learned AGA that investigating agency not conducting investigation properly or was negligent cannot be mere ground to discredit the testimony of victim.

15. It is also submitted that as per Section 114 of Evidence Act, "where sexual intercourse by the accused/appellant is proved and the question is whether it was without the consent of the woman-victim alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent," so there is irrebuttal presumption against the appellants. Hence, the appeal of the appellants deserves to be dismissed.

16. Having considered the rival submission advanced by learned counsel for the appellants as well as learned AGA, this Court clearly proceed to examine the evidence as adduced by the prosecution.

17. First of all, I discussed the medical examination of the victim. Medical Examination of the victim was conducted by PW-4 Doctor Vimla Sharma at Female Hospital, Shekohabad, Mainpuri. In the external examination, no external injury had been found by P.W.-4 except one contusion on the right thigh of the victim. In internal genital examination, she found hymen membrane absent. No other injury was found on the private part of the victim and besides this, she had also detached 12 weeks pregnancy. On the opinion of this witness that she was usual to intercourse and for determination of age, she had referred the victim for x-ray of the elbow and wrist joint. On the basis of x-ray report Exhibit Ka-9, PW-4 Dr. Vimla Sharma have determined the age of victim

about 20-21 years. Thus at the time of alleged incident, victim was major.

18. One of the argument of the learned AGA is that presumption under Section 114 A of the Evidence Act is that the Court shall presume that the victim did not give her consent to commit sexual intercourse. The standard and onus of proof in the case of rape has been changed by insertion of Section 114 A of the Evidence Act. It has only created a presumption qua the consent of victim. Section 114 A provided that in a prosecution for rape under sub Section (2) of Section 376 IPC when there is an allegation of rape, the question whether it was without consent of the victim, the Court shall presume that she did not give her consent, in case of rape where it is established that there has been intercourse and if victim states in her evidence before the Court that she did not consent then the Court shall presume that she did not consent.

19. The Evidence Act nowhere say that the victim's evidence cannot be accepted unless it is corroborated in material particulars. The victim is undoubtedly a competent witness under Section 118 of Indian Evidence Act and her evidence must receive the same weight as attached to an injured witness in case of physical violence. The same degree of care and caution must attached in the evaluation of her evidence as in the case of an injured complainant or witness what is necessary that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of charge levelled by her. If the Court keep this mind and feels satisfied that it can act on the evidence of the victim there is no Rule of Law or practice incorporated in Evidence Act which it requires it to look for corroboration of

evidence. If for some reason, the Court is hesitant to place implicit reliance on the testimony of the prosecutrix, it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice.

20. Now the following questions arise-

- (i) whether the testimony adduced by victim is cogent and credible.
- (ii) whether the evidence adduced by victim inspire confidence.
- (iii) whether the sexual intercourse done by appellants without her consent.

21. Victim-PW 1 in her statement stated that she reached at Jasrana at about 5:30 in the month of August so there is no question of darkness in the evening of 5:30 pm. As per evidence that the victim reached Jasrana bus stand alongwith her husband but in this case neither the missing report nor the abduction report lodged by husband; only the NCR under section 498 IPC lodged by husband-Kunwarpal against the accused-appellant Santosh. In this case, Kunwarpal-husband of PW-1 (victim) is the star witness but neither the statement of victim was record under Section 161 Cr.P.C. nor Kunwarpal examined during trial by the prosecution.

22. As per testimony of the prosecutrix, she was abducted or kidnapped from Jasrana bus stand afterwards she forcibly taken by the appellants to Aligarh where she was stayed in an hotel near the Aligarh bus stand for about a month. During stay at hotel, she had ample opportunity to raise the protest or alarm but neither the protest nor any alarm raised by the victim so it cannot be attributed that she was abducted and raped against her consent. Her silence



in the opinion of this Court, amount to consent on her behalf.

23. This Court is quiet conscious of the legal position that normally the Courts should not discard the version of prosecutrix because she did not gain anything in putting her own honour. Stake by false implication of appellants but at the some time, the Courts should also bear in minds that in changed values of our society, false charges of rape also cannot be ruled out.

24. There have also been rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case as has been laid down by Hon'ble Apex Court in the case of ***Radhu Vs. Sate of Madhya Pradesh*** reported in ***[(2007) 12 SCC 57]***.

25. There are two places where the rape is alleged to have been committed, first is the *junri* field near Jasrana town bus stop where alleged gang rape committed by the appellants and where she was abducted by appellants and second place of occurrence is the hotel situated near Aligarh bus stand where victim is said to have been kept for one month and during this period, gang raped by the appellants but no investigation regarding this place has been done by the Investigating Officer. Neither the Investigating Officer visited the hotel in Aligarh nor recorded the statement of said hotel employees. No site plan was prepared regarding second place of occurrence. In this case, Investigating Officer conducted the investigation in a very cursory manner and submitted the charge sheet without proper investigation.

26. Prosecutrix specifically stated in her statement that during alleged gang rape her cloths i.e. *patikot, blouse and dhoti* were stained with blood when the alleged incident was taken place. But the same was neither handed over to the Investigating Officer during the course of investigation nor any recovery memo was prepared which shows that the prosecution version is not supported by corroborative piece of documentary evidence.

27. In this case PW-2 Om Prakash (Nandoi of the victim) was also examined in his statement and has stated that the husband of the victim-Kunwar Pal met him and has stated that his wife was gone elsewhere. Thereafter, Kunwar Pal thought that his wife was gone alongwith Santosh and other persons and he has also sated that he has seen his wife alongwith three accused persons while going on by bus but PW-2 neither make any resist against the appellants nor victim told to PW 2 that she was abducted by the appellants which shows that eyewitness account of PW-2 is highly doubtful.

28. It has also mentioned that the appellants Santosh and Bhagwan Das were also resident of the same village which was the parental home of prosecutrix and further also she visited the parental house of the victim prior to the incident. So this possibility cannot be led that the appellants falsely and illegally implicated in the present case on account of village enmity and party bandi.

29. In the present case, defence of the appellants through out had been showed that he has been falsely roped by the victim in the present crime. Defence has not adduced any evidence in his defence. In the opinion of this Court the appellants, if not entitled to clear acquittal on charge of kidnapping, abduction as well as gang rape are at

least entitled to benefit of doubt considering the nature of evidence adduced by victim. Hence, the contention of the appellants even for offence under Section 366 and 376 (2)(g) cannot be sustained.

30. On perusal of the entire evidence produced by prosecution neither FIR lodged by the victim herself with the allegation that all the accused persons have committed rape upon her while she was going alongwith her husband and reached at bus stop Jasarana while she was attending the natural call near Jasarana bus stop thereafter she has gone Etah by bus alongwith all the accused persons. Subsequently, she went to Aligarh by bus and stayed in hotel alongwith the accused persons for a month but in the FIR no time and date is clearly mentioned and she never raised any alarm or protest when she was accompanying forcibly with the accused persons and travelled in bus. She never made any alarm at the bus stop where the first incident was taken place. It shows that she has visited several places alongwith the accused persons, according to her own sweet will.

31. Though the whole prosecution story is unreliable, belies logic and the learned trial court misled, itself, in relying upon the prosecution witnesses which are contrary to each other which do not inspire confidence. The complete testimony of the victim being unworthy of credence, unreliable and bundle of lies could not have formed the basis for the conviction of the appellants, on the basis of illegal and inadmissible evidences.

32. Therefore in the facts and circumstances of the case, the conviction of the accused on the basis of solitary testimony of the prosecutrix, is not sustainable for the reasons discussed above. Thus, the finding recorded by trial court cannot be

affirmed. Thus, this Court is of considered opinion that there is no scope to sustain the conviction of the accused appellants for commission of offence under Section 376 IPC or under Section 366 IPC and as a result, the accused appellants are entitled to the benefit of doubt as the prosecution has not been able to prove its case, beyond all reasonable doubts. Resultantly, for the reasons mentioned above, the appeal stands '**allowed**'.

33. The impugned judgement and order of conviction and sentence passed by learned trial court is, hereby, **quashed** and **set aside**. The accused appellants is acquitted of the charges levelled against them.

34. Since, the appellants are on bail, they need not to surrender.

35. Office is directed to transmit lower court record to the court below alongwith a copy of this order.

**Order Date :- 6.8.2020**

Ankita