

Court No. - 43

Case :- CRIMINAL APPEAL No. - 5017 of 2009

Appellant :- Smt. Shahjahan And Others

Respondent :- State of U.P.

Counsel for Appellant :- D.K. Dewan,Afzal Ahmad,Irshad Ahmad

Counsel for Respondent :- Govt. Advocate,Surendra Prasad Mishra

With

Case :- CRIMINAL APPEAL No. - 5646 of 2009

Appellant :- Preetam

Respondent :- State of U.P.

Counsel for Appellant :- S.K. Mishra

Counsel for Respondent :- Govt. Advocate

With

Case :- CRIMINAL APPEAL No. - 5005 of 2009

Appellant :- Lala @ Shakir And Another

Respondent :- State of U.P.

Counsel for Appellant :- Mukhtar Alam

Counsel for Respondent :- Govt. Advocate

With

Case :- JAIL APPEAL No. - 5445 of 2009

Appellant :- Kasim

Respondent :- State

Counsel for Appellant :- From Jail,Mohd. Afzal

Counsel for Respondent :- A.G.A.

Hon'ble Ashwani Kumar Mishra,J.

Hon'ble Dr. Gautam Chowdhary,J.

(Per: Hon'ble Ashwani Kumar Mishra,J.)

1. All these appeals are directed against a composite judgment and order of conviction and sentence dated 11.08.2009, passed by the Additional Sessions Judge, Court No.2, Bijnor, in Sessions Case No.622 of 2005 (State Vs. Preetam and others), under Sections 363, 366, 368 & 376(g) I.P.C., arising out of Case Crime No.549 of 2004, Police Station-Nehtaur, District-Bijnor; whereby accused appellants- Preetam, Ayyub and Lala @ Shakir have been convicted and sentenced to five years rigorous

imprisonment alongwith fine of Rs.10,000/-, each, under Section 363 I.P.C. and on failure to deposit fine to undergo simple imprisonment for one year; to undergo ten years rigorous imprisonment alongwith fine of Rs.20,000/-, each, under Section 366 I.P.C. and on failure to deposit fine to undergo simple imprisonment for one and a half years; whereby accused appellant Preetam has also been convicted and sentenced to life imprisonment alongwith fine of Rs.2,00,000/-, under Section 376(g) I.P.C. and on failure to deposit fine to undergo simple imprisonment for two years; accused appellants Smt. Shahjahan, Smt. Gulshan and Javed have been convicted and sentenced to undergo ten years rigorous imprisonment alongwith fine of Rs.20,000/-, each, under Section 368 I.P.C. and on failure to deposit fine to undergo one and a half years, each, for simple imprisonment; whereby accused appellant-Kasim has been convicted and sentenced to five years rigorous imprisonment alongwith fine of Rs.10,000/- under Section 363 I.P.C. and on failure to deposit fine to undergo simple imprisonment for one year; he has also to undergo ten years rigorous imprisonment alongwith fine of Rs.20,000/- under Section 366 I.P.C. and on failure to deposit fine to undergo simple imprisonment for one and a half years; as well as to undergo life imprisonment alongwith fine of Rs.2,00,000/-, under Section 376(g) I.P.C. and on failure to deposit fine to undergo simple imprisonment for two years. All the sentences are directed to run concurrently.

2. Since all the criminal appeals and jail appeal have been heard together, as such, they are being disposed off by this common judgment.

3. Informant in the present case is the father of the victim (P.W.-3), who has lodged a written report on 23rd of July, 2004 stating that his 16 year old minor daughter (Victim) has been enticed by the accused Kasim at about 6.00 a.m. on 17.06.2004, which incident has been seen by Jay Prakash son of Sita Ram (not produced) and Dinesh son of Dileep (P.W.-2). Despite best endeavours, the informant could not trace out his daughter, as such, the report has been lodged. On these allegations, the FIR came to be lodged at 16.25 hours on 28th July, 2004, Police Station-Nehtaur, District-Bijnor, under Sections 363 & 366 I.P.C., arising out of Case Crime No.549 of 2004.

4. The investigation proceeded further and ultimately the victim has been recovered on 8th of August, 2004. The recovery memo of the victim dated 08.08.2004 is duly exhibited at the stage of trial, where the victim disclosed that on 17.06.2004 at about 6.00, she was engaged in daily ablution when her neighbour (accused) Preetam came and told that her buffalo was released. The victim came to tie the buffalo, whereafter she was told by Preetam that her friend Nargish was standing at the bus station and that she should go and get her. When she came to the bus station, accused Kasim was standing there. It is then that accused Kasim on the threat of a knife forced her to sit on the motorbike belonging to

accused Preetam. She was also pressed by the knife and out of fear she sat on the bike of the accused Preetam, whereafter accused Kasim also sat on the same bike behind her. These two persons then took her to a *ghass mandi* at Nehtaur, where two other accused, namely, Aayub and Lala @ Shakir were present. All four accused took the victim to a mango orchard, whereafter accused Aayub and Lala @ Shakir brought a tempo and a *burqa* and she was given some intoxicant, as a result of which the victim lost her consciousness. Accused Kasim then took her to Amroha at the house of his sister, where accused Kasim and Preetam committed rape upon the victim. The victim was taken to the house of the other sister of accused Kasim on the next day, where she was again subjected to sexual assault by the two accused. Victim further stated that she was taken to Delhi and was kept in a rented room at Nangloi. According to the victim she was kept captive in that room by the accused for almost a month and she was subjected to sexual assault regularly by these two accused persons. The victim also stated that while accused Preetam and Kasim were consuming liquor, they called a girl, who was playing along with her brother. These persons asked the girl to come to them and play after placing the minor brother on the cot. Accused Preetam forced the victim to lift the child and when she refused to do so, the accused assaulted the victim. Victim has alleged that force was applied by the two accused in order to compel her to lift the child. She was also assaulted by the accused persons. On the next day, the victim was compelled to take the child. Accused

Preetam told accused Kasim that the child be taken to the place, where he was required, whereafter accused Kasim took the child. The victim was not informed as to what happened to the child. The accused Preetam then took the victim to Panipat and she was sexually assaulted for 15-16 days, whereafter the victim was brought to Nehtaur. The victim was then taken to Chandpur where she indicated of her captivity to the Police Constable by gesture, who came to her rescue, whereafter the accused Kasim was caught and accused Preetam fled. The victim in her statement under Sections 161 and 164 Cr.P.C. has also come out with similar version of her travail. The precise case of the victim is that she was firstly abducted by the accused persons, whereafter she was taken to different places and subjected to sexual assault. The victim pertinently also stated about the attempt by the two accused to kidnap a minor child at Delhi and that she (victim) was compelled by these two accused to participate in it and that in fact she had not participated in this part of the crime.

5. On 08.08.2004 itself, the missing minor child abducted from Delhi was recovered on the pointing out of the accused Kasim from the house of one Shameem Ahmad, to whom the child abducted at Delhi was allegedly sold for Rs.25,000/-. The victim was medically examined on 09.08.2004 and her injury report dated 09.08.2004 has been exhibited during trial as Ex.Ka-5. As per the medical examination of the victim, no external or internal injury of any kind was found on the victim. Supplementary medical report of 20.08.2004 is also on record which indicates that

on the vaginal smear prepared of the victim, no spermatozoa etc., was found. The age of the victim has been determined as above 18 years. No definite opinion about rape has been given by the doctor. It is on the basis of above material that ultimately two charge-sheets came to be submitted in the matter. The first charge-sheet was submitted on 30th September, 2004 against the accused Kasim, Preetam, Lala @ Shakir and Aayub, under Sections 363, 366, 368 & 376(g) I.P.C., whereas the subsequent charge-sheet dated 13.10.2004 came to be filed against Ajijur Rehman, Smt. Shahjahan, Javed and Smt. Gulshan and charges were framed against the accused appellants under Sections 363, 366, 368 & 376 I.P.C. by the court of Session after the Magistrate took cognizance on the charge-sheets and committed the case to the court of Session. All the accused denied their implication and demanded trial.

6. During the course of trial the victim has been produced as P.W.-1. In her testimony she has supported the prosecution case and has reiterated her version that she was kidnapped by her neighbour Preetam and another accused Kasim on 17.06.2004. They took her to a mango orchard, where she was forced to wear a *burqa* and later raped by accused Preetam and Kasim. She was then taken to various locations, including Amroha and Delhi, where she was repeatedly raped and assaulted by the accused Preetam and Kasim. Other accused helped the principal accused in crime but offence of sexual assault is not attributed to them. The victim was also forced to

participate in the kidnapping of a child, who was later sold. She eventually escaped and reported the incident to the police, leading to the arrest of one of the accused, Kasim. She further stated that her statement was recorded before a Magistrate, and she was medically examined at a government hospital. She has been receiving threats from the accused persons to withdraw her case.

7. In her cross-examination, the victim has stated that she stayed at Rajdhani Park, Nangloi at Delhi. She has, however, denied the fact that she used to visit Smt. Imrani. She admitted that after she came to Bijnor, she came to know that an FIR has been lodged against her by Smt. Imrani wife of Jameer. She has denied the suggestion that she was looking after the child of Smt. Imrani, who got kidnapped. The victim, however, has admitted that there is a criminal case registered against her in Delhi in respect of the kidnapping of the minor children. She has, however, feigned ignorance about the lodging of the FIR against her in the kidnapping case at Delhi in the month of July, 2004. She has also denied the fact that Panipat Police had brought her to Nehtaur and that the kidnapping of the minor child took place during the period the victim was with the accused. The victim has admitted that she travelled from Delhi to Panipat and other areas in public transport but she neither raised any alarm nor she lodged any complaint etc.

8. Dinesh has been produced as P.W.-2, who has stated that he saw the victim being taken by the accused Kasim

and Preetam on a motorcycle and that this fact was disclosed by him to Jivendra Singh. In the cross-examination, P.W.-2 has admitted that he had disclosed the incident of 17th of June, 2004 to Jivendra Singh (P.W.-3). He, however, thought this to be a minor event and he was not aware that for several days the victim was being searched in the village. P.W.-3 is the informant, who has supported the prosecution case. In the cross-examination, P.W.-3 has stated that he made all efforts to trace out the victim and ultimately he came to know from Dinesh and Jay Prakash that accused had taken the victim with them, whereafter he lodged the report. P.W.-3 has proved the written report. He has also proved the recovery memo of the victim after she was recovered from the custody of accused Kasim on 08.08.2004. The victim was given in the custody of P.W.-3 on 19.08.2004. P.W.-4 is Dr. Binu Gupta, who has proved the injury report, according to which the victim was above 18 years of age; there were no external or internal injuries on the victim; victim's hymen was old torn and healed but there were no signs of any fresh bleeding or injury etc. In her cross-examination, P.W.-4 has stated that age of the victim could be above 20 years also. In reply to the counsel, P.W.-4 has stated that the victim was above 18 years of age on the date of the incident.

9. P.W.-5 Malkhan Singh is the Investigating Officer, who has proved the Police papers.

10. The above evidence of prosecution has been confronted to the accused appellants, who have denied their implication and have stated that they have been falsely implicated.

11. On the basis of the above evidence, the trial court has convicted the accused appellants, as per above and sentenced them to life and lesser sentences under Sections 363, 366, 368 & 376(g) I.P.C.

12. On behalf of the appellants, it is submitted that the prosecution case is wholly improbable and that the victim had joined the company of the accused Preetam and Kasim on her own. It is also urged that the delay of more than a month in lodging of the FIR has not been explained by the informant. Learned counsel for the appellants emphatically argued that the lodging of the FIR was purposive inasmuch as the victim herself was implicated in a case of kidnapping of minor child by one Smt. Imrani and only with the intent to wriggle out of said criminal case and to invent excuse for her in the criminal proceedings lodged against her that the FIR has been lodged in the present case. It is also argued that medical evidence clearly proves that the victim was major and there are no internal or external injury on her. Testimony of the victim has been relied upon to state that her conduct in not reporting the incident of rape to anyone though she travelled to multiple places by public transport, exposes the falsity of the prosecutrix.

13. Learned A.G.A., on the other hand, stated that the FIR lodged against the victim at Delhi is a separate and a distinct crime which has no relevance for the criminal prosecution lodged against the accused appellants in the present case. Learned A.G.A. moreover submitted that the victim has been consistent in implicating the accused persons and there is no reason to disbelieve her version. It is further argued that the trial court has evaluated the evidence on its merits and there is no perversity or illegality therein which may require this Court to interfere in the matter.

14. We have heard Sri Mukhtar Alam, Mohd. Naushad Siddiqui, learned Advocate holding brief of Sri Irshad Ahamad, Sri Saquib Mukhtar, learned Advocate holding brief of Sri Awes Iqbal, learned counsels for the appellants, Sri Durgesh Kumar Singh, learned amicus curiae for the appellant-Kasim and Ms. Archana Singh, learned A.G.A. and have perused the materials on record.

15. The prosecution case is that 16 year old minor victim has been abducted by the accused persons, who was later taken to different places and was subjected to sexual assault. The implication of the accused persons is primarily under Sections 363, 366 and 368 I.P.C., whereas the accused Kasim and Preetam have been charged of offences under Section 376(g) I.P.C. also. The trial court has returned a categorical finding that prosecution has successfully established the charge against the accused persons on the strength of evidence led in the matter.

16. First and foremost, this Court is required to consider as to whether the victim on the date of incident was minor or major. This issue assumes significance in view of the settled legal position that the consent of a minor would be immaterial.

17. Onus is upon the prosecution to establish that the victim on the date of incident was minor. The only evidence brought on record to prove the minority of the victim is the statement of the informant, who has alleged that the victim was 16 year old on the date of incident. There is, however, no certificate of municipality nor any school record to prove the minority of the victim. The only evidence on record in respect of the age of the victim is the report of the doctor based upon the X-Ray of the victim. The radiological report of the doctor clearly shows the victim to be above 18 years of age. P.W.-4, who is the doctor and had examined the victim, has stated in her cross-examination that the age of the victim could be above 20 years of age. This evidence clearly demolishes the prosecution case with regard to minority of the victim on the date of incident. We cannot approve the finding of the trial court that the victim was minor when the only evidence in respect of age of the victim is the doctor's report which categorically shows the victim to be major. When the evidence on the aspect of age is analysed in terms of Section 94 of the Juvenile Justices Act, we find that the victim cannot be treated to be minor and has to be held major on the date of incident.

18. The prosecution case, essentially, is that on 17.06.2004, the minor victim was abducted by the accused Kasim and Preetam. The fact that accused Preetam and Kasim had taken the victim on a motorcycle at about 6.30 in the morning on 17.06.2004 was communicated to the informant by P.W.-2. However, the report in respect of the disappearance of the victim has been lodged for the first time on 20th of July, 2004. Ordinarily, some delay in reporting the cases of sexual offences are not to be frowned upon by the court as usually the parents suppress such incident for protecting the prestige of the family and the victim but the delay in the facts of the present case has a different connotation altogether. The victim in her statement before the court has clearly admitted that she was implicated in a case of kidnapping of a minor child by one Smt. Imrani at Delhi. The testimony of the victim reveals that an FIR against her was lodged in Delhi in the month of July, 2004. It is also admitted on record that on the very day, when the victim was recovered from Nehtaur, the kidnapped child at Delhi was also recovered on the pointing out of one of the accused Kasim from Bijnor. The fact that the child kidnapped in Delhi was recovered from the district where the victim was also recovered on the same date cannot be a matter of co-incidence. This is particularly so when the victim herself is implicated as an accused by the mother of the minor child.

19. Shri Durgesh Kumar Singh, learned amicus curiae while arguing the appeal on behalf of the accused

appellant Kasim, submits that the possibility of the victim being a partner in crime in the offence of kidnapping along with other accused cannot be ruled out. He further argued that apparently once the evidence surfaced against the victim in the offence of kidnapping, for which FIR was lodged at Delhi, that the criminal proceedings were initiated against the accused persons with the calculated intent of distancing the victim from the offence of kidnapping committed at Delhi in month of July, 2004 and to create a defence in those proceedings. This submission of Sri Durgesh Kumar Singh is adopted by other learned counsels, who appear for the other accused appellants.

20. The submission advanced on behalf of the accused appellants has been carefully analysed by us in the context of evidence placed on record. It is apparent that the victim in the present case has been recovered on 08.08.2004. She was medically examined on the very next date i.e. 09.08.2004. In the medical examination of the victim, no external or internal injury of any kind has been found. Though, the victim has alleged that she was physically assaulted and that she was at one stage attacked with knife and on another occasion her hand and fingers were pressed with a plier (*plas*) suggesting that force was applied on her, but such version of the victim is not supported by the medical evidence placed on record. The victim otherwise is a major lady, who is found to be above 18 years of age and the fact that she remained with the accused persons for almost two months and made no complaint in that regard, is also a circumstance to be kept

in mind. Though, the victim has attempted to explain this circumstance by stating that she was often intoxicated by the accused persons but except for the version of the victim, no other evidence is brought on record by the prosecution. The medical evidence does not support intoxication of victim for months together. We are not convinced from the explanation put-forth by the victim that she was every time intoxicated, as a result of which she could not raise any grievance. The victim admits that she was taken by public transport to long distances, where presence of large number of persons cannot be ruled out. Even otherwise, if a young lady is found intoxicated in a public transport, some suspicion is likely to arise amongst the co-travellers and the possibility that such fact would go unnoticed, is rather remote. The explanation that such version of the victim was merely an excuse to cover up the non-raising of protest by her, is a distinct possibility.

21. In the peculiar facts of the present case, we find that the medical evidence on record does not support the allegation made by prosecutrix and there is no other corroboration of the version of the victim. We have to examine as to whether on the strength of the solitary testimony of the victim, the conviction of the accused appellants could be sustained?

22. Learned counsel for the appellants has placed reliance upon a judgment of the Supreme Court in Raju and others Vs. State of Madhya Pradesh (2008) 15 SCC 133, wherein the Supreme Court has examined the

evidentiary value of a victim of sexual assault which has been found comparable to the testimony of an injured witness. In para 9 to 12, the Supreme Court has clearly stated that though the version of victim of sexual assault is to be treated at par with the testimony of an injured witness but the mere fact that her testimony has to be given sufficient weight would not mean that other circumstances on record are to be ignored. The Court has clearly observed that while offence of rape causes the greatest distress and humiliation to the victim but at the same time false allegation of rape upon accused can cause equal distress, humiliation and damage to the accused as well. Para 10 and 11 of the aforesaid judgment are reproduced hereinafter:-

“ 10. The aforesaid judgments lay down the basic principle that ordinarily the evidence of a prosecutrix should not be suspect and should be believed, the more so as her statement has to be evaluated at 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.”

23. Reliance has also been placed upon the judgment of the Supreme Court in Manoharlal Vs. State of Madhya Pradesh (2014) 15 SCC 587, wherein the Supreme Court again considered the testimony of a victim of sexual assault and disbelieved her, after noticing the facts of the

case, in para 8 and 9 of the judgment which are reproduced hereinafter:-

“8. Though as a matter of law the sole testimony of the prosecutrix can sufficiently be relied upon to bring home the case against the accused, in the instant case we find her version to be improbable and difficult to accept on its face value. The law on the point is very succinctly stated in Narender Kumar v. State (NCT of Delhi) reported in (2012) 7 SCC 178, to which one of us (Dipak Misra, J). was a party, in following terms:

“20. It is a settled legal proposition that once the statement of the prosecutrix inspires confidence and is accepted by the court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case.

21. A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject-matter being a criminal charge. However, if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial which may lend assurance to her testimony.....”

9. Having found it difficult to accept her testimony on its face value, we searched for support from other material but find complete lack of corroboration on material particulars. First, the medical examination of the victim did not result in any definite opinion that she was subjected to rape. Secondly, Riyaz who was like a brother to the victim and thus a close confidant, has not supported the case of the prosecution and has completely denied having met her when she allegedly narrated the incident to him. Thirdly the person who was suffering from fever and to whose house she was first taken by the appellant was not examined at all. Fourthly, the policeman who the victim met during the night was also not examined. Fifthly, neither the brother nor any of the parents of the victim were examined to corroborate the version that she had come from the village of her brother and alighted around 10:00 P.M. at Bajna bus stand. Lastly, the sequence of events as narrated would show that she had allegedly accompanied the appellant to various places. In the circumstances, we find extreme difficulty in relying upon the version of the victim alone to bring home the charge against the appellant. We are inclined to give benefit of doubt to the appellant.”

24. In the present case, we are not inclined to accord the status of a sterling witness to be victim of the present case, as we find that neither her statement appears to be credible nor is supported by medical evidence on record. There is otherwise a distinct object to be served for her to falsely implicate the accused persons, inasmuch as the

implication of the accused persons would clearly constitute a defence for the victim in the offence of the kidnapping lodged against her at Delhi. We also find that the victim at every stage of the proceedings i.e. investigation as well as trial has been highlighting the circumstances in which she was compelled by the accused appellants to take part in the offence of kidnapping. Her statement clearly conveys an impression that creating her defence for the kidnapping case at Delhi was always weighing with her when she made her statement in this case either to the Investigating Officer or while making statement in the Court. In that view of the matter, we find substance in the submission advanced on behalf of the appellants that the allegation against the accused persons of having enticed the victim or subjected her to sexual assault was in fact a cover up and was intended to create a justification for the victim in the criminal proceedings instituted against her in the courts at Delhi. We cannot discard the possibility of the victim herself being a partner in crime. The appellants argument in this regard cannot entirely be ruled out. Consequently, the conviction and sentence of all the appellants vide judgment and order dated 11.08.2009, passed by the Additional Sessions Judge, Court No.2, Bijnor, in Sessions Case No.622 of 2005 (State Vs. Preetam and others), under Sections 363, 366, 368 & 376(g) I.P.C., arising out of Case Crime No.549 of 2004, Police Station-Nehtaur, District-Bijnor, cannot be sustained and is hereby set-aside. All the aforesaid Criminal Appeal Nos.5017 of 2009, 5646 of 2009 & 5005 of 2009 and Jail Appeal No.5445 of 2009 preferred by the accused

appellants, namely, Smt. Shahjahan, Javed, Smt. Gulshan, Preetam, Lala @ Shakir, Ayyub and Kasim succeed and are allowed and all the accused appellants are acquitted of the charges levelled against them by granting them benefit of doubt.

25. We record our appreciation for the services rendered by Sri Durgesh Kumar Singh, learned amicus curiae who would be entitled to his fee from the High Court Legal Service Authority.

26. The accused-appellants, namely, Smt. Shahjahan, Javed, Smt. Gulshan, Preetam, Lala @ Shakir, Ayyub and Kasim would be released, forthwith, unless they are wanted in any other case, subject to compliance of Section 437-A Cr.P.C./481 B.N.S.S., 2023.

Order Date:- 21.11.2024

Anurag/-

(Dr. Gautam Chowdhary, J.) (Ashwani Kumar Mishra, J.)