

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

CRA No.09/2007

Reserved on :18.05.2023

Pronounced on. 11.07.2023

Subash Chander

...Appellant(s)

Through:- Mr. Ashok Parihar, Advocate

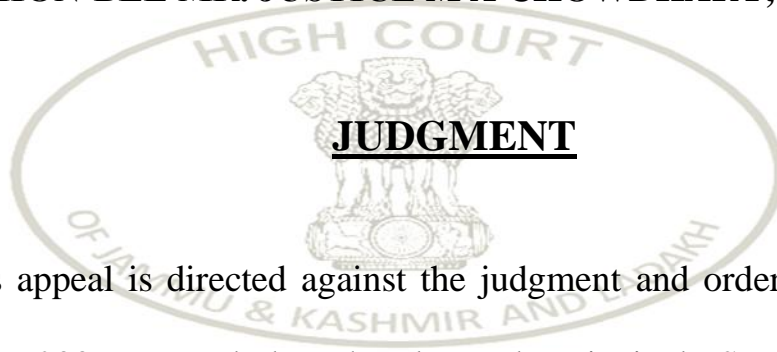
V/s

State of Jammu & Kashmir

...Respondent(s)

Through:- Mr. Adarsh Bhagat, GA

CORAM: HON'BLE MR. JUSTICE M A CHOWDHARY, JUDGE



1. This appeal is directed against the judgment and order dated 7th of Aril, 2007 passed by the learned Principal Sessions Judge, Baderwah [“the trial court”] in Sessions Case No.22/2001, titled ‘*State of J&K v. Subash Chander*’, whereby while acquitting the appellant of the charge punishable under Sections 376/511 RPC convicted him for offences punishable under Sections 354,323 and 341 RPC and sentenced him to undergo simple imprisonment of two months under Section 354 RPC and one month each under Section 323 and 341 RPC, with further direction that all the sentences shall run concurrently.

2. Before advertng to the grounds of challenge urged by Mr. Ashok Parihar, learned counsel appearing for the appellant to find fault with the judgment impugned, a brief reference to the prosecution case, set up before the trial court, would be necessary.
3. Complainant-Naib Chand alongwith his daughter-prosecutrix in an injured conditions presented an application before the Incharge Police Post, Bhalla against the appellant alleging therein that on 20.09.2000 at 1.30 p.m., when prosecutrix was returning to her house from Government High School Seri, she was waylaid by the appellant who outraged modesty of the prosecutrix, held her forcibly and started teasing her. Prosecutrix made a noise. Meanwhile, one Prem Raj, VDC member, who was on patrolling, came on spot and on seeing him, appellant fled away. The appellant had also committed such type of acts 2/3 times earlier also. On the basis of this complaint, vide FIR, No.202/2000 a case registered at Police Station, Bhaderwah under Section 376, 511, 341, 354, 323 RPC and the investigation was set in motion.
4. During investigation, Investigating Officer visited the spot and prepared the site plan. One blood stained duppata was also seized. The prosecutrix was sent to Bhalla Hospital and certificate from the doctor was obtained. Statements of witnesses under Section 161 Cr.P.C. were recorded. On culmination of the investigation, challan was presented before Judicial Magistrate, Bhaderwah, who, committed the same to the trial Court.

5. Charges under Sections 341, 376, 511, 323 RPC were framed against the appellant vide order dated 29.11.2001, who denied the charge and claimed to be tried. To substantiate its case, the prosecution examined prosecutrix, Prem Raj, Hans Raj, Mool Raj, Naib chand, Dr. Madan Lal and Alaf Din as prosecution witnesses. After closure of the prosecution evidence, whole of the incriminating evidence was explained to the appellant and his statement was recorded, in terms of Section 342 CrPC. The appellant denied the allegations appearing against him in the statements of the prosecution witnesses and examined Ram Lal, Sukh Ram, Om Parkash and Jiwan Lal as defence witnesses.
6. The trial court, after considering the evidence that has come on record before it and rival submissions made by learned counsel for the parties, has held that no offence under Section 376, 511 RPC was made out, established or proved against the appellant. However, offences under Section 354, 323, 341 RPC were held proved against the appellant and he was accordingly sentenced to undergo, simple imprisonment for two months for offence punishable under Section 354 RPC and simple imprisonment for one month each for offences punishable under Sections 323/341 RPC. All the sentences were ordered to run concurrently, vide judgment impugned dated 07.04.2007. It is this judgment which is assailed before this Court by the appellant on numerous grounds.
7. Mr. Ashok Parihar, learned counsel for the appellant, while reiterating the grounds taken in the appeal, submits that trial court

has mis-appreciated the evidence on record resulting into wrong conviction. It is submitted that the impugned judgment/order is liable to be set aside on the ground that conviction of the appellant for an offence under Section 354 RPC for which he was never charged nor the charge was altered, is bad. As per the learned counsel, without formal charge under Section 354 RPC, conviction for such offence is impermissible. Learned counsel for the appellant submits that the delay in lodging the FIR, in itself was fatal to the prosecution case, has not been appreciated by the trial Court. Learned counsel would also submit that there is no mention of place of occurrence in the order of charge and that this omission is not curable.

8. Mr. Adarsh Bhagat, learned Government Advocate, ex adverso, submits that the trial Court has correctly appreciated the evidence on record and has rightly convicted and sentenced the appellant. He submits that since the appellant is a habitual offender, no interference is warranted by this Court with the judgment impugned, as the findings recorded by the trial court are based on correct appreciation of evidence adduced before the trial Court.
9. Heard learned counsel for the parties and perusal of the record.
10. The prosecutrix in her deposition before the trial Court has stated that the appellant restrained her on way and took her to the fields of maize and gagged her mouth with scarf. The appellant pulled her from the breast and cut her lips with teeth and tried to untie her salwar. On seeing PW-Prem Raj, appellant fled away, as a result, he could not succeed in his evil design. The report was lodged on the

next day. Her scarf was seized. PW-Prem Raj deposed that he heard the hue and cry from the maize field and prosecutrix came to him and told that she was caught by the appellant. The witness corroborated the statement of the prosecutrix by stating that he has seen blood on the lower lip of the prosecutrix. PW-Mool Raj has deposed that father of the prosecutrix called him from the house and he saw prosecutrix bleeding from her mouth and there were marks of nail near the cheeks. On enquiry, prosecutrix told him that after appearing in the paper, appellant waylaid her on the way in the maize field at Seri and forcibly took her inside the field. The witness also proved the seizure of the blood stained scarf. PW Hans Raj also proved the seizure memo of blood stained scarf.

11. PW Naib Chand, father of the prosecutrix, has deposed the same facts, as narrated by the prosecutrix in her statement before the trial Court. In cross-examination, the witness stated that he came home at 5 p.m. He went to Police Station at 11 O' Clock along with Prem Raj for lodging the report and the prosecutrix was called thereafter.
12. PW- Dr. Madan Lal in his examination-in-chief has deposed that he had examined the prosecutrix at PHC Bhalla, brought by SI Alaf Din, of PP Bhalla. He had noted bruise on inner aspect of lower lip in the middle about 05 cm x 0.5 cm and two linear scratches below the right eye perpendicular in direction, colour dark red, second scratch on the cheek on right side transverse in direction about 1 cm long; that both the injuries were simple in nature, caused by friction against some blunt object. Duration of injury was stated less than 24

hours. He also proved certificate issued by him. The Investigating Officer has stated that as per his investigation, the appellant has committed offences punishable under Sections 376, 504, 341, 354, 323 RPC. The injury form marked as EXPW-AD shows injury on the lower lip of the prosecutrix and scratches on both sides of the face of the prosecutrix.

13. The defence witnesses have deposed that there was a dispute between the father of the appellant and uncle of the prosecutrix. They also stated that there is also dispute between appellant and PW Prem Lal regarding partition. According to the defence witnesses, PW-Prem Raj has cooked this story against the appellant fraudulently.
14. On the basis of the evidence that has been brought on record before the trial Court, the trial Court has rightly concluded that no offence punishable under Section 376 RPC and 511 RPC was made out, established or proved against the accused.
15. Insofar submission of learned counsel for the appellant that in absence of formal charge under Section 354 RPC, appellant's conviction for that offence is unsustainable is concerned, the provision of Section 236 CrPC takes care of such situation and safeguard the power of the criminal court to convict an accused for an offence with which he is not charged although, on facts found in evidence, he could have been charged for such offence. Mere omission or defect in framing the charge does not disable

the court from convicting the accused of the offence which is found to have been proved on the basis of the evidence on record.

16. So far as the second plea of the learned counsel for the appellant that there was delay in lodging FIR is concerned, that commission of offence was alleged to have taken place on 20.09.2000 at 1.30 P.M whereas the FIR was lodged on 21.09.2000 at 6.30 P.M. at the nearby police station which was at a distance of 13 kms from the place of occurrence, however, in my considered opinion sufficient reasons have come out with regard to delay in lodging the FIR. The father of the prosecutrix was stated to be away at Doda in connection with his government job and had returned on being intimated in the evening only and after consultation in the family had reported the commission of offence to the police next day. It has also come on record that the matter was also under consideration of local panchayat before being reported to the police station. Otherwise also in such offences, wherein dignity of a woman that too of a younger age is involved, the traditional families are hesitant to report such matters to the police putting their honour and dignity also at stake, therefore the delay of a single day in lodging of FIR, in the considered opinion of this court, by no stretch of imagination, can be said to be inordinate delay, so as to be fatal for the prosecution case. Therefore, this contention of the learned counsel for the appellant is misplaced and is rejected.

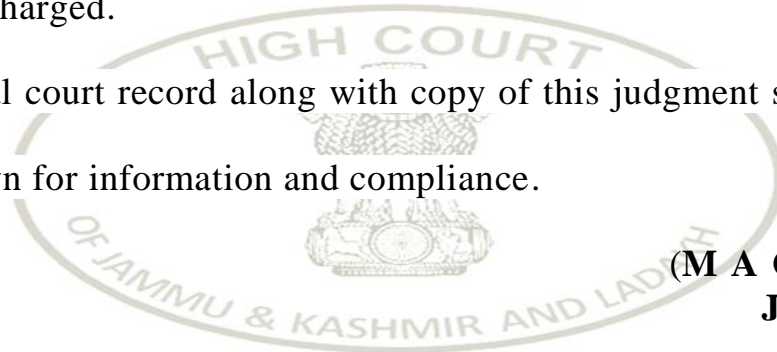
17. Hon'ble Apex Court in a case titled **Harjit Singh v. State of Punjab** reported as **(2006) 1 SCC 463** held that omission to frame charge under section 306 in terms of Section 215 of the Code of Criminal Procedure may or may not result in failure of justice, or prejudice the accused as it cannot be said that in all the case, an accused may be held guilty of commission of an offence under Section 306 of the Indian Penal Code, wherever, the prosecution fails to establish the charge against him under Section 304-B IPC thereof. Moreover, ordinarily such a plea should not be allowed to be raised for the first time before the court unless the material on record are such which would establish the said charge against the accused. On this principle, therefore, it cannot be said that in a charge under Sections 376/511 RPC and when a charge not having been framed of a lesser offence U/S 354 RPC of the same nature, conviction cannot be recorded. Since the offence under Section 354 RPC falls within the nature of the offence punishable under Section 511 read with Section 376 RPC, the trial court was competent to record conviction under Section 354 RPC when the offences under Section 376/511 RPC was not proved even without there being a formal charge U/S 354 RPC. It is always open to the trial court to convict a person of a lesser offence of the same nature, even without being charged for that offence.
18. The third point raised by the learned counsel for the appellant is that place of occurrence has not been shown. On perusal of the

complaint, it has been recorded that the prosecutrix while returning from her school was intercepted by the appellant on way and taken to maize field at Seri and assaulted there. It appears from the cross examination of all the witnesses that no such question had been asked to any of the witnesses with regard to the exact place of occurrence by the defense. Therefore, raising of this contention at this stage, in the considered opinion of this court, is not relevant. The statement of PW-3 Prem Raj, who was cited as an eye witness, is also clear with regard to place of occurrence, as he has described it the maize fields of Seri Paddar, meaning thereby, that the place of occurrence had been identified by this witness. Even the prosecutrix had, in her cross examination, stated that the fields, where she had been taken, was that of her uncle, therefore, this contention too has no force to be considered for the disposal of this appeal.

19. For the foregoing reasons and observations made hereinabove, it is held that the prosecution had, by leading sufficient, cogent and credible evidence to connect the accused/appellant with the commission of the offence, proved the case and the trial court has rightly recorded the conviction of the appellant for the commission of offences punishable under Sections 354/323/341 RPC by passing a reasoned impugned judgment. The quantum of sentences, is also not found to be excessive, so as to warrant any interference by the court.

20. The appeal, having regard to the above observations, is found to be bereft of any merit and substance, as the appellant had failed to make out a case for his acquittal or for interference into the impugned judgment whereby he has been convicted and sentenced. The appeal is thus dismissed. The impugned judgment dated 07.04.2007 passed by the trial court is thus upheld. The bail and personal bonds of the appellant are discharged.

21. Trial court record along with copy of this judgment shall be sent down for information and compliance.



(M A Chowdhary)
Judge

Jammu
11.07.2023
Raj Kumar.

Whether the order is reportable: Yes