

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

CrlA(S) No. 8/2019

CrlM No. 914/2019

Reserved on: 23.05.2022

Pronounced on: 05.07.2022

Ishfaq Ahmad Khan

...Appellant(s)

Through: Mr. Bhat Fayaz Ahmad, Advocate.

Vs.

State of J&K & Ors.

...Respondent(s)

Through: Mr. Usman Gani Mir, GA.

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

JUDGMENT

1. Appellant herein feeling aggrieved of the **judgment and order dated 30.07.2019** passed by learned Additional Sessions Judge, Anantnag in the case No.76/ASJ, whereby he has been convicted for the commission of offence punishable under Section 376(2)(i) RPC and sentenced to rigorous imprisonment for ten years and a fine of Rs.50,000/-, and in default of payment of fine, to undergo further imprisonment for a period of six months.
2. The judgment and order impugned have been assailed on the ground that the appellant had been falsely implicated in the case by the father of the prosecutrix for dispute over some payments between them; that the trial court has relied upon the statement of prosecutrix, though her statement did not inspire confidence to base conviction; that the prosecution had examined most of the witnesses from the family of the prosecutrix only, and their statements are of no corroboration with that of the statement of prosecutrix; that the

evidence of medical examination suggested that there was no evidence of fresh sexual intercourse when the prosecutrix was examined on 07.01.2017 though she was alleged to have sexually ravished during previous night and also there was absence of spermatozoa which remains alive within 72 hours of the incident.

3. The factual matrix of the case is that one Azad Ali Khan S/O Gul Ali Khan R/O Gulistan Mohalla Kehribal lodged a written report at the Police Station, Mattan on 07.01.2017 alleging therein that during the intervening night of 6th-7th January, 2017, appellant came to his house and after having dinner stayed there, and that during night he forcibly raped his daughter who was aged about nine years only. On the basis of this report, a case was registered vide FIR No. 03/2017 for the commission of offence punishable under Section 376 RPC, and the investigation was set in motion. After recording the statement of witnesses and conducting the medical examination of the victim, the investigation was concluded for the commission of offence punishable under Section 376 RPC against the appellant.
4. On completion of the investigation, charge-sheet was laid against the accused-appellant before the court of learned Chief Judicial Magistrate Anantnag who, vide his order dated 14.03.2017, committed the case to the Sessions Court Anantnag, wherefrom the case was assigned for disposal under law to the Fast Track Court for trial of rape cases (Additional Sessions Court) Anantnag. The appellant was charge sheeted by the trial court on 03.05.2017, who while pleading innocence, denied the charge and claimed trial.
5. Prosecution, in order to bring home the charge against the appellant, examined 10 out of 11 listed prosecution witnesses, whereas the

defence had admitted the statement of PW-7 Dr. Tariq Ahmad recorded in terms of Section 161 CrPC. The appellant was examined in terms of Section 342 CrPC, disclosing him the incriminating evidence on 17.07.2018, who again while pleading innocence, denied the prosecution version and besides himself as his own witness, examined two other witnesses in his defence. The trial court vide impugned judgment and order, held the appellant guilty, recorded conviction for the commission of offence punishable under Section 376 (2)(i) RPC and sentenced him to undergo rigorous imprisonment for 10 years and a fine of Rs.50,000/- and in default of payment of fine to undergo further imprisonment for a period of six months.

6. Heard learned counsel for both the sides, perused trial court record and considered.
7. Learned counsel for the appellant argued that this is a case where the appellant for some payment due to him from the complainant, was falsely implicated and that the minor daughter of the complainant was used to settle the scores with the appellant by involving him in the commission of such heinous offence. He has further argued that having examined the statement of prosecution witnesses recorded by the court below, it is clear that no witness other than the prosecutrix stated to have witnessed the alleged crime, though as per the prosecution story the offence had been committed during the dead of the night, when three more witnesses other than the prosecutrix, were also in the same room where the alleged incident occurred. It has also been argued that there was delay in lodging FIR as the same was lodged in the evening of 7th January

2017, while-as the offence was alleged to have been committed during the previous night. It is also argued that the expert evidence of doctor does not support the prosecution story inasmuch as the doctor examining the prosecutrix has stated that there was no injury on the private parts of the prosecutrix who was stated to be of tender age, as such, the case is of false implication and the court below while convicting and sentencing the appellant has not rightly appreciated the evidence led by the prosecution and seems to have been swayed by the charge of rape having been committed against the child, without appreciating the evidence in its proper perspective. It was finally prayed that the impugned judgment and order be set aside and the appellant be acquitted of the charge.

8. Learned counsel for the respondents, on the other hand, vehemently argued that the appellant had ravished and sexually assaulted a child of nine years of age, and that there is sufficient evidence to connect the accused with the commission of offence, particularly so in view of the statement of the prosecutrix who has vividly described the sequence of occurrence and very clearly stated that the appellant had overpowered her during night hours when they were sleeping in the same room, so much so that she could not raise alarm as her mouth was gagged. He further argued that it cannot be said that the prosecutrix, who was the child of tender age of nine years only, would implicate and involve the innocent person at the risk of her honour and that there was no reason for her to have falsely implicated the appellant for the commission of such a heinous offence. He further argued that though the sole statement of prosecutrix was sufficient to record conviction of the appellant,

however, there was corroboration of evidence and the statement of medical expert which cannot be ruled out for possibility of commission of rape. It was prayed that the appeal having no merit be dismissed and the conviction and sentence recorded by the trial court, be maintained and upheld.

9. The prosecution story, as briefly put, is that on Friday 06.01.2017, the appellant came to the house of the complainant PW-1 Azad Ali Khan as his friend and stayed there; that during the night hours, the appellant committed rape against one of the daughters aged about nine years of the complainant. On the basis of this complaint filed by the complainant, an FIR No.03/2017 was lodged at the local police station for the commission of offence punishable under Section 376 RPC. Prosecution, besides examining PW-1 Azad Ali Khan (complainant), the prosecutrix (name withheld to hide her identity), PW-3 wife of the complainant namely Yaseema Begum, PW-4 Bilal Ahmad Khan, PW-5 Riyaz Ali Khan had also examined the medical expert PW-6 Dr. Rehana Hassan and the police officials including I.O as prosecution witnesses. The court during the trial also examined Mariya and Shahid Ali Khan, siblings of the prosecutrix who were stated to be present in the same room where the prosecutrix was allegedly raped, whereas the appellant examined Mushtaq Ahmad Khan, Mohammad Afzal Khan and also himself crossed the witness box as defence witnesses.
10. The stand of prosecution is that it is proved that during the investigation and also during the trial, the accused on 07.01.2017 stayed in the house of the complainant and during the night hours, when the complainant and his wife went to sleep in the 1st floor of

the house, the appellant was given the bedding to sleep in the room located in the ground floor, where two daughters of the complainant including the prosecutrix, his son and brother-in-law also slept; that in the morning, the appellant and other persons woke up as usual, had tea, left for their respective jobs. The prosecutrix along-with her sister went for tuition; the appellant also left for his home and the complainant had also gone for his job. In the evening, after coming back from the tuitions, the prosecutrix was stated to have told her younger sister with regard to this incident that she had been raped by the appellant during the night when she was sleeping next to the appellant in the room; and that she had experienced pain in her private part, besides bleeding. The younger sister of the prosecutrix narrated the same incident to their mother and in turn the mother informed her husband who lodged complaint before the police. During the course of investigation, it was concluded that the appellant had raped the prosecutrix by overpowering her. The prosecution had not cited all the persons who were present in the room where the incident took place including the maternal uncle of the prosecutrix namely Bilal Ahmad Khan, who was aged about 22 years and brother of the prosecutrix Shahid Ali Khan, who was aged about 15 years, as prosecution witnesses and both these witnesses had been examined by the court as court witnesses.

- 11.** The prosecutrix during the trial stated that the appellant who was friend of her father used to come to their home and on the fateful night her maternal uncle was sleeping in separate bedding near one wall and in the 2nd bedding she and her younger sister were sleeping, whereas in the 3rd bedding accused was sleeping. Her bedding was in

between that of the maternal uncle and the accused. She further deposed that during the night hours appellant molested her younger sister, who told her about this incident and she shifted her younger sister towards other side and slept herself on the side of the appellant; thereafter the accused/appellant focused torch on her, took her to his bedding, gagged her mouth with a muffler and took off his and her lowers with the help of his legs and arms. That the accused had sexual intercourse with her three times and thereafter she went back to her bedding. The accused had threatened her not to disclose this incident to anybody otherwise he would repeat this act and threatened to kill her. That after waking up in the morning she took tea, went to the bathroom where she found blood with her urine. During the day time, she was alone in her home, her mother had gone to the vegetable garden, her father drove to his job, her brother went to the tuitions and her younger sister had gone to fetch milk, and during this time the accused had threatened her. Thereafter she stayed at home with her sister for whole day playing carom and both the sisters went to the tuitions at 4.00 pm. She felt uncomfortable while walking and narrated whole episode to her sister and thereafter her sister narrated the same to their mother after arriving home from tuitions. Her mother took her to the doctor. They lodged report at the police station and the police also took her to the doctor. Her mother made phone call to her husband for coming to the police station. The occurrence had taken place during the previous night and on the next evening she had been taken for medical examination. The other witnesses, who were stated to be present in the same room where the offence of alleged rape was committed, were the maternal uncle of

the prosecutrix, brother and younger sister of the prosecutrix, but were not cited as prosecution witnesses by the prosecution. The trial court however, exercising the power under Section 540 CrPC directed these witnesses to be examined as court witnesses.

- 12.** CW-Mariya stated that the accused used to come to her house and sometimes stayed there for a night. Last time when the accused stayed in their house, four beddings were laid in the room at ground floor; her parents were in the upper storey. In the room, on the 1st bedding accused was sleeping, she along-with her sister were in the 2nd bedding whereas their maternal uncle-Bilal Ahmad was sleeping in the 3rd bedding and her brother Shahid Ali Khan was sleeping in the 4th bedding. During the night hours the accused caught hold of her arms and her sister (prosecutrix) shifted her to the side of her maternal uncle and she of her own slept on the side of the accused. She however, stated that she did not wake up from her sleep during this incident and had not heard anything till 4.00 pm, when she and her sister had gone for tuitions and had not made any complaint. The victim had told that she was bleeding with the urine and then she narrated the episode that the accused had caught hold of her, gagged her mouth, caught hold of her private parts and dragged her due to which she felt pain and that the accused had also threatened her. She narrated this story to her mother who telephonically asked her husband as to whether the accused was with him, who replied in affirmative. The accused came to their house. She does not know what happened afterwards when the accused had come to their house. The case was registered against him and he was taken to the police station.

- 13.** CW-Shahid Ali Khan stated that the accused was known to him as he was visiting their house for last 2-3 years as there were friendly relations between his father and the accused. He further stated that four beddings had been laid, three in one line and 4th bedding was laid towards the feet side. Bedding of the accused and his maternal uncle was laid towards the walls, whereas bedding of his sisters was in their middle. He had not heard anything during the night. The episode had been shared to him by his uncle at 6.00 pm.
- 14.** The statements of complainant and his wife Yasmeeena Begum, at the most, can be said to be hearsay with regard to the occurrence though they are witnesses to the complaint and other factors during the investigation.
- 15.** PW-4 Bilal Ahmad Khan (maternal uncle of the prosecutrix) who was sleeping in the same room where the prosecutrix was allegedly raped, stated about the beddings laid for different persons in the room, but he had not come to know about anything till 5.00 pm next day, when her sister told her about the occurrence. He denied having personal knowledge about the said occurrence.
- 16.** PW-5 Riyaz Ali Khan brother of the complainant is also a hearsay witness as he had stated to have been informed by his brother telephonically about the incident and had no personal knowledge about the occurrence.
- 17.** On the basis of the statements of the witnesses present in the room, it can be safely stated that though being in a small room and having laid beddings adjacent to each other, the maternal uncle of the prosecutrix who was stated to be of the age of 22 years, brother of the prosecutrix who was stated to be of the age of 15 years and the

younger sister of the prosecutrix who was 7 years old, had not come to know anything with regard the commission of rape on the prosecutrix being in the same room.

18. So far as the statement of PW-6 Dr. Rehana Hassan, who examined the prosecutrix is concerned, she had stated that on her vaginal examination, hymen of the prosecutrix was found ruptured, sample for sperm detection had been taken, wherein no sperm was detected. The prosecutrix had not achieved menarche. On examination, she was of the opinion that though sexual intercourse had taken place but there was no incident of fresh intercourse. She further deposed that there were neither bruises on her body nor any foreign body was found on examination of the prosecutrix. Her gait was normal. The rupture of the hymen can be possible even by cycling, horse-riding or by inserting any foreign body in the vagina. The fresh intercourse can be examined on conducting local examination of genital area, besides presence or absence of spermatozoa. In the instant case, spermatozoa was absent so she gave her opinion of no fresh intercourse signs. The prosecutrix had been brought to her within 12 hours of alleged occurrence. She had not found any traces of semen on any part of the body of the prosecutrix. From naked eye she could found the hymen ruptured with old tear. In fresh rupture there can be congestion of local parts and adena also. In old cases there can be no such signs. From the statement of this witness it comes out that as per the medical opinion, which is though not conclusive proof but is of corroborative nature, that the prosecutrix had not been subjected to sexual intercourse in the recent past as alleged and that her hymen

had old tears and its rupture cannot be connected to any recent incident.

19. PW-7 Dr. Tariq Ahmad had examined the appellant-accused with regard to his potency and stated to have found him potent. PW-8 HC Gul Mohammad and PW-9 SI Adil Ahmad are formal witnesses to the seizure memos.

20. PW-10 ASI Mohammad Ayoub had investigated the case and had stated that in his investigation it was proved that the accused had committed rape on the prosecutrix, as such, he concluded the investigation in the form of the charge-sheet for the commission of offence punishable under Section 376 RPC and laid charge sheet.

21. On consideration of whole of the gamut of the prosecution evidence, the case mainly revolves around the deposition of the prosecutrix who was only 9 years of age. Her statement has to be considered in the light of the observations of the superior courts as to whether whole statement of prosecutrix should be taken into account to base conviction. The prosecutrix was stated to be the child, whose statement is, otherwise, to be taken into account with all circumspection to rule out as to whether the child had not been deposed having been tutored.

22. Hon'ble Apex Court in the case '**Krishna Kumar Malik Vs. State of Haryana** reported as (2011) 7 SCC 130' held that no-doubt it is true that to hold accused guilty for the commission of offence of rape the solitary evidence of the prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality.

23. The Supreme Court in another case titled '**Rai Sandeep alias Deepu Vs. State (NCT of Delhi)**' reported as **(2012) 8 SCC 21**' had observed that the sterling witness should be of a very high quality and calibre whose version should, therefore, be unassailable.

Paragraph- 15 of the said judgment is reproduced hereunder:-

“15. In our considered opinion, the ‘sterling witness’ should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross- examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have correlation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a ‘sterling witness’ whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the

said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.”

24. Under Section 118 of the Indian Evidence Act, every individual is competent to be a witness in a court of law, unless incapable of understanding the question placed before him/her. Capability to understand at a young age is more likely to be dependant and to be formed at the opinion and perception of what others say and portray, due to which the testimony of a child is more likely to be modified or altered. Hence dealing with a child witness is of key importance. Testimony of such a witness must be scrutinised to ensure that it was not given under duress or undue influence and that it must also corroborate other evidence. The main concern is the inclination of the child witness to be tutored by some other party who has an interest in the matter and which hampers the testimony. Though the ‘voir dire’ test was undertaken by the trial court, to assure that the prosecutrix was capable of understanding and answering question, nonetheless, whether the child is tutored or not can be deduced from the contents of her statement.

25. On the anvil of the principles, when the version of the prosecutrix is tested, it is unfortunate that the said witness has failed to pass any of the tests mentioned above. There is total variation in her version from what was stated in the complaint and what was deposed before the court at the time of trial. There are material variations as regards that the prosecutrix had shifted her younger sister, on being molested by the appellant, to the side of her maternal uncle, whereas she herself came to the side of the appellant and that the accused took

her to his bedding, removed his and her lowers, had sexual intercourse three times, advised her to put on her trouser and then she went back to her own bedding to sleep.

26. It is not understandable as to how the prosecutrix, who was apprehensive with regard to her sister who was younger to her being molested who in her own statement had not said anything with regard to her alleged molestation, and instead of informing her younger sister about the incident the prosecutrix should have informed her maternal uncle or her brother who too were sleeping in the same room, and how without any protest she was shifted to the bedding of the appellant by the appellant and then after having sexual activity went back to her own bedding. Her statement is also hard to be believed to the extent that she had been raped thrice by the appellant. It cannot be possible that the child of the age of only 9 years, who even had not reached the age of menarche could be ravished three times repeatedly without any pain, protest or resistance which may not have been noticed by the other persons sleeping in the same room.

27. The contention of the prosecutrix is also belied to the extent that the statement of the medical expert who has clearly stated that there was no injury on the private parts of the prosecutrix. The repeated sexual activity on such a person of tender age cannot be possible without any injury in the vaginal /genital area.

28. Applying the principles laid down by the Hon'ble Apex Court for appreciation of statement of such witness, it appears that the statement of prosecutrix was not trustworthy particularly on the face of it, as the prosecutrix had not disclosed anything for being ravished

repeatedly in the night to her mother in the morning and reluctantly disclosed the same on the next day in the evening. In such a situation of the matter, on the basis of the evidence led by the prosecution, the sole statement of the prosecutrix which can be relied upon to record conviction, is found not to be trustworthy and reliable, as such, the prosecution cannot be said to have proved its case beyond doubt to bring home the charge of rape, to record conviction and sentence of the appellant.

- 29.** In such a situation, it appears that the prosecutrix, who was the child, may have been tutored to make the statement for implicating the appellant falsely, who was stated to have some dispute with regard to some payments. It is also trite that the statement of the child witness had to be considered with all circumspection to rule out the child being tutored for false implication of some person.
- 30.** Having regard to all the facts emerging out of the prosecution evidence that the sole statement of the prosecutrix is to be considered in absence of any eye witness, the prosecutrix's statement cannot be stated to be sterling and her version cannot be said to be unassailable.
- 31.** Looking at the facts of the case, it is clear that presence of almost all the witnesses- parents, maternal uncle and siblings- elder brother and younger sister, was in the house and except parents all others in the room, where the prosecutrix is alleged to have been raped by the appellant, conduct of the parents to sleep in the upper floor, leaving the children including prosecutrix in the ground floor, where the beddings of the daughters were claimed to have been laid just besides that of appellant who was a stranger, is not understandable.

32. Mother of the prosecutrix stated that she had seen blood stains on the legs of the prosecutrix that she had washed, besides rashness and inflammation had been noticed on the private parts of the prosecutrix. PW-Dr. Rehana, who had examined the prosecution as medical expert, however, ruled out any rashes or inflammation.
33. In the considered opinion of this Court for the afore-stated reasons, the charge against the appellant has not been proved beyond any shadow of reasonable doubt, as such, the trial court has misdirected itself to appreciate the evidence so as to record conviction on the basis of the prosecution evidence.
34. In view of the discussions made hereinabove and applying the legal principles to the factual background of the case and the evidence brought on record during trial, the appeal is **allowed** and the impugned judgment and order dated **30.07.2019** passed by learned Additional Sessions Judge, Anantnag in case **No.76/ASJ**, recording conviction and sentencing the appellant under Section 376(2)(i) RPC, is set aside. Appellant/convict is ordered to be released forthwith, in case he is not required in any other case(s).
35. **Appeal is disposed** of along-with connected **CrIM.**
36. Registry to sent back the trial court record.

(M. A. CHOWDHARY)
JUDGE

Srinagar
05.07.2022
Muzammil. Q

Whether the order is reportable: *Yes / No*