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AFR

Court No. - 13

Case :- CRIMINAL APPEAL No. - 233 of 2000

Appellant :- Lalla

Respondent :- State of U.P.

Counsel for Appellant :- V.S.Verma,Ram Kumar,Rehan Ahmad Siddiqui

Counsel for Respondent :- Govt Advocate

Hon'ble Karunesh Singh Pawar,J.

1. This criminal appeal has been preferred against the judgment and order dated 10.3.2000, passed by Additional Sessions Judge-XI, Lucknow in Sessions Trial No.671 of 1997 (Crime No.22 of 1997) State vs. Lalla, P.S. Gosainganj, district Lucknow under sections 363, 366, 376 I.P.C., whereby the appellant has been convicted and sentenced to five years rigorous imprisonment and a fine of Rs.5000/-, with default provision, under section 376 I.P.C..

2. The prosecution case, in brief, is that on 14.1.1997 at about 8.00p.m., the accused Lalla enticed away daughter of the complainant Rajaram without her consent. She has taken silver ornaments and Rs.2200/- cash along with her. Even after ample search, her whereabouts could not be found. This incident has been seen by Gama and Santram of his village. A written report of the incident was given at

police station Gosainganj on 16.1.1997, on the basis of which first information report was registered. On 27.1.1997, the victim was recovered.

3.Charges under sections 363, 366 and 376 I.P.C. were framed against the accused which was denied by him and the accused claimed to be tried.

4.The prosecution in order to prove its case has produced P.W.1 Rajaram, P.W.2 Dashratha, P.W.3 Gama (independent witness), P.W.4 Santram (independent witness), P.W.5 Constable 1787 Fakhrul Hasan, P.W.6 Radhey Shyam, Inspector, P.W.7 Dr. Ratna Pandey who medically examined the victim and P.W.8 Kumari Sunita Sachan.

Statement of the accused has been taken under section 313 CrPC, in which his case was of denial.

5.P.W. 1 complainant Rajaram has stated that the victim was 13 to 14 years old. On the date of incident, at about 8.00p.m., Lalla accused of the village has enticed her daughter away to keep her with him. The victim has not taken anything with her. When he returned at about 1.00 in the night, his wife told him regarding the incident. Santram and Gama of the village had seen the victim and the accused. He reported the incident on 16th. He got written

the report from the daughter of one Munshi and put his thumb impression thereon. He has proved Ext.Ka.1, written report. In his examination-in-chief, he has further stated that in the written report, the fact regarding taking away ornaments and money has been mentioned by him due to the fact that he was envious. He again stated that she did not take money and ornaments with her. After six days, he came to know that the victim and the accused were apprehended by the police at Amethi Chauraha. After medical examination, the victim was handed over to the complainant. After 6-7 days of the incident, the victim was handed over in his supurdagi. He has proved the recovery memo as Ext. Ka-2.

In his cross-examination, P.W.1 has stated that while he returned home, his wife did not tell him as to with whom the victim has gone. After ample search when the victim was not found and Lalla too was not found at his home, then he was of firm belief that it is Lalla who enticed the victim away. He does not know the name of the girl who wrote the written report. He further stated that the fact of ornaments and money taken by the victim was written in the written report by him due to the fact that he was envious. He further stated that the investigating officer did

not visit his village. He denied the suggestion that the victim herself went away with Lalla. He further denied the suggestion that at the time of the incident, the victim was 20 years old.

P.W.2 Dashratha aged about 16 years has stated in her examination-in-chief that she knows the accused who is present in Court. He is a resident of her village. On the date of incident, while she was tying the buffalo calf, the accused dragged her towards Ghuskar village and threatened her that if she raises alarm, she will be shot by the country-made pistol. She was stopped from raising alarm. She was kept in Ghuskar village with a person of that village, at his place. She was raped by the appellant. Although, she cried but the appellant used to say that he will marry her. One day, the accused was taking her to some place which she did not know. Then, near Amethi pulia, they were apprehended by the police and brought to police station. She was subjected to medical examination in hospital. She proved recovery memo Ext.Ka.2 and her thumb impression on it. She was raped 15-20 times.

She stated in her cross-examination that she went away from her home with the accused. At that time, the accused

was alone. There was no one else. He was having a country made pistol at that time. She was threatened by the accused on gun point and this fact was told by her to the investigating officer, however, she does not know why the investigating officer has not mentioned in her statement. She denied the suggestion that she had taken accused Lalla and not otherwise. She further denied the suggestion that she on her own accord and free will went away with Lalla. She also denied the suggestion that she has not been raped against her will. She further denied that the accused has not been caught with her.

P.W.3 Gama is an independent witness. In his chief, he has stated that while he was with Santram, he saw that Lalla was going along with Dashratha towards west. On the second day, he came to know about the incident.

In his cross, he stated that the girl was walking ahead and the boy was following her. He did not enquire from them. He further stated that the investigating officer has not met him. He stated that no investigation with him was conducted by the investigating officer.

P.W.4 Santram has also given more or less the same statement as has been given by P.W.3. He has further stated

in his cross- examination that he saw that the girl was walking and the boy was following her. He does not know whether the investigating officer came in his village. He does not know how the investigating officer has recorded his statement.

P.W.5 Constable Fakhrul has proved the chick report in his writing and signature and proved Ext. Ka.3. He further proved Ext.Ka-4 Carbon copy of general diary.

P.W. 6 Inspector Radhey Shyam has stated that he took statement of the prosecution witnesses, got the victim medically examined and filed charge sheet. In his cross-examination, he stated that the case diary is not on record and therefore, he could not tell as to when the statement was given by the prosecution witnesses.

P.W.7 Dr. Ratna Pandey, Mahila Hospital, Balrampur, Lucknow has deposed that while she was posted as Pathologist in Golaganj Mahila Hospital on 7.2.1997, she conducted medical examination of the victim Dashratha. She proved vaginal test report, Ext. Ka.7. No sperm was found nor gonococci.

P.W. 8 Kumari Sunita Sachan, who was posted at Mahila Hospital, Balrampur along with Dr. Jyoti Bajpai has proved

her signature and writing. She proved Ext. Ka-8.

6. The accused in his statement under section 313 CrPC has denied all the incriminating circumstances put to him, however, no defence was taken by him.

7. I have heard Mr. Rehan Ahmad Siddiqui, learned amicus curiae for the appellant, and Mr. Alok Tiwari and Ms. Nikita Mishra, learned A.G.A. for the State.

8. Learned amicus has submitted that the occurrence is of 14th January, 1997 at about 8.00p.m., the first information report has been lodged on 16.1.1997 at 3.40p.m. after delay of two days. The victim was recovered on 27.1.1997 after 13 days of the incident. As per version of the written report/first information report, the prosecutrix went away with the appellant along with silver ornaments and Rs.2000 cash. It is submitted that P.W.3 and P.W.4 have stated that the prosecutrix was walking ahead and the appellant was following her which shows that the victim went out of her own accord and free will. It is further submitted that during the period of 13 days in which she was allegedly in the captivity of the accused, the victim did not raise any alarm which, in itself, shows that she was a consenting party.

As per medical report of the prosecutrix, no mark of injury

on any part of the body was found. The hymen was found old torn and healed. He has submitted that no spermatozoa or gonococci was found. Epiphysis around elbow was fused and the epiphysis around knee and wrist was not found fused. It is submitted that since age of the victim during trial was not proved, hence it cannot be said that she was minor at the time of alleged incident. The appellant was acquitted under sections 363, 366 I.P.C., however, he has been convicted for the offence under section 376 I.P.C. without any cogent evidence. It is further submitted that the prosecution has failed to establish its case beyond reasonable doubt and benefit of doubt must go in favour of the accused.

9.A.G.A., on the contrary, while opposing the argument of the appellant's counsel and supporting the prosecution case has submitted that the testimony of the prosecutrix is intact and on the sole testimony of the victim, the accused can be convicted. No other corroborative material is needed as per law.

10. Having heard parties' counsel and after perusal of the record, this court finds that in the written report, it is the case of the prosecution that the victim was enticed away by

the appellant and while going away, the victim took silver jewellery and cash of Rs.2200/- with her. Written report was given by P.W.1 complainant. However, before the court, in his examination-in-chief, the complainant has stated that the victim did not take away any ornament.

In his examination-in-chief and in the cross, P.W. 1 has stated that due to envy, he has mentioned in the written report that his daughter had taken jewellery and cash with her. In his cross, he has stated that the investigating officer did not visit his village. He denied the suggestion that the victim herself on her own went with the accused. He further denied the suggestion that she is 20 years old. In his statement, P.W.1 has denied that the prosecutrix has taken anything with her, however, in the cross, he has admitted that he got written in the written report that she took jewellery and cash with her, however, in envy.

P.W.2 in her examination-in-chief though has supported the prosecution story, however, in the cross-examination, she has stated that she went away with the appellant from her home. At that time, the appellant was alone. She told the investigating officer that she was taken on gun point, however, it has not been written by the investigating officer

in her statement. She further stated that from Ghuskar, the accused was taking her in the night some where on foot. She denied the suggestion that she took the accused Lalla and not that the accused has taken her away. Further she denied the suggestion that she on her own accord went away with the accused Lalla. She further denied the suggestion that she was raped against her will.

The testimony of P.W. 2 does not inspire confidence as in her cross, she herself has stated that she went away with the appellant from home and at that time, the appellant was alone.

The occurrence according to the prosecution case took place on 14.1.1997. The victim has been recovered on 27.1.1997, i.e. after 13 days of the incident. P.W.1 complainant is not an eye-witness. The evidence of P.W.1 is hearsay evidence.

Further, P.W.3 and P.W.4 who are independent witnesses in their cross have clearly stated that the girl was walking ahead and the appellant was following her. The testimony of these two independent witnesses shows that the prosecutrix went away from her home on her own accord and free will and she was not taken forcibly.

11. Keeping in view all these facts, statement of P.W.1, P.W.2, P.W.3 and P.W.4, the fact that the victim was recovered after 13 days of the incident and at no point, she raised any alarm, no corroborative material has been found by the doctor in the medical examination report which is Ext. Ka-7 and Ext.Ka.8 which are on record, which show that the victim was habitual in sexual intercourse, hymen was found old torn, admitted two fingers easily, it is evident that the prosecutrix on her own accord and free will went away with the appellant. She was above sixteen years of age. Therefore, ingredients of offence under section 363 I.P.C. as given in section 361 I.P.C. are missing, hence the trial court has rightly acquitted the appellant under section 363 I.P.C.

As regards section 366 I.P.C., two important ingredients that the accused has abducted the victim with him against her will with intent that she may be compelled to marry or in order that she may be forced or seduced to illicit intercourse, are missing and has not been proved by the prosecution, therefore, for offence under section 366 I.P.C., the appellant has also rightly been acquitted.

In regard to conviction under section 376 I.P.C., the

testimony of the prosecutrix is made doubtful in view of the testimony of the two independent witnesses, i.e. P.W.3 and P.W.4, the written report and the statement of P.W.1 that the victim while going away has taken silver armaments and cash of Rs.2200 with her which shows that she on her own accord and free will went away with the appellant.

So far as consent part is concerned, it has been seen that the victim remained with the appellant for a period of 13 days as per her own statement and while she was going with the appellant near Amethi pulia, i.e. a public place, she was apprehended by the police. She went on foot with the appellant from Ghuskar to some unknown place. She had ample opportunity to raise alarm which she did not do. There was no mark of injury on the person of the prosecutrix nor on her private part. Keeping all this in view coupled with the testimony of P.W.3 and P.W.4, it is clear that she was a consenting party.

12.Besides, so far as age of the prosecutrix is concerned, according to Modi "A Textbook of Medical Jurisprudence and Toxicology", Twenty Seventh Edition, fusion in the females is at the age of 16-20 years in the case of females. The age of the girl shall be more than sixteen years in cases

of complete fusion of metaphyses with distal epiphyses of the radius and the ulna.

As per medical report, Ext.Ka-8, knee and elbow joints are found fused and thus according to Modi's Medical Jurisprudence, it can well be inferred that she was above 16 years of age, although the burden to prove the medical age was on the prosecution which the prosecution has failed to prove. Except the medical report, no educational record etc could be produced during the course of the trial by the prosecution which may show the correct age of the victim.

It is further evident from perusal of the medical report dated 8.2.1997, Ext.Ka.8 that the victim was having 7+7/7+7 teeth, she passed the two-finger test and on this basis, it can safely be said that she was above sixteen years of age.

13.Even otherwise, since the incident is of 1997 and as per unamended Indian Penal Code, at that time, the age of consent for sexual intercourse was 16 years and above and therefore, the burden was on the prosecution to prove that the prosecutrix was below 16 years of age which as said above, the prosecution could not do.

14.It is significant to note that the case diary has not been

produced by the investigating officer. The prosecution witnesses have denied their statement under section 161 CrPC during their statement before the court. The accused has been precluded to confront the witnesses. During their cross examination also, the power of the court under section 165 Evidence Act to put any question to a witness is also couched in very wide terms and the accused has been denied this opportunity for want of case diary, although this does not vitiate the trial, however, causes a dent in the prosecution case.

The investigating officer though is said to have proved the site plan but considering the statement of P.W.1, P.W.3 and P.W.4, it can be said that the investigating officer has not even visited the village. The investigation has been conducted in a very casual manner. Overall, the prosecution failed to prove its case beyond reasonable doubt.

15. Thus, in view of shaky testimony of the prosecutrix which is made doubtful by the statement of P.W.3 and P.W.4, coupled with the lack of any corroborative material to determine the exact age of the prosecutrix except the medical report, according to which she appears to be above sixteen years of age, the testimony of P.W.3 and P.W.4,

particularly their statement that the victim was going ahead and the accused Lalla was following her, she went with the accused with silver jewellery and cash of Rs.2200/- as per the written report of P.W.1 himself, I am not inclined to affirm the judgment of conviction of the appellant under Section 376 I.P.C.

16. In view of what has been stated hereinabove, the criminal appeal is allowed and the judgment and order of conviction and sentence dated 10.3.2000, passed by Additional Sessions Judge-XI, Lucknow in Sessions Trial No.671 of 1997 (Crime No.22 of 1997) State vs. Lalla, P.S. Gosainganj, district Lucknow is set aside. The appellant is acquitted of the charges levelled against him. The appellant be released from jail forthwith.

17. Let a copy of this judgment be transmitted to the trial Court as well as Superintendent, Jail concerned, for compliance. The lower court records be also sent, back to the lower court.

18. Mr. Rehan Ahmad Siddiqui, learned amicus curiae shall be paid by the Registry of this Court a sum of Rs.20,000/- for contesting the case on behalf of the appellant.

19. The Senior Registrar of this Court is directed to ensure

compliance.

Order Date :- 14.12.2023

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