

**Court No. - 43**

**Case :-** CRIMINAL APPEAL No. - 7006 of 2009

**Appellant :-** Raj Kumar

**Respondent :-** State of U.P.

**Counsel for Appellant :-** Mithilesh Kumar Shukla, Indra Deo Mishra, Noor Mohammad, Rakesh Kumar Verma, Shri Ram (Rawat)

**Counsel for Respondent :-** Govt. Advocate

**Hon'ble Ashwani Kumar Mishra, J.**

**Hon'ble Shiv Shanker Prasad, J.**

1. The accused appellant- Raj Kumar has been convicted and sentenced vide judgment and order dated 09.11.2009, passed by the Additional Sessions Judge/Fast Track Court No. 2, Agra in Session Trial No. 800 of 2008 (State Vs. Raj Kumar), arising out of Case Crime No. 30 of 2008, under Section 376(c) I.P.C., Police Station - Fatehabad, District - Agra along with fine of Rs. 10,000/- and in default of payment of fine six months additional imprisonment.

2. Prosecution case in nutshell is that the informant (P.W.-1) has lodged a report stating that his eight year old minor daughter has been enticed by the accused appellant who has committed unnatural sex and also raped her and bitten her cheeks. On the basis of such report the Investigating Officer proceeded and the statement of the victim was recorded under Sections 161 and 164 Cr.P.C. in which she supported the allegation of FIR. The victim was also examined medically in which no injuries were found except for a cheek bite. The hymen was found intact and no injuries were noticed on the private parts of the victim. The age of the victim was determined as 11 years. The vaginal smear was also referred for the pathological report in which neither any semen nor any sperms / spermatozoa was found on the victim.

3. The report of the Chief Medical Officer, Agra dated 10.03.2008 is on record as per which the age of the victim is 11 years.

4. The investigation proceeded and ultimately the charge sheet was submitted against the accused appellant under Section 376 IPC. The case was committed to the Court of Session by the Magistrate. The accused appellant accordingly was charged of committing offence under Section 376(F) IPC.

5. The accused appellant has denied the accusation made against him and has demanded trial. The trial proceeded in which the prosecution proved the FIR (Exhibit ka-6).

6. The prosecution also proved the statement under Section 164 Cr.P.C. of the victim, the medical examination report, supplementary report, pathological report, x-ray report and charge-sheet. The victim has been adduced in evidence by the prosecution, who has however not supported the prosecution case. She has stated that she had gone to attend the marriage at her maternal uncle's place and she was not subjected to rape. In the cross-examination, she has clearly stated that the accused appellant has not committed any untoward act against her. She has also stated that the earlier statements were given by her as was told to her by the police persons.

7. P.W.-2 is the father of the victim and is the first informant, who has also not supported the prosecution case and has stated that the name of accused appellant was taken on the basis of disclosure made by the villagers. He has however not disclosed the name of the villagers, who had given such information to him. In the cross-examination, he has denied that any statement was given by him supporting the prosecution case under Section 161 Cr.P.C. or that he saw the accused appellant running from the

place. He has, therefore, completely contradicted the prosecution version.

8. P.W.-3 is the doctor, who has examined the victim and has stated that no injuries were found on the private parts of the victim and her hymen was intact. She has also referred to the supplementary pathological report, in which no semen or spermatozoa was found. The age of the victim has been certified to be 11 years. The other prosecution witnesses are formal in nature.

9. The accused appellant has been confronted with the incriminating material collected against him under Section 313 Cr.P.C. and he has denied his implication levelled against him. He has stated that in-laws of P.W.-2 had enmity with him and that is why he has been falsely implicated.

10. The Trial Court on the basis of the material placed during the course of trial has found the charges levelled against the accused appellant to be proved beyond reasonable doubt. For such purposes the statement of victim under Section 164 Cr.P.C. has primarily been relied upon in addition to the teeth bites on the cheek of the victim found at the time of her medical examination.

11. Sri Ajay Kumar Srivastava, Advocate holding the brief of Sri Rakesh Kumar Verma, learned counsel for the accused appellant submits that this is a case of no evidence inasmuch as the plea of unnatural sex / rape has not been substantiated in the medico legal report wherein no injury on the private parts of the victim has been found and mere existence of teeth bite would not justify a finding of unnatural sex / rape on part of the accused appellant. It is also stated that since the victim has not supported the prosecution case nor her father has supported the prosecution

case, as such the finding of guilt returned by the Court below is contrary to the materials available on record.

12. Mrs. Archana Singh, learned AGA for the State on the other hand contends that the statement of victim recorded under Section 164 Cr.P.C. is credible and the teeth bite marks on the cheek of the victim also supports and corroborates her statement recorded under Sections 161 and 164 Cr.P.C.

13. We have heard learned counsel for the parties and have carefully examined the record of the present appeal as also the original records of the Trial Court.

14. The records clearly reveal that the incident alleged against the victim is of 01.03.2008 at about 08:00 p.m. but the first information report has been lodged after five days i.e. on 05.03.2008 at about 01:30 p.m. The only explanation for the delay in lodging FIR is that he got the victim medically treated first and it was only thereafter that the FIR was lodged on 05.03.2008. There is, however, nothing on record to show that the victim was medically examined prior to 05.03.2008. No evidence of any kind has been produced by the prosecution to show that the victim was medically attended too, earlier, or that she had sustained any injuries which required her hospitalization etc. In such circumstances, the explanation for delay in lodgement of FIR does not appear to be convincing.

15. The victim has been medically examined on 06.03.2008 at about 01:45 p.m. and in such examination no injury on the private parts of the victim has been found and her hymen has been found to be intact. In the pathological report also neither any sperm nor any spermatozoa has been found. The doctor, who had examined the victim has also appeared as P.W.-3 and has clearly

stated that there were no marks of injury on the victim suggesting occurrence of rape or unnatural sex with the victim.

16. The victim herself has not supported the prosecution case and has clearly stated in the cross-examination that no untoward act was done against her by the accused appellant- Raj Kumar. The statement of the father of the victim is to similar effect.

17. Once we analyze the evidence available on record, we find that neither the medical evidence nor the victim or her father in their deposition before the Court have supported the prosecution case. The statement of victim under Section 164 Cr.P.C., therefore can not be read in isolation so as to form basis for the conviction of the accused appellant when the victim herself has not supported her previous stand in her deposition made before the Court. We are not impressed by the reasoning assigned by the Trial Court for convicting the accused appellant inasmuch as the finding of guilt has been returned by the Court below essentially relying upon the contents of the FIR as also the statement of the victim under Section 164 Cr.P.C. which cannot be treated as a piece of substantive evidence. As we have already noticed that neither the medical evidence nor the statement of prosecution witnesses support the commissioning of offence under Section 376(F) IPC against the accused appellant, the finding of guilt returned by the Court below is rendered unsustainable.

18. Learned counsel for the accused appellant states that the accused appellant is in jail for more 14 years without remission and with remission the period undergone by him is more than 18 years.

19. In view of the discussions and deliberations held above, the present appeal succeeds and is allowed. The judgment and order of conviction and sentence dated 09.11.2009, passed by the

Additional Sessions Judge/Fast Track Court No. 2, Agra against the accused appellant is set aside.

20. The accused appellant, who is reported to be in jail shall be released, forthwith, unless he is wanted in any other case on compliance of Section 437-A Cr.P.C.

21. Let a copy of this judgment be sent to the Chief Judicial Magistrate, Agra, henceforth, for necessary compliance.

**Order Date :- 21.11.2022**

SK Srivastava