

Court No. - 37

**Case :-** CRIMINAL APPEAL No. - 544 of 2010

**Appellant :-** Raggu Baniya @ Raghwendra

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

**Counsel for Appellant :-** Anupam Laloriya, Amit Tripathi, Prashant Kumar Srivastava

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

**Hon'ble Dr. Kaushal Jayendra Thaker, J.**

**Hon'ble Ajai Tyagi, J.**

1. By way of this appeal, the appellant has challenged the Judgment and order dated 08.12.2009 passed by Additional Session Judge, Special Court (Dakaity Affected Area), District Kanpur Dehat in S.T. No.68 of 2009, State v. Raggu Baniya @ Raghwendra, (arising out of Case Crime No.413 of 2008), under Sections 376 of IPC, Police Station Ghatampur, District Kapur Dehat whereby the accused-appellant was convicted under Section 376 IPC and sentenced to imprisonment for life imprisonment with fine of Rs.5,000/-, and in case of default of payment of fine, to undergo further rigorous imprisonment for six months.

2. The brief facts as per prosecution case are that on 24.8.2008 at about 9:00 a.m., the prosecutrix was going alone from her house to break the cucumber in the field of Bhaiyadin Yadav, when she reached, accused- Raggu Baniya @ Raghwendra son of Chandra Pal Sankhwar who had caught hold of her with bad intention and he committed rape with her and on the sound of her screaming, complainant with his brother (Baburam) came running to the place of the incident and tried to nab the accused, but accused ran away from the place of offence. The complainant reached the police station for reporting the said incident as a case of rape. Sub Inspector Ramraj Shukla, Chauki Incharge registered the First Information Report and started the investigation, visited the spot (namely place of offence), prepared site plan, recorded

[WWW.LIVELAW.IN](http://WWW.LIVELAW.IN)

statements of the prosecutrix and witnesses and after completing investigation submitted charge sheet against the accused.

3. The prosecution so as to bring home the charges examined five witnesses, namely:-

1	Prosecutrix	P.W.1
2.	Sukhram( Father)	P.W.2
3.	Dr. Geeta Yadav ( Doctor)	P.W.3
4.	Sughar Singh Sachan (Chief Pharmacist)	P.W. 4
5.	Ramraj Shukla (Chauki Prabhari)	P.W. 5

4. In support of the ocular version of the witnesses, following documents were produced and contents were proved by leading evidence:

1	F.I.R.	Ext. Ka-10
2.	Written report	Ext. Ka-2
3.	Recovery memo of Cloth	Ext. Ka-7
4.	Statement of Pinki (prosecutrix)	Ext. Ka-1
5.	Injury Report	Ext. Ka-3
6.	Supplementary Report	Ext. Ka-4
7.	Injury Report	Ext. Ka-5
8.	Charge Sheet Mool	Ex. Ka-9
9.	Site Plan with Index	Ex. Ka-8

5. Heard Shri Amit Tripathi, learned counsel for the appellant and learned AGA for the State and also perused the record.

6. Learned counsel for appellant has relied on the following decisions of the Apex Court rendered in the case of **Sadashiv Ramrao Hadbe Vs. State of Maharashtra, 2006(10)SCC 92** and the judgment of High Court of Andhra Pradesh in the case of **Manne Siddaiah @ Siddiramulu Vs. State of Andhra Pradesh, 2000(2) Alld(Cri)** so as to contend and submit that in fact no case is made out so as to convict the

accused under Section 376 I.P.C. and the prosecutrix has roped in the accused with ulterior motive i.e. because of dispute between her father (Sukhram) and the accused and in the alternative contends that reliance on the aforesaid decision is placed so as to demonstrate that life imprisonment is too harsh a punishment.

7. It is submitted by learned counsel for the State that the judgment of learned Trial Judge cannot be found fault with.

8. Learned counsel for the appellant Shri Amit Tripathi has stated that the accused is in jail since 24.8.2008. The accused who at the time of incident was a young age of 19 years he should be given chance of rehabilitation. Learned counsel for appellant has relied on the decision of **Sadashiv Ramrao Hadbe Vs. State of Maharashtra (supra)** and has submitted that she presses for clean acquittal of the accused. The appellant has been in jail since 24.08.2008. In support of his submission, he presses into service the judgment in the case of **Manne Siddaiah @ Siddiramulu (supra)** rendered by Andhra Pradesh High Court, though it is a judgment of Single Bench, i.e. by Justice B. Sudershan Reddy (as he then was). Learned counsel has relied on findings returned in paragraphs 14 and 15 of the said judgment, which lay down as follows :-

*“14. In nutshell the version given by P.W.5 is not supported by even P.Ws. 1 and 2. P.W.1 in his evidence in categorical terms states that he caught hold of the appellant herein as his wife informed him that the appellant has raped her. P.W.5 in her evidence does not state that she has informed P.W.1 about the rape at any time. These major inconsistencies and contradictions in the evidence of material witnesses - P.Ws. 1, 2 and 5 create a lot of suspicion and doubt about the prosecution case. Added to that, P.W.10 - the Civil Assistant Surgeon who examined P.W.5, in her evidence clearly states that she did not find*

*any external injuries on the body of P.W.5. She has also not noticed any semen and spermatozoa in the vaginal slides.*

*15. In the aforesaid circumstances, it would not be safe to convict the appellant herein on mere suspicion. The inconsistencies and contradictions noticed above are fatal to the case of the prosecution and create any amount of doubt. Obviously, it is the appellant who is entitled for the benefit of doubt.*

9. Learned counsel for appellant presses into service the judgment in the case of **Sadashiv Ramrao Hadbe Vs. State of Maharashtra** (supra) more particularly observations in paras 9, 10, 11 of the said judgment, which are verbatim reproduced as follows :-

*“9. It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring of confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen.*

*10. In the present case there were so many persons in the clinic and it is highly improbable the appellant would have made a sexual assault on the patient who came for examination when large number of persons were present in the near vicinity. It is also highly improbable that the prosecutrix could not make any noise or get out of the room without being assaulted by the doctor as she was an able bodied person of 20 years of age with ordinary physique. The absence of injuries on the body improbablise the prosecution version.*

*11. The counsel who appeared for the State submitted that the presence of semen stains on the undergarments of the appellant and also semen stains found on her petticoat and her sari would probablise the prosecution version and could have been a sexual intercourse of the prosecutrix.*

*12. It is true that the petticoat and the underwear allegedly worn by the appellant had some semen but that by itself is not sufficient to treat that the appellant had sexual intercourse with the prosecutrix. That would only cause some suspicion on the conduct of the appellant but not sufficient to prove that the case, as alleged by the prosecution.”*

**10.** We are unable to convince ourselves with the submission made by learned AGA for State that the prosecutrix has been a victim of atrocity as well as rape and, therefore, the accused should not be leniently dealt with.

**11.** We have been taken through the evidence and the deposition mainly of prosecution witnesses and judgment of Trial Court. We have read the same and are discussing the same.

**12.** PW-1, namely, the prosecutrix has been examined on oath who was made to understand that she was in a court of law, she understood the importance of her testimony, she understood why she was summoned to the Court where she answered that as the accused had committed bad work with her, she was summoned and that she was capable of answering or the questions. According to her, when she was 11 years of age and when she went with Pooja (sister of accused) for eating cucumber in the field of Bhaiyadin. Raghvendra-accused sent his sister from the field of Bhaiyadin to fetch water. When she also tried to leave the place, he conveyed that he would give her cucumber, he took her to the maize field, she started screaming but the accused forcibly shut her mouth by cloth and he had forcible intercourse. She was brought to the police station by her grand father. She was hospitalized for three days. She was taken to the hospital by her grand father and the police personnel. Her statement under Section 164 Cr.P.C. was recorded before the concerned Magistrate. In her cross examination, she stated that on the date or day of incident she did not go to the school as it was a Sunday. She was playing at her home and

when Pooja came, her grand-father and father were not in the house. Her grand-father had gone just three fields ahead of Bhaiyadin's field (the place of incidence). The incident occurred when Pooja called the prosecutrix at 9.00 a.m.

**13.** Sukhram, was examined as PW-2, who is the uncle of the prosecutrix, who had given the FIR. The prosecutrix was bleeding and so he took her on his shoulder and took her to police station and from there she was taken to hospital. She was hospitalized in Urshila Hospital, Kanpur, where she was hospitalized for three days. PW-2 when he was in his field, he heard the screaming of a girl, she was not able to speak because her mouth was forcibly shut by cloth. He brought the prosecutrix to their home and at 12.30 he took her to the police station.

**14.** Dr. Geeta Yadav, PW-3 in her ocular version mentioned that hymen was ruptured and was bleeding the vaginal smear for the determination of the age of the prosecutrix was prepared. The matter was sent to the Radiologist and the injured, she was kept in emergency ward. Doctor in her ocular version did not give any finding of opinion about the sexual intercourse or rape committed on the prosecutrix. The prosecutrix was sent for getting her age examined by the C.M.O., Kanpur Nagar. The Injury, according to the doctor could be caused even otherwise than rape the hymen may ruptured not be because of the rap.

**15.** As far as PW-4, Chief Pharmacist is concerned, he is also a medical officer and he was summoned so as to prove the medico legal cases. The prosecutrix was referred to Kanpur accept the records he did not throw much light on the other facts.

**16.** PW-5 is the Officer who had conducted the investigation.

**17.** We now would to sift the evidence threadbare of the prosecution story, the evidence led and discussed before the trial court and appreciated as by the learned Trial Judge.

18. Provision of Section 376 I.P.C. read as follows :

“376. Punishment for rape.—

(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever,—

(a) being a police officer commits rape—

(i) within the limits of the police station to which he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) on a woman in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) commits rape on a woman knowing her to be pregnant; or

(f) commits rape on a woman when she is under twelve years of age; or

(g) commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to

fine: Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years. Explanation 1.—Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section. Explanation 2.—“Women’s or children’s institution” means an institution, whether called an orphanage or a home for neglected woman or children or a widows’ home or by any other name, which is established and maintained for the reception and care of woman or children. Explanation 3.—“Hospital” means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation.”

19. In respect of the victim, the doctor in medical report has opined as under :-

*“In the x-Ray of both wrist A.P., all eight carpal bones were found present. The lower epiphyses of both wrist joints have not fused. In the x-Ray of both elbow joints, all the bony epiphyses around both elbow joints had fused*

*In her supplementary report, lady doctor opined that no spermatozoa was seen by her. According to physical appearance, age of the prosecutrix was 15 to 16 years. No definite opinion about rape was given”*

20. The evidence as discussed by learned Judge discusses all the aspects and he has held that the mere fact that no external marks of injury were found by itself would not throw the testimony of the prosecutrix over board as it has been found that at the time of

[WWW.LIVELAW.IN](http://WWW.LIVELAW.IN)

occurrence as she was a minor girl. We also do not give any credence to that fact and would like to go through the merits of the matter.

**21.** As far as the commission of offence under Section 376 IPC is concerned, the learned Judge has relied on the judgments of **(1) Rafiq Versus State of U.P., AIR 1981 SC page 559, (2) Nawab Khan Versus State, 1990 Cri.L.J. Page 1179 and the judgment in (3) Bharvada Bhogin Bhai Hirji Bhai Versus State of Gujarat, AIR 1983 SC page 753.**

**22.** We venture to discuss the evidence of the prosecutrix on which reliance is placed by trial court and whether it inspires confidence or not so as to sustain the conviction of accused. There were concrete positive signs from the oral testimony of the prosecutrix as regards the commission of forcible sexual intercourse. In case of **Ganesan Versus State Represented by its Inspector of Police, Criminal Appeal No. 680 of 2020 ( Arising from S.L.P. ( Criminal ) No.4976 of 2020)** decided on 14.10.2020 wherein the principles of accepting the evidence of the minor prosecutrix or the prosecutrix are enshrined the words may be that her testimony must be trustworthy and reliable then a conviction based on sole testimony of the victim can be based. In our case when we rely on the said decision, it becomes clear that the testimony of the prosecutrix can be said to be that of a sterling witness and the medical evidence on evaluation prove the fact that case is made out against the accused.

**23.** Though the evidence of Dr. Geeta Yadav, Medical Officer, PW-3, Mahila Hospital Kanpur Dehat who medically examined the prosecutrix on 22.10.2009, Auxiliary and public hair was not present. The breasts was not developed. The height of prosecutrix was 131 c.m. and her weight was 23 kg., teeth were present in her mouth. There was no injury on the breast. There was no injury and bleeding on the vaginal but hymen was torn and heeled vagginal smear was collected and was sent to the Pathologist. No living or dead spermatozoa were found in

the vaginal smear. As per medical examination report no external or internal injury were visible on the whole body of the prosecutrix. On perusal of the medical report it appears that the victim was about 11 years old at the time of incident.

24. In the x-ray examination, both wrist A.P., all eight carpal bones were found present. Lower epiphyses of both wrists joints were not fused. All the bony epiphyses around both elbow joints were fused. In the supplementary report, the doctor opined **that no spermatozoa was seen** by her and according to the physical appearance, age of the victim was appearing to be 15 to 16 years and no definite opinion about rape could be given.

25. As far as the medical evidence is concerned, there are three facts which emerge. Firstly, no injury was found on the person of the victim. We are not mentioning that there must be any corroboration in the prosecution version and medical evidence. The judgment of the Apex Court rendered in the case of **Bharvada Bhogin Bhai Hirji Bhai Versus State of Gujarat, AIR 1983 SCC page 753**, which is a classical case reported way back in the year 1983, on which reliance is placed by the learned Session Judge would be helpful to the prosecution. The medical evidence should show some semblance of forcible intercourse, the prosecutrix was gagged and hospitalised for three days even if we go as per the version of the prosecutrix that the accused had gagged her mouth for ten minutes and had thrashed her on ground, there would have been some injuries to the fully grown lady on the basis of the body.

26. In our finding, the medical evidence goes to show that doctor did not find any sperm. The doctor opined that no signs of forcible sexual intercourse were found. This was also based on the finding that there were no internal injuries on the girl who was minor girl.

27. The factual data also goes to show that there are several contradictions in the examination-in-chief as well as cross examination of the witnesses. The prosecutrix in her examination-in-chief, she states that incident occurred at about 9:00 a.m. but nowhere in her ocular version or the FIR, she has mentioned that she was going to the fields to eat cucumber.

28. For maintaining the conviction under Section 376 Cr.P.C., medical evidence has to be in conformity with the oral testimony. We may rely on the judgment rendered in the case of **Bhaiyamiyan @ Jardar Khan and another Versus State of Madhya Pradesh, 2011 SCW3104**. The chain of incident goes to show that the prosecutrix was raped as would be clear from the provision of section 375 read with Section 376 of IPC.

29. The judgment relied on by the learned counsel for the appellant will also permit us to concur with the judgment impugned of the learned Trial Judge where no perversity has crept in. Learned Trial Judge has given any finding as to fact as to how commission of offence under Section 376 IPC was made out in the present case, but the learned Judge further has not put any question in the statement recorded under Section 313 Criminal Procedure Code, 1973 of the accused relating to rape or statement which is against him.

30. In view of the facts and evidence on record, we are convinced that the accused has been convicted for life, hence, the judgment and order impugned is reversed and the accused is convicted for period undergone. The accused appellant, if not wanted in any other case, be set free forthwith.

31. Appeal is **partly allowed** accordingly.

32. A copy of this judgment be sent to the Law Secretary, State of U.P. who shall impress upon the District Magistrates of all the districts in the State of U.P. to reevaluate the cases for remission after 14 years

of incarceration as per mandate of Sections 432 and 433 of Cr.P.C. even if appeals are pending in the High Court.

33. The accused, if not wanted in any other case, may be released forthwith.

34. We are thankful to learned counsel for the parties for ably assisting this Court.

35. Record be sent to Session Court.

**Order Date :- 26.10.2021**

A.N. Mishra