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Court No. - 46

Case :- CRIMINAL APPEAL No. - 5690 of 2004

Appellant :- Shamim And Others

Respondent :- State of U.P.

Counsel for Appellant :- A.K. Singh, Sudhir Kumar

Counsel for Respondent :- Govt. Advocate

Hon'ble Ashwani Kumar Mishra, J.

Hon'ble Ms. Nand Prabha Shukla, J.

(Re: Hon'ble Ms. Nand Prabha Shukla, J.)

Heard Sri Sudhir Kumar, learned counsel for the appellants and Sri Rahul Asthana, learned Additional Government Advocate for the State.

This is an appeal under Section 374(2) Criminal Procedure Code (Cr.P.C.) preferred by the appellants Shamim, Shafi and Khurshid challenging the Judgment and Order dated 30.10.2004 who have been convicted under Section 376 IPC for imprisonment of life and a fine of Rs. 10,000/- and under Section 452 IPC for imprisonment of three years and a fine of Rs. 3,000/- with default stipulations passed in Sessions Trial No. 438/1996 by Additional Sessions Judge (Fast Track Court No.-4), Badaun.

PROSECUTION CASE:-

The prosecutrix gave a written Tehrir on 14.11.1991 at 12:30 p.m. at P.S. Mujariya, District Badaun stating that about two years back, her husband purchased two bighas of land from Shamim. But later he wanted to sell it for personal necessity. Shamim desired to get back the land sold by him for the same amount but her husband was reluctant as he had a habit of gambling. In revenge, Shamim expressed his anger and on being insulted, he threatened of dire consequences. About a week before the incident, her husband went to Dehradun for a job. Then, on the intervening night of 12/13.11.1991 at around 12:00 at night, accused Shamim along with Shafiq, Khurshid and Ashfaq of her village, entered into her house. On hearing the noise, she woke and enquired as to why they entered her house in odd hours. Her sister-in-law (Jethani) Firozi, who was nearby, also woke. The accused dragged her towards the sugarcane field. On being dragged, she screamed and her sister-in-law (Jethani) too raised an alarm. The villagers came but the accused dragged her away towards the sugarcane field and committed rape for the

whole night one by one. In the morning, when the tillers saw her, they rushed to rescue her, the accused fled away. The prosecutrix came out from the sugarcane field with their help and then lodged the FIR.

On the basis of the aforesaid Tehrir, the First Information Report was lodged as Case Crime No. 179/1991 under Section 452, 376 IPC at P.S. Mujariya, District Badaun on 14.11.1991 at 12:30 p.m. against the four named accused Shamim, Shafi, Khurshid and Ashfaq.

On the same day, i.e. 14.11.1991 at 08:30 pm, the prosecutrix was produced for medical examination at Community Health Center, Ujhani, Badaun. According to the doctor, no external injuries were found. As per the internal examination, the vagina was two fingers loose and uterus was normal in size and the vaginal smear was taken for pathological examination of sperms. The prosecutrix was then referred for X-ray for the determination of age.

Next day, i.e. on 15.11.1991, *salwar* of the prosecutrix having stains of semen was collected and the recovery memo dated 15.11.1991 was prepared (Exhibit Ka-2).

According to the X-ray Report dated 24.01.1992, the epiphysis around the right elbow and the right wrist were found fused. As per the supplementary report dated 29.01.1992, radiological age of the prosecutrix was more than 18 years. It was opined that no opinion could be given about rape as there were no sperms seen in the vaginal smear and was habitual to sexual intercourse.

The Investigating Officer made the spot inspection, prepared the site plan and recorded the statement of prosecutrix and the witnesses under Section 161 Cr.P.C. and was produced before the Magistrate for the recording of her statement under Section 164 Cr.P.C. The charge-sheet was submitted against all the four accused persons under Sections 452, 376 IPC. The co-accused Ashfaq died during inquiry, therefore, the proceedings were abated against him. After the cognizance, the learned Magistrate committed the case to the Sessions Court for the commencement of the trial. The charges were framed against the accused Shamim, Shafiq and Khurshid under Sections 452 and 376 IPC. The accused denied the charges and claimed to be tried.

The prosecution produced as many as seven witnesses. PW-1- is the prosecutrix/first informant, who proved the written Tehrir as Exhibit Ka-1. PW-2- Smt. Firozi sister-in-law (Jethani) of the prosecutrix and PW-3-

Janab Khan (son of PW-2) were examined as the eye witnesses, PW-4- Dr. Suman Nagar proved the injury report and supplementary report , PW-5- Dr. M.P. Gangwar proved the X-ray report, PW-6- Inspector D.K. Baliyan was the second Investigating Officer and PW-7- Yashveer Singh was the first Investigating Officer.

After the prosecution evidence was closed, the statement of the accused were recorded under Section 313 Cr.P.C. in which they denied the occurrence and stated that they were falsely implicated. The accused Shamim denying the incident stated that a property dispute was pending amongst them as he sold 2 bighas of land to the husband of the prosecutrix on being lured. So his wife instituted a suit for cancellation of the sale deed against the prosecutrix. The co-accused Shafiq also denied the incident and stated that he had been falsely implicated due to enmity. The co-accused Khurshid also denied the incident and stated that he too had been falsely implicated, due to political rivalry. In defence, the accused produced the copy of the sale deed dated 25.04.1991 and the copy of the Suit No. 242/1991 Shamim vs. Prosecutrix. But, no oral evidence was placed in defence.

PROSECUTION WITNESSES:-

PW-1 (Prosecutrix) in her examination-in-chief recorded on 14.08.2001 deposed that her age was about 30 years. She knew the accused Shamim, Shafiq, Khurshid and Ashfaq who were the residents of her village. The prosecutrix supported the prosecution case and deposed that all the four accused entered into her house by crossing over the wall. After hearing the noise, she woke up and saw them inside her house and questioned their presence in odd hours. In the meanwhile, her sister-in-law (Jethani) Smt. Firozi also woke up and identified the accused in the light of Chirag and Lantern. At this, the accused dragged the prosecutrix outside the home and pulled her towards sugarcane field where she was raped in the whole night one by one. In her extensive cross-examination, she deposed that she was married about 10-12 years before the incident and had a son and a daughter. Her husband was suffering from disease and was feeble. He was undergoing treatment in Delhi and Agra. She further deposed that she was illiterate. She stated that the accused were not armed with any weapon at the time of the incident. They came across the boundary wall and opened the latch of the door. She was well aware that before sleeping she had latched the door. When the accused entered, she was sleeping and was awakened by accused Shamim. The accused did not insult or rape her inside her house rather they dragged her by holding

her hands and legs towards the sugarcane field. She received injuries in her legs and back. Even the clothes were torn. The distance of the sugarcane field from her house was about a mile. When she was dragged, she screamed and even her sister-in-law (Jethani) raised an alarm. The villagers reached but no one chased to rescue her as the accused were dangerous miscreants, who forcefully committed rape and badly tortured her. No blood was oozing from her back, only marks were present. Few injuries were on her hands and back. At the time of incident, the blood oozed and fell on the ground.

PW-2 Smt. Firozi, the sister-in-law (Jethani) of the prosecutrix deposed that about ten years before the incident at around 12:00 at night while she was sleeping in her Verandah, she heard the noise of prosecutrix and saw the accused Shamim, Khurshid, Shafiq and Ashfaq inside the house in the light of lantern and Dibbi. She was an illiterate lady. All the four accused dragged away the prosecutrix to insult her. Though she raised an alarm but no villagers chased the accused persons. During cross-examination, the said witness deposed that she was present in her house. There was no prior enmity with the accused persons. Before the incident, the wife of accused Shamim, namely, Tamizan had instituted a case against the prosecutrix for cancellation of the sale deed.

PW-3 Janab Khan, the son of Smt. Firozi in his examination-in-chief deposed that he was sleeping with his mother and aunt. When the accused entered his house, he woke up on the alarm of his aunt and saw the accused persons in the light of *Dibbi* who dragged away his aunt from the house. During extensive cross-examination, the said witness deposed that he had not seen the torn clothes of his aunt nor any injuries on her body with the oozing blood.

PW-4 Dr. Suman Nagar was posted as Medical Officer Incharge at Community Health Center, Ujhani, District Badaun stated that on 14.11.1991, she examined the prosecutrix. There were no mark of external injuries. The vagina was two fingers loose and the uterus was normal in size. The vaginal smear was taken to examine the presence of spermatozoa. For age determination, the victim was referred for X-ray. A supplementary X-ray Report was prepared according to which the age of the victim was more than 18 years. No opinion could be given about rape as there was no sperms seen in the vaginal smear. She was habitual to sexual intercourse. In her cross-examination, she deposed that there were no internal injuries. She further deposed that in case the prosecutrix was dragged holding her hands and legs then definitely some injuries could be

caused on her body but no external injuries were found nor any spot of blood was found on her body nor on her clothes. In case, any female is forcefully subjected to rape, the injuries could be caused on her back. From the perusal of the injury report, there were no signs of external or internal injuries nor any sign of commission of rape.

PW-5 Dr. M.P. Gangwar was the Radiologist posted at District Hospital Badaun, who stated that on 24.01.1992, he performed the X-ray of the right elbow and the right wrist of the prosecutrix. Both the epiphysis were found fused. According to the X-ray Report, the age of the prosecutrix was determined as above 18 years.

PW-6 Inspector D.K. Baliyan was the second Investigating Officer and was entrusted with the investigation. He deposed that the prosecutrix was produced before the Magistrate for recording her statement under Section 164 Cr.P.C., whereby the prosecutrix supported the prosecution case. The said witness deposed that from the perusal of the Medical Report, no injuries were present on the body of the prosecutrix nor the doctor opined about commission of rape.

PW-7 Inspector Yashveer Singh was the first Investigating Officer. In his examination-in-chief, who deposed that on 14.11.1991, the said case was registered in his presence and the copy of Chik Report and General Diary were handed over to him. On 15.11.1991, he recorded the statement of the prosecutrix made a spot inspection and prepared the site plan. He collected the *salwar* of the prosecutrix and prepared the recovery memo. The said witness deposed that no blood was found from the place of incident. Though the sugarcane plants were found broken but he did not make any such entry in the case diary. The *salwar* which was collected from the prosecutrix was also not sent for the chemical examination. He did not enquire from the prosecutrix about the reasons for the delayed FIR.

STATEMENT OF THE ACCUSED UNDER SECTION 313 Cr.P.C.:-

The accused Shamim in his statement recorded under Section 313 Cr.P.C. stated that he was falsely implicated due to personal enmity as his wife had instituted a case against the prosecutrix. There was a property dispute as the sale deed of two bighas of land was executed in favour of the prosecutrix by being lured. The co-accused Shafiq also stated that he had been falsely implicated due to political enmity and rivalry. The co-accused Khurshid stated that he had been falsely implicated that he too

had been falsely implicated due to political rivalry.

SUBMISSIONS ON BEHALF OF THE APPELLANTS:-

Learned counsel for the appellants challenging the conviction and sentence argued that they have been falsely implicated due to personal enmity and political rivalry. There is a delayed FIR. Further, it was argued that they have been falsely implicated due to property dispute between the prosecutrix and the wife of accused Shamim as the suit for cancellation of sale deed was instituted. The main contention of the learned counsel for the appellants was that the case of the prosecutrix does not corroborate with the medical examination report. The victim in her examination-in-chief stated that she was forcefully subjected to rape by the accused one by one for the whole night but no such external or internal injuries were found on the body of the victim. It was further deposed by the victim that she was dragged by her hands and legs of a distance of one mile but no such injuries were found on her body. The prosecutrix was a married lady having two children. From the X-ray Report, it is evident that epiphysis around the right elbow and the right wrist were fused. According to the X-ray Report, the radiological age of the prosecutrix was more than 18 years. PW-2 and PW-3 were examined as eye witness account of the incident but they could only narrate the incident which took place within the house but could not depose about the incident which took place in the sugarcane field. It is the admitted case of the prosecution that the prosecutrix was neither insulted nor subjected to rape inside her house but the actual incident of rape took place in the sugarcane field, therefore, the testimony of the two eye witnesses has no basis. From the Medical Report, it is obvious that there were no mark of external or internal injuries on the body of the prosecutrix. Neither any blood was found oozing from her body. The prosecutrix deposed that she was dragged to the sugarcane field covering a distance of about one mile but no such external injury was found on her body nor the blood was found oozing which also belies the prosecution story. The recovered clothes of the prosecutrix (salwar) having stained semen was not sent for chemical examination. No independent witness was examined to prove the case. According to the supplementary report, no opinion about rape was given as there were no sperms found in the vaginal smear. The prosecutrix was habitual to sexual intercourse. It was strange that despite the alarm being raised by the prosecutrix and her sister-in-law (Jethani) PW-2, no villagers chased the accused to rescue the prosecutrix, which also belies the prosecution case.

SUBMISSIONS ON BEHALF OF THE STATE

Per contra, learned Additional Government Advocate vehemently opposed the arguments advanced by the counsel for the appellants and argued that the prosecutrix supported the prosecution version. In her statement recorded under Section 164 Cr.P.C. as well as in her examination-in-chief and the cross-examination, the prosecutrix was firm and consistent. PW-2 and PW-3 were the eye witnesses account of the incident and had supported the prosecution case. There was sufficient source of light. The accused had strong motive of insulting the prosecutrix as there was a property dispute between the co-accused Shamim and the husband of the prosecutrix who purchased two bighas of land by alluring him due to which accused Shamim felt insulted and wanted to take the revenge. The Medical Report also corroborates with the prosecution version. The accused crossed over the boundary wall of the prosecutrix' house and entered their house and were seen in the light of lantern and dibbi. The *salwar* of prosecutrix contained the stains of semen. During spot inspection, the Investigating Officer found the broken sugarcane plants.

ANALYSIS:-

Having heard the rival submissions and arguments advanced by learned counsel for the parties and after the perusal of records, we find that though there was slight delay in lodging the FIR but in rape matters it is a normal phenomenon. In cases of sexual assault, the victim is often bashful and carries trauma in her mind and requires some time to master the courage to undertake a legal battle against the culprit. The appellant counsel has emphasized the property dispute as the main motive of implicating them for the accusation of rape finds substance. Enmity is a double edged weapon. The property dispute amongst the party is a strong reason for false implication. It has been found that already a suit was instituted by the wife of accused Shamim for the cancellation of the sale deed therefore, there was no occasion for the accused to unnecessarily insult the prosecutrix by committing rape. The prosecutrix was a married young lady having two children and was medically examined within 48 hours of the incident on 14.11.1991 at 08:30 p.m., therefore, there was no reason to question its credibility. According to the doctor, no external injuries were found on her body. As per the internal examination, the vaginal smear did not contain any sperm. The prosecutrix was habitual to sexual intercourse, therefore, no opinion about rape could be given. According to the X-ray report, the age of victim was more than 18 years.

The testimony of the prosecutrix of commission of rape is not substantiated and does not corroborates with the medical evidence. The statement of the prosecutrix is unworthy of credence. It is the admitted case of the prosecution that the accused were not carrying any weapon. PW-2 and PW-3 were examined as eye witness account of the incident but they could only narrate the incident which took place within the house but could not depose about the incident which took place in the sugarcane field. It has also been admitted by PW-1 that the accused neither insulted nor raped her inside the house. The evidence adduced by PW-2 and PW-3 does not support the case of commission of rape on the prosecutrix. The recovered clothes of the prosecutrix (salwar) having stained semen, was not sent for chemical examination which also does not fortify the prosecution case. No independent witnesses were examined. Though the Investigating Officer found the fallen sugarcane plants but no such entry was made in the Case Diary. The site plan does not indicate the height of the boundary wall which was crossed by the accused while entering into the house. It is a clear case of false implication due to political rivalry and property dispute. There is no material evidence to substantiate the prosecution case.

In view of aforesaid facts and circumstances, the prosecution has failed to prove its case beyond the reasonable doubt. The statement of the prosecutrix is full of discrepancies and does not inspire confidence. Though, the conviction can be based on the sole testimony of the prosecutrix but the evidence of the prosecutrix when read as a whole does not corroborates with the medical evidence and is not worthy of credence.

In light of the observations of the Hon'ble Supreme Court, it is a settled position of law that the conviction can be based on the sole testimony of the prosecutrix but at the same time the Courts have to be extremely careful while examining the sole testimony as cautioned in ***State of Punjab vs. Gurmeet Singh (1996) 2 SCC 384:***

"If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestation."

This was reiterated in ***Sadashiv Ramrao Hadbe vs. State of Maharashtra and Another (2006) 10 SCC 92.***

Similarly, the Hon'ble Supreme Court in ***Radhu Vs. State of***

Madhya Pradesh (2007) 12 SCC 57 has held that:

"It is now well settled that a finding of guilt in a case of rape, can be based on the uncorroborated evidence of the prosecutrix. The very nature of offence makes it difficult to get direct corroborating evidence. The evidence of the prosecutrix should not be rejected on the basis of minor discrepancies and contradictions. If the victim of rape states on oath that she was forcibly subjected to sexual intercourse, her statement will normally be accepted, even if it is uncorroborated, unless the material on record requires drawing of an inference that there was consent or that the entire incident was improbable or imaginary. Even if there is consent, the act will still be a "rape", if the girl is under 16 years of age. It is also well settled that absence of injuries on the private parts of the victim will not by itself falsify the case of rape, nor construed as evidence of consent. Similarly, the opinion of a doctor that there was no evidence of any sexual intercourse or rape, may not be sufficient to disbelieve the accusation of rape by the victim. Bruises, abrasions and scratches on the victim especially on the forearms, wrists, face, breast, thighs and back are indicative of struggle and will support the allegation of sexual assault. The courts should, at the same time, bear in mind that false charges of rape are not uncommon. There have also been rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case."

Recently, in **Manak Chand @ Mani vs. State of Haryana, 2023 SC Online SC 1399**, in three Judge's Bench of the Hon'ble Supreme Court while making observation in the matters of false cases of rape has held that:

"It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration."

Thus, considering the entire facts and circumstances of the case, the evidence as well as the law laid down by the Hon'ble Apex Court in various judgments discussed in foregoing paragraphs, we hold that in cases of a false accusation of rape, the accused must be protected from the

indictment.

Hence, on the basis of the discussions as above, we are of the view that the prosecution has failed to prove its case beyond reasonable doubt and the appeal is liable to be allowed.

Accordingly, the appeal is **allowed**. The impugned Judgment and Order of conviction and sentence dated 30.10.2004 passed by Additional Sessions Judge/ Fast Track Court-IV, Badaun in Sessions Trial No. 438/1996 registered as Case Crime No. 179/91, under Section 452 and 376 IPC, P.S. Mujariya, District Badaun is hereby set aside. The appellants **Shamim, Shafiq and Khurshid** are on bail. Their bail bonds are cancelled and the sureties are discharged.

Office is directed to transmit a certified copy of this judgment and order to the concerned Court for necessary information. It is further directed that the original record of the case be returned forthwith which shall be kept safely by the Trial Court.

Order Date :- 9.11.2023

Shivani