HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU

Cr. Appeal 3-A/2003
Cr. M.P 17/2003

Date of order 10.02.2010

Sanjay Kumar Vs. State and Others

Coram :

Hon' ble Mr. Justice Gh. Hasnain Massodi, Judge.

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i) Whether to be reported in Press/Journal/Media: **Yes/No**

ii) Whether to be reported in Digest/Journal: **Yes/No**

Appearing counsel:

For the Appellant(s) : Mr. J.R.Arora, Advocate
For the respondent(s) : Mr. B.R.Chandan, Dy. A.G

Instant criminal appeal is directed against judgment of learned Sessions Judge Udhampur dated 28.12.2002 in case titled State versus Sanjay Kumar (file No.29/Sessions whereby the appellant has been convicted for offence punishable under section 363 and 376 RPC and sentenced rigorous imprisonment of two years & fine of Rs. 500/- and seven years & fine of Rs.1000/- respectively. The impugned judgment and order

have been passed against the following factual backdrop:

The victim of the alleged offence on 25th July, 2000 lodged a written report at police post STF Sudhmahadev that the appellant on 24th July 2000 kidnapped the victim at Sudhmahadev when the victim was on her way to her residence, took the victim to a house about a kilometer away from the place of occurrence and confined the victim in a room and without her consent subjected the victim to repeated sexual assault . The report was forwarded by Incharge STF Police post Sudhmahadev to Police Station Chenani whereupon a case FIR 81 of 2000 under section 363, 342 and 376 RPC was registered. The investigation was entrusted to Shri Shiv Dev Singh IHC/378. The Investing Officer rushed to the spot, prepared the site plan of alleged place of occurrence, arrested the accused, seized underwear of the appellant and bed sheet having semen stains, sent the victim for medical examination and seized her “shilwar” which together with underwear of the appellant and bed sheet, were sent for forensic examination. The Investing Officer recorded statement of the victim

and the others acquainted with the facts of the case, including experts who assisted in / facilitated the investigation and on the strength of material collected, found the appellant prima-facie to have committed offence punishable u/s 363, 342 and 376 RPC. The investigation was accordingly closed as proved and the charge sheet presented in the competent court. The investigation revealed that the victim had been sent by her mother from her native place Bupp to Chenani on 24th July, 2000 at about 6.30 P.M to get her some medicine the victim on her return found the appellant traveling in the vehicle who when the victim and the appellant got down from the mini bus at Sudhmahadev, took the victim to a place of his relation where the appellant confined her in a room disrobed her and committed rape on her several times, during the night. The investigation revealed that the victim in the morning on 25th July 2000 on the pretext to answer call of nature, gave a slip to the appellant and rushed to the police post set up at Sudhmahadev and reported the matter to STF personnel as stated above. The trial court recorded the prosecution evidence. The victim/ prosecutrix

examined as PW/1 stepped in the witness box and so did her mother, Shri Shashi Kumar 443 SPO STF post , Sudhmahadev, Paras Ram - Village Guard Chowkidar, Shri Chandi Ram Chowkidar/Village Guard, Smt. Dr. Bimla Tickoo a lady doctor who examined the victim and Shri Shiv Dev IHC/378 who investigated the matter. The circumstances appearing in the prosecution evidence against the appellant were put to the appellant u/s 342 Cr. P.C. The appellant feigned ignorance about the occurrence, denied to be acquainted with the victim or to have been arrested on 25th July 2000 or that his underwear was seized by the police. The appellant examined S/ Shri Trilok Chand and Rajinder Kumar in his defence.

Learned trial Judge on a threadbare discussion of the charge sheet, presented against the appellant and the evidence brought on file by the prosecution as well as appellant as also the stand of appellant in his statement u/s 342 Cr. P.C, held the prosecution to have proved its case against the appellant beyond any doubt. The trial court on 27.12.2002 proceeded to convict the appellant u/s 363, 376 RPC and adjourned the matter to

28.12.2002 to hear the appellant on sentence. The trial court on 28.12.2002 after hearing the appellant sentenced the appellant as above. The judgment dated 27.12.2002 convicting the appellant u/s 363, 376 RPC of the aforesaid offence and the order dated 28.12.2002 sentencing the appellant are assailed on the following grounds:

1) That the story narrated by the victim of her having been physically and forcibly kidnapped by the appellant in the broad day light in presence of the people, was unnatural and not to be believed; that the statement of the victim that the appellant took her to his sister's house, also sounded unnatural in as much as in presence of the religious background of the appellant, he would not even think of taking a girl to the sister's house to commit rape on her; that had there been substance in the occurrence, the sister of the appellant and other family members could have come to the rescue of the victim and saved the victim from the clutches of the appellant.

2) That the medical evidence did not even remotely connect the appellant with the alleged

occurrence; that the semen strains alleged to have been found on the underwear and the bed sheet were not sent for chemical examination so as to find out whether the semen found on underwear and bed sheet was that of the appellant;

3) That the statement of the victim has gone un-corroborated and the statement itself suffered from discrepancies and contradictions making the story set up by the prosecution doubtful and not to be believed.

4) That the trial court has not appreciated the evidence adduced by the appellant in his defence in right perspective and rushed to the conclusion without making appropriate appreciation of the evidence brought on the file.

I have gone through the memo of appeal, the impugned judgment and order as also record received from the trial court. I have heard learned counsel for the appellant and Ld. Dy. Advocate General. Learned counsel for the appellant while elaborating on the grounds set out in the memo of appeal to question legality of impugned judgement

and order points out that prosecution had failed to bring any evidence on record to prove that the victim was minor at the time of occurrence. It is argued that the school certificate recording date of birth of the victim though placed on file, has not been proved in accordance with law in as much as the author of certificate or official of the school in possession of school record has not been examined to prove the certificate. The learned counsel for the appellant submits that failure of the investigating agency to subject the victim to ossification test to prove her age, has also made a major dent in the prosecution case. It is argued that once a victim is held not to be a minor on the date of occurrence, the complexion of the matter is changed and the consent of the victim discernible from the record, would absolve the appellant from the charges leveled against him. The counsel for the appellant to support his argument, places reliance on law laid down in 2001 SC 2231 and 2000 Cr. Law Journal 4683.

The argument advanced by learned counsel for the appellant is far fetched and bereft of any force. The victim in her statement recorded on

4.1.2001 has given her age as 14 years. The victim thus on the date of occurrence was about 13 years of age. No effort has been made by the appellant or his counsel during cross examination of the victim or her mother, to throw challenge to and question the age given by the victim in her statement before the court. The cross examination of the victim or his mother who has also appeared in the witness box, does not as a matter of fact, touch this aspects of the case. PW Mst. Jattii, mother of the victim stating to be aged 40 years has in her cross examination deposed that the victim was her third daughter (younger to two daughters) and that her eldest daughter was of 20 years old. A feeble attempt made during cross examination of the victim to have information regarding her siblings, has received the same response.

In the circumstances there is no reason to disbelieve the testimony of the victim that she was 13 years old at the time of the occurrence. So viewed even if the school leaving certificate bearing seal and signature of the Headmaster, Government High School Bupp on the official stationary of the school bearing No.HSB/2000/59 dated 28.7.2000

wherein Date of Birth of the victim is certified as 18.06.1986 is discarded, the statement of the victim tested at the touch stone of cross examination as regards the age of the victim is to be relied a trust worthy. The reliance placed on AIR 2001 SC 2231 in this behalf, is grossly misplaced. The controversy in the aforesaid case related to juvenility of the accused sentenced to death on the charge of having committed offence punishable u/s 302

> *"where the accused convicted for murder and sentenced to death by the Supreme Court', was not found to be juvenile either by the Investigating Officer or by the Magistrate to whom he was produced or by the Magistrate who recorded his confessional statement or by the Sessions Court to whom accused was committed and no such plea about his juvenility was raised by the accused wether during investigation, inquiry or trial , the plea that he being juvenile could not be sentenced much less to death sentence raised at time of review was clearly an afterthought."*

In the aforesaid context the Supreme

Court opined on the various tests to determine age of an accused, as under:

> *"the statement of the doctor is no more than an opinion. The court has to base its conclusions upon all the facts and circumstances disclosed on examining of the physical features of the person whose age is in question, in conjunction with such oral testimony as may be available. An X-ray ossification test may provide a surer basis for determining the age of an individual than the opinion of a medical expert but it can be no means be so infallible and accurate a test as to indicate the exact date of birth of the person concerned. Too much reliance cannot be placed upon text books, on medical jurisprudence and toxicology while determining the age of an accused. In this vast country with varied latitude, heights, environment, vegetation and nutrition, the height and weight cannot be expected to be uniform."*

The case thus has no relevance to the controversy sought to be raised up in the present appeal.

It is next argued that the medical

evidence on the file does not support the version given by the victim. It is stated that while the victim has deposed that she was repeatedly subjected to rape by the appellant during the night intervening 24th and 25th July, 2000, the lady doctor who examined the victim on 25th July, 2000 did not come across any marks of violence on any part of the body of the victim including the private parts and that no spermatozoa were detected in the vaginal smear sent for laboratory for examination. It is argued that the lady doctor who examined the victim found the victim habitual to sexual intercourse and did not come across any evidence of fresh tear in the hymen of the victim. The absence of marks of violence on the person of the victim and the surrounding circumstances detailed in the EXPW-VT, it is argued point to the consent of the victim. The counsel for the appellant to buttress his arguments seeks to draw support from AIR 2000 SC 1608, AIR 2001 SC 3049. In AIR 2000 SC 1608 the prosecution case was that the victim had been subjected to brutal rape and forced sexual intercourse by the appellant and thereafter left on a railway tract to be run over by the passing train.

There was no evidence available to the prosecution to prove rape except the examination report of vaginal smear that confirmed presence of semen and spermatozoa indicating that the deceased must have been subjected to sexual intercourse before her death. The “dhoti” of the appellant when subjected to chemical examination, did not reveal presence of any blood stains or semen on the “dhoti”. In the said factual background the Supreme Court observed :

> *“If there had been any forcible sexual intercourse the victim must have made some strong resistance being a grown up lady and in the process, some injuries would have been found on the vagina/ private parts of the body or some other parts indicating any such use of any force and it would be too much to assume that there would have been no injury whatsoever on the body, on this account.”*

In the reported case the victim after her death was not available and obviously did not step in the witness box. In the present case the victim has not only stepped in the witness box but has been subjected to thorough and searching cross

examination. In the present case unlike the reported case we have the testimony of the victim available on the file.

Even in the reported case the Supreme Court proceeded to observe

> *"Though injuries on the body is not always a must or sine-qua-non to prove the charge of rape. Having regard to the case of the prosecution that the victim had been subjected to brutal rape and forced sexual intercourse, this aspect of the case could not be completely lost sight of ."*

The reported case thus does not come to the rescue of the appellant in the present case.

In (1998) 8 SCC 635 the Supreme Court has held that none rupture of hymen and absence of injury on victim's private parts, does not belie her testimony and that the opinion of the doctor that no rape was committed, cannot throw out the otherwise cogent and trust worthy evidence of the prosecutrix.

In AIR 2001 SC 3049 the testimony of prosecutrix was disbelieved on the ground that whereas the prosecutrix alleged that due to gang

rape she sustained injuries and blood from her private parts staining her body and the cloths she was wearing, the report of chemical examination of the clothes and the doctor who examined her ruled out presence of any blood stains on the cloths of the prosecutrix or on her body. Furthermore the prosecutrix's version of the occurrence was belied and contradicted by her maternal aunt and uncle to whom she claimed to have narrated the events immediately after the occurrence. It was in the said circumstances that the testimony of the prosecutrix was held to be unreliable. The conclusion arrived in the reported case could not be pressed into service in the present case in as much as the facts of two cases are different and distinguishable.

The inference to be drawn from the medical evidence, according to the learned counsel for the appellant, was also supported by the fact that the victim even if her version was accepted, did not raise any hue and cry during the night of occurrence, nor did try to run away from the place of occurrence. The conduct of the victim, it is emphasized, points to her consent to the sexual intercourse. ….

Ld. Counsel seeks to draw support from following reported cases:

2006(1) Cr. Rulings 525 Gauhati , 2006 (2) Cr. Ruling 201 Gauhati.

In 2006 (1) Cr. Rulings 525 Guahati, the victim was married women having two children, elder 6 years and younger 2 ½ years of age and was found to have permitted the appellant to enter her room the second time after the appellant had allegedly committed rape on the victim. Having regard to the facts and circumstances of the case the victim was held to have been a consenting party and the appellant acquitted.

In 2006 (2) Cr. Rulings 201 Gauhati again victim was major, married and mother of two children. The victim was found stark naked with the appellant in the victims bedroom and to have allowed the appellant to indulge in sexual intercourse without raising any hue and cry. On the basis of such evidence on the file, the victim's version was held to be not free from doubt.

In the case in hand the victim is a minor girl of 14 years, there is thus no question claiming

acquainted on the plea of her having consented to the sexual intercourse. The facts of the reported cases of which reliance is sought to be placed, are markedly different from the facts of the present case. The opinion of PW Dr. Vimla Tickoo that the victim might have earlier also indulged in sexual intercourse, cannot lead to the inference that the victim must have consented to sexual intercourse with the appellant. All that the testimony of PW Dr. Vimla Tickoo and her report EXP-VT may lead to is that the victim might have previous to the occurrence gone for sexual intercourse. The absence of spermatozoa from the vaginal smear obviously taken a considerable time from after the occurrence, also does not discredit the prosecution case. The argument that failure of the victim to raise hue and cry or to run away from the room she was confined in and subjected to rape and that the victim was to be presumed to be consented party, must fail on two accounts. In the first place the victim is a minor and the consent on her part, even if inferred from the surrounding facts, can be of no help to the appellant; in the second place the argument is made oblivious and unmindful of

evidence of record. Prosecution evidence convincingly proved that though the house where the alleged occurrence took place belonged to the sister of the appellant, yet neither the appellant's sister nor her husband or any other family member resided in the house _ at a good distance from local habitation. In the circumstances, and any of the family of appellant's sister having been attracted the scene of occurrence, does not arise. The victim in her statement has vividly deposed that after the appellant sexually assaulted the victim, the appellant fell asleep and the victim could not unbolt the door as the bolt was at the top of the door and thus not reachable / accessible.

The argument that testimony of the victim was uncorroborated and can not, because of contradiction and discrepancies, be relied upon to record conviction against the appellant, also does not sound convincing.

The victim narrated vivid details of the occurrence before the trial court. The victim deposed that at about 6.30 P.M on 24th July 2000 she left her place at village Bupp for Chenani town to fetch medicine for her mother a hypertension

patient and that on her return from the Chenani town in a mini bus the victim found the appellant also traveling in the bus who got down from the mini bus at Sudh Mahadev at 8.00 P.M where the appellant alighted to proceed on foot to her native village; that the appellant took her away to a house about one kilometer to the place where the victim and the appellant had got down from the bus and sexually assaulted the victim in the house, the victim and the was confined.

The argument that the victim in her cross examination has claimed to have raised hue and cry and the appellant caught hold of her and took her away from Sudhmahadev Bus Stand and that a good number of people assembled but did not make any effort to free the victim from the clutches of the appellant, rendered testimony of the victim uncredit worthy, also does not sound convincing. Similarly the contention that in view of the statement of the victim in her cross examination that on her making an attempt to raise hue and cry the appellant tried to close the mouth of the victim which admittedly did not find mention in the FIR was a serious contradiction and should have persuaded the trial

court to have thrown away the prosecution case, cannot be accepted. A few contradictions here and there are bound to creep in statement of a girl of 14 years of age and such discrepancies, contradictions and exaggerations should not and cannot be used as a tool to discredit the testimony which is otherwise cogent and convincing. The discrepancies of the nature as are pointed out by learned counsel for the appellant, as a matter of fact, impart credibility to testimony of victim of sexual assault and must lead the court to conclude that the version has been natural and untutored.

In (2005) 13 SCC 766 it has been held that minor contradiction in significant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise relied prosecution case.

In 2006 9 SCC 787 the Supreme Court observed:

> *"The courts while dealing with such cases should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are*

not of a fatal nature, to throw out an otherwise reliable prosecution case."

It is pertinent to point out that after the victim was not able to run away from the room where the victim was confined and subjected to rape, she lost no time when in the morning of 25th July, 2000 the victim got an opportunity to leave the room on the pretext of her having to ease herself. The first thing that the victim did, was to rush to the local police post set up after eruption of militancy in the area. The victim without any delay lodged a report giving details of the alleged occurrence and the circumstances in which the occurrence took place at the police post Sudh Mahadev. There have been no significant improvements in the version of the victim to what victim stated in the FIR EXPW/GD. The victim has stuck to her stand and her testimony has come out unscathed and un-impeached on her cross examination.

The argument that the statement of the victim in the present case did not find any corroboration from the other material, is also made regardless of other evidence on the file.

First and foremost, the report EXPW/GD lodged immediately after the occurrence and thus of significant corroborative value, fully corroborates the testimony of the victim. The statement of the PW Mst. Jatti mother of the victim who worried by failure of the victim to return to her house from Chenani town, left her residence in wee hours of 25th July, 2000 and met the victim in Police station Chenani and was narrated whatever had befallen the victim, has lend support to the testimony of the victim. In (2008) 7 SCC 257 it has been held that the previous statement of the complainant is of corroborative value. The fact that the victim accompanied by her mother led the police party headed by the I.O to the place of occurrence where from the seizures vide EXPW/SK and EXPW/SK-1 were made and the site plan EXPW/SS prepared also corroborates the statement of the victim and so does the aforesaid documentary evidence. Even in a case where the testimony of the victim of the sexual assault is uncorroborated the testimony if otherwise reliable is not to be discarded on the mere ground that no corroboration was forthcoming from the other evidence on the file.

In 1993 2 SCC 622 it has been held:

"There is no legal compulsion to look for corroboration of the evidence of the prosecutrix before recording an order of conviction. Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate her veracity."

In (2005) 13 SCC 766 it is held

"It is now a well-settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The testimony of the victim of sexual assault is vital, unless there are compelling reasons which necessitate looking for corroboration of her statement. The courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where here testimony inspires confidence and is found to be reliable. It is also a well-settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under the

given circumstances."

The legal principal also finds expression in law laid down in (2006) 9 SCC 787 where the Supreme held:

> *"It is settled law that the victim of sexual assault is not treated as accomplice and as such, her evidence does not require corroboration from any other evidence including the evidence of a doctor. In a given case even if the doctor who examined the victim does not find sign of rap, it is no ground to disbelieve the sole testimony of the prosecutrix. In normal course a victim of sexual assault does not like to disclose such offence even before her family members much less before public or before the police."*

In (2009) 3 SCC 761 the appellant wanted to marry the prosecutrix and forcibly committed rape on her. Thereafter assured to marry her. However appellant later on refused to marry the prosecutrix. The prosecutrix had not reported the rape immediately to the police and allowed the matter to be settled through a local "panchayat". The Supreme Court rejecting the

defence case that the prosecutrix had kept quite and indulged in sexual intercourse with the appellant after the first occurrence and that the delay was fatal and the circumstances indicating the element of consent on her part holding the version given by the prosecutrix to be truthful and not to be ignored. It was held

> *"There can be no dispute that the investigation in this case is not at all satisfactory. There are discrepancies galore. However, in this case, the truthful version of the prosecutrix cannot be ignored. It is trite law that the defence cannot take advantage of such bad investigation where there is clinching evidence available to the prosecution as in this case."*

Let us now focus on the stand of the appellant before trial court and the evidence adduced in defense. It needs to be recalled that one of the grounds urged in the appeal is that learned trial court has completely brushed aside the defence version. The stand of the appellant before the trial court has been one of denial of the occurrence. It has been insisted that the appellant was not acquainted with the victim and that the

appellant was not involved in the alleged occurrence. The witnesses examined by the appellant in defense on the other hand does not only depart from the appellant's stand but also confirm presence of the appellant as well as victim in the mini bus that left Chenani town in the evening of 24th July 2000. D/W Trilok Chandi has deposed that the mini bus in which the witness, victim and the appellant were traveling was the last bus to leave Chenani town to Sudh Mahadev on 24th of July, 2000 and that a few inhabitants of his village traveled in the mini bus from Chenani to Sudh Mahadev. The witness insisted that victim went to her house and for some distance from Sudh Mahadev Bus Stand the witness also walked with the group where after the witness went to Chokenalah _ his native place of the residence and the victim proceeded to her village . D/W Rajinder Kumar is driver of mini bus 2505/JK-14. The witness has deposed that on 24.7.2000 the appellant was employed as a conductor with the mini bus of which the witness was the driver. The witness has insisted that the appellant was traveling in the mini bus in the evening on 24.7.2000 and that the

appellant stayed at his residence during the night. The witness has deposed that the appellant was on 25.7.2000 arrested from the mini bus. The DW Rajinder Kumar thus has belied the stand of the appellant that the appellant was not arrested on 25th of July 2000. The stand of DW Rajinder Kumar that the appellant stayed at his house on 24.7.2000 does not inspire confidence in view of the statement of the victim and other evidence on the file. So viewed the defence evidence instead of putting a question mark on the prosecution case as a matter of fact, lends support to the prosecution case in some essential details, like traveling of the appellant and the victim in the mini bus that left Chenani town for Sudhmahadev and are reinforces the testimony of the victim.

For the reasons discussed above the conclusion drawn by the learned trial court are based on the evidence on the file. Learned trial Judge has made an objective and dispassionate appraisal of the evidence on the file and had every reason to arrive at the conclusion that the prosecution had been able to prove its case beyond reasonable doubt. The appellant has been rightly

convicted for committing offence punishable u/s 363, 376 RPC. There has been no challenge to the quantum of sentence awarded by the learned trial court. Otherwise also having regard to the age of the victim as also the age and background of the appellant the sentence awarded by the trial court appears to be just and proper and to serve the ends of justice.

For the reasons discussed above, the appeal is dismissed and judgment of learned Sessions Judge Udhampur dated 28.12.2002 and the sentence is upheld. The bail granted to the appellant is canceled. The appellant is directed to be taken into custody to serve the sentence. The period of custody, if any, be set off under rules, against the sentence awarded by the Learned trial court.

(Gh. Hasnain Massodi)
Judge

Jammu
10.02.2010
G. Nabi