

**HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU**

Cr. Acq. Appeal No. 47/2003

Date of decision: 04.08.2014

State of J&K

Vs.

Sanjay Kumar

Coram:

Hon'ble Mr. Justice Mohammad Yaqoob Mir, Judge

Hon'ble Mr. Justice Janak Raj Kotwal, Judge

Appearing counsel:

For appellant (s): Ms. Meenakshi Bhatyal, Govt. Advocate

For respondent(s): Mr. Jasbir Singh Jasrotia, Advocate
alongwith respondent.

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| i. | Whether approved for reporting in Press/Media | : | Yes/No/Optional |
| ii. | Whether to be reported in Digest/Journal | : | Yes/No |

Per Kotwal-J

1. State is in appeal against judgment dated 27.08.2003 rendered by learned Sessions Judge, Udhampur, whereby respondent Sanjay Kumar (herein after the accused) has been acquitted after his trial for offence under section 376 RPC for having committed forcible sexual intercourse with his step sister, a child aged 7, on 9th Maghar, 2058 (25.11.2001).
2. Heard. We have perused the record.
3. Bantoo Devi (PW-1), who lodged the FIR, is the mother of the victim (PW-2). Mahinder Nath (PW-5) is the

paternal uncle of the victim and the accused and at the relevant time was a member of the Panchayat of the village. According to the prosecution on 9th Maghar, 2058 (25.11.2001) at about 7/7.30 PM accused fraudulently took the victim to their cattle house under the pretext that she should hold the mace, while giving fodder to the cattle. In the cattle house, accused committed forcible sexual intercourse with the victim. Incident was seen by PW-1, who had reached on spot on hearing screams of the victim. On the next day, PW-1 reported the matter to PW-5, who, however, did not take any action so PW-1 lodged report at the Police Station, Basant Garh on 28.11.2001. On her report offence under section 376/511 RPC was registered as FIR No. 22/2001 and the investigation commenced. Dr. S. L. Dulia (PW-9) conducted medico-legal examination of the victim on 28.11.2002. Accused was arrested on 30.11.2002 and on 01.12.2002 Dr. Rajesh Gupta (PW-10) conducted his medico-legal examination. After completion of investigation police filed charge sheet against the accused for commission of offence under section 376 RPC, which after committal came up for trial before the Court of Sessions Judge, Udhampur.

4. Accused pleaded not guilty and claimed to be tried. Prosecution, besides examining the victim as PW-2, produced ten witnesses, namely, Bantoo Devi (PW-1),

Ichoo (PW-3), Ram Dass (PW-4), Mohinder Nath (PW-5), Joginder Paul (PW-6), Raghunandan, Naib Tehsildar Basantgarh (PW-7), Dr. Dinesh Khajuria (PW-8), Dr. S. L. Dulia (PW-9), Dr. Rajesh Gupta (PW-10) and Sehdev Singh, HC (PW-11) at the trial. Trial court recorded statement of the accused. Accused produce one Yog Raj as defence witness. Learned trial court after appraisal of evidence and record acquitted the accused concluding that “it appears that the prosecution has not been able to prove its case against the accused beyond all shadow of doubt.” **Hence this appeal.**

5. We may give brief resume of the testimonies of the prosecution witnesses in regard and relating to the incident, before reviewing the entire evidence to determine the correctness or otherwise of the impugned judgment.
6. Victim (PW-2) was a 7 years old child when the trial court recorded her statement on 29.01.2002. The trial court after her preliminary examination, however, had recorded its satisfaction that the victim was capable of understanding the questions and replying correctly. She stated that accused is her step brother and they live separately in the same house. On the day of occurrence, she was reading in her room in the evening and her mother was cooking meals. Accused came to her and asked her to accompany him for providing

fodder to the cattle. She accompanied the accused to the cattle house where electricity was on. Accused felled her down and turned her face upwards. Accused put her shalwar (trousers) off as also his pantaloons, he came over her and put his organ into her private part and rubbed it eight/ten times. She felt a lot of pain. She raised a noise. On hearing the noise, her mother came there and on seeing her, the accused ran away. She did not bleed. Her mother took her inside. On the next day, her mother took her to Mohinder Kumar who is her uncle and narrated the incident to him. He refused to lodge the report. In the night Mohinder Kumar beat her mother with a stick and asked her not to reveal the incident to anyone. They went to Police Station on next day. Police got her medical examination conducted and seized her shalwar. Nothing had been glued to her shalwar. In cross-examination she stated that in his life time her father used to love her step mother more than her mother and had given more property to her step mother. Her mother and her step mother were not in good terms. After the death of her mother, her step mother had asked them to live separately. They were not given share in the shop of the father. They are not in speaking terms with the accused. Accused had taken her catching hold of her from the room where she was reading. She accompanied the accused on his asking to the cattle house. Accused did

not beat her. She was weeping when the accused had felled her down and had called her mother. Her mother immediately came there. She did not raise any noise. Accused ran away and after that her mother raised noise. Her mother did not chase the accused. Their house is in isolation. Mother of the accused neither came there nor was she informed about the occurrence. She is making the statement of her own and she has not been tutored by her mother in this regard. Her mother had told her that she has to make a statement in the court. Her mother did not tell her that she has to make the same statement which she had made before the police. Her medical examination was got conducted in the Police Station in presence of her mother at 5.00 pm. Report was written by the police.

7. Bantoo Devi (PW-1) has stated that at 7 in the evening she was cooking meals and her daughter was reading in the other room. Her daughter raised a noise from the cattle house so she went there. She found the accused lying over her daughter and committing sexual intercourse with her. On seeing her, accused ran away. Electricity light was on in the cattle house. Shalwar of her daughter was untied. She pulled up her daughter, put on her shalwar and brought her inside the house. She did not do anything in the night and on the next morning she went to Mohinder Kumar, who is a member of Panchayat and narrated the incident to him.

Mohinder Kumar yelled at her and said that he will not lodge a case saying that she herself may lodge the case. She could not lodge the report on that day. On the next day she reached Police Station, Basant Garh accompanied with the victim and lodged the report. FIR was registered. Police came on spot. Her daughter was got medically examined and her shalwar was seized. The witness has proved the contents of the report as Ex.PW-BD and of the FIR as Ex. PW-BD-I. She has further stated in chief examination that accused resides separately in the same house in which she resides. Accused is the son of the other wife of her husband. In cross-examination she has stated that accused is the son of the first wife of her husband. Land of her husband is still joint but they cultivate the land separately. She and the other wife of her husband have got similar land from their husband. Elder brother of the accused runs a shop. He has to pay her Rs. 30,000/ in lieu of her share in the shop. Brother of the accused has retained the entire shop and he owes her Rs. 30,000/ as value of half of the shop. He however, is not paying this amount from last two years. There are eight/ten houses near her house and names of some of their owners are Mohinder and Joginder etc. It was dark when the noise was raised but she had identified the accused in electricity light. The cattle house adjoins their residential house. Mother of the accused was

present in the house at the time of incident but his brother was not there. Only the accused and his mother were present in the house at that time. She had raised a noise on seeing the accused but none had come there. She had also complained to the mother of the accused. She or her daughter did not inform anyone about the incident on the day of occurrence. Report was lodged on the third day of the incident and on the same day, police had got her daughter medically examined. Doctor was called by the police at the Police Station and after medical examination, they had returned to their house directly from the Police Station. PW Ichoo was also present when she had complained to Mohinder Kumar on the next day of the incident. Mohinder Kumar is her 'Devar' (husband's younger brother) and Ichoo is her 'Jeth' (husband's elder brother). She had shown her daughter as also the blood stained clothes to Ichoo also. She had gone to Mohinder Kumar at 9 in the morning and remained there for two hours. After that she returned to her house and did not narrate the incident to anyone else on that day. Two/three persons had come to kill her in the night following the day when she had narrated the incident to Mohinder Kumar and due to that she had gone to Police Station. She would not have lodged the report had the member Panchayat advised the accused. Police Station falls at a distance of one hour journey

from her house. Her daughter was wearing the same clothes when she was taken to Police Station, which she had been wearing on the day of incident. She had returned to the house wearing the same clothes. Police had seized the clothes on the next day. Ram Dass and Krishna were present at the time of seizure of the clothes and none from the village was called. Someone residing near Police Station had drafted the report. No police personnel was present when the report was written. Jettu Ram, who is her 'Jeth' (husband's elder brother) is serving in police. She did not narrate the incident to him. He was not present in the house when the report was lodged.

8. Ichoo (PW-3) has not supported the prosecution case and has been declared as hostile witness. He has however, admitted to be the paternal uncle of the victim and the accused. He has stated in chief examination that PW Bantoo had not come to him but has admitted that police had seized the trousers, which was shown to him in a pathway. In cross-examination by defence he has stated that PW Bantoo and mother of the accused are not in good terms. There is a money dispute with accused and his brother. There is no electricity in the house of Bantoo.
9. Mohinder Nath (PW-5) too has not supported the prosecution case and has been declared as hostile

witness. He has stated that on 9th Maghar Bantoo had come to him at 8/9 in the night and had complained that accused's brother Kewal has misbehaved with her daughter. He went to the house of the accused. Accused and his mother were present there. Accused was reading. He enquired about Kewal from his mother who said that Kewal is at his shop and is staying there from last four/five days. He then asked Bantoo as to why she was making such allegation when Kewal is not present in the house. On this, Bantoo said that if it was not Kewal then it might be accused Sanjay. On his way back, he saw the daughter of Bantoo and enquired from her who said that she has been advised by her mother to say so. The girl did not level any allegation of misbehavior against anyone. In cross-examination by the prosecution he, while admitting that he was a member of the Panchayat, has denied to have deposed before the police in a manner suggested to him. He has further stated that his relations with both the parties are equally good. In cross-examination by defence he stated that relations between Bantoo and the mother of the accused were not good and they are not in good terms. They have a dispute about money transaction. He had taken the girl to a 'Dev Sthan' (seat of a deity) and enquired about the incident who had said that her mother had asked her to make such a statement.

10. We may also refer to the evidence rendered by the doctors who examined the victim and the accused:
11. Doctor, S. L. Dulia (PW-9) has stated that on 28.11.2001 he was posted as B.M.O. Basant Garh and had examined the victim. On examination he found that there was an attempt to rape, hymen of the girl was found ruptured and she was bleeding from her vagina. There were scratches all over her thighs. The witness also proved as Ex. PW -SL the certificate issued by him in which duration of incident is given as 50 to 60 hours. In cross-examination, he stated that PHC Basant Garh falls at a distance of 1-2 KM from the Police Station, Basant Garh. He had examined the girl in the hospital. He had noticed semen stains. The girl was examined by him at 4.00 pm. Hymen can be ruptured by inserting finger etc.
12. Dr. Rajesh Gupta (PW-10) has stated that he had examined Sanjay Kumar S/o. Tara Chand, who was present at the time of his statement and had opined that he is capable of performing sexual intercourse. He has proved the certificate issued by him as Ex. PW-RG in which he had opined that there was nothing suggestive that the person cannot perform sexual act.
13. Here we may also give a brief resume of the sole defence witness, Yog Raj. He has stated that name of

the first wife of Tara Chand is Bimla whereas PW-1 is his second wife. PW-1 was not in good terms with her husband. PW-1 has lodged the false case against the accused. A meeting about the incident was called at that time, which was attended by 12/15 persons. PW-1 had also attended that meeting. On being asked, she had said that case is false and has been filed about the shop. Victim had also come in that meeting and on asking had said that she had been tutored by her mother. Accused had done nothing to her. Village brotherhood had then boycotted PW-1. This case has been lodged due to dispute about a shop, which is being run by the brother of the accused. In cross examination, he has stated that meeting was called by Mohinder, who is 'Jeth' of PW-1. No document was prepared in the meeting. He did not make any statement in the police even after coming to know about the police case nor did the police inquire from him.

14. A perusal of the impugned judgment would show that the trial court has on comparing the evidence rendered by the victim and her mother with the evidence rendered by the doctor (PW-9) found the prosecution case shrouded in suspicion. Besides, the trial court has taken note of 'proved enmity' between the mother of the victim and mother of the accused. The trial court

has found favour with the defence argument that PW-1 coerced accused party to part away with cash and some property and had used her daughter as a tool and lodged the report in connivance with the police. The trial court seems to have seen falseness in the allegation against the accused. This is evident from the trial court's taking note that the victim was below eight years in age and according to her the accused had inserted his male organ into her vagina and committed the sexual act for about 'two minutes' and observing that this act was bound to have caused serious injury to her genitals and put her to lot of physical and mental trauma calling for immediate 'medical attention' and observing further that 'according to PW-2, the victim (name omitted) it did not happen so. Blood did not come out of her genitals. Her Shalwar did not get blood stained.' The trial court also took note of the medical evidence and the manner in which medico-legal examination of the victim was conducted in particular that 'at one time doctor says that after her examination he found that there was an attempt to rape and then goes further to say that hymen was ruptured and kept bleeding'. Learned trial court has concluded:

"when put together, all these circumstances, variation between the statement of victim pw 2 wherein she has said that blood did not come out from her body but the doctor says he found her bleeding; further the examination of the girl in the

Police Station rather than in hospital and lastly the contradictory nature of finding of the doctor; his furnishing of the certificate in a casual manner, having no mark of identification of girl, and not identifying her in the court, throws the prosecution case in realm of suspicions surroundings.”

15. Ms. Menakshi Bhatyal, learned Government Advocate, would say that learned trial court has fallen into error in appreciating the evidence, in particular that of PW-1 and PW-2 mother of the victim. She would say that learned trial court has assumed enmity between the two sides without the same having been proved or even evident from the evidence on record. Ms. Meenakshi concluded saying that learned trial court has acquitted the accused of a serious charge of committing rape on his sister (step) though the testimony of the victim alone is sufficient to prove the charge, which, nonetheless, is supported by the testimony of her mother PW-2, who had seen the incident and is corroborated by the medical evidence.
16. Mr. Jasbir Singh Jasrotia, learned counsel for the accused, however, supported the judgment. He vehemently supported the way in which learned trial court has appreciated the evidence and in support relied upon judgments reported as 2008 (3) CCC 676 (SC), 2009 (3) CCC 630 (SC), 2005(1) Apex Court judgments 308 (SC) and 2008 (2) CCC 495 (SC).

17. Testimonies of the victim (PW-2) and her mother (PW-1) provide direct evidence of the incident. The question for determination primarily is whether the evidence of the victim and her mother should have been relied upon by the trial court and if relied upon, whether the whole prosecution evidence is sufficient to prove the charge against the accused.
18. We, while reviewing the evidence, have accorded our consideration to the reasons recorded by the learned trial court for not relying upon the evidence rendered by the victim and her mother.
19. Mother of the victim (PW-1) and the mother of the accused are co-wives of one Tara Chand. After the death of their husband, they are living separately in the same house of their deceased husband alongwith their respective children. General impression, gatherable from the prosecution evidence, that is, testimonies of PWs. Mahinder Nath and Ichoo, who are the real paternal uncles of the victim, that is, brother of the husband of PW-1, is that there was deficit of cordiality between the two ladies though we do not endorse the finding of the trial court that there was 'proved enmity' between the two. We are bit disturbed to note and are unable to understand why the mother of the accused was not brought into picture if such a sensational

incident, involving her son and a minor girl of the family, had taken place in the family. According to PW-1, the mother of the accused was present in the house at the time of incident. We, however, could not trace any indication, much less justification, in her testimony as to why she did not complain to the mother of the accused instead of rushing to PW Mahinder.

20. In the backdrop of the cordiality deficit between the mother of the victim and the mother of the accused and obscure failure on the part of the former to complain or bringing the incident to the notice of the latter, we, on scrutinizing the entire evidence, do not feel safe in differing with the reasons recorded by the learned trial court for not relying upon the evidence rendered by the victim and her mother. Our attention rather has been attracted by an important aspect emerging from the record on the trial court file, which shakes the very foundation of the prosecution case and raises a serious doubt about credibility of evidence relating to the involvement of the accused in the incident.
21. While lodging the report (Ex. PW-BD) at Police Station, Basant Garh, PW-1 who was accompanied with the victim, had stated that the accused had taken the victim to the cattle house under the pretext of holding the mace to enable him to give fodder to the cattle.

This would in turn show that there was no other source of light in the cattle house. As against this the victim in her testimony before the trial court says that the accused had asked her to accompany him for giving fodder to the cattle. She accompanied him to cattle house where electricity was on. Likewise, mother of the victim, PW-1, says that electricity was on in the cattle house and says further in the cross-examination that it was dark at that time but she had identified the accused in the electricity light. The very basis of prosecution case is that accused had allured the victim to the cattle house under the pretext that she should hold the mace to enable him to give fodder to the cattle, which, however, is rendered suspicious by the unequivocal say of the victim and her mother that the cattle house was having electricity and according to the latter she had identified the accused in the electricity light.

22. We are conscious of the importance and evidentiary value of the evidence of the victim in a case of rape. But her evidence cannot be looked into in isolation of the surrounding circumstance nor can the surrounding circumstances be ignored. The evidence of the victim must inspire confidence and must be reliable. The level of confidentiality and reliability becomes more important once the accused has earned acquittal from the trial court because the acquittal strengthens the

presumption of innocence. It is well settled that in appeal against acquittal under section 417 of the Code of Criminal Procedure High Court has full power to review the evidence upon which the acquittal was founded, but it is equally well settled that the presumption of innocent of the accused is further reinforced by his acquittal by the trial court. Supreme Court in *Muralidhar and another v State of Karnataka*, 2014, AIR SCW 2278, after surveying a long chain of judgments' of the Court, has in para 12 of the reporting recapitulated the criteria to be born in mind while dealing with appeals against acquittal:

12.... (i) There is presumption of innocence in favour of an accused person and such presumption is strengthened by the order of acquittal passed in his favour by the trial court, (ii) The accused person is entitled to the benefit of reasonable doubt when it deals with the merit of the appeal against acquittal, (iii) Though, the power of the appellate court in considering the appeals against acquittal are as extensive as its powers in appeals against convictions but the appellate court is generally loath in disturbing the finding of fact recorded by the trial court. It is so because the trial court had an advantage of seeing the demeanor of the witnesses. If the trial court takes a reasonable view of the facts of the case, interference by the appellate court with the judgment of acquittal is not justified. Unless, the conclusions reached by the trial court are palpably wrong or based on erroneous view of the law or if such conclusions are allowed to stand, they are likely to result in grave injustice, the reluctance on the part of the appellate court in interfering with such conclusions

is fully justified, and (iv) Merely because the appellate court on re-appreciation and re-evaluation of the evidence is inclined to take a different view, interference with the judgment of acquittal is not justified if the view taken by the trial court is a possible view. The evenly balanced view of the evidence must not result in the interference by the appellate court in the judgment of the trial court.”

23. We, for the reasons stated and discussed above, are not in a position to disagree with the view taken and do not find any error or illegality in the judgement of acquittal recorded by the learned trial court. We would rather say that it would not have been safe for the trial court to rely upon the version of the victim and her mother to record conviction against the accused as we are persuaded to hold that involvement of the accused in the alleged occurrence is not proved beyond doubt.

24. For the aforementioned, we dismiss this appeal and uphold the judgement acquittal rendered by the trial court.

(Janak Raj Kotwal)
Judge

(Mohammad Yaqoob Mir)
Judge

Jammu:
04.08.2014
Rakesh

