

Court No. - 43

Case :- CRIMINAL APPEAL No. - 2039 of 2007

Appellant :- Chandra Kishore & Another

Respondent :- State Of U.P.

Counsel for Appellant :- R.O.V.S. Chauhan, Amit Misra, Prashant Kumar Srivastava, Rajiv Lochan Shukla

Counsel for Respondent :- Govt. Advocate, Pankaj Sharma

Hon'ble Vikram Nath, J.

Hon'ble Pratyush Kumar, J.

The instant appeal filed on behalf of the accused-appellants under section 374(2) of Cr.P.C is directed against the judgement and order dated 9.3.2007 passed by Sri Dinesh Kumar Sharma, Special Judge (SC/ST), Etawah in, S.T. No.95 of 2003 (State of U.P. Vs. Chandra Kishore and others), whereby the appellants have been convicted under section 376 (2)(g), 506 I.P.C and 3 (2)(v) SC/ST (Prevention of Atrocities) Act and sentenced to undergo imprisonment for life with a fine of Rs.10,000/-, each, rigorous imprisonment of one year, respectively. In default of payment of fine they have been further directed to undergo further rigorous imprisonment of one year.

Co-accused Harvijay Singh has been acquitted from the charges under section 376(2)(g) read with section 114 I.P.C and 3(2)V of SC/ST Act.

Heard learned counsel for the appellants and learned A.G.A for the State-respondent and perused the record.

Facts giving rise to the present appeal may be summarized as under:-

That on 13.12.2002 at 9.50 a.m Janak Singh gave a written report at police station Basrehar, stating therein that on 8.12.2002 his daughter Rita had gone to relieve herself at 6.00 p.m, Chandra Kishore, Dileep Kumar and Harvijay alias Pintoo forcibly caught her in the muster filed of Nathu Bhurji and Harvijay alias Pinto closed her mouth and Chandra Kishore and Dileep Kumar raped his daughter. At the alarm raised by his daughter, his wife and brother of

informant Ram Babu reached there but all the three had run away from the spot. On that day he was not in the house. When he came back on 13.12.2009 he came to know about the occurrence, when he made a complaint to the family member of those boys. They had criticized him and threatened him for his life.

At this, check F.I.R was scribed, case crime No. 197 of 2002, under sections 376, 506 I.P.C and section 3(2)(v) SC/ST (Prevention of Atrocities), Act was registered at the police station. Investigation was taken over by the Circle Officer, who took the investigation. On the same day he examined the informant and inspected the spot. The accused persons were arrested. Thereafter the victim, her mother and other witnesses were examined. The medical evidence was collected. After completion of investigation charge sheet was submitted.

Appellants stood for trial before the court of Special Judge where they were charged, on their denial they were tried the appellants Chandra Kishore and Dileep Kumar were convicted and sentenced as above. Co-accused Harvijay alias Pintoo was acquitted.

Feeling aggrieved, the present appeal has been preferred.

Learned counsel for the appellants in support of the appeal submits that the F.I.R was lodged with the delay and without any explanation. The medical evidence does not support the prosecution version. The statement of the victim is full of contradiction and the learned Trial Judge has failed to note error in relying upon the uncorroborated testimony of the victim which is contradictory in itself. On the strength of these, he has submitted that the impugned order is illegal and deserves to be set aside.

On behalf of the State-respondent, these arguments have been repelled and it has been submitted that the delay in F.I.R in a rape case is immaterial and uncorroborated, the testimony of victim is sufficient to sustain the conviction. The learned A.G.A has further submitted that the findings recorded by the learned

trial Judge are well substantiated from the record. The cogent reason has been given in support thereof. The appeal has no substance and deserves to be dismissed.

Before we propose to deal with the arguments submitted by the respective parties, we would like to recollect the manner in which appeal against conviction is required to be considered by this Court and scope of jurisdiction conferred on the Court by sections 374 and 386 Cr.P.C. Further we would like to refresh in our mind the observation made by the Apex Court in the case of **Ishvarbhai Fuljibhai Patni Vs. State of Gujarat [1995 Supreme Court Cases (Cri) 222]**, in this regard. Para-4 of the judgment reads as under:

"4. Since, the High Court was dealing with the appeal in exercise of its appellate jurisdiction, against conviction and sentence of life imprisonment, it was required to consider and discuss the evidence and deal with the arguments raised at the bar. Let alone, any discussion of the evidence, we do not find that the High Court even cared to notice the evidence led in the case. None of the arguments of the learned counsel for the appellant have been noticed, much less considered and discussed. The judgment is cryptic and we are at loss to understand as to what prevailed with the High Court to uphold the conviction and sentence of the appellant. On a plain requirement of justice, the High Court while dealing with a first appeal against conviction and sentence is expected to, howsoever briefly depending upon the facts of the case, consider and discuss the evidence and deal with the submissions raised at the bar. If it fails to do so, it apparently fails in the discharge of one of its essential jurisdiction under its appellate powers. In view of the infirmities pointed out by us, the judgment under appeal cannot be sustained."

In the case of **Lal Mandi, Appellant v. State of West Bengal, Respondent [1995 CRI.L.J.2659 (Supreme Court), 2659]**, the Apex Court in para-5 of the report has given caution to the High Court reminding its duty in the matter of hearing of appeal against conviction. It would be gainful to reproduce the

observation made in para-5 of the report, extracted below:

"5. To say the least, the approach of the High Court is totally fallacious. In an appeal against conviction, the Appellate Court has the duty to itself appreciate the evidence on the record and if two views are possible on the appraisal of the evidence, the benefit of reasonable doubt has to be given to an accused. It is not correct to suggest that the "Appellate Court cannot legally interfere with" the order of conviction where the trial court has found the evidence as reliable and that it cannot substitute the findings of the Sessions Judge by its own, if it arrives at a different conclusion on reassessment of the evidence. The observation made in Tota Singh's case, which was an appeal against acquittal, have been misunderstood and mechanically applied. Though, the powers of an appellate court, while dealing with an appeal against acquittal and an appeal against conviction are equally wide but the considerations which weigh with it while dealing with an appeal against an order of acquittal and in an appeal against conviction are distinct and separate. The presumption of innocence of accused which gets strengthened on his acquittal is not available on his conviction. An appellate court may give every reasonable weight to the conclusions arrived at by the trial court but it must be remembered that an appellate court is duty bound, in the same way as the trial court, to test the evidence extrinsically as well as intrinsically and to consider as thoroughly as the trial court, all the circumstances available on the record so as to arrive at an independent finding regarding guilt or innocence of the convict. An Appellate Court fails in the discharge of one of its essential duties, if it fails to itself appreciate the evidence on the record and arrive at an independent finding based on the appraisal of such evidence."

Before proceedings further we think factum of the evidence adduced before the trial Court must be placed on record. Summary of the statement of the prosecution witness reads as under.

Brief summary of prosecution evidence is as under:-

Janak Singh PW-1 is the first informant and the father of the victim. He has reiterated the fact mentioned in the F.I.R. He has proved the written report Ext -Ka-2.

The victim PW-2 has stated that she is member of scheduled caste. The appellants and co-accused Harvijay alias Pintoo are Lodhi Rajpoot. Two years ago at 6.00 p.m. she had gone to relieve herself in the field of Nathu Bhurji all the three accused came there and caught her, Harvijay alias Pintoo closed her mouth, Dileep thereafter Chandra Kishor have committed forcibly rape with her. At her alarm his uncle Ram Babu and mother came there and seeing running the accused Harvijay alias Pintoo, threatened to kill them and made good escape.

Smt. Dhan Devi PW-3 is the mother of the victim. She has supported the prosecution version.

S.I. PW-4 is the scribe of the check F.I.R. He has proved the check F.I.R Ext-Ka-3, copy of the report of the general diary Ext-Ka-4.

Dr.Vijay Gupta is the Medical Officer who on 13.12.2002 had medially examined the victim. According to her there was no external mark of injury on the person of the victim as also on private part. Hymen was old torn and vaginal semen was prepared. X-ray was advised. The report of the vaginal smear examination was negative. The victim was aged about 15 years. She has proved the medical examination report Ext-Ka-5 and supplementary report Ext-Ka-6.

Additional Superintendent of Police Km. Ruchita Chaudhry PW-6 is the Investigating Officer. She has given details of the steps taken in the course of the investigation. She has proved site plan Ext-Ka-8.

Before the trial Court the case of the defence was of simple denial. All the three accused in their statements recorded under section 313 Cr.P.C had admitted that the victim belonged to scheduled caste and they were Lodhi Rajpoot. Rest of the facts stated by the prosecution witnesses were denied by them. According to them, the victim was major. They were falsely prosecuted.

In the defence one witness was examined . Ram Babu D.W-1 the uncle of the victim has deposed that on 8.12.2002 at 6.00 p.m. no rape was committed with the victim. No incident has taken place. According to him there was party bandi in the village. Accused belonged to other party and the father of victim for obtaining money from the Government, had lodged the false case.

So far as the evidential value of the witness examined by the prosecution is concerned, this necessitates further for re-examination and re-assessment of their testimonies.

Janak Singh PW-1 the first informant is not an eye witness. Even his evidence under section 6 of the Evidence Act cannot be treated to be relevant because according to him, he returned to the house on the next following morning. This interval of time takes away his evidence out of purview under section 6 of the Evidence Act.

Victim PW-2 is a natural and probable witness of the occurrence which took place with her. The Hon'ble Apex Court has held that in a rape cases the evidence of the victim is necessary with the evidence of an injured witness.

In this regard, we would like to refresh our mind when the circumstantial evidence can be treated to be conclusive so as to prove the guilt of the accused. In the celebrated case of **Sharad Birdhi Chand Sarda vs State Of Maharashtra, AIR 1984, S.C., 1622**, the Hon'ble Supreme Court has lucidly enumerated when the circumstantial evidence can be treated to be conclusive. The relevant observation reads hereunder:-

152. *A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:*

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the

circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this court in Shivaji Sahebrao Bobade v. State of Maharashtra, (1973)2 SCC 793 where the following observations were made:

“certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.”

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

153. *These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.”*

The only finding is whether the alleged victim was actually raped or not. In case she was subjected to rape her evidence commands confidence as commented by the evidence of injured witness. In case of injured witness, the Court had assurance from the medical evidence that the injured had actually sustained injury but in the fact of the rape case has to be ascertained by the Court with the help the medical evidence because the evidence of the victim does not need corroboration from the medical evidence. The necessary legal position is that the Court is required to scrutinize the evidence of the victim intrinsically to see her statement that she was subjected to rape is worthy of reliance or not. Only thereafter from the other surrounding circumstances corroboration may be held.

When the statement of the victim PW-2 is subjected to such scrutiny. It transpire that her statement is unnatural and improbable. According to her she was

caught by the appellants in the muster field of Nathu Bhurji. According to site plan Ext.Ka-7 the muster field of Nathu Bhurji situate at the distance of one hundred and 50 measures from metalled rape. According to victim PW-2 the field of Nathu Bhurji is adjacent to the *gher* of Ram Naresh between these two distance is hundred steps from there her house is at distance of 10-20 steps. Therefore, further says that when the appellants tried to catch her. There was a scuffle and she raised an alarm. Had she raised an alarm considering the proximity from Abadi and her house. It appears natural that some one must have heard her alarm. She has admitted in the cross examination that she did not mention to the Investigating Officer that she had raised an alarm.

On this point her statement has been contradicted by her previous statement but the fact remains that before she was caught and she resisted and her clothe was allegedly torned, she has ample opportunity to raise an alarm. Since it was not a lonely place, therefore, her depiction of event does not inspire confidence. .

The Investigating Officer had investigated the spot. The muster field had been shown in the site plan. The hight of the muster plant as noted, the Investigating Officer had entered in the site plan that mere about place indicated the letter "A". the mustered plants were found disturbed and broken. The incident had taken place on 8.12.2002 and the Investigating Officer who have inspected the spot on the same day but she did not take broken plants in her possession nor she had given measurement of the area where the plants were found broken. But this much is reflected from the site plant that mere the place of occurrence there is flour mill and the alleged occurrence took place during evening hours when mostly the villagers after working in their field collect the flour from the mill. The nearest of the flour mill is also create doubt in truthful of the statement of the victim. Further she says that her cloths were spoiled but they were not subjected scientific examination. In the medical evidence no sign of rape was found. According to doctor Smt. Vijay Gupta, the victim was habitual of sexual intercourse. Inspite of

aware of this fact the victim claimed that she was raped by three persons. Doctor expressed her inability to opine that the victim could have been raped on 8.12.2002 or not.

At this juncture I would like to discuss the other fact emerged from the prosecution witness. Smt. Dhan Devi PW-3 is mother of the victim. She says that after the victim had gone to relieve herself. Therefore, heard an alarm and reached there with her brother-in-law Ram Babu and saw the appellants running from there. She was informed by her daughter that she was raped by these three appellants. Thus, she has not seen the occurrence. She had seen the appellants running away from the spot. From her testimony, it transpires that the F.I.R was lodged by her husband naming the victim as "X" but according to her she had not know the daughter having the "X" rather name of her daughter is "S". When her husband was confronted with this fact he has stated that he had two daughters the name of elder is "S" and the name of younger daughter is "C". He had no daughter known by the name of "X". In the first information report the name of the victim has been shown as "X". The victim in the memo of taking cloth has signed by rider her "X". The medical examination Ext.Ka-5 reveals that a girl namely "X" was medically examined. In the supplementary report Ext.Ka-6 situation is the same. In the chart the victim has been shown to be "X".

Now the question arose whether "S" was also called "X" or the first informant had lodged a false F.I.R complaining about the commission of offence punishable under section 3(2) (v) SC/ST (Prevention of Atrocities) Act.

On behalf of the defence it has been suggested that the member of Scheduled Caste when fell the victim to atrocities they used to get compensation and in the present case the first informant Janak Singh PW-1 admits that he had received Rs.25,000/- for the reported incident. It has also been suggested that in order to claim such a compensation the name of the victim is usually changed so that no one can object on the ground of repeated claims. The suggestion of the defence appears to be proper because I notice

that great discrepancy in the statement of the first informant. In the first information report he says that on 8.12.2002 her daughter was raped and he came back on 13.12.2002 then lodged the F.I.R. In his statement he says that he came back on the next following morning ie in the morning of 9.12.2002 and his wife told him about the occurrence after five days. This statement not only makes the F.I.R but also makes the statement of victim PW-2 and Dhan Devi PW-3 is unreliable due to none silence. It is known that mere suggestion from the record of the Court that the uncle of the victim and real brother of the first informant Ram Babu categorically stated that the victim was not raped on 8.12.2002 and a false F.I.R was lodged by his brother to get compensation. All the appellants were falsely implicated due to village politics. In site of cross examination came into 4 pages, the defence witness stood in ground and place it is the test of cross examination successfully The mother of the victim claims that this witness accompanied her to the seen of occurrence. This shows that the family of the victim had ever confidence in this person.

Suffice is to say that the statement of the victim PW-2 is of doubtful veracity due to inherent improbable from other fact noticed as above. Her statement cannot be relied upon except her statement, there was no evidence to show the complicity of the appellants in the alleged crime. Therefore the findings of guilt recorded by the learned trial Judge are erroneous. The learned trial Judge has not made any effort to ascertain whether any rape was committed or not. On this point the learned trial Judge has committed illegal error which resulted in erroneous findings, they deserve to be set aside as also the conviction and sentence of the appellants. The appeal has no substance.

The appeal is **allowed**. The impugned judgment and orders mentioned above as also conviction and sentences of the appellant No.1 Chandra Kishore and appellant No.2 Dilepp Kumar are set aside. They are acquitted from the charge framed under section 376 (2)(g) I.P.C read with Section 3(2) (V) SC/ST (Prevention of Atrocities) Act. They are

acquitted from the charge framed under section 376 and 506 I.P.C. They are in jail. If they are not wanted in any other case, they may be released forthwith.

Office is directed to communicate this decision to the court concerned forthwith and to send back the record.

Order Date :- 10.6.2016

G.S