

HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU

CRAA No. 01/2013.

Date of Judgment: 30.12.2017

State of J&K

vs

Sanjay Kumar

Coram:

Hon'ble Mr Justice Badar Durrez Ahmed, Chief Justice

Hon'ble Mr Justice Sanjeev Kumar, Judge.

Appearance:

For the Appellant(s) : Mr. Ravinder Gupta, AAG.

For the Respondent(s) : Mr. Anil Khajuria, Advocate.

i) Whether approved for reporting in Law journals etc.: Yes/No

ii) Whether approved for publication in press: Yes/No

Sanjeev Kumar-J

1. This acquittal appeal is directed against the judgment dated 28.09.2012 passed by learned Additional Sessions Judge, Udhampur (hereinafter referred to as "The trial Court") in file No. 66/Sessions titled State Vs. Sanjay Kumar.
2. The prosecution story as projected by the police in the charge-sheet is that the prosecutrix accompanied by her parents lodged a written complaint on 28.04.2006 in the police station Udhampur, stating therein that on the intervening night of 17/18th August, 2016, at about 1 a.m, the respondent entered into their house. The prosecutrix was sleeping in the open verandah. She was kidnapped by the respondent and taken to his shop situated nearby, where the respondent committed rape upon her. In the complaint, it was further stated that another person namely Kaka, the brother of respondent and one Yash Pal Singh S/O Hukma Singh were also present in the shop at night. All these three persons including the respondent took the prosecutrix

to the nearby jungle in the wee hours of next morning, where the respondent once again committed rape upon her. The further prosecution version is that on 19.04.2006, the prosecutrix was taken to the house of respondent by all the three from where she managed to flee and reached her home. The matter was not immediately reported to the police for the reason that the father of the prosecutrix was away. Pursuant to the aforesaid written report, F.I.R No. 96/2006 was registered in the police station Udampur against the respondent and two other persons namely Kaka and Hukam for commission of offences under Section 376 RPC. Consequent upon registration of the F.I.R, investigation was set in motion and the investigating officer after completing all requisite formalities, effecting seizures and recording the statement of witnesses under Section 161 Cr.PC as also after getting the reports from the Forensic Science Laboratory, Jammu with regard to the seized clothes and mattress allegedly containing semen stains, presented the challan in the trial Court only against the respondent exonerating the two other accused named in the written complaint i.e., Kaka and Yash Pal Singh. On 16.09.2006, the trial Court framed charge against the respondent for commission of offences under Sections 457/376/363/342 RPC. The respondent pleaded not guilty to the charge and claimed to be tried. The prosecution was, therefore, directed by the trial Court to lead evidence in the case. The prosecution examined as many as 18 witnesses out of total 25 witnesses cited in the charge-sheet. Prosecutrix is the only witness of occurrence whereas, the other evidence led by the prosecution is more or less circumstantial.

3. Before we consider the submissions made by the State in support of its appeal, it would be appropriate to take brief note of the statements of the relevant witnesses examined by the prosecution. The prosecutrix in her statement before the trial Court has stated that she knows the respondent who is her neighbour. On 8.04.2006, when she was sleeping alone in the verandah

of her house at about 3 a.m, the respondent accompanied by three persons entered her house. They gagged her mouth and took her to the shop of the respondent. She was taken to a room situated at the back of the shop where the respondent committed rape upon her. She has further stated that on the same night, the respondent and his companions took her into a forest situated half a kilometre away. The companions of the respondent however, came back from the jungle and Yash Pal and Kaka Ram, two brothers of the respondent along with some other people came in the forest and took her to the house of the village Numberdar. She was taken along with the respondent to the police station. She claims that she made a statement to the police who after recording her statement got her signatures also. She, however, denied her signatures on the application lodged by her on 20.04.2006. She has also claimed that she had studied up to 9th standard and had failed twice in the 10th class. Regarding her age, the prosecutrix submitted that her younger sister is 15/16 years old and that she was elder to her by one year. **PW Noor Bano** is the mother of the prosecutrix. In her deposition, she stated that she along with her children was sleeping inside the house whereas, the prosecutrix was sleeping in the verandah. She has further stated that in the morning, she did not find prosecutrix on her cot and thought her daughter might have gone out to attend the call of nature but when she did not come back, she enquired about her daughter in the locality. Next morning, her daughter came back home and told her that the respondent had kidnapped her. She, however, further stated that she did not know whether the respondent had committed rape upon the prosecutrix. She has also stated that prosecutrix was a student of 10th class and had failed in the said class once. **PW Ghulam Ali** is the father of the prosecutrix. He is a hearsay witness and has deposed whatever was allegedly told to him by his wife PW Noor Bano. He has, however, stated that the age of his daughter was 15/16 years. He, however, could not state the year and month of the birth of the prosecutrix. He, however, proved his signatures on the seizure memos with respect to the

seized clothes of his daughter. **PW Abdul Karim**, however, denied that his statement was ever recorded by the police. He is also a hearsay witness having heard that the daughter of PW Noor Bano had gone missing. He has not stated anything incriminating against the respondent. Similarly, **PW Shah Mohd.** is only a witness to the disclosure memo though he identified his signatures on the disclosure memo but stated that the police got his signatures forcibly. He even denied having made the statement as recorded by the police under Section 161 Cr.PC. **PW Mohd. Sharif** is a person with whom the prosecutrix had been later on married. He has denied that any such occurrence with regard to the kidnapping of the prosecutrix and commission of rape upon her by the respondent had ever happened. **PW Sakeena**, **PW Hukma Singh** and **PW Zunaid Ali** and **PW Swami Raj** are the witnesses to different seizure memos with respect to the seized articles. **PW Zunaid Ali** has specifically stated that nothing was recovered in his presence at the instance of respondent and that the contents of recovery memo were incorrect. **PW Dr. Sushma Dhar** was one of the members of the board of doctors constituted for examination of the prosecutrix. In her deposition, she stated that she did not find any marks of violence on the person of the prosecutrix though on local examination, the Hymen was found torn and old tears present. She further stated that there was no fresh laceration present and vaginal smear showed no Spermatozoa dead or alive. She finally opined that prosecutrix was found habitual to intercourse. **PW Dr. Ashwani Kumar** and **PW Dr. Arvind** who were other members of the medical board have echoed the statement made by PW Dr. Sushma Dhar. The medical witnesses aforesaid thus, could not come to a definite opinion with regard to occurrence of rape in the recent past. **PW Dr. Mainsha Langer** is a radiologist who had examined the prosecutrix. She, in her deposition, has stuck to her opinion that the prosecutrix was more than 14 years and less than 16 years. Interestingly, in her deposition, PW Dr. Manisha Langer stated that she was not aware of the term "Ossification Test". She further stated that

the age varies from place to place according to the climatic conditions. She, however, stated that the certificate was given by her after examining the skiagram. She, therefore, has not been able to give any definite basis for arriving her opinion viz-a-viz the age of the prosecutrix. The other witnesses are not relevant insofar as the prosecution case is concerned. **PW Aftab Hussain** has narrated the manner in which he conducted the investigation in the matter. He further stated that he recorded the statement of prosecutrix on 21.04.2006 though the prosecutrix had lodged the F.I.R on 20.04.2006. He has further stated that though the prosecutrix had read up to 9th in the school but he did not get a certificate from school authorities with respect to her date of birth rather he got the age of the prosecutrix determined from doctor. This in a nutshell is the evidence adduced by the prosecution.

4. On conclusion of the prosecution evidence as usual, the incriminating circumstances wherever appearing in the prosecution evidence were put to the accused and his statement under Section 342 Cr.PC was recorded. The respondent in his statement under Section 342 Cr.PC stated that the age of the prosecutrix was more than 18 years. He also stated that because of animosity of the father of the prosecutrix with him, false statement was made by the prosecutrix to implicate him. He specifically denied that he ever kidnapped the prosecutrix or committed any rape upon her. The respondent also produced **DW Mohan Lal** and **DW Joginder** as defence witnesses. Both the witnesses have stated in one breath that prosecutrix used to demand credit from the shop of the respondent which the respondent used to avoid and that there was also enmity between the respondent and the family of the prosecutrix with respect to land and therefore, a case was fabricated against the respondent.
5. This in a nutshell is the total evidence led in the case and the learned trial Court after meticulously examining the same came to the conclusion that prosecution had miserably failed to bring home the guilt of the respondent

beyond reasonable doubt and that the evidence collected by the prosecution was insufficient to hold the respondent guilty of the offences for which he had been charged. The learned trial Court has rightly found that as per the prosecution evidence which includes the statement of the prosecutrix, the prosecutrix reached the police station on the night of 18.04.2006 itself when, as she claims, she was brought to the police station by Yash Pal and Kaka Ram, the brothers of the respondent along with some other people, yet no report of kidnapping and rape was lodged by her in the police station. As per prosecution, a written report was filed in the police station only on 20.04.2006 pursuant to which the F.I.R was registered in the police station. There is, thus, unexplained delay of two days in lodging the F.I.R which casts doubt on the veracity of the prosecution case. It is no doubt true that in a case of sexual assault, the Court can base conviction on the sole testimony of the prosecutrix provided the same inspires confidence of the Court and is credible, reliable and unimpeachable. The circumstances narrated by the prosecutrix with respect to her kidnapping and subsequent rape on the face of it do not inspire confidence. As is rightly observed by the trial Court, it is improbable that all family members i.e., brothers and sisters of the prosecutrix along with their mother were sleeping in a room bolted from inside but the prosecutrix was sleeping alone in the verandah of her house. Right from the time of her alleged kidnapping till she was brought to the police station after having remained for some time in the night in jungle, she did not raise any alarm. Her statement that she had biscuits in the jungle offered by the respondent does point out to a natural presumption that she had been a consenting party in the alleged episode of kidnapping. From the analysis of the evidence led by the prosecution, the learned trial Court rightly concluded that the age of the prosecutrix was 18 years and in any case more than 16 years. Referring to the medical evidence, it was found that there was no mark of violence found on the body of the prosecutrix nor the prosecution could prove any definite medical opinion with regard to the commission of

sexual assault in the recent past. To top it all, the prosecution did not produce the concerned Scientific Officer of FSL to prove his report nor the prosecution furnished any reason or explanation for withholding the said witness. Even the best evidence with regard to the age of the prosecutrix i.e a certificate from the concerned school where she had studied up to matric was not procured by the prosecution.

6. For all these reasons and the reasons stated in detail by the trial Court, the trial Court found the evidence collected by the prosecution insufficient to connect the respondent with the commission of the offence he was charged with and therefore, acquitted the accused.
7. We, for our satisfaction as also to find as to whether there was any infirmity in the judgment impugned, once again went through the whole evidence led by the prosecution but could not come to an opinion contrary to the one taken by the trial Court. It is now a trite law that while hearing an appeal against the order of acquittal, the powers of appellate Court are circumscribed by well established principles. The Supreme Court in **Vijay Kumar Vs. State; (2009) 12 SCC 629**, paragraph (12) held thus:

“(1) In an appeal against an order of acquittal, the High Court possesses all the powers, and nothing less than the powers it possesses while hearing an appeal against an order of conviction.

(2) The High Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusion and findings in place of the findings recorded by the trial Court, if the said findings are against the weight of the evidence on record, or in other words, perverse.

(3) Before reversing the finding of acquittal, the High Court has to consider each ground on which the order of acquittal was based and to record its own reasons for not accepting those grounds and not subscribing to the view expressed by the trial Court that the accused is entitled to acquittal.

(4) In reversing the finding of acquittal, the High Court has to keep in view the fact that the presumption of innocence is still available in favour of the accused and the same stands fortified and strengthened by the order of acquittal passed in his favour by the trial Court.

(5) If the High Court, on a fresh scrutiny and reappraisal of the evidence and other material on record, is of the opinion that there is another view which can be reasonably taken, then the view which favours the accused should be adopted.

- (6) *The High Court has also to keep in mind that the trial Court had the advantage of looking at the demeanour of witnesses and observing their conduct in the Court especially in the witness box.*
- (7) *The High Court has also to keep in mind that even at that stage the accused was entitled to benefit of doubt. The doubt should be such as a reasonable person would honestly and conscientiously entertain as to the guilt of the accused."*

8. It is equally well settled that in an acquittal appeal, if the appellate Court on appreciation of evidence finds that another view different from the one taken by the learned trial Court is also possible, the view which favours the accused has to be taken (see *Hari Ram Vs State of Rajasthan* ;(2000)9 SCC 136).
9. That being the principle of law defining the scope of interference in acquittal appeals, we do not find any merit in this appeal and the same is, therefore, dismissed.

Jammu
30.12.2017
Tarun



(Sanjeev Kumar)
Judge

(Badar Durrez Ahmed)
Chief Justice