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VISVESWARAN

v.

STATE REP. BY S.D.M.

APRIL 28, 2003

B

[Y.K. SABHARWAL AND H.K. SEMA, JJ.]

*Penal Code, 1860: ss. 346, 366 and 376:*

C

*Rape of a young woman by a police constable—Conviction by Trial Court—Affirmed by the High Court—Victim and other witnesses failed to identify accused in the Court—Test identification parade not conducted—Effect of—Conviction—Correctness of—Held: when the guilt of the accused is established by the circumstantial evidence or otherwise, identification of the accused either in test identification parade or in the Court is not necessary to convict him—Any defect in the investigation need not necessarily result in the acquittal—Rape cases are required to be dealt with utmost sensitivity by the Court—Minor contradictions/insignificant discrepancies may be ignored.*

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E

*Evidence—Appreciation of—Courts to take extra caution while evaluating evidence—Evidence must be appreciated having regard to the entire background of the case—Under the facts and circumstances of the case commission of rape was fully established—Non-holding of test identification parade not fatal and does not create any reasonable doubt in the case of prosecution—Evidence Act, 1872—Circumstantial evidence.*

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**According to the prosecution, the victim, her husband and other relatives had been pursuing the profession of lead coating to vessels/utensils. On the fateful night when the victim and others were sleeping, appellant, a police constable, had taken the victim and her husband in a taxi on the pretext of some inquiry and on the way, pushed her husband and later raped her in a hotel. In the morning, the victim escaped and narrated the incident to her husband and others. They had lodged an FIR in the nearby Police Station. Matter was investigated and the final report was submitted against the police constable under Sections 366 and 376 IPC.**

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**Trial Court found the accused guilty of offences under Sections 346, 366 and 376 IPC, and convicted and sentenced him accordingly. The**

conviction/sentence was affirmed by the High Court. Hence the present appeals. A

It was contended for the appellant that in the absence of any evidence establishing identity of the appellant as the accused who committed the rape on the victim, he could not be held liable for the offences charged; and that non-holding of test identification parade was fatal to the case of prosecution. B

Dismissing the appeals, the Court

HELD: 1.1. In view of the background of the case, the strata of society to which the victim belongs and the nature of her profession and the established fact that the victim was picked up by a Police Constable ostensibly for interrogation on the pretext of suspicion on some complaint having been made and then used to fulfil sexual hunger, there is no material to come to the conclusion that the appellant was falsely implicated since his involvement in the crime has been established from the circumstances of the case beyond any reasonable doubt. [984-E] C D

1.2. It is unfortunate that test identification parade was not held. An important aspect of the case is that the appellant had beard and moustaches when the victim and her husband were examined as witnesses for the prosecution. It was not so at the time of the occurrence. Thus, they could not identify him in the Court. It does not mean that the acquittal is to follow as a natural corroboratory from their statements. The identification of the accused either in test identification parade or in Court is not a sine qua non in every case if from the circumstances the guilt is otherwise established. The commission of crime can also be proved by circumstantial evidence. In the instant case, there are clinching circumstances unerringly pointing out the accusing finger towards the appellant beyond any reasonable doubt. [985-A-C] E F

1.3. The approach required to be adopted by courts in such cases has to be different. The cases are required to be dealt with utmost sensitivity. Courts have to show greater responsibility when trying an accused on charge of rape, the broader probabilities are required to be examined and the courts are not to get swayed by minor contradictions or insignificant discrepancies which are not of substantial character. The evidence is required to be appreciated having regard to the background of the entire case and not in isolation. The ground realities are to be kept in view and H

A that every defective investigation need not necessarily result in the acquittal. In defective investigation, the only requirement is of extra caution by Courts while evaluating evidence. It would not be just to acquit the accused solely as a result of defective investigation. Any deficiency or irregularity in investigation need not necessarily lead to rejection of the case of prosecution when it is otherwise proved. In the instant case, it is no doubt true that if the evidence of witnesses was examined in isolation, without having regard to the said principles, identity of the appellant could not be established due to defective investigation of not holding test identification parade and the benefit should go to the appellant. However, when the case is examined having regard to these legal principles, the result would be otherwise. [985-D-H]

D 1.4. The circumstances which had been taken into consideration against the appellant by the trial court as well as the High Court were that the appellant, a Police official, was caught from a room in a hotel. The hotel record showed booking of the room in that hotel by the appellant and also payment of an advance. The appellant could not explain his whereabouts during the time the offence was committed. He was not cooperative during investigation. He declined to give sample of his semen. He was having different appearance at the time of examination of the prosecution witnesses. [985-H; 986-A, B]

E 1.5. The testimony of the prosecution witnesses was straightforward. The witnesses immediately after the commission of offence, had named the appellant. The non-holding of the test identification parade, having regard to the facts of the case, is not fatal and does not create any reasonable doubt in the case of the prosecution. [986-C, D]

F CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 929-930 of 2002.

G From the Judgment and Order dated 7.3.2001 and 19.7.2001 of the Chennai High Court in CrI. A. No. 682 of 1993.

K.V. Viswanathan, K.V. Venkataraman, Atul K. Sinha, Kunwar Ajit Mohan Singh, K.V. Vijay Kumar for the Appellant.

Krishnan Venugopal and P.N. Ramalingam for the Respondent.

H The Judgment of the Court was delivered by

**Y.K. SABHARWAL, J.** The appellant has been convicted by the trial court for wrongful confinement (Section 346), abduction (Section 366) and rape (Section 376). On conviction, rigorous imprisonment for a period of seven years and fine of Rs.10,000 for offence under Section 376 and lesser punishments for other offences were imposed. The conviction and sentence has been maintained in appeal by the High Court in terms of the impugned judgment which is under challenge on grant of leave. A B

The appellant at the relevant time was posted as a Constable in the Prohibition Wing of Conoor Police Station. The victim, PW1, was a young, recently married rustic woman. The commission of crime on the person of the victim by a Police Constable has also been fully established and is not a matter in issue. The issue that has been raised in this appeal is about the identity of the accused. C

The established facts are that during March 1989, PW1, her husband (PW2), Uncle of PW2 (PW4) and their other relatives pursuing the profession of lead coating to vessels/utensils, used to go from place to place for the purpose of their profession. At the relevant time, they were at Kethi in Udthagamandalam for the said purpose. Their native place is Pondicherry. On the night between 11th and 12th March, 1989, while all these persons were sleeping on the bus stand, a Police Constable came in a taxi at about 1 a.m. and asked PW1 and PW2 about their identity and profession. On PW1 replying that PW2 is her husband and they had come for the purpose of their profession of lead coating to vessels, they were told that there was a suspicion on them and were asked to board that taxi. Under these circumstances, they were made to board the taxi. After covering some distance, PW2 was pushed out from the taxi and when asked why was he pushed out, PW1 was told that her parents had made a complaint and she had to be interrogated alone. She was forcibly taken into a room in Woodlands Hotel at Udthagamandalam. The room was bolted from inside and rape committed on her. In the morning, the taxi-driver came and tapped the door, the Police Constable went inside the bathroom instructing the driver to bring the taxi. When he was in the bathroom, PW1 bolted the door from outside and came out of the hotel. PW1 thereafter with the help of an old man reached the bus stand and narrated the incident to PW2 and PW4. They then went to the Police Station Kethi and she narrated the incident which was reduced into writing by Sub-Inspector of Police. It is Exhibit P-1. Exhibit P-1 was signed by PW1. PW12 registered a case under Sections 366 and 376 IPC and submitted it to the Inspector of Police. Exhibit P-19 is the First Information Report. PW13, the Inspector of Police received D E F G H

A A copy of Exhibit P-19 and recorded statements of PW1 and PW2 and thereafter sent PW1 for medical examination in the hospital. As the accused was serving in the Police department, PW13 submitted the file to the Revenue Divisional Officer (PW14). Exhibit P-20 is the letter written by PW13 submitting the file to PW14. The accused was not available when PW14 searched for him. All this happened on 12th March.

B On 13th March, PW14 went to the hospital and seized the clothes worn by PW1 and arrested the accused in Woodlands Hotel. As the accused was in intoxicating mood, a certificate from the doctor was obtained. The clothes of the accused were also seized. The car driver (PW5) and the cleaner (PW6) were located at 10 p.m. and so also the taxi. PW14 recorded the statement of PW5, PW6 and PW7 on 13th March. PW7 is a car mechanic in whose presence taxi was hired for conducting a raid. Accused was sent for medical examination on 14th March, 1989. The car was also seized on 14th March under Exhibit P-23 and PWs.5, 6 and 7 were arrested. The doctor who examined PW1 appeared as a prosecution witness (PW10). PW1 told PW10 that she had been raped by a Police Constable. PW15 another doctor, who examined the accused at 11.15 a.m. on 14th March, found following injuries on the accused :

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- “1. Abrasion with constusion 1/2 cm long in the right side of the chest in the region.
  2. Abrasion 1/2 cm long in the left side of the chest just below the lateral end of the left clavicle.
  3. Abrasion in front of left shoulder 1/2 cm long.”

F PW15 found the above injuries when the accused was produced before him to find out his potency. PW15 also found dried semen at the lower portion of male organ of the accused. The accused, however, did not permit PW15 to take the sample of semen stating that he was impotent at that time. PW15 also deposed that it is possible for the injuries to be caused when the nails of a girl come in contact when she is raped. The Revenue Divisional Officer, Conoor, after recording the statement of witnesses laid the final report against the accused under Sections 366 and 376 IPC.

G The prosecution examined 15 witnesses. None was examined by the accused. In his statement under Section 313 Cr.P.C., the accused stated that the evidence given by the prosecution witnesses is false. The courts below, on appreciation of evidence, convicted and sentenced the accused as above

stated.

It stands established from evidence and could not be questioned that PW1 was picked up and raped by a Police Constable substantially in the manner deposed by her. The only dispute that has been raised is about the identity of the accused. Learned counsel for the appellant contends that the prosecution has miserably failed to establish that the appellant committed the crime. The contention of Mr. Viswanathan is that it is a case of no evidence since there is not even an iota of evidence to connect the appellant with the commission of the offence and, in fact, it stands disproved that the appellant is the person who committed the crime.

In order to properly appreciate the contention of learned counsel, it would necessary to bear in mind the background of the case including the state of society to which the victim belongs, her profession as also of the accused and the manner in which investigation was conducted. It is a common practice with those carrying the profession which PW1 and PW2 were carrying, to sleep during night on roadside or such similar place, while going from place to place. As above noticed, PW1, PW2 and PW4 were sleeping on a bus stand when PW1 and PW2 were picked up by a Constable ostensibly for interrogation on a suspicion allegedly on a complaint made. It is also apparent from record that the investigation has been highly defective. The question to be examined, however, is whether despite discrepancies and deficiencies pointed out and strongly pressed into service by learned counsel for the appellant, has the prosecution been able to prove, beyond reasonable doubt, the guilt of the appellant.

The evidence of PW1 and PW2 was recorded by the trial court in September 1993. The main discrepancy and deficiency in the case of the prosecution that has been heavily relied upon by Mr. Viswanathan is that none of the witnesses including PW1 and PW2 could identify the appellant. It is correct, as pointed out by the learned counsel, that both PW1 and PW2 stated in their evidence that the person who took them in the car was not present in the Court. Similar was the statement of PW4. PW5 who was driver of the vehicle in the question was declared hostile. PW6, the cleaner of the vehicle, was also declared hostile. He also did not name the appellant. PW7, a car mechanic who was present when the taxi was hired from the taxi stand, was examined in the Court of Judicial Magistrate where he stated that the appellant had engaged a taxi and brought a boy and a girl and went with the girl. However, in cross-examination, he stated that the said statement was

A given at the instance of the Police and that when he was examined by RDO-PW14, he had only stated that the person was a Police Constable and had not told his name but in the Court of Judicial Magistrate, the name of the Police Constable as Visveswaran - the appellant was stated only after the Police had told him to do so. In view of this evidence, it was strenuously contended that the present case is of no evidence and, therefore, the appellant is entitled to a clean honourable acquittal and not an acquittal as a result of a reasonable doubt in the prosecution case. The further contention of learned counsel was that under these circumstances, the non holding of test identification parade was fatal to the case of the prosecution. At the first blush, we were much impressed by the contentions but on deeper consideration, we are of the view that in the facts and circumstances of the case, no interference is called for with the findings arrived at by the trial court and affirmed by the High Court on appreciation of evidence despite the aforesaid deficiencies and discrepancies pointed out on behalf of the appellant.

D Having already noticed the background of the case, the state of society to which the victim belongs and the nature of her profession and the established fact that the victim was picked up by a Police Constable ostensibly for interrogation on the pretext of suspicion on some complaint having been made and then used to fulfil sexual hunger, we find no material to come to the conclusion that the appellant was falsely implicated since his involvement in the crime has been established from the circumstances of the case beyond any reasonable doubt. PW1's deposition was that she could identify the person who raped her. She also told so to the Police. She further stated that his name starts with word 'Visu'. She also told PW14 that she could identify the person who raped her. To the similar effect was the statement of PW2. PW2, on examination by RDO, gave the name of the person as Visveswaran - the Appellant. PW6, though declared hostile, did support the case of the prosecution to the extent that a boy and a girl were taken in the car by the driver at the request of a Police Constable and on way the boy was dropped. He, however, stated that the girl was sent back after interrogation. As already noticed, PW7, though stated before the Judicial Magistrate that the appellant had engaged the taxi and brought a boy and a girl and went with the girl, but in cross-examination, stated that the name of the appellant was given by him at the instance of the Police. The victim was raped by a Police Constable in a hotel. The question is as to the identify of that Police Constable. Was the appellant the said Police Constable, or there was some other Police Constable?

H It is unfortunate that despite the aforesaid facts, the test identification

parade was not held. An important aspect of the case is that the appellant had beard and moustaches when PW1 and PW2 were examined as witnesses for the prosecution. It was not so at the time of the occurrence. PW1 and PW2, therefore, it is evident, could not identify him in Court and stated in their deposition that the said person is not in Court. It does not mean that the acquittal is to follow as a natural corroboratory from the statements of PW1 and PW2. The identification of the accused either in test identification parade or in Court is not a sine qua non in every case if from the circumstances the guilt is otherwise established. Many a times, crimes are committed under cover of darkness when none is able to identify the accused. The commission of crime can be proved also by circumstantial evidence. In the present case, there are clinching circumstances unerringly pointing out the accusing finger towards the appellant beyond any reasonable doubt.

Before we notice the circumstances proving the case against the appellant and establishing his identity beyond reasonable doubt, it has to be borne in mind that approach required to be adopted by courts in such cases has to be different. The cases are required to be dealt with utmost sensitivity, courts have to show greater responsibility when trying an accused on charge of rape. In such cases, the broader probabilities are required to be examined and the courts are not to get swayed by minor contradictions or insignificant discrepancies which are not of substantial character. The evidence is required to be appreciated having regard to the background of the entire case and not in isolation. The ground realities are to be kept in view. It is also required to be kept in view that every defective investigation need not necessarily result in the acquittal. In defective investigation, the only requirement is of extra caution by Courts while evaluating evidence. It would not be just to acquit the accused solely as a result of defective investigation. Any deficiency or irregularity in investigation need not necessarily lead to rejection of the case of prosecution when it is otherwise proved.

Reverting to the instant case, it is no doubt true that if the evidence of witnesses is examined in isolation, without having regard to the aforesaid principles, there may be considerable force in the submission that the identity of the appellant has not been established and likewise as a result of defective investigation of not holding test identification parade, the benefit should go to the appellant. However, when the case is examined having regard to the aforesaid legal principles, the result would be otherwise. Circumstances which have been taken into consideration against the appellant by the trial court as well as the High Court are that the appellant, a Police official, was caught



- A from a room in a hotel. The proprietor of the hotel was examined as PW3. The hotel record (Exhibits P-4 and P-5) showed booking of the room in that hotel by the appellant and also payment of advance of Rs.100/-. PW3 had also been examined by PW14. The appellant could not explain his whereabouts during the time the offence was committed. He was not cooperative during investigation. He declined to give sample of his semen. He was having different appearance at the time of examination of PW1 and PW2 in Court. At the time of commission of offence, he did not have beard and the moustaches. However, when PW1 and PW2 were examined in Court, he had beard and the moustaches and was wearing Dhoti. The testimony of PW1 and PW2 was straightforward. The witnesses, immediately after the commission of offence, had named the
- C appellant. The non-holding of the test identification parade, having regard to the facts of the case, is not fatal and does not create any reasonable doubt in the case of the prosecution. We are unable to accept the contention that the identity of the appellant had not been proved. From the proved circumstances, it has been fully established that PW1 was picked up and raped in a hotel room as per the case set up by the prosecution by a Police Constable who
- D was none other than the appellant. There is no infirmity in the impugned judgment of the High Court. The appeals are accordingly dismissed.

S.K.S.

Appeals dismissed.