

RAJASTHAN HIGH COURT
HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

S.B. Criminal Appeal No. 90/1992

Ghulam Mohammed son of Ghulam Rasool (Ghulam Hussain)
Resident of Phoota Khurra Police Station Ramganj, Jaipur at
present at Central Jail, Jaipur

----Appellant

Versus

State of Rajasthan through Govt. Advocate

----Respondent

For Appellant(s) : Mr. Sudhir Jain, Adv. with
Mr. Parth Sharma, Adv.
For Respondent(s) : Mr. Imran Khan, Public Prosecutor

HON'BLE MR. JUSTICE ANOOP KUMAR DHAND

Judgment

RESERVED ON : 09/05/2024

PRONOUNCED ON : 20/05/2024

REPORTABLE

For convenience of exposition, this judgment is divided in the
following parts: -

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Factual Matrix:-

1. The appellant herein calls into question the impugned judgment dated 27.02.1992 passed by the Special Judge, Sati Nivaran and Additional Sessions Judge, Jaipur City, Jaipur in Sessions Case No.1/1991 by which the accused-appellant (hereinafter referred to as 'the appellant') has been convicted for the offence punishable under Section 376 IPC and has been sentenced to undergo seven years' rigorous imprisonment with fine of Rs.500/- and in default of payment of fine, further to undergo two months' additional simple imprisonment.
2. Shorn of details, the facts relevant and essential for disposal of the appeal are noted hereinbelow.

Case of Prosecution:-

3. PW-1 'R' lodged First Information Report (FIR) (Ex.P-1) with Police Station Ramganj, Jaipur City, Jaipur alleging therein that her second marriage was solemnized with Ghulam Mohammed under the Special Marriage Act. From the first wedlock with Late Rampal Meena, two children were born. The age of the son 'K' is 18 years and of daughter 'S' is 13 years. Two years back, she went to Godha Bhawan and stayed there for some days. Taking benefit of her absence, her husband Ghulam Mohammed committed rape upon her daughter. A month back, her daughter told her that Ghulam Mohammed committed rape thrice upon her and even the same act was done at the house of Sayeed etc.
4. Upon this report, FIR was registered for the offence under Section 376 IPC against the appellant and after investigation, the appellant was charge - sheeted under Section 376 IPC and charge was framed for the same offence. The appellant denied the charge

and claimed trial. The prosecution examined five witnesses. Thereafter, the appellant in his explanation under Section 313 CrPC claimed himself as innocent but no evidence was produced in defence. After completion of trial, the trial Court found him guilty and convicted and sentenced him as indicated hereinabove.

Submissions on behalf of the Appellant:-

5. Counsel for the appellant submits that the FIR (Ex.P-1) was lodged by the mother of the prosecutrix wherein the allegations have been levelled against the appellant that on three different occasions, rape was committed by him with her daughter. Counsel submits that as per the FIR, the first incident occurred two years back from date of FIR and for lodging the delayed FIR, no explanation has been given. Counsel submits that when the statements of the mother 'R' (PW-1) of the prosecutrix was recorded during the course of trial, she has not supported the version of prosecution and she has been declared as hostile. Counsel submits there are a lot of contradictions in the statement of the prosecutrix 'S' (PW-2) with regard to the offence. Counsel submits that one incident of rape has been allegedly committed in the presence of the mother of the prosecutrix. Counsel submits that such story of prosecution and such allegations of the prosecutrix is not reliable. Counsel submits that allegations of rape are not corroborated by the medical evidence when the prosecutrix was medically examined and her Medico Legal Report (MLR) (Ex.P-7) was prepared. Counsel submits that no injury was found on the private and external part of the prosecutrix and the Doctor was not sure about the rape. Hence, vaginal swab was sent to the Forensic Science Laboratory (FSL) for analysis but the

prosecution has failed to exhibit the said report of FSL on record to connect the appellant with the alleged incident. Counsel submits that when the statement of the Investigating Officer were recorded, he has admitted that the FIR was received by police station on 22.06.1990 but the report was lodged on 02.07.1990 and no site plan of the place of occurrence was prepared. Counsel submits that the prosecution itself is not clear about the place of occurrence where the incident has occurred. Counsel submits that at the instance of one Rajendra Godha, the instant false case was lodged against the appellant but the prosecution has failed to examine this material witness. Counsel submits that when the statement of Dr. Manju Sharma (PW-5) were recorded, she has admitted in her cross-examination that the hymen of the prosecutrix might have ruptured due to sustaining an injury. Counsel submits that there are lot of contradictions in the statements of the witnesses which create serious doubt on the entire prosecution story. Hence, under these circumstances, the trial Court has committed an error in convicting the appellant for the alleged offence and the judgment passed by the trial Court is not sustainable in the eye of law and the appellant is liable to be acquitted. In support of his contention, counsel for the appellant has placed reliance on the following judgments:-

- (I) **Ramdas and Others Vs. State of Maharashtra** reported in **2007 AIR (Supreme Court) 155;**
- (II) **Suta Ram @ Ramjilal Vs. State of Rajasthan** reported in **2010(2) RLW 1507 and**

(III) **State Vs. Madhu Puri & Ors. (S.B. Criminal Leave to Appeal No.4/2010** decided on 06.02.2012) reported in **2012(3) RLW 2714.**

Submissions by the Public Prosecutor:-

6. Per contra, learned Public Prosecutor opposed the arguments raised by the counsel for the appellant and submitted that looking to the age of the prosecutrix 'S' i.e. 13 years only, it cannot be believed that she would have levelled false allegation against her step father. Counsel submits that in spite of the fact that the FIR was lodged by the mother of the prosecutrix and she turned hostile, even then the prosecutrix dared to depose against the appellant about the incident occurred with her. Counsel submits that as per the medical report of the prosecutrix, her hymen was found to be ruptured. Counsel submits that hymen of the minor child like the petitioner could not be ruptured unless such incident occurred with her. Counsel submits that delay in such matter is not material as the allegations are there against the step father of the petitioner. Counsel submits that considering all these material available on the record, the trial Court has not committed any error in convicting the appellant for the offence punishable under Section 376 IPC. Counsel submits that the judgment passed by the trial Court is just as well as cogent and reasoned, which needs no interference of this Court.

Analysis & Discussions:-

7. Heard and considered the submissions made at Bar and perused the material available on record.

8. Having gone through the statements of PW-1 'R', who is mother of the prosecutrix, at whose instance, the entire

investigation was set into motion and she herself has not supported the case of prosecution and she has been declared as hostile.

9. PW-2 'S' has stated that her mother PW-1 'R' went to meet her brother and she was at home where the accused committed rape upon her. Then they shifted to a newly rental house at Ramganj, there also the accused committed rape upon her, and the accused told her not to tell about the incident to her mother and she kept mum. After some days, again the accused tried to remove her cloths in the rainy reason when her mother was sleeping. In her cross-examination, this witness has admitted that the incident was committed with her two years back, one month prior to lodging of FIR by her mother. She has also stated that on many occasions, the appellant made the same attempt even in the presence of mother when she was sleeping. In the cross-examination, she has submitted that the incident of rape was committed with her at home situated at Chhoti Chopar then she changed her version and submitted that it occurred at the home at Kishanpole. She has admitted in her cross-examination that she remained silent for two years after the incident and thereafter she told the police about the incident of rape. She has denied the suggestion that the report was lodged at the instance of Rajendra Godha.

10. The Investigating Officer Vishambhar Dayal (PW-3) investigated the matter and recorded the statements of the witnesses and arrested the appellant vide arrest memo (Ex.P-3) and he got the prosecutrix medically examined from the Doctor

and her vaginal swab was sent by him to FSL for analysis vide receipt (Ex.P-4).

In his cross-examination, he has admitted that though the report (Ex.P-1) was received by him on 26.06.1990 but the same was kept pending for pre-investigation and the FIR was registered on 02.07.1990 while the statements of informant/complainant 'R' were recorded on 01.07.1990. He admitted that this fact came up during his investigation that the informant 'R' was residing at the house of one Rajendra Godha but his statements were not recorded by him. He admitted that no site plan of the place of occurrence was prepared by him because there was no need for doing so and he has not gone to the place at the instance of the prosecutrix where the incidents of rape were allegedly committed upon her.

11. There is no provision under the Code of Criminal Procedure or criminal jurisprudence to keep any report of offence of rape or any offence pending for pre-investigation for considerable time and record the statement prior to lodging of FIR. Here in this case the FIR (Ex.P-1) was registered on 02.07.1990 while the statement of the informant 'R' was recorded on 01.07.1990 vide exhibit P2. The investigation made by this Investigating Officer is so defective that no site plan of the places of occurrence were prepared by him to prove the case of prosecution where the incidents of rape were allegedly committed with the prosecutrix 'S'.

12. Recording of police statement (Ex.P2) of PW-1 'R' by the Investigating Officer (I.O.), Vishambhar Dayal (PW-3) on 01.07.1990 i.e. prior to lodging of FIR (Ex.P.1) is quite surprising

because the motion of law came into picture on 02.07.1990 when the FIR was registered under Section 154 CrPC. Even in a serious case of rape where the incident has occurred at two-three different place of occurrence and the Investigating Officer has neither prepared the site plan of all the places of occurrence nor taken the prosecutrix 'S' (PW-2) and the informant/complainant 'R' (PW-1) to the 'scene of offence' where the occurrences of rape have taken place. When this Investigating Officer was put to cross-examination about his such inaction, he answered that "he did not deem it just and proper to prepare the site plan and take the prosecutrix at the scene of offence". Such kind of action of I.O. amounts to misuse of the power. This Court is surprised to note that the trial Court has overlooked this critical aspect of the matter. The independent witness Rajendra Godha has not been examined by this Investigating Officer. Hence, there is a serious doubt created about the genuineness of the prosecution case.

13. In order to ascertain the age of the prosecutrix, her medical examination was conducted by Dr. Vivekanand Goswami (PW-4) who gave his opinion on the basis of X-Ray Report (Ex.P-6) that her age was 12 to 14 years. In his cross-examination, he has admitted that the age of the prosecutrix may vary by +/- two years and it might be 10 years or 16 years.

14. The prosecutrix 'S' (PW-2) was medically examined by Dr. Manju Sharma (PW-5) on 03.07.1990 and she prepared her Medical Report (Ex.P-7) and she did not find any injuries on her private and external parts of the body and her hymen was found old teared and ruptured and she was not found virgin. In absence of chemical report, no opinion regarding rape was given by her.

In her cross-examination, she admitted that generally the hymen of 11 year old girl remains intact and if intercourse is done then bleeding might occur in hymen. Hymen may rupture due to sustaining of any injury. She was unable to explain how hymen of the prosecutrix was ruptured.

15. On perusal of the Medical Report (Ex.P-7) and statements of the Medical Officer Dr. Manju Sharma (PW-5), it is clear that no injuries were found on the private and external parts of the body of the prosecutrix 'S' (PW-2) and no opinion regarding rape was given in absence of chemical report i.e. Forensic Science Report (FSL).

It is worthy to note here that vaginal smear was not taken but only vaginal swab of the prosecutrix 'S' was taken when she was medically examined and the same was sent to FSL vide receipt (Ex.P-4) for chemical analysis but no FSL report has been exhibited on the record. Hence, there is no corroborative evidence available on the record that the prosecutrix 'S' was raped or recent sexual intercourse was committed with her.

16. In view of the above backdrop, now the whole case of prosecution rests on the solitary testimony of the prosecutrix 'S' (PW-2).

17. Truly, it is settled law that the Court can base the conviction of the accused in rape cases solely on the basis of evidence of the prosecutrix if it is found to be trustworthy and worthy of credence. It may be mentioned here that there is no rule of prudence that in every case there must be corroboration of the statements of the prosecutrix before a conviction can be based thereon, but as matter of prudence, the necessity of corroboration must be

present in the mind of the Court, especially when it is found that the prosecutrix is not giving any true facts.

Here in the instant case, the prosecutrix remained silent for two years even after the alleged act of the appellant and she did not narrate the incident even to her mother for about two years from the date of first incident of rape. Then again she kept mum for more than a month when the second incident of rape was committed with her. Keeping silence for such inordinate and considerable time makes the prosecution case suspicious and improbable.

18. Her statements does not stand corroborated by medical evidence as no marks of injury was found on her private and external parts of her body and no FSL report was exhibited by the prosecution to establish the recent act of sexual intercourse with the prosecutrix 'S' (PW-2).

19. At one point of time, she has alleged that the appellant attempted to commit the incident with her in the presence of her mother when she was sleeping. Even then she did not narrate this incident to her mother. Such allegation appears to highly improbable.

20. The entire case is based on the report of the incident lodged by the mother of the prosecutrix 'R' (PW-1) and she has not supported the case of prosecution and she has been declared as hostile. Hence, the case of prosecution does not inspire any confidence.

21. The learned Trial Court on the basis of the fact that the child victim maintained her version throughout the proceedings and was consistent, convicted the appellant on the sole testimony of the



child victim and with there being a lack of any evidence to prove the defence of the appellant.

Legal position of verdicts on the issue involved:-

22. It is a settled law cemented with a catena of judgments that conviction can be on the basis of sole testimony of the prosecutrix. The Hon'ble Supreme Court in the case of **Krishna Kumar Malik v. the State of Haryana** reported in **(2011) 7 SCC 130**, with the same being reiterated in a recent decision of the Hon'ble Supreme court in **Ganesan v. State Represented by its Inspector of Police** reported in **(2020) 10 SCC 573**, has observed that to hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient, provided that the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality.

23. The Hon'ble Supreme Court, in the case of **Rai Sandeep alias Deepu v. State (NCT of Delhi)** reported in **(2012) 8 SCC 21**, enumerated what is considered a "sterling witness". In paragraph 22, it was held as under:—

"22. In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a

position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all 12 other such similar tests to be applied, can it be held that such a witness can be called as a "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

24. In the case of **Ramdas Vs. State of Maharashtra** reported in **2007 (2) SCC 170**, the Hon'ble Apex Court has held that conviction in a rape case can be based solely on the basis of testimony of the prosecutrix, but that can be done in a case where the Court is convinced about the truthfulness of the statements of the prosecutrix and there exists no circumstances which cast a shadow of doubt over her veracity. Eight days delay in lodging FIR was found to be suspicious hence benefit of doubt was given to accused with the following observations made in Para 23 to 25 which reads as under:

"23. It is no doubt true that the conviction in a case of rape can be based solely on the testimony of the prosecutrix, but that can be done in a case where the court is convinced about the truthfulness of the prosecutrix and there exist no circumstances which cast a shadow of doubt over her veracity. If the evidence of the prosecutrix is of such quality that may be sufficient to sustain an order of conviction solely on the basis of her testimony. In the instant case we do not find her evidence to be of such quality.

24. Counsel for the State submitted that the delay in lodging the first information report in such cases is immaterial. The proposition is too broadly stated to merit acceptance. It is no doubt true that mere delay in lodging the first information report is not necessarily fatal to the case of the prosecution. However, the fact that the report was lodged belatedly is a relevant fact of which the court must take notice. This fact has to be considered in the light of other facts and circumstances of the case, and in a given case the court may be satisfied that the delay in lodging the report has been sufficiently explained. In the light of the totality of the evidence, the court of fact has to consider whether the delay in lodging the report adversely affects the case of the prosecution. That is a matter of appreciation of evidence. There may be cases where there is direct evidence to explain the delay. Even in the absence of direct explanation there may be circumstances appearing on record which provide a reasonable explanation for the delay. There are cases where much time is consumed in taking the injured to the hospital for medical aid and, therefore, the witnesses find no time to lodge the report promptly. There may also be cases where on account of fear and threats, witnesses may avoid going to the police station immediately. The time of occurrence, the distance to the police station, mode of conveyance available, are all factors which have a bearing on the question of delay in lodging of the report. It is also possible to conceive of cases where the victim and the members of his or her family belong to such a strata of society that they may not even be aware of their right to report the matter to the police and seek legal action, nor was any such advice available to them. In the case of sexual offences there is another consideration which may weigh in the mind of the court i.e. the initial hesitation of the victim to report the matter to the police which may affect her family life and family's reputation. Very often in such cases only after considerable persuasion the prosecutrix may be persuaded to disclose the true facts. There are also cases where the victim may

choose to suffer the ignominy rather than to disclose the true facts which may cast a stigma on her for the rest of her life. These are case where the initial hesitation of the prosecutrix to disclose the true facts may provide a good explanation for the delay in lodging the report. In the ultimate analysis, what is the effect of delay in lodging the report with the police is a matter of appreciation of evidence, and the court must consider the delay in the background of the facts and circumstances of each case. Different cases have different facts and it is the totality of evidence and the impact that it has on the mind of the court that is important. No strait jacket formula can be evolved in such matters, and each case must rest on its own facts. It is settled law that however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. (See AIR 1956 SC 216 : Pandurang and others vs. State of Hyderabad). Thus mere delay in lodging of the report may not by itself be fatal to the case of the prosecution, but the delay has to be considered in the background of the facts and circumstances in each case and is a matter of appreciation of evidence by the court of fact.

25. In the instant case there are two eye witnesses who have been examined to prove the case of the prosecution. We have rejected outright the evidence of PW-5. We have also critically scrutinized the evidence of the prosecutrix, PW-2. She does not appear to us to be a witness of sterling quality on whose sole testimony a conviction can be sustained. She has tried to conceal facts from the court which were relevant by not deposing about the earlier first information report lodged by her, which is proved to have been recorded at the police station. She has deviated from the case narrated in the first information report solely with a view to avoid the burden of explaining for the earlier report made by her relating to a non cognizable offence. Her evidence on the question of delay in lodging the report is unsatisfactory and if her deposition is taken as it is, the inordinate delay in lodging the report remains unexplained. Considered in the light of an earlier report made by her in relation to a non cognizable offence, the second report lodged by her after a few days raises suspicion as to its truthfulness."

25. In the case of **Thulia Kali Vs. State of Tamil Nadu** reported in **AIR 1973 SC 501**, Hon'ble Apex Court has held that FIR in a criminal case is an extremely vital and valuable piece of

evidence for the purpose of corroborating the oral evidence adduced at the trial. Hence, the delay in lodging the FIR should be satisfactorily explained. It has been observed as under:

“First information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the report can hardly be over-estimated from the standpoint of the accused. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the name of the actual culprits and the part played by them as well as the names of eye-witnesses present at the scene of occurrence. Delay in lodging the First Information Report quite often results in embellishment which is a creature of after-thought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is, therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained.”

26. The Hon'ble Supreme court, in its decision, **Tameezuddin @ Tammu v. State of (NCT) of Delhi** reported in **(2009) 15 SCC 566**, provided that in a case of rape, the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter. In the present matter, the discrepancies create doubt about the factum of occurrence, and the evidence by the child victim is not of sterling quality.



27. The Hon'ble Supreme Court, in its decision, **Aman Kumar v. The State of Haryana** reported in **(2004) 4 SCC 379**

enumerated that:

“It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands on a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony.”

28. The sole testimony of the child witness (PW-2 'S') does not inspire confidence. In the absence of any witnesses or medical evidence to corroborate, reasonable doubt on the commission of the offence by the appellant-accused can therefore be inferred. This court is of the opinion that the discrepancies in the testimonies of the witnesses and the deficiencies noted above, casts a shadow of doubt on the prosecution case, and the appellant's involvement is thus not proved beyond reasonable doubt.

29. A bare perusal of the record and the statements of the prosecutrix 'S' (PW-2) indicates that she has revealed three different sets of events having occurred on three different occasions i.e. two year back, one month back and few days back. But the inordinate delay in lodging of FIR has not been explained by the prosecution, thereby a shadow of doubt is cast upon the whole prosecution case.

30. Delay of more than two years in lodging of FIR, not narrating of repeated incidents of rape by the prosecutrix 'S' (PW-2) to her mother 'R' (PW-1) or anyone for two years, no marks of injury or violence on the private and external parts of the body of the prosecutrix, absence of evidence of recent sexual intercourse in absence of FSL chemical report, non-preparation of site plans of the places of occurrence and not supporting the case of prosecution by the mother of the prosecutrix create serious doubts on the entire prosecution story.

31. In view of the above analysis, it is found that the learned trial Court has not properly appreciated the material evidence available on the record. The prosecution has failed to prove its case beyond reasonable doubt against the appellant.

Conclusion:-

32. In view of the aforesaid discussions, the impugned judgment is not found to be sustainable and deserves to be set aside and accordingly, the same stands quashed and set aside. Appeal stands allowed. The appellant is acquitted by extending the benefit of doubt.

33. The appellant is on bail. His bail bonds stand discharged.

34. Keeping in view the provision of Section 437-A CrPC, the appellant is directed to furnish personal bond of Rs.1,00,000/- and two surety of Rs.50,000/- each before the trial Court within a period of one month, which shall remain effective for a period of six months, so that in the event of filing of Special Leave Petition against this judgment or on grant of leave, the appellant on receipt of notice thereof shall appear before the Apex Court.

35. Record of the trial Court be sent back forthwith.

**Directions:-**

36. The Director General of Police (DGP) of the State of Rajasthan shall cause an enquiry to be made into the conduct of the Investigating Officers. Needless to add, appropriate action shall be initiated against all the erring officials after affording due opportunity of hearing to them strictly in accordance with law.

37. Let a copy of this order/judgment be forwarded to the Director General of Police (DGP) of the State of Rajasthan for necessary action and compliance.

(ANOOP KUMAR DHAND),J