

Neutral Citation No. - 2024:AHC:135524-DB

RESERVED AFR

Court No. - 43

Case :- CRIMINAL APPEAL No. - 5306 of 2002

Appellant :- Heera

Respondent :- State of U.P.

Counsel for Appellant :- Rajiv Gupta

Counsel for Respondent :- D.G.A.

Hon'ble Ashwani Kumar Mishra,J.

Hon'ble Dr. Gautam Chowdhary,J.

(Per: Hon'ble Dr. Justice Gautam Chowdhary)

1. By means of the instant appeal, the accused-appellant Heera is assailing the judgment and order of conviction dated 24.10.2002 passed by the learned Additional Sessions Judge (Fast Track) Court Room No. 16, District Bulandshahr in Sessions Trial No. 122 of 2002 (State Vs. Heera) arising out of Case Crime No. 107 of 2001 whereby the accused-appellant has been sentenced under Section 376 I.P.C. to undergo for life imprisonment along with fine of Rs. 1000/- and in default in payment of fine to further undergo simple imprisonment of two years.

2. The prosecution case emanates on the written report of the informant (exhibit ka-1), as per which, on 31.03.2001 when the informant had gone for work and his wife Smt. Heera Devi had gone to jungle to bring the fodder and his daughter aged about 04 years was alone in the house, while playing she went out of the house to look for her mother, at about 06:00 P.M., when the accused-appellant enticed her away and took her to the wheat field of Isthtiaq Haji and committed rape upon her. On hearing her cry, Gurcharan Singh son of Mohar Singh and Durga

Prasad son of Moti Ram rushed towards the spot and saw that the accused-appellant had forcefully pressed the victim and was committing rape upon her. As soon as Gurucharan Singh and Durga Prasad reached, the accused appellant ran away towards the forest. The trouser (Pajami) of the victim was brought down and was soaked with blood and the victim was lying unconscious. The informant and his wife rushed to the place of occurrence and brought back the victim. Upon such report, the F.I.R. came to be lodged on 31.03.2001 in Case Crime No. 107 of 2001, under Section 376 I.P.C. at Police Station Jahangirabad, District Bulandshahr. The matter was entrusted for investigation to the Investigating Officer and the victim was medically examined on 01.04.2001 at about 12:30 A.M. Thereafter statements of the witnesses including that of the victim were recorded under Section 161 Cr.P.C. and 164 Cr.P.C. The Investigating Officer, after collecting evidence, culminated the investigation in submission of charge sheet against the accused-appellant under Section 376 I.P.C. upon which cognizance was taken on 11.06.2001 by the concerned Magistrate. The case was committed to the Court of Sessions and the case was registered as Sessions Trial No. 122 of 2002 (State Vs. Heera). Charge was framed under Section 376 I.P.C., against the accused-appellant. The accused-appellant denied the charges and demanded trial. Consequently, the trial commenced.

3. During trial, the prosecution has relied upon following documentary evidence:-

“(i) Written report (Ex. Ka-1).

(ii) Medico Legal Examination Report (Ex. Ka-2).

(iii) Supplementary Medical Report (Ex. Ka-3).

(iv) Recovery memo of "Pajami" G.D.entry (Ex. Ka-4)

(v) Site Plan with Index (Ex. Ka-5).

(vi) Charge sheet original (Ex. Ka-6).

(vii) F.I.R. Ka-7)

(viii) Site Plan (Ex. Ka-8)

(ix) Inquest report (Ex. Ka-9)."

4. From the side of prosecution, as many as six prosecution witnesses appeared before the trial Court. The P.W.1 is the informant Vinnami, P.W.2 Durga Prasad, P.W. 3 is victim, P.W.4 Gurcharan Singh, P.W.5 Dr. Anita Dutta and P.W.6 S.I. Ram Ji Lal, whereas no defence witness was adduced.

5. The informant-P.W.1 has clearly supported the prosecution case and has repeated the F.I.R. version. In his cross-examination, it borne out that he did not go to the place of occurrence and he saw the victim unconscious at his house.

6. P.W.2 Durga Prasad, one of the witnesses of fact has stated that he alongwith Gurcharan were going towards the jungle and as he reached near the wheat field of Ishtiaq, he heard cry, on which he went to that side where he saw that the accused-appellant ran towards forest buttoning up his pant and the victim was lying bleeding.

7. P.W.3 is the victim, who answered to the questions merely by shaking her neck. The testimony of the P.W.3 as has been recorded before the trial Court, is as under:-

नाम:- "Victim" गवाह सवालो का जबाव हाँ ना में गर्दन हिला कर देती है।

प्रश्न:-1 तुम्हारे पीछे कोन खड़ा है ?

उत्तर :- हीरा

प्रश्न:-2 क्या हीरा ने तुम्हे खाने के लिये बिस्कुट दिया ?

उत्तर:- हाँ में गर्दन हिलायी

प्रश्न:-3 हीरा क्या तुम्हे खेत पर ले गया था ?

उत्तर:- गर्दन हिला कर हाँ में बताया।

प्रश्न:-4 क्या हीरा तुम्हारे गांव में रहता है ?

उत्तर:- गर्दन हिला कर हाँ में उत्तर दिया।

प्रश्न:-5 हीरा ने खेत पर ले जाकर क्या तुम्हारे साथ बुरा काम किया ?

उत्तर:- हाँ में गर्दन हिलायी।

प्रश्न:-6 जब हीरा बुरा काम कर रहा था तो तुम्हारे कहां दुःख हुआ था?

उत्तर:- हाथ लगाकर पेशाब की जगह बतायी।

प्रश्न:-7 दर्द होने पर तुम रोयी थी ?

उत्तर:- हाँ में गर्दन हिलायी।

प्रश्न:-8 जहाँ दर्द हुआ क्या खून आया था ?

उत्तर:- गवाह ने गर्दन हिलाकर हाँ में जवाब दिया।

8. Another witness of fact, P.W.4 Gurcharan Singh also adduced his testimony before the trial, who has reiterated the similar version as has been stated by P.W.2.

9. P.W.5 is Dr. Anita Dutta, who had examined the victim. The doctor has proved the medical reports. Relying upon the medical papers, the doctor has stated that there are no external or internal injury on the victim and her hymen is intact. The possibility of rape has not been supported by the doctor. P.W.6 is the Sub-Inspector Ramji Lal who is formal witnesses and has supported the prosecution case, on the basis of evidence collected during the investigation.

10. The accused-appellant has been confronted with the material evidence adduced against him during the trial. His statement under Section 313 Cr.P.C. came to be recorded wherein he stated that he has been falsely implicated and that the evidence adduced is not reliable.

11. On the basis of the above material produced during

the trial, the Court of Sessions has come to the conclusion that the guilt of the accused appellant has clearly been established beyond reasonable doubt and consequently, the accused-appellant has been convicted and sentenced as per the law.

12. Challenging the impugned judgement and order of conviction and sentence against the accused appellant, Sri Shyam Babu Vaish, learned counsel for the accused-appellant, submits that the Court of Sessions has erred in recording the finding of conviction and sentence against the appellant inasmuch as the testimony of witnesses are not reliable and that the accused-appellant has been falsely implicated. He further submits that the victim did not sustain any internal or external injury and the medical examination as well as supplementary medical report do not corroborate with the prosecution version. Learned counsel further argued that perverse findings has been recorded by the trial Court. Thus, the impugned judgment and order is liable to be set aside.

13. Per contra, learned A.G.A. has submitted that offence has been committed by the accused-appellant and the learned trial Court, after considering the evidence available on record, recorded the findings of conviction and has sentenced the accused-appellant to undergo life imprisonment, therefore there is no illegality or perversity in the judgement and order of conviction passed by the trial Court and thus the impugned judgement and order of conviction does not call for any interference by this Court.

14. We have heard Sri Shyam Babu Vaish learned counsel

for the accused-appellant, Sri Pankaj Kumar Tripathi, learned A.G.A. for the State and perused the material on record including the original record of the trial Court.

15. The learned trial Court while recording the findings of conviction has observed though hymen is found intact but according to the medical jurisprudence, in the case of girl of less than 12 years, hymen is posteriorly situated, which restricts the gender (penis) to come in contact with hymen thus it is natural that the hymen would be intact even after the commission of offence alleged furthermore, genital injuries are such that the same cannot be examined without giving anesthesia. The learned trial Court considering the testimony of witnesses of fact i.e. P.W. 2 Durga Prasad and P.W.4 Guru Charan Singh has observed that their statements corroborate each other and they are natural witnesses. Apart from the aforesaid statements, learned trial Court also considered the testimony of the victim, who appeared before the trial Court as P.W.3. After considering the evidence adduced before the trial Court, the learned trial Court has convicted and awarded sentence to the accused-appellant for life imprisonment along with fine.

16. Before discussing the findings of conviction recorded by the trial Court, it is necessary to perused Section 375 I.P.C. in which "Rape" has been defined which reads as under:-

375. Rape-- A man is said to commit "rape": if he--

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a women or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of the body of such woman or makes her to do so with any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person.

17. The statement of the victim recorded before the trial Court as P.W.2 shows that merely she has shaken her neck while answering the questions put to her, which is not entirely reliable. The possibility of a minor victim having been tortured to shake her neck instead of giving an oral reply cannot be ruled out particularly as a girl of 5-6 years may ably answer the questions put to her. There is nothing on record to suggest that the victim was incapacitated or could not speak. The witness of fact P.W. 2 Durga Prasad has stated before the trial Court that he rushed towards the direction from where the sound of cry was coming and on seeing him, the accused-appellant ran away towards the forest buttoning his pants and the victim was lying bleeding. A similar version was also stated by P.W. 4 Gurucharan. In the medical examination of the victim, no bleeding or injury etc. is however found.

18. So far as statements of witnesses of fact are concerned, it is crystal clear after seeing them, the accused-appellant ran away towards the forest buttoning his pants but it has not been specifically stated that the accused-appellant was seen committing rape upon the victim. "Rape" has been defined under Section 375 I.P.C.

which specifically states that (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a women or makes her to do so with him or any other person; or (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a women or makes her to do so with him or any other person; or (c) manipulates any part of the body of a women so as to cause penetration into the vagina, urethra, anus or any part of the body of such women or make to do so any other person; or (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, whereas no such ingredients of Section 375 I.P.C. has been found in the statement of the witnesses of fact.

19. So far as testimony of P.W.2 victim is concerned, it is necessary to take note of the fact that she has merely shaken her neck while answering the question put to her. There is much inconsistencies in the prosecution version and the cross examination of the victim. While the FIR speaks of the incident to have taken place at 6.00 P.M. and the victim was allegedly taken back home by the informant and his wife, the victim in her cross examination has stated that she went back home alone and it was day time. The Apex Court in the matter of *Dola alias Dlagobinda Pradhan and another Vs. State of Odisha* reported in *2018 (18) SCC 695* has reversed the concurrent conviction in somewhat similar circumstances observing that the testimony of the victim is full of inconsistencies and does not find support with the medical evidence.

20. Now coming to the finding recorded by the learned

trial Court with regard to the medical evidence. In the instant case, the incident is said to have taken place on 31.03.2001 at about 18:00 hours, whereas the medical examination of the victim was conducted on 01.04.2001 at about 12:30 A.M. i.e. within 06:30 hours from the time of incident. The medical examination report of the victim is as under:-

"Certified that I have examined Km. "X" d/o Vinami resident of Village Jalilpur P.S.Jahangirabad B/I Constable CP NO. 99 Rajendra Sharma P.S. Jahangirabad, District Bulandshahr at 12:30 A.M. on 01.04.2001.

M.I. Colour of iris of eyes is black.

G.E. She is fully conscious and alert at the time of examination. Breast not developed. Axillary and public hairs not present.

No mark of injury on her body.

Height-97 c.m. weight 15 kg., Teeth 10/10 (milk teeth)

Internal Examination No mark of injury on her private parts including lower abdomen and inner part of both the thighs.

Vagina admits tip of the finger. Hymen intact.

Vagina smear made and sent to pathologist for HPE to District Hospital Bulandshahr.

Referred to Radiologist X-ray department, District Hospital Bulandshahr for X-Ray elbow and wrist joint (including carpal bones) for age."

21. Pursuant to the recommendation made by Medical Officer K.M.G., Bulandshahr for X-Ray as well as pathological examination before the Radiologist, the victim was examined, after her examination, the supplementary report was prepared on 12.04.2001, which reads as under:-

"Supplementary report of "X" daughter of Vinami

resident of Jalilpur, P.S. Jahangirabad, District Bulandshahr.

X-Ray Report No. 1543-44 dated 03.04.2001.

X-Ray Rt. Wrist AP view No. 1543 shows appearance of 4 carpal bones. Capitate, Hamate cuneiform and lunate distal end of radius appeared but styloid of ulna not appeared.

X-Ray Rt. Elbow joint No. 1544:- Head of radius not appeared. Medial epicondyle of humerus appeared.

Lateral epicondyle not appeared.

Pathology Report No. 23 of 2001 dated 03.04.2001.

No spermatozoa seen in the supplied smear.

Conclusion (1) Her age is about 5-6 years.

(2) No opinion about rape can be given"

22. So far as bleeding of victim is concerned, the medical report states that the vagina admits tip of the finger and also the fact that supplementary report shows that no spermatozoa was seen and therefore, no medical evidence of rape is on record. The medical examination of the victim was conducted within six and half hours of the time of incident and had there been any such bleeding, the doctor would not have opined that vagina admits tip of the finger. The opinion of the doctor that no rape has been committed has been completely ignored by the trial Court. Thus the testimony of P.W.2 and P.W.4 do not find support from the medical evidence.

23. Although in **Sadashiv Ramrao Hadbe Vs. State of Maharashtra, 2007 (1) SCC (Cri.) 161** the Hon'ble Apex Court has held that the sole testimony of prosecutrix is sustainable if it inspires the confidence of the Court but if

the version given by the prosecutrix is not supported by the medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the Court shall not act on the solitary evidence of the prosecutrix. The paragraph no. 9 of the aforesaid judgement reads as under:-

“9. It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring of confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen.”

24. We have given our thoughtful consideration to the evidence on record as has been discussed in the preceding paragraph and also the arguments submitted by the learned counsel for the parties. We find that the statements of witnesses of fact as well as the victim do not corroborate with the medical evidence. The medical examination of the victim was conducted within six and a half hours. The specific case of the prosecution is that sexual assault was committed upon the victim. In our assessment at the tender age of six years if the victim is subjected to rape some sort of injury is bound to occur and be reflected in the medical papers or the testimony of doctor. The fact that neither any redishness was seen nor any swelling was noticed by the doctor in the private part of the victim and her hymen was found intact, coupled with the fact that there are contradictions in the manner in which the offence

was observed by the witnesses, we are of the considered opinion that the prosecution has failed to prove the charges of rape levelled against him and accused is entitled to benefit of doubt.

25. In view of the discussions and deliberations held, this criminal appeal succeeds and is allowed. The conviction and sentence of the accused appellant Heera vide judgment and order dated 24.10.2002 passed by the learned Additional Sessions Judge (Fast Track) Court Room No. 16, District Bulandshahr in Sessions Trial No. 122 of 2002 (State Vs. Heera) arising out of Case Crime No. 107 of 2001 under Section 376 I.P.C. Police Station Jahangirabad, District Bulandshahr, is set aside.

26. The accused-appellant shall be released forthwith unless he is wanted in any other case subject to compliance of Section 437-A Cr.P.C.

27. The trial Court record along with the copy of this order be transmitted to the court concerned forthwith.

Order Date :-21.08.2024
S.Ali

(Dr. Gautam Chowdhary,J.) (Ashwani Kumar Mishra,J.)