HIGH COURT OF JAMMU& KASHMIR AND LADAKH
AT SRINAGAR

CRA No. 01/2010

Reserved On: 25th of April, 2023
Pronounced On: 11th of May, 2023.

Raja Sajad Ahmad Wani

… Appellant(s)

Through: -
Mr Wajid Mohammad Haseeb, Advocate.

V/s

State of Jammu and Kashmir

… Respondent(s)

Through: -
Mr Sajjad Ashraf Mir, Government Advocate.

CORAM:

HON'BLE MR JUSTICE M. A. CHOWDHARY, JUDGE.

(JUDGMENT)

01. The Appellant, through the medium of this Criminal Appeal, has challenged the 'Judgment of Conviction' dated 24th of February, 2010 as well as the 'Order of Sentence' dated 25th of February, 2010 passed by the learned 1st Additional Sessions Judge, Srinagar in a case titled **'State v. Raja Sajad Ahmed Wani'**, bearing File No. 97/Sessions, whereby the Appellant was convicted for the commission of offences punishable under Sections 366 and 376 of the now repealed Ranbir Penal Code (for short 'RPC') and sentenced to: *(i)* rigorous imprisonment of seven years and to pay a fine of Rs.10,000/- under Section 376 RPC; and (ii) rigorous imprisonment for five years and to pay a fine of Rs. 5,000/- under Section 366 RPC, with a direction that both the sentences of imprisonment shall run concurrently.

02. The factual matrix of the case, is that the Appellant, on 9th of November, 2001, was alleged to have abducted the prosecutrix (name withheld to hide her identity) from Chiterhama when she had gone to a spring near mosque to fetch water and that she was taken to Dangerpora,

Padgampora, Pulwama, where she was seduced to illicit intercourse with her against her will and wish. The father of the prosecutrix, on 15th of November, 2001, lodged a complaint at Police Station, Zakoora, Srinagar, whereupon a case was registered vide FIR No. 59/2001 for the commission of offences punishable under Sections 366 and 376 RPC against the accused/ Appellant herein. During investigation, the police recovered the abductee (prosecutrix) from Dangerpora, Padgampora, Pulwama from the house of one Abdul Majeed Dar, whereafter she was medically examined and, after completion of the investigation, a charge sheet was laid against the accused/ Appellant herein for the commission of offences punishable under Sections 366 and 376 RPC.

03. The Appellant was charge-sheeted for the commission of aforementioned offences vide Order dated 24th of October, 2002 by the Court of learned 1st Additional Sessions Judge, Srinagar (hereinafter referred to as the 'trial Court'), who pleading innocence, denied the charges and claimed trial.

04. The Prosecution, in order to prove its case to bring home the charge against the accused/ Appellant, examined: *(i)*Gulzar Ahmad Sheikh;*(ii)*Mst. Hajira;*(iii)*Habibullah Dar;*(iv)* Khazir Mohammad Dar;*(v)*Abdul Rehman Dar;*(vi)*Nazir Ahmad Dar;*(vii)*Manzoor Ahmad Dar; and *(viii)* the prosecutrix as Prosecution witnesses.

05. The Prosecution evidence was explained to the accused/ Appellant and he was examined in terms of Section 342 of the J&K Code of Criminal Procedure, who, again, refuted the allegations levelled against him and, on his part, examined: *(i)* Abdul Ahad Dar; and *(ii)* Showkat Ahmad Rather as Defence witnesses.

06. After conclusion of the trial, the trial Court found the accused/ Appellant having committed offences punishable under Sections 366 and 376 RPC and, accordingly, convicted and sentenced him vide the impugned 'Judgment of Conviction' and 'Order of Sentence'.

07. The Appellant has assailed the impugned 'Judgment of Conviction' and 'Order of Sentence', *inter alia*, on the following grounds:

> "a) That as per the allegations levelled in the challan, the alleged accused is alleged to have forcibly abducted the prosecutrix on 09.11.2001 and the FIR in this behalf has been lodged in the concerned police station on 15.11.2001 i.e. after about six days of the alleged occurrence. This long delay of six days has not been explained by the prosecution, as such, was fatal to the prosecution in view of the various authoritative pronouncements of the Apex Court and other courts of the Country. This vital aspect of the matter though vehemently canvassed before the trial court, but the trial court was not considered, which renders the impugned judgments as bad in law and liable to be set aside;
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> b) That the case of the prosecution is that the accused has abducted and raped the prosecutrix. The prosecutrix while deposing before the trial court has stated that she has been raped by the alleged accused. However, this statement of the prosecutrix has not been corroborated by any medical evidence. It is respectfully submitted that no doctor or medical expert has neither been cited as witness in the calendar of challan nor examined by the prosecution during the trial, as such, finding recorded by the trial court that rape has been committed upon the prosecutrix is not sustainable under law. On this ground also the impugned judgement and sentence passed by the trial court is liable to be set aside;
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> c) The Investigating Officer (I.O) has not been examined by the prosecution in the trial court which has caused serious prejudice to the alleged accused amongst others on the ground that the prosecutrix during her examination in the court has deposed that she was recovered after three days of occurrence. It is respectfully submitted that FIR has been lodged after six days of the alleged occurrence and the delay could have been explained by the Investigating Officer had he been examined by the prosecution. Secondly, no natural evidence has been collected by the Investigating Officer during investigation inasmuch as none of the clothes which the prosecutrix was wearing at the time of alleged occurrence have been seized by the Investigating officer. This too could have been explained by the Investigating Officer had he been examined by the prosecuting during trial. It is further submitted that no chemical examination of any nature has been collected by the Investigating Officer during investigation of the case which also could have been explained by the Investigating Officer had he been examined by the prosecution. All these material aspects of the matter have been ignored by the trial court which has caused serious prejudice to the alleged accused, therefore, on this ground also the impugned judgement/conviction and sentence are liable to be set aside;
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> d) That there are glaring contradiction in the statement of the witnesses examined by the prosecution which make the prosecution story highly doubtful and on such doubtful evidence no conviction or

sentence could be recorded by the trial court. On this ground also the impugned judgement/conviction and sentence are liable to be set aside;

e) That the statement of the alleged accused recorded by the trial court under 342 Cr.P.C. is highly defective. No material questions/incriminating evidence has been put to the allege accused which renders the judgement/conviction and the sentence impugned liable to be set aside;

f) That the impugned judgment/conviction had the sentence passed by the trial court is based on surmises and conjectures. ON this ground also the impugned judgement/conviction and the sentence are liable to be set aside;

g) That after going through the whole prosecution evidence, it becomes abundantly clear that the case against the accused is manipulated one. This aspect of the matter has also been ignored by the trial court which renders the impugned judgement/conviction and the sentence liable to be set aside;

h) That the impugned judgement/conviction and the sentence passed by the trial court do not stand the tests laid down by the Apex Court necessary for awarding conviction and sentence in criminal cases particularly involving heinous offences. On this ground also the judgement/conviction and the sentence impugned are liable to be set aside;

i) The most of the witnesses examined by the prosecution in the trial court are interested witnesses. No independent witnesses has been cited or examined by the prosecution. Therefore, on this ground also no conviction or sentence could lie against the alleged accused and, therefore, the impugned judgement/conviction and the sentence are liable to be set aside;

j) That the evidence adducted by the prosecution is highly insufficient and falls short of prove of the requisite standard as laid down by the Apex Court and the other courts of the Country. Therefore, the impugned judgement/conviction and the sentence are highly illegal, improper and had in law and, therefore, liable to be set aside; and

k) That it appears from the records of the trial court that an application under Section 540 Cr. PC was filed by the prosecution during the trial for summoning the doctor alleged to have examined the prosecutrix, but the said application does not appear to have been disposed of by the trial court one way or the other. This also renders the judgement/conviction and the sentence passed by the trial court liable to be set aside."

08. Mr Wajid Mohammad Haseeb, the learned Counsel appearing for the Appellant, argued that the Appellant had been falsely implicated by the father of the prosecutrix, who lodged a report on 15th of November,

2001 at the Police Station, alleging therein that the prosecutrix who was minor, had gone missing since 9th of November, 2001; that the prosecutrix was claimed to have been recovered on 16th of November, 2001 when she was subjected to medical examination by a Doctor, who had certified that the prosecutrix was of the age of majority and that there was no evidence of recent sexual intercourse with her. Learned Counsel for the Appellant further argued that the father of the prosecutrix had falsely stated in his report that the prosecutrix was minor in age, whereas the fact of the matter is that she had attained the age of majority. He also argued that the prosecutrix, who was major, had gone with the Appellant on her own accord, as she was having an affair with the Appellant and both of them had decided to marry each other.

09. The learned Counsel has argued that in the particular facts and circumstances of the case, where the Appellant had taken the prosecutrix to the house of his sister and who was recovered from there after six days, does not, in any manner, suggest that she was forcibly kidnapped or detained at the place of the sister of the Appellant, that too with the intent of committing rape upon her. He has further argued that the prosecutrix had gone with the accused/Appellant of her own will, without any use of force or compulsion and, thus, she cannot be stated to have been kidnapped. Besides the Doctor, who had examined the prosecutrix on the day of recovery, had stated that there was no evidence of any recent sexual intercourse with the prosecutrix, meaning thereby that she had not been subjected to sexual intercourse as well. Learned Counsel for the Appellant finally prayed that the impugned 'Judgment of Conviction' as well as the 'Order of Sentence' be set aside and the accused/ Appellant be acquitted of the charges levelled against him.

10. Mr Sajjad Ashraf Mir, the learned Government Advocate, representing the Respondents, has argued that the prosecutrix had been forcibly kidnapped and confined at the house of his brother-in-law by the accused/Appellant, who had not pleaded or raised any enmity for his false implication during trial. He has further submitted that all the Prosecution

witnesses, examined by the Prosecution, had supported the Prosecution case and, so much so, that the Defence witnesses, examined by the accused/ Appellant, had also supported the Prosecution story by stating that the prosecutrix had been taken by the Appellant to the house of his brother-in-law, wherefrom she was recovered. The learned Counsel has, accordingly, prayed that the instant appeal be dismissed and the impugned 'Judgment of Conviction' as well as the 'Order of Sentence' be upheld.

11. Heard and considered.

12. Since the prosecutrix had travelled all along from the place of alleged abduction to the place of recovery in a vehicle and stayed at the house of the brother-in-law of the Appellant without any protest, enroute or at the destination, therefore, it cannot be said that the prosecutrix had been kidnapped against her will. Although, the prosecutrix had stated that she was taken by the Appellant in a vehicle driven by some other person, however, that other person was neither cited by the Prosecution as a witness nor the prosecutrix has claimed that she had raised any alarm before him complaining of alleged abduction. The prosecutrix had stated that at the time of her recovery, her father was the first to enter the room with the Police party, whereas the father had stated that he did not know from where and from whom she had been recovered.

13. The prosecutrix has also stated in her statement that the room, where she and the Appellant were made to stay, was also used by the minor children of the sister of the Appellant, therefore, in all the probability, the prosecutrix had gone with the Appellant of her own accord and stayed at the house of the sister of the Appellant with him, with an intention of getting married and, in such a situation, neither of the offences of rape or kidnapping could be stated to have been constituted. Besides, the prosecutrix, during investigation, stated to the Police that the Appellant had talked to her at a spring near Masjid Shareef at Chiterhama and proposed to go for marriage; that she had travelled in a vehicle to Dangerpora, Padgampora, Pulwama at the place of the brother-in-law of the Appellant, namely, Abdul Majeed Dar and the Appellant had told them that he had

entered into marriage with the prosecutrix; that during night the Appellant subjected her to rape under the pretext that they are going to marry; and that she was recovered by the Police in presence of her father, Gulzar Ahmad.

14. The prosecutrix, during her examination at the trial, stated that she was subjected to repeated sexual intercourse for three days by the Appellant and that she had been medically examined the day she had been recovered. She also stated that though she had not married the accused, but he had forcibly taken her signatures on a paper and that the sister of the Appellant also resided in that house in which she was confined by the accused/ Appellant, however, she could not inform the brother-in-law and sister of the accused/ Appellant that she had been forcibly abducted as she was locked in a room.

15. On a close scrutiny of the impugned 'Judgment of Conviction', what emerges is that the learned trial Court has held that even the sole statement of the prosecutrix is sufficient enough to record the conviction of the accused, if the statement of the prosecutrix inspires confidence and is convincing and clinching. The learned trial Court has further observed that since the sexual assaults have been committed by the accused/Appellant upon the prosecutrix, who is an illiterate and rustic villager, therefore, even if her statement is not corroborated, the accused/Appellant can be convicted on the basis of her statement only. It is also held that Section 114 (B) of the Evidence Act, 1997 draws a presumption in favour of the Prosecution case that the sexual intercourse was without the consent of the prosecutrix. The trial Court, thus, on the solitary statement of the prosecutrix came to the conclusion that the Prosecution has succeeded to prove its case, so as to connect the accused/Appellant with the commission of alleged offences and, accordingly, recorded conviction and sentenced the accused.

16. On a bare perusal of the trial Court record, it is found that the prosecutrix had been examined on 16th of November, 2001 by a Doctor, namely, Masarat Shafi, Assistant Surgeon, L.D. Hospital, Srinagar, who, after physical examination of the prosecutrix, was of the opinion that there was no mark of violence on any part of her body and that no spermatozoa

were found, therefore, the Doctor was of the opinion that there is no evidence of any recent sexual intercourse.

17. The Prosecution had withheld the aforesaid important witness from being examined during the trial. The Investigating Officer was also not examined by the Prosecution, who is the author of the case, from whom important and vital explanations could have been sought by the Defence through his cross-examination with regard to all the factual aspects of the case and his investigation into the case. Dealing with a similar case where the Doctor and the Investigation Officer had not been examined by the Prosecution and the trial Court had recorded the conviction of the accused, which had also been upheld by the High Court, the Apex Court in a case titled **'Rajesh Patel v. State of Jharkhand'**, reported as **'(2013) 3 SCC 791'**, has held in Paragraph Nos. 18 and 19 as under:

> "18. Further, neither the Doctor nor the I.O. has been examined before the trial court to prove the prosecution case. The appellant was right in bringing to the notice of the trial court as well as the High Court that the non-examination of the aforesaid two important witnesses in the case has prejudiced the case of the appellant for the reason that if the doctor would have been examined he could have elicited evidence about any injury sustained by the prosecutrix on her private part or any other part of her body and also the nature of hymen layer etc. so as to corroborate the story of the prosecution that the prosecutrix suffered unbearable pain while the appellant committed rape on her. Non-examination of the doctor who has examined her after 12 days of the occurrence has not prejudiced the case of the defence for the reason that the prosecutrix was examined after 12 days of the offence alleged to have committed by the appellant because by that time the sign of rape must have disappeared. Even if it was presumed that the hymen of the victim was found ruptured and no injury was found on her private part or any other part of her body, finding of such rupture of hymen may be for several reasons in the present age when the prosecutrix was a working girl and that she was not leading an idle life inside the four walls of her home. The said reasoning assigned by the High Court is totally erroneous in law.
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> 19. In view of the above statement of evidence of PW3 and PW4 whose evidence is important for the prosecution to prove the chain of events as per its case, the statement of evidence of the aforesaid witnesses has seriously affected the prosecution case. Therefore, the courts below could not have, at any stretch of imagination, on the basis of the evidence on record held that the appellant is guilty of committing the offence under Section 376, IPC. Further, according to the prosecutrix, PW3 who is alleged to have rescued her from the place of occurrence of offence, has clearly stated in his evidence that he does not know anything about the

> incident in his statement thereby he does not support the version of prosecution. The High Court has erroneously accepted the finding of the trial court that the appellant has not been prejudiced for non-examination of the doctor for the reason that she was working as a Nurse in the private hospital of PW4 and being a nurse she knew that the information on commission of rape is grave in nature and she would not have hesitated in giving the information to the police if the occurrence was true. Further, the finding of the courts below that non-examination of the I.O. by the prosecution who has conducted the investigation in this case has not caused prejudice to the case of the appellant, since the prosecution witnesses were unfavorable to the prosecution who were either examined or declared hostile by the prosecution, which reasoning is wholly untenable in law. Therefore, the finding and reasons recorded by both the trial court as well as the High Court regarding non-examination of the above said two witnesses in the case has not prejudiced the case of the appellant is totally an erroneous approach of the courts below. For this reason also, we have to hold that the findings and reasons recorded in the impugned judgment that the trial court was justified in holding that the prosecution has proved the charge against the appellant and that he has committed the offence on the prosecutrix, is totally erroneous and the same is wholly unsustainable in law."

18. The medical examination report on the file suggests that there was no evidence of recent sexual intercourse with the prosecutrix, who had been examined on 16th of January, 2001, after her allegations of repeated rape during the last six (06) days since 9th of January, 2001, when she was allegedly abducted. Considering the evidence in the case, it is found that the prosecution's evidence is not natural, consistent and probable to sustain the conviction of the Appellant for the alleged offences stated to have been committed by him. Non-examination of the material Prosecution witnesses, *viz.* the Doctor and the Investigating Officer, has not only caused prejudice to the case of the Appellant, but also to the case of the Prosecution and created a reasonable doubt. Therefore, the benefit of doubt has to be given to the Appellant. The statement of the prosecutrix, which has been based by the learned trial Court to record the conviction of the Appellant, is most unnatural, improbable and does not inspire confidence.

19. Another important fact to be noticed is that there was inordinate and unexplained delay of six days in the lodging of the FIR on 15th of November, 2001, with nominating the accused/Appellant to have kidnapped and raped the prosecutrix on 9th of November, 2001. Such an unexplained and inordinate delay is also fatal for the Prosecution case.

20. Since, all other witnesses, except the prosecutrix, had made general statements that the prosecutrix went missing in the evening of 9th of November, 2001 from her village Chiterhama and was recovered on 15th of November, 2001 from Dangerpora from the house of the sister of the Appellant/accused, who was also arrested from there. It appears that the prosecutrix, without any protest or raising any alarm, accompanied the accused/ Appellant in a vehicle driven by a third person and travelled all along to Dangerpora, where she had stayed with the family of the sister of the accused/Appellant, without disclosing to any of the family members that she had been kidnapped by the accused/ Appellant against her will. The certificate of the Doctor, who was not examined by the Prosecution, also suggests that there was 'recent no sexual intercourse with the prosecutrix. She appears to have made a false statement with regard to this fact at the instance of his family to implicate the accused/ Appellant', with whom she apparently had eloped.

21. It is also evident from the facts and circumstances of the case, particularly in the face of the statement of the prosecutrix, that she had gone from her village with the accused of her own will and stayed with him at the house of his brother-in-law with the arrangement of getting married. It seems that the prosecutrix, after her recovery and arrest of the accused/ Appellant, under the influence of her family, had made statement to implicate the Appellant/ accused. The learned trial Court has ignored the important facets of the case to arrive at a conclusion that the accused had committed offences punishable under Sections 366 and 376 RPC and recorded conviction and awarded sentence, based on the sole statement of the prosecutrix. In the considered opinion of this Court, the learned trial Court has misdirected itself to record conviction of the accused/ Appellant on the solitary statement of the prosecutrix, which does not inspire confidence to record such a conviction.

22. For the foregoing reasons and discussion made hereinabove, the present appeal is **allowed** and the impugned 'Judgment of Conviction' as well as the 'Order of Sentence' are set aside. The Appellant/ accused is

acquitted of both the charges punishable under Sections 366 and 376 RPC. His bail and personal bonds shall stand discharged, accordingly. Seized articles shall be destroyed. Registry to send down the trial Court records, along with a copy of this Judgment, for information

21. **Disposed** of as above, along with the connected CrlM(s).

(M. A. CHOWDHARY)
JUDGE

SRINAGAR
11th May, 2023
"TAHIR"

i. Whether the Judgment is speaking? Yes
ii. Whether the Judgment is reportable? Yes