Reserved Judgment

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Jail Appeal No.29 of 2015

Dal Chandra ..... Appellant

Versus

State of Uttarakhand ..... Respondent

Ms. Manisha Bhandari with Mr. Shiv Pande, Advocates, for the appellant.
Mr. Amit Bhatt, Dy. Advocate General, for the State.

Dated: June 01, 2018

Coram: Hon'ble Rajiv Sharma, J.
Hon'ble Alok Singh, J.

Per: Hon'ble Rajiv Sharma, J.

This appeal is instituted against the judgment and order dated 09.09.2015 rendered by Special Judge (POCSO)/FTC/Additional Sessions Judge, Haldwani (Nainital) in Sessions Trial No.29/2015, whereby the appellant Dal Chandra was charged with and tried for the offence under Section 376(2)(i) I.P.C. and Section 5(m) r/w Section 6 of the Protection of Children from Sexual Offences Act (*hereinafter to be referred to as 'the Act'*). At the end of trial, the Trial Court convicted the appellant under Section 376(2)(i) of the Indian Penal Code (for short 'the I.P.C') and sentenced him to undergo fifteen years' rigorous imprisonment with fine of Rs.10,000/- and in default of payment of fine, to undergo additional rigorous imprisonment for a period of two months.

2. Case of the prosecution in a nutshell is that PW1, grandmother of prosecutrix (name withheld) lodged the report on 24.1.2015 to the effect that the appellant

was known to her. He came to her house on that day at 5:30 PM. Appellant took away her granddaughter (prosecutrix), aged about one year and three months, on the pretext of providing her biscuits. After some time, the appellant brought back the prosecutrix. When PW1 changed the clothes of prosecutrix, she found that the blood was oozing out from her private parts and she was crying. She took the prosecutrix to the hospital. Thereafter, the first information report was lodged.

3. The matter was investigated and Challan was put up before the Court after completing all the codal formalities.

4. Prosecution has examined as many as seven witnesses in support of its case.

5. Appellant was also examined u/s 313 Cr.P.C. He denied the case of prosecution. According to him, he was falsely implicated.

6. Appellant was convicted and sentenced by the Trial Court, as noticed hereinabove. Hence this appeal.

7. Learned Counsel, appearing on behalf of the appellant, has vehemently argued that the prosecution has failed to prove its case against the appellant beyond reasonable doubt.

8. Learned Dy. Advocate General, appearing for the State, has supported the judgment dated 9.9.2015.

9. We have heard learned counsel for the parties and gone through the impugned judgment and lower court record very carefully.

10. PW1 is the grandmother of prosecutrix. She deposed that on 24.1.2015, she along with her daughter (PW2) had gone to bring the fuel wood from the jungle. They came back at 5-5:30 PM. At that time, the appellant was sitting in the house. He was drunk. Her granddaughter was playing in the house. Appellant took away the prosecutrix on the pretext of providing her biscuits. Appellant returned to house after a long time. She enquired the appellant why he was so late but he did not reply. The prosecutrix was crying. Her daughter noticed that blood was oozing out from the private parts of prosecutrix. The first information report was thereafter lodged. She was acquainted with the appellant since he was her tenant. She proved the first information report. In her cross-examination, she deposed that the appellant was her tenant. He was a rickshaw puller. He was paying Rs.30/- per day to her. Appellant used to deposit the money with her and take the same away when he was going to his home. Clothes of victim were given to the SHO. She proved her statement recorded u/s 164 Cr.P.C.

11. PW2 is the mother of prosecutrix. She testified that she was living with her mother (PW1). Her daughter was one year and three months' old. They had gone to jungle to fetch the fuel wood. They came back at 5 PM. Appellant was sitting in the house. He was drunk. Appellant took away her daughter. He came back after one hour. The prosecutrix was crying. Her trouser was wet. Blood was oozing out from her private parts. Appellant tried to run away, however, he was apprehended by her mother. The clothes of prosecutrix

were taken into possession. In her cross-examination, she denied the suggestion that the appellant had entered into any altercation with her mother. The appellant was her tenant.

12. PW3 Head Constable Bhagwan Giri Goswami has registered the first information report.

13. PW4 Dr. Manju Rawat has medically examined the prosecutrix. She has noticed the following injuries on the body of prosecutrix: -

> *"1. Injury- Perennial tear at midline measuring 1x 0.5 cm extending to posterior wall of vagina. Fresh bleeding present.*
>
> *2. Slight oedema present around perineum.*
>
> *3. Labia Majora- Slight Oedema present*
>
> *4. Labia Manora- Slight Oedema present*
>
> *5. Fourchette & Introitus- Tear present 1 x 0.5 cm*
>
> *6. Hymen Perineum- Midline fresh bleeding present"*

14. According to her, no spermatozoa was seen in pathology report. No definite opinion could be given about the act of sexual assault. She further opined that on examination of findings and the medical history, the sexual assault could not be ruled out. She has proved the medical report. In her cross-examination, she has testified that she noticed blood on the clothes of prosecutrix. She has not conclusively ruled out the possibility of victim being sexually assaulted.

15. PW5 S.I. Devendra Singh Bisht has taken the clothes of victim into possession.

16. PW6 S.I. Suman Pant is the Investigating Officer. She has proved the arrest of appellant. She prepared the spot map and recorded the statements of witnesses.

17. PW7 Dr. Dilip Varshney has medically examined the appellant. He has noticed two abrasions on his hips measuring 1 x 1 cm. These abrasions were red in colour. These abrasions were fresh in nature and could be caused by a hard rough object.

18. From the evidence, discussed hereinabove, it is evident that the statement of PW1 is dully corroborated by PW2. They have categorically deposed that on 24.1.2015, appellant has allured the prosecutrix to provide her biscuits. He came back after about one hour. PW1 and PW2 noticed fresh blood oozing out from the private parts of prosecutrix.

19. There is no merit in the contention of learned Counsel for the appellant that there was animosity between the parties. Rather the appellant was the tenant of PW1.

20. The submission made by learned Counsel for the appellant that there was some dispute with regard to the payment of money also cannot be accepted. The first information report too was promptly lodged.

21. The prosecutrix was medically examined by PW4 Dr. Manju Rawat. She has noticed injuries on the private parts of prosecutrix. According to her, there was

perineal tear at midline measuring 1 x 0.5 cm extending to posterior wall of vagina. There was slight oedema present around perineum. There was slight oedema present in the labia major and labia minora also. Tear was present measuring 1 x 0.5 cm on the fourchette and introitus. The doctor also noticed bleeding on hymen perineum of prosecutrix. According to her, the possibility of sexual assault could not be ruled out.

22. PW7 Dr. Dalip Varshney, who examined the appellant, has noticed two abrasions on the hips of appellant. These injuries have not been explained by the appellant.

23. According to the Forensic Science Laboratory (FSL) report, human semen was detected on Exhibits 4 and 7. Human blood was found in Exhibits 1, 2, 3, 5, 6, 9, 10 and 11. However, the blood could not be detected on Exhibits 4, 7 and 12.

24. Their Lordships of Hon'ble Supreme Court in (2007) 10 SCC 30 in the case of '*Dimple Gupta (minor) v. Rajiv Gupta*' have held that illiterate witness do not have sense of time and so cannot be expected to lay down with precision the chain of events. Their Lordships have held as under: -

> *"8. We have also perused the judgments of the trial Magistrate and the High Court. We find no reasons to justify a reversal of the findings that had been recorded by the trial Magistrate as the application was supported by the Statement of PW1 Narain Dassi and several other witnesses. PW3 Chandra Devi specifically deposed that Narain Dassi and respondent Rajiv Gupta had stayed in her house in village Kalpa several years earlier. The High Court has held that statement of PW3 could not be relied upon as it appeared that she had been in Sri Lanka at the relevant time and could not have therefore been host to Narain Dassi and Rajiv Gupta in Kalpa. We are of the opinion that in such matters it is impossible to lay down with precision the chain of events more particularly when illiterate villagers with no sense of time are involved. We find*

no reason therefore to hold as to why the statement of PW3 should not be believed. Likewisem we find that PW4 Bhag Rath Pradhan of village Kalpa had proved the extracts of the birth register Ex.PW-4/A which shows the father's name of Dimple Gupta as Rajiv Kumar whereas PW5 Devender Singh, a teacher has proved the admission form of Dimple Gupta where the column pertaining to the father's name has been left blank as would perhaps be expected from an unwed mother as it would be best to keep silent on the subject to avoid embarrassment to all concerned particularly at the time when the child was being admitted to school."

25. In (2010) 2 SCC 9 in 'Wahid Khan v State of M.P.', their Lordships of Hon'ble Supreme Court have held that even slightest penetration is sufficient to make out offence of rape and depth of penetration is immaterial. Their Lordships have held as under: -

"It was also contended by learned counsel for the appellant that since hymen of the prosecutrix was found to be in tact, therefore, it cannot be said that an offence of rape was committed on her by the appellant. This contention cannot be accepted as offence of rape has been defined in Section 375 of the IPC. Explanation to Section 375 reads thus :

"Explanation- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape."

It has been a consistent view of this Court that even a slightest penetration is sufficient to make out an offence of rape and depth of penetration is immaterial."

26. In (2014) 2 SCC 592 in the case of '*Parminder @ Ladka Pola v. State of Delhi*' their Lordships of Hon'ble Apex Court have held that even though the doctor stated there was no sign of injury on prosecutrix and hymen was found intact but the version of prosecutrix, of rape, was adequately corroborated. In that case also, the human semen and blood was detected on the underwear of prosecutrix but no semen was detected in the vaginal swab. Their Lordships held that non-rupture of hymen is not sufficient to dislodge the theory of rape and the conviction of rape was confirmed. Further held that there was penetration which has caused bleeding in private parts of prosecutrix, as would be evident from the

fact that underewear of prosecutrix was stained by blood. Their Lordships have held as under: -

> *"11. Section 375, IPC, defines the offence of 'rape' and the Explanation to Section 375, IPC, states that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. This Court has accordingly held in Wahid Khan v. State of Madhya Pradesh [(2010) 2 SCC 9] that even the slightest penetration is sufficient to make out an offence of rape and depth of penetration is immaterial. In the aforesaid case, this Court has relied on the very same passage from Modi in Medical Jurisprudence and Toxicology (Twenty Second Edition) quoted above. In the present case, even though the hymen of the prosecutrix was not ruptured the High Court has held that there was penetration which has caused bleeding in the private parts of the prosecutrix as would be evident from the fact that the underwear of the prosecutrix was stained by blood. In our considered opinion, the High Court was right in holding the appellant guilty of the offence of rape and there is no merit in the contention of the learned counsel for the appellant that there was only an attempt to rape and not rape by the appellant."*

27. For the reasons, recorded hereinabove, we find no merit in this jail appeal and thus, we dismiss the same by affirming the judgment and order, under challenge. Appellant is already in jail. He shall serve out the sentence, so awarded to him by the Trial Court.

28. Let a copy of this judgment and order along with the LCR be transmitted to the Court with the direction to inform the appellant-Dal Chandra about the fate of his appeal.

(Alok Singh, J.) **(Rajiv Sharma, J.)**

Rdang