

**IN THE HIGH COURT OF JUDICATURE AT
ALLAHABAD**

Court No. - 89

A.F.R.

Case :- JAIL APPEAL No. - 5100 of 2011

Appellant :- Amar Singh

Respondent :- State

Counsel for Appellant :- Vikram Bahadur Singh, Amicus Curuae

Counsel for Respondent :- Mr. Shrawan Kumar Ojha (A.G.A.)

Hon'ble Karunesh Singh Pawar,J.

1. Present jail appeal has been preferred against the judgment and order dated 7.7.2011 passed by Additional Sessions Judge, Court No.5, Kanpur Nagar whereby the accused appellant Amar Singh has been convicted and sentenced under section 366 I.P.C. to undergo five years rigorous imprisonment and fine of Rs.2000/- and under section 376 I.P.C. for seven years R.I. and fine of Rs.3,000/-, with default provision in each of the offences. The appellant has been acquitted of the charge under section 363 I.P.C.

2. Heard Mr. Vikram Bahadur Singh, learned amicus curiae, appearing for the appellant and Mr. Shrawan Kumar Ojha, learned Additional Government Advocate for the State.

3. The prosecution case is that the complainant Bablu, P.W. 1 lives in Swaroop Nagar, Kanpur in a hut and carries on the business of selling eggs for livelihood. Amar Singh, the present appellant works in Arya Nagar karkhana. He also lives in Swaroop Nagar. On 22.3.2010, Amar Singh enticed away

daughter of the complainant aged about 16-17 years, from her home. He agreed her to marry. The complainant apprehended both, the accused Amar Singh and his daughter from karkhana and gave them in the custody of police. A written report was given by him to the police station on the basis of which case crime No.60 of 2010 under sections 363, 366 I.P.C. was registered.

4. Investigation was conducted by the investigating officer. Statement(s) of the prosecutrix and other prosecution witnesses were taken. The prosecutrix was medically examined. Her statement was recorded under section 164 CrPC. On pointing out of the prosecutrix, place of occurrence was inspected and site plan was prepared and consequently charge-sheet against the accused appellant under sections 363, 366, 376, 506 I.P.C. was filed. Against the accused appellant, charges under sections 363, 366, 376 I.P.C. were framed. The accused denied the charges and claimed to be tried.

5. From the side of the prosecution, P.W.1 Bablu, P.W.2 prosecutrix, P.W.3 Dr. Jyotsana Kumari, P.W.4 S.I. Ram Chandra Pal and P.W.5 Constable Pradeep Kumar were examined. The written report has been exhibited as Ext.Ka-1, supurdaginama as Ext. Ka-2, medical report of the victim as Ext.Ka-3, supplementary medical report as Ext.Ka-4, site plan

as Ext.Ka-5, charge-sheet as Ext.Ka-6, chik FIR as Ext.Ka-7 and G.D. entry as Ext.Ka-8. Statement of the accused under section 313 CrPC was recorded where the case of the accused is of denial.

6. The prosecutrix in her statement under section 164 CrPC has stated that she went with the accused to Arya Nagar Karkhana. She was forcibly raped there and was threatened. She was subjected to rape thrice. She became unconscious and in the morning, she came home and told the incident to her mother and then her parents and brother Deepu went to karkhana and caught the accused from there and gave him to the police.

7. P.W.1 Bablu has stated that on 22.3.2010, the accused enticed away the prosecutrix from his home. He also went to karkhana. Both of them were found there and he agreed them to marry. From the karkhana, he apprehended the accused and the prosecutrix, and handed them over, to the police.

In cross-examination, he changed the time of the incident and stated that the incident took place in the month of November, then stated that the incident occurred on December 28 evening. He further stated in his cross examination that his daughter has not told him that she was enticed away. He knew the accused. He is a resident of the same mohalla. He caught the accused from karkhana and stated that he will get them married.

It is further stated that he has shown the place of incident to the investigating officer. He stated that he got the written report written by Rajvansh of mohalla. He told the investigating officer that his daughter has agreed for the marriage. He did not agree for the marriage. However, he stated that if the daughter is ready, he can marry her. The accused was caught from Karkhana by P.W.1 and his wife. He also stated that his nephew Deepu was also with him. He denied the suggestion that he did not tell the investigating officer that his daughter has given consent for marriage. He did not agree for that, nor tried to get them married.

P.W.2 has stated that on 22.3.2010, the accused took her to his karkhana at Arya Nagar by enticing her away. He pressed her mouth from her clothes and subjected her to rape thrice. She got unconscious. Someone opened the door of the karkhana. Then, she went to her parents and told them about the incident. Thereafter, her parents and her brother Deepu took the accused from karkhana to the police station. She was also taken along with the accused.

In her cross-examination, she stated that she did not remember the date and time of the incident. Then she says that it was Monday. The accused used to come to her house when P.W.1 was away and talked her and her mother. She further stated that the accused used to come to her house for the past

one year and they used to crack jokes in the house and her family members did not mind accused coming to her house. Then he says that she went alone on foot from the house towards mandir in the evening. Along with her, her younger sister Pinki also went.

She further stated that she told the investigating officer that she is 18 years old. She was enticed away by the accused. She told her parents that she is going to temple. They did not stop her. On the pretext of taking her mandir, the accused took her, his home and thereafter to karkhana. She stated that she on her own accord went away with the accused to temple. The accused has not forced her to go to temple. However, when instead of taking her to temple, he was taking her to karkhana, she objected. On the way, she has not opposed while she was taken by the accused. She had full faith on the accused. Chowkidar was present at the karkhana. He was under influence of liquor. Both had taken liquor. In the karkhana, the prosecutrix P.W.2, Chowkidar and the appellant were present. No one else was there. The door of the karkhana was locked from inside. She then stated that she went in karkhana on her own accord. She denied the suggestion that she has not given statement to the investigating officer that from karkhana, his parents and uncle apprehended her and Amar

Singh, present appellant. She further denied the suggestion that she has told the investigating officer that she has stayed with Amar Singh at his house for the entire night. Her clothes were not seized by the investigating officer.

P.W.3 Dr. Jyotsana Kumari has examined the prosecutrix, P.W.2. No injury was found on the person of the prosecutrix, including her private part.

According to pathological report, no spermatozoon was seen. P.W.3 Dr. Jyotsana Kumari has stated that no definite opinion regarding rape with P.W.2 can be given and in the medical examination, redness and swelling was found on the vagina. However, no blood was found. There was no injury on any part of the prosecutrix body. P.W.3 further stated that she has not seized any cloth of the prosecutrix. As per report of the Chief Medical Officer, the prosecutrix was 19 years old.

P.W.4 S.I. Ram Chandra Pal, investigating officer in his statement has said that on the pointing out of P.W.2, he inspected the place of occurrence and has prepared the site plan in his writing. He further stated that P.W.1 has told him that the accused has agreed for marriage. He further stated that P.W.1 told him that he went at the place of occurrence with his wife and brother Pappu. P.W.4 further stated that P.W.1 has told him that the accused

enticed away his daughter and had taken to his home. The investigating officer has stated that P.W.1 has not told him that the accused took his daughter to karkhana. P.W.4 further stated that the prosecutrix told him that on the pretext of taking her to temple and after visiting the temple, the accused took her to his home and kept her entire night at his house. She further stated that the accused raped her at his house, however, she did not tell him that how many times she was raped. P.W.4 further stated that the prosecutrix has not told him regarding any threat or marpeet done by the accused. She had not told him regarding taking the accused to karkhana. P.W.4 has further stated that he has not inspected karkhana. He further stated that the prosecutrix in her statement told him that the accused enticed away the prosecutrix to his home and he made her agreed for marriage.

The mother of the prosecutrix also told him that the accused took the prosecutrix from his home to karkhana in the morning. Mother of the prosecutrix further told that when they reached to karkhana, then the accused and the prosecutrix were found standing there. During investigation, he has not received the blood stained clothes of the prosecutrix. He has not recovered the sample and soil from the place where the prosecutrix was allegedly raped. He has not taken any mark from

the place of occurrence. He further stated that the place of occurrence is room of the accused appellant. He has not shown the place where the accused and the prosecutrix were apprehended, in the site plan. He has denied the suggestion that he has prepared a baseless site plan. He has further denied the suggestion that he has not shown place of occurrence in the site plan. He has not shown karkhana in the site plan. The suggestion that the place which he has shown in the site plan is not the place of occurrence has been denied by the witness and further he denied the suggestion that on the saying of the family members of the prosecutrix and under pressure by senior police officers, he completed the formality and filed false charge sheet against the accused.

P.W.5 Constable Pradeep Kumar is a formal witness, who has proved the first information report, Ext. Ka.7.

8. It is submitted on behalf of the appellant that the room of the accused from the hut of P.W.1 is a few paces away. The prosecutrix has not raised any alarm while going to the room of the accused. He submits that the prosecution has failed to prove its case beyond reasonable doubt. The testimony of the prosecutrix is not worthy of credence.

9. Learned Additional Government Advocate has opposed the appeal and has submitted that the

testimony of the prosecutrix is intact. She has levelled clear allegation against the appellant. The same statement has been given by her in her statement under section 164 CrPC. It is lastly submitted that minor irregularity in the prosecution case will not come in the aid of the accused. In support of his contention, learned A.G.A. has relied on judgment of Supreme Court in **Vijay alias Chinee versus State of Madhya Pradesh** 2010(8)SCC 191 and **State of Kerala versus Kundumkara Govindan and another** 1969 Cr.L.J. 818.

10. Having heard learned amicus curiae, appearing for the appellant and learned A.G.A. as well as perusal of the record, I find that as regards the date of occurrence, in the written report, there is no mention of the date of occurrence. In the chick F.I.R. also, date of occurrence is not mentioned. P.W.1 in his statement has stated that the date of occurrence is 22.3.2010, i.e. the date his daughter was enticed away by the accused. In the cross-examination, he has changed the time of occurrence and has stated that the incident is of November month. Then he says that the incident is of December.

P.W.2 in her examination-in-chief has not stated the exact date of incident; rather she has stated that it

was Monday. In her cross-examination, she has stated that the incident occurred on 22.3.2010.

P.W. 4 S.I. Ram Chandra Pal has stated in his chief that on 23.3.2010 when he was posted at police Swaroop Nagar, the accused was given in his custody which shows that according to testimony of P.W.1, the date of occurrence comes to 22nd March. As regards the place of occurrence, P.W.1 in his statement has stated that the place of occurrence is karkhana where the appellant was an employee. P.W.2 in her examination-in-chief has stated that she was subjected to rape at karkhana. However, in her cross-examination, she has changed it. She has denied the suggestion that she stayed with the accused at his home for the entire night. She further stated in her cross that she told the investigating officer that she was first taken to the house of the accused, then to karkhana.

The investigating officer in his statement has stated that it was P.W.1 who told him that the appellant took his daughter to his house. P.W.4 has stated that the prosecutrix has also told him that she was kept for the entire night at the house of the appellant. She further stated to P.W.4 that she was raped at the house of the appellant. She has not told P.W.4 regarding the incident at karkhana. The mother and the younger sister of P.W.2 and P.W.2 herself – all have stated in their statement to P.W.4

that the accused took the prosecutrix to his home because the appellant had got the consent of the prosecutrix for marriage. P.W.4 further stated that he inspected the place of occurrence at the pointing out of the prosecutrix and prepared the site plan. He pointed out the room where the incident took place in the site plan, i.e. the room of the accused appellant. He further stated that in the site plan, he has not shown karkhana. The site plan prepared by the investigating officer is Ext. Ka-5 wherein the place of occurrence is shown at the room of the accused.

11. Collective reading of the statements of P.W.1, P.W.2 and the statement of P.W.4 as also the site plan does not show as to whether the place of occurrence is karkhana or the house of the accused appellant and thus, exact place of occurrence is doubtful.

12. Now. coming to the testimony of the prosecutrix who in her statement has stated that on the date of incident, she went alone from her house to J.K. Mandir. Thereafter, she stated that on 22.3.2010 in the evening, she went to J.K. Mandir with her younger sister Pinki. Thereafter, again she says that she on her own accord and free will went away with the appellant to Mandir and no force was applied by the appellant to take her to temple. While she was going with the accused to Mandir,

when she found that instead of taking her to Mandir, the appellant was taking her to karkhana, she objected and raised alarm.

Then she says that on the way, she has not made any resistance while she was taken by the accused as she had full faith on the accused. She further says that she went to karkhana on her free accord. She denied the suggestion that she has told the investigating officer that she remained with the appellant at his house for the entire night.

13. A perusal of the statement of the prosecutrix shows that the same is self contradictory and inconsistent and does not inspire confidence. At one place, she says that she was enticed away by the appellant and was subjected to rape at karkhana and also was threatened by the accused appellant. Then, in her cross-examination, she says that she went to karkhana at her own accord. She was aware that the accused was taking her on the opposite route which does not go to temple. She did not make any resistance as she had full faith on the appellant. She has stated that the accused has never persuaded for going out from the house. The appellant used to come to her house for the last one year with the consent of family members and they did not mind that. P.W.2 further says that they never went to the house of the accused. She further says that on the pretext of taking to Mandir, the accused took her to

his home and then to karkhana. She denied the suggestion that she has told the investigating officer that she remained with the accused appellant for the entire night at his home; rather she stated that she told the investigating officer that she was in karkhana with the accused appellant. She further stated that she went alone from her house to J.K. Mandir. Then she says that she was going along with her younger sister. She further stated that no first information report was written in front of her at the police station. Thus, the testimony of the prosecutrix varies from every stage and does not inspire confidence, hence, to convict the appellant on testimony of P.W.2, some corroboration is required as held by Supreme Court in **Mod. Ali alias Guddu versus State of U.P.** (2015)7 SCC 272 (Emphasis is on paras 29 and 30).

P.W.3 Dr. Jyotsana Kumari has stated that according to report of the Chief Medical Officer, the prosecutrix was 19 years old. She has not given any clear opinion on rape. No external or internal injury has been found on the person of the prosecutrix. No spermatozoon has been found in the pathological report. There was no bleeding. Redness or swelling on the private part/vagina could have come from some stimulant substance like red pepper, petrol and therefore, has not given any definite opinion about rape. P.W.4 has disputed

the place of occurrence as told by P.W.1. Statement of P.W.2 regarding place of occurrence is also doubtful. P.W.4 has stated that he has not collected any soil or mark from the place of occurrence. He has not visited even karkhana which according to the prosecutrix is the place of occurrence. He has stated that he has not shown karkhana in the site plan.

14. On overall consideration of the prosecution evidence, statement of the prosecution witnesses and the material collected by the investigating officer, it is clear that in the written report and the first information report, no date of incident has been mentioned. Scribe of the first information report Rajvansh has not been produced. The prosecutrix in her statement has stated that she went to temple along with the appellant at her free will and accord, however, she told the investigating officer that Amar had taken her to his home and she was kept there whole night. This shows contradictory statement of the prosecutrix. Whether the place of occurrence is karkhana or the house of accused becomes doubtful as per the site plan itself. In the site plan, karkhana has not been shown. P.W.4 has not visited the place of occurrence, i.e. karkhana. Neither the soil nor the clothes of the prosecutrix has been collected by the investigating officer. Chowkidar of karkhana has

not been produced by the prosecution. The younger sister of the prosecutrix who could have been the eye-witness has also not been produced by the prosecution; rather has been withheld. Hence for not examining Chowkidar and Pinki, younger sister of P.W.2, adverse inference is to be taken against the prosecution as held by Supreme Court in 2001 Criminal Law Journal 2602 **Takhaji Hiraji versus Thakore Kubersing Chamansing and others.** Relevant paragraph 19 is reproduced as under :

"19. So is the case with the criticism levelled by the High Court on the prosecution case finding fault therewith for non-examination of independent witnesses. It is true that if a material witness, which would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness which though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the Court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the Court ought to scrutinise the worth of the evidence adduced. The court of facts must ask itself - whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the Court can safely act upon it uninfluenced by the factum of non-examination of other witnesses. In the present case we find that there are at least 5 witnesses whose presence at the place of the incident and whose having seen the incident cannot be doubted at all. It is not even suggested by the defence that they were not present at the place of the incident and did not participate therein. The injuries sustained by these witnesses are not just minor and certainly not self-inflicted. None of the witnesses had a previous enmity with any of the accused persons and there is apparently no reason why they would tell a lie. The genesis of the incident is brought out by these witnesses. In fact, the presence of the prosecution party and the accused persons in the chowk of the village is not disputed. How the vanity of Thakores was hurt leading into a heated verbal exchange is also not in dispute. Then followed the assault. If the place of the incident was the chowk then it was a sudden and not pre-meditated fight between the two parties. If the accused persons had reached their houses and the members of the prosecution party had followed them and opened the assault near the house of the accused persons then it could probably be held to be a case of self-defence of the accused persons in which case non-explanation of the injuries sustained by the accused persons would have assumed significance. The learned Sessions Judge has on appreciation of oral and the circumstantial evidence inferred that the place of the incident was the chowk and not a place near the houses of the accused persons. Nothing more could have been revealed by other village

people or the party of tight rope dance performers. The evidence available on record shows and that appears to be very natural, that as soon as the melee ensued all the village people and tight-rope dance performers took to their heels. They could not have seen the entire incident. The learned Sessions Judge has minutely scrutinised the statements of all the eye-witnesses and found them consistent and reliable. The High Court made no effort at scrutinising and analysing the ocular findings arrived at by the Sessions Court. With the assistance of the learned counsel for the parties we have gone through the evidence adduced and on our independent appreciation we find the eye-witnesses consistent and reliable in their narration of the incident. In our opinion non-examination of other witnesses does not cast any infirmity in the prosecution case. "

(Emphasised by me)

15. In Kundumkara Govindan's case (supra), relied on by learned Additional Government Advocate, Assistant Sessions Judge acquitted the accused giving benefit of doubt, holding that the evidence of the prosecutrix in a rape case cannot be believed unless it is corroborated in material particulars. It is not the case here. Law in this regard is settled. Statement of the prosecutrix alone is sufficient to convict the accused if the same inspires confidence and is of impeccable character and quality. In case the statement is infirm, then some corroboration is needed.

The facts of the present case are different from the above case law. Hence, in the facts of the present case, rule of prudence cannot be dispensed with as in view of the self contradictory and shaky testimony of the prosecutrix, corroborative material is required which is absent in this case.

16. So far as the judgment in Vijay alias Chineer versus State of M.P. (supra) is concerned, relied on by learned A.G.A., place of incident was not disputed and admittedly, the prosecutrix at the place

of incident was subjected to rape and therefore, there are concurrent finding of facts by the two courts. Here, in the present case, place of occurrence is itself disputed by the investigating officer and from the testimony of P.W.2. In that regard also, it does not inspire confidence. Therefore, this judgment also is not applicable in the facts of the present case.

17. Since the place of occurrence in this case is not clear, coupled with the fact that the testimony of P.W.2 is quite shaky and does not inspire confidence as also the fact that younger sister Pinki of P.W.2 who was an eye-witness has not been produced by the prosecution, Chowkidar of karkhana at Arya Nagar has also not been made accused along with the appellant and has not been produced by the prosecution, scribe of the first information report has also not been made witness in this case, I am of the opinion that such kind of testimony of P.W.2 does not inspire confidence.

18. Thus, in view of the aforesaid discussion, the prosecution has failed to prove its case beyond reasonable doubt. Every part of the testimony of the prosecutrix is infirm, doubtful and contradictory which does not pose confidence. There is no corroborative evidence in support of the testimony of the prosecutrix. The prosecution has not been able to prove the place of occurrence, the time of

occurrence and manner of occurrence. The exact place of occurrence has not been established and there is variation in the evidence about place of occurrence as per the evidence of the investigating officer and the witnesses. The court below has not taken note of this contradiction which was a material contradiction and therefore there has been a total wrong appreciation of evidence on record which has resulted in miscarriage of justice. There appears to be suppression of material facts relating to occurrence because of the contradiction as indicated. Unusual manner of shifting the place of occurrence and the fact of the prosecutrix having a company of the accused appellant at her free will and accord while going to temple and then to karkhana as also they having been acquainted with each other leaves doubt on the veracity of the incident. The investigating officer has not collected any evidence from the place of occurrence. Two important and available witnesses have been withheld by the prosecution from the Court, therefore, it is hard to convict the appellant on this quality of evidence and it is a fit case to draw adverse inference against the prosecution for withholding two important witnesses from the Court.

19. In view of what has been stated hereinabove, the jail appeal is allowed and the judgment and

order of conviction and sentence dated 7.7.2011 passed by Additional Sessions Judge, Court No.5, Kanpur Nagar in S.T. No.759 of 2010, is set aside.

20. As per report dated 12.6.2017, sent by Superintendent, District Jail, Kanpur Nagar, the appellant has already been released after serving full sentence and giving benefit of remission period.

21. Let a copy of this judgment be transmitted to the learned trial Court. The lower court records be also sent back to the lower court.

(Karunesh Singh Pawar, J

Order Date :- 3.8.2022

kkb.