

A.F.R.

Reserve Judgement

Court No. 49

Case :- CRIMINAL APPEAL No. - 745 of 2014

**Appellant :-** Bhura

**Respondent :-** State of U.P.

**Counsel for Appellant :-** Sharad Malviya, J.H. Khan, M.I. Farooqui

**Counsel for Respondent :-** Govt. Advocate

Hon'ble Suneet Kumar, J.

Hon'ble Om Prakash Tripathi, J.

(Per Om Prakash Tripathi, J.)

Heard Shri J.H. Khan, learned counsel for the appellant, learned A.G.A. for the State and perused the material on record.

The appellant has preferred this criminal appeal aggrieved by judgment and order dated 21.12.2013 passed by Additional Sessions Judge, Court No. 3, District- Meerut, in Session Trial No. 758 of 2011 (State Vs. Bhura @ Bhure) arising out of Case Crime No. 112 of 2009, under Section 376G and 506 I.P.C., Police Station- Daurala, District- Meerut, convicting and sentencing the appellant to undergo imprisonment for life under Section 376G I.P.C. with a fine of Rs. 5000/-, in default of payment of fine to undergo one year additional imprisonment and one year rigorous imprisonment for an offence punishable under Section 506 I.P.C. with a fine of Rs. 1000/- in default of payment of fine two month additional imprisonment. All the sentences shall run concurrently.

The case of Rahul was separated from this case as Rahul was juvenile and matter has been sent to Juvenile Justice Board for trial.

The prosecution case is as follows:

On 03.03.2009 at around 9:00 p.m. 'P' (daughter of complainant), aged about 14 years, went to attend the call of nature in the vacant residence of M.D.A., where Rahul and Bhura S/o Virendra, R/o Village- Palhaida came there and forcibly picked up complainant's daughter by holding her face and took her to the fields and after smelling the intoxicant material, raped her forcibly. On hearing the noise of victim, Roshan S/o Samay Singh and Santari W/o Rajkumar went towards the fields then both the accused ran away threatening that if told to any one, they would kill.

On the basis of the written report (Exhibit Ka-1), the police registered Case Crime No. 412 of 2009, under Sections 376, 506 I.P.C. against accused Rahul and Bhura. Investigation of the case was taken over by Sub- Inspector Alok Kumar Sharma. Site inspection was prepared by the investigator, the relevant documents were recorded in the case diary and recorded the statements of the witnesses.

After completing the investigation, Investigating Officer has filed charge sheet against Rahul and Bhura, under Section 376, 506 I.P.C. Cognizance was taken by the Chief Judicial Magistrate and committed to the court of sessions on 29.06.2021 for trial

and thereafter the said sessions trial has been transferred to the court of Additional Sessions Judge, Court No. 3, Meerut for trial.

Charge under Sections 376G and 506 I.P.C. has been framed by Additional Sessions Judge, Court No. 15, Meerut. Charge was denied by the accused Bhura @ Bhure. The accused-appellant pleaded not guilty and claimed to be tried.

In order to prove the charges framed against the appellant, the prosecution has examined witnesses, detailed as under:-

1	Smt. Jagwati (complainant)	PW-1
2	Sushil Jain	PW-2
3	Prosecutrix	PW-3
4	Dr. Anju Jodha	PW-4
5	Constable Harpal Singh	PW-5
6	S.I. Tulsiram Goswami	PW-6
7	Rajhans (Clerk, C.M.O. Office)	PW-7
8	Dr. Pramila Gaud	PW-8

In spite of ocular version of the witnesses, following documents were produced and contents were proved by leading evidence:-

1	Written Report	Ext. Ka-1
2	Recovery of memo of clothes	Ext. Ka-2
3	Statement under Section 164 Cr.P.C.	Ext. Ka-3
4	Medical examination report	Ext. Ka-4
5	Supplementary medical report	Ext. Ka-5
6	First Information Report	Ext. Ka-6
7	Kayami G.D.	Ext. Ka-7
8	Charge-sheet	Ext. Ka-8
9	Medical examination of prosecutrix	Ext. Ka-9
10	Pathology report	Ext. Ka-10
11	X-ray report	Ext. Ka-11
12	Spot map	Ext. Ka-12 & 13

In statement under Section 313 Cr.P.C. the accused has stated that he had made love marriage with Mausi of victim due to this enmity he was falsely implicated in this case.

The main question is that whether accused Bhura @ Bhure has committed rape with prosecutrix on 03.03.2009 at 9:00 p.m. when she has gone to attend the nature's call with help of Rahul after smelling her intoxicant material raped her forcefully.

In F.I.R. the age of the prosecutrix has been stated as 14 years, after medical examination the age of the prosecutrix was found at 16 years as shown in Ex- KA-9. No spermatozoa seen in the vagina smear, in Exh. KA-5 shows that no opinion regarding can be given hymen torn, bleeding present inside vagina and torn edge vagina admits two fingers with difficulty and painful.

Prosecutrix PW-3 had deposed in her statement on oath that she knows accused Bhura @ Bhure who is her neighbour. Incident took place prior four years at about 9:00 p.m, she went for nature's call in the vacant house of M.D.A. then Rahul and Bhura came there and by holding her face took her to the field and after subjecting her to the smell of intoxicant material raped her forcefully. Rape was committed by both the accused. She was unable to oppose them due to intoxication, she made noise then they threatened her and if this fact was told to anyone then she shall be killed. After hearing the scream of PW-3 her maternal uncle Roshan and Mausi Santari came on the spot and took her home. She told them about the incident committed by

the accused. PW-3 was medically examined and recovery memo of her Salwar, Kurta and underwear as prepared by the police as Exhibit Ka-2. Her statement was also recorded before the Magistrate. She narrated entire story before the court. Witness has also proved the statement under Section 164 Cr.P.C. as Exhibit Ka-3. This witness was not cross examined by the defence despite ample opportunity, consequently the cross examination of the witness was closed by the court. As the statement of witness is not rebutted by the defence so the evidence is admissible and relevant for the disposal of this case.

PW-2 is the witness of recovery, before this witness clothes of the prosecutrix was sealed and recovery memo was prepared. He has proved the recovery memo. In the cross examination the witness has stated that clothes related to the case are not before him in the court, at present prosecutrix has been married.

PW-1 mother of the prosecutrix has deposed on oath that incident took place prior two and a half year, her daughter had gone for nature's call at 9:00 p.m. behind the house. Accused Bhura and Rahul R/o Village-Palhaida carried my daughter forcefully by holding her mouth and took her to the field and inhaled her intoxicating substance, thereafter, both committed rape with her daughter. On hue and cry made by her daughter, Roshan, Santari and other members of the village came on the spot, seeing them accused Rahul and Bhura fled away. Her daughter told the witness about the incident. First day she was

silent due to fear and on second day lodged F.I.R. The age of her daughter was 14 years. Witness has proved written report as Exhibit Ka-1. Police had also taken the clothes of her daughter and sealed it.

PW-4 Dr. Anju Jodha has proved medical report and supplementary report as exhibit Ka-4 & Ka-5.

PW-5 Constable Harpal formal witness has proved chik F.I.R. as exhibit Ka-6 and Kayami G.D. Ka-7.

PW-6 I.O. who had proved charge sheet as exhibit Ka-8 and others witnesses also proved spot map as exhibit Ka-12 & Ka-13 as secondary evidence.

PW-7 senior clerk in C.M.O. office, Meerut has proved X-ray report as exhibit Ka-10 and X-ray material as exhibited 1,2 & 3.

PW-8 Dr. Pramila Gond has also proved slide report as exhibit Ka-11 and stated that there was no spermatozoa in the slide.

Prosecutrix PW-3 had supported the prosecution case in her statement under Section 164 Cr.P.C. proved as exhibit Ka-3, statement of prosecutrix under Section 164 Cr.P.C. is as follows:-

" On 03.03.2009 at about 9:00 p.m., she went for nature's call behind her home then suddenly Rahul and Bhura came there. Rahul gagged her mouth so she could not make a noise. They took her in the field and put a handkerchief on her face so she became unconscious, Rahul and Bhura committed rape with her.

After sometime she became conscious she make hue and cry then accused threatened her that they will kill her, if, she told about the incident. After hue and cry, her maternal uncle and aunt came there and brought her to the house where she told the story to her mother."

Prosecutrix after marriage had also supported the prosecution version in her examination-in-chief before the trial court, but despite ample opportunity to the defence for cross examination, no cross examination was done by the accused. After closing the cross examination no application for recall was moved for cross examination of the witness. No revision has been filed against the said order so in absence of rebuttal entire evidence of PW-3 is fully reliable. PW-1 had also supported the prosecution case and there is nothing in her cross examination by which prosecution evidence can be belied. PW-1 is also an illiterate lady, she has supported the prosecution case and stated that what was told by her daughter on the date of incident.

Incident took place on 03.03.2009, F.I.R. was lodged on 04.03.2009. Medical examination of the prosecutrix was conducted on 04.03.2009 in which it has been opined that no mark of injury of external part of the body, hymen torn, bleeding present from inside vagina and edge vagina admits two fingers with difficulty and painful as shown in Exhibit Ka-4 & Ka-5. Ka-9 is her age certificate by which it is evident that age of the prosecutrix was 16 years. From the perusal of the supplementary

report, it appears that no spermatozoa seen in the slide taken from vagina smear. Thus medical report exhibit Ka-4 & Ka-5 supports and corroborates prosecution case. Evidence of PW-3 is corroborated by medical evidence exhibit Ka-4 & Ka-5.

From the perusal of the record, it appears that in this case defence counsel had cross examined PW-1, PW-2, PW-6, PW-7, PW-8 but the learned counsel for defence had not cross examined PW-3, PW-4, PW-5 after been given ample opportunity. He had not also participated in the argument knowingly with intent to delay the trial. It is also praiseworthy that prosecutrix had fully supported prosecution version even after marriage. Such sort of courage is appreciated. Her evidence is like an injured witness and is fully credible and trustworthy supported by medical evidence. We do place confidence in the deposition of PW-1 and PW-3. F.I.R. was promptly lodged on the next day from the date of incident, there is no grudge to falsely implicate accused appellant. On the basis of fully reliable evidence prosecution has proved beyond reasonable doubt that accused Bhura @ Bhure has committed rape with prosecutrix on 03.03.2009 at 9:00 p.m. when she had gone to attend the nature's call as narrated by the prosecutrix. Thus the trial court had rightly held the accused guilty for the charges under Section 376(G) and 506 I.P.C. Thus we confirm the conviction of the appellant. It is evident that in judgment of the trial court at page 1 & 17, the date of incident has been typed inadvertently 08.03.2009 which shall be read as 03.03.2009.

The main emphasis placed before us is on the point of sentence by the learned counsel for appellant. The submission is that at the time of incident accused was 19 years of age, he is a labour and is in incarceration for about 13 years and at present he is 32 years. He is married person. Prosecutrix has also married and living peaceful happy married life.

Learned counsel for the appellant relied on *Dinesh @ Buddha Vs. State of Rajasthan, 2006 Lawsuit SC 162*, decided on 28.02.2006 by Supreme Court of India in which it has been held that the sentence provided in Section 376(2)(f) I.P.C. does not per se become life sentence. Learned counsel for State submitted that even in a case covered under Section 376 (2) (f) I.P.C., imprisonment for life can be awarded. It is to be noted that minimum sentence of ten years has been statutorily provided and considering the attendant circumstances the imprisonment for life in a given case is permissible. Neither the trial court nor the High Court has indicated any such factor. Only by applying Section 3(2)(v) of the Atrocities Act the life sentence was awarded. Therefore, the sentence of life imprisonment was reduced to 10 years.

In the case of *Bavo@Manubhai Ambalal Thakore Vs. State of Gurarat 2012 (2) SCC 684* decided on 03.02.2012 by Supreme Court in which it has been held that on the date of incident victim was seven years age and accused was in the age of 18/19 years and that the incident occurred ten years ago, the award of

life imprisonment which is maximum prescribed was not warranted and also in view of the mandate of Section 376 (2)(f) I.P.C., the court felt that the ends of justice would be met by imposing rigorous imprisonment for ten years. The appellant had already served nearly ten years. The sentence of life imprisonment was modified to rigorous imprisonment for ten years.

*Rajendra Datta Zarekar Vs. State of Goa, (2007) 14 SCC 560*, the victim was aged about six years and the accused was aged about 20 years. Ultimately, the Supreme Court confirmed the conviction and sentence of 10 years as awarded by the High Court. However, the fine amount of Rs.10,000/- awarded under Section 376 (2)(f) being found to be excessive was reduced to Rs.1000/-.

Learned A.G.A. submitted that accused appellant should be punished severely without relaxation. The offence of rape is serious offence. The physical scar may heal, but the mental scar will always remain. When a woman is ravished, what is inflicted is not merely physical injury but the deep sense of some deathless shame. Judicial response to human rights cannot be blunted by legal jugglery. A girl of 14 years who is raped is not an accomplice. The measure of punishment in a case of rape cannot depend upon the social status of the victim or that accused. It must depend upon the conduct of the accused, the state and age of the sexually assaulted female and the gravity of

the criminal act. Crimes of violence upon women need to severely dealt with. Protection of society and deterring the criminal is the avowed object of law and this is required to be achieved by imposing appropriate sentence. The sentencing Courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. The court must hear the loud cry for justice by the society in cases of the heinous crime of rape on innocent helpless girl of tender years. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the court. To show mercy in the case of such heinous crime would be travesty of justice and the plea for leniency is wholly misplaced.

It is admitted fact that at the time of incident the prosecutrix was about 14 years and accused was 19 years. At the time of incident accused was married person and prosecutrix married later on and is leading a peaceful married life. The appellant is at present 32 years and is incarceration for 13 years for charge under Section 376(G) I.P.C. So in the present facts and circumstances and the law laid down by the Apex Court, we are of the view that in the present case life imprisonment would be excessive punishment and punishment for 13 years would be adequate punishment which the appellant has already served out. Therefore the sentence is reduced to R.I. 13 years in place of life imprisonment. We feel that ends of justice would suffice by imposing R.I. for 13 years which has been served by the

appellant already. However, fine amount of Rs.5000/- being found to be excessive reduced to Rs.3000/- in default, to further undergo R.I. for one month.

In view of the above discussion the conviction imposed on the appellant herein is confirmed. However, the sentence of life imprisonment is modified to R.I. for 13 years with a fine of Rs.3000/- in default of further undergo R.I. for one month. The conviction and sentence imposed on the appellant under Section 506 I.P.C. is confirmed. All the sentences shall run concurrently.

With the above modification of sentence, the appeal stands disposed of.

Office is directed to send copy of this judgment alongwith original record to the Court concerned for necessary action and compliance in accordance with law.

**(Om Prakash Tripathi,J.) (Suneet Kumar,J.)**

**Order Date :- 11.03.2022**

Sharad/-