(A.F.R.)
Reserved on 23.8.2022
Delivered on 26.8.2022

Court No. - 89

Case :- CRIMINAL APPEAL No. - 1935 of 1992

Appellant :- Ishrat
Respondent :- State
Counsel for Appellant :- S.R. Verma, Aarushi Khare
Counsel for Respondent :- A.G.A.

Hon'ble Krishan Pahal,J.

1. Heard Ms. Aarushi Khare, learned Amicus Curiae for the appellant and Sri Vinod Kumar Singh Parmar, learned AGA for the State.

2. Present Criminal Appeal under Section 374(2) of the Cr.P.C. has been preferred by accused-appellant Ishrat against the judgment and order dated 20.10.1992 passed by Sri S.C. Nigam, Seventh Additional District and Sessions Judge, Kanpur Nagar in Sessions Trial No.175 of 1990 (State Vs. Ishrat), Police Station- Chamanganj, District- Kanpur Nagar, whereby accused-appellant was convicted u/s 324 IPC and sentenced to three years rigorous imprisonment. He was also convicted u/s 354 IPC and sentenced to two years rigorous imprisonment. Both sentences were to run separately.

PROSECUTION STORY:

3. Prosecution story, in nutshell, as unfolded from written report dated 29.11.1988 (Ex.Ka-1) is that informant Shaukat Ali (PW-1) filed written report (Ex.Ka-1) transcribed by Mohd. Aslam, mentioning therein that on 29.11.1988 between 01:00 PM to 03:00 PM, his minor daughter aged about 4-5 years had gone to the house of one of the neighbours to play. On the same day at about 03:00 PM, some people of the locality were stated to have brought his minor daughter in a blood soaked condition from the field and informed that some unknown person had assaulted her private parts by a blade. The victim was taken to the hospital for treatment. It has also been stated in the FIR that blood stained blade is still lying in the field.

4. On the basis of written report (Ex.Ka-1), Chik FIR (Ex.Ka-5) was registered on 29.11.1988 at 09:15 PM as Case Crime No.274 of 1988, under Section 324 IPC against unknown person. Thereafter investigation was initiated.

5. The investigation was taken up by the Investigating Officer Mehfooz Ali, Sub-Inspector who after recording the statement of the witnesses, preparing site plan, taking in possession the blood stained blade and other materials, arrested the appellant and prepared the arrest memo dated 1.12.1988, thereafter submitted the charge-sheet against him on 16.12.1988.

TRIAL PROCEEDINGS:

6. Charge against the appellant was framed by the Trial Court on 22.6.1990 u/s 324, 376/511 IPC. The appellant had claimed himself to be juvenile at the time of offence but after the radiological examination, he was found to be major. The trial was proceeded as such.

7. In order to prove its case, the prosecution has examined ten witnesses i.e. PW-1 Shaukat Ali (Informant), PW-2 Victim, PW-3 Dr. Sushma Singh, PW-4 Ram Kishore, PW-5 Dr. H.N. Bahadur, PW-6 Dr. Ashok Upadhyay, PW-7 Mohd. Javed, PW-8 Gulshan, PW-9 Shakeela and PW-10 Mahfooj Ali. The Court was pleased to examine Dr. Ram Babu as CW-1 to prove the ossification test report of the appellant wherein the age of the appellant was found above 18 years.

8. PW-1 informant is the father of the victim and has corroborated the prosecution story. He has stated that the appellant had committed the diabolic offence of severely cutting the private parts of his minor daughter after having attempted to rape her. The witness was cross-examined by the counsel for the appellant wherein he has stated that after lodging of the FIR, he was informed by the victim that it was the appellant who had committed the said crime to her as by the time of lodging of the FIR, she

was not in a condition to speak. He has proved his written report as Ex.Ka-1.

9. PW-2 is the victim who has stated that the appellant had taken her behind the bushes in the field by luring her to give her a toffee where she was disrobed and her private part was cut by him with a blade. She has also stated in the examination-in-chief that she had told about the name of the appellant at the hospital. She had identified the appellant in the dock. Nothing material could be extracted from her in cross-examination by the defence counsel.

10. PW-3 is Dr. Sushma Singh who has stated that the victim was in a state of shock at the time of her medical examination and was not even able to speak. Her blood pressure was found 180-50 mm Hg. Her internal examination was conducted under general anesthesia. She had observed that her private part was badly damaged and tear were present of size 06mm x 5mm and 08mm x .5mm. No spermatozoa were found by the pathologist in the vaginal smear. Dr. Singh has further opined that there is a possibility of sexual intercourse having been committed with the victim. She has proved the medical examination report as Ex.Ka-2. As per the Ossification test, the age of the victim was found to be four years. She has even confirmed the time of the offence. Dr. Sushma Singh has further stated that due to the serious condition of the victim, she had consulted Senior Dr. Negi and Surgeon Dr. Bahadur and the medical examination of the victim was conducted by her in their presence.

11. PW-4 Ram Kishore is the formal witness. He has proved the FIR as Ex.Ka-5 and the GD of the institution of the FIR as Ex.Ka-6.

12. PW-5 Dr. H.N. Bahadur, Senior Consultant who has proved the bed head ticket of the victim as Ex.Ka-7. The victim had undergone treatment from 29.11.1988 to 23.12.1988.

13. PW-6 Dr. Ashok Upadhyay who was the first person to examine the victim on 29.11.1988 at about 03:45 PM and found following injuries on her body.

> *"1. Horizontal incised wound 6cm x 1cm x muscle deep present on the pubic region 6cm below the umbilicus fresh bleeding present.*
>
> *2. Horizontal incised wound 8cm x 1cm x muscle deep present half cm below injury no. One. Fresh bleeding present.*
>
> *3. Horizontal incised wound 10cm x 2cm x muscle deep present One & half cm below injury no. Two.*
>
> *4. Multiple incised wounds over right labia majora region on its upper surface & by the side ranging in size from 4cm x ¼cm to 1cm x ¼cm in size depth not probed. Fresh bleeding present.*
>
> *5. Multiple incised wounds over left labia region on its upper surface & by its side ranging in size from 2cm x ¼cm to ½cm x ¼cm depth not probed. Fresh bleeding present.*
>
> *6. Multiple small incised wounds present all along the margin of right labia ranging in size from ¼cm x ¼cm to ½cm x ¼cm x depth not probed. Fresh bleeding present.*
>
> *7. Multiple small incised wounds present all along the margin of left labia ranging in size from ¼cm x ¼cm to ½cm x ¼cm x depth not probed. Fresh bleeding present.*
>
> ***Opinion***
>
> *All injuries are fresh caused by sharp edged object for ascertaining the nature. All injuries kept under observation. Patient admitted & referred to E.M.O. Dufferin Hospital for internal examination of private parts and necessary action."*

14. He opined that the said injuries could have been sustained by the victim on 29.11.1988 between 1 to 2 PM.

15. PW-7 Mohd. Javed is the independent witness. He has stated in his examination-in-chief that he has not seen the occurrence but had heard of it on 29.11.1988 at about 05:00 PM. He has not supported the prosecution story and thus, was declared hostile by the public prosecutor and cross-examined.

16. PW-8 Gulshan is another independent witness who had also resiled from his statement recorded by the Investigating Officer and has not supported the prosecution version.

17. PW-9 is the mother of the victim and has stated that about 15 days before the occurrence, an altercation with the appellant had occurred over watching television in her house. She has also corroborated the statement of the victim.

18. PW-10 Mehfooj Ali is the Investigating Officer who has proved recovery memo of blood stained blade recovered from the place of occurrence as Ex.Ka-8. He has proved the memo blood stained sand and simple sand as Ex.Ka-9. Ex.Ka-10 is the letter for medical examination of victim wherein Doctor has opined that the victim was found in an unconscious state. He has further stated that the victim was not able to speak at the time of her admission on 29.11.1988. Site plan has been proved as Ex.Ka-11. Ex.Ka-12 is the memo of blood stained frock of the victim. He has also proved the recovery memo of blood stained frock of the victim as Ex.Ka-13. The charge-sheet has been proved as Ex.Ka-14.

19. Thereafter, the statement of accused-appellant under Section 313 Cr.P.C. was recorded. He has stated that the prosecution story is false. Appellant-accused Ishrat claimed that he has been falsely implicated in the case to get the house vacated.

20. On appreciation of evidence available before Trial Court and after hearing parties, learned Sessions Judge convicted and sentenced accused-appellant, Ishrat, as stated above, by judgment and order impugned in this appeal.

POINTS OF DETERMINATION:

i) Whether the appellant had committed the said offence of assault causing grievous hurt by dangerous weapon to the victim on 29.11.1988 between 1 PM to 3 PM?

ii) Whether the appellant had caused any assault or criminal force to the victim with an intent to outrage her modesty?

RIVAL CONTENTIONS:

21. Ms. Aarushi Khare, learned Amicus Curiae appearing for the appellant has argued that the appellant has been falsely implicated in the present case. The FIR is delayed by about six hours and there is no explanation of the said delay caused. The appellant is not named in the FIR. During investigation, his name has come up in the statement of the victim, informant and other witnesses. Learned Amicus Curiae has further stated that there are several contradictions in the statements of the witnesses. She has also stated that as per the statement of the mother of the victim PW-9, the victim had come to the house of the appellant walking although she has denied the said fact later on during further cross-examination. She has referred to several contradictions in the said statement of the prosecution witnesses, namely, PW-1, PW-2 & PW-9. She has further stated that the blood stained blade and the blood stained frock of the victim has not been seen for chemical examination by the Investigating Officer. This is the serious lacuna in the prosecution story. She has also stated at Bar that the offence is of the year 1988 and much water has flown down the Thames, thus, the appellant is entitled to acquittal. The witnesses are interested witnesses and the said fact stands supported by the statements of appellant recorded u/s 313 Cr.P.C. The independent witnesses PW-7 and PW-8 have turned hostile. The prosecution story is falsified on account of absence of corroboration. She has also stated that if the court is not inclined in allowing the appeal, the appellant may be released to the period of sentence already undergone.

22. Per contra, Sri Vinod Kumar Singh Parmar, learned AGA has vehemently opposed the criminal appeal on the ground that the victim is a child of tender age of four years. The offence of cutting her private parts with a blade and also attempting to commit rape and outraging the modesty of the victim has categorically been proved by the statement of the PW-1 and PW-2 and has also been corroborated by PW-9 who happens to be the mother of the victim. There are no material

contradictions in their statements. The treating Doctors have also categorically corroborated the prosecution story and have even been asked about the alleged time of offence regarding the injuries sustained by the victim which further substantiate the prosecution allegations.

23. Learned AGA has further stated that the FIR was naturally lodged by the appellant as it was his priority to get the victim medically examined as her private part was found mutilated and she was not in a conscious state. The said delay stands explained by the statement of the PW-1. The said fact has also been corroborated by the statement of PW-2 victim and PW-10 Sub-Inspector Mehfooj Ali, the Investigating Officer.

24. Learned AGA has further stated that in the present scenario, no independent witness is ready to depose against another person to face ire of the accused later on in life. To buttress his argument, he has placed much reliance on the judgement of Supreme Court in the case of ***Shiv Ram and Another vs. State of U.P.***[1], and the operative part of para-16 reads as under:-

> *"16. ...... The witnesses further admitted that many persons had gathered at the place of occurrence, if this be so it was very much necessary for the prosecution to examine some independent witnesses to lend assurance to the credibility of the evidence of these two eyewitnesses. These submissions do not impress us at all. Nowadays it is a common tendency that no outsider would like to get involved in a criminal case much less in the crime of present magnitude and, therefore, it was quite natural that no independent witness would come forward to assist the prosecution. It is well settled that the evidence of witnesses cannot be discredited only on the ground that they are close relatives of the deceased persons. All that is required in such a situation is that the court must scrutinize the evidence of such witnesses with utmost care and caution. The magnitude of the present crime and nature of prosecution evidence has put us on guard to appreciate the evidence of these two eye witnesses with utmost care and caution. We have done this exercise and we are unable to be persuaded to discard the evidence of these two witnesses on the grounds urged before us. The evidence of both these witnesses in our considered view is absolutely straightforward, unblemished and without any infirmity. The first information report which was lodged within four hours, naming all the accused also lends asurance to our conviction that the evidence of these two witnesses is trustworthy and cannot be discarded. The contentions of the learned counsel for the accused, therefore, stand rejected."*

1 (1998) 1 SCC 149

25. Learned AGA has also stated that the prosecution story is itself proved by the statements of PWs-1, 2 and 9 and they cannot be considered as interested witnesses as there is nothing on record to suggest that the appellant has been falsely implicated by the informant.

CONCLUSION:

26. This is one of the most serious and diabolic offence committed against a minor girl of tender age of four years.

27. Coming to the first point for determination, it is proved beyond reasonable doubt by the statements of prosecution witnesses i.e. PW-1 informant, PW-2 victim, PW-3 Dr. Sushma Singh, PW-5 Dr. H.N. Bahadur, PW-6 Dr. Ashok Upadhyay and PW-9 Shakeel, mother of the victim that the appellant has committed the aforesaid heinous offence with the victim of tender age. In the statements of prosecution witnesses, the date, time and motive of offence also stands corroborated. The identification of the appellant in the dock has been done by the PW-2 victim. The witnesses have not been cross-examined on this point by the counsel for the appellant. Even the minor contradictions that had crept up in the statement of the victim, have not been put to the Investigating Officer as per the provision of Section 145 of the Indian Evidence Act, 1872, thus, it also stands proved and unrebutted.

28. Now, I proceed to consider second point for determination which is in regard to commission of any assault or criminal force by the appellant with the victim with an intent to outrage her modesty. The said point has also been proved beyond reasonable doubt by the statements of the victim and the doctors referred above.

29. The learned Trial Court has rightly taken recourse of Section 222 of Cr.P.C. wherein the allegations of commission of rape by the appellant with the victim were not found. Although the internal examination report of the victim supports it. However, the evidence regarding the commission of offence punishable under Section 354 IPC was established

by the statement of the victim PW-2 and, therefore, on this count, learned Trial Court has rightly convicted the appellant u/s 354 IPC, although, the charge was framed u/s 376/511 IPC. The accused-appellant deserved harsh punishment for the diabolic offence committed by him which depicts his depraved mental status.

30. Learned Amicus Curiae appearing for the appellant has pointed out certain discrepancies in the statements of the prosecution witnesses. On this count, this Court is of the considered view that it is but natural that minor discrepancies and contradictions may appear in the statement of witnesses. It is a settled law that in the evidence of untutored witnesses such contradictions are bound to creep in. The witnesses have not been examined in Court immediately after the offence. They have been examined after about two years of the occurrence and some trivial and minor contradictions are natural to come up in their statements as they are not bound to possess a photographic memory.

31. The said view has been vented by the Apex Court in ***Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat***[2]**,** and the relevant paragraphs no.5, 6 & 10 are as under:-

> *"5. ……… We do not consider it appropriate or permissible to enter upon a reappraisal or reappreciation of the evidence in the context of the minor discrepancies painstakingly highlighted by learned counsel for the appellant. Over much importance cannot be attached to minor discrepancies. The reasons are obvious:*
>
> > *(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.*
> >
> > *(2) ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.*
> >
> > *(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.*

2 (1983) 3 SCC 217

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment 1.1 at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time- sense of individuals which varies from person to person.

(6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him-Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.

6. Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all important "probabilities-factor" echoes in favour of the version narrated by the witnesses.

....
....
10. Without the fear of making too wide a statements or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural Society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because: (1) A girl or a woman in the tradition bound non- permissive Society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. (2) She would be conscious of the danger of being ostracised by the Society or being looked down by the Society including by her own family members, relatives, friends and neighbours. (3) She would have to brave the whole world. (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. (S) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an

acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarrassed in relating the incident to others being over powered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence. (12) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross examination by Counsel for the culprit, and the risk of being disbelieved, acts as a deterrent."

32. It has also been settled by the Apex Court in ***Rameshwar v. State of Rajasthan***[3]**,** that corroboration is not the *sine qua non* for a conviction in a rape case.

"The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge ....

The only rule of law is that this rule of prudence must be present to the mind of the Judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand."

33. Section 134 of Indian Evidence Act, 1872 provides that it is the quality and not quantity that matters with respect to proving of fact. The provision clearly states that no particular number of witnesses are required to establish a case. In the case herein, the statement of the victim stands corroborated by the medical evidence. In the case of ***Chacko alias Aniyan Kunju and Others Vs. State of Kerala***[4]**,** the Apex Court has discussed in para-7 the parameters of Section 134 of the Indian Evidence Act, 1872 and the same is reproduced hereunder:-

"7. Coming to the question whether on the basis of a solitary evidence conviction can be maintained, a bare reference to Section 134 of the Evidence Act, 1872 (in short "the Evidence Act") would suffice. The provision clearly

3 AIR 1952 SC 54

4 (2004) 12 SCC 269

states that no particular number of witnesses is required to establish the case. Conviction can be based on the testimony of a single witness if he is wholly reliable. Corroboration may be necessary when he is only partially reliable. If the evidence is unblemished and beyond all possible criticism and the court is satisfied that the witness was speaking the truth then on his evidence alone conviction can be maintained. Undisputedly, there were injuries found on the body of the accused persons on medical evidence. That per se cannot be a ground to totally discard the prosecution version. This is a factor which has to be weighed along with other materials to see whether the prosecution version is reliable, cogent and trustworthy. When the case of the prosecution is supported by an eyewitness who is found to be truthful as well, mere non-explanation of the injuries on the accused persons cannot be a foundation for discarding the prosecution version. Additionally, the dying declaration was found to be acceptable."

34. Regarding the argument tendered by the learned Amicus Curiae pertaining to the hostility of the two witnesses i.e. PW-7 and PW-8 in the present case, the statement of hostile witnesses can be discarded and only the part which corroborates the prosecution story has to be considered. The two witnesses have not denied the commissioning of offence, but have only denied having seen it. The Apex Court in the case of ***C. Muniappan v. State of Tamil Nadu***[5]***,*** has opined as under:-

*"**81.** It is settled legal proposition that:*

> *"6. ... the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof."*

***82.** In State of U.P. v. Ramesh Prasad Misra [(1996) 10 SCC 360 : 1996 SCC (Cri) 1278] this Court held that (at SCC p. 363, para 7) evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde v. State of Maharashtra [(2002) 7 SCC 543 : 2003 SCC (Cri) 112] , Gagan Kanojia v. State of Punjab [(2006) 13 SCC 516 : (2008) 1 SCC (Cri) 109] , Radha Mohan Singh v. State of U.P. [(2006) 2 SCC 450 : (2006) 1 SCC (Cri) 661] , Sarvesh Narain Shukla v. Daroga Singh [(2007) 13 SCC 360 : (2009) 1 SCC (Cri) 188] and Subbu Singh v. State [(2009) 6 SCC 462 : (2009) 2 SCC (Cri) 1106] .*

5 (2010) 9 SCC 567

> ***83.*** *Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence."*

35. Considering the overall facts and circumstances of the case, statement of the witnesses, relevant case laws and the fact that the offence committed by the appellant by mutilating the private part of the minor girl cannot be termed as an act of a person of normal virtues. The said offence has been committed out of severe sexual lust and sadistic approach. The appellant does not deserve any kind of leniency as the said case stands proved beyond any reasonable doubt by the statement of the prosecution witnesses and the medical evidence adduced.

36. It is a very sorry state of affairs that the State has not preferred any appeal against the leniency observed by the learned Trial Court in sentencing the appellant to such a short term. The lethargy of the public prosecutor is highly deplorable.

37. From the evidence available on record, it is proved beyond reasonable doubt that the accused-appellant Ishrat had committed grave offence and the learned lower court had rightly convicted and sentenced him as mentioned above.

38. In above circumstance, I do not find any merit in the appeal. The appeal is **dismissed**, accordingly. The judgement and order dated 20.10.1992 passed by Sri S.C. Nigam, Seventh Additional District and Sessions Judge, Kanpur Nagar in Sessions Trial No.175 of 1990 (State Vs. Ishrat), Police Station- Chamanganj, District- Kanpur Nagar, is hereby affirmed. Bail bonds of accused-appellant are hereby cancelled and sureties are discharged from their liability. He is directed to surrender before the court below forthwith to serve out remaining sentence and if he fails to do so, concerned Chief Judicial Magistrate shall take appropriate action in this regard.

39. Let a copy of this judgement along with Lower Court Record be returned to the court concerned forthwith for compliance. A compliance report be also sent to this Court.

Order Date :- 26.8.2022
Siddhant

(Justice Krishan Pahal)

Digitally signed by SIDDHANT SAHU
Date: 2022.08.26 14:11:08 IST
Reason:
Location: High Court of Judicature at Allahabad