State of H. P.

Vs

Lekh Raj and Another

Criminal Appeal No. 1174 of 1999

(S. Saghir Ahmad, R. P. Sethi JJ)

02.11.1999

JUDGMENT

SETHI, J.:-

1. Leave granted.

2. The prosecutrix, a widow of 55 years of age was criminally assaulted and subjected to forcible sexual intercourse by the respondents on 10-11-1993 near her village Baadi in Gumanu Nalla, District Mandi, Himachal Pradesh when she was coming back to her house after attending the marriage of the daughter of her husband's brother. The first information report was submitted by her on the next date against the respondents. She was medically examined and her torn salwar was sent for chemical analysis. On medical examination various injuries were found on her person. As the prosecutrix was found habituated to sexual intercourse, being an elderly woman and mother of two grown-up children, no opinion was possible about the last date of sexual act. However the doctor upon examination of the injuries, mentioned in the medico-legal certificate, was of the opinion that the injuries reflected the signs of a struggle. The trial court of Sessions Judge, Mandi convicted the respondents under Sections 376(2)(g) and 323 of the Indian Penal Code and sentenced them to undergo rigorous imprisonment for five years and to pay a fine of Rs. 5000 each under Section 376 IPC and six months' rigorous imprisonment under Section 323 with a fine of Rs. 500 each. In default of the payment of fine, the appellants were to undergo further rigorous imprisonment specified in the judgment. In appeal filed by the appellants the High Court vide order impugned in this appeal set aside the order of the Sessions Judge and acquitted the respondents of the charges framed against them. Alleging that the judgment of the High Court was against law and facts, the State has preferred this acquittal appeal.

3. Respondent 2 has been acquitted by the High Court on the ground that his identity could not be established by the prosecution at the trial. The admitted position is that the name of Respondent 2 was not known to the prosecutrix and thus his name not mentioned in the FIR. She had, in the written report lodged with the Superintendent of Police, Mandi on 10-10-1993, stated that Respondent 1 "with another person whose name is not known to the complainant intercepted the complainant from her back and gagged her mouth. They pounced upon her and made her lie down on the road and had forcible sexual intercourse with her". In her statement before the trial court the prosecutrix admitted that she had not known Respondent 2 earlier an further that no identification parade was conducted by the investigating agency. She further admitted having seen Respondent 2 in the Court only after the day of occurrence. How Respondent 2 was named as an accused person is a mystery shrouded with doubts which has not been properly and sufficiently explained by the prosecution. During the investigation of a crime the police agency is required to hold identification

parade for the purposes of enabling the witness to identify the person alleged to have committed the offence particularly when such person was not previously known to the witness or the informant. The absence of test identification may not be fatal if the accused is known or sufficiently described in the complaint leaving no doubt in the mind of the court regarding his involvement. Identification parade may also not be necessary in a case where the accused persons are arrested at the spot. The evidence of identifying the accused person at the trial for the first time is, from its very nature, inherently of a weak character. This Court in Budhsen v. State of U.P.[(1970) 2 SCC 128 : 1970 SCC (Cri) 343] held that the evidence in order to carry conviction should ordinarily clarify as to how and under what circumstances the complainant or the witness came to pick out the particular accused person and the details of the part which he allegedly played in the crime in question with reasonable particularity. In such cases test identification is considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them. There may, however, be exceptions to this general rule, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely without such or other corroboration. Though the holding of identification proceedings are not substantive evidence, yet they are used for corroboration purposes for believing that the person brought before the court was the real person involved in the commission of the crime. The identification parade even if held, cannot, in all cases, be considered as safe, sole and trustworthy evidence on which the conviction of the accused could be sustained. It is a rule of prudence which is required to be followed in cases where the accused is not known to the witness or the complainant.

4. The holding of identification parade in the instant case would have been irrelevant, had the name of Respondent 2 been mentioned in the FIR Exhibit P/D. The prosecutrix in her deposition before the trial court even denied the suggestion of Respondent 2 to the effect that Respondent 2 had been working at her place as a mason. It was, therefore, incorrect for the trial court to hold:

> "So far as the identification of the accused is concerned that is not disputed at all, therefore, at the relevant time they could not have been identified by the prosecutrix."
>
> The identify of Respondent 2 was, admittedly, not established during the investigation and it is not clear as to how the said respondent was put on trial along with Respondent 1. We agree with the finding of the High Court that accused Diwan Chand could not be held guilty as no unimpeachable, reliable and satisfactory evidence was produced regarding his involvement in the commission of the crime.

5. We are, however, of the opinion that the High Court was not justified in holding that the prosecutrix had not been subjected to forcible sexual intercourse or the prosecution had failed to prove the case against Respondent 1 also. To hold that the prosecution had not proved the case against the respondent, beyond reasonable doubt, the High Court mainly relied upon the medical evidence and finding that "no dead or alive spermatozoa were seen. Absence of such dead or mobile spermatozoa either in the vagina or in the cervix of the prosecutrix rules out the possibility of the prosecutrix having been subjected to sexual intercourse on the date and time alleged by the prosecution". Such a conclusion is not referable to any evidence on record. No such suggestion was put to the doctor nor any medical authority referred to in support of the conclusions arrived at by the High Court. This Court in State of Maharashtra v. Chandraprakash Kewalchand Jain [(1990) 1SCC 550 : 1990 SCC (Cri) 210] relying upon medical evidence observed that "spermatozoa can be found if the woman is examined within 12 hours after intercourse, thereafter they may be found between 48 and 72 hours but in dead form". If the prosecutrix washes herself by then, the spermatozoa may not be found. In that case the Court after satisfying itself regarding the presence of semen on the

clothes of the prosecutrix held that "the absence of semen or spermatozoa in the vaginal smear and slides, cannot cast doubts on the creditworthiness of the prosecutrix."

6. Modi in his Medical Jurisprudence and Toxicology has noted:

> "The presence of spermatozoa in the vagina after intercourse has been reported by Pollack (1943) from 30 minutes to 17 days, and by Morrison (1972) up to 9 days in vagina and 12 days in the cervix. However, in the vagina of a dead woman, they persist for a longer period."

It follows, therefore, that the presence of spermatozoa, dead or alive, would differ from person to person and its positive presence depends upon various circumstances. Otherwise also the presence or absence of spermatozoa is ascertained for the purposes of corroboration of the statement of the prosecutrix. If the prosecutrix is believed to be a truthful witness in her deposition, no further corroboration may be insisted. Corroboration is admittedly only a rule of prudence. This Court in State of Punjab v. Gurmit Singh [(1996) 2SCC 384 : 1996 SCC (Cri) 316] took note of the existing rate of crime against women and held: (SCC p. 403, para 21)

> "21. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault -- it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations."

Referring to an earlier judgment in Chandraprakash Kewalchand Jain case [(1990) 1SCC 550 : 1990 SCC (Cri) 210] this Court in Gurmit Singh case [(1996) 2SCC 384 : 1996 SCC (Cri) 316] held: (SCC pp. 395-97, paras 8-9)

> "The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed consideration which have no material effect on the veracity of the prosecution case or even discrepancies

in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of secular aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable. In State of Maharashtra v. Chandraprakash Kewalchand Jain(2) Ahmadi, J. (as the Lord Chief Justice then was) speaking for the Bench summarised the position in the following words: (SCC p. 559, para 16)

> 'A prosecutrix of a sex offence cannot be put on a par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the

court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which required it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence.'

We are in respectful agreement with the above exposition of law. In the instant case our careful analysis of the statement of the prosecutrix has created an impression on our minds that she is a reliable and truthful witness. Her testimony suffers from no infirmity or blemish whatsoever. We have no hesitation in acting upon her testimony alone without looking for any 'corroboration'. However, in this case there is ample corroboration available on the record to lend further credence to the testimony of the prosecutrix."

The other circumstance which prevailed upon the High Court to pass the order of acquittal is that the sealing of salwar Exhibit P-1 was not properly established. It is not denied that the seized salwar had stains of blood and semen on it. The mere fact that some different marks were noted on the sealed packet was by itself no ground to discard the otherwise reliable evidence of the prosecutrix. The High Court appears to have completely ignored the medical evidence specifying the injuries on the person of the prosecutrix which proved and established the struggle and resistance shown by her at the time of commission of the offence of rape. The doctor had noted the following injuries on the person of the prosecutrix.

"1. There was a small abrasion on right side of her forehead with clotted blood.

2. There were abrasions on extensive surfaces on both legs and left knees which were reddish-brown in colour.

3. There were multiple abrasions on lateral surface of both thighs.

4. There was a bruise on posterior surface on left thigh.

5. There was also a bruise on left buttock 4" x 3" in size.

6. Abrasion on left side of back in lumbar region."

These injuries were sufficient to lend corroboration to the testimony of the prosecutrix particularly when no motive is attributed to her for falsely involving Respondent 1 in the commission of the

crime. The prosecutrix, in her cross-examination, had denied even the suggestion that the injuries sustained by her were sustained while cutting grass in the jungle. She had also denied that she was a liquor addict. The suggestion regarding the existence of a dispute between Lekh Raj respondent and her husband over the fishing net was also not admitted. She also denied the suggestion that the accused persons had neither met her nor committed any rape. The suggestions in cross-examination were not rightly believed by the courts below to hold the existence of a motive for falsely implicating the respondents. During the arguments before us also the learned counsel for the appellant could not point out to the existence of any motive for falsely implicating the respondents. The fact that the prosecutrix was a widow of about 55 years of age having two grown-up children was a circumstance to be taken note of for the purposes of satisfying the Court that there was no ulterior motive of roping the accused in the commission of crime.

7. In support of the impugned judgment the learned counsel appearing for the respondents vainly attempted to point out some discrepancies in the statement of the prosecutrix and other witnesses for discrediting the prosecution version. Discrepancy has to be distinguished from contradiction. Whereas contradiction in the statement of the witness is fatal for the case, minor discrepancy or variance in evidence will not make the prosecution's case doubtful. The normal course of the human conduct would be that while narrating a particular incident there may occur minor discrepancies, such discrepancies in law may render credential to the depositions. Parrot-like statements are disfavoured by the courts. In order to ascertain as to whether the discrepancy pointed out was minor or not or the same amounted to contradiction, regard is required to be had to the circumstances of the case by keeping in view the social status of the witnesses and environment in which such witness was making the statement. This Court in Ousu Varghese v. State of Kerala [(1974) 3 SCC 767 : 1974 SCC (Cri) 243] held that minor variations in the accounts of the witnesses are often the hallmark of the truth of their testimony. In Jagdish v. State of M.P.[1981 Supp SCC 40 : 1981 SCC (Cri) 676] this Court held that when the discrepancies were comparatively of a minor character and did not go to the root of the prosecution story, they need not be given undue importance. Mere congruity or consistency is not the sole test of truth in the depositions. This Court again in State of Rajasthan v. Kalki [(1981) 2 SCC 752 : 1981 SCC(Cri) 593] held that in the depositions of witnesses there are always normal discrepancies, however, honest and truthful they may be. Such discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence, and the like. Material discrepancies are those which are not normal and not expected of a normal person.

8. Referring to and relying upon the earlier judgments of this Court in State of U.P. v. M.K. Anthony [(1985) 1 SCC 505:1986 SCC (Cri) 105: AIR 1985 SC 48] , Tahsildar Singh v. State of U.P.[AIR 1959 SC 1012 : 1959 Supp (2) SCR 875], Appabhai v. State of Gujarat [1988 Supp SCC 241 : 1988 SCC (Cri) 559 : JT (1988) 1 SC 249], Rammi v. State of M.P. [(1999) 8 SCC 649 : JT (1999) 7 SC 247] and this Court in are cent case Leela Ram v. State of Haryana [(1999) 9 SCC 525 : JT (1999) 8 SC 274 held:

> "There are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reasons therefor should not render the evidence of eyewitnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence...

The court shall have to bear in mind that different witnesses react differently under different situations: Whereas some become speechless, some start wailing while some others run away from the scene and yet there are some who may come forward with courage, conviction and belief that the wrong should be remedied. As a matter of fact it depends upon individuals and individuals. There cannot be any set pattern or uniform rule of human reaction and to discard a piece of evidence on the ground of his reaction not falling within a set pattern is unproductive and a pedantic exercise."

9. One of the discrepancies which persuaded the High Court to disbelieve the prosecution evidence is the alleged shifting of the place of occurrence from the main road to 20 feet away from it. The prosecutrix has categorically stated that she was dragged from the road down the path which was about 20 feet away from the road and raped there. The discrepancy or contradiction pointed out is that in the FIR which was submitted in writing and was in the English language, the place of occurrence was mentioned as road. Such mention was based upon recording of the complaint by Shri S. P. Parmar, Advocate, after hearing the narration of the prosecutrix whom he found at that time to be scared, nervous and hesitant. Such a discrepancy cannot be held to be a major discrepancy amounting to contradiction under the circumstances of this case. It is not disputed that the statement of the prosecutrix under Section 161 was recorded immediately and in that statement she had not alleged to have stated that the occurrence had taken place on the road and not away from the road. She was categoric in stating that the accused persons grappled with her on the path and took her down at a distance of about 20 feet where they committed the crime. It is alleged that such a discrepancy was fatal inasmuch as the road was a motorable one and had the occurrence taken place there, a number of witnesses could have seen the occurrence. The argument is without any substance inasmuch as it has come in evidence that the road was not a thoroughfare and only one or two vehicles used to ply on it.

10. The High Court appears to have adopted a technical approach in disposing of the appeal filed by the respondents. This Court in State of Punjab v. Jagir Singh [(1974) 3 SCC 277:1973 SCC (Cri) 886] held: (SCC pp. 285-86, para 23)

> "23. A criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures."

The criminal trial cannot be equated with a mock scene from a stunt film. The legal trial is conducted to ascertain the guilt or innocence of the accused arraigned. In arriving at a conclusion about the truth, the courts are required to adopt a rational approach and judge the evidence by its intrinsic worth and the animus of the witnesses. The hypertechnicalities or figment of imagination should not be allowed to divest the court of its responsibility of sifting and weighing the evidence to arrive at the conclusion regarding the existence or otherwise of a particular circumstance keeping in view the peculiar facts of each case, the social position of the victim and the accused, the larger

interests of the society particularly the law and order problem and degrading values of life inherent in the prevalent system. The realities of life have to be kept in mind while appreciating the evidence for arriving at the truth. The courts are not obliged to make efforts either to give latitude to the prosecution or loosely construe the law in favour of the accused. The traditional dogmatic hypertechnical approach has to be replaced by a rational, realistic and genuine approach for administering justice in a criminal trial. Criminal jurisprudence cannot be considered to be a utopian thought but have to be considered as part and parcel of the human civilization and the realities of life. The courts cannot ignore the erosion in values of life which are a common feature of the present system. Such erosions cannot be given a bonus in favour of those who are guilty of polluting society and mankind.

11. The learned Additional Sessions Judge has noted the following facts to find the accused guilty of the commission of crime:

> "(i) According to the prosecutrix both the accused persons had grappled with her and she was made to lie down on the earth and in that process she sustained injuries on her body and these injuries were noticed at the time of her examination by PW 1 Dr Maulshri Lata as stated above, which are also described in the medico-legal certificate Ex. PA and synchronise with the time of alleged incident. The possibility of sustaining these injuries in the agricultural operations is of no use when there is direct evidence to show that these injuries have been sustained by her in a particular way, as stated by her when examined in the Court and she was also subjected to a lengthy cross-examination by the accused persons.
>
> (ii) At the time of contacting her advocate, Shri S. P. Parmar, PW 11 she was scared and hesitant.
>
> (iii) The place of the alleged incident was pointed out 20 feet down the road, by her to the investigating officer on the basis of which the site plan Ex. PG was prepared.
>
> (iv) The prosecutrix is a widow. She was living with her son. The alleged incident took place on 10-11-1993 in the evening. She lodged the complaint on 11-11-1993 and on the same date, presented it before the Superintendent of Police, Mandi and thereafter the case was registered on the same day, i.e., on 11-11-1993 in Police Station Sadar, Mandi.
>
> (v) She did not consent to sexual act, but complained against it to the police as aforesaid and also testified it on oath. Since the case falls under Section 376(2)(g) of the Penal Code, thus the presumption as required under Section 114-A of the Evidence Act has to be drawn against the accused person.
>
> (vi) On 12-11-1993 the Salwar Ex. P-1 of the prosecutrix was taken into possession. It was torn and there were some stains over it. It was sealed in the presence of S/Shri Babu Ram and Padam Singh with seal impression 'M'. This act has not been disputed by the accused persons. It was sent for examination to the Forensic Sciences Laboratory, Shimla, and on its examination report Ex. PH was received which showed presence of human blood and semen. Further, with reference to this, it is to be noticed that she was a widow."

We agree with the conclusions arrived at by the learned Sessions Judge on proper appreciation of evidence so far as Respondent 1 is concerned. We have also critically analysed the statement of the witnesses and have come to the conclusion that the prosecution has proved its case against Respondent 1 beyond all reasonable doubts.

12. Under the circumstances the appeal is partly allowed by setting aside the judgment of the learned Single Judge insofar as it has acquitted Respondent 1. The conviction and sentence awarded by the Sessions Judge to Respondent 1, namely, Shri Lekh Raj is upheld. It is further directed that out of the amount of fine, when recovered, a sum of Rs. 4500 shall be paid to the prosecutrix. No ground is made out to interfere with the order of acquittal relating to Respondent 2, namely, Shri Diwan Chand. The bail bonds furnished by Respondent 1 shall stand cancelled and he is directed to be taken into custody for undergoing the sentence awarded to him.