SUPREME COURT OF INDIA

O.M. Baby

Vs.

State of Kerala

Crl.A.No.133 of 2007

(Swatanter Kumar and Ranjan Gogoi,JJ.)

03.07.2012

JUDGMENT

Ranjan Gogoi,J.

1. The appellant O.M. Baby (since deceased), had been convicted by the learned Sessions Judge, Wayanad, Kalpetta, Kerala under Sections 376, 506 (ii) and 342 IPC. He was sentenced to undergo rigorous imprisonment for seven years for the offence under Section 376 IPC; two years for the offence under Section 506 (ii) IPC and for a period of one year for the offence under Section 342 IPC. Additionally, for the offence under Section 376 IPC, a fine of Rs.50,000/-, in default, further imprisonment for two years was imposed on the appellant. The fine amount was directed to be paid to the prosecutrix (PW 2). The learned trial court had also directed that the sentences are to run consecutively.

2. Aggrieved, the deceased-appellant filed appeal before the High Court of Kerala. By the judgment and order dated 13.01.2005, the appeal was dismissed by the High Court. However, the sentence imposed under Section 376 IPC was reduced to three years. The sentences imposed under Sections 506 (ii) and 342 IPC were maintained but were directed to run concurrently. Aggrieved by the aforesaid, this appeal has been filed.

3. During the pendency of the appeal, the appellant, O.M. Baby, died on 07.10.2008. On an application filed, the wife of the deceased was allowed to be pursue the appeal.

4. At the outset, the case of the prosecution, in brief, may be noticed. According to the prosecution, the family of the victim (PW 2) was maintaining an account with the appellant, who was running a provision shop in the locality. Different articles were purchased from the shop of the accused on credit which were adjusted from time to time by payments made as well as by the amount due to the family of the victim who used to supply milk to the accused. The prosecution has alleged that on 25.12.1993 at about 8 AM, PW 2 who, was then aged about 12 years, went to the shop of the accused with milk and also to make a few purchases.

As 25.12.1993 happened to be Christmas day, the shop was closed from the front. After PW 2 handed over milk to the accused she wanted some articles from the shop on credit. The accused, according to the prosecution, asked PW 2 to go inside the shop. Thereafter, the accused supplied the articles as demanded by PW 2; however, soon thereafter, the accused came from behind, put a cloth on the face of PW 2, took her to adjacent room and closed the same. He then committed rape on her after putting her into fear of death. Consequently, according to the prosecution, PW 2 did not offer any resistance and also did not raise any alarm.

5. The further case of the prosecution is that after PW 2 reached her house, she told her mother about the incident. As the father of the victim was away, her mother (PW 4) informed her own brother (PW 3) and after his arrival, they took the victim to the Taluka Headquarter hospital. However, as there was no Gynaecologist in the hospital they took the victim to the District hospital where PW 1 examined her at about midnight of 25.12.1993. According to the prosecution, PW 1 issued the report of the medical examination (Ext. P 1) and also informed the Gynaecologist (PW 18) who came to the hospital and took the vaginal swab and smear of the victim which was sent for chemical analysis. Thereafter, according to the prosecution, report of the analysis dated 13.07.1994 (Ext. 2) was submitted.

6. The prosecution had further alleged that as PW 4 (the mother of the victim) suspected that the doctors of the District hospital where the victim was taken on25.12.1993 may not be fair, she had filed a petition in the Court of the Judicial Magistrate First Class, Sulthan Bathery and on the basis thereof, the Investigating Officer of the case (PW 13) got the victim examined by another Gynaecologist (PW 8) in the Medical College Hospital at Calicut. PW 8 took the vaginal swab and smear of the victim and sent the same for chemical analysis. The report of the medical examination of the victim by PW 8 (Ext. P-8) as well as the chemical analysis report dated 13.07.1994 (Ext. P-9), according to the prosecution, were received in due course. It may be noticed, at this stage, that while in the first report of chemical analysis i.e. Ext. P-2 it is recorded that the sample did not show the presence of spermatozoa, the second report of analysis (Ext. P-9) was to the contrary.

7. On these facts, the FIR (P-10) was registered and the Investigation was conducted by PW 13, the Circle Inspector of Police Station, Sulthan Bathery. The accused was arrested in the course of investigation and he was also medically examined by PW 7 who submitted the Potency Certificate of the accused (Ext. P- 7). On completion of the investigation, charge sheet was filed and the case was committed for trial to the Court of Learned Sessions Judge, Sulthan Bathery who framed charges against the accused. The accused having denied the charges was put on trial in the course of which the prosecution examined as many as 14 witnesses and also Exhibited 15 documents. No evidence was adduced on behalf of the

accused who, however, had proved certain contradictions in the First Information Report and the evidence of PW 2. The same were marked as Ext. D-1 and D-2. The accused was also examined under Section 313 Cr. P.C. wherein he denied the allegations levelled against him. Thereafter, at the conclusion of the trial, the accused-appellant was convicted and sentenced as already noted above.

8. Learned counsel for the appellant has submitted that in view of the two contradictory reports of chemical analysis of the sample of vaginal swab and smear (Ext. P-2 and P-9), the benefit of the first report (Ext. P- 2) which did not indicate presence of spermatozoa should go in favour of the accused. In this regard, it has been submitted that the sample in respect of which Ext. P-2 report was submitted was taken on the day of the incident itself, i.e. 25.12.1993 whereas the sample, which is the subject matter of the second report (Ext. P-9) was taken ten days later, i.e. on 06.01.1994. Learned counsel for the appellant has submitted that there is no material on record to show any lacuna in taking of the first sample and that the prosecution has failed to satisfactorily explain the two contradictory reports. Learned counsel has further argued that the evidence on record discloses that there were no external injuries on any part of the body of the alleged victim which can corroborate the evidence of the prosecutrix tendered in court. Pointing out the evidence of PW 2, learned counsel has urged that there are several inconsistencies in the evidence of the prosecutrix which would make it unsafe for the court to act on the uncorroborated testimony of the said witness.

9. Learned counsel, while pointing out the relevant part of the evidence, has also urged that the uncle of the alleged victim, a Police Constable, was a tenant in the house of the accused and the said person bore a grudge against the accused for being evicted from the tenanted premises. Above all, according to the learned counsel, the family of the victim owed a sum of about Rs.18,000/- to the accused on account of purchase of different articles. On account of the said facts, a false and concocted case has been brought against the accused with the help and connivance of the Police Constable. Learned counsel, therefore, has contended that the order of conviction should be set aside so that the stigma attached to the family of the deceased accused is removed.

10. Controverting the submissions advanced on behalf of the appellant, the learned State Counsel has submitted that from the evidence of PW 4, i.e. the mother of the victim, it is clear and evident that she had some doubts with regard to the fairness of the doctors in the District hospital and therefore, PW 4 had filed an application dated 04.01.1994 (Ext P-14) before the concerned court for a second medical examination of the victim. Accordingly, the second medical examination of the victim was conducted on 06.01.1994 by P.W.8. The sample of vaginal swab and smear was again taken on 06.01.1994 and the report submitted on 13.07.1994 (Ext. P-9) had confirmed the presence of spermatozoa. Learned State Counsel

has submitted that the above circumstances show that there is nothing unusual or any suspicious circumstance surrounding Ext. P-9 to throw any doubt, particularly, when the second medical examination and the taking of second set of samples was performed by the doctors of the medical college hospital to whose no motive or interest can be attributed. Insofar as absence of injuries on the victim is concerned the learned State Counsel has submitted that even in Ext. P-1 (Report of the first medical examination held on the day of occurrence) it is recorded that the victim was in pain. It is further argued that the alleged discrepancy in the report of the medical examination conducted by PW 11 to determine the age of the victim (Ext. P 12) and the evidence of PW 2 with regard to bite marks on the breast; and the further statement of PW 2 in court that she fell unconscious and her failure to make such statement before the police as pointed out on behalf of the appellant are minor discrepancies which do not affect the core of the prosecution case. According to the learned State counsel, the victim (PW 2) has given a vivid account of the incident and there is no reason why the same should be disbelieved. So far as role of the Police Constable (I.O.), uncle of the victim in instituting a false and concocted case on account of the reasons noticed is concerned, learned State counsel has pointed that the said facts are not substantiated by the evidence on records.

11. While it is correct that the two reports of the analysis of vaginal swab and smear are contradictory, we are of the view that in the present case the prosecution has clearly proved and established the circumstances which necessitated the second medical examination of the victim and a second set of sample of vaginal swab and smear to be taken and sent for chemical analysis. The aforesaid exercise was carried out on the basis of the application filed by the mother of the victim (PW 4) before the court of learned Judicial Magistrate as she had serious doubts with regard to the fairness of the doctors in the District hospital who had carried out the first medical examination and had taken the samples of vaginal swab and smear on the date of the occurrence. The application by PW 4 before the learned Court was filed without delay, i.e. on 04.01.1994 and the second round of medical examination and taking of samples was completed on 06.01.1994. No motive and interest can be attributed to PW 8 who had conducted the second round of medical examination and had taken the second set of sample of vaginal swab and smear for chemical analysis. That apart, it is clear from the evidence of PW 8 that after sexual intercourse, though active spermatozoa would be present for 36 hours, the same would remain in the vaginal canal for as long as 17 days. There is no evidence to the contrary. In the aforesaid circumstances we do not see how the second report of the analysis (Ext. P-9) can be ignored by us.

12. Insofar as absence of injuries on the body of the victim is concerned, the evidence on record discloses that in the first medical examination itself, i.e. Ext. P- 1 it is recorded that the victim was walking in pain. The evidence of PW 11, Dr. Shirley Vasu, Assistant

Professor of Forensic Medicine, who had examined the victim for determination of her age, clearly shows that circum areolar bite mark contusion of both breast was noted along with laceration of lower lip. In these circumstances, it cannot be said that in the present case, the prosecution has not succeeded in showing that the victim had not suffered any external injuries whatsoever. In any event, absence of injuries or mark of violence on the person of the prosecutrix may not be decisive, particularly, in a situation where the victim did not offer any resistance on account of threat or fear meted out to her as in the present case. Such a view has already been expressed by this Court in Gurcharan Singh V. State of Haryana [1] and Devinder Singh V. State of H.P [2].

13. An argument has been made by the learned counsel for the appellant that in view of certain inconsistencies in the evidence of the prosecutrix her testimony should not be accepted without any corroboration. As already noted, not only corroboration in the form of external injuries is available in the present case, even otherwise i.e. in the absence of corroboration the testimony of the victim cannot be ignored, unless the inconsistencies or contradictions are sufficiently serious to warrant such a course of action. We have already observed that the inconsistencies in the statement of PW 2 are on minor aspects which do not affect the core of the case. The golden rule of appreciation of the testimony of a prosecutrix laid down in Rameswar Vs. State of Rajasthan[3] and amplified in State of Maharashtra Vs. Chandraprakash Kewalchand Jain[4] has been consistently followed till date. It will, therefore, be useful to reproduce herein para 16 of the judgment of this Court in the above case of State of Maharashtra V Chandraprakash Kewalchand Jain (supra):

> "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 requires 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."

14. We would further like to observe that while appreciating the evidence of the prosecutrix, the court must keep in mind that in the context of the values prevailing in the country, particularly in rural India, it would be unusual for a woman to come up with a false story of being a victim of sexual assault so as to implicate an innocent person. Such a view has been expressed by the judgment of this Court in the case of State of Punjab vesus Gurmit Singh[5] and has found reiteration in a recent judgment in Rajinder @ Raju versus State of H.P[6], para 19 whereof may be usefully extracted :

"19. In the context of Indian culture, a woman - victim of sexual aggression - would rather suffer silently than to falsely implicate somebody. Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her and therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for. But for high improbability in the prosecution case, the conviction in the case of sex crime may be based on the sole testimony of the prosecutrix. It has been rightly said that corroborative evidence is not an imperative component of judicial credence in every case of rape nor the absence of injuries on the private parts of the victim can be construed as evidence of consent."

15. Insofar as the involvement of the uncle of the victim, the Police Constable, in setting up a concocted case against the accused is concerned, we do not find any evidence whatsoever in support of the contentions advanced. There is no material on record to show that any rent was due to the accused by the aforesaid person or that a sum of Rs.18,000/- was due to the accused from the family of the deceased.

16. For the aforesaid reasons, we do not find any merit in this appeal. It is accordingly dismissed and the judgment and order of the High Court of is affirmed.

Judgment Referred

[1] (1972) 2 SCC 0749
[2] (2003) 11 SCC 0488

[3] AIR (1952) SC 0054
[4] (1990) 1 SCC 0550
[5] (1996) 2 SCC 0384
[6] (2009) 16 SCC 0069