SUPREME COURT OF INDIA

Rajesh Patel

Vs.

State of Jharkhand

Crl.A.No.1149 of 2008

(Chandramauli Kr. Prasad and V.Gopala Gowda JJ.)

15.03.2013

JUDGMENT

V.GOPALA GOWDA, J.

1. This criminal appeal is directed against the judgment of the High Court of Jharkhand at Ranchi passed in Criminal Appeal No.58 of 1999 dated 14.11.2006 wherein it has confirmed the judgment and order passed by the 1st Additional Sessions Judge, Jamshedpur in S.T.No.168 of 1994/172 of 1995. By the said judgment, the appellant herein was convicted under Section 376, I.P.C. and was sentenced to undergo rigorous imprisonment for a period of seven years.

2. The prosecution case in nutshell is stated hereunder for the purpose of appreciating the rival legal contentions urged in this appeal.

3. The prosecutrix in this case has made a statement before the police at Ghatsila police station, stating that she has narrated the incident which took place on 14.2.1993 at 11.00 a.m. in the house of the appellant. She stated that she was working as a nurse in the Nursing Home of Dr. Prabir Bhagat at Moubhandar in the jurisdiction of Ghatsila, East Singhbhum District. The house of the appellant Rajesh, who appears to be a classmate of prosecutrix, is situated near the Nursing Home in which the prosecutrix was working as a nurse. It is the case of the prosecution that at the request of the appellant she went to his house in order to get back her book from him. As soon as she entered the house of the appellant, he closed the door from inside. At that time the members of the appellant’s family were not present inside the house. When the prosecutrix tried to raise alarm, she was terrorized by the appellant who threatened her that she would be killed by a

knife if she raises alarm. Thereafter, the appellant committed rape on her. When she felt pain on her private part, she wanted to cry but she was silenced by the appellant by displaying a knife to her. After committing the offence of rape the appellant left the house and locked the door from outside. After half an hour, one Purnendu Babu of Chundih came and unlocked the house and the prosecutrix returned to her house silently. It is further the case of the prosecution that she went to her house and narrated the incident to her mother. However, the mother of the prosecutrix remained silent for two to four days on the assurance of Mr. Purnendu Babu that he would take action in the matter. Additionally, it was alleged that the appellant at the time of committing the offence had also threatened the prosecutrix that she would be killed if she lodges a complaint against him.

4. The trial court convicted the accused and sentenced him to undergo imprisonment of seven years. The correctness of the same was challenged before the High Court of Jharkhand by filing Criminal Appeal No.58 of 1999 urging various legal contentions. After considering the legal contentions on behalf of the appellant, the High Court has affirmed the conviction and sentence of the accused and dismissed the appeal. The correctness of the same is challenged in this appeal urging the following legal contentions: that the courts below have failed to appreciate that the sole testimony of the prosecutrix could not have been used against the appellant to hold him guilty of offence under Section 376, IPC; that the prosecution has not examined either the doctor who conducted the medical examination of the prosecutrix or the investigating officer. Therefore, the finding of fact holding that the appellant is guilty of the offence is erroneous in law and liable to be set aside. Another ground urged by Mr.Sanjay Hegde, the learned counsel for the appellant, is that the courts below failed to appreciate that the story of confinement of the prosecutrix in the house of the appellant cannot be sustained. This is because PW3 Purnendu Babu, a common friend of the appellant and the prosecutrix, who is alleged to have rescued the prosecutrix from the alleged confinement, did not support the same, thereby breaking the chain of events of the prosecution story. Further, it is urged by him that the courts below failed to note the delay in lodging the FIR which has not been adequately explained. The Courts below have explained the delay in filing FIR on the basis of the intervention of PW3 and PW4, namely, Purnendu Babu and the Doctor of the Nursing Home in which the prosecutrix was working, as they assured the victim to settle the matter between the parties. However, both of these witnesses were declared either tendered by the prosecution or hostile during the course of the trial. Further, the appellant contends that the learned courts below failed to take into consideration of the serious contradiction in the version of the prosecutrix and her mother. The prosecutrix in her cross examination has stated that Dr. Prabir Bhagat – PW4 was

in his chamber in the evening when the appellant along with Purnendu Babu- PW3 went to the Nursing Home whereas the mother of the prosecutrix in her testimony has stated that the incident could not be reported to Dr.Prabir Bhagat on the date of the occurrence since the Doctor was in TATA. According to the appellant, the courts below have ignored the contradiction in the version of the prosecutrix. On one hand she says that she never met the appellant till 21.2.93, on the other hand she has stated that on the evening of the alleged occurrence, she met the appellant at the dispensary of Dr.Prabir Bhagat. It was further contended by the appellant regarding the prosecution explanation that she could not raise alarm when the house was locked and offence was being committed on her as she was threatened by the appellant with a knife is improbable to believe her statement. This is because she could have raised an alarm when the appellant allegedly locked the prosecutrix inside the house for half an hour after the appellant committing offence of rape on her. For all the abovementioned grounds, the appellant's counsel contends that the conviction and sentence imposed upon the appellant cannot be allowed to sustain.

5. Alternatively, the learned counsel contends that if, the physical relationship between the appellant and the prosecution is established, it was a case of consensual sex. Both of them were majors to enter into such alliance and they were classmates and familiar with each other as well as on visiting terms prior to the alleged occurrence of offence. Therefore, the appellant has not committed offence as alleged. On the issue of sentencing, the learned counsel has relied upon the decision of this Court in the case of Ram Kumar v. State of Haryana[1], as the appellant in the present case had already undergone the imprisonment of more than 1 year and 8 months and more than 20 years have elapsed from the date of commission of the offence and therefore the appeal may be allowed by passing appropriate order. The prosecutrix and the appellant are both married and settled in life and further the appellant is of a young age. Therefore, this Court may exercise its power by recording special and adequate reasons as provided under proviso to Section 376, IPC and the sentence imposed may be reduced to the period already undergone in judicial custody by the appellant and treat the same as imprisonment and relief may be granted to him to this extent as was observed in Ram Kumar case (Supra), if the case urged on behalf of the appellant is not acceptable.

6. On the other hand, the prosecution sought to justify the concurrent findings of fact recorded by the High Court and the Trial Court on the charge against the accused. The learned counsel for prosecution would contend that the Courts below, while accepting the testimony of the prosecutrix and her mother, have rightly convicted and sentenced the accused to undergo imprisonment for seven years and

the same need not be interfered with by this Court in this appeal in exercise of its jurisdiction. Further, it is contended by the learned counsel that the judgment referred to supra by the appellant's counsel is inapplicable to the facts situation of the present case and therefore, discretionary power of this court for reduction of the sentence need not be exercised and prayed for dismissal of this appeal.

7. With reference to the aforesaid rival legal contentions urged on behalf of the parties, we have carefully examined the case to find out as to whether the impugned judgment warrants interference of this Court on the ground that the concurrent finding of fact by the High Court on the charge leveled against the appellant under Section 376, IPC, and the finding recorded on this charge against the appellant on the basis of the evidence on record is erroneous in law and if so, whether it requires interference of this Court in exercise of its jurisdiction. The said points are answered in favour of the appellant by assigning the following reasons:

8. The prosecution case is that the appellant has committed the offence of rape on the prosecutrix on 14.2.1993. She is the solitary witness to prove the charge. The same is sought to be corroborated by her mother PW2 who has supported the prosecution case on the basis of narration of the alleged offence by the prosecutrix to her. It is an undisputed fact that both the appellant and the prosecutrix are class-mates and had good acquaintance with each other as they were exchanging books. The case of the prosecution is that she had given her book to the appellant. She asked him to return the same and he asked her to go to his house on 14.2.93 to take back the book. Accordingly, she went to the house of the appellant. When she entered the house he locked the door of the house from inside. At that time she has not raised an alarm, except stating that she insisted not to lock the door of the house as there were no other inmates in the house at that point of time. The version of the prosecutrix is that she could not raise alarm as the appellant has threatened her with knife. Further case of the prosecution is that he had then committed offence of rape on her. Further she has stated that while the appellant was committing rape on her she got pain in her private part at that point of time also she wanted to raise alarm, but he has shown the knife to her not to raise alarm. Thus, the prosecution story as narrated by the prosecutrix is most improbable and unnatural. This contention of the appellant is further supported by the contention urged on his behalf that after the offence was committed, the appellant locked her in the house and went away from the house. After about half an hour Mr.Purnendu Babu –PW3, who is a common friend of both the appellant and the prosecutrix came there and unlocked the room till then she did not raise alarm drawing the attention of the neighbours. The aforesaid circumstance would clearly go to show to come to the conclusion that the case of the prosecution is not natural and

probable. Neither the prosecutrix nor the PW3 has informed the police with regard to the alleged offence said to have committed by the appellant after the prosecutrix was unlocked from the house. The reason given by the prosecution is that PW3 was making sincere efforts to bring about the settlement of marriage between the appellant and the prosecutrix. The same did not materialize and, therefore, the complaint was lodged with the jurisdictional police on 25.2.93. The above said version of PW1 regarding settlement between her and the appellant is not proved as PW3 has stated in his evidence that he does not know anything regarding the alleged offence.

9. Further, there is an inordinate delay of nearly 11 days in lodging the FIR with the jurisdictional police. The explanation given by the prosecutrix in not lodging the complaint within the reasonable period after the alleged offence committed by the appellant is that she went to her house and narrated the offence committed by the appellant to her mother and on assurance of Purnendu Babu – PW3, the mother remained silent for two to four days on the assurance that he will take action in the matter. Further, the explanation given by the prosecutrix regarding the delay is that at the time of commission of offence the appellant had threatened her that in case she lodges any complaint against him, she would be killed. The said explanation is once again not a tenable explanation. Further, the reason assigned by the High Court regarding not lodging the complaint immediately or within a reasonable period, it has observed that in case of rape, the victim girl hardly dares to go to the police station and make the matter open to all out of fear of stigma which will be attached with the girls who are ravished. Also, the reason assigned by the trial court which justifies the explanation offered by the prosecution regarding the delay in lodging the complaint against the appellant has been erroneously accepted by the High Court in the impugned judgment. In addition to that, further observation made by the High Court regarding the delay is that the prosecutrix as well as her mother tried to get justice by interference of PW3, who is a common friend of both of them and PW4, the Doctor with whom the prosecutrix was working as a Nurse. When the same did not materialize, after lapse of 11 days, FIR was lodged with the jurisdictional police for the offence said to have been committed by the appellant. Further, the High Court has also proceeded to record the reason that prosecutrix had every opportunity to give different date of occurrence instead of 14.2.93 but she did not do it which reason is not tenable in law. Further, the High Court accepted the observation made by the learned trial Judge wherein the explanation given by the prosecutrix in her evidence about being terrorized to be killed by the appellant in case of reporting the matter to the police, is wholly untenable in law. The same is not only unnatural but also improbable. Therefore, the inordinate delay of 11 days in lodging the FIR against the appellant is fatal to the prosecution

case. This vital aspect regarding inordinate delay in lodging the FIR not only makes the prosecution case improbable to accept but the reasons and observations made by the trial court as well as the High Court in the impugned judgments are wholly untenable in law and the same cannot be accepted. Therefore, the findings and observations made by the courts below in accepting delay in lodging the FIR by assigning unsatisfactory reasons cannot be accepted by this Court as the findings and reasons are erroneous in law.

10. Further in the case in hand, PW3, who is a common friend of the appellant and the prosecutrix, according to the prosecution case, he has categorically stated that he does not know anything about the case for which he had received the notice from the court to depose in the case. PW4 has stated in his evidence that the prosecutrix was getting nursing training privately in his chamber for the last three years as on the date of his examination, namely, on 16.11.95. He has stated in his examination- in-chief that on 14.2.93 when he opened his chamber the prosecutrix came to his chamber and further stated that her mother did not tell him anything. He has been treated as hostile by the prosecution, he was cross-examined by the prosecutor, in his cross-examination he has categorically stated that he has told the police that he does not know anything about the incident. He has further stated that neither the prosecutrix nor her mother told him about the incident and further stated that he does not know anything about the case.

11. Further, neither the Doctor nor the I.O. has been examined before the trial court to prove the prosecution case. The appellant was right in bringing to the notice of the trial court as well as the High Court that the non-examination of the aforesaid two important witnesses in the case has prejudiced the case of the appellant for the reason that if the doctor would have been examined he could have elicited evidence about any injury sustained by the prosecutrix on her private part or any other part of her body and also the nature of hymen layer etc. so as to corroborate the story of the prosecution that the prosecutrix suffered unbearable pain while the appellant committed rape on her. Non-examination of the doctor who has examined her after 12 days of the occurrence has not prejudiced the case of the defence for the reason that the prosecutrix was examined after 12 days of the offence alleged to have committed by the appellant because by that time the sign of rape must have disappeared. Even if it was presumed that the hymen of the victim was found ruptured and no injury was found on her private part or any other part of her body, finding of such rupture of hymen may be for several reasons in the present age when the prosecutrix was a working girl and that she was not leading an idle life inside the four walls of her home. The said reasoning assigned by the High Court is totally erroneous in law.

12. In view of the above statement of evidence of PW3 and PW4 whose evidence is important for the prosecution to prove the chain of events as per its case, the statement of evidence of the aforesaid witnesses has seriously affected the prosecution case. Therefore, the courts below could not have, at any stretch of imagination, on the basis of the evidence on record held that the appellant is guilty of committing the offence under Section 376, IPC. Further, according to the prosecutrix, PW3 who is alleged to have rescued her from the place of occurrence of offence, has clearly stated in his evidence that he does not know anything about the incident in his statement thereby he does not support the version of prosecution. The High Court has erroneously accepted the finding of the trial court that the appellant has not been prejudiced for non-examination of the doctor for the reason that she was working as a Nurse in the private hospital of PW4 and being a nurse she knew that the information on commission of rape is grave in nature and she would not have hesitated in giving the information to the police if the occurrence was true. Further, the finding of the courts below that non-examination of the I.O. by the prosecution who has conducted the investigation in this case has not caused prejudice to the case of the appellant, since the prosecution witnesses were unfavorable to the prosecution who were either examined or declared hostile by the prosecution, which reasoning is wholly untenable in law. Therefore, the finding and reasons recorded by both the trial court as well as the High Court regarding non-examination of the above said two witnesses in the case has not prejudiced the case of the appellant is totally an erroneous approach of the courts below. For this reason also, we have to hold that the findings and reasons recorded in the impugned judgment that the trial court was justified in holding that the prosecution has proved the charge against the appellant and that he has committed the offence on the prosecutrix, is totally erroneous and the same is wholly unsustainable in law.

13. The finding with regard to the sentence of the appellant recorded by the trial court which is accepted by the High Court on the basis of the solitary testimony of prosecutrix which is supported by the evidence of her mother PW2 is once again an erroneous approach on the part of the High Court. The offence of rape alleged to have committed by the appellant is established without any evidence as the prosecution failed to prove the chain of events as stated by the prosecutrix. Since the evidence of PW3 PW4 did not support the prosecution case, but on the other hand, their evidence has seriously affected the story of prosecution. Therefore, the courts below could not have found the appellant as guilty of the charge and convicted and sentenced him for the offence of rape.

14. Further, one more strong circumstance which has weighed in our mind is that they had good acquaintance with each other as they were class-mates and they were in terms of meeting with each other. The defence counsel had alternatively argued that the appellant had sex with her consent. The High Court proceeded not to accept the said argument by giving reasons that the appellant failed to explain as to under what circumstance he had sex with the consent of the prosecutrix when she was confined in his house. The contention urged on behalf the appellant that it was consensual sex with the prosecutrix is to be believed for the reason that she herself has gone to the house of the appellant though her version is that she went there at the request of the appellant to take back her book which she had given to him. This is a strong circumstance to arrive at the conclusion that the defence case of the appellant is a consensual sex. Further, the prosecution case is that after the offence was committed by the appellant he had locked the room from outside and left. After half an hour Purnendu Babu- PW3 arrived and unlocked the room. This story is improbable to believe and the prosecutrix has not lodged the complaint either immediately or within reasonable period from the date of occurrence. The complaint was undisputably lodged after lapse of 11 days by the prosecutrix. In this regard, it is pertinent to mention the judgment of this Court in Raju v. State of Madhya Pradesh[2], the relevant paragraph of which is extracted hereunder for better appreciation in support of our conclusion:

> "12. Reference has been made in Gurmit Singh case to the amendments in 1983 to Sections 375 and 376 of the Penal Code making the penal provisions relating to rape more stringent, and also to Section 114-A of the Evidence Act with respect to a presumption to be raised with regard to allegations of consensual sex in a case of alleged rape. It is however significant that Sections 113-A and 113-B too were inserted in the Evidence Act by the same amendment by which certain presumptions in cases of abetment of suicide and dowry death have been raised against the accused. These two sections, thus, raise a clear presumption in favour of the prosecution but no similar presumption with respect to rape is visualised as the presumption under Section 114-A is extremely restricted in its applicability. This clearly shows that insofar as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally, her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined."

15. For the aforesaid reasons the prosecution case is not natural, consistent and probable to believe to sustain the conviction and sentence of the appellant for the alleged offence said to have committed by him.

16. The trial court as well as the High Court should have appreciated the evidence on record with regard to delay and not giving proper explanation regarding delay of 11 days in filing FIR by the prosecutrix and non- examination of complainant witnesses, viz. the Doctor and the I.O. which has not only caused prejudice to the case of the appellant but also the case of prosecution has created reasonable doubt in the mind of this Court. Therefore, the benefit of doubt must enure to the appellant. As we have stated above the testimony of the prosecutrix is most unnatural and improbable to believe and therefore it does not inspire confidence for acceptance of the same for sustaining the conviction and sentence. Therefore, we are of the view that the impugned judgment requires to be interfered with by this Court in exercise of its jurisdiction. Accordingly, we allow the appeal and set aside the impugned judgment.

17. If the appellant has executed the bail bonds, the same may be discharged.

[1] (2006) 9 SCC 589
[2] (2008) 5 SCC 133