

# SUPREME COURT OF INDIA

State of Rajasthan

Vs.

Roshan Khan

Crl.A.Nos.79-80 of 2005

(A. K. Patnaik and Gyan Sudha Misra JJ.)

15.01.2014

## JUDGMENT

### **A. K. PATNAIK, J.**

1. These are appeals by way of Special Leave under Article 136 of the Constitution against the judgment dated 21.11.2003 of the Rajasthan High Court, Jodhpur Bench, setting aside the judgment of the trial court convicting the respondents of the offences punishable under Sections 366 and 376(2)(g) of the Indian Penal Code, 1860 (for short 'IPC'). Facts

2. The facts very briefly are that on 28.04.1999 Ruliram lodged a complaint at the Bhadra Police Station in District Hanumangarh, stating as follows: There was a marriage of the daughter of his brother Gyan Singh for which a feast was arranged by him on 27.04.1999. His 15-16 years old daughter, who was slightly weak-minded, disappeared. When she did not return for quite some time, he and others started searching her. At about 9.00 p.m., a milkman informed him that he had seen six boys taking away a girl towards Kalyan Bhoomi. About 1.00 a.m. on 28.04.1999, when Ruliram was on a scooter with Gyan Singh still looking for his daughter, he noticed five boys in the light of the scooter near the old dilapidated office building of the Sheep and Wool Department and all the five, seeing the light of the scooter fled. When they went into the old building, they found Akbar having sexual intercourse with his daughter and she was shouting. They caught hold of Akbar who later informed them that all the remaining five had also performed sexual intercourse with his daughter and they knew the remaining five persons. The police registered a case under Sections 147 and 376, IPC, and carried out

investigation and filed a charge-sheet against the six respondents under Sections 376/34, IPC, and the case was committed for trial.

3. In the course of trial before the Additional Sessions Judge, Nohar Camp, Bhadra, the prosecution examined as many as nine witnesses. Ruliram was examined as PW-1, his daughter (prosecutrix) was examined as PW-2, and Dr. Ramlal, who had medically examined the prosecutrix, was examined as PW-7 and the report of the Forensic Science Laboratory was marked as Ext.P-39. The Additional Sessions Judge relied on the evidence of PW-1, PW-2 and PW-7 and the Ext.P- 39 and convicted the six respondents under Section 376(2)(g) and Section 366, IPC, by judgment dated 18.11.2000, and after hearing them on the question of sentence, sentenced them for rigorous imprisonment for ten years each and a fine of Rs.5,000/- each, in default a further sentence of two months rigorous imprisonment each for the offence under Section 376(2)(g), IPC, and rigorous imprisonment for four years each and a fine of Rs.3,000/- each, in default a further sentence of one month rigorous imprisonment each for the offence under Section 366, IPC. The Additional Sessions Judge, however, directed that the sentences for the two offences are to run concurrently and upon deposit of fine by the accused persons, a compensation of Rs.25,000/- be paid to the prosecutrix.

4. The respondents filed criminal appeals before the High Court and the High Court held in the impugned judgment that the deposition of the prosecutrix (PW-2) was not believable and the evidence of Dr. Ramlal (PW-7) did not corroborate the prosecution story in some respects. The High Court further held that the evidence given by Ruliram (PW-1) that the prosecutrix was only aged 14 years cannot be believed and that she could be aged up to 19 years and there were circumstances to suggest that she went with the respondents on her own. The High Court was also of the view that the delay on the part of Ruliram (PW-1) to lodge the FIR on 28.04.1999 at 11.00 a.m. when the incident came to his knowledge at 1.00 a.m. cast serious doubts on the prosecution case. The High Court accordingly set aside the judgment of the Additional Sessions Judge, allowed the appeals and acquitted all the six respondents of the charges.

Contentions of learned counsel for the parties:

5. Dr. Manish Singhvi, learned counsel for the State submitted that the High Court should not have disbelieved the evidence of PW-1 and PW-2 as there was no enmity between these witnesses and the accused persons. He referred to the evidence of PW-1, PW-2 and PW-7 as well as FSL report (Ext.P-39) to show that a

case of gang rape by the six accused persons had been established beyond reasonable doubt. He further submitted that the High Court could not have held that there were circumstances to suggest that the prosecutrix could have gone on her own with the accused persons. He relied on Section 114A of the Indian Evidence Act, 1872 which provides that where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent. He submitted that the High Court has lost sight of this presumption under Section 114A of the Indian Evidence Act.

6. Dr. Singhvi next submitted that the High Court should not have entertained doubts about the prosecution story on the ground of delay in lodging the FIR. He submitted that no father would like to lodge a complaint making a false allegation of rape of his daughter. He relied on the decision of this Court in *Balwant Singh and Others v. State of Punjab* [(1987) 2 SCC 27] in which a similar contention that the father of the prosecutrix had lodged the FIR on account of previous enmity with the accused was rejected on the ground that a father of the prosecutrix would not falsely involve his daughter in a case of rape by the accused.

7. Dr. Singhvi finally submitted that the prosecutrix in this case was a mentally deficient girl and was vulnerable to sexual abuse and, therefore, the High Court should have been sensitive while deciding the case. He cited the decisions of this Court in *State of H.P. v. Gian Chand* [(2001) 6 SCC 71] as well as in *Tulshidas Kanolkar v. State of Goa* [(2003) 8 SCC 590] in support of this submission. He submitted that in the present case the trial court had rightly convicted the respondents under Sections 366 and 376(2)(g), IPC but the High Court reversed the conviction of the respondents and acquitted them of the charges. He submitted that on almost similar facts this Court in *State of Rajasthan v. N.K.* [(2000) 5 SCC 30] has set aside the judgment of the High Court and restored the conviction of the accused persons by the trial court.

8. In reply, Mr. Mukesh Sharma, learned counsel for respondent Nos. 1, 2, 3, 4 and 6, submitted that Dr. Ramlal (PW-7) has not found any injury on the private parts of the prosecutrix and that he has found only some marks of eczema. He further submitted that PW-1 has only stated that with the help of the scooter light, he saw five persons running away but he has not been able to properly identify these five persons, namely, respondents Nos. 1, 2, 3, 4 and 6. He submitted that as he had

only found Akbar (respondent No.5) having sexual intercourse with the prosecutrix, no case of gang rape under Section 376(2)(g), IPC, is made out.

9. Mr. Sidharth Dave, amicus curiae for respondent No.5, submitted that the prosecution story that the prosecutrix was a mentally deficient girl has not been proved. He argued that, on the contrary, the doctor (PW-7) has opined that the mental condition and equilibrium of the prosecutrix were normal. He next submitted that the High Court has rightly come to the conclusion that the FIR was actually lodged at 11.00 a.m. on 28.04.1999 and had been ante timed to 6.00 a.m. on 28.04.1999. He argued that this manipulation casts serious doubts on the prosecution story that rape has been committed on the prosecutrix. He submitted that Dr. Ramlal (PW-7) has found on examination of the prosecutrix that there was one posterior perineal tear of the size 1/4" x 1/8" x 1/8" caused within 24 hours and had also given his opinion that this injury may result from the fall on some hard surface and, therefore, a case of rape by Akbar had not been established beyond reasonable doubt. He submitted that the view taken by the High Court was a plausible one on the facts of this case and should not be interfered with an appeal under Article 136 of the Constitution. He relied on the judgment of this Court in *State of Rajasthan vs. Shera Ram* [(2012) 1 SCC 602] in support of this submission.

#### Findings of the Court

10. We have perused the evidence of informant (PW-1). He has stated that 28.04.1999 was the date of marriage of Manju, the daughter of his brother Gyan, and during dusk time on 27.04.1999, his daughter (the prosecutrix), who was 14 years old and not mentally balanced, had gone to call the ladies of the locality but did not return. He searched the entire village and thereafter he went on the scooter driven by his brother Gyan Singh towards village Rajpura and on the way a milkman told them that six boys catching the hand of a girl were taking her towards the cremation ground. They went searching for the prosecutrix in the cremation ground but did not find her there. Thereafter, they turned the scooter towards village Motipura and they found that five persons were standing in the cluster of keekar trees near the Bhedia Daftar (an old dilapidated building) and on seeing them, five persons fled away. When they went inside the dilapidated building they found that the prosecutrix was crying and Akbar was lying over her and having sexual intercourse with her. PW-1 has also stated that the five persons who fled away are Roshan, Jangsher, Yakoob, Shafi and Kadar. He has also said that all the aforesaid six persons are residents of his Mohalla (locality) and were

present in Court. PW-1 has further stated that by the time they reached the Bhedia Daftar, it was about 1.00 a.m. of 28.04.1999 and he took the prosecutrix and Akbar to the Police Station and submitted the complaint (Ext.P-1) at 6.00 a.m. of 28.04.1999.

11. We have also perused the evidence of prosecutrix (PW-2). She has stated that when the marriage of the daughter of his uncle Gyan was to take place, she had gone out at dusk time from her house to call ladies to sing songs and on the way she met Akbar who told her that her uncle was looking for her. Then she accompanied with Akbar proceeded further and met Jangsher near the railway crossing who also told her that her uncle was looking for her. She then started walking and Akbar and Jangsher followed her and after some time she found Shafi and Yakoob and all the four persons started following her and after some time she saw Kadar and Roshan and all the six persons took her to a bridge on the road and from there they brought her to the tree of Tali in the field. Thereafter, all the six persons made her fall beneath the Tali tree forcibly and removed her salwar, caught hold of her and took her to a distance of two-three fields and then to a hut. Then they took her to Bhedia Daftar where also they committed sexual intercourse with her and when Akbar was committing rape on her, PW-1 and her uncle came and the remaining five persons fled away. She has stated that all these six accused persons belong to her Mohalla (locality) and they were present in Court. She has also identified six accused persons in Court. She has categorically stated that all the six persons committed rape on her without her consent and forcibly.

12. We have also read the evidence of Dr. Ramlal (PW-7) He has stated that he has examined the prosecutrix and prepared the medical examination report (Ext.P-15) and he had not found any mark of injury on her hidden parts, breast, thighs and forearm. He has further stated that her hymen was already ruptured and there was one posterior perineal tear of the size 1/4" x 1/8" x 1/8" caused within 24 hours. His opinion is that prosecutrix was habitual to sexual intercourse and there was nothing to suggest that she had not been raped but the vaginal swab and smear slides could be tested to find out the presence of sperms. PW-7 has also examined all the six accused persons and also stated that their pants and underwears were taken into possession and sealed and delivered to the SHO, Bhadara. The SHO, Bhadara, has been examined as PW-9 and he has stated that he handed over the pieces of medical evidence received from the Medical Officer of Govt. Hospital, Bhadara to the in-charge of the Malkhana and later on he got all such evidence in eight packets sent to the FSL, Rajasthan for test and the FSL, Rajasthan, submitted the test report (Ext.P-39).

13. Ext. P-39, which is the report under Section 293, Cr.P.C. of the FSL, Rajasthan, gives the following descriptions of the articles and result of examination:

“Description of Articles

|Packet Parcel No. |Exhibit No. marked by|Details of exhibits | |me | | |A. |1  
|Vaginal Swab | |“ |2 |Vaginal smear | |B. |3 |Salwar | |“ |4 |Kameej | |1. |5  
|Pants | |2. |6 |Pants | |“ |7 |Underwear | |3. |8 |Pants | |4. |9 |Pants | |“ |10  
|Underwear | |5. |11 |Pants | |“ |12 |Underwear | |A. |13 |Underwear |

Result of Examination

Human semen was detected in exhibit No.1, 2 (from packet marked A), 3, 4 (from B), 5 (from 1), 7 (from 2), 8 (from 3) & 10 (from 4).

Semen was not detected in exhibit No.6 (from 2), 9 (from 4), 11, 12 (from 5) & 13 (from A).

Exhibit No.1, 2 (from A) have been consumed during the examination.

(Dr. PRABHA SHARMA)”

14. Thus, the evidence of the prosecutrix (PW-2) is clear that all the six respondents, Akbar, Jangsher, Roshan, Yakoob, Kadar and Shafi, committed rape on her without her consent and forcibly. This evidence of the prosecutrix (PW-2) is also corroborated by the evidence of the informant (PW-1), who had himself witnessed Akbar committing rape on the prosecutrix. PW-2 had also informed PW-1 soon after the rape by the accused persons that not only Akbar but the other five respondents also had forcibly committed rape on her. The evidence of PW-1 and PW-2 that all the six respondents had committed rape on the prosecutrix is also corroborated by the complaint (Ext.P-1) made by PW-1 to the police within a few hours of the incident as provided in Section 157 of the Indian Evidence Act. Dr. Ramlal (PW-7) has opined after medically examining the prosecutrix that there was nothing to suggest that she had not been raped. To confirm whether rape was committed on the prosecutrix by the six accused persons, the vaginal swab and vaginal smear as well as salwar and kameej of the prosecutrix and the pants and underwears of the accused persons were sent by the letter (Ext.P-31) to the FSL,

Rajasthan, and as per the report of the FSL, Rajasthan (Ext.P-39), human semen was detected in the vaginal swab and vaginal smear (Exts.1 & 2 from packet 'A'), salwar and kameej of the prosecutrix (Exts.3 & 4 from packet 'B'), two pants (Ext.5 from packet 1, and Ext. 8 from packet 3) and two underwears (Ext.7 from packet 2, and Ext.10 from packet 4). The medical evidence, therefore, also corroborates the evidence of PW-1 and PW-2 that there was sexual intercourse between the prosecutrix and the accused persons.

15. We cannot accept the submission of Mr. Siddharth Dave, learned amicus curiae for respondent No.5 that the finding given by the High Court that the prosecutrix may have gone with the accused persons on her own is a plausible one and should not be interfered with under Article 136 of the Constitution. As we have already noticed, the prosecutrix (PW-2) has deposed categorically that all the six persons had raped her without her consent and forcibly. Section 114A of the Indian Evidence Act, 1872 clearly provides that in a prosecution for rape under clause (g) of sub-section (2) of Section 376, IPC, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent. Since the prosecutrix (PW- 2) has categorically said that sexual intercourse was committed by the accused without her consent and forcibly, the Court has to draw the presumption that she did not give consent to the sexual intercourse committed on her by the accused persons. The defence has not led any evidence to rebut this presumption. In our considered opinion, the High Court could not have, therefore, held that there were circumstances to show that PW-2 had gone on her own and on this ground acquitted the respondents.

16. From Ext.P-31 read with Ext.P-39, it is also clear that human semen was detected from the pants of Akbar and Jangsher and the underwears of Safi and Yakub. As per the medical evidence, four persons had committed rape on the prosecutrix. Explanation 1 to Section 376(2)(g), IPC, states that where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of the sub-section. This Court has, therefore, consistently held that where there are more than one person acting in furtherance of their common intention of committing rape on a victim, it is not necessary that the prosecution should adduce clinching proof of a completed act of rape by each one of the accused on the victim. (see *Om Prakash v. State of Haryana* [(2011) 14 SCC 309], *Ashok Kumar v. State of Haryana* [(2003) 2 SCC 143], *Bhupinder Sharma v.*

State of H.P. [(2003) 8 SCC 551], Pardeep Kumar v. Union Admn. [(2006) 10 SCC 608] and Priya Patel v. State of M.P. [(2006) 6 SCC 263]). Thus, we cannot accept the submissions of Mr. Mukesh Sharma, learned counsel for respondent nos.1, 2, 3, 4 and 6, and Mr. Siddharth Dave, learned amicus curiae for respondent No.5, that the medical evidence do not establish a case of gang rape under Section 376(2)(g), IPC.

17. The High Court, however, has considered the delay on the part of informant (PW-1) to lodge the FIR as a relevant factor to doubt the prosecution story. We find that PW-1 has explained the delay in his evidence. He has stated that after he found his daughter at about 1.00 a.m. on 28.04.1999 at the Bhedia Daftar with Akbar and after the five other accused persons had fled, they returned to their house at 2.00 a.m. and remained at their house till before sunrise and thereafter lodged the FIR at the Police Station. He has further stated that the delay from 2.00 a.m. to 6.00 a.m. in lodging the report was on account of the fact that his wife was sick and he was also frightened and there was no other person to go to the police station. He has also stated that he returned home from the police station at about 9.00 a.m. The SHO of Bhadara Police Station has in his evidence stated that on 28.04.1999 the informant appeared in the police station and produced a written report (Ext.P-1) before him. In cross-examination on behalf of the accused-Roshan, Shafi and Yakoob, PW- 9 has stated that Ext.P-1 was produced before him at 6.00 a.m. on 28.04.1999. Yet the High Court has come to the conclusion that the report (Ext.P-1) must have been filed at about 11.15 am. and was ante timed to 6.00 a.m. For this conclusion, we do not find any evidence, but only a surmise that Ext.P-1 must have been typed at the court premises after 11.00 a.m. Thus, the report (Ext.P-1) was filed by PW-1 at 6.00 a.m. in the morning reporting an incident that he had witnessed between 1.00 a.m. and 2.00 a.m. on 28.04.1999 and the period from 2.00 a.m. to 6.00 a.m., in our considered opinion, has been sufficiently explained by PW-1 in his evidence that he could not leave his wife alone until sunrise. As has been rightly submitted by Dr. Singhvi, no father would lodge a false complaint that his daughter has been gang-raped. The High Court should not have doubted the prosecution story on the ground of delay in lodging the FIR.

18. The judgment of the High Court is thus contrary to the evidence on record and is liable to be set aside. We accordingly set aside the judgment of the High Court acquitting the respondents and restore the judgment of the trial court convicting the respondents for the offences under Sections 366 and 376(2)(g), IPC, and maintain the sentences imposed for the two offences on the respondents by the trial court.

19. The appeals are accordingly allowed. The respondents will be taken into custody forthwith to undergo the remaining sentence.