

(2012) 05 AHC CK 0210

Allahabad High Court (Lucknow Bench)

Case No: Criminal Appeal (Jail Appeal) No. 722 of 2010

Ram Lal Gaderia

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: May 2, 2012

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 222, 313
- Evidence Act, 1872 - Section 114, 118
- Penal Code, 1860 (IPC) - Section 376, 511
- Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 3(1)(x)

Citation: (2012) ACR 3173 : (2012) 6 ADJ 777

Hon'ble Judges: S.V.S. Rathore, J

Bench: Single Bench

Advocate: Brijendra Singh, Amicus curiae, for the Appellant;

Final Decision: Partly Allowed

Judgement

Hon'ble S.V.S. Rathore, J.

This jail appeal has been preferred by the appellant Ram Lal Gaderia against his conviction in Session Trial No. 1312 of 2001, u/s 376 I.P.C., arising out of case crime No. 161 of 1997, Police Station Sarojini Nagar, District Lucknow, whereby the appellant was convicted for the offence u/s 376 I.P.C. and was sentenced to undergo rigorous imprisonment for a period of 10 years with fine of Rs. 5,000/- with default stipulation of two months rigorous imprisonment. The appellant was acquitted of charge u/s 3 (1) (x) S.C./S.T. Act.

In brief the facts of the case are as under:

Complaint (P.W.-1) (hereinafter referred as "Prosecutrix") was going to the house of his tenant Ram Pyare to bring kerosene oil alongwith her brother Shiv Kumar. While

they were on way, the appellant Ram Lal Gaderia, forcibly lifted her, closed her mouth and took her towards the grove situated in north direction from the village and after opening her trousers (salwar) committed rape with her. On the alarm raised by the victim and her brother, Ram Chandra tenant and his mother and other persons of the village reached there and accused ran away from there.

First Information Report of this case was lodged, in the same night at 00.30 hours. On the basis of the First Information Report, case was registered at case crime No. 161 of 1997. Medical examination of the victim was conducted by P.W.-8 Dr. Smt. Pushpa Nautiyal on 3.6.1997 in which no mark of injury was found on any part of the body or on her private parts. Internal examination hymen was found old torn and healed. Vaginal smear was taken for histopathology. In the vaginal smear examination no spermatozoa was found and as per the supplementary report age of the victim was about 15-16 years. Initial investigation of this case was conducted by P.W.-6 Satish Chandra Pandey subsequently from 4.6.1997 it was taken over by Manik Chandra P.W.5 and after completion of the investigation charge-sheet Ext. K-2 was filed. Medical examination report and supplementary report are Ext. K-4 and Ext. K-5 respectively.

2. Perusal of the record shows that in this case, during transmission of the charge-sheet to the Court, case diary and other police papers were lost, therefore, after holding an inquiry by the police, photocopies of the charge-sheet and case diary were sent to the Court, on the basis of which cognizance was taken. Other recovery memos by which trousers (salwar) of the victim was taken into custody and memo by which underwear and vest of the accused was taken into custody could not be re-constructed. Forensic Science Laboratory report and the site plan of this case could not be produced during trial.

3. Prosecution in order to prove its case examined,...

P.W.-1 victim who is said to be aged about 13 years at the time of occurrence.

P.W.-2 is her brother Shiv Kumar, who is said to be aged about 11 years at the time of occurrence.

P.W.-3 is Smt. Ranno, mother of the victim.

P.W.-4 is Guru Prasad, in his presence underwear and vest of the accused was taken into custody.

P.W.-5 is Manik Chandra, subsequent Investigating Officer, who filed the charge-sheet.

P.W.-6 is Satish Chandra Pandey, initial Investigating Officer of this case.

P.W.-7 is constable Om Prakash who prepared G.D. and chik report of this case. During trial G.D. has not been proved.

P.W.-8 Dr. Smt. Pushpa Nautiyal who prepared the medical examination report and the supplementary report, Ext. K-4 and Ext. K-5 respectively.

4. No evidence on behalf of the defense was adduced. Case of the appellant is of total denial and of false implication as stated by him in his statement u/s 313 Cr.P.C. A suggestion was given to the witness that the mother of the victim used to prepare country made liquor and in connection with the said business some altercation took place between the mother and the appellant and some other persons, because of which he has been falsely implicated in this case.

5. Heard Sri Brijendra Singh, amicus curiae on behalf of the appellant and the learned Additional Government Advocate for the State.

6. Argument on behalf of the appellant is that the appellant has been falsely implicated in this case. The story, as stated by the prosecutrix is unreliable. Learned trial Court has not appreciated the evidence in correct perspective and has further argued that in absence of some important documents, the defense of the appellant was prejudiced, but these factors were not considered at all by the learned trial Court, rendering its judgment unsustainable under law.

7. Learned Additional Government Advocate has argued that in this case prosecutrix has lodged the First Information Report. At that time she was a minor girl and she has fully corroborated the prosecution case during trial also. It is further submitted that some contradictions, in the evidence of the witnesses are bound to occur as their evidence was recorded after 10 years of the occurrence. It is further submitted that non production of other papers has not caused any prejudice to the accused as in cases of this nature it is the evidence of the prosecutrix that is of utmost importance.

8. As per the prosecution version, at the time of the incident P.W.-2 Shiv Kumar was also accompanying the prosecutrix. During trial it has come in evidence that the P.W.-2 Shiv Kumar had run away while the appellant lifted the prosecutrix and took her towards the grove. It has also come in evidence that after hearing noise, mother of the victim reached there. It is really strange that she has not supported the prosecution story, and was declared hostile. Therefore, there remains only evidence of the prosecutrix to be examined.

9. What value should be attached to the evidence of the prosecutrix it has been discussed in a recent judgment in the case of [Mohd. Imran Khan Vs. State \(Govt. of NCT of Delhi\)](#). In this case Hon"ble Apex Court following the views expressed in some earlier cases, held as under:

It is a trite law that a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another person's lust. The prosecutrix stands at a higher pedestal than an injured witness as she suffers from emotional injury. Therefore, her evidence need not be tested with the same amount of

suspicion as that of an accomplice. The Indian Evidence Act, 1872 (hereinafter called "Evidence Act"), nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness u/s 118 of Evidence Act 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. 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. 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. The Court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations. Rape is not merely a physical assault, rather it often distracts the whole personality of the victim. The rapist degrades the very soul of the helpless female and, therefore, the testimony of the prosecutrix must be appreciated in the background of the entire case and in such cases, non-examination even of other witnesses may not be a serious infirmity in the prosecution case, particularly where the witnesses had not seen the commission of the offence." ([State of Maharashtra Vs. Chandraprakash Kewalchand Jain,](#) ; [Vijay @ Chinee Vs. State of Madhya Pradesh,](#))

In view of the aforementioned legal position evidence has to be scrutinized. As stated earlier, in this case the police papers were lost during transmission to the Court, therefore, recovery memo of trousers (salwar) of the prosecutrix was not produced before the Court, neither the chemical examination report and nor the trouser (salwar) was produced before the Court. Recovery memo of the underwear and vest of the accused that were taken into custody but it also met the same fate. Nothing was produced before the Court. Site plan has also not been produced. Now in this background, the evidence has to be scrutinized with more caution.

11. First point is regarding the age of the prosecutrix. She was aged about 11 years, as per prosecution story. In the medical examination, her age was opined by the doctor to be 15-16 years. Argument was raised before the trial Court that benefit of variation of 2 years of age should be given and the prosecutrix should be held to be of 17 or 18 years but on this point learned trial Court has appreciated evidence in correct perspective and has held that she was minor. Hon"ble Apex Court in the case of State of U.P. v. Chottey Lal, 2011 (73) ACC 429, has held that it is not necessary to add 2 years in the age opined by the doctor. In this case there was ample evidence to suggest that she was minor. It is not a case in which the defence was that the prosecutrix was a consenting party. It is nowhere the case of the appellant that she

was major and the intercourse took place with her consent. Therefore, in view of specific defense case of false implication, the age of the prosecutrix cannot be said to be of any help to the accused. Even if it is assumed that she was major even then there is nothing on record to indicate or to infer that she was a consenting party.

10. According to First Information Report, case of the prosecution was that the prosecutrix, alongwith his brother P.W.-2 Shiv Kumar, was going to the house of his tenant Ram Pyare to take kerosine oil but in her evidence in Court, she has stated in her cross-examination that she was going to take kerosine oil from the shop and the occurrence took place at a distance of 2 kilometer from her house. P.W.-2 Shiv Kumar in his cross-examination has also stated that they had gone to the shop to purchase kerosine oil. The Court cannot ignore the time gap which has taken place between the occurrence and the examination of these witnesses in Court. The occurrence of this case had taken place on 2.6.1997 and more than 10 year after the said occurrence, statement of the prosecutrix was recorded in Court. Therefore, such minor contradictions are bound to occur in the evidence rather it goes to show that witnesses were not tutored.

11. But one thing that boggles the mind is that prosecution has come with a definite case that P.W.-2 Shiv Kumar was also accompanying the prosecutrix. In the First Information Report it was mentioned that the prosecutrix and P.W.-2 Shiv Kumar kept on raising the alarm and accused forcibly opened the trousers (salwar) and started committing rape with her. But before the Court P.W.-2 Shiv Kumar has stated that when accused lifted her sister and ran towards the grove then he started crying and came back to his house. He narrated this story to his mother thereafter his mother alongwith some other villagers ran towards the place of occurrence and seeing them, the accused ran away from there. P.W.-2 Shiv Kumar in his evidence has stated that this incident had taken place at a distance of about 10-12 houses from his house, it appears that he is referring the place where from the prosecutrix was lifted by the appellant. Therefore, he must not have taken longtime to reach his house and to narrate the incident to his mother.

12. According to the prosecution evidence, on getting this information they ran towards the place of occurrence and reached there, where from the appellant is said to have ran away. P.W.-1, the prosecutrix in her cross-examination has also admitted this fact that her brother went back crying and accused closed her mouth. It has also come in evidence that there was no other person except the accused. Definite case of the prosecution is that accused lifted the prosecutrix and thereafter went towards the grove. Therefore, there was nothing to prevent P.W.-2 Shiv Kumar to raise alarm, and as per the prosecution version he raised the alarm and on his alarm his mother and other persons reached the place of occurrence. It is really strange to note that in this case P.W.-3, mother of the prosecutrix has stated that she had not gone to the police station and no inquiry was made to her by the police. She has specifically stated that she has no knowledge about this incident. In cases of this

nature it is the evidence of the prosecutrix that assumes highest importance and no corroboration of her evidence is required.

13. In this case First Information Report was lodged in the same night. As per the evidence P.W.-1, she alongwith other persons reached police station at 9.30 p.m. But First Information Report in this case was lodged at 00.30 hrs. The delay in lodging the F.I.R. in cases of this nature is very common. It has been held in the case of *State of Himachal Pradesh v. Gyanchandra*, 2008 (3) SCC 565, in which the Honable Apex Court has held that in the incident like rape more so when the preparator of the crime happens to be a member of the family or related thereof involving the honour of the family or related thereof and therefore, there is reluctance on the part of the family of the victim to report the matter to the police and carry the same to the Court. A cool thought may proceed before lodging of the F.I.R.

14. In this case learned Amicus curiae has also submitted that the prosecutrix was found to be habitual of sexual intercourse, therefore, she was not having a good character. But in this appeal it is not to be decided whether prosecutrix was a girl of good character or not. What is to be decided is whether the appellant had committed rape with her or not? Honable Apex Court in the case of *State of U.P. v. Pappy @ Yunus and another*, AIR 2005 SC 1248, has held that in a rape case even assuming that the victim was previously accustomed to sexual intercourse is not determinative question. On the contrary, the question which was required to be adjudicated was, whether the accused committed rape on the prosecutrix. Learned trial Court while dealing with this issue has rightly held that even if she is taken to be a girl of easy virtues even then no person gets any right to commit rape with her. In this case the medical examination of the prosecution took place on 3.6.1997 at 4.00 p.m. i.e. after about 32 hours of the alleged occurrence. In the medical examination Ext. K-4 no mark of injury on any part of the body was found, hymen was old torn healed and accepted two fingers easily. Some smelling discharge was also present there. In the pathological report no spermatozoa was found and no definite opinion about rape was given by the doctor and it was reported that she is used to sexual intercourse. While P.W.1 has stated that accused-appellant gave him a blow of kick and fell her on the ground.

15. As stated earlier, in this case the appellant claims to have been prejudiced by non-production of the trousers (salwar) of the prosecutrix, underwear and vest of the accused and its test report because the chemical examination of these articles as it has a very important bearing on the case. In this case the defense of the accused was that her mother used to manufacture liquor and Jaikaran, Rajan Kumar and the appellant used to come there to consume "Daru". Some quarrel had taken place because of which the appellant has been falsely roped in this case. But this does not appeal to reason and the learned trial Court has rightly rejected this defence story with the reason that in such circumstances other persons would also have been named in the First Information Report but no effort was made to falsely

implicate any other person. Keeping an overall view of the matter. It appears that just after the accused lifted the prosecutrix his brother came to his house, raising alarm and just thereafter all these persons went to the place of occurrence and accused ran away from there. So it left very little time for the accused to fulfill his lust and it appears only to be case of an attempt to commit rape. This finding finds support with the medical examination.

16. Hon'ble Apex Court in the case of [Pandharinath Vs. State of Maharashtra](#) , modified the conviction of the appellant from Section 376 I.P.C. and reduced it to attempt to commit rape u/s 376/511. I.P.C. In that case Hon'ble Apex Court observed that "even if we accept the contention of the counsel appearing for the appellant that no offence u/s 376 is proved in the instant case on the basis of the evidence on record, it is definitely a case of commission of the offence of attempting to rape. The prosecutrix has clearly stated in her examination in chief that on waking up she found the accused-appellant sitting near her legs and the accused-appellant removed her under garments and gagged her mouth. Subsequently, the accused-appellant felt sorry for the incident and also apologized for the same. There is no suggestion in the cross-examination on the party of the accused to the aforesaid statement of the prosecutrix that the accused did not remove her cloth. She had categorically stated in her examination in chief that the accused had removed her clothes. The accused-appellant had also stated that the prosecutrix should forgive him for his acts against which no suggestion was put to the effect that he did not seek such an apology. If the accused-appellant had removed her clothes and he had not rebutted this statement of the prosecutrix in his examination in chief, it is definitely a case of attempt to rape.

17. In the facts of the present case also there is specific allegation of the prosecutrix that accused-appellant forcibly removed her trouser (salwar) and also removed his own underwear. This fact has not been rebutted in cross-examination. No suggestion was put to the witness that nothing of this sort was done by the appellant. On the contrary, the accused-appellant has come with a definite case of false implication, but as stated earlier, the defence of false implication does not appeal to reason, and was rightly rejected by the trial Court. Witnesses in there statements have stated that her mother used to make "Daru". about six years prior to the occurrence. Mere altercation in connection with the said business cannot be said to be ground for false implication after such a long time of six years, and that too in a case of this nature. The suggestion of the appellant was that this altercation took place with him and some other persons also but no effort was made to falsely implicate any other person. Learned trial Court has also rightly discarded this defense version.

18. Since in this case the time gap between the initiation of the occurrence by the accused and the reaching of the witness on the place of occurrence appears to be very little, therefore, it does not appeal to reason that accused-appellant could have

committed rape with the prosecutrix. But the circumstances which are available on record clearly established that the accused-appellant definitely made an attempt to commit rape by removing the clothes of the prosecutrix and his own cloths. Since in this case recovered clothes have not been produced in Court. No chemical examination report has been produced therefore in the peculiar facts of this case, where medical examination report is not supporting the prosecution version, therefore, this Court is of the considered view that conviction of the accused-appellant u/s 376 I.P.C. was not proper and he was guilty of offence for attempt to commit rape punishable u/s 376. read with Section 511 I.P.C.

19. Hon"ble Apex Court in the case of Pandharinath (supra) has held that:

It is well-settled legal position that if an accused is charged of a major offence but is not found guilty thereunder, he can be convicted of minor offence, if the facts established indicate that such minor offence has been committed. Reference in this regard may be made to the decision of this Court in [State of Maharashtra Vs. Rajendra Jawanmal Gandhi](#), ; and [Tarkeshwar Sahu Vs. State of Bihar \(Now Jharkhand\)](#), .

It is true that there was no charge u/s 376 read with 511 I.P.C. However, u/s 222 of the CrPC when a person is charged for an offence he may be convicted of an attempt to commit such offence although the attempt is not separately charged. This Court in Shamnsaheb M. Multtani v. State of Karnataka, (2001) 2 SCC 577 , had an occasion to deal with Section 222 of the CrPC. The Court came to the conclusion that when an accused is charged with a major offence and if the ingredients of minor offence are available. The Court observed as follows in relevant para:

What is meant by "a minor offence" for the purpose of Section 222 of the Code? Although the said expression is not defined in the Code it can be discerned from the context that the test of minor offence is not merely that the prescribed punishment is less than the major offence. The two illustrations provided in the section would bring the above point home well. Only if the two offences are cognate offences, wherein the main ingredients are common, the one punishable among them with a lesser sentence can be regarded as minor offence vis-a-vis the other offence.

20. In view of the discussion made above, the conviction of the appellant u/s 376 I.P.C. was not proper but the offence u/s 376. read with Section 511 I.P.C. is clearly proved against the accused-appellant and accordingly this appeal deserves to be partly allowed.

21. Appeal is hereby partly allowed, conviction and sentence of the appellant u/s 376 I.P.C. is hereby set-aside. The appellant is convicted for the offence u/s 376 I.P.C. read with Section 511. Keeping in view, the fact that occurrence of this case is about 15 years old and the accused appellant is in jail since 5.5.2009, prior to it also, at the stage of bail, the appellant remained in custody. It is informed by the Id. Counsel that he has remained in jail for a total period of more than three years. Therefore, in

view of this the appellant is hereby sentenced to the period already undergone by him in this case. The appellant shall be released forthwith, if not wanted in any other case. Office is directed to communicate this order to the Court concerned for immediate compliance.