
(2011) 01 AHC CK 0321

Allahabad High Court

Case No: Criminal Jail Appeal No. 2356 of 2009

Sanjeev @ Sanju

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: Jan. 24, 2011

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 164, 313
- Penal Code, 1860 (IPC) - Section 366, 376

Citation: (2011) 3 ACR 2570 : (2011) 3 ADJ 112 : (2011) CriLJ 4589

Hon'ble Judges: Vinod Prasad, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Vinod Prasad, J.

Appellant Sanjeev @ Sanju, through instant jail appeal has questioned the legality and sustainability of his conviction Under Sections 366, and 376 IPC and awarded sentences of 5 years R.I. with fine of Rs. 5,000/- on the first count and 7 years R.I. with fine of Rs. 5,000/- on the second count with further direction that in default of payment of fine on each of the counts Appellant shall under go three months further simple imprisonment for each of them implanted by Additional District and Sessions Judge Chandausi, Moradabad in Session Trial No. 312 of 2008, States/. Sanjeev@ Sanju, vide impugned judgment and order dated 9.3.2009.

2. Appellant's appeal was admitted on 10.4.2009 and was directed to be listed for final hearing. Today the appeal is listed and in joint agreement with Sri Mohit Singh learned Counsel for the Appellant, who meanwhile had filed power on behalf of the Appellant and Sri K.N. Bajpai learned A.G.A., the appeal was heard finally and is being disposed off by this order.

3. The gravamen of the charge levelled against the Appellant as is perceptible from written FIR Ext. Ka-1 .dated 16.1.2007 and chik FIR Ext. Ka 10, dated 19.10.2007, and

later on testified before the trial Court by fact witnesses are that the Appellant on 2.10.2007 at 4:00 pm abducted PW-4 Km. Priyanka Sharma daughter of informant PW1 Smt. Pushpa Sharma, when she had gone for stitching tuition to Rajasthan Training Centre, Bara Mahadeo, Chandausi, for the purposes of forcing her to solemnize marriage and to submit to sexual intercourse against her wishes. From training centre she had gone to the house of her Mausea(Maternal uncle) Sri Ram Sharma, in Bara Mahadeo as his daughter Parul @ Priyanka was her friend. Accompanied with Parul@Priyanka she had gone to madam Shalini Sharma of NTT to fetch her NTT certificate but Madam had refused to hand it over to her and consequently both of them returned to the house of her Mausea Sri Ram Sharma where she was offered a cold drink. After that Parul brought her towards Sita Ashram in a rickshaw where PW4 started developing giddiness and unconsciousness. There a van with black window panes was standing in which Appellant, Arvind, Vivek and Rekha were sitting. Parul alighted PW4 from rikshaw and pushed her in the van and then Priyanka PW4 was driven to Shahjahanpur where she was stayed at Vivek"s house and from there she was shifted to Rekha"s house. From Shahjahanpur she was travelled to Sitapur and then to Delhi. Appellant is alleged to have raped the victim and then slapped and assault her. She was also taken to some lawyer, where she was made to sign on some blank papers. Ornaments of PW4 consisting of ring, chain, and ear tops were sold by the Appellant, who solemnised marriage with PW4 at gun point in a temple. From Delhi PW4 was brought to Chandausi by the Appellant, where they were apprehended by the police on 7.12.2007 from road ways bus stand and that day itself police interrogated her. PW4 was got medically examined at Moradabad where she was detained at Women police station. On 10.12.2007 her medical and x-ray examinations were done and then again she was lodged at Women Police Station. Police also moved an application, Ext. Ka 9, for recording of her statement and resultantly her 164 Code of Criminal Procedure statement, Ext. Ka 3, was recorded by a Magistrate on 13.12.2007. Thereafter PW4 was brought back to Chandausi by the police, where she was handed over to her parents on 14.12.2007 as she had moved an application, Ext. Ka 4, expressing her desire for the same. During her stay with Appellant PW4 had become pregnant as well and after her alleged recovery she, on her own volition, got her two months old fetus aborted.

4. A typed FIR about the incident was lodged at Police Station Chandausi on 19.10.2007 at 4:30 p.m. by Smt. Puspha Sharma, PW1, mother of the victim, after she was informed by Chandra Prakash PW-3 and Ajay Kumar Sharma on 15.10.2007, about abduction of her daughter. Said FIR was got typed on 16.10.2007 and, under the direction of the Circle Officer, was registered as crime No. 935 of 2007 u/s 366 IPC. Chik FIR and GD entry, Ext. Ka 10 and 11 were prepared by Const. Clerk Satyendra Singh. Investigation of the crime was conducted by PW5 SI Mohd. Yasin who had recovered the victim and later on offence u/s 376 IPC was also added against the Appellant on the strength of the statement of victim PW4.

5. Investigation into the crime was conducted by PW5 SI Mohd. Yasin, who penned down 161 Code of Criminal Procedure statements of witnesses, prepared site plan Ext. Ka 6, recovered Appellant and victim on 7.12.2007 at 8 a.m. and prepared recovery memo Ext. ka 2 and search memo Ext. ka 7, moved application, Ext. ka 9 for recording of 164 Code of Criminal Procedure statement of the victim and concluding investigation charge-sheeted the Appellant vide Ext ka 5 on 6.1.2008 for offences Under Sections 366/376 IPC.

6. Medical examination of the victim Priyanka Sharma, PW 4 was got done by Dr. Smt. Halima Khan PW6 on 7.12.2007 at 3.20p.m., who was brought to her by Const. Smt. Nirmala Devi and her medical examination report Ext. ka 12 was prepared. Doctor has recorded following facts in her medical examination report:

No evident injury seen any where around the body surface of the girl. Axillary and pubic hair were present, breast well developed, height 147 cms, weight 55 kg, teeth 7+8 and 7+8.

On examination- No evident injury seen any where around the private part of the girl. Hymen represented by old healed tags. Vagina admits two fingers examination easily. Uterus size bulky and soft and seems to be gravid uterus and as the girl states herself of two months of amenorrhoea. Vaginal smear prepared and sent to pathologist for presence of alive or dead spermatozoa. For age x-ray of right elbow and knee and wrist joint is advised. USG of lower abdomen for confirmation of Prg.

7. USG report of victim dated 10.12.2007, Ext. Ka 13, indicated single infrautero foetus live with CRL10W 2d. Cardiac and limb movements were normally seen. Victim's vaginal smear report of slides, Ext. Ka 14, revealed that there was no spermatozoa, either alive or dead present. According to supplementary report Ext. Ka 15, given by PW6, victim was pregnant by ten weeks, she was 19 years of age and no definite opinion could be given about rape.

8. Submission of charge-sheet resulted in summoning of Appellant for charge-sheeted offences and finding his case trial by Court of Session's, the same was committed to Session's Court for trial where it was registered as S.T. No. 312 of 2008 State v. Sajiv @ Sanju.

9. Additional Session's Judge, Chandausi, Moradabad, charged the Appellants Under Sections 366/376 IPC on 4.4.2008, which charges were denied by the Appellant who claimed to be tried and hence his trial commenced.

10. In it's endeavour to substantial levelled charges and bring home the guilt of the Appellant, prosecution in all examined six witnesses out of whom PW1 informant mother Smt. Pushpa Sharma, PW2 Vishal, elder brother of victim, PW3 Chandra Prakash Sharma, witness of abduction and PW4 victim Priyanka were fact witnesses. PW5 S.I. Mohd. Yasin, investigating Officer and PW6 Dr. Smt. Halima Khan were formal witnesses.

11. In his statement u/s 313 Code of Criminal Procedure Appellant denied incriminating circumstances appearing against him in prosecution evidences and took the defence that PW4 had left her house on her own volition to solemnize the marriage with him, which she in fact did solemnise and subsequently, after being apprehended, under pressure of her parents she falsely implicated Appellant in a false charge of rape and abduction. In his defence he examined Santosh Kumar DW-1, who is none else than his real brother.

12. The trial Judge after critically appreciating the evidences tendered during the trial came to the conclusions, vide his impugned judgment and order, that the prosecution has successfully establish the guilt of the Appellant and, therefore, it convicted and sentenced him as has already been recorded earlier in the opening para of this judgment which findings and sentences are now being assailed by the Appellant through instant jail appeal.

13. I have heard Sri Mohit Singh, learned Counsel in support of this appeal for the Appellant and Sri K.N. Bajpai learned A.G.A. in opposition and have perused and analysed trial Court record and prosecution evidences.

Castigating the impugned judgment of the conviction and sentence, it is submitted that star witness of the prosecution, Priyanka victim PW4 is a wholly unreliable witness. On her own deposition, she is major aged about 23 years and a graduate. After finishing her studies she was training in stitches in Rajasthan Training Centre. She had left her house on her own volition and had eloped with the Appellant and had solemnised marriage with him. Appellant was known to the victim since much before as he was very poor and to earn his morsel he was working as a servant in her house and was doing a manual labour and house keeping of lifting garbage etc. Incident was engineered when her mausa(maternal uncle) gave her intoxicated cold drink because of which she developed giddiness some times there after. PW-4 accompanied her cousin sister Parul @ Priyanka D/O her mausa on a rickshaw after taking the drink but her mausa nor Parul @ Priyanka were made accused in the crime nor where examined as prosecution witnesses to substantiate allegation of abduction. Thus withholding of two most important witnesses nor charge-sheeting them with whom incident had engineered gave a most serious dent in the prosecution story. In this respect evidence of PW3 Chandra Prakash, who is not only a chance witness but also did not divulge the incident to any body for many days does not inspire any confidence. His 161 Code of Criminal Procedure statement was also recorded very late a month after recovery on 6.1.2008, albeit he was a signatory to the memo of handing over of PW4 to her parents on 14.12.2007. Evidence of PW3 indicates that he was a got up and planted witness other wise there was no reason for the I.O. not to raid the house of the Appellant and apprehend his father and sister Rekha. More over PW3 has been substantially and directly contradicted by PW, 1 and 4 on all material aspects of the matter as he had stated that he did not know as to whether PW4 was abducted or not nor he knew whether she had married with

the Appellant or not. Learned Counsel would therefore submit that charge of abduction remains unsubstantiated and fails. For other charge he submits that from the depositions of the victim it is writ large that she wandered around alongwith the Appellant to many places i.e. Chandausi, Sitapur, New Delhi etc. without complaining to any body and her conduct unerringly projects her consent to the entire incident and she being major and capable of giving her consent, conviction of the Appellant u/s 376 I.P.C. is also assailable. At the time of her recovery victim was pregnant by two months old foetus and medical evidences alongwith conduct of PW4 makes it evident that PW4 was a consenting party to carnaliter cognovit or sexual interaction between her and the Appellant and consequently charge of rape also must fail. Supplementary submission for this end was that the explanation offered by the victim that she was terror stricken, should not be accepted for the reason that at no point of time, the victim, at the initial stage of her depositions, uttered that the Appellant was armed with any weapon although in Court she attributed gun to him. In essence it was submitted that prosecution miserably failed to prove it's case against the Appellant who should be acquitted of both the charged offences and his appeal be allowed.

14. Criticising trial Court's approach to whole case, it was submitted that the entire approach of the trial Court was lopsided without peeping into inherent intrinsic unworthiness of victim's statements and it's analysis was not dispassionate to separate the grain from the chaff to cull out the real truth. Inconsistencies, improbabilities, un-naturalities in the prosecution version has been ignored by the trial judge to convict the Appellant and hence impugned judgment should not be countenanced and deserves to be set aside.

15. Learned A.G.A. per contra endeavoured to support the impugned judgment and defended it in it's reasoning and refuted Appellant's contentions.

16. I have considered the arguments advanced by both the contesting sides and cogitated over evidences led during the trial and defence of the Appellant.

From the appreciation of evidences and material exhibits it is evident that there is no discord on some of the important issues between rival sides and those facts are that the victim was major on the date and time of the incident. She had disclosed her date of birth as 1.7.84 in her application Ext. Ka 4 and hence on the date of the incident she was 23 years of age. This age is supported by her 164 statement, Ext. Ka 3 and deposition of the informant PW1, her mother. Both aforesaid Exhibits further proves that she was a graduate. It is also admitted that Appellant was a servant at the house of the informant and had free access in it and hence was very well known to the victim. Deposition of PW 1 indicate that there were cordial relationship between families of victim and accused (Page 2 and 3 of the depositions). Relationship between victim and her mausa Sri Ram Sharma and his daughter Parul @ Priyanka is also not in dispute. Sexual interaction between victim and Appellant, pregnancy of victim and child belonging to Appellant are also the

facts which are not in dispute. It is also admitted that father of both Appellant namely Arvind and of victim namely Vijai Prakash Sharma were employed in railways and hence were colleagues and their residences were also close by. In such background facts the only mooted question remains to be adjudicated is as to whether victim was abducted or she had left the house on her own volition to solemnise marriage with the Appellant as once it is held that incident occurred in concurrence with both, in that eventuality both the charges must fail as victim was capable giving her consent for marriage and cohabitation. Thus the question which now remains to be decided lies in a very narrow compass i.e. as to whether the victim left the house on her own volition because of affection, infatuated love, or she was abducted.

17. A critical appreciation of evidences on the determinable question of all fact witnesses, PW1 to 4 revealed that the allegation of the victim regarding her abduction is very weird. It is not understandable why her mausa Sri Ram Sharma will administer her intoxicated cold drink because of which she developed giddiness. It is also very bizarre that her cousin sister will carry her in a rickshaw to Sita Ashram and will alight her from rickshaw and push her inside van for being abducted. Her mausa and cousin sister Parul @ Priyanka were never made accused in the case though they are alleged to be a privy to the crime. This aspect makes prosecution story suspect. Further although victim claimed that she had fainted but she remembered every fact happened to her and places travelled by her and therefore her claim is false. Her ignorance in her 164 statement regarding names and acquaintances of persons inside the van is a false statement per se and when judged in the light of evidence of PW1, it is contradicted straight way. According to testimonies of PW1 both the families knew each other very well. Moreover victim travelled to Shahjahanpur and from there to Sitapur and stayed in a hotel and from there to Delhi and then to a village and then to Hardoi, where she was taken to an advocate Pramod Kumar Verma and there she had signed on 12-13 blank papers. During all these travelling and with the advocate the victim, though had ample opportunity to lodge a complaint did not state a single word regarding crime committed upon her. Conspicuous silence of the victim is indicative of her consent and nothing else. During all these victim did not utter any hue and cry nor lodged a protest. Her conduct is revealing of her consent to the entire episode and indicate that it all happened with her consensus and therefore her story of abduction does not inspire any confidence at all. In this respect defence of the Appellant that the victim being a major eloped with her and married with Appellant and became pregnant and subsequently when caught, under the influence of her parents, falsely implicated him has an air of truthfulness and is more confidence inspiring. It seems to be more probable narration of the whole incident. It is recollected that evidence of the victim is clear, categorical and cogent that she had gone for coaching in Rajasthan Training Centre Bara Mahadev, Chandausi, where she was taking the coaching for stitching and from there she, accompanied with her cousin sister Parul @ Priyanka, had gone to fetch her N.T.T. Certificate to the concerned teacher Shalini.

Since the certificate was not ready, both of them returned to the house of her mausa. As mentioned above all this ipse dixit by a solitary witness is not commendable without further corroboration and there is no corroborative evidence to that effect. It is all the more dicey that neither the parents of the victim nor any of the relatives nor the I.O. searched the victim at the house of Sri Ram Sharma, father of Parul @ Priyanka, although he was one of the relatives and her going to his house was very probable. Investigating Officer has also not cared to interrogate the said Mause, which unerringly indicates that had he been interrogated, he would have narrated a entirely different story altogether. Even to the advocate who got the blank papers signed, victim did not made any complaint. In those cases such as the present one, the Courts have to be suspect and cautious in critically appreciating the evidence of the victim to separate the truth from falsehood. It is the duty of the Courts to separate grain from the chaff so that no innocent man is thrown behind the bars, without there being convincing incriminating evidences against him. Courts are not expected to rely upon evidence of victim in a pedantic manner without critically appreciating it and, accept prosecuterix's testimonies howsoever fanciful and unworthy of credence it may be.

18. On an over all analysis of the evidence of the victim it is perceptibly clear that victim was a consenting party to the entire fact of roaming, her deposition of abduction and rape is nothing but falsehood. Medical report does not support the charge of rape. Allegation that her ornaments were sold by the Appellant is not substantiated by any evidence at all. No recovery has been made from the possession of the Appellant nor the victim could divulge any place or shop where those ornaments were sold. Victim herself seems to be untruthful witness even on those facts, which are admitted to her brother and mother. When the testimony of a witnesses are examined on the touch stone of probability and truthfulness, the character of their depositions are of prime and paramount importance and once they do not inspire confidence no reliance should be placed on truncated depositions. In above view, it cannot be said by any amount of certainty that the victim is a truthful and a wholly reliable witness. Cohabitation and pregnancy is admitted and since doctor's opinion is not against the defence version of consent cohabitation, which seems to be the real fact and more probable it is unsafe to form any opinion against Appellant accused. Since I find that the medical report vis-a-vis unsatisfactory prosecution evidences with different versions do not establish the charge of abduction and rape I am of the opinion that Appellant's conviction under Sections 366 and 376 IPC are not sustainable.

19. Sessions Judge while analysing the prosecution case has not cared to look into the intrinsic inherent improbabilities and un-naturalities of the depositions of the victim and completely ignored them and hence impugned judgment is susceptible to criticism. It has accepted evidences of the witnesses in a pedantic manner without critically appreciating it on the touchstone of probability for it's acceptability. Deposition of the victim unerringly indicates that she has given uncreditworthy

testimonies which do not inspire any confidence at all. She had embellished her statements to suit prosecution. In her statement u/s 164 Code of Criminal Procedure, which was her earliest version, she did not allege any weapon in the hands of the Appellants but later on modified her statement and assigned gun to the Appellant. This concoction she had done deliberately only to suit her allegation of being terrorised. No weapon however was recovered from the possession of the Appellant when he was apprehended alongwith PW4. Reasons for making improvement in her earlier statement is not difficult to perceive but she failed to convince ever inquisitive critical thoughts and summation of evidences. Therefore her deposition that she was terrorised is not acceptable and is hereby rejected. In fact incriminating evidences against the Appellant are so pitiabley unconvincing that they cannot be accepted as genuine.

20. In my above analytical view I am fortified by the Apex Court decision in *Mussaiddin Ahmad v. State of Assam* 2010 SCC 1445, wherein on similar fact situation Apex Court has disbelieved the testimonies of the victim while acquitting the Appellant therein.

21. Wrapping up the discussion and this judgment I am of the opinion that prosecution has remained unsuccessful in bringing home the guilt of the Appellant and substantiate charges of abduction and rape against him and resultantly the Appellant deserves acquittal.

In the net result Appellant's instant appeal is allowed and he is acquitted of both the charges Under Sections 366 and 376 IPC and is therefore directed to be released from jail where he is incarcerated unless he is incarcerated there in connection with any other crime.

Appeal is allowed.