
(2007) 04 AHC CK 0292

Allahabad High Court

Case No: Criminal Appeal No. 1759 of 2000

Raju alias Saleem

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: April 25, 2007

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 376, 376(2)(f)

Citation: (2007) 21 CriminalCC 905

Hon'ble Judges: M.K. Mittal, J

Bench: Single Bench

Advocate: Sagir Ahmad, for the Appellant; S.L. Kesharwani and AGA, for the Respondent

Final Decision: Dismissed

Judgement

M.K. Mittal, J.

Appeal has been preferred by appellant Raju @ Saleem against the judgment and order dated 21.07.2000 passed by Sri U.K. Tripathi the then 4th Addl. Sessions Judge, Kanpur Nagar in S.T. No. 1442 of 1998 whereby the appellant has been found guilty and convicted u/s 376 IPC and sentenced to undergo rigorous imprisonment for ten years and fine of Rs. 10,000/- has also been imposed on him with the direction that in default the appellant shall undergo imprisonment for six months.

2. Brief facts as disclosed in the first information report (EX-Kal), lodged by R.P. Singh, father of the prosecutrix at Police Station Railbazar, Kanpur Nagar, on 15.04.1998 at 8.45 P.M., are that when his daughter aged about five years was going from his house No. 198-11, Faithfulganj to the house No. 329 Faithfulganj and when reached near a betel shop in the field one boy who told his name as Bablu, to the daughter of the informant, allured his daughter for giving some money, took her in a lonely place near a banyan tree and there he committed rape on her at about 7.30 P.M. Thereafter he took her back and left her near "Pani Ki Tanki". The girl reached

her house and narrated the incident. He immediately came with the girl at the place of occurrence but by that time the accused had gone away.

3. On the basis of this first information report, PW3, head constable Radhey Shyam, who was posted on 15.04.1998 at the police station Railbazar, prepared the check report Ex-Ka-2. He also registered the case in the general diary at rapat No. 51. Its copy has been proved as Ex-Ka-3.

4. The girl was sent for medical examination with head constable Raj Narayan. PW4 DR. Sanju Agarwal who was posted as Medical Officer at A.H.N. Dafrin Hospital on 15.04.1998 examined the prosecutrix at 9.35 P.M. The mother of the girl was also present at that time. On external examination the medical officer found that the breast were not developed, axillary and pubic hairs were not present. There was no mark of external injury on the body. Internal examination was made under anesthesia. According to the doctor the hymen was in torn condition and fresh blood was coming. There was a tear of one inch on the posterior wall of vagina which was bleeding. Stitching was done and vaginal smear was made and was sent for pathological examination-X-ray was also advised.

5. Dr. Sanju Agarwal, considering the physical condition of the girl admitted her for treatment in the hospital. She prepared the medical report Ex-Ka-4 and report for pathological examination Ex-Ka-5. This girl was discharged from the hospital on 21.04.1998 and treatment was advised. The discharge certificate has been proved Ex-Ka-6. The doctor has also stated that the prosecutrix had come for bandage and treatment on 01.05.1998 and in that connection a note was made in the discharge card by Dr. Karuna Jauhari. She proved it Ex. Ka6-A. However she did not prepare any supplementary report but on the basis of X-ray report and X-ray plate stated that seven carpal bones had appeared in the wrist and therefore the age of the girl should have been about seven to eight years. She further stated that on the basis of the injuries the committal of rape on the girl was possible between seven to eight P.M. on 15.04.1998.

6. PW6 constable Manorama Bajpai was posted as constable at Police Station Railbazar, Kanpur Nagar on 21.04.1998 and she took the prosecutrix for X-ray examination to Dafrin hospital at about 10 A.M. Her father was also present at that time. After X-ray she was handed over to her parents.

7. PW5 Dr. R.B. Singh, who was posted as Senior Radiologist in U.H.M. Hospital, Kanpur Nagar, took the X-ray of the prosecutrix on 21.04.1998 and prepared his report Ex-Ka-7. According to the radiologist the age of the girl was about eight years.

8. The case was investigated by PW7 Sub Inspector Anant Ram Bhukesh. He started the investigation on 15.04.1998 and interrogated the mother of the prosecutrix. The statement of the girl could not be recorded on that date because of her ailing condition. Some suspected boys were brought to hospital and were shown to the

girl but she did not allege their involvement. The Investigating Officer inspected the place of occurrence along with informant on 16.04.1998 and prepared the site plan Ex-Ka-9. The blood stained frock, chaddhi and cotton were taken in custody on 17.04.1998 and fard Ex-Ka-10 was prepared. A boy named Babloo was brought to the hospital on 18.04.1998 but the prosecutrix did not identify him.

9. The investigation was transferred to PW8 Sri Prakash Singh Station Officer who started investigation on 19.04.1998. After perusing the case diary, he also searched the boys named Babloo and also brought them to the hospital. But the girl refused their involvement in the incident. On 01.05.1998 at about 9.15 A.M. he arrested the accused near the Lucknow Railway Crossing. Incidentally the informant with his wife and the prosecutrix came there as they were going to the hospital for treatment. The girl shouted that that was the boy who had committed rape on her. Accused disclosed his name and was taken to police station. The witnesses were further interrogated on 11.06.1998 and after completing the investigation the charge-sheet Ex-Ka-11 was submitted against the accused appellant. Blood stained clothes as taken from the prosecutrix were sent for chemical examination and the report of the chemical examiner dated 24.06.1998 is Ex-ka-12. According to this report human blood and sperms were found on the frock, chaddhi and the cotton.

10. Accused was committed to the Court of Sessions and was charged u/s 376 IPC on 04.03.1999. He pleaded not guilty and claimed trial.

11. In support of its case, prosecution besides the above noted formal witnesses also examined the informant Ram Pal Singh as PW1 and the prosecutrix as P W2. These witnesses stated about the prosecution case and also the manner in which the accused appellant was identified by the prosecutrix.

12. PW1 Ram Pal Singh has stated on oath that on 15.04.1998 at about 7.30 P.M., he was in his house No. 329 when his daughter who was coming from his house No. 198-11 to his house No. 329, was taken by the accused on allurement of giving her some money to a lonely place where the accused committed rape on her and thereafter took her back and left near the "Pani Ki Tanki". His daughter came weeping and she was also bleeding. When inquired his daughter told him that the accused had taken her and had also committed rape on her and had told his name as Babloo. The witness, his wife and daughter went to the place of occurrence but at that time accused could not be available. He came back to his house, scribed the report Ex-Ka-1 and lodged it at Police Station. His daughter was sent for medical examination and her condition being serious, was admitted in the hospital. Later on the blood stained clothes were taken by the Investigating Officer and fard Ex-Ka-2 was prepared. His daughter was discharged from the hospital after six days but she was advised to come to hospital daily for dressing. On 01.05.1998 at about 9.15 A.M. when he was taking his daughter for dressing along with his wife and the neighbours Virendra Singh and when they reached near the Lucknow crossing, police personnel were taking accused towards Police Station. His daughter when

saw the accused, shouted that he was the man who had taken her and committed rape on her. The complainant went to the Police Station and told the Police Inspector. In cross-examination he has stated that the distance between his two houses was about 200 yards and the place from where the accused had taken her was about 100 yards from his house. At that time the betel shop was closed. He also stated that his daughter had told the name of that man as Babloo and he had also mentioned this fact in the first information report. At that time his daughter was student of Kindergarten Lower and was going to school for about last one year. The Investigating Officer had also inspected the place of occurrence. He had seen the police personnel about ten paces from the crossing. Police had taken the accused to the Police Station and he also accompanied them. Thereafter he went to the hospital for dressing . When her daughter had come to him she was conscious but was limping. The Inspector brought about 10-12 boys named Babloo and showed them to his daughter but she told the Inspector that they had not committed rape on her. He denied the suggestion that he took money from those boys and let them go. He denied that in order to work out the case, accused whose name is Raju was arrested show in his name as Babloo. He also expressed his ignorance if accused was arrested by the Police on 27.04.1998. He also denied that the accused was not arrested on 01.05.1998. He also denied that the accused had been falsely implicated in the case.

13. PW2 the prosecutrix was aged about six years at the time of her examination in Court and in order to test her understanding, questions were put and she intelligently replied to those questions. She identified the accused in the Court also and stated that she was raped by him near the banyan tree and thereafter the accused left her near the Pani ki Tanki. Accused had taken her from near the Gumti and had told her that he would give her money. In reply to question whether it was day or night when the accused took her, she stated that " ". She was going with her father and mother on scooter when she identified the accused near the railway crossing. At that time police was taking the accused and when she saw him, she told her father that that was the man who had taken her and had committed rape on her. In cross-examination she stated that her father had purchased the other house and her mother had gone there for its cleaning, and she had also gone there and was returning alone from that house. She also denied the suggestion that she was not speaking the truth at the instance of her parents and that she was giving a wrong statement against the accused. She also denied that accused did not take her and that some Babloo of her Mohalla had taken her. From the railway crossing, they went to Police Station and thereafter went to hospital.

14. Accused was examined u/s 313 Cr.P.C. He denied the prosecution case and stated that he was arrested by the Police from his house and not at the railway crossing as alleged. According to him he had enmity with Jabbar and he got him falsely implicated in the matter. He also denied having committed any rape.

15. Accused examined his father Subrati as DW1 in his defence. According to Subrati he and his second son Yasin were arrested by the Police and were detained at the Police Station for 4-5 days and thereafter they were let off. His son Raju @ Saleem (appellant) was taken by the police from his house and was detained for five days and then he gave a telegram to Superintendent of Police and District Magistrate on 30.04.1998. He proved the telegram Ex-Kha-1 and the receipt Ex-K.ha-2. He was also given the entry slip Ex-Kha-3. This witness has stated that he had enmity with Jabbar the police informer and he got his son implicated in this matter. He also stated that when he was at the police station, 6-7 boys named Babloo were brought there but they were let off after taking money from their parents and he could not get his son released because of his poverty. In cross-examination he has stated that prior to this incident his son was never arrested. He denied that he was arrested in a case under N.D.P.S. Act. He also denied the suggestion that his son was arrested because he was identified by the prosecutrix. He did not tell about this incident to any Police Officer and also did not give any application and for the first time made the statement in the Court.

16. Learned Trial Court after considering the evidence on record came to the conclusion that the prosecution had been able to establish beyond reasonable doubt that it was the appellant who had committed rape on a minor girl. Consequently he held him guilty and convicted him and sentenced as noted above. Feeling aggrieved this appeal has been filed.

17. I have heard Sri Sagir Ahamad, Learned Counsel for the appellant, Sri S.L. Kesharwani, learned A.G. A. And have perused the Trial Court record.

18. Learned Counsel for the appellant has contended that the accused has been falsely implicated in this case and that there is no evidence to connect the accused with the incident, that no test identification parade was organised and the name of the culprit as was disclosed by the prosecutrix was Babloo whereas the name of the appellant is Raju @ Saleem. He has also contended that the appellant has been falsely implicated on account of his enmity with Jabbar and that learned Trial Court has wrongly convicted him and he is entitled to be acquitted.

19. Against it, the Learned Counsel for the State has contended that the accused took a minor girl of 5-6 years and committed rape on her. According to him the medical evidence amply proves that rape was committed on this girl. He has also contended that although the name Babloo was mentioned in the first information report but it appears that the accused had given his name wrongly and prior to the incident the prosecutrix did not know him and his name, and that during investigation several boys named Babloo were brought before the prosecutrix but she denied that rape was committed on her by any of them. He has further contended that prosecutrix identified the accused when he was being taken by the Police and there is no ground to doubt or discredit her testimony. There is no reason for the false implication of the accused and the case of enmity with Jabbar is

after thought and has been taken for the first time by the accused in his statement u/s 313 Cr.P.C. He has further contended that learned Trial Court has rightly convicted the appellant and the appeal is liable to be dismissed.

20. As far as the question of commission of rape on the minor daughter of the informant it is concerned, the statement of the prosecutrix as well as medical evidence amply show that rape was committed on her. Prosecutrix has stated in positive terms that rape was committed on her and there is nothing in her cross-examination to show that rape was not committed on her on the date, time and place as mentioned by her. Dr. Sanju Agarwal has also given a positive finding that rape was committed on the prosecutrix and it has also been corroborated by the report of the Chemical Examiner. The age of the prosecutrix is also not disputed. Therefore the fact that rape was committed on a minor girl aged about 5-6 years is established.

21. Now it has to be seen whether this diabolic act was committed by the accused appellant. According to the prosecution case, it was the accused who committed this offence. In this connection, Learned Counsel for the state referred to the testimony of the prosecutrix. The girl was about 5-6 years old and was a school going child and was going to school for about one year prior to the incident. Her examination also shows that she is intelligent child and stated that she was not giving the statement under the influence of her parents. Perusal of the statement also shows that she was not under any influence and made the statement in a very natural manner. When on 01.05.1998 she was being taken by her father for dressing and when they reached the railway crossing she saw the accused in police custody and she immediately identified the appellant and told her father that he was the man who had committed rape on her. This statement has also been corroborated by her father and there is nothing in their cross-examination to show that they are not speaking the truth.

22. Contention of Learned Counsel for the appellant that the girl had named Babloo and the name of the accused is not Babloo, is not material because the accused was not known to the girl prior to the incident and she named him Babloo as this name was told to her by the accused. The fact that during investigation the Investigating Officer brought several boys named Babloo before the prosecutrix but she denied their involvement shows that the Investigating Officer was fair in conducting investigation. There is no enmity of the complainant with the accused and there was no reason for him to falsely implicate him. No suggestion has been given to the complainant or even to the Investigating Officer that the accused was implicated on account of any enmity between the applicant and his father with Jabbar. Therefore the contention that he has been implicated on account of enmity with Jabbar, is not tenable and cannot be accepted.

23. The Learned Counsel for the appellant has further contended that accused was not put up for test identification but it is not material. Prosecutrix had seen the

accused at the time of incident and then she saw her near the railway crossing and identified him. She denied the suggestion that she was made to identify the accused at the police station. She identified the accused in the Court also. In the circumstances of the case, the non conductance of test identification does not affect the prosecution case.

24. The Learned Counsel for the accused has contended that the accused was taken from his house by the police on 27.04.1998 and detained illegally. He also contended that his arrest on 01.05.1998 near the Lucknow Crossing has been wrongly shown. The investigating Officer, PW8 has stated that the name of the accused came to light as suspect on 23.04.1998 and he also searched him on 24.04.1998 but could not find him. He denied the suggestion that the accused was arrested on 27.04.1998. The defence witness Subrati DW1 has stated that he gave a telegram on 30.04.1998 to the Superintendent of Police and the District Magistrate. In this connection, the investigating Officer has expressed his ignorance if the father of the accused had given any telegram on 30.4.1998. The accused did not examine any official of the office of Senior Superintendent of Police or District Magistrate to prove that telegram was received in that Office. The witness Subrati has admitted in the cross-examination that he neither told about the incident nor gave any statement or letter to any police officer and made the statement for the first time in the Court. Therefore on the basis of the telegram it cannot be held that the accused was arrested by the Police on 27.04.1998.

25. Learned Counsel for the appellant has also cited the case of [Karmajit Singh @ Pappu Vs. State of Punjab](#), . In that case, a group of 15-20 persons is alleged to have come over the roof of the house of the deceased and they cut open the same and fired gun shots and killed inmates of the house. Thereafter they went away. Three .persons were named but only accused appellant Karmajit Singh could be apprehended and he faced trial and was convicted by the learned lower Court and the High Court dismissed the appeal. Hon"ble Apex Court held that the witnesses had no occasion to see and identify the accused who was on the roof of the house. It was dark at that time and the witnesses had also not seen towards the roof. In those circumstances, the testimony of the witnesses regarding identity of the accused was not accepted and he was acquitted by the Hon"ble Apex Court. But in the present case, facts are different. Accused took the prosecutrix committed rape on her and then left her near the "Pani Ki Tanki". It has also come in her evidence that at that time the sun was about to set. This statement of the prosecutrix regarding time of the incident has not been challenged in her cross-examination although searching cross-examination has been made. It shows that there was sufficient light and she could very well identify the accused who must have come close to her during commission of the offence and there could be no mistake about the identity of the accused, when she saw her near railway crossing and then in the Court.

26. Learned Counsel for the appellant has also contended that accused has been in jail for about seven years and that he be convicted with the period of sentence already undergone but in view of the facts and circumstances of the case and the nature of offence as committed by the accused on a five years old girl, the accused is not entitled for any leniency even at this stage. Section 376(2)(f) IPC provides for minimum sentence often years if the age of the prosecutrix is less than twelve years. However, the lesser sentence can be given for adequate and special reasons. In the circumstances of the case I do not find any special or adequate reason to reduce the period of sentence the appellant. However the fine as imposed is excessive and is liable to be reduced. The appellant shall pay a fine of Rs. 1000/- and in default shall undergo simple imprisonment for one month.

27. Thus I come to the conclusion that the learned trial Court has rightly accepted the prosecution evidence and has rightly convicted and sentenced the accused, I do not find any justified or justifiable ground to interfere in the impugned order except that the amount of fine is reduced from Rs. 10,000/- to Rs. 1000/- and in default he shall undergo simple imprisonment for one month. With this modification the appeal is liable to be dismissed.

28. The appeal is hereby dismissed with above noted modification. Accused is in custody and shall remain in custody to serve out the sentence imposed on him. The copy of the judgment be sent to learned Trial Court who shall send the modified conviction order to the concerned Jail authority for necessary compliance.