

**(2010) 01 AHC CK 0286****Allahabad High Court****Case No:** Criminal A. No. 2045 of 2003

Ashok Kumar and Another

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

**Date of Decision:** Jan. 25, 2010**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 161, 313
- Penal Code, 1860 (IPC) - Section 109, 34, 354, 376

**Citation:** (2010) 2 ACR 1996**Hon'ble Judges:** Vinod Prasad, J**Bench:** Single Bench**Advocate:** A.K. Gaur, I.N. Pandey, K.K. Mani, Lav Srivastava, S.P. Singh Raghav, V.K. Jaiswal and Anil Raghav, for the Appellant; Amit Mishra and S.K. Agarwal and A.G.A., for the Respondent**Final Decision:** Partly Allowed**Judgement**

Vinod Prasad, J.

The two Appellants Ashok Kumar and Pramod Kumar have challenged the impugned judgment and order dated 25.2.2003, recorded by the I Vth Additional Sessions Judge, Court No. 4, Ghaziabad in S.T. No. 364 of 1992, State v. Ashok Kumar and Anr., by which the trial Judge has convicted Appellant No. 1 Ashok Kumar u/s 376/34, I.P.C. and Appellant No. 2 Pramod Kumar u/s 376 simplicitor and has sentenced both of them to undergo ten years rigorous imprisonment with a fine of Rs. 10,000 each and has further directed that in default of payment of fine they shall suffer six months further R.I. The trial Judge has also directed for payment of Rs. ten thousand as compensation to the prosecutrix victim in case the fine is recovered.

2. Eschewing unnecessary details prosecution allegations against the Appellants in the written report Exhibit Ka-1 and later on testified before the trial court in the concerned S.T. No. 364 of 1992, State v. Ashok Kumar and Anr., through witnesses of

facts, were that the victim is the daughter of informant, Chotha Ram, and Madan is her elder brother. On 13.3.1991 at about 11.30 a.m., when the victim was returning to her house after feeding buffalo, then the two Appellants, Ashok Kumar and Pramod Kumar, dragged her inside uninhabited vacant house of Hukum Singh P.W. 2 and Appellant No. 1 Ashok Kumar bolted the door from out side and then Appellant No. 2 Pramod Kumar ravished victim's chastity. Later on during the trial Appellant No. 1 was also alleged to have committed the same offence, which allegation has been disbelieved by the trial court. Hue and cry by the victim attracted Hukum Singh, P.W. 2 and Smt. Lado to the spot. Ashok Kumar Appellant who was standing outside the closed door ran way from the spot. After unbolting the door, Hukum Singh and Smt. Lado witnessed Appellant No. 2 Pramod Kumar performing carnal sexual act with the victim. However, pushing both the witnesses the said accused also escaped from the spot. The ignominy was narrated to the informant Chotha Ram by her son Madan in Ordinance Depot at Shakoor Basti, Delhi. The informant returned to his house and after verifying the facts from his daughter got a written report Ext. Ka-1 prepared and subsequently, after covering a distance of 6 km. south, lodged his F.I.R. as Exhibit Ka-7 at P.S. Sahibabad, district Ghaziabad on the following day, i.e., 14.3.1991 at about 12.10 p.m.

3. Head constable Om Veer Singh registered the written F.I.R. and prepared chick report Ext. Ka-7 and the relevant G.D. entry. S.I. R.P.S. Chauhan commenced the investigation of the crime who copied the chick report and G.D. entry and then recorded the statement of the victim and thereafter interrogated Om Veer Singh. Investigating Officer thereafter penned down statement of Hukum Singh and other witnesses and then he copied the X-ray report and medical report of the victim. Investigating Officer also conducted the spot inspection and prepared the site plan Exhibit Ka-5.

4. Magistrate on the basis of the charge-sheet, summoned the accused persons and finding their committed offences triable by Court of Session's committed their case to the Session's Court for trial and resultantly in the Court of I Xth Additional Session's Judge, S.T. No. 364 of 1992, State v. Ashok Kumar and Anr., u/s 376/354, I.P.C. was registered against the Appellants.

5. Trial Judge, charged both the Appellants u/s 354/376, I.P.C. on 19.1.1993, which charges after being under stood by the Appellants were denied and hence the trial proceeded against them.

6. Medical examination of the victim was conducted on 14.3.1991 at about 1.00 p.m. by Dr. Anjali Rastogi, who prepared her medical examination report, Ext. Ka-3, which she has proved. Doctor found that the victim was 160 cm. in height, with weight 49 kg. and her teeth were 14/14. On external and internal examination the doctor has noted following facts:

No axillary hair, pubic hairs were scanty and thick, breasts were well developed.

No mark of injury all over her body.

External Examination:

No mark of injury on her private parts. Her hymen was torn and redness was present at 5 O'clock position. No fresh bleeding and discharge was seen. Vagina was admitting one finger with difficulty.

The doctor advised:

(i) X-ray of her elbow and wrist joint for age determination.

(ii) Vaginal smear on two slides to find out presence of spermatozoa. Further examination of the prosecutrix was conducted by senior Pathologist Dr. S.C. Mishra, who had conducted the pathological test on the slides of vaginal smear taken from Km. Suman and had prepared his pathological test report Ext. Ka-2.

7. To substantiate it's case and bring home the guilt of the Appellants prosecution examined Suman victim P.W. 1, Hukum Singh, (eye-witnesses) P.W. 2 and Chotha Ram (informant) as P.W. 3. Rest of the informal witnesses included Dr. S.C. Mishra, Pathologist P.W. 4, Dr. Anjali Rastogi, Medical Officer P.W. 5, Investigating Officer R.P.S. Chauhan, S.I. P.W. 6 and Dr. R.R. Tyagi, Radiologist P.W. 7.

8. Appellants-accused in their statements u/s 313, Code of Criminal Procedure denied incriminating circumstances put to them and in their defence, Appellant Ashok Kumar stated that Satya, elder brother of the victim, had molested his mother and when he had gone to lodge his F.I.R. he was arrested and falsely implicated in the instant case. Second Appellant Pramod Kumar took the same defence with additional plea that since he was a witness in the molestation case of the mother of co-accused, therefore he has been falsely implicated.

9. Additional Sessions Judge, Court No. 4 Ghaziabad vide his impugned judgment and order dated 20.5.2003 believed the prosecution witnesses and finding a ring of truth in it's charge, convicted Appellant Ashok Kumar u/s 376/34, I.P.C. and the Appellant Pramod Kumar u/s 376 and then sentenced each of them to seven years R.I. with fine of Rs. 10,000 and in default of payment of fine to undergo six months further R.I. Hence, this appeal questioning sustainability of the conviction and sentence by the Appellants.

10. I have heard Sri. V.P. Srivastava, learned senior counsel assisted by Sri. Lav Srivastava, advocate on behalf of the Ashok Kumar Appellant, Sri. I.N. Pandey, learned Counsel on behalf of the Appellant No. 2 Pramod Kumar and Sri. Patanjali Mishra, learned A.G.A. for the State Respondent.

11. Learned senior counsel after reading the evidences of prosecution witnesses submitted that the whole prosecution story is absolutely false and the prosecutrix seems to be a consenting party. He further contended that Appellant No. 1 Ashok Kumar has been falsely implicated. Learned senior counsel further submitted that

the prosecution allegation to bolted door from outside is a false story and no independent person has been examined by the prosecution albeit place of incident is densely populated. It was also contended that no injury was found on the internal and external body parts of the victim, which indicates her consent in the incident. Learned senior counsel further submitted that the mother of the Appellant Ashok Kumar was molested by Satya, real brother of the victim, and as a counter blast, to save the skin from that charge of molestation, that a false case was cooked up in which Appellant Ashok Kumar has been falsely implicated. It is further pointed out that the prosecution has shifted it's version from time to time to suit the medical testimony and to make it's case congruent with the Investigating Officer's evidence. In his submissions none of the prosecution witnesses are reliable and no implicit reliance can be placed on their testimonies. Learned senior counsel further pointed out that deposition of witnesses of fact is belied by Investigating Officer and, therefore, it was harangued, that exaggerated tutored version, full of pitfalls and embellishments cannot be accepted as gospel truth to convict the Appellants.

12. Learned Counsel for the Appellant No. 2, Pramod Kumar also toed the same line of argument as was put forth by the learned senior counsel and further submitted that the victim has testified contradictory versions and, therefore, participation of Appellant No. 2 in the crime is also not established. Concludingly both the counsels contended that the appeals filed by the Appellants be allowed and their recorded convictions and sentences be set aside and they be set at liberty.

13. Learned A.G.A. refuted all the submissions raised by both the counsels and contended that the defence of the Appellants is absolutely false and the victim has no animus/ intention to falsely implicate the Appellants. Medical report supports the charge of rape being committed on the victim and therefore appeal lacks merits and deserves to be dismissed.

14. I have heard both the sides and have gone through the entire records of trial court and of this appeal.

15. Summation of facts and it's critical appreciation, indicates that the victim, while she was returning to her house, was dragged in an inhibited vacant house of Hukum Singh P.W. 2, and there her chastity was ravished by Appellant Pramod Kumar, according to the F.I.R. version. This incident was witnessed by Hukum Singh and Smt. Lado and Hukum Singh P.W. 2 has fully supported the victim in all material aspects of the incident. P.W. 3 informant Chotha Ram is not an eye-witness of the incident and his evidence regarding gaining knowledge about the incident and lodging of F.I.R. by him is confidence inspiring. Applying the maxim falsus in uno falsus in omnibus, the evidence of this witness, so far as rape being committed by Appellant Pramod Kumar is concerned, does not suffer from any infirmity. Although he had embellished his evidence by deposing that Appellant Ashok Kumar also blotted victim's honour but this part of his evidence has been disbelieved by the trial Judge and I do reject the same as it seems to be a concocted version. Eikly,

unblemished evidences of victim P.W. 1 and that of Hukum Singh P.W. 2 against Appellant Pramod Kumar lends credence to the prosecution story and their testimonies are well supported by medical evidences of the doctors and Ext. Ka-2 to Ext. Ka-4, wherein it is mentioned that the victim was subjected to rape and spermatozoa was present in her vaginal smear slides. All these reports have been duly proved by the concerned doctors. P.W. 1 and P.W. 2 were subjected to searching cross-examination by the defence but they failed to elicit any thing favourable to the Appellant Pramod Kumar. Entire evidences of fact witnesses are natural and confidence inspiring. It does not indicate at all that they are tutored or unreliable witnesses. P.W. 2 is an eye-witness of the carnal intercourse, who when unbolted door had seen Appellant Pramod Kumar ravishing the chastity of the victim. From the very beginning his name has figured as an eye-witness of the incident. There is nothing in his deposition to disbelieve him although he was cross-examined at a great length. Defence has failed to demolish prosecution story against Appellant Pramod Kumar and the prosecution witnesses have stood the test of cross-examination in this respect.

16. Learned senior counsel has raised certain criticism from the testimony of victim and Hukum Singh in respect of torn off clothes, presence of blood at the spot, bolting of door from inside in an endeavour to show that neither P.W. 1 nor P.W. 2 are wholly reliable witnesses but those minor contradictions do not damage the basic fabric of prosecution case from it's acceptability. P.W. 1 is clear and cogent in her deposition regarding charge of rape being committed by Appellant Pramod Kumar and she has been well supported by P.W. 2 Hukum Singh. There was no enimous for her to falsely implicate the Appellants. It is difficult to accept that she will manufacture a case to blemish her own honour. In this respect the criticism of learned A.G.A., that the defence of the Appellants is patently false and absurd has much substance in it. In my view trial Judge has rightly rejected the defence version, which seems to be an after-thought. In above view I find participation of Appellant Pramod in crime established beyond a pale of doubt and therefore I conclude that the prosecution has successfully brought his guilt home. Ten years of imprisonment for the offence of rape implanted by the trial Judge with fine of Rs. Ten thousand also does not seem to be excessive on the facts and circumstances of the case.

17. Now turning towards the appeal of Ashok Kumar I find that prosecution has shifted it's case from time to time. There is no allegation against him in the F.I.R. of committing any rape on the victim. F.I.R. was dictated by the informant P.W. 3 after gaining knowledge about the incident from the victim herself as is admitted to both P.W. 1 and P.W. 3. Curiously enough it does not mention any offence u/s 376, I.P.C. being committed by Appellant Ashok Kumar. Testimonies of P.Ws. 1 and 3 in this respect is full of doubt. The said allegation also does not find any mention even in their statements u/s 161, Code of Criminal Procedure Therefore there is no reason to accept this part of prosecution version that Appellant Ashok Kumar also had forceful sexual intercourse with the victim. The said allegation is pure concoction

and therefore I reject that part of prosecution case. Trial Judge also did not believe the same but convicted Ashok Kumar u/s 376/34, I.P.C. Firstly, Section 34, I.P.C. has no application on the facts and circumstances of the case as there is no evidence that Appellant Ashok Kumar shared common intention to commit rape upon the victim alongwith the other Appellant Parmod and secondly, that he was an abettor of the crime only for which he was not charged. Embellishment and concoction by the victim and her father to anoint charge of rape on Appellant Ashok Kumar does not satiate judicial scrutiny for it's acceptance. What has been brought successfully by the prosecution is that Appellant Ashok Kumar was guarding the room while Appellant Pramod was outraging the modesty of the victim inside it. Thus, Appellant Ashok Kumar is guilty of abetment of main offence u/s 109, I.P.C. read with Section 376, I.P.C. In such a view so far as the Appellant Ashok Kumar is concerned his conviction u/s 376/34, I.P.C. is not sustainable and he should have been convicted u/s 376/109, I.P.C. Since I find that no prejudice shall be caused to Appellant Ashok Kumar if his conviction is altered from Sections 376/34 to 376/109, I.P.C., therefore, his conviction is altered into those offences. Further I find that the sentence of ten years R.I. with fine of Rs. Ten thousand implanted on this Appellant is towards higher side, therefore I reduce the same to five years R.I. only.

18. Net result of the above discussion is that the appeal of Appellant Pramod Kumar is dismissed in full and his conviction and sentence implanted by the trial court is hereby confirmed. After realizing the fine from him, the same shall be paid to the victim as compensation for the injury caused to her to ointment her soul. In the event of default in payment of fine, Appellant Pramod Kumar shall undergo one year further R.I. The said Appellant is in jail. He shall continue to remain in jail to serve out remaining part of his sentence.

19. Appeal of Appellant Ashok Kumar is partly allowed. His conviction u/s 376/34, I.P.C. is hereby altered to one u/s 376/109, I.P.C. and his sentence is also altered and reduced to five years R.I. only. Appellant Ashok Kumar is on bail. He is directed to surrender forthwith to his surety and personal bonds to serve out remaining part of his sentence.

Let a copy of this judgment be certified to the trial court for it's intimation.