
State of U.P. Vs Sudhir Gupta

Government Appeal No. 3516 of 1984 and Cr. A. No. 2582 of 1984

Court: Allahabad High Court

Date of Decision: May 27, 2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) â€” Section 313, 374, 377#Evidence Act, 1872 â€”
Section 114, 118#Penal Code, 1860 (IPC) â€” Section 302, 376, 376(2)(g)

Citation: (2014) 3 ACR 2876 : (2014) 86 ALLCC 349

Hon'ble Judges: Rakesh Tiwari, J; Kalimullah Khan, J

Bench: Division Bench

Advocate: Satish Trivedi, A.K. Awasthi, D.K. Awasthi, Manish Tiwari and Sudhir Kumar,
Advocate for the Respondent

Final Decision: Dismissed

Judgement

Kalimullah Khan, J.

This Government Appeal No. 3516 of 1984 has been filed u/s 377 Cr.P.C. by the State of Uttar Pradesh against the

four accused-respondents Sudhir Gupta, Virendra Kumar, Umesh Chandra and Krishna Kant against the judgment and order dated 5.9.1984

passed by the then III Assistant Sessions Judge, Bareilly in S.T. No. 288 of 1982 for enhancement of the sentence awarded to the respondents on

the ground that the sentence awarded against them is wholly inadequate in the facts and circumstances of the case; that under the provisions of

section 376(2)(g) as amended by the Criminal Law Amendment Act, 1983, the sentence in gang rape case like present one shall not be less than

10 years especially when there is no extenuating circumstance for awarding lesser punishment to them. Whereas, criminal appeal No. 2582 of

1984 has been filed u/s 374 Cr.P.C. by the accused-appellants Virendra Kumar, Krishna Kant, Umesh Chandra and Sudhir Gupta challenging the

aforesaid judgment and order dated 5.9.1984 whereby learned Trial Court has convicted all the aforesaid accused-appellants u/s 376 IPC and

sentenced appellant Virendra Kumar to undergo rigorous imprisonment for 8 years and appellants Sudhir Gupta, Umesh and Krishna Kant to

undergo rigorous imprisonment for 4 years. All the aforesaid accused-appellants have been imposed a fine of Rs. 10,000/- each and in default of

payment of fine they have to undergo a further sentence of 2 years each. In case of the realization of amount of fine, victim was awarded the

compensation of Rs. 25,000/-. This Government Appeal No. 3516 of 1984 and criminal appeal No. 2582 of 1984 have emerged out of common

judgment and order dated 5.9.1984, therefore, both the appeals are being disposed of by this common judgment.

2. In brief, the prosecution case is that on 27.2.1981 at about 2:30 p.m., all the aforesaid accused persons committed gang rape upon a minor girl

aged about 14 years, hereinafter called the "prosecutrix" inside the room of accused Virendra Kumar, who dragged her inside his Baithaka, when

she was asking for whereabouts of her friend Anju. She raised hue and cry which attracted the people of vicinity including the prosecution witness

Afzal Ahmad, P.W. 4. They asked accused to open the door by knocking the same and by informing them that police was to reach there. After

committing the gang rape, by opening the next door, all the accused fled away after extending threat to the prosecutrix to kill her father and

brother, in case she discloses their names. Thereafter, police reached on the spot and brought the victim to the police outpost, Kuharapir, District

Bareilly. On the information given by Amrish, her maternal uncle, Harsh Swamp Sharma, first informant, who is the father of the prosecutrix

reached at police outpost, Kuharapir alongwith Amrish where he found the prosecutrix sitting there. He was told that the prosecutrix was brought

from the house of Virendra Kumar accused. He asked the prosecutrix as to what happened with her but she was silent and kept mum throughout.

He brought her to his house where she used to be silent and distracted apart from being broken, perplexed and frightened. On 4.3.1981 she

received burn injuries when she was lighting the stove as per prosecution story. She was admitted in District Hospital for her medical treatment.

Her condition was serious and critical. All the four accused alongwith their associates used to go round the hospital and they used to make ironical

and satirical remarks against her. The first informant then asked the prosecutrix as to why these accused were showing their impertinence,

uncivilized gestures expressing their naughtiness and wicked behaviour. It is at this stage that the prosecutrix started weeping and disclosed to her

father in presence of her mother, the aforesaid incident of gang rape committed by all the aforesaid four accused upon her. She disclosed that on

27.2.1981, when she was going to attend her fruition to Mohalla Bhund, accused Virendra Kumar forcibly got her hold off and dragged her inside

his house, where rest three accused Sudhir Gupta, Umesh and Krishna Kant were already sitting there and all of them committed gang rape upon

her one by one. She cried and raised alarm whereupon neighbouring persons were attracted there. They extended exhortation and someone of

them called for police and thereafter, accused after extending threats that if she discloses their names to anyone, they would kill her brother and

father, fled away. Police took her to outpost and inquired the matter but keeping in mind her pride and defamation, she did not disclose the incident

to police or anyone earlier.

3. First informant prepared the written report Exhibit Ka-4 on 12.3.1981 and lodged in the police station, Prem Nagar, District Bareilly. Chick

report was drawn, case was registered in the general diary. Investigation started. She was subjected to medical examination. Raids were laid by

police to arrest the accused persons. One Jagdish, friend of first informant assisted the police in effecting the arrest of the accused. He was

threatened by the accused persons not to take initiative for their arrest and ultimately, Jagdish was murdered by accused Virendra Kumar and in

due course, he was put on trial and was found guilty for the murder of Jagdish and was awarded a sentence of life imprisonment.

4. After collecting the evidence, recording statements of P.Ws., preparing the site plan and being satisfied with the output of the investigation, I.O.

submitted the charge-sheet against all the accused persons u/s 376 IPC.

5. Case was committed to the Court of Sessions.

6. Accused were charged for the offence u/s 376 IPC. They pleaded not guilty and claimed their trial.

7. In order to prove its case prosecution examined 7 P.Ws. including prosecutrix, P.W. 1, first informant, Harsh Swarup Sharma, P.W. 4 and

Afzal Ahmad, P.W. 5, whose evidences pertain to the facts of the case. Rest evidence is of formal nature.

8. Prosecutrix, P.W. 1 has proved the prosecution case as embedded in the F.I.R. and deposed that accused Sudhir Gupta, Virendra Kumar,

Umesh Chandra and Krishna Kant committed gang rape upon her inside the house of accused Virendra Kumar, who had dragged her inside the

room. Rest three accused were already sitting there. On her hue and cry, persons of locality intervened from outside the door, whereupon the

accused fled away extending threats to the life of her father and brother, in case she discloses their names. Her deposition (Examination-in-chief) is

reproduced as under:

9. She has been subjected to lengthy cross-examination but her evidence could not be shattered.

10. Harsh Swarup Sharma, P.W. 4 has proved written report Exhibit Ka-4 and deposed on facts.

11. Afzal Ahmad, P.W. 5 has proved that he was one amongst the members of the public, who were collected there at the spot after hearing hue

and cry of the prosecutrix and asked the accused to open the door. Before police reached at the spot, accused fled away from another door.

However, police recovered the prosecutrix from the house of accused Virendra Kumar and took her with them to outpost, Koharapir, where

Harsh Swarup Sharma, P.W. 1, father of the prosecutrix alongwith her maternal uncle Amrish reached there and took her to his house.

12. Accused persons were examined u/s 313 Cr.P.C They denied the prosecution allegations and attributed their false implication on account of

enmity. In spite of opportunity given to adduce the evidence in their defence, they did not adduce any oral evidence in their defence. However,

some documentary evidence vide papers No. 90-Kha, 91-Kha, 92-Kha, 93-Kha, 94-Kha & 96-Kha were filed which has been mentioned in the

lower Court judgment.

13. Having heard learned Counsel for the parties, learned Trial Court vide impugned judgment and order dated 5.9.1984 found all the four

accused guilty under sections 376 IPC and he convicted and sentenced them as aforesaid.

14. Feeling aggrieved, the State of Uttar Pradesh has preferred Government Appeal u/s 377 Cr.P.C. for enhancement of sentence and all the

accused filed their criminal appeal No. 2582 of 1984 u/s 374 Cr.P.C. for setting aside the impugned judgment and order with a prayer to acquit

them from the charge levelled against them.

15. During the pendency of these appeals before this Court, it was found that statements of accused recorded by Trial Court u/s 313 Cr.P.C.

were missing, hence, under the orders of the High Court dated 17.9.2008 the statements of accused persons u/s 313 Cr.P.C. was recorded afresh

by the Trial Court. They were further given opportunity to examine defence witnesses, if any. Learned Trial Court complied the order and sent the

recorded statements of accused and their witnesses Suresh Gupta, D.W. 1, Devaki Nand Gupta, D.W. 2 and Ramesh Kumar Rastogi, D.W. 3,

who have given their testimonies establishing the indirect enmity of accused Krishna Kant with Harsh Swarup Sharma, first informant (P.W. 4).

16. Be it known that after a month of the pronouncement of impugned judgment and order dated 5.9.1984 the Trial Court record was burnt in a

fire in office on dated 29/30.10.1984 and 4/5.11.1984. Hence, the records were reconstructed by Trial Court without the active co-operations of

accused-respondents although they were asked to co-operate but they turned as deaf ear.

17. D.W. 1, Suresh Gupta s/o Khunni Lal, aged about 56 years r/o Sanjay Nagar Pal Barat Ghar near P.S. Baradari, District Bareilly has

deposed that he was a tenant in a house which lies besides the house of Hakeem Ram Chandar Vaidya in Mohalla Kuncha Sitaram in the year

1980. He lived there for 14-15 years. He was acquainted with accused Krishna Kant, who too resided in the same mohalla. His one shop was in

the tenancy of Brahma Swarup. In the year 1980 a litigation was going on in between two. Krishan Kant wanted to evict Brahma Swarup.

Whenever, there was quarrel in the year 1980, the three brothers of Brahma Swarup and his brother-in-law Harsh Swarup Sharma (informant)

used to come and take side of Brahma Swarup against Krishna Kant. After 1980 Krishna Kant accused got the tenanted shop vacated from

Brahma Swarup as a result of which informant and others were bearing grudge against him and due to this enmity Harsh Swarup Sharma has

falsely implicated the respondent Krishna Kant, Sudhir Gupta and Umesh in this false case of rape with his daughter as Sudhir Gupta was helping

Krishna Kant in the aforesaid quarrel. In the cross-examination the witness stated that he was acquainted and familiar to the accused Krishna

Kant. He used to be invited by him in the worships and functions in his house as and when occasions arises. In the present case registered at the

instance of Harsh Swarup Sharma accused respondents have been convicted. However, he has denied the suggestion that on account of his

friendship and family relation with accused persons he is falsely deposing in their favour to screen them from legal punishment.

18. D.W. 2, Devaki Nandan s/o Nand Gupta aged 55 years r/o Mohalla Jakati Street House No. 243, P.S. Kila, District Bareilly has deposed

that in the year 1980 he was residing in Neemki Chadhai Pulkaji, P.S. Kila, District Bareilly. The house of his maternal grand father was situated

there wherein he lived for about 20 years. There was a litigation in between Krishna Kant and Brahma Swarup over eviction of a shop which was

in the tenancy of Brahma Swarup and whenever, quarrel took place all the four brothers of Brahma Swarup and their brother-in-law Harsh

Swarup Sharma (informant) used to come and take side of Brahma Swarup against Krishna Kant while accused Umesh, Virendra Kumar and

Sudhir Gupta used to come for the help of Krishna Kant and this is the reason that all the aforesaid accused Umesh, Virendra Kumar, Sudhir

Gupta and Krishna Kant have been falsely implicated in this false case of rape. In the cross-examination he has stated that he had frequent visit in

the house of Krishna Kant since 1980-81. He admitted that for the first time, he has deposed the aforesaid facts on 20.10.2008.

19. D.W. 3, Ramesh Kumar Rastogi s/o Middhan Lal Rastogi, aged 53 years r/o Chhoti Bamanpur, P.S. Qila, District Bareilly has deposed that

he had bicycle repairing shop in the year 1980 in 23 Kuncha Sitaram, Bareilly and the said shop was there since 1970 to 1991. The shop of

Krishna Kant existed in Sitaram wherein Bramha Swarup was a tenant. Krishna Kant wanted to get his tenanted shop vacated. Several quarrels

took place in between the two. All the brothers of Brahma Swarup and informant Harsh Swarup Sharma used to come to help Bramha Swarup

while accused Sudhir Gupta, Virendra Kumar and Umesh used to come to help Krishna Kant accused and to resolve the dispute. This witness has

stated that he has seen the house of accused Umesh which was opposite his shop. Umesh is the next door neighbour of Bramha Swarup. There

was a quarrel in between Bramha Swarup and Umesh over a common wall. The house of Virendra Kumar was situated in Patwa Gali in the year

1980-81. The aforesaid gali is densely populated. In the cross-examination, he has said that he had no license of his shop. The witness has claimed

his deep association and family terms with Krishna Kant. He did not admit the suggestion that with a view to screen the offenders from legal

punishment he is falsely deposing in their favour but he conceded that for the first time after about 30 years he has deposed in the Court and prior

to it he had not disclosed this fact to any police officer.

20. We have heard learned A.G.A. and learned Counsel for the accused-respondents.

21. Learned A.G.A. has submitted that it is a proved case of gang rape but without assigning any cogent and justifiable reason, learned Trial Court

while convicting all the aforesaid four accused for gang rape, arbitrarily took a lenient view in the matter of awarding sentence to them. In gang

rape cases minimum normal sentence is 10 years as provided u/s 376(2)(g) of the I.P.C. but learned Trial Court without assigning any reason

awarded sentence to accused Virendra Kumar for 8 years and to rest of the accused only 4 years rigorous imprisonment and thereby a

miscarriage of justice has been done in this case. Accordingly, he prayed that the sentence awarded to accused persons be enhanced to bring it in

consonance with the normal sentence provided to accused in gang rape cases.

22. Per contra, learned Counsel for the accused-respondents has contended that the impugned judgment and order dated 5.9.1984 is bad in law

and facts and, therefore, it deserves to be set aside. Prosecution has failed to prove its case beyond all reasonable doubt. There is an inordinate

delay of about a fortnight in lodging the F.I.R. and there was no reason to conceal the factum of alleged incident by the prosecutrix for about a

fortnight. No prudent man would believe the prosecution story and it was not possible for the accused to commit gang rape upon a prosecutrix in a

situation where a crowd is knocking the door throughout and further, it was not possible for accused to leave the scene of incident in presence of

the crowd. He has further submitted that when the prosecutrix was keeping mum after the incident and their names had not come to light for about

15 days, then there was no occasion for them to take up round of the hospital and to pass ironical remarks against the prosecutrix or to extend

threat for killing her parents and brother. Afzal Ahmad, P.W. 5 is a chance witness and he is inimical to accused Virendra Kumar, inasmuch, as he

has deposed against him in a case of murder of Jagdish. He has further submitted that the radiological age of the girl is about 19 years and as per

the deposition of prosecutrix, P.W. 1, her age is 23 years. No injury on her private parts was found. However, he has conceded that since the

defence has pleaded false implication, therefore, age of the prosecutrix would not be material. All the accused persons have different strained

relations with informant. All live and work separately from each other accused. There is no common thread between them in the entire prosecution

case, therefore, it is impossible and improbable for them to come together to commit the gang rape.

23. Perusal of the record including the judgment and order reveals to us that learned Trial Court has found the evidence of victim prosecutrix and

her father worth reliable. He was of the opinion that even if there was some enmity in between Amrish, the maternal uncle of prosecutrix and co-

accused Krishna Kant, even then there was no reason for Harsh Swarup Sharma, the father of prosecutrix to falsely implicate the accused persons

at the cost of the defamation of her unmarried daughter, especially when he himself being a teacher is a responsible person in the society. He had

no direct enmity with any accused. He would not prefer to bear the burden of her unmarried daughter throughout, the life because the rape and

especially, the gang rape casts a serious stigma, physical as well as mental, on the prosecutrix in the estimation of the society and it stings her mind

throughout the life. Due to this incident, she was not married although her younger sister was married after about two years of the incident. Being

perplexed, she, in the opinion of the trial Court appears to have attempted to commit suicide by setting herself ablaze and when even after that

she was not set free by accused in the hospital, she disclosed their names at that stage to her parents and only then they could know about the

incident. There is no reason for her to falsely implicate them in such a heinous offence which is disastrous to her life and to ruin her entire career.

24. No human being would descend to the level of sacrificing the future of his young daughter by allegations of rape like this for the sake of party

factions. In the very nature of things aforesaid suggestion is most unjustified. Accused Virendra Kumar was alleged to have caught hold off the

prosecutrix, took her inside the house, locked the door and raped her for about 10 minutes and thereafter, rest three accused respondents

committed rape upon her one after the other. During the commission of rape by one accused, other accused were catching her head, hands and

legs. The 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. What is necessary is that the Court must be alive to and consonance of the fact that it is dealing with the evidence of a person, who is

interested in the outcome of the charge levelled by her. 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) of 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. The nature of evidence required to lend

assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. ""But if a prosecutrix is an adult

and of full understanding, the Court is entitled to base a conviction of her evidence unless the same is shown to be informed and not trustworthy. If

the totality of the circumstances appearing on the record of the case discloses 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. In rape case, corroboration to the testimony of the

victim girl need not be insisted. Conviction can be based on the testimony, if found true and reliable. The theory of need of corroboration to

prosecutrix in rape cases stands exploded. The conviction for rape on uncorroborated testimony of victim girl is permissible. Need of

corroboration in the backdrop of Western Ecology may be true but cannot be transplanted to Indian soil. Corroboration is not the sine quo non for

a conviction for rape. The evidence of a victim of a sex offence is entitled to great weight, absence of corroboration notwithstanding and while

corroboration in the form of eye witness account of an independent witness may often be forthcoming in physical assault cases such evidence

cannot be expected in sex offences, having regard to the very nature of the offence.

25. In the case of *Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat*, Hon^{ble} Supreme Court held that ""....., it is now time to tackle the

pivotal issue as regards the need for insisting on corroboration to the testimony of the prosecutrix in sex-offences. This Court, in *Rameshwar Vs.*

The State of Rajasthan, has declared that corroboration is not the sine qua non for a conviction in a rape case. The utterance of the Court in

Rameshwar may be replayed, across the time-gap of three decades which have whistled past, in the inimitable voice of Vivian Bose, J. who spoke

for the Court--

The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that

the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the

mind of the Judge.....

The only rule of law is that this rule of prudence must be present to the mind of the Judge or the jury as the case may be and be understood and

appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to

stand.

It was further held in the aforesaid case law

.....without the fear of making too wide a statements or of overstating the case, it can be said that rarely will a girl or a woman in

India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context

of the urban as also rural Society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society.

Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because: (1) A girl or

a woman in the tradition bound non- permissive Society of India would be extremely reluctant even to admit that any incident which is likely to

reflect on her chastity had ever occurred. (2) She would be conscious of the danger of being ostracised by the Society or being looked down by

the Society including by her own family members, relatives, friends and neighbours. (3) She would have to brave the whole world. (4) She would

face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. (5)

If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable

family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others

will always haunt her. (8) She would feel extremely embarrassed in relating the incident to others being over powered by a feeling of shame on

count of the upbringing in a tradition bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to

the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and

members of the husband's family of a married woman would also more often than not, want to avoid publicity on account of the fear of social

stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible

for the incident regardless of her innocence. (12) The reluctance to face interrogation by the investigating agency, to face the Court, to face the

cross examination by Counsel for the culprit, and the risk of being disbelieved, acts as a deterrent.

In view of these factors the victims and their relatives are not too keen to bring the culprit to books. And when in the face of these factors the crime

is brought to light mere is a built-in assurance that the charge is genuine rather than fabricated. On principle the evidence of a victim of sexual

assault stands on par with evidence of an injured witness. Just as a witness who has sustained an injury (which is not shown or believed to be self

inflicted) is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex-offence is entitled to

great weight, absence of corroboration notwithstanding. And while corroboration in the form of eye witness account of an independent witness

may often be forthcoming in physical assault cases, such evidence cannot be expected in sex offences, having regard to the very nature of the

offence. It would therefore be adding insult to injury to insist on corroboration drawing inspiration from the rules devised by the Courts in the

Western World. Obeisance to which has perhaps become a habit presumably on account of the colonial hangover. We are therefore of the opinion

that if the evidence of the victim does not suffer from any basic infirmity, and the probabilities-factors does not render it unworthy of credence, as a

general rule, there is no reason to insist on corroboration except from the medical evidence, where, having regard to the circumstances of the case,

medical evidence can be expected to be forthcoming, subject to the following qualification: Corroboration may be insisted upon when a woman

having attained majority is found in a compromising position and there is a likelihood of her having levelled such an accusation on account of the

instinct of self-preservation. Or when the "probabilities-factor" is found to be out of tune"".

26. In the present case, Dr. Smt. Usha Jain, Medical Officer, P.W. 6 has deposed that when she was posted as Medical Officer, District Hospital

Bareilly, prosecutrix of this case was brought to her by constable C.P. 592 Hardeo Sharma, P.S. Prem Nagar and she had examined her on

14.3.1981 at 12:30 hours in connection with the rape committed against her. She had already been subjected to medical examination, regarding

the injury sustained by her in the District Hospital. Her hymen was torn at 3, 6 & 9 "O" Clock position. Its edges were not raw. Its edges were

slightly red. Its edges were healed. Vagina admits two fingers with difficulty and pain. She has proved her medical examination reports Exhibit Ka-

5 and Exhibit Ka-6. In her opinion, the prosecutrix was subjected to rape more than six days back and within 15-20 days and the possibility of

rape being committed upon her on 27.2.1981 (date of incident) cannot be ruled out and her radiological age was 19 years with a variation of six

months either side. She noticed burn injuries on the head, face of the prosecutrix for the medical treatment of which she was admitted in the

hospital. Be it known that incident of rape was committed on 27.2.1981. She received burn injuries on 4.3.1981 and was subjected to medical

examination for rape on 14.3.1981. Therefore, during the aforesaid interval the injuries sustained by a victim during the gang rape might have

subsided still the aforesaid symptom pointed out by the aforesaid doctor lends corroborative support to the testimony of the prosecutrix.

27. Incident of gang rape is said to have occurred on 27.2.1981 at about 2:30 p.m. Prosecutrix sustained burn injuries on 4.3.1981. She remained

in District Hospital, Bareilly for about three and half months and thereafter, she was shifted to Balrampur hospital, Lucknow for further and better

treatment. She disclosed the incident of gang rape upon her committed by all the aforesaid four accused only on 12.3.1981. The same day written

report Exhibit Ka-4 was prepared and it was registered in the general diary dated 12.3.1981 at 22:25 hours vide rapat No. 46 in police station

Prem Nagar, District Bareilly. Jagdish, a social worker and friend of first informant Harsh Swarup Sharma took initiative to get the accused

persons arrested in this case of gang rape. Krishna Kant, Umesh Chandra and Sudhir Gupta respondents were arrested in the same night whereas

Virendra Kumar accused could not be arrested. Accused Virendra Kumar extended threat for life to Jagdish and Harsh Swarup Sharma in case

they got accused persons arrested in this case of gang rape and the next day on 13.3.1981, aforesaid Jagdish was murdered by Virendra Kumar

accused who was found guilty and sentenced to life imprisonment in that case. All the aforesaid facts have been proved by Harsh Swarup Sharma

(P.W. 4), prosecutrix (P.W. 1) and Afzal Ahmad (P.W. 5). In the facts and circumstance of the case noted above, a delay of a fortnight in lodging

the F.I.R. cannot be said to be fatal to the prosecution. On the point of delay in lodging the F.I.R., learned trial Court got his view supported by

case law *Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat*, wherein the concealment of fact of rape for about 12 days by the father of the

victim was ignored by the Hon"ble Supreme Court.

28. In Indian society, it is well unusual that a lady with a view to implicate a person would go to the extent of stating that she was raped as held in

Madan Lal v. State of M.P. 1997 (2) Crimes 210 (MP)

29. When a sex offence is involved delay stands generally explained. In Indian society it brings a scandal to the family of the prosecutrix and time is

unnecessarily wasted to decide if the scandal should be made public. Here in the case prosecutrix has stated that while fleeing away respondents

had threatened her to kill her parents in case she discloses their names, therefore, if she was silent for about a fortnight under the circumstances

noted above the delay of 13-14 days in lodging the F.I.R. is well explained.

30. No explanation has been offered from the accused Virendra Kumar as to how the prosecutrix has reached in his house if he had not dragged

her inside his house as stated by the prosecutrix which is further supported by evidence of Afzal Ahmad, P.W. 5 who says that on hue and cry of

the prosecutrix a mob was collected there at the house of accused Virendra Kumar who was pre-known to him. The mob extended threats to the

accused to open the door disclosing the fact that police was to reach there. Accused fled away by opening one of the three doors in the house and

thereafter, police reached to the spot who took the prosecutrix with them to police outpost, Kohrapir from the house of accused Virendra Kumai

Singh. His presence at the spot is natural, as he was working in the house of Jagdish where he was manufacturing plastic goods and had gone as

usual to the house of Babu Ram Patawa for purchasing plastic raw material. Babu Ram Patawa"s shop was in Patawa Gali whereas the factory of

this witness was in mohalla Gadhayiya where Jagdish resided. This witness has been cross-examined at length but nothing material could be

fetches out from his mouth to disbelieve his testimony.

31. In the presence of this witness all the four accused after opening the door came out and went away. All of them were pre-acquainted to this

witness. Therefore, there is no question of misidentify . There is no substance in the suggestion of learned Counsel for the respondents that the

witness Afzal Ahmad was inimical to accused Virendra Kumar as he has deposed against him in the case of murder of Jagdish because the case of

murder of Jagdish is the post incident of this rape case on the prosecutrix by accused Virendra Kumar and three others. After lodging the F.I.R. on

12.3.1981 Jagdish, who was friend and social worker was instrumental to get the respondents arrested and in fact except Virendra Kumar rest

three accused were arrested in the same night and on the next day i.e. 13.3.1981 accused respondent Virendra Kumar shot Jagdish dead. In the

said murder case of Jagdish this witness Afzal Ahmad stood a prosecution witness and deposed against Virendra Kumar. He was found a reliable

witness and Virendra Kumar was convicted and sentenced u/s 302 I.P.C. for life imprisonment. He has no direct or indirect enmity with any

accused-respondents. Nothing has occurred in his deposition to undermine the value and weight of his evidence against the respondents.

32. Further, the evidence of prosecutrix is supported by the evidence of her father, Harsh Swamp Sharma, P.W. 4, who deposed that on the

information of Amrish, he went to the police outpost Kohrapir where he found the prosecutrix sitting there. He was told by the police that she was

recovered from the house of accused Virendra Kumar. He asked the matter from the prosecutrix but she kept mum throughout and disclosed the

incident only on 12.3.1981 in the hospital in presence of her mother as stated above. There is nothing in the evidence of prosecutrix to disbelieve

her evidence. Neither she nor the informant had any enmity with accused-respondents.

33. As per the evidence of prosecutrix (P.W. 1), Smt. Kamla Devi, P.W. 2, Principal, Kanya Junior High School, Mahapalika, Bareilly, Shanti

Sharma, Head Master, Primary Kanya Pathshala, Biharipur, Bareilly (P.W. 3) and informant Harsh Swarup Sharma (P.W. 4) on the day of

incident prosecutrix was a minor girl. Her date of birth was 4.6.1965 as per the academic certificates whereas as per the radiological age she was

aged about 19 years as per the deposition made by Dr. Smt. Usha Jain (P.W. 6).

34. In this case learned Counsel for the accused has rightly conceded that age of the prosecutrix on the day of incident is immaterial because

accused did not plead that prosecutrix was a consenting party.

35. In our opinion, learned trial Court has rightly held that since it was not a case of consenting party as proved by the evidence of prosecutrix,

therefore, thorough probe in determining the age of prosecutrix on the day of incident is uncalled for.

36. In Balwant Singh and Others Vs. State of Punjab, the Division Bench of the Hon"ble Supreme Court in para 14 & 15 of this judgment

observed as under:--

14. It is difficult for us to accept the contention of the appellants that because of enmity of the father of the prosecutrix against the appellants, they

have been falsely implicated in the case. It may be that litigations are going on between Dalip Singh and the appellants, but it is absurd to suggest

that because of the litigations or any enmity that he may have against the appellants, the father of the prosecutrix would falsely involve his daughter

in a case of rape by the appellants. On the contrary, the High Court has rightly observed that the appellants, who are debtors, had a common

interest to bring disrepute to Dalip Singh, their creditor, by committing rape on his daughter, Kumari Rajwant Kaur (P.W. 2). There is, therefore,

no substance in the contention of the appellants that they have been falsely implicated in the case on account of the enmity of Dalip Singh against

them.

15. Lastly, it is submitted by the learned Counsel for the appellants that the absence of any injury on the back of the prosecutrix or any part of her

body falsifies the case of rape by the appellants on her. It is submitted that the prosecutrix was expected to offer resistance which would normally

cause certain injury on her body and particularly on the back. As there was no such injury, it should be held that there was no such incident as

alleged. This argument, in our opinion, is devoid of merit it cannot be said that whenever resistance is offered there must be some injury on the

body of the victim. The appellants were four in number and the prosecutrix being a girl of 19/20 years of age, she was not expected to offer such

resistance as would cause injuries to her body. It is also not correct to say that there was no injury at all. It has been earlier noticed that as per the

medical report she had red abrasions on her right breast. In the circumstances, the contention of the appellants is rejected. No other point has been

urged on behalf of the appellants in these appeals.

37. Defence of the accused-appellants was that they had been falsely implicated in the case by Harsh Swamp Sharma, father of prosecutrix

because he had an enmity against the accused-appellants in connection with some litigations contested in between them and Amrish, brother-in-law

of the informant concerning realization of rent and eviction of the tenanted house of accused Krishna Kant @ "Pappu. It is difficult for us to accept

the contention of the accused-appellants that because of enmity of Amrish, maternal uncle of the prosecutrix on one side and respondent Krishna

Kant on other side they have been falsely implicated in this case. It may be that the litigations might have gone in between them but it is absurd to

suggest that because of the litigations or any enmity with Amrish may have against them, the father of the prosecutrix would falsely involve his

daughter in a case of rape by the appellants-accused. On the contrary, it appears to us very probable that since all the accused are friends and well

wishers of each other as it has been proved by the evidence of D.W. 1, D.W. 2 & D.W. 3 examined by them, they had a common interest to bring

disrepute to Amrish or Harsh Swarup Sharma by committing rape of his daughter prosecutrix P.W. 1. There is, therefore, no substance in the

contention of the appellants-accused that they have been falsely implicated in the case on account of the enmity as alleged by them. Be it known

that all the accused reside in the same locality and closely related to each other, therefore, their presence at spot on the date and time of incident is

not improbable.

38. From the perusal of the evidence of the aforesaid three defence witnesses, it is clear that they are deeply interested in the cause of accused

respondents. They are highly related and interested witnesses. The incident had taken place in the year 1981 whereas these witnesses have been

examined in the year 2008 after the delivery of the impugned judgment and order convicting and sentencing the accused respondents in this gang

rape case. There appears substance in the contention of the learned A.G.A. that the evidence of these witnesses is an eye wash and they are

deposing with a view to render benefit to accused. They could not be in a position to know the truthfulness or otherwise of the factum of gang rape

committed by accused persons inside the house of accused Virendra Kumar but still they are deposing that the said story of prosecution is not true.

It by itself suggest that they are deeply interested in the acquittal of respondents and for that end they may go up to any extent. No benefit of their

depositions accrue to the respondents. However, from the evidence of these three D.Ws. this fact is amply clear that all the accused-appellants are

deeply associated with each other and they used to help Krishna Kant

39. There is no flaw either on facts or on law in the findings of conviction of accused recorded by Trial Court.

40. However, we are of the firm view that the leniency adopted by learned Trial Court in the matter of awarding sentence to accused persons was,

not justified. The perusal of the record shows that mode and manner of the incident was barbaric and dare devil. An innocent school going girl was

passing through a thoroughfare in a densely populated Patwa Gali and asking whereabouts of her friend Km. Anju from children of the locality.

Over hearing the same accused Virendra Kumar on the false pretext that Km. Anju is living in his house, as tenant, persuaded her to reach there

from where he forcibly caught her wrist and dragged her into his room where remaining three accused were already sitting there. She started

crying for help but meanwhile all the four accused committed rape upon her. Accused Virendra Kumar committed rape first of all and thereafter

rest three accused committed rape one after the other. She has been cross-examined at length by accused but she has very plainly, clearly and

categorically deposed about the perpetration of all the four accused into the crime. Even the approximate duration of rape committed by each of

the accused were asked by cross-examiner and was answered by the prosecutrix. Perusal of her deposition leaves no room for doubt about the

veracity of her deposition. She is an injured witness. Being prosecutrix, she is victim. She is wholly reliable witness. There is nothing to brush aside

her statement and there is nothing to distinguish her evidence in regard to each accused. Specific allegation of rape has been made against all the

four accused. To our mind, all the accused deserve to same punishment and no distinction can be drawn in the matter of awarding sentences to

them. There is no mitigating or extenuating circumstance except the fact that for more than 30 years have elapsed and at the time of incident

accused persons were ranging in between 20-25 years of age.

41. The law regulates social interest, arbitrates conflicting claims and demands. Security of person and property of the people is an essential

function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross cultural conflict where living law

must find answer to the new challenges and the Courts are required to mould the sentencing system to meet the challenges. The contagion of

lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law

which must be achieved by imposing appropriate sentence. Therefore, in operating the sentencing system, law should adopt the corrective

machinery of the deterrence base on factual matrix. By deft modulation sentencing process be stem where it should be, and tampered with mercy

where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and

committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances

are relevant factors which would enter into the area of consideration.

42. The Hon^{ble} Supreme Court in Mohan Anna Chavan Vs. State of Maharashtra, held as under:

The physical scar may heal up, but the mental scar will always remain. When a woman is ravished, what is inflicted is not merely physical injury

but the deep sense of some deathless shame. By the very nature of the offence it is an abnoxious act of the highest order^{""}.

43. In Dhananjay Chatterjee alias Dhana Vs. State of W.B., the Hon^{ble} Supreme Court held as under:

The imposition of appropriate punishment is the manner in which the Courts respond to the society's cry for justice against the criminal. Justice

demands that Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of the crime. The Court must not

only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of

appropriate punishment.

44. No doubt that Criminal Law Amendment Act No. 43 of 1983 is applicable w.e.f. 25.12.1983 and it has no retrospective effect. The incident

of rape in question is dated 27.2.1981, therefore, the aforesaid amended provision of section 376 I.P.C. is not applicable in the facts and

circumstances of this case,

45. The amended provision (supra) provides that in a case of gang rape accused shall be punished with rigorous imprisonment for a term which

shall not be less than ten years but which may be for life and shall also be liable to fine:

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either

description for a term of less than ten years.

46. It does not mean that prior to the aforesaid amendment sentence for more than ten years of imprisonment could not have been imposed in the

cases of gang rape.

47. Considering the fact that almost 33 years have elapsed since the date of incident and the learned trial Court has awarded to accused Virendra

Kumar a sentence of rigorous imprisonment for eight years alongwith fine of Rs. 10,000/- and in default of payment of fine he is to undergo simple

imprisonment for two years and at the same time he awarded lesser punishment to rest of the accused appellants, it would be appropriate and

proper to enhance the sentences awarded to appellants Umesh, Krishna Kant and Sudhir Gupta to bring it at the par of the punishment awarded

by the trial Court to accused Virendra Kumar.

48. Criminal Appeal is dismissed. Conviction of all the appellants are maintained u/s 376 I.P.C. and sentence awarded to accused Virendra

Kumar is affirmed. Sentences awarded by learned Trial Court to accused respondents Umesh, Krishna Kant and Sudhir Gupta are enhanced from

four years imprisonment to eight years rigorous imprisonment. The amount of fine imposed and the imprisonment awarded to them in default of

payment of aforesaid fine and the compensation awarded to the victim prosecutrix vide impugned judgment and order dated 5.9.1984 is

maintained. The operative portion of the order passed in the impugned judgment is modified to the aforesaid extent and the Government Appeal is

partly allowed accordingly.

49. Appellants are directed to surrender themselves before the Court of learned C.J.M., Bareilly within a period of 30 days to serve out the

sentences awarded to them. In case of default learned C.J.M. concerned shall commit them to custody by adopting the procedure established by

law under the intimation to the Registrar General of this Court. Let a copy of this order be communicated to the learned C.J.M., Bareilly

immediately for compliance.