

(2013) 06 UK CK 0033

Uttarakhand High Court

Case No: Criminal Appeal No. 257 of 2004

Yameen

APPELLANT

Vs

State of Uttaranchal

RESPONDENT

Date of Decision: June 21, 2013

Citation: (2013) CriLJ 4949 : (2013) 2 NCC 131

Hon'ble Judges: U.C. Dhyani, J

Bench: Single Bench

Advocate: Bhuvnesh Joshi and Vivek Shukla, for the Appellant; P.S. Soun, Learned A.G.A. and Ms. Meena Vohara, Brief Holder, for the Respondent

Judgement

U.C. Dhyani, J.

A first information report was lodged by Wahid against Yameen (accused-appellant), on 08.12.2001, in PS Ranipur, which was registered as case crime No. 269 of 2001, in respect of offences punishable u/s 376, IPC. After the investigation, a charge-sheet was submitted against the accused for the offence punishable under Sections 376 and 506, IPC. The case was committed to the Court of Session. When the trial commenced and prosecution opened its case, charge for the offences punishable under Sections 376 and 506, IPC was framed against the accused-appellant, who pleaded not guilty and claimed trial.

2. PW 1 Mashroofa (victim, wife of the informant), PW 2 Wahid (informant), PW 3 Aasmin, PW 4 Doctor Deepa Sharma, PW 5 Head Constable Rishiram and PW 6 SI S.L. Azad were examined on behalf of the prosecution. Incriminating evidence was put to the accused in statement u/s 313, Cr.P.C., in which he said that he was falsely implicated in the case. He also submitted that the informant did so on account of enmity with him. DW 1 Nawab Ali and DW 2 Sayeed were examined in defence. After considering the evidence on record, accused Yameen was exonerated of the offence punishable u/s 506, IPC. He was convicted of the offence punishable u/s 376, IPC and was sentenced to undergo rigorous imprisonment for seven years, vide impugned judgment and order dated 4.8.2004. Aggrieved against the said judgment

and order, present Criminal Appeal was preferred.

3. As has been said earlier, the criminal law was set into motion at the instance of PW 2 Wahid, who wrote the complaint (Ext. Ka-1) enumerating the facts contained therein that he was a resident of village Rajpur, PS Ranipur, District Haridwar. He was a labourer. On 07.12.2001, his wife Mashroofa, was going to take the grass. It was around 8:30 a.m. Their daughter PW 3 Aasmin also accompanied PW 1. Aasmin was aged 12 years. When PW 1 reached near a garden, situated opposite to Naugajepeer, co-villager Yameen s/o. Shareef, who was present in the garden, came out and caught hold of PW 1. PW 1 raised alarm. PW 3 rushed to the village (for the purpose of seeking help). The accused-Yameen took PW 1 inside the garden and committed rape with her. When PW 2 came to his house, PW 1 narrated the entire story. PW 2 went to lodge the report, but the police told him to get the medical examination of the victim done first. PW 2 went to the hospital along with PW 1. The Medical Officer in the Government Hospital, Haridwar told him to lodge the first information report first and only then the victim will be medically examined. In the meanwhile, the accused threatened PW 2 with dire consequences, if he dared to lodge the report against him. Ext. Ka-1 was addressed to the Superintendent of Police, Haridwar and it is after such request made to S.P., Haridwar, on 08.12.2001, that the chik FIR (Ext. Ka-5) was registered in PS Ranipur, District Haridwar.

4. The prosecution led the evidence through PW 1 Mashroofa and PW 3 Aasmin d/o. PW 1 (and PW 2). PW 1 Mashroofa was a Bengali speaking woman. She did not understand Hindi properly and therefore, her statement (examination-in-chief) was recorded by the Court below through the assistance of her husband (PW 2), who knew Hindi as well as Bengali. PW 1, in her examination-in-chief, said that the incident took place about a year ago (from the date of deposition), at 8:30 a.m. She was going to fetch the grass. Her daughter Aasmin, aged 12 years, accompanied her. When PW 1 reached near the garden situated opposite to Naugazapeer, accused Yaamin came to her. (Yameen was present in the garden). Yameen caught hold of PW 1 and outraged her modesty. The accused-appellant asked PW 1 to take out her clothes. PW 1 tried to resist, but the accused did not leave her. PW 1 described, in her examination-in-chief, as to how the accused committed rape with? PW 1 returned to her house thereafter. She narrated the incident to her husband. She went to lodge the first information report with her husband, but the police directed them to get PW 1 medically examined. PW 1 and PW 2 then went to the Government Hospital, Haridwar. She was not medically examined on that day. The medical examination was conducted on the next day. Accused was present in the Court when PW 1 tendered evidence.

5. When cross-examination of PW 1 started, PW 2 went out of the Court. The assistance of Mr. Ashish Sarkar, Advocate, who was well versed in Hindi as well as in Bengali, was taken by the Court below. Initially, learned counsel for the accused before the Court below tried to avoid cross-examination of PW 1, but, of late,

cross-examined her. PW 1 said that she, along with her husband worked, in the field of the co-villagers. A civil suit was instituted by the elder brother of the accused against Nasir and others. It will be pertinent to mention here that Nasir and other had no concern with PW 1, except the fact that, she along with her husband, worked in the fields of those people. She affirmed the allegations made against the accused in her cross-examination also and also said that her daughter Yameen accompanied her to fetch the grass. Accused, not only outraged her modesty, but her wearing apparels were torn by him. She was disrobed. Her trousers were taken off and she was sexually assaulted by him. She raised alarm but nobody came for her help. Her daughter ran away to the village for soliciting help. Victim disclosed the incident to her husband at home. The accused threatened her that he will kill her husband. During those days when the incident took place, she along with her husband resided in the house of Nasir. When she started from her house, her husband was not present at home. Accused initially dragged her for about 300 paces. She sustained injuries on her waist, legs and hips, as also in the chest and head. She gave the statement to the investigating officer in Bengali. She belonged to West Bengal. Many other irrelevant questions were also asked to PW 1 in her cross-examination. She denied the allegation that she was an instrument in the hands of Nasir and Bashir, who have falsely implicated the accused in this case. Even close and detailed scrutiny of the cross-examination of PW 1 could not make out any case in favour of the accused-appellant. In other words, no inroad could be made in the evidence of PW 1 to create suspicion in the prosecution story.

6. The statements of PW 1 were corroborated by PW 3 Aasmeen, aged 12 years. In her examination-in-chief, she said that at about 2-2½ years ago (from the date of deposition), she along with PW 1 went to fetch the grass in the field. When PW 3 and PW 1 reached near Naugazapeer, Yameen met them. PW 3 said that Yameen pulled PW 1 and dragged her in the garden. PW 1 raised an alarm, but the accused did not spare her. PW 3 also raised an alarm. She ran towards her village (for help). After sometime, her mother (PW 1) came to the village. Her father PW 2 also came in the meanwhile. PW 2 was informed by PW 1 that Yameen sexually assaulted her.

7. In the cross-examination, PW 3 said that PW 1 and PW 3 started from their house at 8:30 a.m. PW 1 and PW 3 were having sickles in their hands. Naugazapeer was far away from their village. It takes about two hours to reach there. They reached Naugazapeer at around 11:00 a.m. No other villager met them there. When her father reached home, PW 1 disclosed him about the incident. Many other villagers assembled there. Yameen possessed a country made pistol and knife when he caught hold of PW 1. She did not go to lodge the report along with her parents. She also did not go to the hospital along with them. PW 1 and PW 3 did not inflict the blows of sickles on Yameen in their self-defence. PW 3 also said that PW 1 sustained bodily injuries. Thus nothing has come in the cross-examination of PW 3 to indicate that she was telling a lie. PW 3's evidence lend credence to the prosecution story. Her evidence lend assurance to the testimony of PW 1.

8. Although a note of caution is given by Hon"ble Supreme Court that the evidence tendered by a child witness should be treated with caution, but even a careful and close scrutiny of the testimony of PW 2 would indicate that PW 1 did not bring a false story. The truthfulness of prosecution story, as projected by PW 1, duly corroborated by PW 2 is not in doubt. In other words, the evidence tendered by PW 1, duly supported by PW 3, inspired confidence. In fact, the prosecution story was proved beyond reasonable doubt on the strength of the truthfulness of the testimony of PW 1 and PW 3 alone, but the evidence of the victim duly supported by his daughter was further strengthened by other peripheral evidence including the evidence of informant (PW 2).

9. The examination-in-chief of PW 2 is nothing but almost verbatim reproduction of the prosecution story, put forth by way of complaint (Ext. Ka-1). It will be a futile exercise to reproduce his examination-in-chief, in which he proved his complaint also, on the basis of which the first information report was registered. He was also cross-examined at length. He was not an eye-witness. Whatever he wrote in his complaint, was on the basis of what was told to him by his wife.

10. PW 5 Head Constable Rishiram was a formal witness, who proved the chik FIR (Ext. Ka-5) and entry of the same in G.D. (Ext. Ka-6). PW 6 S.S. Ajad was investigating officer, who upon being satisfied that the accused committed the crime, submitted the charge-sheet.

11. PW 4 Dr. Deepa Sharma examined the victim on 08.12.2001, at 2:30 p.m. and proved report (Ext. Ka-3). PW 4 did not find any mark of injury on victim"s body. She also gave supplementary report (Ext. Ka-4) and submitted that there was no finding suggestive of rape. Although medical evidence did not corroborate the ocular evidence tendered by PW 1 and PW 3, but the same was not averse to such story either. The ocular evidence, in sexual assault cases is not always corroborated by the medical evidence. Mere penetration is sufficient to constitute "rape".

12. DW 1 and DW 2 were examined on behalf of the defence. The evidence tendered by them was in the form of negative evidence, in as much as, they said that PW 1 was not sexually assaulted by the accused-appellant. The reason for their saying so was that PW 1 did not disclose the incident to DW 1 and DW 2. DW 2 was said to be present on the place of occurrence, but he did not witness such incident. It was not necessary for PW 1 to have disclosed the incident to each and every one including DW 1 and DW 2. She narrated the incident to PW 2, who was her husband, and who was intimately concerned with her. No evidence was offered to show that PW 1 was so close or was so intimate to DW 1 and DW 2 that, she, in normal circumstances, would have disclosed the incident to them. The alleged incident took place in a garden and it was not evidenced that DW 2 was so focused that he noticed each and every thing going on around him. Capacity to observe is one thing and the capacity to observe carefully is another thing. Many a things happen around a man, but the same are noticed by him only when he is focused on it. Otherwise, the common man

of such a background is known for his casual approach, not really concerned too much with others, except with his own welfare. Learned Court below has discussed in detail the prosecution evidence, as also the defence evidence and has rightly come to conclusion that the prosecution was able to prove the case against the accused-appellant beyond reasonable doubt. There is nothing on record to suggest that a different view from what was taken by the Court below should be taken.

13. No interference is called for. Criminal Appeal is liable to be dismissed and is accordingly dismissed. The Judgment and Order under Appeal is affirmed, as also the conviction and sentence awarded to the accused-appellant. Accused-appellant is on bail. His bail is cancelled. He is directed to surrender before the Court below forthwith to serve out the sentence, as was awarded by the Court below and thus affirmed by this Court. Let a copy of this Judgment along with the Lower Court Record be sent back to the Court below for causing the accused-appellant surrender and sending him to prison to serve out the sentence as above.