

Reserved on 11.07.2018
Delivered on 06.08.2018

In Chamber

Case :- CRIMINAL APPEAL No. - 4701 of 2004

Appellant :- Chhotey Lal

Respondent :- State Of U.P.

Counsel for Appellant :- S.K. Upadhyay, Abhishek Sharma A/C, Preetpal Singh Rathore, S.S. Upadhyay

Counsel for Respondent :- Govt. Advocate

Hon'ble Rajesh Dayal Khare, J.

Hon'ble Mahboob Ali, J.

(Delivered by Hon'ble Mahboob Ali, J)

Heard Sri Abhishek Sharma learned Amicus Curiae for the appellant and learned AGA for the State.

2. This appeal is directed against the judgment and order dated 26.08.2004 passed by learned Additional Sessions Judge, fast track Court No. 4, District Badaun by which the appellant has been convicted and sentenced to imprisonment for life with a fine of Rs. 5000/- under Section 376 IPC and in case of default in payment of fine additional imprisonment of six months.

3. Briefly stated the facts of the case are ;

Sher Singh PW-1, father of the victim, lodged the first information report of the incident at Police Station Kotwali District Badaun on 24.01.1999 at 14.50 hours;

The prosecution story as has been unfolded in the first information report is to the effect that on 23.01.1999 the first informant Sher Singh

who is a resident of Bareilly, had gone with his family to Mohalla Katra Jalindri Sarai, Badaun to attend the marriage ceremony of his *Bua's* son Munna Lal ; at 10 p.m. on the same day i.e., 23.01.1999 when his daughter Pushpa aged about 8 years was playing with other children, appellant Chhotey Lal from the neighborhood came there and tried to entice the girl to take her along and when Mordhwaj (*fufera* bhai of the first informant) asked him as to where he was taking the girl, he explained to Mordhwaj that he will just bring the girl back after making her play, thereafter the appellant took the girl to his house; after 15-20 minutes when the girl did not turn up, the first informant along with Mordhwaj and Ram Singh went to the house of appellant Chhotey Lal, who opened the door and came out holding his pant in his hand and when they enquired about the victim, the appellant stating his ignorance, fled away immediately; then they entered the room only to see that the victim was lying on a piece of cloth in an unconscious condition with her *pajami* and *kachchi* pulled down, they also saw that her private part was bleeding, thus, having raped the victim with those clothes only, her father brought her to Sheel Nursing Home, Barielly for treatment where she was admitted at 3.30 in the night and on asking, the victim narrated the incident to her father (the first informant) in her own language to the effect that the appellant Chhotey Lal had raped her; in the morning on 24.01.1999 the first informant was told that the report of the incident has to be lodged in Badaun, so, he brought the victim back to Badaun and got the first information report, lodged.

4. On the basis of the written report (Ext. Ka-1), case crime no. 43 of 1999 under Section 342 and 376 IPC was registered at Police Station Kotwali, District Badaun against the accused/appellant Chhotey Lal ; the police sent the victim to District Women Hospital, Badaun for treatment and medical examination on 24.01.1999 where she was medically examined and x-ray was advised for her age determination; vaginal smear of the victim was also sent for microscopical examination; on the basis of pathologist report, supplementary medical report (Ext. Ka-9) has been prepared.

5. The investigation of the case was taken over by S.I. Sant Ram Verma who, after inspecting the place of incident, prepared the site plan Ext. Ka-8; he also procured the vaginal smear and took in possession the clothes etc. of the victim and dispatched the same for pathological examination, the report of pathologist is on record.

The investigating officer after completing the investigation, submitted charge sheet Ext. Ka-7 against the accused/appellant Chhotey Lal under Section 342/376 IPC. Since the offence mentioned in the charge sheet was exclusively triable by the Court of sessions, the Chief Judicial Magistrate, Badaun committed the case for trial of the accused to the Court of Sessions, Badaun where it was registered as S.T. No. 352 of 1999 State vs. Chhotey Lal and made over for trial to the Court of Additional Sessions Judge, Fast Track Court No. 4 Badaun, who on the basis of material brought on record and after hearing the prosecution as well as the accused appellant on the point of charge, framed charge under Section 376 IPC against the accused-appellant Chhotey Lal who abjured the charge and claimed trial.

6. The prosecution, in order to prove its case against the accused-appellant, examined as many as 9 witnesses of whom PW-1 first informant Sher Singh (father of the victim) and PW-2 (victim herself), were examined as witnesses of fact while PW-3 Dr. Neeta Chandel, PW-4 Constable Radhey Shyam, PW-5 Dr. T.N. Sharma, PW-6 HCP Radhey Sharma, PW-7 S.I. Sant Ram Verma, PW-8 Dr. Rama Mandlal and PW-9 Dr. Paladhi were examined as formal witnesses of the case.

7. The incriminating evidence and circumstances has been placed to the accused-appellant by way of his examination under Section 313 Cr.P.C. so as to provide him an opportunity to render his explanation regarding the same; in his examination under Section 313 Cr.P.C., the appellant has alleged false implication in the case and discarded the incident and evidence of Sher Singh PW-1 and PW-2 (victim) being wrong, he has more specifically alleged false implication in this case by Mordhwaj, however, later, he, himself, has produced Mordhwaj in his defence as DW-1.

8. On conclusion of the trial, learned Additional Sessions Judge, Fast Track Court No. 4 District, Badaun, after considering the arguments advanced before him by the learned counsel for the parties and scrutinizing the evidence on record, convicted the accused appellant Chhotey Lal under Section 376 IPC and sentenced him to imprisonment for life with a fine of Rs. 5000/-.

9. Hence, this appeal.

10. Heard learned Amicus Curaie on behalf of the appellant, learned AGA for the State and perused the record.

11. Learned counsel for the appellant has made following submissions;

(i) that the alleged incident is of 23.01.1999 (10 pm) and the FIR was lodged on 24.01.1999 at 2.50 p.m. after an unexplained delay of about 17 hours whereas the distance of the Police Station is only 1 km from the place of occurrence.

(ii) that there are contradictions in the statements of PW-1 and PW-2 with regard to the fact that PW-2, the victim has stated in her statement that she narrated the incident to her father in the evening of the next day of the incident whereas PW-1 the first informant (father of the victim) deposed that the girl had narrated the incident to him around 3.30 in the night when she was admitted in a hospital in Bareilly.

(iii) that Mordhwaj who is alleged to have been with the first informant Sher Singh when they found the victim in the house of appellant, has denied being with the first informant and also the fact of tracing the victim in the room of the appellant, he has instead supported the accused-appellant.

(iv) that the medical evidence in the present case is not at all in consonance with the ocular evidence with regard to the time of occurrence, as the Doctor (PW-9) has stated that the offence appears to have been committed about 6 hours before the time of medical examination of the victim i.e., at 3.30 p.m. on 24.01.1999, thus the time of incident as contended by the learned Amicus Curaie, would shift to about 9.30 in the morning of 24.01.1999 and the same would go to reflect that incident in

question has not taken place at the point of time as has been alleged in the first information report.

12. Per contra, learned A.G.A. has supported the impugned judgement and order of conviction and sentence; countering the contentions of learned Amicus Curaie, learned A.G.A. has submitted that there is no delay in lodging the F.I.R. and whatever delay is being contended that has been properly explained. He has further proceeded to submit that the prosecution case stands fully proved by cogent direct evidence corroborated by medical evidence and there is no material contradiction in the statements of PW 1 and PW 2 nor there is any inconsistency with regard to time and place of the incident.

13. While deciding the appeal, the High Court has been guided by the principles laid down by Hon'ble Apex Court from time to time. The Hon'ble Apex Court has propounded the following principles in **Padam Singh Vs. State of U.P., 2000 (1) SCC 621.**

"It is the duty of an appellate Court to look into the evidence adduced in the case and arrive at an independent conclusion as to whether the said evidence can be relied upon or not and even if it can be relied upon, then whether the prosecution can be Said to have been proved beyond reasonable doubt on the said evidence. The credibility of a witness has to be adjudged by the appellate Court in drawing inference from proved and admitted facts. It must be remembered that the appellate Court like the trial Court has to be satisfied affirmatively that the prosecution case is substantially true and the guilt of the accused has been proved beyond all reasonable doubts as the presumption of innocence with which the accused starts, continues right through until he is held guilty by the final court of appeal and that presumption is neither strengthened by an acquittal nor weakened by a conviction in the trial court."

14. Further guidelines have been issued by the Hon'ble Apex Court in case of **Rama & others vs. State of Rajasthan 2002 (4) SCC 571** which are as under:

“It is well settled that in a criminal appeal, a duty is enjoined upon the appellate court to reappraise the evidence itself and it cannot proceed to dispose of the appeal upon appraisal of evidence by the trial court alone especially when the appeal has been already admitted and placed for final hearing. Upholding such a procedure would amount to negation of valuable right of appeal of an accused which cannot be permitted under law”

15. Following guidelines have also been issued by three Judges Bench of the Hon'ble Supreme Court in case of **Majjal Vs. State of Haryana, 2013 (6) SCC 798:**

“It was necessary for the High Court to consider whether the trial court's assessment of the evidence and its opinion that the appellant must be convicted deserve to be confirmed. This exercise is necessary because the personal liberty of an accused is curtailed because of the conviction. The High Court must state its reasons why it is accepting the evidence on record. The High Court's concurrence with the trial court's view would be acceptable only if it is supported by reasons. In such appeals it is a court of first appeal. Reasons cannot be cryptic. By this, we do not mean that the High Court is expected to writ an unduly long treatise. The judgment may be short but must reflect proper application of mind to vital evidence and important submissions which to the root of the matter.”

The aforesaid observations have also been quoted by the Hon'ble Apex Court in the case of **Kamlesh Prabhudas Tanna and Anr V. State of Gujarat reported in 2014 Cr.LJ 443.**

16. Keeping in view the propositions cited above, the Court is to scrutinize the evidence available before it afresh and to draw the conclusion accordingly, bearing in mind the presumption of innocence of accused unless otherwise is established from evidence available on record without being influenced by the findings recorded by learned trial court.

17. We have perused the record and scrutinized the evidence carefully. The

record reveals that the incident is alleged to have occurred on 23.01.1999 between 10 p.m. to 10.30 p.m.; the written report of the occurrence (Ext. Ka 1) was given by PW-1 Sher Singh, father of the victim, at Police Station Kotwali, Badaun on 24.01.1999 at 2.50 p.m., in which it was stated that the first informant, along with his family, had gone to attend the marriage of his *Bua's* son in Badaun and on 23.01.1999 when his daughter (victim) aged about 8 years was playing with other children at about 10 p.m., the appellant Chhotey who happens to be a resident of the neighborhood, was seen enticing his daughter by his *fufa's* son Mordhwaj who asked him as to where he was taking the girl to which the appellant told him that “ अभी खिलाकर ला रहा हूँ ” and he took the girl towards his house and when the victim did not turn up after 15-20 minutes, the first informant along with Mordhwaj and Ram Singh proceeded to trace the girl and reached the house of appellant Chhotey who came out after opening the door of the house with his pant in his hand and when they enquired about the victim, showing his ignorance, the appellant fled away immediately; they entered his room and saw the victim lying unconscious on a piece of cloth with her *pajami* and *kachchi* pulled down and her private part bleeding, they immediately rapped the girl in those clothes only and took her to Sheel Nursing Home where she was admitted at about 3.30 in the night. On asking by the first informant, the victim told him that she has been raped by the appellant Chhotey. When the first informant was informed in the morning of 24.01.1999 that the FIR of the incident has to be lodged at Badaun, he brought the girl to Badaun and submitted a written report in order to lodge the FIR against the accused-appellant Chhotey on which a case crime no. 43 of 1999 was registered against the accused-appellant Chhotey Lal under Section 342/376 IPC at Police Station Kotwali, Badaun. Pants of the accused-appellant which he was wearing at the time of incident, was taken in possession as per *fard* Ext. Ka-6 and also the clothes of the victim were taken in possession and kept in sealed cover as per *fard* Ext. Ka-11;

18. The victim was sent to Women Hospital, Badaun for medical

examination where on 24.01.1999 at 3.30 p.m., Dr. S. Paladhi examined the girl which report (Ext. Ka-10) is as follows:-

External Examination

- Female child of average body-built.
- Height 3.5 feet
- Weight 17 kg
- Teeth 12/12
- No external injury
- Breast not developed
- Axillary and pubic hair not developed

Examination of private parts

- Hymen torn
- Posterior part of vagina torn
- Second degree torn
- Bruises present outside involving upper part of anal orifice and valva
- Bleeding present from the injured part
- Vaginal smear taken for microscopical examination for presence of sperms.

Remarks

- Injury of private part may be due to blunt object and it may be male sex organ
- Advised x-ray of wrist joint and elbow joint for confirmation of age
- The victim was admitted in the hospital for repair of torn parts and treatment.

19. As per supplementary medical report (Ext. Ka-9) the radiological age of the girl is found to be 7 to 8 years and as per the pathological report (Ext. Ka-2) the vaginal smear was positive for dead sperms; RBC present; on the basis of the pathological report, supplementary medical report (Ext. Ka-9) was prepared which reveals injuries on the private parts of the victim and dead sperms found on examination of vaginal smear, RBCs also found and the report says that rape has been done with the victim.

20. Learned counsel for the appellant has contended that as per the statement of Dr. S. Paladhi (PW-9) the duration of the incident may be six hours before the medical examination of the victim i.e., 3.30 p.m., on 24.01.1999, thus the incident comes to about 9.30 a.m., whereas in the FIR the incident is shown to have taken place at about 10 in the night of 23.01.1999.

21. Countering this submission, learned AGA has submitted that the Doctor has not stated any substantial medical ground for her observation to the effect that the incident may have taken place 6 hours before the medical examination of the victim nor it is in consonance with the ocular testimony which prevails over medical evidence and the ocular testimony of the present case has been very cogent and consistent to establish the factum that the incident took place on 23.01.1999 in between 10 p.m. to 10.30 p.m.

22. Having scrutinized the evidence it becomes evidently clear that the consistent ocular evidence has established the time of occurrence as alleged in the FIR and medical evidence has corroborated the ocular testimony to the effect that sexual assault has been caused to the victim. It is also relevant to mention here that the first informant has clearly stated that he, along with his family, had gone to attend the marriage ceremony of his *Bua's* son in Badaun where on 23.01.1999 at 10.00 p.m. to 10.30 p.m. the incident took place. There is no denial to this marriage, neither the appellant in his examination under Section 313 Cr.P.C. has refuted the factum of marriage on that day nor there is anything on record to show that on 23.01.1999 the said marriage did not take place in Badaun at the place as alleged in the FIR, even DW-1 Mordhwaj has also admitted the marriage ceremony of the son of first informant's *bua* and has further proceeded to admit the presence of the accused-appellant at the time and place of the incident as he has stated that during the whole night of 23.01.1999 he and the appellant Chhotey Lal were busy working in the marriage. Thus the time and place of incident stands fully proved on the basis of cogent and consistent ocular evidence adduced by the prosecution and also by the testimony of defence witness Mordhwaj who has admitted

the factum of marriage and presence of the appellant at and around the time and place of the occurrence.

23. Learned counsel for the appellant has also submitted that there is material contradiction in the statements of PW-1 and PW-2 with regard to the time when the victim (PW-2) narrated the story to her father (PW-1) inasmuch as PW-1 Sher Singh has stated that the victim was admitted in Sheel Nursing Home, Bareilly at 3.30 in the night and on his asking, the girl had narrated him the story of rape by the accused- appellant Chhotey Lal, whereas, PW-2 (the victim) has stated that she told about the incident to his father the next day of the incident. Careful perusal of the deposition of the victim shows that she had narrated the story to his father about her being wronged in the evening itself and she has specifically clarified that she had told about the incident to her father before going to the police station, it is very well in consonance with the statement of the first informant. Thus, keeping in view the age of the victim and her traumatic condition, she might have been confused in the cross-examination by an expert lawyer and there appears to be no inconsistency in her statement as regards the narration of the story to her father and family members. In these circumstances, it is clear that there is no material contradiction in the testimony of PW 1 and PW 2.

24. It may be of great relevance to quote hereas below, the observation of the Apex Court contained in para 6 of the judgement in **Dinesh @ Buddha Vs State of Rajasthan (AIR 2006 Supreme Court, 1267)**;

“Sexual violence apart from being a dehumanizing act is an unlawful intrusion on the right of privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity it degrades and humiliates the victim and where the victim is a helpless innocent child or a minor, it leaves behind a traumatic experience. A rapist not

only causes physical injuries but more indelibly leaves a scar on the most cherished possession of a woman i.e. her dignity, honour, reputation and not the least her chastity. Rape is not only a crime against the person of a woman, it is a crime against the entire society. It destroys, as noted by this Court in Shri Bodhisattwa Gautam v. Miss Subhra Chakraborty (AIR 1996 SC 922), the entire psychology of a woman and pushes her into deep emotional crisis. It is a crime against basic human rights, and is also violative of the victim's most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21 of the Constitution of India, 1950 (in short the 'Constitution'). The Courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity.....”

25. Sexual violence is a crime which apart from violating the Fundamental Right of a woman, violates her basic human rights as well; it violates, with violence, the private person of a woman which destroys her dignity, honour and chastity, the ravishment is so destructive that it does not only cause physical harm to the victim but has full impact to traumatize her psychologically, pushing her into emotional crisis. Thus, the Judges dealing with such cases of sexual crime against women ought to be socially sensitized as Courts are supposed to deal with such matters with most cherished social intricacies and utmost sensitivity without being swayed by minor contradictions or insignificant discrepancies.

26. Learned counsel for the appellant has also contended that there is no explanation about the delay in lodging the FIR.

27. Learned AGA has contended with vehemence that delay in lodging the FIR has been properly explained by the first informant as he has clearly stated in his evidence that his daughter, a small child of 8 years

was sexually ravished and her private part was bleeding thus, looking to her pathetic condition, he immediately took her to Sheel Nursing Home, Bareilly for her treatment as he is a resident of District Bareilly, where the girl was admitted at 3.30. in the night and when he was told that the FIR has to be lodged in Badaun, he rushed back to Badaun with the girl and got the FIR lodged at Police Station Kotwali, Badaun, from where the victim was sent for medical examination in Women Hospital, Badaun where the medical examination of the victim was conducted. Learned counsel for the appellant has submitted that there is nothing to show that the girl was treated in Sheel Nursing Home, Bareilly nor any medicine was applied to the injured private parts of the victim, for this contention, the learned counsel for the appellant took strength from the statement of PW-9 Dr. S. Paladhi who has stated that during the medical examination of the victim it was not found that, before the medical examination conducted by her, any first-aid was given or any medicine was applied to the injured private parts of the victim. The factum that the victim was taken to Bareilly for treatment by her father cannot be disbelieved only on the ground that no first-aid/medicine was given to the victim and, as contended by learned AGA it is quite possible that keeping in view the gravity and seriousness of the offence of rape with a small girl, it was not appropriate on the part of the doctors in Bareilly to apply any medicine to the injuries in the private parts of the victim or give any treatment to her unless the FIR is lodged and medico-legal formalities are done and possibly, owing to this fact, doctors have not applied medicine to the injured private parts of the victim. Thus, in view of this and considering the distance and bad condition of roads, arrangement of transportation etc., the journey from Bareilly to Badaun, it is clear that the delay in lodging FIR has been properly explained and the FIR cannot be considered as delayed.

28. Learned Amicus Curaie on behalf of the appellant laid much emphasis on the fact that Mordhwaj DW-1 with whom the first informant alleges to have traced the victim ravished sexually in the house of the accused-appellant Chhotey Lal, has denied this factum and also the factum of FIR being scribed by him, instead he has supported the appellant.

Perusal of the evidence of DW-1 Mordhwaj shows that he has denied the written report having been written by him, he has denied his signature on the written report and has also denied the fact that he had gone to the police station for lodging the FIR. But this witness (DW-1) has admitted the marriage ceremony of *bua's* son of Sher Singh (the first informant) on 23.01.1999, he has also admitted the presence of appellant-Chhotey Lal at and around the time and place of the incident as he has stated that Chhotey Lal was working in the marriage with him since evening for the whole night. PW-1 Sher Singh, the first informant has clearly stated that he, along with his family, had gone to Badaun to attend the marriage ceremony of his *Bua's* son on 23.01.1999, on which date at about 10 p.m. her daughter (the victim) was playing nearby with other children when the appellant Chhotey Lal tried to entice her away, Mordhwaj (DW-1) objected to and asked the appellant as to where he was taking the girl on which appellant explained him that he is just bringing the girl back after making her play. PW-2 (victim) has also corroborated this fact by stating that she along with her parents had gone to Badaun to attend the marriage of her Chacha Munna Lal and there was decoration of light in the marriage and she was playing there with other children when accused-appellant came there and tried to entice her and her chacha Mordhwaj enquired from the appellant as to where he was taking her. In view of this, the bald statement made by DW-1 that in the marriage, the first informant Sher Singh was not seen, can't be believed keeping in view the fact that marriage ceremony is admitted, the presence of appellant Chhotey Lal has also been admitted by this witness which factum supports the prosecution version. Besides, the appellant has also stated in his examination under Section 313 Cr.P.C. that he has been implicated in this case by Mordhwaj. It also goes to reflect that Mordhwaj (DW-1) was with the first informant and he also witnessed the incident but later, for reasons best known to him, he appears to have been won over by the accused- appellant and, consequently, he changed sides. Apart from this, presence of DW-1 Mordhwaj at the police station on the date and time when the FIR was lodged, has also been established by the carbon copy of GD (Ext. Ka-4) in which the name of Mordhwaj

finds mention in the array of persons who had gone to lodge the FIR, thus, the evidence of DW-1 is rendered wholly unreliable.

29. Having heard the learned Amicus Curiae for the appellant and learned AGA for the State and having scrutinized the evidence on record, it is evident that the prosecution case stands fully proved and established by the consistent and cogent direct evidence in the form of PW-1 and PW-2. It is well established proposition of law that in cases of sexual offence the evidence of a victim of sexual assault stands at par with the evidence of an injured witness. In this case the evidence of the victim (PW2) has been fully corroborated by the cogent evidence of PW 1. There are no inconsistencies or material contradictions in the testimony of PW 1 and PW 2; medical evidence has fully supported the ocular testimony; as per the medical report the radiological age of the victim is found to be between 7 to 8 years and pathological and microscopical examination reveals that in the medical examination the private part of the victim was bleeding and there were injuries of assault on her private part, dead sperms and RBCs were found in the vaginal smear of the victim and it is finally reported by the Doctor that rape has been done with the victim.

30. After examining the evidence on record very carefully, we do not find any infirmity in the judgment and order of conviction and sentence.

31. Hence, the conviction and sentence of the appellant under Section 376 IPC is upheld.

32. The appeal is devoid of merits, hence, dismissed accordingly.

33. Office is directed to pay Rs. 15,000/- to learned Amicus Curiae within a period of one month for assistance to the Court.

(Mahboob Ali,J.)

(Rajesh Dayal Khare,J.)

Order dated: 06.08.2018
Ujjawal