

Raj Kishor Rai and Another Vs. the State of Bihar

Raj Kishor Rai and Another Vs. the State of Bihar

SooperKanoon Citation : sooperkanoon.com/1151956

Court : Patna

Decided On : Feb-10-2014

Judge : Aditya Kumar Trivedi

Appeal No. : Criminal Appeal (SJ) No. 128 of 2011 with Criminal Appeal (SJ) No. 204 of 2011

Appellant : Raj Kishor Rai and Another

Respondent : The State of Bihar

Judgement :

Cr.Appeal No.128 of 2011 wherein Raj Kisahore Rai happens to be the appellant, Cr.Appeal No.204 of 2011 wherein Ram Ishwar Rai happens to be the appellant commonly originate from the judgment dated 14.12.2010 passed by Additional Sessions Judge, Fast Track Court No.IV, Vaishali at Hajipur in Sessions Trial No.285 of 1998 convicting both the appellants under Section 376(2)(g), wrongly mentioned as 376(g) of the IPC and order of sentence dated 18.12.2010 directing each of them to undergo R.I. for ten years as well as also fined Rs.20,000/- in default thereof to undergo S.I. of two months additionally, as such analogously heard and are being disposed of by a common judgment.

2. Manju Devi, victim aged about 13 years instituted first information report(Ext-5) on 11.03.1997 at about 9.30 A.M. at Sarai police station disclosing therein that on the previous day she was alone at her house as her mother and brother have

gone to Biharsharif. At about 7 P.M., while she was going to latrine situated east to her house, Ram Ishwar Rai armed with chhura, Raj Kishore Rai armed with pistol and Tulsi Kumar Rai came, caught hold and began to drag which she protested. On account thereof, all of them threw her on ground. Ram Ishwar Rai caught her breast. Raj Kishor Rai gagged her mouth and further said that she will be murdered after pointing out pistol. Ram Ishwar Rai torn her frock while Tulsi Kumar untied the string and then committed rape. After Tulsi Kumar, Ram Ishwar Rai also committed rape upon her. When Raj Kishor Rai removed his hand from her mouth, then thereafter she raised alarm over which Mantun Kumar and Manish Kumar came seeing whom, all the three escaped therefrom. Mantun Kumar and Manish Kumar carried her to her house. Today when her brother returned back from Biharsharif then she disclosed the occurrence over which he has carried her to P.S.

3. On the basis of the aforesaid first information report Sarai P.S. Case No.22 of 1997 was registered under Section 376(g) of the IPC whereupon investigation commenced and culminated by way of filing chargesheet. Trial proceeded against all, however case of Tulsi Kumar has been separated and sent to Juvenile Justice Board while remaining two have been convicted and sentenced, the subject matter of instant appeal.

4. The defence case as is evident from mode of cross-examination as well as from the statement recorded under Section 313 of the Cr.P.C. is of complete denial of occurrence. It has further been pleaded that on account of animosity they have been falsely roped in. To support the same two D.Ws. have also been examined.

5. It has been submitted on behalf of the appellants that the judgment of conviction and sentence recorded by the learned Trial Court happens to be bad in law as well as on facts because of the fact that the learned Lower Court did not consider the loopholes persisting in the prosecution case. To buttress his submission, it has been submitted by the learned counsel for the appellants that first of all the occurrence so alleged is suffering from improbability in the background of the fact that all the accused so named happens to be full brother and on account thereof, no one could expect commission of an offence of rape by all the three brothers

that too when the youngest happens to be a juvenile while the eldest happens to be aged about 40 years, as has been disclosed in the FIR itself.

6. It has further been submitted that during course of evidence, it has come that brother of informant Pappu Kumar as well as mother of informant Dropadi Devi have gone to Bihar Sharif on the eve of marriage of another brother of informant then under such circumstance there was no occasion for the informant to remain alone at her house. Therefore, the aforesaid two improbabilities virtually make the whole prosecution case unreliable.

7. With regard to lapses on the part of the prosecution, it has been submitted that neither Manish Kumar nor Mantun Kumar have been examined. During course of evidence, it has come from the mouth of informant, P.W.5 that her younger sister Rinku was also available who neither been cited as chargesheet witness nor been examined during course of trial. Not only this, the doctor as well as the I.O. also could not be examined by the prosecution during course of trial.

8. It has further been submitted that P.W.1 and P.W.2 who happens to be seizure list witnesses had also gone to volte face to the prosecution and hence been declared hostile. P.W.3 Pappu Kumar, the brother, P.W.4, Dropadi Devi mother of informant are hearsay witness while P.W.6 Manoj Kumar, P.W.7 Bishundeo, P.W.8 Bachneshwar Jha, P.W.9 Brahamdeo Thakur and P.W.10 Umesh Paswan are formal in nature. That means to say, the prosecution case rest upon evidence of victim herself, the P.W.5 whose evidence, in the background of infirmities visualizing therein remains uncredit-worthy. Therefore, virtually instant case happens to be that of no evidence.

9. It has further been submitted that the learned Lower Court had noticed the aforesaid infirmities persistent in the prosecution case but wrongly and illegally put reliance over the evidence of the victim P.W.5 Manju Kumari which in the facts and circumstances of the case, should not have been apart from the fact that it also suffered by other kind of infirmities, such as delay in lodging FIR without any cogent and reasonable explanation as well as having appearance of her brother and mother all on a sudden on the following day while they were away according to prosecution case itself.

10. It has further been submitted that on account of non-examination of doctor, the defence is found prejudiced because of the fact that the victim was examined on 11.03.1997, the day on which FIR was registered. The Doctor had found hymen old ruptured as well as absence of external or internal injury over the person of victim more particularly at or around private parts. Not only this, the doctor was also not of definite opinion with regard to commission of rape.

11. In likewise manner, on account of non-examination of I.O. again the interest of defence has been soaked. There happens to be specific disclosure in the FIR as well as during course of evidence of P.W.5, the victim that she had resisted even then having been over powered at the point of pistol, rape was committed after tearing her apparel. In the aforesaid background, the objective finding of I.O. relating to place of occurrence would have divulged whether an occurrence had taken place in a way as narrated by the P.W.5, the victim.

12. Then, it has been submitted that the prosecution parties himself happens to be a desperate fellow, more particularly, P.W.3 who along with his brother stood an accused in so many cases wherein Ram Ishwar Rai(appellant) figured as a witness. It is also an admitted fact that one of the brother of victim was still confined under judicial custody for causing murder of his cousin brother. So, in sum and substance, the prosecution could not be able to substantiate its case consequent thereupon the judgment impugned is fit to be set aside.

13. On the other hand, the learned Additional P.P. while supporting the finding recorded by the learned Trial Court submitted that the offence of rape is always committed when the victim is found completely vulnerable and on account thereof, no one except the victim, in majority of the cases, remains the sole witness of occurrence. It has also been submitted that rape is committed to demoralize the opponent, in revengeful manner or under lascivious activity. The present case happens to be that of revengeful act whereunder rape was committed by all the brothers because of the fact that both the parties happens to be on inimical term and that happens to be reason behind that D.W.1, own uncle of victim has come forward in rescue of the appellants. It has also been submitted that the evidence of victim, in a case of rape stood on highest pedestal, needs no corroboration. The

only criteria happens to be whether the evidence inspires confidence or not. If it did not satisfy, then and then only corroboration is needed. In the present case, the victim had detailed the event.

14. In order to support is case, the prosecution had examined altogether ten P.Ws. out of whom, P.W.1 Sitaram Rai, and P.W.2 Ashok Kumar are on seizure of torn apparel belong to P.W.5, the victim, P.W.3 Shyam Deo Prasad, the brother of victim, P.W.4 Dropadi Devi, the mother of victim, P.W.5 Manju Kumari, the victim herself, P.W.6 Manoj Kumar, P.W.7 Bishundeo, P.W.8 Bachneshwar Jha, P.W.9 Brahmdeo Thakur and P.W.10 Umesh Paswan are formal in nature through whom the prosecution had exhibited six exhibits as well as material exhibit-I. The defence had also examined two D.Ws. D.W.1 Ramdeo Prasad and D.W.2 Baijnath Rai as well as had also exhibited deposition of Ram Ishwar Rai dated 04.01.2003 in Sessions Trial No.465 of 2001 as Ext-A.

15. Now coming to the status of witnesses, P.W.6, P.W.7, P.W.8, P.W.9 and P.W.10 happens to be formal in nature who have had exhibited seizure list, statement under Section 164 of the Cr.P.C. Forensic Science lavatory report, formal FIR, injury report as well as material exhibit, the packet. However, F.S.L. report needs no support for its exhibit on account of presence of Section 293 of the Cr.P.C. Therefore, first of all, Ext-4, the F.S.L. report relating to examination of apparel born by victim P.W.5 at the time of occurrence and which was seized as per seizure list, Ext-2. From the F.S.L. report, it is evident that the semen was detected thereupon and on account thereof, the probability of some sort of sexual indulgence visualizes. The relevance of 164 statement, formal FIR as well as injury report is found completely notched for want of examination of the author so much so there also happens to be non-compliance of Section 32 of the Evidence Act on this score.

16. Now coming to remaining evidence, P.W.1 and P.W.2 are the witnesses in whose presence apparel was seized and for that Ext-2, the seizure list was prepared. Though, they have not supported the case of the prosecution relating to seizure in their presence. However, admitted their presence by way of identifying their respective signatures which happens to be Ext-1, 1/1 respectively.

17. P.Ws.3 and 4 are not an eye witness to the occurrence rather appear to be corroborative in nature by way of hearsay. P.W.3 had deposed that the occurrence is of dated 10.03.1997 at about 7.30 P.M. At that very time, his sister Manju Kumari was alone at his house as he had gone to Biharsharif. He returned in the morning of 11.03.1997 and then his sister Manju Kumari, Manish Kumar(NE) and Muntun Kumar(NE) narrated the incident. They have also spoken that on 10.03.1997 at about 7 P.M. while Manju Kumari was going to answer natural call Ram Ishwar Rai, Tulsi Rai committed rape upon her and during course thereof, Raj Kishor Rai had pointed pistol upon her. After some time police had come and enquired about the occurrence. His sister Manju Kumari had narrated the incident over which his sister had signed, he also put his signature. During cross-examination at para-5, he had admitted that no occurrence had taken place in his presence. He had gone to Biharsharif on the occasion of marriage of his elder brother Lalan held on 09.03.1997. All the family members including his mother except sister have gone to participate. He had also admitted the institution of the case as well as Ram Ishwar Rai being FIR named witness in that case. He had denied the suggestion that as Ram Ishwar Rai stood as a witness therefore, his family has been implicated.

18. P.W.4 is the Dropadi Devi, the mother of victim. She had deposed that the occurrence is about four years ago on which date she was at Biharsharif. On the following day, she returned from Biharsharif and during course thereof, she was informed by the villagers that Ram Ishwar Rai and Tulsi Rai have committed rape upon her daughter. When he came at her house, she was informed by her daughter that Ram Ishwar Rai and Tulsi Rai have committed rape upon her and during course thereof, Raj Kishor Rai had pointed pistol toward her. During course of cross-examination at para-3, she had stated that the occurrence of rape was not committed in her presence. She had gone to attend marriage of her son Lalan Kumar scheduled on 09.03.1997. She alone had gone to Biharsharif while her daughter remained here. She had further admitted that in a case of Marpit her sons gone to jail. In para-6, she had stated that one hut was being constructed in between her house as well as house of accused but the same is stayed. Then had denied the suggestion regarding false implication.

19. P.W.5 is the victim herself. She had deposed that the occurrence happens to be dated 10.03.1997 it was 7.30 P.M. At that very time, save and except her sister as well as she herself none was present. At that very time, she was going to lavatory situated outside her house. At that very time, Ram Ishwar Rai armed with churra, Raj Kishor Rai armed with pistol, Tulsi Rai came out of whom Ram Ishwar Rai caught hold her, torn her frock. Raj Kishor Rai gagged her mouth and then all of them threw her on ground. Thereafter Tulsi Rai untied string and committed rape. Then Ram Ishwar Rai committed rape. She raised alarm as well as also protested over which Mantun Kumar and Manish Kumar came and took her to house. She remained there. On the following morning, her elder brother came whom she narrated the event. Thereafter, she had gone to Sarai police station along with brother where she recorded her statement and then put her signature. She was subsequently sent to hospital for medical examination. During cross-examination at para-6, she had stated that his brother Pappu along with Pankaj, her another brother happens to be an accused in connection with murder of her cousin brother Hemant Kumar. Pankaj is under custody. In para-10, she had shown location of lavatory lying east to her house having no door rather curtain is hanging there. She had further deposed that she had not indulged in sexual intercourse with anybody since before the occurrence. In para-12, she had clearly stated that at the time of recording of first information report as well as during course of her further statement, she had not shown presence of her younger sister. She had further stated that as soon as she had covered about 20 feet distance towards lavatory, the accused persons reached there. They have committed rape at the place where they met. In para-13, she had detailed the event how the accused persons indulged themselves at the time of occurrence and in likewise manner happens to be under para-14 as well as para-15. In para-16, she had stated that during course of commission of rape semen had fallen over her apparel. In para-17, she had stated that she has handed over salwar to the police but she had not handed frock. She had shown the lip as well as the injuries having present over her person.

20. From the aforesaid evidence, it is crystal clear that P.W.5, the victim fully detailed the manner of occurrence whereunder she was ravished by the appellants including Tulsi and the defence could not be able to sack her testimony. The non-

examination of Manish and Mantun Kumar coupled with non-examination of doctor as well as I.O. is not at all found adverse to the prosecution case side by side prejudicial to the interest of appellant because of the fact that even non-presence of injury over the person of victim and hymen being old rupture is not going to discredit the prosecution version when during cross-examination the defence had tested the testimony of the victim on that very score. The non-examination of I.O. also not caused prejudiced to the appellant because of the fact that there happens to be complete lacking of contradiction in the evidence of P.W.3, P.W.4 as well as P.W.5. Furthermore, as no cross-examination was made from P.W.5, the victim regarding location of lavatory, the nature of surface where she was thrown and ravished, whether she had bangle in her hand, wriggled at the time of commission of rape. Not only this, P.W.5 even not been cross-examined with regard to material Ext-1, the salwar. Non-examination of Manish Kumar and Mantun Kumar also did not cast any doubt with regard to factum of occurrence because of the fact that the persons happens to be admittedly after the occurrence. Neither P.W.3, P.W.4 nor P.W.5, victim have been cross-examined regarding the cause due to which P.W.5 remained at the house or at least would have succeeded in noosing the prosecution version over presence of P.W.5 at her house.

21. During course of statement under Section 313 of the Cr.P.C., it is evident that the incriminating material along with the allegation having against each of the appellant have properly been confronted and the appellants blatantly denied.

22. So far status of D.Ws. are concerned D.W.1 is own uncle of P.W.5, the victim as well as P.W.3 who had deposed denying the occurrence and further prevalence of animosity amongst the prosecution as well as accused persons. However, he also possess similar status as is evident from para-6 of his cross-examination wherein had admitted to be a witness in a case instituted by Ramashankar Prasad as well as Pappu(P.W.3) as he shot at son of Ramashankar Prasad. D.W.2 had also denied the occurrence as well as had also stated that on account of animosity this false case has been instituted. However, from para-5 of his cross-examination, it is evident that he happens to be uncle of accused.

23. In *Ganga Singh v. State of Madhya Pradesh* reported in 2013(Cr.L.J.) page 3966 at para-10, it has been held:- Law is well settled that the prosecutrix is a victim of, and not an accomplice, in a sex offence and there is no provision in the Indian Evidence Act requiring corroboration in material particulars of the evidence of the prosecutrix, as is, in the case of evidence of an accomplice.

24. In *Narendra Kumar v. State(NCT of Delhi)* reported in (2012) 7 SCC 171, it has been held at paras 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 and 31 as follows:-

20. It is a settled legal proposition that once the statement of the prosecutrix inspires confidence and is accepted by the court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case. 21. A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject matter being a criminal charge. However, if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or substantial (six circumstantial), which may lend assurance to her testimony. (Vide *Vimal Suresh Kamble v. Chaluverapinake Apal S.P.* (2003) 3 SCC 175 and *Vishnu v. State of Maharashtra* (2006) 1 SCC 283. 22. Where evidence of the prosecutrix is found suffering from serious infirmities and inconsistencies with other material, the prosecutrix making deliberate improvement on material point with a view to rule out consent on her part and there being no injury on her person even though her version may be otherwise, no reliance can be placed upon her evidence.(Vide *Suresh N. Bhusare v. State of Maharashtra*)(1999) 1 SCC 220. 23. In *Jai Krishna Mandal v. State of Jharkhand* (2010) 14 SCC 534 this Court while dealing with the issue held: (SCC p. 535, para 4)

œ4. the only evidence of rape was the statement of the prosecutrix herself and when this evidence was read in its totality the story projected by the prosecutrix was so improbable that it could not be believed.?

24. In *Raju v. State of M.P.* (2008) 15 SCC 133 this Court held: (SCC p. 141, para 10)

œ10. .. that ordinarily the evidence of a prosecutrix should not be suspected and should be believed, more so as her statement has to be evaluated on a par with that of an injured witness and if the evidence is reliable, no corroboration is necessary.?

The Court however, further observed: (*Raju case*, SCC p. 141, para 11)

œ11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication . there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration.?

25. In *Tameezuddin v. State (NCT of Delhi)* (2009) 15 SCC 566, this Court held as under: (SCC p. 568, para 9)

œ9. It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter.?

26. Even in cases where there is some material to show that the victim was habituated to sexual intercourse, no inference of the victim being a woman of œeasy virtues? or a woman of œloose moral character? can be drawn. Such a woman has a right to protect her dignity and cannot be subjected to rape only for that reason. She has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. Merely because a woman is of easy

virtue, her evidence cannot be discarded on that ground alone rather it is to be cautiously appreciated. (Vide *State of Maharashtra v. Madhukar Narayan Mardikar* (1991) 1 SCC 57 *State of Punjab v. Gurmit Singh* (1996) 2 SCC 384 and *State of U.P. v. Pappu*.) (2005) 3 SCC 594.

27. In view of the provisions of Sections 53 and 54 of the Evidence Act, 1872, unless the character of the prosecutrix itself is in issue, her character is not a relevant factor to be taken into consideration at all.

28. The courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the evidence of the witnesses which are not of a substantial character.

29. However, even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the victim and other witnesses have falsely implicated the accused. The prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defence. However great the suspicion against the accused and however strong the moral belief and conviction of the court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt. (Vide *Tukaram v. State of Maharashtra* (1979) 2 SCC 143 and *Uday v. State of Karnataka*.) (2003) 4 SCC 46.

30. The prosecution has to prove its case beyond reasonable doubt and cannot take support from the weakness of the case of defence. There must be proper legal evidence and material on record to record the conviction of the accused. The conviction can be based on sole testimony of the prosecutrix provided it lends assurance of her testimony. However, in case the court has reason not to accept the version of the prosecutrix on its face value, it may look for corroboration. In

case the evidence is read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix's case becomes liable to be rejected.

31. The court must act with sensitivity and appreciate the evidence in totality of the background of the entire case and not in the isolation. Even if the prosecutrix is of easy virtues/unchaste woman that itself cannot be a determinative factor and the court is required to adjudicate whether the accused committed rape on the victim on the occasion complained of.?

25. The delay in filing of the case is found itself explained although no cross-examination has been made on behalf of the appellant from the victim P.W.5 on this score, that at the time of commission of rape, none of her family members were available. After arrival of her brother and mother P.W.3 and P.W.4 on the following morning she disclosed the event and immediately rushed to police station where case was registered.

26. In *Om Prakash v. State of Haryana* reported in (2011) 14 SCC 309, the aforesaid event has been taken into consideration under para-18 thereof:-

œThere is some delay in lodging the FIR but that delay has been well explained. A young girl who has undergone the trauma of rape is likely to be reluctant in describing those events to anybody including her family members. The moment she told her parents, the report was lodged with the police without any delay. Once a reasonable explanation is rendered by the prosecution then mere delay in lodging of a first information report would not necessarily prove fatal to the case of the prosecution.?

27. A plea has been taken out on behalf of appellant that the offence so alleged happens to be improbable on account of putting an allegation against the three full brothers out of whom, as per allegation two have indulged in sexual activities and during course thereof, remaining one had pointed out pistol and took control over victim P.W.5 to facilitate the act. The aforesaid theme could not be considered favourable to appellants because of the fact that the offence of rape is to be viewed differently than that of other kinds of offences.

28. In Prem Kumar v. State of Punjab and others reported in 2013 Cr.L.J. 2973 wherein the father and son were arrayed as an accused of rape where similar kind of argument was raised and negating the same under para-22, it has been held:-

œ22. We are aghast at the judicial insensitiveness shown by the Trial Court, and we find it no less, at the level of the High Court. The view taken by the Trial Court, that the father and son cannot rape a victim together, may in itself cannot be a ground of absolute improbability, however, it may fall within the realm of rarest of rare cases. Whether the allegation is correct or not, has to be examined on the basis of the evidence on record and such an issue cannot be decided merely by observing that it is improbable.?

29. The non-examination of I.O. is not always found fatal in the prosecution case. Unless and until the defence is able to show that on account of non-examination of I.O. they have been seriously prejudiced because of presence of material contradiction, in consistency regarding place of occurrence, probability of defence version.

30. In Lahu Kamlakar Patil and Another v. State of Maharashtra reported in (2013) 6 SCC 417 at para-18, it has been held:-

œ18It is an accepted principle that non-examination of the investigating officer is not fatal to the prosecution case. In Behari Prasad v. State of Bihar (1996) 2 SCC 317, this Court has stated that non-examination of the investigating officer is not fatal to the prosecution case, especially, when no prejudice is likely to be suffered by the accused. In Bahadur Naik v. State of Bihar (2000) 9 SCC 153, it has been opined that when no material contradictions have been brought out, then non-examination of the investigating officer as a witness for the prosecution is of no consequence and under such circumstances, no prejudice is caused to the accused. It is worthy to note that neither the trial Judge nor the High Court has delved into the issue of non-examination of the investigating officer.?

31. Although P.W.1 and P.W.2 happens to be the seizure list witnesses before whom the salwar which the victim had worn at the time of occurrence was handed

over turned hostile. However, accepted their signatures over the production-cum-seizure list. The reliability of search and preparation of seizure list in the aforesaid background was taken into consideration by the Honble Apex Court in (2006)2 SCC(Cri) 444 Surendra Singh v. State of Haryana in para-7, it has been dealt with in following way:-

œWith regard to PWs 3 and 4 panch witnesses being turned hostile, this contention was also well considered by the trial court and the High Court. And both the courts held that their statements do not affect materially the prosecution story. PW 3 stated that pistol or cartridges or currency notes mentioned in Ext. PC were not recovered in his presence. He, however, admitted his signatures over Ext. PC and Ext. PD. PW 4 also stated that the pistol, cartridges or currency notes mentioned in Ext. PC were not recovered in his presence. He also admitted that Ext. PC and Ext. PD bear his signatures. Therefore, both the courts correctly held that Ext. PC and Ext. PD were recovered in the presence of PWs 3 and 4 who were panch witnesses.?

32. The non-presence of injuries has been taken into consideration reported in (2012) 11 SCC 362 O.M. Baby(Dead)by Legal Representative v. State of Kerala at para-16:-

œ16.An argument has been made by the learned counsel for the appellant that in view of certain inconsistencies in the evidence of the prosecutrix her testimony should not be accepted without any corroboration. As already noted, not only corroboration in the form of external injuries is available in the present case, even otherwise i.e. in the absence of corroboration the testimony of the victim cannot be ignored, unless the inconsistencies or contradictions are sufficiently serious to warrant such a course of action. We have already observed that the inconsistencies in the statement of PW 2 are on minor aspects which do not affect the core of the case. The golden rule of appreciation of the testimony of a prosecutrix laid down in Rameshwar v. State of Rajasthan(AIR 1952 SC 54) and amplified in State of Maharashtra v. Chandraprakash Kewalchand Jain(1990) 1 SCC 550) has been consistently followed till date.?

33. While appreciating the evidence of the prosecutrix in a rape case certain precautions have been prescribed by the Honble Apex Court in the background of prevailing social fabric in O.M.Baby, case itself referred above and it looks better to incorporate para-18 thereof:-

œWe would further like to observe that while appreciating the evidence of the prosecutrix, the court must keep in mind that in the context of the values prevailing in the country, particularly in rural India, it would be unusual for a women to come up with a false story of being a victim of sexual assault so as to implicate an innocent person. Such a view has been expressed by the judgment of this Court in State of Punjab v. Gurmit Singh (1996) 2 SCC 384 and has found reiteration in Rajinder v. State of H.P. (2009) 16 SCC 69, para 19 whereof may be usefully extracted: (Rajinder case SCC pp. 78-79).

œ19. In the context of Indian culture, a woman"victim of sexual aggression"would rather suffer silently than to falsely implicate somebody. Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her and therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for. But for high improbability in the prosecution case, the conviction in the case of sex crime may be based on the sole testimony of the prosecutrix. It has been rightly said that corroborative evidence is not an imperative component of judicial credence in every case of rape nor the absence of injuries on the private parts of the victim can be construed as evidence of consent.?

34. After analyzing the evidence available on the record, it is apparent that defence had not cross-examined the victim P.W.5 regarding the circumstances whereunder she remained at her house while her other family members had gone to Bihar Sharif to attend marriage of her another brother Lalan. Had there been, then the improbability in her version over her presence at her house would have surfaced. In likewise manner, the defence also could not cross-examined the

victim that during course of commission of occurrence she had put any sort of physical resistance moreover, she had divulged during cross-examination regarding bite on her lip as well as molestation. The defence also could not cross-examine the victim P.W.5 over place of occurrence at least whether the ground was harden one which could at least visualize as well as probabalize the injury over her back. The event visualizing on account of non-cross-examination of a witness on a particular point has been explained in *Ganga Singh v. State of Madhya Pradesh*, referred(supra) in following way at para-11:-

œAccording to Mr. Mehrotra, however, PW-5 is not a reliable witness as she has made a significant omission in her evidence by not stating anything about the seizure of the blouse, dhoti and broken bangles which were made in her presence. But we find that no question has been put to PW-5 in cross-examination with regard to seizure of the blouse, dhoti and broken bangles in her presence. If the appellants case was that PW-5 cannot be believed because she made this significant omission in her evidence, a question in this regard should have been put to her during her crossexamination. To quote Lord Herschell, LC in *Browne v. Dunn*[(1894) 6 R 67] :--

œ. it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that the imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit.?

Section 146 of the Indian Evidence Act also provides that when a witness is cross-examined, he may be asked any question which tend to test his veracity. Yet no question was put to PW-5 in cross-examination on the articles seized in her presence. In the absence of any question with regard to the seizure of the blouse, dhoti and broken bangles in presence of PW-5, omission of this fact from her

evidence is no ground to doubt the veracity of her evidence.?

35. Thus after having minutes observation of evidence of P.W.5, the victim, it is apparent that she has tested herself to be a trustworthy witness and on account thereof, the commission of rape at the hands of appellants so alleged and levelled is found conclusively proved. Furthermore from the conduct of appellants himself mandate of Section 53A is found frustrated.

36. Instead of framing of charge under Section 376(2)(g) of the IPC, it is apparent that the learned Trial Court had framed charge under Section 376(g) of the IPC whereunder conviction and sentence has also been recorded. Although, during course of argument, it has been argued on behalf of the appellant that by such omission appellant has been prejudiced but could not be able to show by way of illustration the nature of prejudice. Apart from, the omission being superficial Section 465 of the Cr.P.C. takes care thereof. Moreover, the evidence, the statement of the appellant so recorded under Section 313 of the Cr.P.C. thoroughly justified presence of Section 376(2)(g) of the IPC.

37. While appreciating the case of gang rape, in *Om Prakash v. State of Haryana* as referred above, it has been hold as:-

œ21. A plain reading of Section 376(2)(g) with Explanation 1 thereto shows that where a woman is raped by one or more of a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of Section 376(2)(g) IPC. In other words, the act of gang rape has to be in furtherance of their common intention before the deeming fiction of law can be enforced against the accused.

22. This Court in *Ashok Kumar v. State of Haryana* (2003) 2 SCC 143 had occasion to dwell on Explanation 1 to Section 376(2)(g) IPC while examining whether the appellant Ashok Kumar could be convicted under the same because at the crucial time, he happened to be in the house of the co-accused Anil Kumar in whose case the judgment of conviction under Section 376(2)(g) had attained finality. The Court observed that the prosecution must adduce evidence to show that more than one accused has acted in concert and in such an event, if rape had

been committed by even one of the accused all will be guilty irrespective of the fact that she has not been raped by all of them. Therefore, it may not be necessary for the prosecution to adduce evidence of a completed act of rape by each one of the accused. The provision embodies a principle of joint liability and essence of that liability is in existence of common intention. That common intention presupposes prior concert as there must be meeting of minds, which may be determined from the conduct of the offenders which is revealed during the course of action.?

38. Now coming to the case in hand, it is apparent that P.W.5 was over powered by three accused persons, namely, Ram Ishwar Rai, Raj Kishor Rai and Tulsi Rai and during course thereof, Raj Kishor Rai facilitated the crime by over powering the victim putting her under fear of death by pointing pistol while Ram Ishwar Rai and Tulsi Rai had committed rape and on account thereof, their conviction and sentence under Section 376(2)(g) of the IPC is found appropriate. Accordingly, this appeal sans merit and is dismissed. Appellants are under custody, hence are directed to serve out the remaining sentence.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com