

Padigi Narasimha Vs. State

Padigi Narasimha Vs. State

SooperKanoon Citation : sooperkanoon.com/429075

Court : Andhra Pradesh

Decided On : Mar-06-1996

Reported in : 1996(2)ALD585; 1996(1)ALD(Cri)555; 1996CriLJ2997

Judge : B.K. Somasekhara, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 376 and 450; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 154, 154(1), 162, 162(1) and 313; Evidence Act - Sections 145

Appeal No. : Crl. A. No. 965 of 1992

Appellant : Padigi Narasimha

Respondent : State

Advocate for Def. : Public Prosecutor

Advocate for Pet/Ap. : K. Ravindra Babu, Adv.

Judgement :

1. The appellant is the accused in Sessions Case No. 497 of 1991 on the file of Assistant Sessions Judge, Hyderabad and having been convicted for the offences punishable under Sections 450 and 376 I.P.C. and sentenced to undergo R.I. for ten years on each count and also to pay a fine of Rs. 1,000/- on each count, in default to suffer S.I. for six months on each count, he has come up with this

appeal.

2. The accused was prosecuted by Bahadurpura Police for the said offences. He pleaded not guilty to the charges. Therefore, a trial was afforded. The prosecution examined as many as 12 witnesses as per P.Ws. 1 to 12 respectively and got marked 14 documents as per Exs. P-1 to P-14 respectively and four material objects as per M.Os. 1 to 4 respectively. After examining the accused under Section 313 Cr.P.C. he was called upon to enter defence. He did not produce any defence witness.

3. After hearing both sides and with the material before her, the learned Asst. Sessions Judge came to the conclusion that the charges against the accused for the offences punishable under Sections 450 and 376 I.P.C. were proved beyond reasonable doubt and consequently passed the impugned order of conviction and sentence.

4. The case of the prosecution can be recorded in brief :

P.W. 1 is the victim of the alleged offences and the prosecutrix P.W. 2 is her husband. P.W. 3 is her sister. P.W. 7 is a close relative of P.Ws. 1 to 3. P.W. 4 is the land-lady of the house in which P.W. 3 and her husband were living at the relevant time. According to the Charges, in between 15th and 16th May, 1991 at about 3.00 A.M., the accused committed lurking house-trespass into the house of P.W. 3, where P.W. 1 was sleeping with her child, with the intention of committing rape, and in consequence of such intention, he gagged her mouth with piece of cloth, intimidated her of the consequence of death in case if she obstructed or protested by showing a knife to her and committed rape by having forcible sexual intercourse.

5. P.W. 1 had a child about one month prior to the date of incident. It was a cesarean case. She had come to Kondareddyguda, Kishanbagh, Hyderabad with her husband to eke her livelihood. Since she was in confinement, P.W. 3 accommodated her in her house, particularly when her husband was away on duty. On the date of incident, P.W. 1 was sleeping with her child in the house of P.W. 3, which is a room having doors with a bolt. P.Ws. 2, 3 and 7 were sleeping

outside the house, the door of the house was kept open and an electric light in the house was burning. The accused resided in the same locality nearby and was known to P.Ws. 1 to 3. At about 3.00 A.M. during mid-night, he entered the house, where P.W. 1 was sleeping, P.W. 1 identified him, the accused woke her up by patting her, she questioned him as to why he came during mid-night, he replied that he had job (Vernacular Matter Omitted), she replied what is that work during mid-night, and let him speak in the morning (Vernacular Matter Omitted), the accused gagged her mouth with a piece of cloth, took out a knife from the pocket by saying that if she created a roar, she will be smashed, due to fear, she laid on the cot, he removed her clothes, fell on her and raped her. Because there were sutures for cesarean operation, due to the act of the accused, they were meddled with and she got bleeding. She became unconscious. She regained conscious after some time. She found the accused lying by her side. He did not allow her even to go to for urinals. She begged him by touching his feet. He permitted to go out. She went outside the house, fell on the feet of her husband, she could not speak as she was not even able to speak and voice was not coming and in such circumstances, she showed the room to her husband and in the meanwhile, the accused ran from the place, which was seen by P.Ws. 2 and 3, they along with the neighbours Manemma and Ramulamma tried to catch him without any success. She informed all this to P.Ws. 2, 3 and 7 P.W. 2 searched for the accused during mid-night but could not find him. Then P.Ws. 1 to 3 and 7 went to the police station and informed the Head - Constable, P.W. 11, in the police station about the incident. He took P.W. 1 and others to the hospital and admitted her. She was examined by the lady doctor P.W. 10 and was treated. She was able to speak after some time and at about 9.00 A.M., P.W. 11 came to the hospital and recorded her first information report as per Ex. PW 1. P.W. 10 collected the saree - M.O. 1 and petty-coat-M.O. 2 from the person of P.W. 1 and produced before the police. They were seized under the panchanama Ex. P-3 by P.W. 12 - Inspector of Police, Bahadurpura Police Station in the presence of mediators including P.W. 5. P.W. 12 registered Crime No. 46/91 for the offence punishable u/s. 376 I.P.C. and issued F.I.R. - Ex.P-10 to the concerned Magistrate Court. He recorded the statements of P.Ws. 1 to 3 and 7 in the hospital. As already pointed out, he seized M.Os. 1 and 2 under Ex. P-3 panchanama. He requested P.W. 10 to examine

P.W. 1 and give her opinion regarding the rape or forcible sexual intercourse alleged by P.W. 1. He also gave a requisition to the doctor to collect semen from P.W. 1. Accordingly, P.W. 10 examine P.W. 1, noted her condition, etc., collected semen and subject to the report of Chemical Examiner, she gave her opinion that there was a forcible sexual intercourse on P.W. 1 few hours prior to the time of the examination. P.W. 10 observed fresh nail marks on the throat and fresh contusions over the neck of P.W. 1. There were also abrasions on fourchetta, uterus was antitated, normal size, servical meoments were tender. Abdominal wound was healing. She issued Ex. P-7 certificate. She also gave her opinion as per Ex. P-8 P.W. 1 was treated in the hospital for about a week and Ex. P-9 is the case sheet.

6. P.W. 12 continued the investigation, whereby he conducted and observations of the place of occurrence as per Ex. P-4; on 17-5-1991, he received information that the accused was residing in Kishanbagh X-roads, he secured the mediators by names Sayyed Rashed Hussain (P.W. 9), and Sayyed Fakruddin, he along with the mediators including P.W. 9 and staff went to that place, where he apprehended the accused at about 10 a.m. and brought him to the police station and recorded his statement as per Ex. P-5 whereby he informed that if he was taken to his house, he would produce the knife. Accordingly, the accused took P.W. 12 and the mediators to his house and produced M.O. 3 - knife from his house, which was seized under the panchanama Ex. P-6 in the presence of P.W. 9 and another. He seized the cut-drawer-M.O. 4 under Ex. P-5 panchanama in the presence of mediators. He arranged to send M.Os. 1, 2 and 4 to the Forensic Science Laboratory for analysis along with a letter of advice, Ex. P-11, and collected the report from the F.S.L. as per Ex. P-12. He also collected the further report from F.S.L. as per Ex. P-13, the certificate from the doctor P.W. 10, recorded the statement of P.W. 4 and after completing investigation, he filed the charge sheet into Court.

7. As against the case of the prosecution as above, the case of the defence is one of total denial. However, it is suggested to P.Ws. 1 to 3 that in view of the dispute or quarrels between them and the accused near the water tap within the locality, the accused has been falsely implicated in the alleged offences, that a false case

is foisted against him at the instigation of certain persons, who are opposed to him and actually at the time and date of offence, the accused was not at all present either in the headquarters or near the place of incident.

8. Mr. K. Ravindra Babu, the learned counsel for the appellant-accused, has raised several contentions in support of the grounds of appeal as follows :-

The case of the prosecution as found in Ex. P-1 - First Information Report is totally deviated during the course of trial setting up a theory as stated by P.W. 1, which is totally absent in Ex. P-1 and improved by P.Ws. 1 to 3 and 7. The circumstances that P.W. 2, the husband of P.W. 1, was sleeping nearby at a very close distance in the house in addition to her sister - P.W. 3 and a relative - P.W. 7 sleeping nearby is inconsistent with the manner in which the accused is said to have committed the rape and intimidated as against P.W. 1. There are no injuries on P.W. 1 although an attempt is made to show that the accused kicked her on the abdomen, hit her with the knife and meddled her by the act of rape even on the sutured cesarean operation part, without any indication of injury or bleeding. The cloth, which is said to have been used for gagging the mouth of P.W. 1 before the commission of rape, is not seized, much less the absence of the same in the case of the prosecution is not explained. There is no injury on the mouth of P.W. 1. There are no blood marks on the clothes of P.W. 1 viz., M.Os. 1 and 2 and on the cutdrawer M.O. 4 of the accused. The injuries on the throat and neck of P.W. 1 found by P.W. 10 is inconsistent with the evidence of the prosecution, which does not indicate any meddling of her throat or neck by the accused. Although P.W. 1 was able to speak after some time of the incident and disclosed the details of the incident to P.Ws. 2, 3 and 7 and although all of them approached P.W. 11 in the police station, narrated the whole incident, neither any case was registered by P.W. 11 nor any reason is assigned as to why the case was not registered much less the details of the incident as stated above were not recorded in Ex. P-1 F.I.R. Although there is medical evidence that there was a forcible sexual intercourse on P.W. 1 within few hours prior to the time of her examination, the presence of her husband-P.W. 2 closeby at the relevant time is an indication or a possibility that he himself might have attempted such a sexual intercourse after the lapse of some days subsequent to the delivery of the child by P.W. 1. The theory of the

prosecution and the testimony of the prosecution witnesses viz., P.Ws. 1 to 3 and 7, that inspite of the accused committing rape and conduct himself in a manner as to put P.W. 1 to fear and discomfiture is inconsistent with her not waking up her close relatives who were sleeping nearby or the circumstance that it did not disturb the persons sleeping nearby is unnatural, artificial and beyond the understanding of any reasonable and prudent man in such a situation. The accused, who is said to be a person known to P.Ws. 1 to 3 and 7 and particularly to P.W. 1 having entered the house during that odd hour in the mid night has been treated liberally, leisurely and with lenience by P.W. 1 resulting in his sexual intercourse or rape by the accused. There are number of serious doubts in the case of the prosecution which are not satisfactorily explained by the prosecution and the benefit of the same should go to the accused.

The learned Asst. Sessions Judge having ignored the above circumstances and the reasonable doubts was wrong in not extending the benefit to the accused. With the discrepant, artificial, unnatural and unconvincing evidence of the prosecution, the learned Asst. Sessions Judge was not justified in holding that the charges against the accused were proved beyond reasonable dooubt. The impugned order of conviction of the accused for the said offences is not justified. The impugned order of sentence is unjustified, improper, illegal and at any rate harsh, as there were no circumstances to impose the above minimum sentence to the accused ignoring several circumstances which were in favour of the accused. Therefore, the impugned order of conviction and sentence is liable to be set aside.

9. As against the contentions of the learned counsel for the appellant-accused, Mr. Rasheed Ahmed, the learned Public Prosecutor, has contended that the first information to the police has reached within the shortest time possible, the substratum of the incident has been recorded in Ex. P-1, the evidence of P.Ws. 1 to 3 and 7 is consistent in the form and susbtance, the medical evidence has been corroborated the testimony of prosecutrix P.W. 1, the material portion of the investigation was practically concluded on the same day when the F.I.R. was lodged, the discrepancies, if any, as pointed out for the accused, are not material and self-explicable or explainable from the evidence of the prosecution, that the so called defences of the accused are not supported by any probability or proof, the

failure of the accused to prove the plea of alibi strengthens the case of the prosecution, there was no reason for P.Ws. 1 to 3 and 7, particularly to expose the accused regarding a heinous and infamous offence of a rape as against a stranger like the accused and, therefore, the learned Asst. Sessions Judge was justified in passing the impugned order of conviction and sentence and there are no strong reasons for this Court to interfere with the same.

10. With the facts, evidence and the controversies in the case, this Court is confronted with clear questions to be determined in the case. There is no need to categorise them, as each one of them can be considered one after the other.

11. Both from the case of the prosecution and the evidence, the vibgyor colour spectrum or the stream of the splash in the light or the spectrum is certain that the accused made a forcible entry into the house of P.W. 3, where P.W. 1 was sleeping with a baby, intimidated her by showing a knife and had a forcible sexual intercourse and that it was disclosed by P.W. 1 to her husband, P.W. 2, her sister-P.W. 3 and a close relative P.W. 7. In support of that, there has been the consistent testimony of the prosecutrix P.W. 1. and P.Ws. 2, 3 and 7. A streak of such substratum finds a record in Ex. P-1. First Information Report lodged with the police within the shortest possible time after the incident. The time of the incident is said to be 3.00 or 3.30 a.m. during midnight. It was disclosed to P.Ws. 2, 3 and 7 within a short time, the police were approached at about 6.00 a.m. and her statement was recorded at 9.00 A.M. P.W. 1 has been examined by the doctor-P.W. 10 immediately to find the signs of forcible sexual intercourse within a few hours prior to the time of examination with certain injuries on her throat and neck and injury in her vagina and blood marks on her clothes. M.Os. 1 and 2, the clothes of P.W. 1 with blood marks, have been found a positive record of the Chemical Examiner about the presence of blood marks and the spermatozoa. The spot mahazar has been conducted by P.W. 12 on the same day. The accused has been apprehended within a few days, his under garment M.O. 4 has been seized, his potency has been subjected to medical test to get positive medical finding and the investigation has been completed within the shortest time possible.

12. Admittedly, the accused was the resident of the same locality nearby the house of P.W. 4, where P.W. 3 was residing and wherein she accommodated P.Ws. 1 and 2 at the relevant time. He was known to P.Ws. 1 to 4 and 7. Even according to the suggestion of the defence, there was a water dispute. Therefore, as rightly pointed out by the learned Public Prosecutor, the accused is not a stranger to P.Ws. 1 to 3. Here is a case wherein P.W. 1 is exposing a stranger to the act of rape against her not only subjecting him to infamy but also herself to the social blemish and exposure to mental discomfiture and uncomfortable life among the members of the family and relatives. Therefore, the learned Public Prosecutor has raised a very serious question as to why P.W. 1, her husband - P.W. 2 and her own sister - P.W. 3 are exposing the accused to such a heinous act. The answer should have been found in the cross-examination of P.Ws. 1 to 3 and 7 with certain probabilities from the totality of the circumstances. The defence suggests that it was due to water dispute or due to the instigation of some others, the accused has been involved in such a heinous act and an offence is too difficult to be gupped by way of explanation. It is difficult to think that a lady like P.W. 1 and her close relatives with the risk of exposing P.W. 1, herself would involve the accused in such an offence. This Court is totally convinced about such a circumstance being against the accused.

13. The medical evidence positively proves the forcible sexual intercourse on P.W. 1 within a few hours prior to the time of examination, which was done within three or four hours after the incident. The injuries on her throat and neck and the injury within the vagina are the clear indications of such an act.

14. It is not seriously disputed that P.W. 1 had delivered a child within a month prior to the date of incident with a cesarean operation and the sutures still left injury on her abdomen. Therefore, the possibility of her having sexual intercourse with her husband or anybody within that period may not be expected. Therefore, if there was forcible sexual intercourse on the date of incident, it must be either by P.W. 2 - her husband, who was sleeping nearby or by the accused. Since no other alternative is suggested from the material on record, such a possibility has to be examined. It is true that P.W. 2, who was sleeping nearby and who was deprived of such sexual pleasure for sometime prior to the incident, perhaps, if true, might

have made such an attempt. If that is true, there was no reason for the injuries on the throat and neck of P.W. 1. Further more, there was no reason for P.W. 1 to expose herself to the incident of rape by a stranger like the accused. It cannot be forgotten that sex is a bond and a pleasurable relationship between the husband and the wife. If that occurs either by pain or by pleasure or by compulsion, normally the couple may not expose each other to a stranger. Therefore, even assuming that the husband had the opportunity and had attempted the sexual intercourse with his wife-P.W. 1 there was no reason for P.W. 1 to involve the accused in such a sexual act. The circumstance is totally against the accused. Therefore, in the alternative between P.W. 2-husband and the accused, the probability of the accused having been involved in the Sex of P.W. 1 appears to be stronger.

15. Judging the circumstances as a whole, any normal and prudent man should accept the prosecution case that the accused alone was responsible for the forcible sexual intercourse on P.W. 1 at the relevant time. He has not denied that he was living nearby the house of P.W. 3. He has not denied that he did not know P.Ws. 1 to 3. He has not denied that he had no opportunity of access to P.W. 1. His theory of alibi is not discharged. His presence and the opportunity to be at the place of incident at the relevant time during mid-night can thus be accepted with the probabilities with all the aid of the evidence of the prosecution. In other words, the vibgyor or the substratum of the case of the prosecution found in Ex. P-1 has been brought out satisfactorily.

16. It is true that the contentions of the learned counsel for the appellant accused are not without some basis. If we go by Ex. P-1 - F.I.R. the theory recorded within the shortest time after the incident is as follows :-

'In the night of 15-5-91 I was sleeping in the room along with my child. My husband, my sister and my sister's son Anjaiah were sleeping outside the room (in front of the room) at about 3 a.m. somebody came in my room, due to some voice, I got up and saw one Narsiah who also a resident of same locality was standing in the room, I asked him why you came in my room, he said that he is having some work from me. I told him come tomorrow morning. Suddenly, he attacked on me

and kicked on my stomach (which was cesared by an operation) and a cloth put in my mouth and pressed my throat with his hands and warned me that if I shout he will kill me by a knife and shown the knife, due to which I cannot call anybody for my help, after that he raped me. After raping, he went from the room. I got up and informed the matter to my husband and sister. They searched him but he was run away. My husband informed the matter to the police, the police shifted to Govt. Maternity Hospital for treatment, here the doctor admitted me and giving treatment.'

But the testimony of P.Ws. 1 to 3 and 7 means that the accused stayed with P.W. 1 from 3 a.m. to 6 a.m., had a comfortable sexual intercourse with her, although he had a nice sleep with her, prevented P.W. 1 from going out, P.W. 1 managed to go out of the house under the pretext of going to urinals by begging the accused, she went to P.W. 2 - her husband, fell to his feet, could not speak, showed her finger towards the house, the accused came out of the house, seen by P.Ws. 1 to 3 and 7 running away and could not be apprehended by any of them. This theory is totally absent in Ex. P-1. Not only such a theory is dramatic but said to be an improvement in the case of the prosecution. That creates a doubt viz., whether P.Ws. 1 to 3 and 7 really saw the accused going out of the house at the relevant time but also whether the incident occurred in the manner stated by P.W. 1. It is also in the evidence of P.Ws. 1 to 3 and 7 that they went to the police station where P.W. 11 - Head Constable was present, he was informed of the incident, P.W. 1 was taken to the hospital and admitted, even at the time of recording Ex. P-1, P.W. 1 - the victim narrated the incident, it was recorded as per Ex. P-1 in English language but explained to P.W. 1 in Telugu language and thereafter she put her L.T.I. mark on it. Therefore, the learned counsel for the appellant accused has very seriously and vehemently argued that in such a situation, how such an improved version did not find place in Ex. P-1. The learned Public Prosecutor has tried to explain such an omission by saying that in the first place a F.I.R. should not be taken as a full dressed document and secondly, it is the evidence given by the witnesses before the Court, which should be examined and not the contents of F.I.R. or the statements of witnesses u/Ss. 161 or 162 Cr.P.C. and it is the substratum of the evidence of the prosecution which should be examined to find out the truth and not with the discrepancies or contradictions or the improvement

in the case of the prosecution. Therefore, this court is confronted with a very serious question as to how such a theory testified by P.Ws. 1 to 3 and 7 does not find place in Ex. P-1 - F.I.R. In order to answer this question, we are to know the human conduct, the legal implications and the concept of evidence in the form of a first information report Ex. P-1 before the Court.

17. In the first place, this is not a case of contradiction between the evidence of the prosecution and the contents of Ex. P-1 - FIR. It may be a case of improvement or additions to the contents of Ex. P-1. Therefore, we are to know whether such an improvement or addition to the FIR Ex. P-1 has been a later thought or embellishment or a serious attempt to somehow involve the accused in the case. As already pointed out, the commission of a cognizable offence viz., lurking house-trespass into the house of P.W. 3 and the rape said to have been committed by the accused, was reported to the police and recorded in the form of Ex. P-1. That has totally satisfied both the technical and the live implication of Section 154 of Code of Criminal Procedure. The true implication of Section 154(1) Cr.P.C. is that every information relating to the commission of a cognizable offence should be reported to the police, which should be dealt with in accordance with the provisions. On the face of it, it does not mention that the details of the offence should be either disclosed or should be recorded by way of F.I.R. under Section 154(1) Cr.P.C. The instances are too common that such F.I.R. may reach the police in various forms and need not be in person, in writing, or oral or otherwise. There are instances of reaching such information to the police by phone, by rumour, by gossip, by news paper report, or any other source, which the police are able to depend and act upon it. Therefore, initially to think that a F.I.R. should contain all the details of the offence as narrated by the witnesses before the Court is incorrect and misconceived.

18. While dealing with the importance and implication of a First Information Report before the Court, this Court had an occasion to express its firm view in *Gudise Venkappa v. State*, 1994 (2) An WR 21 (NRC) (DB) as follows :-

'FIR in a criminal case is a vital and valuable piece of evidence although it cannot be a substantial evidence. Its importance to safeguard the interests of the accused

need not be over-emphasised. It can be the expectation of any reasonable and prudent man that an FIR should reach the Investigating machinery at the earliest possible time since it should disclose the commission of a cognizable offence regarding which investigation by police has to be initiated.'

19. The sum and substance of the Law which has generated from the facts and circumstances where in the scope, limit and the legal effect of the FIR are well known. F.I.R. is not an encyclopaedia of the case of the prosecution or a Law Lexicon to judge its legal structure. It is a simple report to the police under Section 154 of Cr.P.C. that a cognizable offence has been committed so that the investigation machinery can be set in motion. It is the duty of every one, who comes to know about the commission of offence, to report. It may be oral, in writing or any sort of communication perhaps including audio and video or press. As a fact when it becomes capable of being pursued by the sense of the Station House Officer, it becomes investigation. If made orally, it must be reduced into writing and better authenticated by signature or thumb mark or insignia of approval. Being the first document and report of cognizable offence, its importance need not be over emphasized.

20. In *State of U.P. v. Ballabh Das*, : 1985 CriLJ2009 the Supreme Court declared the law that it is manifest that an F.I.R. is not intended to be a very detailed document and is meant to give only the substance of the allegations made. In *Podda Narayana v. State of Andhra Pradesh*, : AIR 1975 SC1252 it is emphasized that where the FIR lodged very soon after the offence revealing the names of the accused, etc. giving essential details, but without containing overt acts attributed to each of the accused, it is not fatal to the case of the prosecution, because it is neither customary nor necessary to mention every minute detail in the FIR. (Para - 9 of the Ruling).

21. In this case, the details of the incident as narrated by P.W. 1 and something added by P.Ws. 2, 3 and 7 finds no place in Ex. P-1 FIR. Therefore, it may amount to an omission. It cannot be a contradiction as it does not hold contrary to what is mentioned in Ex. P-1. As already pointed out, it may amount to improvement. If we take the guidance from the settled law as above, such an event is not fatal to the

case of the prosecution. But still such an event of a First Information Report omitting to mention some important theory or fact or where the prosecution witnesses introduces a theory or a fact not from the FIR. the Courts would examine the same with all caution and the accused is entitled to demonstrate by various means that such a conduct of the prosecution witnesses cannot be safely accepted. The safety valves are found in Section 162 of Cr.P.C. only. The defence is entitled to prove the omission or contradiction, By establishing such omissions and contradictions, the case of the prosecution can be demonstrated to be tainted with serious doubts to go to the benefit of the accused. It may not be strictly technical. It is real. An accused, who is confronted with such a situation, is entitled to call upon the prosecution witnesses to speak of the contradictions or omission or to explain the same. That is how the proviso to Section 162(1) Cr.P.C. creates a safety valve to the defence. To read thus :

'Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872 (1 of 1872), and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.'

The explanation added to the provision advisedly classifies the omission as a contradiction. To read thus :-

'An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact.'

If we read the proviso to Section 162(1) and the explanation as above, it is clear that both the omission and contradiction have to be proved either by the prosecution or by the accused, as the case may be, depending upon the

circumstances in each case. No such omission or contradiction can be drawn by the Court by merely referring to the document like Ex. P-1 - FIR or the evidence of the witnesses. That is how Section 145 of the Indian Evidence Act is drawn into aid to treat a document like F.I.R. or the statement of the witnesses before the Court as the previous statement, which should be brought to the notice of the witnesses during trial to prove the omission or contradiction. There may not be any luxury if we repeat Section 145 of the Indian Evidence Act.

'145. Cross-examination as to previous statements in writing. - A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.'

The compliance to Section 145 of the Indian Evidence Act not only proves the omissions or contradictions in a given case but also gives opportunity to the witnesses to explain as to why such omission or contradiction occurred.

22. Now, if we adopt the implications of Section 162 Cr.P.C. and Section 145 of the Indian Evidence Act, this case fails to bring out any such omission or contradiction. It is significant to note that none of the witnesses P.Ws. 1 to 3 and 7 including the prosecutrix herself is questioned whether such a theory was reported to police and whether it was recorded and as to why such theory was not reported. It is significant to note that neither P.W. 11 nor P.W. 1 is questioned whether there are such omissions or contradictions in such a situation. The expression used in proviso to Section 162(1) Cr.P.C. viz., 'duly proved,' should be understood in the context of the meaning proved or disproved, not proved etc. u/S. 3 of the Indian Evidence Act. If that is not done, the Court is not obliged to draw inferences of either proof, dis-proof or non-proof. When the accused or the defence did not take any interest in establishing such contradictions or omissions in accordance with Law, he is not entitled to take such contentions in this Court that there has been improvement in the case of the prosecution, due to omissions or contradictions. Therefore, the learned Public Prosecutor is totally right in pointing out that the

prosecution has placed the materials before the Court i.e., the testimony of P.Ws. 1 to 3 and 7 to judge whether the contents of Ex. P-1 are true or not and when the defence did not try to dislodge the same, there was no reason to the Court to doubt the case of the prosecution. This Court is totally convinced that the testimony of P.Ws. 1 to 3 and 7 is consistent regarding the manner in which the incident occurred, which was narrated to P.W. 11 and which was narrated before the Court and which was in substance recorded in Ex. P-1. The medical evidence corroborates the testimony of P.W. 1, in particular being the prosecutrix in a case of rape.

23. More than all, we are dealing with the testimony of P.W. 1 - prosecutrix in a case of rape. As laid down in *State of Maharashtra v. Chandraprakash Kewalchand Jain*, : 1990 CriLJ889 a prosecutrix being not an accomplice being the victim of rape in an injury case does not require her testimony to be corroborated as in the case of an accomplice. When a women speaks boldly of a sexual assault on her with the risk of serious consequences in a society like ours, the Courts cannot start with a suspicion about such a testimony and it would be an insult to the injury to expect corroboration. The same view has been categorically recorded in *Bharwada Bhoginbhai Hirabhai v. State of Gujarat*, : 1983 CriLJ1096 also.

24. When the testimony of P.W. 1, in addition to her immediate report to police as per Ex. P-1 regarding the accused committing rape on her, has been corroborated with sufficient medical evidence showing a clear strong probability that the accused alone was responsible for such a forcible sexual intercourse, in the absence of serious circumstances to think that the accused has been falsely involved, the Courts should not commence with a doubt or suspicion in regard to such a case. The learned Asst. Sessions Judge has given ample and satisfactory reasons as to how the evidence of the prosecution deserves acceptance to hold that the charges against the accused have been proved beyond reasonable doubt. This Court finds no reason to take any other view than that what is taken by the learned Asst. Sessions Judge. In spite of many probable circumstances projected by the defence in the case, the totality of the circumstances in this case lead to one and irresistible conclusion that the accused actually committed rape on P.W.1

by lurking house trespass into the house at the relevant time i.e., during mid-night. Therefore, the impugned order of conviction of the accused for the charges established deserves to be confirmed.

25. Now coming to the question of sentence, the law is very clear. For an offence punishable under Section 450, I.P.C., the punishment prescribed is imprisonment of either description for a term not exceeding ten years and also fine. For an offence punishable under Section 376, I.P.C., the punishment prescribed is imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and with fine. The learned Asst. Sessions Judge has practically imposed the maximum sentence of 10 years. It is true that the offence punishable under Section 376, I.P.C. provides the minimum sentence of imprisonment of seven years. But the Court may for adequate and special reasons to be mentioned in the judgment impose a sentence of either description for a term less than seven years. The learned Asst. Sessions Judge appears to have not applied her mind in detail with regard to this aspect of the matter in so far as the sentence for the offence punishable u/S. 450, I.P.C. is concerned. There is no clear discussion as to how the case warranted maximum sentence. The normal sentence for any offence appears to be 1/3rd of the prescribed sentence, however, subject to the facts and circumstances of each case. It is true that the accused is said to have trespassed into the house during mid-night to commit the offence of rape. There were lot of opportunities for him to have an access to the house, as the doors were opened; the inmates were sleeping and P.W. 1 was known to him. There appears to be certain exaggerations in the evidence of the prosecution regarding the incident also. In the considered opinion of this Court, the offence punishable u/S. 450, I.P.C. did not warrant maximum sentence. Even 50% of the sentence could not have been more than five years. In other words, for such an offence, the normal sentence should be between 2 and 5 years. Having due regard to the facts and circumstances of the case, for that offence, the sentence ought to have been three years R.I.

26. Regarding the offence punishable under Section 376, I.P.C., whether the circumstances justify the minimum sentence or more than the minimum sentence

upto ten years in this case. The accused is a young person. There is nothing on record to show that he is married. As already pointed out, he had acquaintance of P.Ws. 1 to 3 and perhaps P.W. 1 also prior to the date of the incident. He has an easy access to P.W. 1 during mid-night under the circumstances stated above. His act was not disturbed either by P.W. 1 or P.Ws. 2, 3 and 7 to come in the way. He had easy success in his act. The overt act on his part is said to be in continuation and the consequence of the real object. Except some injuries on the throat and neck, there are no injuries found on P.W. 1. Even the sutured injury on the abdomen has not shown the signs of any blood marks. Therefore, although there was no consent on the part of P.W. 1 in allowing the accused to have the pleasure of sex, there was no serious obstruction for an easy sex. The accused is said to be a casual labourer. At any rate, there is nothing in the evidence of the prosecution to show that the accused is a man of status or a man of means.

27. Admittedly, the accused has been in custody or in jail ever since the date of arrest viz., from 17-5-1991 onwards i.e., about two months less than five years by to-day. Already, the accused is exposed to infamy and public ridicule. Even P.Ws. 1 to 3 have been sent out of the locality by the landlady - P.W. 4 and neighbours for whatever reason as suggested by the defence. Therefore, there may not be any risk either for P.W. 1 or for her close relatives, if the accused comes out of the jail after serving the sentence for some reasonable period. Moreover, the accused who is said to be a labourer, should have some opportunity to reform himself and become a good citizen in the society. Even if he comes out from the jail, it may be very difficult for him to secure any job or avocation even to maintain himself. He should, in such a situation, suffer morally, mentally and physically also. Under these circumstances, this is not a fit case either to impose minimum sentence of 7 years or upto 10 years as has been done by the learned Asst. Sessions Judge. The learned counsel for the appellant accused has satisfactorily convinced this Court that having due regard to the financial status of the accused, he cannot be compelled to pay the fine or to serve the sentence for some more time in addition to the substantive sentence. Therefore, taking into consideration of the relevant circumstances in regard to the sentence, this Court feels that this is a fit case to impose the sentence of five years R.I. only for the offence punishable u/S. 376, I.P.C. Thus, the impugned order of sentence deserves to be modified to such an

extent.

28. In the result, the appeal is allowed in part. The order of conviction passed against the appellant-accused by the trial court is confirmed. The order of sentence is modified to the effect that the accused shall undergo R.I. for three years for the offence punishable under Section 450, I.P.C. and also R.I. for five years for the offence punishable under Section 376, I.P.C. Both the sentences shall run concurrently. The period of detention undergone by the accused both during investigation and trial shall be set off. The sentence of fine imposed by the trial court is set aside. If the accused has completed five years R.I. by now, he shall be released forthwith or otherwise he shall be released immediately on completion of five years R.I. by 17-5-1996, if he is not required in any other case.

29. Appeal partly allowed.

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