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Court : Sikkim

Decided On : Sep-09-2009

Reported in : 2010CriLJ44

Judge : A.P. Subba and; S.P. Wangdi, JJ.

Appellant : Mrityunjay Kumar

Respondent : The State of Sikkim

Disposition : Appeal dismissed

Judgement :

S.P. Wangdi, J.

1. By this appeal, the appellant seeks to assail the judgment of the learned District and Sessions Judge, Special Division-I, Sikkim at Gangtok, in S.T. Case No. 5 Of 2007, rendered on 6-8-2008, by which he was convicted under Sections 354/342, I.P.C. and sentenced to undergo simple imprisonment of 1 year and to pay fine of Rs. 1000.00 for offence under Section 354, I.P.C., and for the offence under Section 342, I.P.C. to undergo rigorous imprisonment of 2 years and to pay a fine of Rs. 2000.00. Both the sentences were made to run concurrently.

2. History of the prosecution case is that, on 31-8-2006, at around 16.00 hours, Ranipool Police Station received a written complaint from one Brij Mohan Bihani of

Shanti Complex, Ranipool (PW 1), alleging that on that day at around 2.30 p.m. his daughter Komal Bihani aged about 9 years (the victim/PW 2), had gone to the medical shop of Mritunjay Kumar the accused/appellant near Shanti Complex to purchase medicine. On reaching the medicine shop, the accused Mritunjay Kumar took the victim girl inside a room for check-up where he molested her and raped her threatening the girl with dire consequences if she disclosed the matter to any one. On the basis of that complaint, Ranipool P.S. Case No. 19(08)06 dated 31-8-2006 under Sections 342/376/511/506, I.P.C. was registered and investigation taken up against the accused person. On completion of the investigation, charge sheet was filed against the accused to trial under Section 354, I.P.C. on the following facts being revealed:

Investigation carried out transpired that on 31-8-06 at around 2.30 p.m. victim Komal Bihani, 9 yrs. D/o. Shri Brij Mohan Bihani of Shanti Complex, Ranipool had gone to the medicine shop of one Mritunjay Kumar alias Babla alias Dr. Bhaiya near Shanti Complex, to purchase medicine and for check up, as she was suffering from fever and backache. Before going to the medicine shop she had telephoned her father Brij Mohan Bihani about her illness and her father advised her to go a nearby medicine shop of Mritunjay Kumar alias Babla. The accused asked the victim girl to use hot towel and ointment on her back. The victim girl to left for home, but she returned to the medicine shop after some time when she found no relief from her backache. The accused then took her to a room which was between the shop and bedroom, with a plywood partition. At that time daughter of Mritunjay Kumar, Neha, was playing in that room and the accused told her to go inside the bedroom and he bolted the bedroom door. The accused then first put some ointment oh the victim's back and massaged her back. Slowly he fondled with her body, kissed her and hugged her. After that he slipped off her undergarments with a pretext to check her body. He touched her private part and tried to insert his private part into her but he did not succeed, as the victim girl said her back was still aching and she wanted to case the pain with a warm water compress. The accused then threatened her with dire consequences and warned her not to tell anybody about this incident. After reaching home she narrated the story to her maid servant Amrita Ubrom and later to Kalpana Sharma neighbour of victim who further narrated to victim's father Brij Mohan Bihani.

After summing up the case under Section 342/376/511/506, I.P.C., could not be established against the accused Mritunjay Kumar alias Babla alias Doctor Bhaiya as there is no Medical proof of sexual assault and proof of attempt to rape. However, a case under Section 354, I.P.C. is made out against the accused Mritunjay Kumar alias Babla alias Doctor Bhaiya, 32 yrs. s/o. Shri Ram Manohar Psd. r/o. Bahadurpur, Thana Samistipur, Bihar a/p Near Shanti Complex, 31 'A' NH, Ranipool, East Sikkim from outraging the modesty of a woman (victim girl Komal Bihani).

3. It may be relevant to note that as a part of the investigation, the I.O. had visited the place of occurrence, prepared a rough sketch thereof and statement of the accused/appellant was recorded under Section 164, Cr.P.C. by the Judicial Magistrate, East and North. Apart from this available witnesses were examined and their statements recorded under Section 161, Cr.P.C. Both the accused/appellant and the victim were forwarded for medical examination and their seized garments sent to the CFSL Cell, Kolkata, for examination, in order to confirm the medical report which stated that there was no clinical evidence to indicate sexual intercourse within 24 hours and that there was no clinical evidence to indicate that the accused person is not capable of performing sexual intercourse.

4. On the basis of the above, charge sheet under Section 354, I.P.C. was filed against the accused/appellant for his trial. However, on consideration of charge, the learned Trial Court found sufficient materials and framed charges under Sections 342/376/511, I.P.C. At the end of trial, the prosecution having failed to make out a case under Sections 376/511, I.P.C., the accused/appellant was convicted under Sections 354/342, I.P.C.

5. Before this Court, the appellant raised the following contentions as grounds seeking to set aside the impugned judgment:

(i) That there are material contradictions in the statements of the victim examined as PW 2 in her statements under Section 161, Cr.P.C. and at the trial and lacking in corroboration.

(ii) That since there was no evidence of 'force' used against the victim which remains established by the medical evidence, and the victim's own statement, necessary ingredients of offence under Section 354, I.P.C. are found wanting, and, therefore, the accused could not have been convicted for that offence.

(iii) That the trial Court had failed to take into consideration the statement of the defence witness DW2 which was summarily rejected in paragraph 54 of the impugned judgment.

(iv) That non-examination of DW1, the daughter of the accused person who was a competent witness under Section 118 of the Evidence Act by the trial Court, on the ground that the witness was too young being of tender years, not able to understand the questions put to her. was discriminatory, inasmuch as it took cognizance of the statements of the victim who was also of tender year's but was not similarly tested by the learned trial Court as to her competence and ability to depose.

(v) That there being no evidence of wrongful confinement the appellant ought not to have been convicted under Section 342, I.P.C. Alternatively, the appellant if at all was found liable to be convicted, it ought to have been done under Section 341, I.P.C.

(vi) That the sentence of punishment was too harsh and disproportionate to the offence.

(vii) That considering the fact that the accused person was not a habitual offender but a first timer and the sole earner of his family, he ought to have been released on probation under the Probation of Offenders Act, 1958.

6. Pressing contention (i), Mrs. Laxmi Chakraborty, learned Advocate, appearing on behalf of the appellant, drew the attention of this Court to certain portions of the statement of the victim under Section 161, Cr.P.C. and the one given in the Court in her deposition. It was submitted that, some of the statements given by the victim in Court as PW 2, were contradictory to the ones under Section 161, Cr.P.C. It was submitted that the statement '...that he would give me sweets for not telling

anyone' appearing in her deposition in Court is missing in her statement made under Section 161 of the Cr.P.C. This as per the learned Counsel makes the evidence of the prosecutrix doubtful, requiring the Court to be circumspect in accepting her statement and ought to look for corroboration in order to test its veracity. In support of such submission, reliance was placed upon the decision in the case of Malkhan Singh v. State of U.P. reported in : 1996 Cri LJ 90 and drew attention to paragraph 3 thereof which is extracted below:

3. From perusal of the record it is apparent that the entire case is based upon the sole testimony of prosecutrix. Prosecutrix was found partly reliable and partly unreliable by the Addl. Sessions Judge himself. There is no corroboration of the testimony of this prosecutrix who has stated something at one time and something at the other time. In such type of cases where neither the witnesses are wholly reliable and unreliable the Court should scrutinize the statement of that witnesses very minutely and also insist upon corroboration, one should not be allowed to blow hot and cold in the same breath. Hon'ble Supreme Court in case Vadivelul Thevar v. State of Madras : AIR 1957 SC 614 : 1957 Cri LJ 1000 : 1957 All LJ 898, held that in such category of cases, the Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony direct or circumstantial.

7. Mrs. Laxmi Chakraborty, learned Advocate, by referring to the medical report Ext. 3 pointed but that the fact that no injuries had been found on the body of the prosecutrix, clearly belied her statement that the appellant had committed the act of molestation on her. The following portion of the medical report was emphasised by the learned Counsel in support of her contention:

No injuries seen, Hymen intact

No secretions seen.

Washings taken from

Introitus & vagina taken

& sent (1) to Path Dept STNM

(2) handed over to SI

Tshering Yanzom of Ranipool.

She also placed reliance upon paragraph 3 of the decision in the case of Yerumalla Latchaiah v. State of A.P. in 2006 3 SCC (Criminal) 373.

8. Supporting contention (ii), it was submitted that the essential ingredient of an offence under Section 354, I.P.C. is assault or criminal force to any women which the prosecution had failed to prove, and, therefore, conviction of the appellant for that offence was unwarranted. Against contention (iii), it was submitted on behalf of the appellant that the learned trial Court committed material irregularity in dropping DW 1 as a witness, finding her to be of tender age and not competent to depose, as a consequence of the test which she was made to undergo while on the other hand, accepting the evidence of the prosecutrix who was also of tender age, without her requiring to go through the rigours of the same test. Against contention (iv), it was submitted that great injustice was caused to the appellant in the learned trial Court, rejecting the evidence of DW 2 who was the wife of the appellant, which if accepted would have resulted in his acquittal. The learned trial Court rejecting her evidence summarily, has resulted in the appellant being deprived of a vital piece of evidence which would have negated the evidence of the prosecution.

9. Pressing contention (v), the learned Counsel on behalf of the appellant by referring to the deposition of the prosecutrix, submitted that no case of wrongful confinement provided under Section 340/342, I.P.C. was made out against the appellant, as there was no evidence of the prosecutrix being wrongfully restrained by any person which prevented her from proceeding out of the medical shop of the accused person. Against contention (vi), it was submitted that the learned trial Court had imposed the maximum punishment prescribed for such offences which was too harsh and rather disproportionate having regard to the facts of the case. It was submitted that, if at all, the accused ought to have been convicted under Section 341, I.P.C. which prescribes a lighter sentence.

10. Finally against contention (vii) Mrs. Chakraborty made a fervent plea for release of the appellant on probation under the Probation of Offenders Act, 1958. It was submitted that the accused person was not a habitual offender, but a first timer and the sole earner of his family, facts that would be germane for this Court to consider in granting such relief. In support of her submission, reliance was placed upon paragraph 8 of the decision in the case of Southern Command Military Engineering Services Employees Co-op. Credit Society v. V.K.N. Nambiar reported in : AIR 1988 SC 2126 which reads as under:

8. The question next to be considered is whether the accused are entitled to the benefits of probation of good conduct? We gave our anxious consideration to the contentions urged by counsel. We are of the opinion that the High Court has not committed any error in this regard also. Many offenders are not dangerous criminals but are weak characters or who have surrendered to temptation or provocation. In placing such type of offenders, on probation, the Court encourages their own sense of responsibility for their future and protect them from the stigma and possible contamination of prison. In this case the High Court has observed that there was no previous history of enmity between the parties and the occurrence was an outcome of a sudden flare up. These are not shown to be incorrect, We have already said that the accused had no intention to commit murder of any person. Therefore, the extension of benefit of the beneficial legislation applicable to first offenders cannot be said to be inappropriate.

It was submitted that, keeping in view the observation of the Hon'ble Supreme Court, the appellant deserved to be extended with the benefit of the beneficial legislation as if would be applicable to him for the reasons stated above. In the above premises, it was submitted that the impugned judgment was liable to be set aside and the appellant acquitted of the charges.

11. Mr. Jagat B. Pradhan, the learned Additional Advocate General, who is also the Public Prosecutor for High Court, appearing on behalf of the State, generally supported the impugned judgment and submitted the following in reply in seriatim to the contentions raised on behalf of the appellant as follows:

It was submitted against contention (i) that there are no contradictions in the statement of the victim and that there was sufficient corroboration in the statements of the other PWs. The so called contradictions indicated on behalf of the appellant is of trivial nature and not affecting the substance of the prosecution evidence.

Against contention (ii), it was submitted that the evidence on record clearly established the existence of the element of 'force' necessarily required to constitute the offence under Section 354, I.P.C. Mr. Pradhan drew the attention of this Court to the statement of the prosecutrix, relevant portions of which are extracted below:

In chief.Unformed him that despite the salt compress I did not get well and he took me inside i.e. a room inside the shop....He also told me not to tell anyone of the incident and that he would give me sweets for not telling anyone. I then managed to escape from his clutches by telling him that I would go home and have further salt compresses on my back....

In cross-examination.It is true that I did not scream when the accused had taken off my panties as he had warned me not to scream. The room was locked.... It is true that the wife and daughter of the accused had been bolted inside one room by the accused....

From the aforesaid extracted portion of the statement of the victim, it can be categorically inferred that the prosecutrix was a victim of an offence under Section 354, I.P.C. It was submitted that the evidence clearly revealed the fear and apprehension existing in the mind of the victim in the condition which the accused committed the offence of outraging her modesty. In support of his contention, the decision of Girdhar Gopal v. State reported in : AIR 1953 MB 147 : 1953 Cri LJ 964 was referred to by Mr. Pradhan.

Against contentions (iii) and (iv), it was submitted that there was nothing wrong in the learned trial Court dealing with the evidence of DW1 and DW2 in the manner it had been done in the impugned judgment, as the learned trial Court has taken all relevant facts into consideration as required under the law.

Against contention (v), it was submitted that the facts and circumstances of the case clearly revealed that the victim/prosecutrix was wrongfully confined, against which he has been appropriately punished. It was submitted that 'confinement' would not necessarily involve physical confinement alone, but it also brings within its ambit the condition of the mind and the perception of the person, at the time of the offence. In the present case, the evidence of the prosecutrix unequivocally leads one to conclude that she had been wrongfully confined. To buttress his submission, Mr. Pradhan Laid stress upon the above extracted portion of the deposition of the prosecutrix while dealing with contention (ii) above.

Against contention (vi), it was submitted that the Court had the necessary discretion to impose appropriate punishment within the limits prescribed under the law, taking into consideration the facts and circumstances of the case. In the present case, it was submitted that the punishment was justified, as the offence was committed against a sick minor child by a full grown matured person, circumstances deserving optimum punishment provided under the law, as was done in the present case.

Against contention (vii), Mr. Pradhan submitted that, considering the nature of the offences, the appellant did not deserve the benefit provided under the beneficial law of the Probation of Offenders Act, 1958. Relying upon : 1974 (4) SCC 590 : 1974 Cri LJ 923 in the matter of Uttam Singh v. The State (Delhi Administration), it was submitted that in an offence which was of a lesser seriousness, the Hon'ble Supreme Court refused releasing the accused under Section 4 of the Probation of Offenders Act, 1958. It was submitted that in the facts and circumstances, the appeal deserved to be dismissed as being devoid of any merit.

12. On a careful consideration of the rival contentions of the parties and the evidence on record, our views on each of the contentions raised on behalf of the appellant are as under:

Contention (i)

13. In order to discredit the evidence of the prosecution, the contradictions should be of such that it affects the substance of the prosecution evidence. Contradictions

which do not in any manner shake the substantive part of the evidence with regard to an offence, cannot be considered as contradictions at all. There are a catena of decisions to this effect rendered by the Supreme Court which has held sway-thus, far having passed the test of time, one of which is the case of State of Punjab v. Gurmit Singh reported in : (1996) 2 SCC 384 : 1996 Cri LJ 1728.

14. The contradictions indicated, on behalf of the appellant do not in any manner shake the evidence that the victim/prosecutrix had gone to the medical shop of the accused/appellant and that the appellant had committed the offence of outraging the modesty of the prosecutrix. The learned trial Court has in. detail succinctly set out those circumstances' leading to the offence with which we dp not see any reason to differ. The statement of the prosecutrix apart from it by itself being unshakable, has been categorically corroborated by the father appearing as PW 1 and their neighbour PW 3. The FIR, Ext. 1 which by itself is not a substantive evidence but nevertheless a corroborative piece of evidence, contains the essential allegations made and proved by the prosecutrix. The prosecutrix appearing as PW 2 has given a graphic detail of the incident which is not at all demolished in her cross-examination. Considering all these aspects of the matter, it cannot but be held that the contradiction pointed out on behalf of the appellant does not vitiate the case of the prosecution. This apart, the submission on behalf of the appellant on this point also does not appear to hold water, as the alleged contradictory statement has not been put to the witness as required under the law. Section 145 of the Evidence Act provides as follows:

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.

15. We may also refer to Section 155 of the Evidence Act which provides that the credit of a witness may be impeached in one of the'3 ways as provided therein. In the present case, the 3rd way ought to have been resorted to by the accused

person. The provision prescribing the 3rd way is reproduced below for convenience:

155. (1) ....

(2) ....

(3) By proof of former statements inconsistent with any part of the evidence which is liable to be contradicted;

16. In the present case, the witness, i.e. the prosecutrix, was not at all confronted with the statement made by her. Having failed to exercise this option of grave consequence, it cannot now be said that the statement is a contradictory one on account of which the witness cannot be believed. The first contention, therefore, stands rejected as not maintainable. The case of Malkhan Singh v. State of U.P. : 1996 Cri LJ 90 (supra) upon which reliance was placed on behalf of the appellant is of no help to the accused, as the facts upon which the decision was rendered is distinct from the one at hand. That was a case where the prosecutrix was the sole witness whose statement was found to be inconsistent at different times and was lacking in corroboration. It was, therefore, held that in such type of cases where the witnesses are wholly unreliable, the Court should scrutinise their statements very minutely and insist upon corroboration and that one should not be allowed to blow hot and cold in the same breath.

17. The contents of the medical report Ext. 3 as pointed out by the learned Counsel on behalf of the appellant is no doubt correct, but that too would not be of any assistance because we are not considering the case of an offence under Section 376, I.P.C. where it would have been relevant. As in the case of Yerumallah Latchaiah (supra) cited on behalf of the appellant. But here, the accused has been charged and convicted under Section 354, I.P.C. where different considerations apply. Section 354 prescribes that whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty shall be punished with the prescribed sentence provided therein. Considering the fact that the ingredients of that offence has been fully proved on behalf of the prosecution the medical report pales into

insignificance. This aspect of the matter shall be alluded to while dealing with the next contention which is directly in issue.

Contention (ii)

18. The contention that there was no evidence of use of force, an essential ingredient to constitute an evidence under Section 354, was placed on behalf of the accused on the ground that there was no physical evidence of use of such force. In other words, no injury was found on the body of the victim. As per the appellant, the accused ought to have used physical force which would have been established by injuries on the body of the victim in order to hold him guilty of the offence. This in our view is not the correct position of law. Mrs. Chakraborty referred to the case of Girdhar Gopal v. State : AIR 1953 MB 147 : 1953 Cri LJ 964 in paragraph 2 of which it has been, inter alia, held as follows:

2. It is not the act of outraging the modesty that is mades an offence under Section 354, Penal Code. In order to constitute an offence under Section 354, Penal Code there must be an assault or use of criminal force to any woman with the intention or knowledge that the women's modesty will be outraged. The offence under Section 354; Penal Code can therefore be committed by any man or a woman with the necessary intent or knowledge.

19. We think that the contention does not appear to be sound in law because the use of 'criminal force' which Section 354, I.P.C. envisages need not necessarily involve physical force as is being canvassed on behalf of the appellant. Criminal force has been defined under Section 350, I.P.C. which we may usefully reproduce below:

350. Criminal force.-- Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other.

20. There are eight illustrations to this section which constitutes the use of 'criminal force' of which illustration (f) being relevant is reproduced for convenience:

(f) A intentionally pulls up a woman's veil. Here A intentionally uses force to her, and if he does so without her consent intending or knowing it to be likely that he may thereby injure, frighten or annoy her, he has used criminal force on her.

Considering the above, the act of the accused person in removing the under garments of the prosecutrix, shorn of his actions that followed, by itself, therefore, constitutes the use of force upon the latter. In the case of Lakshmiammal v. Samiappa Goundar and Ors. : AIR 1968 Mad 310 : 1968 Cri LJ 1084 a single bench of the Madras High Court has held 'force' as contemplated in Section 350, I.P.C. as follows:

'Force' refers to force to a person used either directly or indirectly, causing injury, fear or annoyance to that person.

(Underlining supplied)

21. Concurring with the above interpretation, we are of the view that 'force' or 'criminal force' need not necessarily be such as to manifest itself physically. It may be exhibited even in the absence of physical element. We also find support from the very decision of Girdhar Gopal : 1953 Cri LJ 964 (supra) relied upon by the appellant's counsel where it has been held in paragraph 6 on the facts of the case as follows:. To my mind, the act of the applicant in confining Saroj in a room, in making her lie on a bed and then sitting on her and becoming naked is clearly one amounting to use of criminal force with the intention or knowledge that the girl's modesty will be outraged.

(Underlining supplied)

22. In the present case, it has been established that the victim who is of tender age of 9 years was under the complete physical dominion of a full grown male of 32 years. The portion of the deposition of the prosecutrix referred by Mr. Jagat Pradhan, the learned Public Prosecutor, hereinabove, fully supports this fact. The statement of the prosecutrix in her cross-examination and the suggestion made on

behalf of the accused person that she did not scream when the accused had taken Off her panties as he had warned her not to scream and that the room was locked and also the wife and daughter of the accused had been bolted inside one room by the accused is a clinching piece of evidence of the use of criminal force.

Contention (iii)

23. There does pot appear to be any infirmity in the learned trial Court in rejecting the evidence of the wife of the accused person as DW 2, as she does not appear to be a truthful witness, It is well settled that evidence of a witness cannot be discarded merely on the ground that he is either partisan or interested or closely related to the accused person, if it is otherwise found to be trustworthy incredible. It only requires scrutiny with more care and caution so that neither the guilty escape nor the innocent wrongly convicted. If on such careful scrutiny the evidence is found to be reliable and probable it can be acted upon. If it is found to be improbable or suspicious it ought to be rejected. Amongst the plethora of decisions on this aspect it would be sufficient to cite the case of S. Sudershan Reddy v. State of A.P. reported in : (2006) 10 SCC 163 : 2006 Cri LJ 4033 (paragraphs 11 to 16). Paragraphs 12 and 16 be most relevant on this aspect are reproduced below:

12. We shall first deal with the contention regarding interestedness of the witnesses for furthering the prosecution version. Relationship is not a factor to affect the credibility of a witness. It is more often than not that a relation would not conceal the actual culprit and make allegations against an innocent person. Foundation has to be Laid if plea of false implication is made. In such cases, the Court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

16. Again in Masalti v. State of U.P. : AIR 1965 SC 202 : 1965 Cri LJ 226 this Court observed AIR pp. 209-10, para 14 : SCR p. 146

But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. The mechanical rejection of such evidence on the sole

ground that it is partisan would invariably lead to failure of justice. No hard-and-fast rule can be Laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as Correct.To the same effect are the decisions in State of Punjab v. Jagir Singh : 1973 Cri LJ 1589 and Lehna v. State of Haryana : 2003 Cri LJ 3876.

(Emphasis supplied)

24. Applying this principle in the case at hand, there are circumstances which do not inspire our confidence as to the veracity and the truthfulness of the witness DW 2, the wife of the accused person. We find that the accused/appellant has not stated anywhere in his statement under Section 313 of the Criminal Procedure Code that his wife was present when he had applied ointment on the back of the victim. In her deposition, the DW 2 has given conflicting and inconsistent state-merits bordering on evasiveness in respect of the place of occurrence where she claimed to be present when the incident took place. Above all, her categorical statement in her cross-examination that 'I was not present at the place of occurrence at the time of incident' fully justifies the rejection of her evidence by the learned trial Court as unreliable.

Contention (iv)

25. On the contention on behalf of the appellant that the learned trial Court had committed material irregularity in putting the daughter of the accused person appearing as DW1 to the test of ascertaining her competence to give evidence while not doing so in the case of the prosecutrix appearing as PW2, does not appear to be acceptable. From a perusal of the answers to the questions put by the Court to DW1 it can be unhesitatingly stated that she was not competent to depose as found by the learned trial Court. On the other hand, the prosecutrix though also of tender age, clearly appears to be intelligent and had comprehended the questions put to her, inspiring confidence in the Court to treat her as a competent witness, We do not find any reason to interfere in the discretion exercised by the learned trial Court and uphold the same.

Contention (v)

26. While pressing contention (v) that there was no evidence of wrongful confinement for the accused to have been convicted under Section 342, I.P.C., it was submitted that the victim had left the shop of the accused person without any restraint established that no such offence had been committed by him, and, therefore, ought to have resulted in his acquittal. Referring to and relying upon the definition of wrongful confinement as provided under Section 340, I.P.C., it was submitted on behalf of the appellant that since the victim had not been prevented by the accused person from proceeding out of the shop, the essential ingredient of wrongful confinement had not been established. In other words, as per the counsel on behalf of the appellant, like in the case of criminal force, confinement had to necessarily have physical manifestation. This submission is wholly unacceptable in the face of the legal position that confinement need not necessarily be a confinement where the person is physically Held within a certain circumscribed limit. To support the charge of wrongful confinement, proof of actual physical obstruction is not essential. It is the condition of the mind of the person confined, having regard to the circumstances that leads him to reasonably believe that he was not free to move and that he would be forthwith restrained if he attempted to do so. This position of law has been re-emphasised in the case of Om Parkash Tilakchand v. The State reported in : AIR 1959 Punj 134 : 1959 Cri LJ 368 which is extracted below:

29. To support a charge of wrongful confinement proof of actual physical obstruction is not essential. It must be proved in each case, that there was at least such an impression produced in the mind of the person confined, as to lead him reasonably to believe, that he was not free to depart, and that he would be forthwith restrained, if he attempted to do so : see King Emperor v. Shamlal Jairam (1902) 4 Bom LR 79. Bimla Devi, having regard to her feeble state to health and her helplessness, could be reasonably presumed to believe in the threats that if she left the house, she would not be permitted to do so.

After the incidents of two months prior to her admission in the hospital, when she was pursued and forcibly brought back to the house by the brothers of the

accused, she would have had such an impression. It was remarked in Madala Peraiah v. Voruganti Chendriah : 1952 Mad WN 163 : AIR 1954 Mad 247 : 1954 Cri LJ 283, that physical presence of the obstructor is not necessary; nor is any actual assault necessary and fear of immediate harm restraining a man out of a place where he wishes to be and has a right to be is sufficient to constitute an offence under Section 341. Indian Penal Code.

Same reasoning applies to an offence under Section 342, the emphasis being on the apprehension produced on the mind of the person restrained or confined : see also K. Jogayya v. King : AIR 1951 Orissa 142. In my opinion the domination of the Will of the accused and of the other members of his family, upon the mind of Bimla Devi, was sufficiently strong and direct, so as not to leave her an option but to submit to it. It was not necessary for purposes of Section 342 to hold her a prisoner by putting a lock outside her room all the 24 hours.

It was sufficient for purposes of commission of offence of wrongful confinement if she knew the harmful consequences of disobedience if she tried to escape. In such a case a moral force could be as effective, as physical coercion, to which it was unnecessary to resort for keeping her within the four walls of the house. What is of importance in such cases is the reasonable apprehension of force, rather than its actual one.

Any effective restraint on the right of freedom whether caused by threats or by actual physical force is sufficient for purposes of commission of an offence. The coercion of the mind can, in certain circumstances be as effective as coercion of the body, in order to bring the conduct of the wrong-doer within the ambit of Section 341 or of Section 342. Indian Penal Code. Such a restraint may arise out of words, acts, gestures or the like sufficient to induce a reasonable apprehension that failure to submit will result in the use pf force.

It is not necessary to constitute the offence under Section 341 or under Section 342. Indian Penal Code, that the person to be deprived pf his liberty, should be touched or assaulted or actually arrested or confined within walls, the offence may committed by words alone or by acts alone, or by both, or by merely operating on the will or by personal violence or both. A person can be deprived of his liberty of

locomotion as much by the exercise of force as by the express or implied threat of it. See Riley v. Stone 94 SE 434 (440).

(Underlining supplied)

27. There, are catena of other decisions holding the above view which are not being cited as being redundant. Applying the above principle in the facts and circumstances of the present case, we find from the statement of the prosecutrix, referred to and extracted above, leave no room for doubt that the victim had been wrongfully restrained during the entire period of the commission of the offence under Section 354, I.P.C. by the accused person. The statement that 'I then managed to escape from his clutches....' appearing in the statement in chief and that '.... It is true that I did not scream when the accused had taken off my panties as he had warned me not to scream. The room was locked.... It is true that the wife and daughter of the accused had been bolted inside one room by the accused' are evidence of clinching nature to hold that the accused had committed the offence of wrongful confinement as provided under Section 342, I.P.C., making him liable to face the prescribed consequences as provided therein.

28. The alternative submission under contention (v) that, from the evidence on record, if at all, the accused/appellant would be punishable under Section 341, I.P.C. which prescribes a lighter punishment, in our opinion, cannot be accepted, in view of the fact that the evidence under Section 342, I.P.C. stands established beyond all reasonable doubts.

Contention (vi)

29. The plea that the sentence imposed against the accused was too harsh and disproportionate to the offence as the maximum prescribed punishment had been imposed upon the accused, cannot be sustained for the reasons stated hereafter. The contention needs to be seen and considered in the light of the facts and nature of the present case. As already set out above, the victim was a child of tender age of 9 years who had no reason to fear or distrust the accused person, a neighbour and a fully grown male of 32 years, old enough to be her father. The accused has taken unfair advantage of the trust and helplessness of a child who

sought his assistance when she was ailing. The action of the accused person in molesting a child in a planned manner isolating her and confining her in a room by ensuring the absence of his wife and his daughter by bolting them inside the adjoining room and then attempting to violate the sanctity of the child, is one of the basest form of offence that we find difficult to condone and no mitigating circumstance can be pleaded to reduce the sentence. The offence has been proved beyond all reasonable doubts by the prosecution. Once it has been so proved, discretion is vested upon the learned trial Court to impose necessary punishment within the limits prescribed under the law, taking into consideration the facts and circumstances of the case. The law of sentence has been re-emphasised in the case of State of M.P. v. Babulal reported in : (2008) 1 SCC 234 : 2008 Cri LJ 714. Paragraphs 22, 23, 25, 28 and 29 of which are reproduced hereinbelow:

22. The next question relates to adequacy of sentence. Let us consider it on principle as well as in practice, in the light of statutory provisions.

23. Punishment is the sanction imposed on the offender for the infringement of law committed by him. Once a person is tried for commission of an offence and found guilty by a competent Court, it is the duty of the Court to impose on him such sentence as is prescribed by law. The award of sentence is consequential on and incidental to conviction. The law does not envisage a person being convicted for an offence without a sentence being imposed therefore.

25. Injustice-delivery system, sentencing is indeed a difficult and complex question. Every Court must be conscious and mindful of proportion between an offence committed and penalty imposed as also its impact on society in general and the victim of the crime in particular.

28. Moreover, social impact of the crime, particularly where it relates to offences against women, cannot be lost sight of and per se requires exemplary treatment. Any liberal attitude of imposition of meagre sentence or too sympathetic view may be counter productive in the long run and against social interest which needs to be cared for, protected and strengthened by string of deterrence inbuilt in the sentencing system.

29. Sexual violence apart from being a dehumanising act is also an unlawful intrusion of the right to 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 leaves behind a traumatic experience. It has been rightly said that whereas a murderer destroys the physical frame of a victim, a rapist degrades and defiles the soul of a helpless female. The Courts are, therefore, expected to try and decide cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. A socially sensitised Judge is a better armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and complicated provisos.

30. We find that the case of Southern Command, M.E.S. Employees Co-op. Society (AIR 1988 SC 2126) cited on behalf of the appellant is of no help to the appellant, as the facts involved in that case is materially different from the present one as is evident from paragraph 8 of the judgment extracted above upon which reliance had been placed on behalf of the appellant.

31. In the above facts and circumstances, we do not find any reason to interfere with the sentence imposed by the learned trial, Court and uphold the same as being just and proper haying regard to the facts and circumstances of the case.

Contention (vii)

32. Relevant part of Section 4 of the Probation of Offenders Act, 1958 under which the learned Counsel for the appellant claimed the benefit for the appellant reads as under:

4. Power of Court to release certain offenders on probation of good conduct.-- (1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the Court by which the person is found guilty is of opinion that having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the Court may, instead of

sentencing him at once at any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the Court may direct, and in the meantime to keep the peace and be of good behaviour:

Provided that the Court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the Court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.

33. A bare perusal of the above provision makes it clear that an accused can be released on probation of good conduct in appropriate cases where the accused is found guilty of an offence not punishable with death or imprisonment for life and the Court which finds the accused guilty, considers it expedient to release such accused having regard to the nature of the offence and character of the offender. No doubt, the offences with which the appellant has-been found guilty of are not punishable with death or imprisonment for life. However, length of sentence is not the sole, consideration. Two other relevant considerations for exercise of power under Section 4 of the Probation of Offenders Act, 1958 are the nature of the offence and character of the offender. So far as this aspect is concerned, we have already adverted to the issue while dealing with the preceding contention No. (vi). In view of the conclusion that we have arrived at in the matter in the light of the broad guideline Laid down by the Apex Court in State of M.P. v. Babulal : 2008 Cri LJ 714 (supra) we are unable to agree with the submission that it is expedient to release the appellant on probation of good conduct in the present case. The prayer for release of the appellant under the Probation of Offenders Act, 1958 thus stands rejected.

34. In the result, we do not find any reason to interfere with the conviction and sentence imposed by the learned trial Court and accordingly uphold the same as being just and proper having regard to the facts and circumstances of the case.

35. The appeal accordingly stands dismissed.

36. The appellant is accordingly directed to surrender before the Court of the learned District and Sessions Judge (Special Division-I) within 15 days from the date of this judgment to serve the sentence.

37. Needless to say the appellant shall be entitled to the benefit of set off provided under Section 428 of the Code of Criminal Procedure, 1973.

38. A copy of the judgment be transmitted to the District and Sessions Judge (Special Division-I) forthwith for compliance.

39. Let the trial Court records be sent forthwith.

A.P. Subba, J.

40. I agree.

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