

Umesh Vs. the State of Rajasthan

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Court : Rajasthan

Decided On : Aug-08-2001

Reported in : 2002(1)WLN580

Judge : Sunil Kumar Garg, J.

Appeal No. : S.B. Criminal Appeal No. 317 of 2001

Appellant : Umesh

Respondent : The State of Rajasthan

Judgement :

Sunil Kumar Garg, J.

1. This appeal has been filed by the accused appellant against the judgment and order dated 10.5.2001 passed by the learned Addl. Sessions Judge No. 2, Hanumangarh in Sessions Case No. 43/98 by which he convicted the accused appellant for the offence Under Sections 376, 323 and 341 IPC and sentenced in the following manner:

Name of accused Convicted Sentence awarded

appellant Under Section

Umesh 376 IPC Ten years RI and to pay fine of

Rs. 200/-, in default of payment

of fine, to further undergo two

months imprisonment.

323 IPC Three months SI and to pay fine

of Rs. 100/-, in default of

payment of fine, to further

undergo one month

imprisonment.

341 IPC One month SI.

All the above substantive sentences were ordered to run concurrently.

2. The facts giving rise to this appeal, in short, are as follows:

On 15.4.1998, at about 11.30 AM, PW-6 Rampyari (hereinafter referred to as the prosecutrix) lodged a written report Ex.D/2 before the Police Station, Hanumangarh Town stating inter alia that she was living in Hanumangarh Town with her family and on 12.4.1998 at about 11.00 PM in the night she went from her house to take water from the public hand-pump and when she was returning after taking water the accused Akla, Sakla and Umesh (accused appellant) caused wrongful restraint to her and beat her, as a result of which, she received injuries on her eyes and they molested her also with an intention and outrage her modesty and when she made hue and cry, her father-in-law Upendra Das, PW-7 and her Bhabhi Manju Devi, PW-8 came there and they rescued her from them. It was further stated in the report that thereafter Panchayat was held and now she had come to lodge the report.

On this report, police registered the case for the offence Under Sections 341, 323 and 354 IPC and chalked out regular FIR Ex.P/14 and started investigation.

In the meanwhile, on 17.4.1998, the prosecutrix PW-6 Rampyari lodged a written complaint Ex.P/7 in the Court of Addl. Chief Judicial Magistrate, Hanumangarh against eight persons including those three persons, whose names were mentioned by her in report Ex.D/2 and in this complaint, she has made allegations that rape was committed with her by Akla, Sakla and present accused appellant Umesh and she has also stated that rape was committed with her in the shop of accused appellant Umesh and on her making hue and cry PW-7 Upendra Das and PW-8 Manju Devi came there and thereafter, the shutter of the shop was opened by accused persons and Jeevachhdas, PW-1 also came there. The copy of that complaint was also sent to the police.

During investigation, the accused appellant Umesh was arrested by the police on 29.7.1998 through arrest memo Ex.P/10 and on 20.4.1998, the learned Addl. Chief Judicial Magistrate through Ex.D/4 directed SHO Police Station, Hanumangarh that medical examination of the prosecutrix PW-6 Rampyari be got conducted and if she wanted to produce her clothes, they may be taken. The prosecutrix PW-6 Rampyari was got medically examined by PW-3 Dr. Brijesh Gaur on 22.4.1998 and her medical examination report is Ex.P/2.

After usual investigation, police filed challan only against two persons, namely, Umesh (present accused appellant) and Sakla for the offence Under Sections 376, 323, 341 and 354 IPC in the Court of Magistrate, from where the case was committed to the Court of Session.

It may be stated here that against rest accused persons whose names were mentioned in the complaint Ex.P/7, challan was not filed by the police.

On 15.1.1999, the learned Addl. Sessions Judge No. 2, Hanumangarh framed charges for the offence Under Sections 341/34, 376/34 and 323/34 IPC against the present accused appellant Umesh and another accused Akleshwar. The charges were read over and explained to the accused persons. They denied the charges and claimed trial.

During the course of trial, the prosecution in support of its case examined as many as 12 witnesses and got exhibited some documents. Thereafter, statements of

accused persons Under Section 313 Cr.P.C. were recorded and three witnesses were produced in defence.

Note:

1. That during trial before the learned Addl. Sessions Judge No. 2, Hanumangarh, another accused Akleshwar died, therefore, proceedings were dropped against him.

2. That from the record it also reveals that on 15.9.2000 an application Under Section 319 Cr.P.C. was filed on behalf of the prosecution and the learned Addl. Sessions Judge No. 2, Hanumangarh vide order dated 17.10.2000 accepted that application and took cognizance for the offence Under Sections 376, 341 and 323 IPC against accused Sakla and trial of that accused Sakla was separated from the trial of two other accused.

After conclusion of trial, the learned Additional Sessions Judge No. 2 Hanumangarh through his judgment and order dated 10.5.2001 convicted the accused appellant for the offence Under Sections 376, 323 and 341 IPC and sentenced in the manner as stated above holding inter-alia that prosecution has proved its case beyond all reasonable doubts against the accused appellant for the said offences.

Aggrieved from the said judgment and order dated 10.5.2001 passed by the learned Additional Sessions Judge No. 2, Hanumangarh, the present appeal has been filed by the accused appellant.

3. In this appeal, the following submissions have been made by the learned Counsel for the accused appellant:

1. That in the present case, the incident took place on 12.4.1998 and the first report Ex.D/2 was lodged by the prosecutrix PW-6 Rampyari on 15.4.1998 and the allegations of rape through complaint Ex.P/7 were added or made for the first time on 17.4.1998 and thus there is a considerable delay in the present case and the whole case of prosecution should be thrown on this ground alone as the delay has not been explained by the prosecution.

2. That statement of the prosecutrix PW-6 Rampyari should not have been believed by the learned trial Judge as her statement suffers from many infirmities and there is considerable improvement in her statement as in her earlier report Ex.D/2 dated 15.4.1998, she has not made any allegation of rape against the accused appellant and others and thus, her statement suffers from omissions, contradictions, improvements and infirmities and should be discarded.

Hence, it was prayed that this appeal may be allowed and the accused appellant be acquitted of the charges framed against him.

4. On the other hand, the learned Public Prosecutor supported the impugned judgment and order passed by the learned Additional Sessions Judge No. 2, Hanumangarh.

5. I have heard the learned Counsel for the accused appellant and the learned Public Prosecutor and perused the record of the case.

6. Before proceeding further, first medical evidence in the present case has to be seen, which is found in the statement of PW-3 Dr. Brijesh Gaur.

7. PW-3 Dr. Brijesh Gaur states in his statement that on 24.4.1998 he examined the prosecutrix PW-6 Rampyari and found following two injuries on her person:

(1) Bruise 1/2' x 1/2' on right eye below.

(2) Abrasion 1/2' x 1/2' on Left forearm.

He has further stated that he found that she was a lady of 25 years and was a well developed lady and she was having a pregnancy of 20 weeks. He has further opined:

(1) That no definite opinion regarding rape cannot be given.

(2) That she is habitual to sexual intercourse.

He has proved the medical examination report Ex.P/2 of the prosecutrix PW-6 Rampyari.

8. Thus, from the statement of PW-3 Dr. Brijesh Gaur, it appears that there was one bruise and one abrasion on the person of the prosecutrix PW-6 Rampyari and apart from these two injuries, no other injuries including on her private part were found and she was a married lady and having pregnancy of 20 weeks and she was habitual to sexual intercourse.

9. Before proceeding further, something should be said about legal aspect with respect to appreciation of evidence of prosecutrix and the same can be summarised in the following manner:

1. That the main evidence in all such cases is that of victim herself.
 2. That corroboration of the testimony of the prosecutrix in rape case is not required as a rule of law. But, corroboration should ordinarily be required in the case of a woman having attained majority and who is habitual to sexual intercourse and is found in a compromising position, as in such cases there is likelihood of her having levelled such an accusation on account of instinct of self-preservation or when the probabilities factor is found to be out of time.
 3. That corroboration may be by facts and circumstances.
 4. That the injury on the person of the victim, especially her private parts, had corroborative value.
 5. That if the evidence of the victim does not suffer from any basic infirmity and the probabilities factor does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming.
10. In *State of Punjab v. Gurmit Singh* : 1996 CriLJ1728 , the Hon'ble Supreme Court has held that the testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.

Burden of proof

11. 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 her mother have falsely implicated the accused. The evidence of prosecution witnesses cannot be accepted merely because an accused person has not been able to say as to why they have come forward to depose against him. However, great the suspicion against the accused and however strong the moral belief and conviction of the Judge, unless the offence of the accused is established beyond reasonable doubt or beyond the possibility of 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 the prosecution has to bring the offence home to the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt.

12. Keeping the above legal aspect in mind, the facts of the present case are being examined.

13. Before proceeding further, it would be worthwhile to mention here the relevant dates and salient features of the case.

(1) That on 12.4.1998 at about 11.00 PM, the alleged incident took place.

(2) That on 15.4.1998, the written report Ex.D/2 about the alleged incident was lodged by the prosecutrix PW-6 Rampyari before the Police Station, Hanumangarh Town and in this report, there is no mention of the fact that accused appellant and others committed rape with her.

(3) That on this report Ex.D/2, a case for the offence Under Sections 323, 354 and 341 IPC was registered.

(4) That in the report Ex.D/2, the names of PW-7 Upendra Das, father-in-law of the prosecutrix and PW-8 Manju Devi, Bhabhi of the prosecutrix were mentioned, who came on the place of occurrence when she made hue and cry.

(5) That on 17.4.1998, a regular complaint Ex.P/7 was lodged by the prosecutrix PW-6 Rampyari before the Court of Addl. Chief Judicial Magistrate,

Hanumangarh, in which allegations that accused appellant and others committed rape with her were made by her.

14. Since in rape cases the best evidence is of prosecutrix herself, first her statement has to be seen.

15. PW-6 Rampyari in her statement has stated that she was caughthold by the accused appellant and two other accused and she was taken to the shop and the shutter of the shop was closed and, thereafter, present accused appellant and two other accused committed rape with her and after commission of rape, when accused appellant and others were wearing their clothes, she knocked the shutter and hearing the sound PW-8 Manju Devi and PW-7 Upendra Das came and her brother PW-12 Parikshandas also came and seeing them, accused appellant and others ran away. She has further stated that thereafter, Panchayat was called and because of self-respect, she did not make any case and, thereafter, she went to the police and lodged the report Ex.D/2 and later-on complaint Ex.P/7 was lodged before the Court of Addl. Chief Judicial Magistrate, Hanumangarh. In cross-examination, she admits the following facts:

(1) That first report Ex.D/2 was got written by Liyakat, who took her thumb impression on Ex.D/2.

(2) That she has no enmity with the police nor her family has enmity with the police.

(3) That the date on which report Ex.D/2 was given before the police, the police came.

(4) That PW-12 Parikshandas is her brother.

(5) That in report Ex.D/2, the fact that shutter was closed was not mentioned and similarly, in her police statement Ex.D/3 dated 15.4.1998, the fact of closing of shutter was also not mentioned.

(6) That on the report Ex.D/2, she and her brother PW-12 Parikshandas put their thumb impressions.

(7) That in the report Ex.D/2, the fact of putting off clothes by the accused appellant Umesh was not mentioned and similarly, the fact of commission of rape is not mentioned.

16. The next witness is PW-7 Upendra Das, who is father-in-law of the prosecutrix PW-6 Rampyari and this witness admits following facts in cross-examination:

1. That after the alleged incident, he and others did not go to the Police Station, but went to Police Station after four days.
2. That Panchayat was being held to ascertain the fact whether rape was committed with the prosecutrix PW-6 Rampyari or not.
3. That since his daughter-in-law PW-6 Rampyari had gone to her parents house after the alleged incident, why he should have got filed the case.
4. That the report Ex.D/2 in the Police Station was written by Sepoy.

17. PW-8 Manju Devi is Bhabhi of the prosecutrix PW-6 Rampyari and she admits in her cross-examination that Liyakat told that case be filed and upon this, prosecutrix PW-6 Rampyari filed the case.

18. PW-12 Parikshandas is brother of the prosecutrix. He states that he did not go to the Police Station for lodging the report even after one month of the alleged incident and for that, he cannot assign any reason.

19. PW-1 Jeevachhdas is another witness, who says that whatever he is stating, he is stating as per the version given to him by PW-7 Upendra Das.

The case of the prosecution for the offence Under Section 376 IPC against the accused appellant.

20. In my considered opinion, because of the following reasons, the statement of the prosecutrix PW-6 Rampyari that accused appellant committed rape with her cannot be accepted:

(1) That in the report Ex.D/2, which was lodged by the prosecutrix herself on 15.4.1998, there was no mention of the fact that the accused appellant committed rape with her.

(2) That the report Ex.D/2 was also lodged after three days of the alleged incident and thus, sufficient time was available to the prosecutrix to think it over and even after three days, the fact of commission of rape on her by the accused appellant was not mentioned by the prosecutrix and thus, there appears to be reasonable delay in mentioning this fact.

(3) That in rape cases, mere delay in filing FIR is no ground to doubt the case of the prosecutrix, but filing of a complaint after considerable lapse of time is one of the grounds which will be taken into account by the Court while dealing with the case of rape and in the present case, after considerable time, the report Ex.D/2 was lodged and her statement Ex.D/3 was recorded and in both of them, the factum of rape is not found and in these circumstances, for the first time, allegations of rape were made by her in the complaint Ex.P/7 and thus, it is nothing, but improvement on her part.

(4) That no other independent witness supports the case of the prosecutrix on the point of rape.

(5) That there is much contradiction between the statement of the prosecutrix PW-6 Rampyari and her brother PW-12 Parikshandas. The prosecutrix PW-6 Rampyari states that her brother PW-12 Parikshandas also put his thumb impression on the report Ex.D/2 alongwith her, while her brother PW-12 Parikshandas states otherwise, though report Ex.D/2 itself shows that it bears the thumb impressions of PW-6 prosecutrix and PW-12 Parikshandas.

(6) That the fact that PW-7 Upendra Das, who is father-in- law of the prosecutrix, states that after the alleged incident, prosecutrix PW-6 Rampyari had gone to her parents' house, therefore, why he should have lodged the report also goes to show that incident of rape as alleged by the prosecutrix through complaint Ex.P/7 did not occur and something was being suppressed.

(7) That in the report Ex.D/2, there was specific mention that prosecutrix PW-6 Rampyari received two injuries, while she was being molested and these two injuries are found in her medical examination report Ex.P/2, but the medical examination report does not support the case of the prosecutrix on the point of commission of rape, as no injury on her private part was found though there are allegations that three accused persons committed rape with her.

21. For the reasons stated above, the statement of the prosecutrix PW-6 Rampyari that accused appellant committed rape with her cannot be accepted and the findings of the learned Addl. Sessions Judge No. 2, Hanumangarh convicting the accused appellant for the offence Under Section 376 IPC are liable to be set aside and he is entitled to be acquitted of the charge for the offence Under Section 376 IPC.

The case of the prosecution for the offence Under Section 323 IPC and whether accused appellant can be convicted for the offence Under Section 354 IPC in place of 376 IPC.

22. The first report Ex.D/2 though it has been lodged with some delay, but in that report, there is clear cut mention of the fact that the prosecutrix PW-6 Rampyari was beaten by the accused appellant and others, as a result of which, she received injuries on her eyes and her modesty was also outraged.

23. Now the question that arises for consideration is whether the statement of the prosecutrix PW-6 Rampyari can be believed to the extent that is found in her report Ex.D/2 or not.

24. Before appreciating this point, something should be said about the maximum 'falsus in uno falsus in omnilus.

25. It is well settled that evidence of a witness need not necessarily be true in all respects. It may be partly true and partly untrue and the said maxim 'falsus in uno falsus in omnibus' is not applicable in India and it is open to the Court in India to accept a part of evidence of a witness while rejecting the rest of it. For that, the decisions of the Hon'ble Supreme Court in Bhe Ram v. State of Haryana : 1980

CriLJ735 , State of Punjab v. Surja Ram 1995 SCC (Cri) 937, Jeevan v. State of M.P. (RLW 1997 (1) SC 78) and Shravan v. State of Punjab : 2000 CriLJ2780 may be referred to.

26. The statement of the prosecutrix PW-6 Rampyari that she received two injuries gets corroboration from the medical evidence, which is found in the statement of PW-3 Dr. Brijesh Kumar, who has clearly stated that duration of these injuries was about 7-10 days and he examined the prosecutrix PW-6 Rampyari on 22.4.1998 and incident took place on 12.4.1998 and thus, the statement of the prosecutrix PW-6 Rampyari that injuries were caused to her by the accused appellant is further strengthened. Apart from this, in the police proceedings on the report Ex.D/2, which was lodged on 15.4.1998, there is a mention of the fact that on her left cheek and left wrist, there were injuries. Hence, this fact also corroborates the statement of the prosecutrix PW-6 Rampyari on the point that on 12.4.1998 she received injuries.

27. Thus the version, which has been given in the report Ex.D/2 by the prosecutrix PW-6 Rampyari is supported by her statement in Court and further from the medical evidence.

28. It may further be stated here that the delay in the present case so far as the case of prosecution on the point of rape is concerned, was found fatal, but so far as the offences Under Sections 354 IPC and 323 IPC are concerned, this delay cannot be considered as fatal, as according to the statements of prosecutrix PW-6 Rampyari and her father-in-law PW-7 Upendra Das, first Panchayat was held and, thereafter, it was decided that report be lodged.

29. For the reasons stated above, the case of the prosecution that on the relevant date i.e. on 12.4.1998 accused appellant caused injuries to the prosecutrix PW-6 Rampyari and further outraged her modesty is well proved and thus, the findings of the learned Addl. Sessions Judge No. 2, Hanumangarh convicting the accused appellant for the offence Under Sections 323 and 341 IPC are liable to be confirmed and furthermore, the accused appellant is also liable to be convicted for the offence Under Section 354 IPC instead of 376 IPC.

On point of sentence

30. The accused appellant has been convicted for the offence Under Sections 354, 323 and 341 IPC.

31. The accused appellant has remained in PC and JC for the period from 29.1.1998 to 6.8.1998 and from 10.5.2000 till today and thus, he has remained in jail for about more than twenty months.

32. Looking to the entire facts and circumstances of the case and the fact that the accused appellant has remained in jail for about more than twenty months, in my considered opinion, if the accused appellant is sentenced to the period already undergone by him for the offence Under Sections 354, 323 and 341 IPC, it would meet the ends of justice.

Accordingly, this appeal filled by the accused appellant Umesh is partly allowed in the following manner:

(1) That accused appellant is convicted for the offence Under Section 354 IPC instead of 376 IPC and the judgment and order of the learned Addl. Sessions Judge No. 2, Hanumangarh dated 10.5.2001 convicting and sentencing the accused appellant for the offence Under Section 376 IPC stand set aside.

(2) That conviction recorded by the learned Addl. Sessions Judge No. 2, Hanumangarh vide his judgment dated 10.5.2001 against the accused appellant for the offence Under Sections 323 and 341 IPC is maintained.

(3) However for the offence Under Sections 354, 323 and 341 IPC, the accused appellant is sentenced to the period already undergone by him and the order of sentence dated 10.5.2001 passed by the learned Addl. Sessions Judge No. 2, Hanumangarh stands modified accordingly.

(4) Since accused appellant Umesh is in jail, he be released forthwith, if not required in any other case.