A STATE OF UTTAR PRADESH

v.

BABUL NATH

AUGUST 12, 1994

B [DR. A.S. ANAND AND FAIZAN UDDIN, JJ.]

Indian Penal Code, 1860 : Sections 375, 376—Rape—Ingredients—Evidence—Appreciation of—Child victim aged about 5 Years—Found lying in semi-conscious condition in pool of blood—Accused seen running away from
C *scene of occurrence—Medical Evidence establishing sexual assault—Conviction by Trial court—Acquittal by High Court—Held High Court fell into serious error in assessing evidence—Acquittal of accused totally unmerited—Courts to be sensitive in dealing with crimes against girl child.*

Code of Criminal Procedure, 1973 :

D

Sections 154, 161—FIR—Statement made to police—Held not substantive piece of evidence—To be used only to corroborate or contradict the witness.

Constitution of India :

E

Article 136—Appeal against acquittal—Appraisal of evidence—Held to be made if High Court erred in assessing evidence and its findings vitiated by error of law of procedure of found contrary to principles of natural justice or manifestly perverse, resulting into grave injustice.

F

The respondent was charged and tried for an offence punishable under section 376 IPC for committing rape of a child aged about 5 years. The prosecution case was that at about 4 P.M. on 15.3.1977 PW 1 to PW 3, while passing by the side of a grove, heard screams and cries of a girl.
G **They reached the place of occurrence and saw the victim lying down on the ground in a semi-conscious state with her private part profusely bleeding. They saw the respondent running away arranging his 'dhoti'. They arranged for a small cot and took the girl thereon and proceeded on foot to the police station where PW 1 made a written report. The police registered the case against the accused and got the girl medically examined. The lady**
H **doctor, after describing the injuries found on the private part of the victim,**

opined that the girl was subjected to sexual intercourse. The trial court, relying on the evidence of PW 1 supported by the medical evidence, convicted the accused of the offence charged and sentenced him for imprisonment for 5 years. On appeal, the High Court, disbelieving the prosecution case, set aside the conviction and acquitted the accused. Aggrieved, the State filed the appeal by the special leave.

Allowing the appeal, this Court

HELD : 1. The Trial Court rightly convicted and sentenced the respondent as the oral evidence coupled with the medical evidence clearly establishes that the respondent was responsible for sexual assault on the girl aged about 5 years. The judgment of the High Court is based on surmises and conjectures and its appreciation of evidence is absolutely faulty. [607-B]

2.1. This Court, in an appeal under Article 136 of the Constitution, does not normally reappraise the evidence by itself and go into the question of credibility of the witnesser, and the assessment of the evidence by the High Court is accepted as final unless the appreciation of evidence and finding is vitiated by any error of law of procedure or found contrary to the principles of nature justice, errors of record and misreading of the evidence, or where the conclusions of the High Court are manifestly perverse and unsupportable from the evidence on record. [603-D, E]

2.2. In the instant case, the evidence on record, particularly the statement of the eye-witness, PW 1, as well as the medical evidence and the law relating to the commission of offence of rape indicates that the High Court fell into serious error in assessing the evidence correctly and holding that the victim subjected only to an indecent assault and was not subjected to sexual intercourse. [603-F, G]

2.3 The High Court, while appreciating the evidence of the doctor, PW 6, observed that she conceded that the injuries found on the private part of the girl could also be caused by instrument like a piece of glass and on that basis took the view that the opinion of the doctor that rape was committed on the girl became doubtful. This finding is wholly unwarranted and perverse for the reason that simply because the injuries found on the private part of the girl could also be caused in several other ways than the sexual assault on the victim cannot lead to the conclusion that the injuries on her

A private part were not sustained by commission of rape but by some other instrument in the absence of any material to support such a conclusion. No piece of glass was found at or near the place of occurrence. On the contrary there is positive and convicting evidence showing that there was sexual assault on the girl. The doctor found the hymen completely torn, laceration on all sides of the vagina, fresh bleeding and blood stained discharged coming out. According to the evidence of the doctor a finger could be easily inserted inside part of the victim which otherwise was not possible in the case of a child aged 5 years. The High Court totally ignored this aspect of the matter. [603-H, 604-A to C, E, G, H]

Medical jurisprudence by Modi, 21st Edn. p.376, referred to.

2.4. Ingredients essential for proving a charge of rape are, the accomplishment of the act with force and resistance. It is not at all necessary that there should be complete penetration of the male organ with emission of semen and rupture of hymen. It is quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains. [605-C, D, E]

2.5. In the instant case there is more than enough evidence positively showing that there was sexual activity on the victim and she was subjected to sexual assault without which she would not have sustained injuries of the nature found on her private part by the doctor who examined her.

[605-E, F]

2.6. As regards the evidence of the sole eye-witness PW 1, the observations of the High Court that he fabricated the explanation for delay in lodging the report and that he is not a reliable witness are not correct. The victim was totally a stranger for informant PW 1 and the other persons who attended on her. PW 1 deposed that on hearing cries of the girl when he alongwith other persons reached near the place of occurrence into the grove, he saw the girl lying in semi-conscious condition in a pool of blood and the respondent running away arranging his 'dhoti'. The first tried to trace out the identity of the girl and her parentage and then managed for a small cot on which the girl could be taken to the Police Station which was at a distance of about 3-4 kms. They stayed for some time near his village on the expectation that some more villagers may also accompany them to the Police Station. The witness categorically stated the scores of persons arrived and he has also given the names of some of the persons. They

proceeded on foot to the Police Station where he lodged a written report. According to the witness about 5-6 hours were spent in all this before reaching the Police Station. There appears to be no apparent reason for fabricating the explanation for the delay in lodging the report which was bound to occur in the facts and circumstances of the case. The evidence of PW 1 has to be accepted as the same has been corroborated by the medical evidence. [605-F, G, 606-A, B]

2.7. The High Court, while holding that statement of PW 1 was not consistent with the report lodged by him and the statement made to the police under Section 161 Cr. P.C., lost sight of the fact that an FIR or a written report is not substantive piece of evidence but it can be used only to corroborate or contradict the maker thereof. PW 1 was not confronted with the alleged inconsistent statements contained in his report or the statement under section 161 Cr. P.C. [606-C, D]

3. The acquittal of the respondent was totally unmerited and such unmerited acquittals, particularly in crimes against girl child encourage the criminals. The Courts have, therefore, to be sensitive while dealing with such cases but the High Court in this case appears to be far from being sensitive while appreciating the material on record. [607-C-D]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 648 of 1990.

From the Judgment and Order dated 25.5.90 of the Allahabad High Court in Crl. A No. 1758 of 1979.

Bimal Roy Jad and A.S. Pundhir for the Appellant.

R.D. Upadhyay for the Respondent.

The Judgment of the Court was delivered by

FAIZAN UDDIN, J. 1. The respondent Babul Nath a Young man of 32 years was charged and tried for an offence punishable under Section 376 of the Penal Code for committing rape of Kumari Nirmala Devi, a child aged about 5 years, in the afternoon of 15.3.1977 in the grove of one Baleshwar Pathak in village Rampa within the jurisdiction of Police Station Bhadohi, District Varanasi. In Sessions Trial No. 26/78 the Session Judge, Varansi found the respondent guilty of the offence charged with and,

A therefore, convicted him under Section 376 I.P.C. and sentenced him to suffer imprisonment for five years. On appeal by the respondent the High Court rejected the testimony of the sole eye- witness Ram Lakhan, PW 1, set aside the conviction and sentence imposed on the respondent and acquitted him of the charge of rape. The State of Uttar Pradesh has, B therefore, approached this Court in appeal under Article 136 of the constitution of India on grant of leave.

2. The prosecution case as it emerges out of the written report made by Ram Lakhan,PW 1 is that on 15.3.1977 at about 4 PM when Ram Lakhan, PW 1, Jokhan Ram, PW 2, Kansraj, PW 3 and Kauleshwar white C passing by the side of the grove belonging to Baleshwar Pathak of village Rampa they heard screams and cries of some girl and, therefore, they rushed into the grove where they saw the girl Nirmala lying down on the ground in a semi-conscious state with her private part profusely bleeding and the respondent Babul Nath was seen running away arranging his Dhoti for that place. They arranged for a Khatola (Small cot) and proceeded on D foot with the girl on Khatola to the Police Station, Bhadohi where Ram Lakhan, PW 1 made a written report Ext. Ka.1 which was received by the Head Constable Awadh Narain Singh, PW 4. On the basis of said report Head Constable Awadh Narain Singh prepared a formal chik report Ext. KI. 2 and an offence under Section 376 I.P.C. was registered against the E respondent as per Ext. Ka. 3.

3. Therefore, the girl was taken to the Hospital, Bhadohi same day where she was medically examined by Dr. (Mrs.) Santosh Kohali, PW 6 at 10.30 PM. Dr. Kohali found the girl in semi-conscious state and her general condition was poor. Her pulse was 100 per minute. On external examina- F tion the doctor found hymen completely torn and there was laceration on all side of her vagina. There was fresh bleeding. On internal examination doctor noticed that a finger could be easily inserted in her private part. The blood stained discharge was coming out. In the opinion of the doctor the girl was subjected to sexual intercourse.

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4. At the trial the appellant adjured his guilt and pleaded false implication. He took the plea that he was a barber by profession and since he had left shaving the beards of the complainant and the witness and, there being party bandi in the village he was falsely implicated on that account. The appellant, however, led no evidence in defence. The learned H Trial Judge relying on the evidence of the solitary witness Ram Lakhan,

PW 1 supported by the medical evidence found the appellant guilty for the offence he was charged with and, therefore, convicted and sentenced him accordingly as said above. On appeal by the respondent, the High Court took a different view of the medical evidence as well as the evidence of the sole eye-witness Ram Lakhan, PW 1. The High Court was of the opinion that from the medical evidence a reasonable probability was made out that the girl was subjected to indecent assault and it was not proved beyond reasonable doubt that she was subjected to sexual intercourse. With regard to the sole eye-witness Ram Lakhan, the High Court took the view that he lodged the report in the Police Station after more than 5 hours of the incident and the explanation for the delay in lodging the report was fabricated and that his evidence on two important facts was contradictory to the written report lodged by him and that his evidence in court is not consistent with the First Information Report and the statement made under Section 161 Cr. P.C. on these premises the High Court reversed the findings and recorded the order of acquittal of the respondent.

5. At the very out set we may mention that in an appeal under Article 136 of the Constitution this Court does not normally reappraise the evidence by itself and go into the question of credibility of the witnesses and the assessment of the evidence by the High Court is accepted by the Supreme Court as final unless, of course, the appreciation of evidence and finding is vitiated by any error of law of procedure or found contrary to the principles of natural justice, errors of record and mis-reading of the evidence, or where the conclusions of the High Court are manifestly perverse and unsupportable from the evidence on record. In the instant case, on a close scrutiny of the evidence on record particularly the statement of the eye-witness Ram Lakhan, PW 1 as well as the medical evidence and the law relating to the commission of offence of rape, we are of the definite view that the High Court fell into serious error in holding that the victim of this case was subjected only to an indecent assault and was not subjected to sexual intercourse. As regards the evidence of Ram Lakhan, PW 1 and his reliability, the High Court faultered in assessing him evidence correctly as well as in holding that he was not a reliable witness resulting into grave injustice.

6. While appreciating the evidence of the lady doctors Smt. Kohali, PW 6 the High Court observed that the lady doctor conceded that the

injuries found on the private part of the girl could also be caused by instrument like a piece of glass and on that basis took the view that the opinion of the lady doctor that rape was committed on the girl becomes doubtful. This finding is wholly unwarranted and perverse for the reason that simply because the injuries found on the private part of the girl could also be caused in several other ways than the sexual assault on the victim cannot lead to the conclusion that the injuries on her private part were not sustained by commission of the rape but by some other instrument in the absence of any material to support such a conclusion. In the present case though the doctor deposed that the injuries could also be caused by instrument like piece of glass but there were neither circumstances nor any material to conclude or even to suggest that the victim had sustained the injuries by any piece of glass. No piece of glass was found at or near the place of occurrence. On the contrary there is positive and convincing evidence showing that there was sexual assault on the girl and the finding that she was subjected only to indecent assault is absolutely incorrect.

7. In order to see whether there was sexual assault on the girl we may have a look to the medical evidence. Doctor Smt. Santosh Kohali deposed that the victim girl was brought in the hospital in a semi-conscious state and her general condition was poor. On external examination of the girl the doctor found that the hymen was completely torn and there was laceration on all sides of vagina. The doctor noticed that there was fresh bleeding in her private part. On internal examination the doctor found that a finger could easily be inserted in her private part and blood stained discharge was coming out. Thus from the medical evidence it is clear that the girl was not only subjected to an indecent assault but there was sexual activity and the girl was subject to sexual assault, otherwise the doctor would not have found the hymen completely torn, laceration on all sides of the vagina and fresh bleeding. There is yet another factor which goes to show that the girl was subjected to sexual intercourse. According to the evidence of lady doctor a finger cold be easily inserted inside her private part which otherwise was not possible in the case of a child aged 5 years because according to the Medical Jurisprudence by Modi, 21st Edn. Page 376, in a girl under 14 years of age the vaginal orifice is usually so small that it will hardly allow the passage of the little finger through her hymen. In the present case if the girl aged 5 years was not subjected to sexual intercourse the finger could not have been easily inserted in her private part as observed by the lady doctor. The High Court totally ignored this

aspect of the matter also and on wrong premises came to the conclusion that the victim was subjected to indecent assault only. A

8. It may here be notice that section 375 of the I.P.C. defines rape and the explanation to Section 375 reads as follows :

> "Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape." B

From the explanation reproduced above it is distinctly clear that ingredients which are essential for proving a charge of rape are the accomplishment of the act with force and resistance. To constitute the offence of rape neither Section 375 of I.P.C. not the explanation attached thereto require that there should necessarily be complete penetration of the penis into the private part of the victim/prosecutrix. In other words to constitute the offence of rape it is not at all necessary that there should be complete penetration of the male organ with emission of semen and rupture of hymen. Even partial or slightest penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen of even an attempt at penetration into the private part of the victim would be quite enough for the purpose of Section 375 and 376 of I.P.C. that being so it is quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains. But in the present case before us as noticed above there is more than enough evidence positively showing that there was sexual activity on the victim and she was subjected to sexual assault without which she would not have sustained injuries of the nature found on her private part by the doctor who examined her. C D E F

9. Now coming to the evidence of the sole eye-witness Ram Lakhan, PW 1 we find that the observations of the High Court that he fabricated the explanation for delay in lodging the report and that he is not a reliable witness are not correct. It may be pointed out that the girl Nirmala Devi was totally a stranger for informant Ram Lakhan PW 1, and the other persons who attended on her when she was found lying in semi-conscious state with injuries on her private part with profused bleeding. Ram Lakhan deposed that he, along with others took the girl and proceeded on foot to the Police Station. They first tried to trace out the identity of the girl and her parentage and then managed for a Khatola (Small cot) on which the girl could be taken to the Police Station which was at a distance of about G H

A 3-4 Kms. from the place of occurrence, he stayed for some time near his village on the expectation that some more villagers may also join them for taking the victim to the Police Station. Ram Lakhan categorically stated that scores of persons arrived and he has also given the names of some of the persons. They proceeded to the Police Station where he lodged a B written report. According to Ram Lakhan about 5-6 hours were spent in all this before reaching the Police Station. There appears to be no apparent reason for fabricating the explanation for the delay in lodging the report which was bound to occur in the fact and circumstances stated above.

10. The evidence of Ram Lakhan has been held to be unreliable as C the High Court found that his statement was not consistent with the report lodged by him and the statement made to the police under Section 161 Cr. P.C. But strangely enough the High Court lost sight of the fact that F.I.R. or the written report is not substantive piece of evidence but it can be used only to corroborate or contradict the maker thereof. Ram Lakhan, PW 1 D was not confronted with the alleged inconsistent statement contained in his report or in his case diary statement under Section 161 Cr. P.C.,yet the High Court relied on those statements which is not permissible under the law unless inconsistent statements were put to the witness. In these circumstances the reasons on the basis of which the High Court found Ram Lakhan as unreliable witness could not be accepted as the High Court E made a wrong approach while appreciating the evidence of Ram Lakhan, Ram Lakhan deposed that while he and other persons were passing from near the grove of Baleshwar Pathak they heard the cries of the girl and, therefore, they rushed to the place. It took about 5-10 minutes to them to reach at the place of occurrence inside the grove and it appears that during F this period of 5-10 minutes the respondent would have completed his sexual activity on the girl. According to the statement of Ram Lakhan when he reached into the grove and near the place of occurrence he saw the respondent running away from the place of occurrence arranging his Dhoti and the girl was found in semi-conscious condition in a pool of blood. This G statement of Ram Lakhan is corroborated from the medical evidence that we have already discussed in the earlier part of this judgment. Thus, the evidence of Ram Lakhan PW 1 has to be accepted as the same has been corroborated by the medical evidence. Not only this but even the other witness who turned hostile, namely, Jokhan Ram PW 2 , has also admitted that the girl was found in a semi-conscious condition and that he alongwith H several persons including the witness Ram Lakhan, PW 1 had taken the

unknown girl on a Khatola to the Police Station where Ram Lakhan had lodged the written report. He also stated that they had reached the Police Station at about 8.30. In view of these facts and circumstances the High Court fell into a serious error in taking the view that the explanation for the delay in lodging the report was fabricated or that the girl was not subjected to sexual intercourse. The evidence of Ram Lakhan coupled with the medical evidence clearly goes to establish that the respondent was responsible for sexual assault on the child Nirmala aged about 5 years resulting into serious injuries on her private part and, therefore, he was rightly convicted and sentenced by the learned Trial Judge. The Judgment of the High Court is based on surmises and conjectures and its appreciation of the medical evidence is absolutely faulty. The acquittal of the respondent was totally unmerited the such unmerited acquittals, particularly in crimes against girl child encourage the criminals. The Courts have, therefore, to be sensitive while dealing with such cases but the High Court in this case appears to be far from being sensitive while appreciating the material on the record.

A B C D

11. In the facts and circumstances narrated above the appeal succeeds and is hereby allowed. The judgment and order of acquittal recorded by the High Court is set aside and the judgment of the Trial Court holding the respondent guilty for the offence punishable under Section 376 and imposing a sentence of 5 years' rigorous imprisonment is restored. The respondent shall be taken into custody to serve the sentence. His bail bond is hereby cancelled.

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R.P. Appeal allowed.