Reportable

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL No. 1118 of 2004

Ganga Singh ..... Appellant

Versus

State of Madhya Pradesh ..... Respondent

J U D G M E N T

A. K. PATNAIK, J.

This is an appeal by way of special leave under Article 136 of the Constitution against the judgment dated 26.06.2003 of the Madhya Pradesh High Court, Gwalior Bench, in Criminal Appeal No.92 of 1990.

2. The facts very briefly are that the informant lodged an oral complaint on 22.12.1987 at 6.00 P.M. at Mangraoul Police Station, alleging that on 21.12.1987 at 6.30 P.M. in the evening when she had gone to the field of Tilak Singh at

Naya Kunwa to answer her natural call and was coming out from the field, the appellant came and caught hold of her and fell her down, gagged her mouth, lifted her petticoat and committed rape. She returned home and told her mother-in-law about the incident and on 22.12.1987 when her husband, who works on a truck, returned home, she has come to lodge the report in the police station. The police registered the complaint as an FIR, got the informant medically examined at 7.15 P.M. on the same day. Dr. (Mrs.) Kusumlata of Government Hospital, Seondha, opined that as the informant is a married lady and was habitual to intercourse, no definite opinion could be given on whether she was subjected to any sexual intercourse. The petticoat and vaginal smear slides (which were prepared and sealed) were sent for further examination. The police then undertook the investigation, went to the place of occurrence on 23.12.1987 and seized a blouse and a dhoti and got prepared the map of the site of occurrence and after recording statements of witnesses and completing the investigation, submitted a charge-sheet against the

appellant under Section 376 of Indian Penal Code (for short 'IPC').

3. The appellant denied the charge and Session Trial No.9/1988 was conducted by the Sessions Judge, Datia. At the trial, the informant was examined as PW-5, who stood by her story in her complaint, the seizure witness was examined as PW-1, the mother-in-law was examined as PW-2, Dr. Kusumlata was examined as PW-9 and the Investigating Officer was examined as PW-10. The Sessions Judge, after considering the evidence on record held that as PW-5 did not obstruct or resist the appellant from doing the indecent act and no injury was caused on her person, PW-5 appears to have given her consent for the sexual intercourse and acquitted the appellant of the offence under Section 376, IPC, by judgment dated 30.11.1988.

4. The judgment of the Sessions Judge was challenged before the High Court by the State of Madhya Pradesh in Criminal Appeal No.92 of 1990. The High Court held in the impugned judgment that PW-5 has categorically deposed

that the appellant had committed rape against her consent and she had also deposed that she had informed her mother-in-law after returning home and this fact has been corroborated by her mother-in-law (PW-2) and, therefore, there was no reason to disbelieve the testimony of PW-5. The High Court further held that merely because there were some discrepancies in the deposition of PW-5, her testimony cannot be treated as doubtful. The High Court concluded that the finding of acquittal recorded by the trial court was totally perverse and contrary to the evidence on record and set aside the judgment of acquittal and convicted the appellant under Section 376, IPC, and sentenced him to seven years rigorous imprisonment, which was the minimum sentence for the offence of rape under Section 376, IPC.

5. At the hearing, Mr. Ravi Prakash Mehrotra, learned Amicus Curiae appearing for the appellant, submitted that this Court has held in *Narender Kumar v. State (NCT of Delhi)* [(2012) 7 SCC 171] that the prosecution has to prove its own case beyond reasonable doubt and cannot take support from the weakness of the case of defence and hence

there must be proper legal evidence to record the conviction of the accused. He also cited *Rai Sandeep alias Deepu v. State (NCT of Delhi)* [(2012) 8 SCC 21] in which the qualities of a 'sterling witness' have been described and it has been held that the evidence of only a 'sterling witness' can be accepted by the Court without any corroboration. He submitted that in this case this Court further held that the version of such a 'sterling witness' on the core spectrum of the crime should remain intact in order to enable the Court trying the offence to rely on such core version.

6. Mr. Mehrotra submitted that PW-5 was not such a 'sterling witness' and her version that the appellant committed rape on her cannot be believed. He submitted that PW-5 has falsely implicated the appellant in the offence of rape on account of enmity between the appellant and the husband of PW-5. He contended that the Doctor (PW-9) in her evidence as well as the medical examination report (Ext.P-8) are clear that there were no external injuries on the person of PW-5. He submitted that PW-1, the seizure witness, has clearly proved the seizure of bangles, dhoti and

a blouse from the field of Tilak Singh where the occurrence was alleged to have been taken place and these articles were seized in presence of PW-5 and yet PW-5 has omitted to mention about the seizure of these articles from the place of occurrence in her evidence. He finally submitted that the FIR (Ext.P-9) was scribed by V.S. Rathod of the Police Chowki and not by PW-10, the Investigating Officer. He argued that in fact PW-10 went on leave from 23.12.1987 and made a shoddy and defective investigation and hastily submitted a charge-sheet against the appellant. He submitted that there was, therefore, reasonable doubt in the prosecution case and the appellant was entitled to be acquitted because of such doubt.

7. Mr. Siddhartha Dave, learned counsel appearing for the State of Madhya Pradesh, submitted that the testimony of PW-5 that the appellant forcibly committed rape on her by felling her on the ground is corroborated by PW-2 before whom she made a statement soon after the incident as well as by the FIR (Ext. P-9) lodged by her to PW-10 one day after the incident. This is, therefore, not a case where the finding

of guilt against the appellant recorded by the High Court is on the sole testimony of PW-5 as argued by Mr. Mehrotra. He cited *Karnel Singh v. State of M.P.* [(1995) 5 SCC 518] for the proposition that the prosecutrix of a sex offence cannot be put on par with an accomplice whose evidence needs to be corroborated in material particulars. He submitted that the nature of evidence of the prosecutrix is such that no corroboration is necessary and if the testimony of the prosecutrix is trustworthy and totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely implicate the person charged, the Court should ordinarily have no hesitation in accepting her evidence. He submitted that applying the aforesaid test to the evidence of PW-5 and considering all other circumstances in this case, the High Court was right in recording the conviction against the appellant.

8. In reply to the submission of Mr. Mehrotra that the medical evidence of PW-9 as well as the medical examination report (Ext.P-8) did not disclose any injuries on

the person of PW-5, Mr. Dave cited the decision of this Court in *Wahid Khan v. State of Madhya Pradesh* [(2010) 2 SCC 9] in which even though there was no medical evidence to corroborate the testimony of the prosecutrix, this Court held that such corroboration was not necessary where the evidence of the prosecutrix was otherwise consistent and stood corroborated by other circumstances and the FIR. In reply to the contention of Mr. Mehrotra that the appellant has been falsely implicated on account of enmity between the husband of PW-5 and the appellant, he submitted that PW-2 has very fairly stated in her evidence that there was enmity between the two and yet has stated that the complaint against the appellant has not been falsely made. He submitted that a very strong circumstance against the appellant is that after the incident on 21.12.1987 the appellant absconded and he was arrested by the police after ten days on 31.12.1987.

9. Mr. Dave submitted that the trial court has not appreciated the meaning of the word 'consent' used in the

definition of 'rape' in Section 375, IPC. He cited *State of Uttar Pradesh v. Chhotey Lal* [(2011) 2 SCC 550] for the proposition that consent for the purpose of Section 375, IPC, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act as also after full exercise of the choice between resistance and assent. He submitted that the evidence of PW-5 clearly establishes that there was no voluntary participation in the sexual intercourse by PW-5, and on the contrary, PW-5 could not physically resist the sexual intercourse forced on her by the appellant. He submitted that the High Court therefore rightly held the appellant guilty of the offence of rape and the finding of guilt recorded by the High Court against the appellant should not be disturbed by this Court in this appeal.

Findings of the Court

10. Mr. Mehrotra is right in his submission that burden is on the prosecution to prove beyond reasonable doubt that the appellant is guilty of the offence under Section 376, IPC and this burden has to be discharged by adducing reliable

evidence in proof of the guilt of the appellant. In the present case, the prosecution seeks to establish the guilt of the appellant through the evidence of PW-5, the prosecutrix. Law is well-settled that the prosecutrix is a victim of, and not an accomplice in, a sex offence and there is no provision in the Indian Evidence Act requiring corroboration in material particulars of the evidence of the prosecutrix as is in the case of evidence of accomplice. He submitted that the prosecutrix is thus a competent witness under Section 118 of the Indian Evidence Act and her evidence must receive the same weight as is attached to an injured witness in cases of physical violence [see *State of Maharashtra* vs. *Chandrapraksh Kewalchand Jain* (1990) 1 SCC 550]. Keeping this principle in mind, when we look at the evidence of PW-5, we find that she has categorically stated that the appellant fell her down, covered her mouth with one hand and restricted her hands with other hand and lifted her petticoat and committed rape on her. It is true that on her medical examination the next day, PW-9 did not find any injury on the person of PW-5, but PW-5 has explained that she fell on

her back in the agricultural field which had a smooth surface and there were wheat and mustard crops in the field and this could be reason for her not suffering injury.

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

> "……it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross examination showing that the imputation is intended to be made,

> and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit."

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

12. The evidence of PW-5, in this case, is also corroborated by other evidence. Section 157 of the Indian Evidence Act provides that in order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to

investigate the fact may be proved. The evidence of PW-5 is corroborated by the evidence of her mother-in-law (PW-2) before whom she stated about the commission of the rape by the appellant soon after the incident the very same evening. The evidence of PW-5 is also corroborated by the FIR (Ex.9) before the Investigating Officer, PW-10, before whom she lodged the complaint one day after the incident.

13. Further, though the medical evidence of PW-9 and the medical examination report Ex. P-8 do not give any definite opinion on whether or not PW-5 suffered any sexual intercourse, soon after the medical examination on 22.12.1987, the petticoat and vaginal smear slides (which were prepared and sealed) were sent for further examination and the report of State Forensic Science Laboratory (Ex. P-15) confirms spots of semen and spermatozoa. This evidence confirms that PW-5 had been subjected to sexual intercourse some time before she lodged the complaint in the police station on 22.12.1987. Hence, the forensic evidence is not entirely in conflict with the evidence of PW-5 so as to belie her story that she was raped by the appellant.

14. We further find that the appellant has not taken a defence in his statement under Section 313 of the Criminal Procedure Code that the sexual intercourse was with the consent of PW-5. Instead, he has denied having had any sexual intercourse with PW-5 and has taken a stand that he has been falsely implicated on account of a quarrel between him and the husband of PW-5. Yet, the trial court held that there was proof of sexual intercourse between the appellant and PW-5, but the sexual intercourse was with the consent of PW-5. We are of the considered opinion that as the appellant had not taken any defence of consent of PW-5, the trial court was not correct in recording the finding that there was consent of PW-5 to the sexual intercourse committed by the appellant and should have instead considered the defence of the appellant that he had been falsely implicated because of a quarrel between him and the husband of PW-5. We have, however, considered this defence of the appellant but find that except making a suggestion to PW-2, the appellant has not produced any evidence in support of this defence. As PW-2 has denied the suggestion, we cannot

accept the defence of the appellant that he was falsely implicated on account of a quarrel between the appellant and the husband of PW-5.

15. We are also unable to accept the submission of Mr. Mehrotra that the investigation by the police is shoddy and hasty and there are defects in the investigation and therefore benefit of doubt should be given to the appellant and he should be acquitted of the charge of rape. The settled position of law is that the prosecution is required to establish the guilt of the accused beyond reasonable doubt by adducing evidence. Hence, if the prosecution in a given case adduces evidence to establish the guilt of the accused beyond reasonable doubt, the court cannot acquit the accused on the ground that there are some defects in the investigation, but if the defects in the investigation are such as to cast a reasonable doubt in the prosecution case, then of course the accused is entitled to acquittal because of such doubt. In the present case, as we have seen, the evidence of PW-5 as corroborated by the evidence of PW-2 and the FIR establish beyond reasonable doubt that the appellant has

committed rape on PW-5 and thus the appellant is not entitled to acquittal.

16. In the result, we are not inclined to interfere with the finding of the guilt recorded by the High Court against the appellant as well as the minimum sentence of 7 years imprisonment for the offence under Section 376 IPC imposed by the High Court. The appeal is accordingly dismissed.

.....J.
(A. K. Patnaik)

.....J.
(Gyan Sudha Misra)

New Delhi,
July 04, 2013.