

**IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

Crl A(S)No. 1/2024

Reserved on: 07.05.2024

Pronounced on: 17 .05.2024

Naresh Kumar son of Des Raj resident of Village Duggan Tehsil Bani
District Kathua presently lodged at District Jail Kathua

...appellant

Through: - Mr. Jagpaul Singh Advocate
Mr.Sourav Mahajan Advocate.

Vs.

UT of Jammu and Kashmir through SHO P/S Bani

...Respondent

Through: - Mr. Dewaker Sharma Dy.AG

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1 The present appeal is directed against judgment dated 24.01.2024 passed by the learned Principal Sessions Judge, Kathua ('the trial Court' for short) whereby the appellant has been convicted for offences under Sections 363/376/343 RPC, where-after, in proof of offence under Section 363 RPC, the appellant has been sentenced to undergone simple imprisonment for a period of 07 years and to a pay a fine of Rs.5000/-, in proof of offence under Section 376 RPC, he has sentenced to undergo simple imprisonment for a period of 10 years and to pay a fine of Rs.10,000/-, and, in proof of offence under Section 343 RPC, the appellant has been sentenced to undergo simple imprisonment for a period of one year and to pay a fine of Rs.1000/-. All the sentences have been directed to run concurrently.

2 Before proceeding to discuss the grounds of challenge, it would be apt to briefly state the facts that gave rise to initiation of prosecution against the appellant before the trial Court.

3 On 27.02.2018, the father of the prosecutrix PW Simru Ram lodged a report with Police Station, Bani alleging therein that on 20.02.2018, he asked her daughter (prosecutrix) to come to his residential house for assisting him in construction work, but she did not turn up until 11 am. He searched for her at his home, but could not find her there. He waited for the prosecutrix till evening, but could not find any clue about her. According to PW Simru Ram, the age of her daughter was 15 years and he suspected that she has been kidnapped by some person. On the basis of this report, the police registered FIR No. 16/2018 for offence under Section 363 RPC and started investigation of the case.

4 During investigation of the case, the prosecutrix was recovered and she was subjected to medical examination. Her statement under Section 164-A CrPC was recorded before the Magistrate and a report relating to her age was also obtained from the Radiologist. As per the said report, the age of the prosecutrix was found to be 15/16 years. It was found, after investigation of the case, that the prosecutrix was in contact with the appellant/accused on phone for about one month and in February, 2018, the appellant called her to Bani. He made her to sit in a Bus and brought her to Kathua from where she was taken to Rajasthan in a Train where the appellant/accused had taken a room on rent. It was also found that the appellant had kept the prosecutrix over there for

about 10-12 days and committed rape upon her 4-5 times. Thereafter, the prosecutrix was rescued by her brother who brought her back to Bani. Thus, offences under Sections 363/376 RPC were found established against the appellant/accused.

5 The learned trial Court vide order dated 01.02.2022 framed charges for offences under Sections 363/376/343 RPC against the appellant/accused. He denied the charges and claimed to be tried. The prosecution, in order to prove its case against the appellant, examined 07 out of 12 witnesses cited in the challan. After completion of prosecution evidence, the statement of the appellant/accused under Section 342 of J&K Cr.P.C was recorded wherein he denied the occurrence and claimed that the prosecution witnesses have deposed falsehood against him. He did not lead any evidence in defence.

6 The learned trial Court, after hearing the parties and upon appreciating the evidence on record, passed the impugned judgment whereby the appellant/accused has been convicted of offences under Sections 376/363 and 343 RPC and he has been sentenced for committing the aforesaid offences.

7 The appellant has challenged the impugned judgment of conviction and sentence on the ground that the trial Court has not appreciated the evidence on record in its proper perspective. It has been contended that the prosecutrix has made contradictory statements before the Magistrate under Section 164-A Cr.P.C and before the Court during trial of the case and these contradictions relate to essential aspects of the

case. On this ground, it is urged that the statements of the prosecutrix cannot be believed. It has been further contended that the prosecution has failed to prove that the prosecutrix was minor at the time of alleged occurrence and having regard to the fact that she had allegedly stayed with the appellant at Rajasthan for a considerable period of time, it can be inferred that even if she had indulged in any sexual activity with the appellant, the same was consensual in nature. It has also been contended that the trial Court has erroneously given a finding that the prosecutrix was recovered from the custody of the appellant when the evidence on record clearly shows that she was produced before the police by her parents.

8 I have heard learned counsel for the appellant and learned Dy.AG appearing for the respondent. I have also gone through the impugned judgment, the grounds of appeal and the record of the trial Court including the evidence led by the prosecution.

9 As already noted, the charge against the appellant is that he had kidnapped the prosecutrix who was minor at the relevant time, where-after, she was taken by him to Rajasthan where she was kept confined in a room and was raped by the appellant over a period of several days. It is further case of the prosecution that the prosecutrix was rescued from the clutches of the appellant/accused by her brother.

10 The case of the prosecution primarily hinges upon the statement of the prosecutrix. The other circumstances, which, according to the prosecution, corroborate the statement of the prosecutrix, are the

medical evidence and the circumstance that she was recovered from the custody of the appellant/accused. So far as the medical evidence is concerned, it seems that the defence has admitted the medical report relating to the prosecutrix that has been prepared by PW Dr. Tania Kakkar. As per the said report, there was no evidence of recent sexual intercourse. PW-6 Mushtaq Ahmed Bhat, the Scientific Officer has proved the report of the FSL in respect of vaginal smear of the prosecutrix. As per the said report, no spermatozoa were detected in the said vaginal smear. Thus, the medical evidence on record is not of any help to the case of the prosecution.

11 The other circumstance that has been relied upon by the prosecution is the recovery of prosecutrix from the custody of the appellant. EXPW-ML is the memo of recovery of the prosecutrix. As per this document, the prosecutrix was produced before the police by her parents PWs Satya Devi and Simru Ram. PW Sumru Ram has stated that the prosecutrix, after coming back from Rajasthan, met her at Bani. He has further stated that he did not go to Rajasthan. PW Satya Devi has also stated that she did not go to Rajasthan, as such, she cannot tell as to from whose custody, the prosecutrix was recovered. The Investigating Officer PW Mohan Lal has clarified in his statement that on 09.06.2018, PWs Simru Ram and Satya Devi came to the Police Station along with their daughter and informed him that she has been recovered, whereafter, he prepared the memo of recovery. He admitted that he did not visit Rajasthan where the prosecutrix was alleged to have been taken by the appellant.

12 From the statements of the aforesaid witnesses, it is clear that the prosecution has not been able to prove the circumstance that the prosecutrix was recovered from the custody of the appellant. In fact, the case of the prosecution is that while the prosecutrix was in the captivity of the appellant, she called her sister on phone, where-after, her brother rescued her from the clutches of the appellant/accused and brought her back from Rajasthan.. The prosecution has neither cited brother of the prosecutrix, namely Mukesh Kumar as witness in the challan, nor has he been examined as a witness during trial. When the Investigating Officer PW Mohan Lal was cross-examined on this aspect of the matter, he stated that PW Usha Devi, the sister of the prosecutrix, upon receiving a phone call from the prosecutrix, informed her brother Mukesh Kumar, who proceeded to Delhi. He has further stated that up to Delhi, the prosecutrix was brought by a person namely Rattan Chand and from Delhi, she was taken to her home by her brother Mukesh Kumar. Neither Mukesh Kumar, nor Rattan have been cited or examined as witnesses by the prosecution. Thus, there is absolutely no evidence on record to prove the circumstance that the prosecutrix was recovered from the captivity of the appellant

13 That leaves us with the uncorroborated testimony of the prosecutrix. Learned counsel for the respondent-State has vehemently argued that conviction in a rape case can be based upon solitary statement of a victim and it is not necessary for the Court to look for corroboration of her statement. On the other hand, learned counsel appearing for the appellant has contended that there are glaring

contradictions in the statement of the prosecutrix, as such, her sole testimony cannot form basis of conviction of the appellant .

14 The legal position as regards the reliability of statement of a victim of sexual assault has been a matter of discussion and debate for a long time before the Supreme Court and various High Courts of the Country. The position of law that has evolved from the judicial precedents rendered by the Supreme Court and the High Courts of the country over a period of time is that the testimony of a victim of sexual assault, if found to be worthy of credence, requires no corroboration and that the Court may convict an accused on the sole testimony of the prosecutrix. However, the Court, while appreciating the statement of a victim of sexual assault, has to ascertain as to whether the statement of the prosecutrix is worthy of credence. If it is so, then no corroboration is necessary. The question, that is to be determined by the Court in all such cases, is as to whether the statement of the prosecutrix is of sterling quality so that the same can be relied upon without any corroboration.

15 The Supreme Court in the case of **Rai Sandeep @ Deepu vs State of NCT of Delhi, (2012) 8 SCC 21** had an occasion to consider as to who can be said to be a sterling witness. Para (22) of [the said judgment](#) is relevant to the context and the same is reproduced as under:

22. In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of

the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged".

16 From the foregoing analysis of law on the subject undertaken by the Supreme Court, it comes to the fore that prior to placing reliance upon statement of a prosecutrix, the Court should satisfy itself that there is no doubt as to the factum of occurrence, the person involved as well as the sequence of occurrence. It has to be further seen

whether the version given by the prosecutrix is consistent with the version given by every other witness and whether it has correlation with the supporting material.

17 In the light of the aforesaid legal position, let us now analyze the statement of the prosecutrix. According to her, on 20.02.2018 when she was proceeding to the house of her sister PW Usha Devi, she found a vehicle parked in the market and the appellant was sitting in the said vehicle. She boarded the said vehicle for the purpose of going to the house of her sister, but upon boarding the vehicle, the appellant made her to take cold drink, as a result of which, she went unconscious. After three days, she regained her senses and found herself in a room in Rajasthan. When she enquired from the appellant, he threatened her. She was kept locked in the room for about 3-4 days. The appellant would come drunk and commit rape upon her. After 2-3 days, the appellant left his phone in the room and went out to attend his job in a company. She called her sister from the said phone and told her that she is in Rajasthan. Her sister called her brother Mukesh who, in turn, called Rattan Chand, who was working in the same company. Rattan Chand brought her from there and left her halfway, where-from, she was brought by her brother to her home.

18 The attention of the prosecutrix was brought to her statement recorded under Section 164 CrPC where she had stated that she was in contact with the appellant for about one month and that he had called her to Bani from where she was brought to Kathua in a Bus

and thereafter to Rajasthan in a Train. She termed that her said statement is not correct.

19 Section 145 of the Evidence Act permits cross-examination of a witness as to previous statement made by him/her in writing and relevant to the matter in question and if it is intended to contradict him/her by the writing, his/her attention has to be brought to those parts of the writing which are to be used for the purpose of contradiction. In the instant case, during the trial, the previous statement of the prosecutrix, that she was having acquaintance with the appellant/accused who called her to Bani and thereafter, he accompanied her to Kathua in a Bus from where they boarded a Train to Rajasthan, is quite contrary to her statement in the Court that she found a vehicle parked in the market and the appellant was sitting in the said vehicle and when she boarded it, she was offered cold drink which she consumed and fell unconscious, where-after, she found herself in Rajasthan. This contradiction is material in nature and, therefore, cannot, by any stretch of imagination, be termed as a 'minor contradiction'. The defence has been able to prove this contradiction and, therefore, in terms of Section 155 of the Evidence Act, the defence has succeeded in impeaching the credibility of the prosecutrix.

20 There is yet another inconsistency in the statement of the prosecutrix which deserves to be noticed. In her statement, she has deposed that she remained confined in a room for about 5-6 days. She further stated that after two days, she called her sister on phone. As per the evidence on record, the prosecutrix had gone missing on 20.02.2018

and she was recovered on 09.06.2018. Thus, if the prosecution case is to be believed, she had remained in the company of the appellant for more than four and a half months, but, in her statement, she has stated that she remained confined in the room with appellant only for 5-6 days and after two days only, she had informed her sister. There is no explanation from the prosecutrix as to what had happened for all these months. This aspect of the matter has remained unexplained and uninvestigated. This causes a serious dent in the prosecution case.

21 There are other lacunae in the statement of the prosecutrix on essential aspects of the matter. She has not stated as to which place in Rajasthan she was taken by the appellant. She has stated that she was not knowing the exact location of the place of her confinement and she was not even knowing the name of the city etc. where she had been confined by the appellant, but still she was recovered by her brother with the help of one Rattan Chand. It is a mystery as to how the prosecutrix could be recovered from a large State like Rajasthan without there being any clue about her exact location. Perhaps, the brother of the prosecutrix Mukesh and the person who allegedly recovered the prosecutrix (Rattan Chand) could have thrown some light on this aspect of the matter, but unfortunately, the Investigating Agency has neither examined these witnesses during investigation of the case, nor has it cited them as witnesses in the challan. Thus, a vital aspect of the matter has been left uninvestigated by the Investigating Agency. The non-examination of Rattan Chand and Mukesh as witnesses during instigation and trial seriously dents the prosecution case and in terms of Section 114

illustration (g) of Evidence Act, an adverse inference has to be drawn against the prosecution.

22 From the foregoing discussion, it is clear that statement of the prosecutrix cannot be treated as one of sterling quality for the reason that she has contradicted her previous statement on a vital aspects and there are inherent improbabilities and contradictions in her statement making it highly hazardous to place reliance upon it. The prosecutrix in her statement before the Court has given a different version of the occurrence than the one projected by the Investigating Agency in the charge-sheet. While the prosecutrix has stated that she boarded the vehicle of the appellant and she was made to take cold drink, whereafter, she went unconscious and found herself at Rajasthan, but the case of the prosecution as projected in the charge-sheet is that she had previous acquaintance with the appellant who called her to Bani wherefrom she boarded a Bus to Kathua and thereafter she was taken to Rajasthan in a Train. Once her version of occurrence is not consistent with the version of occurrence given in the challan, her statement becomes doubtful. For this reason, the same cannot form a basis of conviction of the appellant, particularly when the corroborative circumstances have not been established.

23 The learned trial Court while convicting the appellant has not taken note of any of the aforesaid aspects of the matter. The finding of the trial Court that the prosecutrix was recovered from the custody of the appellant is not supported by any evidence. The same is clearly perverse. The manner in which the learned trial Court has analyzed the

evidence on record leaves much to be desired. The trial Court without testing the testimony of the prosecutrix on the touchstone of settled principles of evidence, has proceeded to rely upon the same. The findings recorded by the trial Court to say the least, are perverse being based on no evidence and flawed reasoning. The same deserve to be set aside.

24 Accordingly, the impugned judgment of conviction and sentence recorded by the trial Court is set aside. The appellant is directed to be released from the custody forthwith, if not required in any other case.

Record of the trial Court along with a copy of this judgment be sent back.

(Sanjay Dhar)
Judge

JAMMU
17.05.2024
Sanjeev '

Whether order is reportable: Yes