HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT JAMMU

CRAA No. 189/2014

Reserved on: 05.06.2023
Pronounced on:08.06.2023

State of J&K .....Appellant (s)

Through: Mr. Pawan Dev Singh, Dy. AG.

vs

Davinder Kumar & Anr. ..... Respondent(s)

Through: Mr. Gagan Oswal, Advocate

Coram: HON'BLE MR. JUSTICE RAJESH SEKHRI, JUDGE

JUDGMENT

01. This appeal has been directed against the judgement dated 27.05.2013 passed by learned 3rd Additional Sessions Judge, Jammu ('trial court' for short) vide which respondents have been acquitted.

02. The case set up by the prosecution in the trial court, in brief, is that PW-3, Santosh Kumari, mother of the prosecutrix (name withheld) lodged a written report on 17.12.2004, stating therein that she along with her daughter were residing as tenant in the house of a police inspector namely Ajay Gupta at Link Load, Jammu. The prosecutrix used to make quilt covers in the shop of respondent no. 1 situate at Mast Garh. About 7/8 days back, respondent no. 1 asked her to drop the prosecutrix in his shop for night shift. The prosecutrix went to the shop of respondent no. 1, but was not allowed to come back. It was alleged that respondent no. 1 forcibly committed sexual intercourse with the prosecutrix

and two boys were accompanying him. It is further allegation of the complainant that she went to police post, Chowk Chabutra and lodged a report. However, after some days, three persons including a police man took her to the said police post, where she was forced to enter into a written compromise with the respondents, in lieu whereof she was paid Rs. 2000/-. The complainant alleged that since her daughter has been sexually assaulted by the respondents, therefore, she did not intend to enter into any compromise. On the receipt of this report, FIR No. 238/2004 came to be registered with Police Station Pacca Danga, Jammu and investigation came into vogue. The investigation concluded that while respondent no. 1 committed rape upon the prosecutrix, respondent no. 2 made an attempt to commit the rape but did not succeed and both the respondents, in order to destroy the evidence, had thrown a bed sheet, a piece of cloth and an underwear in River Tawi on 08.12.2004.

03. Vide order dated 18.02.2005, respondent no. 1 was charged by the trial court for the commission of offences under Sections 376/201 RPC, whereas respondent no. 2 was charged under Section 376/511 RPC, whereby they pleaded innocence and claimed trial, prompting the trial court to direct for the prosecution evidence. For the sake of brevity, instead of giving a detailed resume of the prosecution evidence, it is proposed to refer to the relevant testimonies of the prosecution witness as and when required. The respondents in their statements under Section 342 CrPC have denied the incriminating imputations arrogated to them and refused to enter the defence.

04. Having heard the rival contentions and perused the judgment, I do not find any illegality, muchless, perversity in the findings recorded therein.

05. Before adverting to the merits of the case, it is pertinent to mention that prosecutrix and her mother, the complainant were respectively examined in chief in the trial court on 09.05.2007 and 22.09.2007 however, they could not be cross-examined due to the absence of the defence counsel. Subsequently, respondents filed an application under Section 540 CrPC for recalling of witnesses and learned trial court vide order dated 13.05.2009 allowed the said application and both prosecutrix and complainant were recalled for cross examination. However, it revealed from various reports of the executing agency viz. SHO police sation, Pacca Danga, Jammu that prosecutrix died on 07.05.2010 and death certificate in this respect was also placed on record and complainant PW-3, Santosh Kumari did not appear despite service and later could not be traced at her residential address. So in these circumstances, prosecution evidence came to be closed by the trial court, without cross examination of the prosecutrix and the complainant.

06. Learned trial court, relying upon various provisions of the Evidence Act, has concluded that testimonies of the prosecutrix and the complainant in the absence of their cross-examination can neither be treated as evidence, nor relied upon to sustain conviction of the respondents. Ten days delay in lodging the FIR as also un-natural conduct on the part of the complainant also weighed with the trial court to hold that prosecution failed to prove its case.

07. The first and foremost question which begs consideration of this court is effect of non cross-examination of a witness.

08. Mr. Gagan Oswal, learned counsel appearing for the respondents has argued that word ‘evidence’ as defined in Section 3 of the Evidence Act, means

and includes all statements' which the court permits, or requires to be made before it by witnesses, including the examination-in-chief, cross-examination and re-examination, subject to the permission of the court.

09. Examinations of a witness, including chief examination, cross examination and re-examination have been defined under Section 137 of the Evidence Act and it is evident from a perusal of the said provision that examination of a witness includes chief-examination, cross-examination and re-examination, subsequent to the cross examination by a party who called him. This position is further clarified in Section 138 of the Evidence Act, which reads thus:-

> **"138 <u>Order of Examinations</u>**
>
> **Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.**
>
> **The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.**
>
> **Direction of re-examination-The re-examination shall be directed to the explanation of matters referred to in cross-examinaton; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter".**

10. It is evident from the afore-quoted section 138 of the Evidence Act that examination of witness includes examination-in-chief and cross-examination and re-examination shall be directed to explain the matters referred to in the cross-examination and if new facts are introduced in re-examination, the adverse party may further cross examine upon those fact(s). Section 138 enables the opposite party to cross examine a witness as regards information tendered by him in his examination-in-chief and the scope of this provision stands further enlarged by Section 146 of Evidence Act, which permits a witness to be questioned, inter alia, in order to test his veracity. Therefore, examination-in-chief of a witness cannot

be taken into consideration to fasten any liability, unless the opposite party is afforded a reasonable opportunity to cross-examine said witness as regards information tendered by him in his examination-in-chief. Reference in this regard may be made to para 11 of ***"Subash Krishnan vs. State of Goa"*** reported as **AIR 2012 SC 3003**, whereby the Apex court has clearly ruled that court, in such circumstances, has no option but to ignore the testimony of the witness who did not offer himself for cross-examination.

11. Identical view has been taken by Hon'ble Supreme Court in ***"Gopal Saran vs Satyanarayan"*** reported as **AIR 1989 SC 1141**, relevant excerpt whereof is reproduced below for the facility of reference:-

> **"…....It may be mentioned that the plaintiff had not subjected himself to cross-examination in spite of the order of the Court after the remand, therefore, it would not be safe to rely on the examination-in-chief recorded which was not subjected to cross-examination before the remand was made. ……."**

12. It is evident from the afore-quoted case law that it shall be highly unsafe to consider the chief examination of a witness, who is not subjected to cross-examination and court in such circumstances, is left with no option, but to ignore such testimony.

13. True it is, that under Section 33 of the Evidence Act, the evidence given by a witness in a judicial proceeding is relevant for the purpose of proving, in a later stage of the said proceedings, the truth of facts which it states, when the witness is dead or cannot be found, provided the adverse party had the right and opportunity to cross-examine. It is manifest from the proviso appended to Section 33 that evidence given by a witness, who is dead or cannot be found, is relevant in a later

stage of the same judicial proceeding for the purpose of proving the truth of facts which the witness states, only when the affected party had the right and opportunity to cross examine the said witness.

14. Reverting to the present case, though application filed by the respondents for cross-examination of the prosecutrix and the complainant was allowed by the trial court, however, neither prosecutrix nor complainant could be cross-examined in view of the fact that as per report of the executing agency viz. SHO police station, Pacca Danga, Jammu, the prosecutrix had expired and complainant first did not appear despite service and later could not be traced at her residential address. In this view of the matter, both the material prosecution witnesses viz. the prosecutrix and the complainant, could not be cross examined and, therefore, I concur with the observation of learned trial court that incomplete statements of the prosecutrix and the complainant, in the absence of their cross-examination, could not be treated as a legal evidence, nor could be relied upon to fasten any criminal liability upon the respondents.

15. Another material aspect of the case is delay in lodging of FIR by the complainant, which prosecution has failed to explain and the investigating officer who was supposed to explain the delay has not been examined in the case. Learned trial judge has rightly observed that discussion on this legal issue has become academic in view of answer to the first legal argument that incomplete statement of the prosecutrix and the complainant, in the absence of their cross examination is unworthy of credence. However, it assumes significance in view of discrepant statement made by prosecutrix and the complainant in their chief examination. The prosecutrix deposed in chief examination that her mother went

to the police station 3/4 days after the occurrence and lodged the report, despite the fact that she had given a graphic narration of the occurrence to her mother on the same day of the occurrence. On the contrary, the complainant PW-3 Santosh Kumari has stated that she went to police post Pacca Danga on the same day when her daughter told her about the occurrence, since nobody was found in the police station, she returned back. Trial court has rightly observed that such a conduct on part of mother of the prosecutrix, whose daughter was sexually ravished by the respondents was unnatural. The record bears testimony to the fact that report EXPW-SK was lodged by the complainant PW-3 on 17.12.2004 i.e. 10 days after the occurrence. The I.O was the best person to explain the circumstances regarding delay in lodgement of FIR. However, as already discussed, prosecution has failed to examine the I.O.

16. For what has been observed and discussed above and having considered the evidence led by the prosecution in its entirety in the trial court, I am of the considered view that there is no scope to raise hypothesis of guilt against the respondents. Learned trial court has passed a well-reasoned and lucid judgment, which does not call for any interference by this court. Hence, the present appeal is dismissed and impugned judgment is upheld. Respondents are discharged of their bail bonds.

(Rajesh Sekhri)
Judge

Jammu
08.06.2023
Abinash

Whether the order is speaking? ***Yes***
Whether the order is reportable? ***Yes***