The State Of Himachal Pradesh vs Raghubir Singh on 15 May, 2024

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Bench: Abhay S. Oka

2024 INSC 421 Non-Report

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 2567 OF 2024

State of Himachal Pradesh … Appel

versus

Raghubir Singh & Ors. … Responde

with
CRIMINAL APPEAL NO. 2568 OF 2024

JUDGMENT

ABHAY S. OKA, J.

FACTUAL ASPECTS

1. The respondents in Criminal Appeal No.2567 of 2024 have been convicted by the High Court of Himachal Pradesh at Shimla by the impugned judgment and order dated 2nd March 2017 for the offence punishable under clause (g) of sub-section (2) of Section 376 of the Indian Penal Code, 1860 (for short, 'the IPC'). They were sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs.50,000/- each. They were sentenced to undergo rigorous imprisonment for six months on default of payment of fine. The fine amount, if deposited, was ordered to be paid to the prosecutrix.

2. Initially, the accused were prosecuted for the offences punishable under ASHISH KONDLE Date: 2024.05.15 19:30:38 IST Reason:

> Section 376, read with Section 34 of the IPC. Six accused were tried before the Sessions Court, namely, Raghubir Singh (Raghubir), Vijay Kumar (Vijay), Ravi

Prakash (Ravi), Anil Kumar alias Bittu (Anil), Hari Ram (Hari) and Sunil Kumar (Sunil). The Trial Court acquitted the accused on the ground that in the absence of any corroborating evidence of any struggle on the part of the prosecutrix or any corroborating injury on the person of the accused, the defence of the accused that the sexual intercourse was with the consent, cannot be ruled out. The appellant–the State of Himachal Pradesh, appealed against the order of acquittal. By the order dated 28th March 2008, the High Court set aside the judgment of the Sessions Court and remanded the case to the Sessions Court with a direction to try the accused for the offence of gang rape. After the order of remand, the case was tried only against five accused as the accused Anil had died. The prosecution adopted the evidence recorded before remand, and even the accused adopted their cross-examination. By the judgment and order dated 24th September 2008, the Sessions Court again passed an order of acquittal. By the impugned judgment and order, the High Court interfered in an appeal preferred by the State. It converted the acquittal of the accused into a conviction for the offence punishable under Section 376(2)(g) of the IPC. Regarding the sentence, the High Court held that there were adequate and special reasons for imposing a sentence of imprisonment for a term of less than ten years. The said power was exercised by the High Court in terms of the proviso to sub-section (2) of Section 376 of the IPC as it existed on the statute book before Section 376 was substituted by Act No.13 of 2013.

3. Criminal Appeal No.2567 of 2024 has been preferred by the State of Himachal Pradesh being aggrieved by that part of the impugned judgment, by which the accused were let off on the sentence of imprisonment for three years which is less than the minimum sentence of ten years as provided under Section 376(2), which was applicable on the date on which the alleged act of offence was committed. Criminal Appeal No.2568 of 2024 has been preferred by accused Vijay for challenging his conviction.

SUBMISSIONS

4. The learned counsel appearing for accused-Vijay, in support of the appeal, urged that on the same evidence, there are two judgments of acquittal in favour of the accused. He submitted that even in the appeal against the first order of acquittal, the High Court did not convert the order of acquittal into conviction and passed an order of remand. He submitted that the finding recorded by the High Court was that on the date of occurrence of the alleged offence, the prosecutrix was more than sixteen years old. Section 375 of the IPC, as was applicable on the relevant date, provided that consensual sexual intercourse with a woman who was more than sixteen years old was not an offence. He invited our attention to the finding recorded in the impugned judgment by the High Court. He submitted that the High Court held that the prosecutrix willingly accompanied accused Vijay, who was sitting beside her in the video parlour where the prosecutrix was watching a movie. He pointed out that the High Court held that the prosecutrix had acquaintance with accused Vijay, and he had shown interest in solemnising marriage with her. He submitted that even going by the case made out by the prosecutrix, she walked ahead of the accused Vijay and reached a bridge in the town. Thereafter, accused Vijay, along with two other accused, came there. Her evidence shows that

she had several opportunities to raise the alarm but failed to do so. He submitted that the evidence of the prosecutrix cannot be believed considering her conduct. He submitted that the Sessions Court, on two occasions, acquitted the accused after making detailed consideration of the evidence on record. He pointed out that after the remand, the Sessions Court, after considering the evidence of the prosecutrix, concluded that there were contradictions in her testimony, and she made improvements. Moreover, her conduct on the date of occurrence does not support the theory of sexual intercourse without her consent. He submitted that the High Court should not have interfered only because another view was possible on the same evidence.

5. The learned counsel appearing for the State urged that the judgment of the Sessions Court, after remand, is perverse. He submitted that no reasonable person, after reading the testimony of the prosecutrix, would conclude that the sexual intercourse was with her consent. He submitted that the approach of the Trial Court while dealing with such a serious case of gang rape was entirely uncalled for. He submitted that there was no reason for the High Court to show leniency and let off the accused on a sentence that was less than the minimum prescribed term. He urged that a minimum prescribed sentence be awarded by allowing the appeal by the State.

CONSIDERATION OF SUBMISSIONS

6. A perusal of the impugned judgment shows that on consideration of the evidence, there is a finding recorded by the High Court that the guilt of the accused has been established. According to the High Court, this was the only possible finding which could have been recorded based on the evidence on record. Before we consider the evidence, we may note that in paragraph 12 of the judgment of the Sessions Court, after remand, it is recorded that in the statement of accused Vijay under Section 313 of the Code of Criminal Procedure, 1973 (for short, 'the Cr.PC.'), he stated that he had intimacy with the prosecutrix for one year. She had been charging money for that. Accused Sunil in his statement under Section 313 of the Cr. PC. stated that the prosecutrix used to accompany him even before the alleged occurrence and used to charge money. He stated that on the day of the incident, the prosecutrix demanded Rs.100/-, but he could pay only Rs.50/-. The Sessions Court further recorded that accused Ravi, in his statement under Section 313 of the Cr.PC., also stated that sexual intercourse with the prosecutrix was with her consent and as he did not pay any money to her, she made a false allegation. The plea of accused Raghubir and Hari was that they were falsely implicated. Accused-Raghubir, in his statement under Section 313 of the Cr. PC stated that since he had accompanied one Chunni Pradhan (discharged accused), false allegations have been made against him. Accused Hari in his statement under Section 313 of the Cr. PC. stated that as he was an employee of Chunni Pradhan, he was also dragged into the case. Thus, three out of five accused have come out with a case that they had sexual intercourse with the consent of the prosecutrix. They went to the extent of alleging that they used to pay her consideration. Sub-section (4) of Section 313 of the Cr.PC provides that the answers given by the accused in his examination under sub-section (1) of Section 313 of the Cr.PC may be taken into consideration in the trial. This Court had an occasion to consider the scope of sub-section (4) of Section 313 of the Cr.PC in the case of Manu Sao v. State of Bihar1. Paragraphs 14 to 17 of the said decision read thus:

> "14. The statement of the accused can be used to test the veracity of the exculpatory nature of the admission, if any, made by the accused. It can be taken into consideration in any enquiry or trial but still it is not strictly evidence in the case. The provisions of Section 313(4) explicitly provides that the answers given by the accused may be taken into consideration in such enquiry or trial and put in evidence against the accused in any other enquiry or trial for any other offence for which such answers may tend to show he has committed. In other words, the use is permissible as per the provisions of the Code but has its own limitations. The courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution, however, (2010) 12 SCC 310 such statements made under this section should not be considered in isolation but in conjunction with evidence adduced by the prosecution.

15. Another important caution that courts have declared in the pronouncements is that conviction of the accused cannot be based merely on the statement made under Section 313 of the Code as it cannot be regarded as a substantive piece of evidence. In Vijendrajit Ayodhya Prasad Goel v. State of Bombay [(1953) 1 SCC 434 : AIR 1953 SC 247 : 1953 Cri LJ 1097] , the Court held as under : (AIR p. 248, para 3) "3. ... As the appellant admitted that he was in charge of the godown, further evidence was not led on the point. The Magistrate was in this situation fully justified in referring to the statement of the accused under Section 342 as supporting the prosecution case concerning the possession of the godown. The contention that the Magistrate made use of the inculpatory part of the accused's statement and excluded the exculpatory part does not seem to be correct. The statement under Section 342 did not consist of two portions, part inculpatory and part exculpatory. It concerned itself with two facts. The accused admitted that he was in charge of the godown, he denied that the rectified spirit was found in that godown. He alleged that the rectified spirit was found outside it. This part of his statement was proved untrue by the prosecution evidence and had no intimate connection with the statement concerning the possession of the godown."

16. On similar lines reference can be made to a quite recent judgment of this Court in Ajay Singh v. State of Maharashtra [(2007) 12 SCC 341 : (2008) 1 SCC (Cri) 371] where the Court held as under : (SCC p. 347, paras 11-13) "11. So far as the prosecution case that kerosene was found on the accused's dress is concerned, it is to be noted that no question in this regard was put to the accused while he was examined under Section 313 of the Code.

12. The purpose of Section 313 of the Code is set out in its opening words—'for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him'. In Hate Singh Bhagat Singh v. State of Madhya Bharat [1951 SCC 1060 : AIR 1953 SC 468 : 1953 Cri LJ 1933] it has been laid down by Bose, J. (AIR p. 469, para 8) that the statements of the accused persons recorded under Section 313 of the Code 'are among the most important matters to be considered at the trial'. It was pointed out that : (AIR p. 470, para 8) '8. ... The statements of the accused recorded by the committing Magistrate and the Sessions Judge are intended in India to take the place of what in England and in America he would be free to state in his own way in the witness box [and that they] have to be received in evidence and treated as evidence and be duly considered at the trial.' " This position remains unaltered even after the insertion of Section 315 in the Code and

any statement under Section 313 has to be considered in the same way as if Section 315 is not there.

13. The object of examination under this section is to give the accused an opportunity to explain the case made against him. This statement can be taken into consideration in judging his innocence or guilt. Where there is an onus on the accused to discharge, it depends on the facts and circumstances of the case if such statement discharges the onus."

17. The statement made by the accused is capable of being used in the trial though to a limited extent. But the law also places an obligation upon the court to take into consideration the stand of the accused in his statement and consider the same objectively and in its entirety. This principle of law has been stated by this Court in Hate Singh Bhagat Singh v. State of Madhya Bharat. [1951 SCC 1060: AIR 1953 SC 468 : 1953 Cri LJ 1933]" (emphasis added) Therefore, the conviction cannot be based solely on the statements made by an accused under sub-section (1) of Section 313 of the Cr. PC. The statements of the accused cannot be considered in isolation but in conjunction with the evidence adduced by the prosecution. The statements may have more relevance when under a statute, an accused has burden of discharge. When the law requires an accused to discharge the burden, the accused can always do so by a preponderance of probability. But, while considering whether the accused has discharged the burden, the court can certainly consider his statement recorded under Section 313. In this case, the accused has no burden to discharge. In the present case, while appreciating the evidence adduced by the prosecution, the statements of the three accused that they maintained a physical relationship with the prosecutrix by paying her money will have to be considered. Dr. Shashi Thakur (PW-4), who had examined the victim, noted inflammation in the private parts of the victim. In the cross-examination, PW-4 opined that it is not necessary that in a case of forcible sexual intercourse, an injury should be there on the body of the victim. Absence of injuries on the person of the prosecutrix is by itself no ground to infer consent on the part of the prosecutrix.

7. At this stage, we may record here that the finding of the High Court in the impugned judgment is that the age of the prosecutrix was not less than sixteen years. In this case, we are concerned with the provisions of Sections 375 and 376 of the IPC, which were substituted by Act No.43 of 1983 with effect from 25th December 1983. Both sections were subsequently substituted by Act No.13 of 2013, effective from 3rd February 2013. Therefore, in the present case, Sections 375 and 376 of the IPC will apply as substituted with effect from 25th December 1983. Considering 'sixthly' in Section 375, at the relevant time, sexual intercourse with a woman who was not less than sixteen years with consent did not constitute an offence of rape.

8. As far as the law relating to appreciation of the testimony of the victim of rape is concerned, the law is well settled. In the decision of this Court in the case of State of Punjab v. Gurmit Singh2, in paragraph 8, this Court held thus:

> "8. .. ..
>
> The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a

> humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the 2 (1996) 2 SCC 384 same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances.

It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice.

Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable. In State of Maharashtra v. Chandraprakash Kewalchand Jain [(1990) 1 SCC 550 : 1990 SCC (Cri) 210] Ahmadi, J. (as the Lord Chief Justice then was) speaking for the Bench summarised the position in the following words: (SCC p. 559, para 16) “A prosecutrix of a sex offence cannot be put on a par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured

complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence." (emphasis added)

9. Now, we turn to the evidence of the prosecutrix (PW-5). She stated that on the afternoon of the date of the incident, she had visited a video parlour in Manali, where she watched a movie. Accused Vijay was sitting next to her. She stated that accused Vijay suggested her to go to a particular place for taking bath. She declined to do so. Accused Vijay told her that he was interested in getting married to her. Both came out of the video parlour, and she was taken to a bridge in Manali, where she was made to wait. A Gypsy vehicle was brought, driven by accused Ravi and one Munna (absconding accused). The prosecutrix was told to sit in the vehicle and was taken to Solang Nullah. The vehicle halted there, and accused Vijay took her near the Nullah, where there was a giant boulder. She alleged that at that place, accused Vijay had forcible sexual intercourse with her. After that, a van arrived there, and the accused, Sunil, alighted from the van. Thereafter, Sunil, Nanu (absconding accused), and Munna (absconding accused) committed forcible sexual intercourse with her. After that, accused Sunil threatened the prosecutrix and told her to keep mum. Around 06:00 p.m., accused Raghu, accused Hari and Chunni Pradhan were sitting near Solang Nullah. When the prosecutrix approached them, she was told to go home. She stated that she was lifted and put in the Gypsy vehicle. The accused boarded the vehicle and brought her to a place known as Kanchi Mod. Thereafter, accused Raghu, accused Hari and Chunni Pradhan allegedly committed sexual intercourse against her wish. She was left on the road, and the accused fled by the gypsy vehicle. The prosecutrix took a lift and reached her home.

10. We have carefully perused the cross-examination of the prosecutrix. In the cross-examination, the case put to her was that she had voluntarily accompanied the accused Vijay. There was no suggestion given by the accused that the sexual intercourse with the prosecutrix was with her consent. The evidence of the prosecutrix in her examination-in-chief that the accused committed sexual intercourse with her has not been shaken. The case of accused Vijay made out in his statement under Section 313 of Cr.PC was that he was in a relationship with the victim for one year and was paying money to the victim for maintaining a sexual relationship. This case has not been put to the prosecutrix. Even the case made out by accused Sunil and Ravi that they were keeping a physical relationship with the prosecutrix by paying money has not been put to the prosecutrix.

11. If the relationship between accused Vijay and the prosecutrix was really continuing for one year, there was no reason for him to take the prosecutrix to a remote place near a Nullah and have sexual intercourse near a boulder. The same is the case with the other two accused. The manner in which the prosecutrix was taken initially near the Nullah and after that to another place establishes the case of the prosecutrix of forcible sexual intercourse. Few insignificant contradictions have been brought on record in the cross-examination of the prosecutrix. However, the version of the prosecutrix about the acts of forcible sexual intercourse by the accused has been hardly tested in the cross- examination.

12. In this view of the matter, the High Court's conclusion was the only possible conclusion based on the evidence on record. Therefore, we find no merit in the appeal preferred by the accused Vijay.

13. Now, we come to the sentencing part. For the offence punishable under sub-section (2) of Section 376 of the IPC, the minimum punishment of rigorous imprisonment for ten years was prescribed. However, at the relevant time, the proviso to sub-section (2) of Section 376 of the IPC read thus:

> " 3 7 6 . ... (2).....

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years."

14. Hence, at the relevant time, the Court had the power, for adequate reasons mentioned in the judgment, to impose a sentence of imprisonment of either description for a term of less than ten years. We have perused the sentencing part of the impugned judgment of the High Court. The High Court has noted the following factors:

> a. The incident was of 8th July 1989;
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> b. For the offences alleged under Section 376 of the IPC, by the judgment dated 30th September 1992, the accused were acquitted;
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> c. Sixteen years after that, on 28th March 2008, the High Court interfered and remanded the case to the Trial Court to try the accused for the offence of gangrape under Section 376(2)(g) of the IPC;
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> d. The Trial Court acquitted the accused by the impugned judgment dated 24th September 2008;
>
> e. While the High Court heard the appeal in 2017, the accused pleaded that their respective ages were in the range of 49 to 55 and that they had their families. In paragraph 5 of the impugned judgment, the High Court noted the same and their family responsibilities.

> What was in the back of the mind of the learned judges of the High Court was that they were dealing with an incident that had taken place twenty-eight years back, and, in the meantime, the accused and their families had moved ahead in life. Therefore, the High Court was of the view that there were adequate reasons which warranted the exercise of powers under the proviso. In the facts of the case, enhancement in sentence is not justified nearly 35 years after the incident.

15. Therefore, we see no merit in the appeal preferred by the State and the appeal preferred by the accused Vijay. Perhaps, except for the accused Vijay, others must have undergone the sentence of three years. In his appeal, Accused-Vijay was granted bail by the order dated 7th May 2018. He has not undergone the sentence of three years. Considering the gravity of the offence, he cannot be shown further leniency. Therefore, the accused, Vijay, must undergo the remaining sentence. Hence, we pass the following order:

> a. Both the appeals are accordingly dismissed;
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> b. We grant one month to the accused Vijay to surrender before the Trial Court to undergo the remaining sentence in terms of the impugned judgment of the High Court.
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> .....J. (Abhay S. Oka) .....J. (Ujjal Bhuyan) New Delhi;
>
> May 15, 2024.