Om Prakash vs State Of U.P on 11 May, 2006

Equivalent citations: AIR 2006 SUPREME COURT 2214, 2006 (1) SCC 401, 2006 AIR SCW 184, 2006 AIR SCW 2814, 2006 (4) ALL LJ 575, 2006 (3) AIR JHAR R 360, 2006 (1) AIR JHAR R 666, (2007) 2 MARRILJ 731, (2006) 38 ALLINDCAS 114 (SC), 2006 (38) ALLINDCAS 114, 2006 (1) SCALE 116, 2006 ALL MR(CRI) 620, 2006 (1) CALCRILR 506, (2006) 2 DMC 770, 2006 (6) SRJ 208, 2006 (3) SCC(CRI) 401, 2006 ALL MR(CRI) 2394, 2006 CALCRILR 1 506, (2006) 1 CHANDCRIC 280, 2006 (1) SCC (CRI) 401, (2006) 2 RAJ LW 1152, 2006 CRILR(SC&MP) 149, 2006 (2) CALCRILR 110, 2006 (5) SCALE 614, 2006 (9) SCC 787, 2006 CRILR(SC MAH GUJ) 1 149, 2006 (2) SRJ 312, 2006 CALCRILR 2 110, 2006 CRILR(SC&MP) 431, (2007) 1 HINDULR 99, 2006 CRILR(SC MAH GUJ) 431, (2006) 42 ALLINDCAS 34 (SC), (2006) 46 ALLINDCAS 278 (PAT), (2006) 1 PAT LJR 699, (2006) 2 CRIMES 232, (2006) 1 SCALE 116, (2006) 5 SCALE 614, (2006) 2 PAT LJR 100, (2006) 1 MADLW(CRI) 269, (2006) 1 MAD LJ(CRI) 63, (2006) 1 RAJ CRI C 200, (2006) 1 SCJ 805, (2006) 1 CURCRIR 62, (2006) 1 SUPREME 1, (2006) 54 ALLCRIC 899, (2006) 3 EASTCRIC 278, (2006) 2 MAD LJ(CRI) 289, (2006) 34 OCR 548, (2006) 3 PAT LJR 248, (2006) 2 RAJ CRI C 440, (2006) 3 RAJ LW 2555, (2006) 3 RECCRIR 152, (2006) 7 SCJ 149, (2006) 2 CURCRIR 193, (2006) 4 SUPREME 313, (2006) 3 JLJR 202, (2006) 55 ALLCRIC 556, (2006) 2 CHANDCRIC 166, (2006) 3 ALLCRILR 696, (2006) 2 JLJR 151, (2006) 101 CUT LT 516, (2006) 1 ALLCRIR 336, (2006) 1 CRIMES 75, (2006) SC CR R 1386, (2005) 84 DRJ 421, (2005) 36 ALLINDCAS 504 (DEL), (2005) 124 DLT 403, (2006) 2 EASTCRIC 79, (2006) 33 OCR 338, (2006) 2 ALLCRIR 1540, 2006 (1) ANDHLT(CRI) 262 SC, 2006 (3) ANDHLT(CRI) 152 SC, (2006) 1 ANDHLT(CRI) 262, 2006 (1) ALD(CRL) 436, (2006) 3 ANDHLT(CRI) 152, 2006 (1) ALD(CRL) 933

Author: Arijit Pasayat

Bench: Arijit Pasayat, S.H. Kapadia

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           CASE NO.:
Appeal (crl.)  629 of 2006

PETITIONER:
Om Prakash

RESPONDENT:
State of U.P.
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DATE OF JUDGMENT: 11/05/2006

BENCH:
ARIJIT PASAYAT & S.H. KAPADIA

JUDGMENT:

J U D G M E N T (Arising out of SLP (Crl.) No. 6111 of 2005) ARIJIT PASAYAT, J.

Leave granted.

Appellant calls in question legality of the judgment rendered by a learned Single Judge of the Allahabad High Court, Lucknow Bench upholding the appellant's conviction for offence punishable under Section 376(2)(e) of the Indian Penal Code, 1860 (in short the 'IPC') as recorded by learned VI Additional Sessions Judge, Hardoi and the sentence of 10 years imprisonment as awarded.

We do not propose to mention name of the victim. Section 228-A IPC makes disclosure of identity of victim of certain offences punishable. Printing or publishing name of any matter which may make known the identity of any person against whom an offence under Sections 376, 376-A, 376-B, 376-C or 376-D is alleged or found to have been committed can be punished. True it is, the restriction does not relate to printing or publication of judgment by High Court or Supreme Court. But keeping in view the social object of preventing social victimisation or ostracism of the victim of a sexual offence for which Section 228-A has been enacted, it would be appropriate that in the judgments, be it of this Court. High Court or lower Court, the name of the victim should not be indicated, we have chosen to describe her as 'victim' in the judgment. The above position was highlighted in State of Karnataka v. Puttaraja (2004 (1) SCC 475). Prosecution version as unfolded during trial is essentially as follows:

> One day prior to the occurrence i.e. 9.3.1985 the police of Sursa arrested Ram Saran, husband of the informant (PW-1) and the challan was brought to the concerned Court on the day of the occurrence. Om Prakash @ Chhotey (hereinafter referred to as the 'accused') who was related to the parents of the informant, met then in the Court premises. Jaipal (PW-2) brother of Ram Saran was also there along with the informant and she was talking to him about bail of her husband. After sometime, accused Om Prakash sent PW-2 to find out whether the challan had come or not. Then at about 3.00 p.m. accused overpowered the informant and he started raping her in the veranda of Zila Parishad near the Court. When the informant raised alarm, PW-2 and one Ram Lal came there and they assaulted Om Prakash who was raping her and they apprehended him and the accused was taken to the police station. The informant gave oral information and then Chik number 126 Exhibit A-1 was recorded and the entry was made in the general diary and the case was registered. Internal examination of the body of the informant was done by Dr. Purnima Srivastava (PW-3) and the medical report is Exhibit A-2 and the supplementary report is Exhibit A-3. The medical examination of the accused was done by Dr. P.K. Gangwar (PW-4)

and the report is Exhibit A-4. The underwear of accused was seized in the police station and the seizure memo is Exhibit A-6 and the petticoat of the informant was seized and the seizure memo is Exhibit A-7. The charge of investigation of the case was given to Shri Mahesh Lal Vadhuria (PW-6), who prepared the site plan of the place of occurrence (Exhibit A-8). The underwear of the accused and the petticoat of Ramwati were sent for chemical examination and the report is Exhibit A-21. After completion of investigation, charge sheet was filed against the accused and cognizance of the offence was taken and thereafter the case was committed to the Sessions Court by the Chief Judicial Magistrate, Hardoi.

Charge was framed against accused Om Prakash @ Chhotey under Section 376 IPC. The accused did not admit the charge and demanded trial.

To substantiate its version, prosecution examined the victim (informant), eye-witness Jaipal (PW-2), Dr. Smt. Purnima Srivastava (PW-3), Dr. P.K. Gangwar (PW-4), Shri Uttam Kumar (PW-5), Shri Mahesh Lal Vadhuria (PW-6) and head constable Shri Jitendra Singh (PW-7).

The statement of accused Om Prakash was recorded under Section 313 of the Criminal Procedure Code, 1973 (in short 'Cr.P.C.'). The accused alleged that he was implicated due to the enmity. It was stated by him that he had come from the village along with the brother of the victim and other persons for taking steps. He even made some attempts in the police station in the night. He had taken some money for the purpose. When the challan came, they got down at Bilgram Chungi and then a quarrel took place amongst the accused, PW-2 and father of the victim on the question of refund of the money. They assaulted him and he was implicated in the criminal case.

Considering the evidence more particularly that of the victim (PW-1) and PW-2 the brother-in-law of the victim and the evidence of the doctor PW-3, the Trial Court held that the accusations have been established. Taking note of the evidence of PW-3, it was held that accused must have known, and that there is full possibility that victim is pregnant. Accordingly, by applying the provisions of Section 376(2)(e) accused was convicted and sentenced to undergo RI for 10 years which is the minimum sentence prescribed. The Trial Court held that there was no reason to reduce the minimum prescribed sentence.

In appeal before the High Court it was submitted that the prosecution version is incredible and the trial Court should not have convicted the accused. The High Court by the impugned judgment affirmed the conviction and sentence. It noted that the FIR was lodged immediately, without any delay. The evidence of the victim was credible and cogent. That itself was sufficient to record conviction. In addition was the evidence of PW-2 an eye-witness. It was, therefore, held that the prosecution has clearly established that the offence was committed by the accused. With reference to

the background facts, it was noted that the accused was in a position to dominate will of the prosecutrix. Therefore, the conviction as recorded was maintained and the appeal was dismissed.

In support of the appeal, learned counsel for the appellant submitted that the prosecution version is clearly unbelievable. It is not believable that the accused who had gone to help the victim's husband to be released on bail would commit rape on her, that too in broad day light. In any event, it was submitted that the requirements of Section 376(2)(e) were not proved.

Per contra, learned counsel for the State submitted that prosecution version has been clearly established by the cogent evidence not only by prosecution but also by PW-2 an eye- witness. It is to be noted that the appellant was caught red- handed and was taken to police station where immediately FIR was lodged.

So far as the applicability of Section 376(2)(e) is concerned, it is submitted that the doctor has clearly stated that the victim was six months pregnant, and it could be known from the external appearance. The Trial Court had rightly observed that the accused must have known the victim was pregnant and there is full possibility in that regard. Though the High Court has not dealt with this aspect, it has clearly noted that the accused was in a position to dominate the will of the victim.

It is settled law that the victim of sexual assault is not treated as accomplice and as such, her evidence does not require corroboration from any other evidence including the evidence of a doctor. In a given case even if the doctor who examined the victim does not find sign of rape, it is no ground to disbelieve the sole testimony of the prosecutrix. In normal course a victim of sexual assault does not like to disclose such offence even before her family members much less before public or before the police. The Indian women has tendency to conceal such offence because it involves her prestige as well as prestige of her family. Only in few cases, the victim girl or the family members has courage to go before the police station and lodge a case. In the instant case the suggestion given on behalf of the defence that the victim has falsely implicated the accused does not appeal to reasoning. There was no apparent reason for a married woman to falsely implicate the accused after scatting her own prestige and honour.

Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault -- it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades

the very soul of the helpless female. The Court, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepencies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial Court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations. This position was highlighted in State of Punjab v. Gurmeet Singh (1996 (2) SCC 384).

A prosecutrix of a sex-offence cannot be put on 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 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 Indian Evidence Act, 1872 (in short '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 own to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case discloses 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. This position was highlighted in State of Maharashtra v. Chandraprakash Kewalchand Jain (1990 (1) SCC 550).

Sub-section (2) of Section 376 makes some special case of rape punishable with more stringent punishment. Sub- section (2) Section 376 reads as follows:

"376(2) Whoever,--

(a) being a police officer commits rape

(i) within the limits of the police station to which he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) on a woman in his custody or in me custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children's institution lakes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution;

or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) commits rape on a woman knowing her to be pregnant; or

(f) commits rape on a woman when she is under twelve years of age; or

(g) commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine."

One of the categories which attracts more stringent punishment is the rape on a woman who is pregnant. In such cases where commission of rape is established for operation of Section 376(2)(e) the prosecution has to further establish that accused knew the victim to be pregnant. In the instant case there was no such evidence led. The Trial Court came to the conclusion that there was "full possibility" of the accused knowing it. There is a gulf of difference between possibility and certainty. While considering the case covered by Section 376(2)(e) what is needed to be seen is whether evidence establishes knowledge of the accused. Mere possibility of knowledge is not sufficient. When a case relates to one where because of the serious nature of the offence, as statutorily prescribed, more stringent sentence is provided, it must be established and not a possibility is to be inferred. The language of Section 376(2)(e) is clear. It requires prosecution to establish that the accused knew her to be pregnant. This is clear from the use of the expression "knowing her to be pregnant". This is conceptually different that there is a possibility of his knowledge or that probably he knew it. Positive evidence has to be adduced by the prosecution about the knowledge. In the absence of any

material brought on record to show that the accused knew the victim to be pregnant Section 376(2)(e) IPC cannot be pressed into service. To that extent the judgment of the Courts below are unsustainable. However, minimum sentence prescribed under Section 376(1) IPC is clearly applicable.

With the modification of sentence by reduction from 10 years to 7 years, the appeal is dismissed.