State Of Rajasthan vs N. K. Accused on 30 March, 2000

Equivalent citations: AIR 2000 SUPREME COURT 1812, 2000 AIR SCW 1407, 2000 (2) SCALE 652, 2000 (3) LRI 577, 2000 CRIAPPR(SC) 260, 2000 (5) SCC 30, 2000 SCC(CRI) 898, 2000 (1) UJ (SC) 762, 2000 UJ(SC) 1 762, 2000 (5) SRJ 47, 2000 CRILR(SC MAH GUJ) 388, 2000 CRILR(SC&MP) 388, (2000) 3 JT 643 (SC), (2000) 2 CURCRIR 14, (2000) 2 RECCRIR 471, (2000) 27 ALLCRIR 905, (2000) 2 SCALE 652, (2000) 2 CRIMES 84, (2000) SC CR R 572, (2000) 2 EASTCRIC 716, (2000) MAD LJ(CRI) 588, (2000) 3 SUPREME 70, (2000) 41 ALLCRIC 410, (2000) 2 CHANDCRIC 95, 2000 (2) ANDHLT(CRI) 7 SC, (2000) 2 ANDHLT(CRI) 7, 2000 (2) KLT SN 23 (SC)

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Bench: S.N.Variava, R.C.Lahoti

PETITIONER:
STATE OF RAJASTHAN

Vs.

RESPONDENT:
N. K. ACCUSED

DATE OF JUDGMENT: 30/03/2000

BENCH:
S.N.Variava, R.C.Lahoti

JUDGMENT:

R.C. Lahoti, J.

The State of Rajasthan has come up in appeal feeling aggrieved by an order of acquittal recorded by the High Court of Rajasthan reversing the judgment of the Sessions Court which had found the accused-respondent guilty of an offence punishable under Section 376 Indian Penal Code and sentenced him to undergo seven years rigorous imprisonment with a fine of Rs.2,000/- and to a further simple imprisonment of one year and nine months in default of payment of fine. According to the prosecution, G, PW2, the prosecutrix, was aged 15 years and was living in village BhaniaYana (Jaisalmer) with her father, mother and a younger sister. The family resided in a lonely hutment situated in a field. On 1.10.1993 at about 12 noon, the prosecutrix was alone in her hut busy washing

clothes on a water pump. NK, the accused-respondent was known to the prosecutrix since before. He came to her and initially asked for water which she provided in a lota. The accused then asked for a knife for peeling the skin of a cucumber. The prosecutrix brought the knife and handed it over to him. When the prosecutrix was about to turn and go back, the accused caught hold of her . He twisted her hand on her back and forcibly took her to a nearby place called Bhitian, , i.e., a place surrounded by walls. The accused forced the prosecutrix to lie down on the ground, put his foot on her chest, closed her mouth with his palm, removed her lehenga upwards and then forcibly committed sexual intercourse with her. The prosecutrix offered resistance and tried to save herself but the respondent gagged her mouth by a towel pressed against her mouth. Having thus raped the prosecutrix, the accused-respondent went away to Thane, another village or another part of the same village. The prosecutrix reached back her home and narrated the entire incident to a woman, described as wife of Udai Singh and to her father, PW 10, who had returned by that time. The victim accompanied by her father wanted to go to the police station and lodge the first information report of the incident but they were prevented from doing so by several village people belonging to the community of the accused who also proposed the matter being settled within the village by convening a panchayat. However, report of the incident was lodged on 5.10.1993 at 11.20 a.m. The offence was registered and investigation commenced.

The prosecutrix was referred for medical examination so as to find out the injuries on her person as also to ascertain her age. Dr. V.D. Jetha, (P.W.9) the medical officer posted at primary health centre, Jaisalmer examined the prosecutrix on 6-10-1993 at about 12 noon upon a requisition made by the investigating officer. Dr. Jetha found inter alia the hymen of the prosecutrix was ruptured in multiple radial tears, the edges of which showed healing at most of the places and mild tenderness. The hymen hole admittted one finger easily with mild tenderness. Sample of vaginal swab from posterior front of vagina was taken and smear slide was prepared which was sealed and sent to forensic science laboratory for examination. In the opinion of Dr. Jetha sexual intercourse with the prosecutrix was done 5 to 7 days before the day of examination. He further opined that after a lapse of 5 to 7 days, the examination of vaginal smear and vaginal swab could not confirm the presence of semen.

For the purpose of ascertaining age of the prosecutrix, x-rays of arms and elbow joints were taken in his presence. After examinaing x-rays he opined that the age of the prosecutrix was 15 years.

On 4.11.1993 on a requisition made by the investigating officer, Dr. Jetha examined NK, the accused-respondent. He was found to be a person of average built suffering from no disease or infirmity. His height was 5 ft 11 inches and weight was 61 kg. He was found fit and competent to perform sexual intercourse. No mark of injury was found on his person.

The trial court found the incident, as alleged, proved. In the opinion of the learned trial Judge the testimony of the prosecutrix inspired confidence. It was corroborated by the medical evidence as also by the testimony of her father. The prosecutrix was held to be 15 years of age on the date of the incident. Though there was delay in lodging the FIR but it was satisfactorily explained. Accordingly, the accused-respondent was found guilty of the offence punishable under Section 376 IPC and sentenced as above.

The High Court has, in an appeal preferred by the accused-respondent, held that the prosecutrix was not proved beyond reasonable doubt to be below 16 years of age. In the opinion of the High Court though the factum of accused- respondent having committed sexual intercourse with the prosecutrix was proved but the absence of injuries on the person of the prosecutrix was a material fact not excluding the possibility of the prosecutrix having been a consenting party. The delay in lodging the FIR was not satisfactorily explained. The delay coupled with the non-examination of the wife of Udai Singh to whom the incident was first narrated by the prosecutrix immediately after the occurrence rendered the prosecution case doubtful. Mainly on this reasoning the High Court has allowed the appeal and acquitted the accused-respondent.

The learned counsel for the appellant-State has vehemently attacked the findings arrived at by the High Court and submitted that none of them was sustainable and none could be a reason for doubting the prosecution case in the given facts and circumstances and hence the acquittal deserves to be set aside.

Having heard the learned counsel for the parties we are of the opinion that the High Court was not justified in reversing the conviction of the respondent and recording the order of acquittal. It is true that the golden thread which runs throughout the cob-web of criminal jurisprudence as administered in India is that nine guilty may escape but one innocent should not suffer. But at the same time no guilty should escape unpunished once the guilt has been proved to hilt. An unmerited acquittal does no good to the society. If the prosecution has succeeded in making out a convincing case for recording a finding as to the accused being guilty, the Court should not lean in favour of acquittal by giving weight to irrelevant or insignificant circumstances or by resorting to technicalities or by assuming doubts and giving benefit thereof where none exists. A doubt, as understood in criminal jurisprudence, has to be a reasonable doubt and not an excuse for finding in favour of acquittal. An unmerited acquittal encourages wolves in the society being on prawl for easy preys, more so when the victims of crime are helpless females. It is the spurt in the number of unmerited acquittals recorded by criminal courts which gives rise to the demand for death sentence to the rapists. The courts have to display a greater sense of responsibility and to be more sensitive while dealing with charges of sexual assault on women. In Bharwada Bhoginbhai Hirijibhai Vs. State of Gujarat 1983 Crl.L.J. 1096 this Court observed that refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. This court deprecated viewing evidence of such victim with the aid of spectacles fitted with lenses tinted with doubt, disbelief or suspicion. We need only remind ourselves of what this court has said through one of us (Dr. A.S. Anand, J. as His Lordship then was) in State of Punjab Vs. Gurmeet Singh & Ors., 1996 (2) SCC 384.

..A rapist not only violates the victims 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 courts, 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 discrepancies in the statement of the prosecutrix, which are

not of a fatal nature, to throw out an otherwise reliable prosecution case.

The questions arising for consideration before us are:

> Whether the prosecution story, as alleged, inspires confidence of the court on the evidence adduced? Whether the prosecutrix, is a witness worthy of reliance? Whether the testimony of a prosecutrix who has been a victim of rape stands in need of corroboration and, if so, whether such corroboration is available in the facts of the present case? What was the age of the prosecutrix? Whether she was a consenting party to the crime? Whether there was unexplained delay in lodging the F.I.R.?
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> It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject matter being a criminal charge. However, if the court of facts may find it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice would do. Reference may be had to a long chain of decisions, some of which are Rameshwar 1952 SCR 377, Sidheshwar Ganguly AIR 1958 SC 143, Madhoram & Anr. (1973) 1 SCC 533, State of Maharashtra Vs. Chandraprakash Kewalchand Jain (1990) 1 SCC 550, Madam Gopal Kaddad (1992) 3 SCC 204 Shri Narayan AIR 1992 (3) SCC 615, Karnel Singh 1995 (5) SCC 518, Bodhisattwa Gautam 1996 (1) SCC 490 & Gurmit Singh (supra). We may quote from the last of the above said decisions where the rule for appreciating the evidence of the prosecutrix in such cases has been succinctly summed up in the following words :-
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> . 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.
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> According to Dr. V.D. Jetha, x-ray of left elbow and arm of the prosecutrix were taken for assessing her age. Though the technician who had actually x-rayed the prosecutrix and prepared the x-ray plates has not been examined in the court but the non-examination is of no consequence. According to Dr. Jetha, x-rays were taken in his presence. Based on the x-ray plates he had drawn deductions, formed an opinion based on standard text books and prepared the report on the question of age. He has further stated that there was no need for the prosecutrix being referred to radiologist

in as much as what radiologist could have read from the x-ray plates could also have been done by him as he has done.

Dr. Jetha found that top radial was fully occified. Olecranon of ulna was also fully occified. Distal end of radial and ulna were not completely occified. On the basis of such data he inferred the age of the prosecutrix to be about 15 years. However, during cross-examination he admitted that the age of the prosecutrix could be 15 or 16 years because a variation of 3 on plus or minus side as described by Modi in his Medical Jurisprudence was possible. The learned counsel for the State vehemently argued that non-occification of the distal ends of radial and ulna was a positive indicator of the prosecutrix having not crossed the age of 15 years and in support of his submission he referred to certain passages and tables from Modis Medical Jurisprudence. However we are not satisfied that only on the basis of Dr. Jethas testimony, a positive finding can be recorded that the prosecutrix was less than 16 years of age on the date of the incident. In the estimate made by Dr. Jetha he himself admits a variation of 3 years on either side being permissible. The prosecutrix herself and her father are illiterate persons. The prosecutrix has not taken any schooling. There is no other satisfactory evidence as to her age available on record. We cannot positively hold on the basis of material available that she was less than 16 years of age on the date of the incident.

It is true that the incident dated 1.10.1993 was reported to the police on 5.10.1993. The prosecutrix was a married woman. Her muklana ceremony had not taken place. Muklana ceremony is a rural custom prevalent in Rajasthan, whereunder the bride is left with the parents after marriage having been performed and is taken away by the husband and/or the in-laws to live with them only after a lapse of time. The origin of the custom owes its existence to performance of child-marriages which are widely prevalent there. The muklana was yet to take place. The prosecutrix was a virgin prior to the commission of the crime and this fact finds support from the medical evidence. The parents of such a prosecutrix would obviously be chary to such an incident gaining publicity because it would have serious implications for the reputation of the family and also on the married life of the victim. The husband and the in-laws having become aware of the incident may even refuse to carry the girl to reside with them. The incident if publicised may have been an end of the marriage for the prosecutrix. Added to this is the communal tinge which was sought to be given by the community of the accused. PW-10, the father of the prosecutrix, the prosecutrix PW-2 and other witnesses have stated that while they were about to move to the Police Station they were prevented from doing so by the community fellows of the accused who persuaded them not to lodge report with the police and instead to have the matter settled by convening a panchayat of village people. After all the family of the victim had to live in the village in spite of the incident having taken place. The explanation is not an after thought. An indication thereof is to be found in the F.I.R. itself where the complainant has stated the delay in lodging the report is due to village panchayat, insult and social disrepute. Nothing has been brought out in the cross-examination of

the witnesses to doubt the truth and reasonableness of the explanation so offered.

> We may however state that a mere delay in lodging the FIR cannot be a ground by itself for throwing the entire prosecution case overboard. The Court has to seek an explanation for delay and test the truthfulness and plausibility of the reason assigned. If the delay is explained to the satisfaction of the Court it cannot be counted against the prosecution. In State of Rajasthan Vs. Narayan AIR 1992 SC 2004 this Court observed True it is that the complaint was lodged two days later but as stated earlier Indian society being what it is the victims of such a crime ordinarily consult relatives and are hesitant to approach the police since it involves the question of morality and chastity of a married woman. A woman and her relatives have to struggle with several situations before deciding to approach the police. In State of Punjab Vs. Gurmit Singh & Ors. (supra), this Court has held The Courts cannot overlook the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged. So are the observations made by this Court in in Karenel Singh Vs. State of M.P. (1995) 5 SCC 518 repelling the defence contention based on delay in lodging the FIR. In the present case, in our opinion the delay in lodging the F.I.R. has been satisfactorily explained.

Absence of injuries on the person of the prosecutrix has weighed with the High Court for inferring consent on the part of the prosecutrix. We are not at all convinced. We have already noticed that the delay in medical examination of the prosecutrix was occasioned by the factum of the lodging of the F.I.R. having been delayed for the reasons which we have already discussed. The prosecutrix was in her teens. The perpetrator of the crime was an able bodied youth bustling with energy and determined to fulfill his lust armed with a knife in his hand and having succeeded in forcefully removing the victim to a secluded place where there was none around to help the prosecutrix in her defence. The injuries which the prosecutrix suffered or might have suffered in defending herself and offering resistance to the accused were abrasions or bruises which would heal up in ordinary course of nature within 2 to 3 days of the incident. The absence of visible marks of injuries on the person of the prosecutrix on the date of her medical examination would not necessarily mean that she had not suffered any injuries or that she had offered no resistance at the time of commission of the crime. Absence of injuries on the person of the prosecutrix is not necessarily an evidence of falsity of the allegation or an evidence of consent on the part of the prosecutrix. It will all depend on the facts and circumstances of each case. In Sheikh Zakir 1983 Crl.L.J. 1285, absence of any injuries on the person of the prosecutrix, who was the helpless victim of rape, belonging to a backward community, living in a remote area not knowing the need of rushing to a doctor after the occurrence of the incident, was held not enough for discrediting the statement of the prosecutrix if the other evidence was believable. In Balwant Singh & Ors. 1987 Crl.L.J. 971 this court held that every resistance need not necessarily be accompanied by some injury on the body of the victim; the prosecutrix being a girl of 19/20 years of age was not in the facts and circumstances of the case expected to offer such resistance as would cause injuries to her body. In Karenel Singh 1995 (5) SCC 518 the prosecutrix

was made to lie down on a pile of sand. This court held that absence of marks of external injuries on the person of the prosecutrix cannot be adopted as a formula for inferring consent on the part of the prosecutrix and holding that she was a willing party to the act of sexual intercourse. It will all depend on the facts and circumstances of each case. A Judge of facts shall have to apply common sense rule while testing the reasonablity of the prosecution case. The prosecutrix on account of age or infirmity or overpowered by fear or force may have been incapable of offering any resistance. She might have sustained injuries but on account of lapse of time the injuries might have healed and marks vanished.

For the offence of rape as defined in Section 375 of the Indian Penal Code, the sexual intercourse should have been against the will of the woman or without her consent. Consent is immaterial in certain circumstances covered by clauses thirdly to sixthly, the last one being when the woman is under 16 years of age. Based on these provisions, an argument is usually advanced on behalf of the accused charged with rape that absence of proof of want of consent where the prosecutrix is not under 16 years of age takes the assault out of the purview of Section 375 of the Indian Penal Code. Certainly consent is no defence if the victim has been proved to be under 16 years of age. If she be of 16 years of age or above, her consent cannot be presumed; an inference as to consent can be drawn if only based on evidence or probabilities of the case. The victim of rape stating on oath that she was forcibly subjected to sexual intercourse or that the act was done without her consent, has to be believed and accepted like any other testimony unless there is material available to draw an inference as to her consent or else the testimony of prosecutrix is such as would be inherently improbable. The prosecutrix before us had just crossed the age of 16 years. She has clearly stated that she was subjected to sexual intercourse forcibly by the accused. She was not a consenting party. She offered resistance to the best of her ability but she succumbed and fell victim to the force employed by the accused. She has narrated how she was approached by the accused while she was busy washing clothes near her hut. The accused initially asked for water in a lota. Then the accused asked for a knife on the pretext that it was needed for peeling cucumber. The accused was gaining time to ascertain if the prosecutrix was alone. No sooner the prosecutrix turned her back unmindful of what laid ahead, her hand was caught hold of by the accused and twisted on her back. The accused pushed her to bhitian, a secluded place. She was thrown on the ground. The accused put his knee on her chest so as to over power her. Her shouting was throttled by the accused who placed his palm on her mouth and later covered her mouth by a towel pressed against her lips. She was then raped. Blood oozed out from her private parts. Having finished his act the accused left her alone and took to his heels. The prosecutrix was weeping. She narrated the incident to a woman described as the wife of Udai Singh and to her father in quick succession. The statement of the father of the prosecutrix corroborates her in all material particulars and is admissible in evidence and relevant under Section 157 as her former statement corroborating her testimony as also under Section 8 of the Evidence Act as evidence of her conduct. In spite of delay in medical examination in the circumstances already discussed the medical evidence corroborates the testimony of the prosecutrix. According to Dr. Jetha, he had found the hymen ruptured in multiple radial tears, the edges of which showed healing at most of the places and mild tenderness. The prosecutrix was not used to sexual intercourse. Pieces of broken bangles were found at the place of the incident and seized. The Forensic Science Laboratory has found (vide report Ex.P/9) presence of human semen on the Lehenga seized from the prosecutrix. It is true that wife of Udai Singh has not been examined. It

would have been better it she would have been examined. However, no dent is caused in the case of the prosecution by her non-examination. She would have repeated the same story as has been narrated by the father of the prosecutrix. We have found the testimony of prosecutrixs father (PW 10) trustworthy and unembellished. The prosecutrix and her father have both been subjected to lengthy cross-examination. The trial court has found both the witnesses reliable. We too find no reason to disbelieve their testimony. A father would not ordinarily subscribe to a false story of sexual assault involving his own daughter and thereby putting at stake the reputation of the family and jeopardizing the married life of the daughter. We find the testimony of prosecutrixs father reliable and lending support to the narration of the incident by the prosecutrix. No reason has been proved, not even suggested during cross-examination of any of the witnesses why the prosecutrix or any member of her family would falsely implicate the accused roping him in false charge of rape. We are surprised to note how an inference as to consent could have been drawn against the prosecutrix and to hold that she was a willing party to the sexual assault made by the accused. Upon an evaluation of evidence available on record we are satisfied to hold that the prosecutrix is a witness of truth. Her testimony inspires confidence. Other evidence available on record lends assurance to her testimony. The Trial Court had rightly held that sexual assault amounting to rape was committed on her by the accused-respondent. In spite of her having not been proved to be under 16 years of age the High Court was not justified in holding her to be a consenting party to the sexual assault on her.

For the foregoing reasons, we are of the opinion that the High Court has committed a clear error of law in interfering with the judgment of the trial court regarding proof of guilt of the accused. The appeal is allowed. The judgment of the High Court is set aside. We hold the accused/respondent guilty of the offence charged i.e. under Section 376 of the I.P.C..

Now remains the question of sentence. The incident is of the year 1993. The accused was taken into custody by the police on 3.11.1993. He was not allowed bail. During the trial as also during the hearing of the appeal by the High Court he remained in jail. It is only on 11.10.1995 when the High Court acquitted him of the charge that he was released from jail. Thus he had remained in jail for a little less than two years. Taking into consideration the period of remission for which he would have been entitled and the time which has elapsed from the date of commission of the offence, we are of the opinion that the accused-respondent need not now be sent to jail. It would meet the end of justice if he is sentenced to undergo imprisonment for the period already undergone by him and to a fine of Rs.2000/- with further simple imprisonment of one year and nine months in default of payment of fine as passed by the Triial Court. The appellant is allowed time till 1st May, 2000 for payment of fine. The accused-respondent is on bail. The bail bonds shall stand discharged on payment of fine as directed. Ordered accordingly.