STATE OF HIMACHAL PRADESH

v.

RAGHUBIR SINGH

FEBRUARY 18, 1993

[DR. A.S. ANAND AND N.P. SINGH, JJ.]

Indian Penal Code, 1860:

S.376—Rape—Accused—Conviction by trial court—Acquittal by High Court—Appeal by State to Supreme Court—Acquittal set aside—Conviction and sentence awarded by trial court confirmed—Held, judgment of High Court based on conjectural findings and not on proper appreciation of evidence—Courts must be slow to interfere with findings based on appreciation of evidence in case of child rape—Conviction can be based on sole testimony of prosecutrix—Absence of injuries on male organ of accused not always fatal to prosecution case—Court cannot enhance sentence without a show cause notice to acquitted accused.

The respondent-accused was prosecuted for committing rape on a child of 8/9 years of age. The prosecution case was that: while the prosecutrix (P.W.4), her father (P.W.5) and elder sister (P.W.7) were in their fields, it suddenly started raining and all the three ran towards their house; P.W.4 got separated from the two kins and was following them when the accused, then aged about 16 years, took her under a mango tree and committed rape on her; P.W.5, who in the meantime returned to the fields in search of P.W.4, saw the accused lying on her; he raised an alarm whereupon P.W.7, rushed to the spot and the accused ran away leaving P.W.4 crying and bleeding per vagina.

The victim was got medically examined the same day and the doctor (P.W.1), besides mentioning the injuries on the private part of the prosecutrix, reported that she had been subjected to sexual intercourse.

At the trial, P.W.5, P.W.7 and the doctor (P.W.1) who had medically examined the prosecutrix, supported the prosecution case in its totality. The trial court held that the accused had committed an offence of rape under s.376, I.P.C. on the prosecutrix, and sentenced him to suffer R.I. for a period of five years.

A The accused filed an appeal before the High Court which acquitted him. The State filed the appeal by special leave to this Court.

Allowing the appeal, this Court,

B HELD: 1.1. Courts must be wary, circumspect and slow to interfere with reasonable and proper findings based on appreciation of evidence as recorded by the lower courts, before upsetting the same and acquitting an accused involved in the commission of heinous offence of rape of hapless girl child. [p.24B-C]

C 1.2. The High Court without appreciating or properly discussing the evidence committed an error in setting aside the findings recorded by the trial court which were based on proper appreciation of evidence and were not unreasonable much less perverse. The judgment of the High Court is based on conjectural findings and cannot be sustained. [pp.22B-C; 25A]

D 3. The statement of prosecutrix (PW4) is clear, cogent and specific. The Sessions Judge recorded her statement on being satisfied that she was capable of giving evidence. She narrated the occurrence in a simple and straight forward manner. The prosecution case was fully supported by her during her statement and nothing has been brought out in the cross-ex-
E amination from which any doubt could be caused about her veracity. Her statement receives ample corroboration from the testimony of her father (PW5) who is found to be a truthful and reliable witness. The medical evidence of PW1 has supported the prosecutrix in all material particulars. The evidence of PW7 who had also seen the accused running away from the scene of crime further lands credence to the prosecution version.
F [pp.21E-H; 22A]

2.1. There is no legal compulsion to look for corroboration of the evidence of the prosecutrix before recording an order of conviction. Evidence has to be weighed and not counted. Conviction can be recorded on the sole
G testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity. [p.22D]

2.2. In the instant case the evidence of the prosecutrix is found to be reliable and trustworthy. No corroboration was required to be looked for, though enough was available on the record. The medical evidence provided
H sufficient corroboration. [p.22E]

3.1. There is no inflexible axiom of law which lays down that the absence of injuries on the male organ of the accused would always be fatal to the prosecution case and would discredit the evidence of the prosecutrix, otherwise found to be reliable. Every case has to be approached with realistic diversity based on peculiar facts and circumstances of that case and inferences have to be drawn from the given set of facts and circumstances. [p.24D-F]

Rahim Beg & Anr. v. *State of U.P.,* **[1972] 3 SCC 759, distinguished.**

3.2. The doctor (PW3), who had examined the respondent, found him to be capable of sexual intercourse and according to him the absence of injury on the male organ of the accused was not suggestive of the fact that he had not indulged in sexual intercourse with the prosecutrix, then of tender years of age. His evidence was not at all challenged on this aspect by the defence. [p.24F-G]

4.1. The judgment of the High Court acquitting the accused is set aside. The accused is convicted under S.376 IPC for having committed rape on the prosecutrix and sentenced to suffer regorous imprisonment for a period of five years. [pp. 25H; 26A]

4.2. Though for such an offence a more severe sentence would have been desirable but neither the State sought enhancement of the sentence by filing an appropriate petition nor any notice in this regard had been issued to the accused, and without putting him on such a notice, the Court cannot enhance the sentence. The provision prescribing more stringent minimum sentence under Section 376 was also incorporated in the Code by an amendment only with effect from December, 1982, after the offence in the instant case had been committed. [p.25D-G]

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 398 of 1984.

From the Judgment and Order dated 16.11.83 of the Himachal Pradesh High Court in Crl. A. No. 32 of 1983.

Ms. Kusum Choudhury and Ms. Bina Gupta for the Appellant.

Dr. N.M. Ghatate and S.V. Deshpande for the Respondent.

A The following Order of the Court was delivered:

On special leave being granted, the State of Himachal Pradesh has preferred this appeal against the judgment and order dated 16.11.1983, acquitting the respondent of an offence under Section 376, IPC earlier recorded by the learned Sessions Judge.

B

Briefly stated the prosecution case is that on 2.8.1982, the prosecutrix, Raksha Devi PW4 alongwith her father Nikkoo Ram PW5 and an elder sister by name Samti were in their fields. It started to rain all of a sudden and the prosecutrix, her father and her sister, ran towards their house. The C prosecutrix got separated from her father and elder sister and was following them when the respondent Raghubir Singh, then aged about 16 years, came to her and caught hold of her hand and took her under a mango tree. The prosecutrix, who was 7/8 years old at that time was wearing a frock and having a shawl with her. The respondent spread the shawl on the ground and making D the prosecutrix lie on that shawl committed rape on her. Since, the prosecutrix had not reached her home, Nikkoo Ram her father after waiting for about half an hour returned towards the field and saw the respondent lying on top of the prosecutrix, Raksha Devi, under the mango tree. He raised alarm and the respondent ran away carrying with him his underwear. The prosecutrix was crying and was bleeding per vagina. The occurrence took place at about 2.30 E p.m. and the First Information Report Ex. PE was lodged at the Police Station at 5.50 p.m. The prosecutrix was got examined by the doctor, who found her hymen ruptured and slight bleeding coming out of the vaginal edges. Blood clott was also present and the external genitals of the prosecutrix were found to be tender and red. The vagina admitted one finger with difficulty, which got F smeared with blood. The doctor who had examined the prosecutrix, namely, Dr. Urmil Gupta, Medical Officer, Rural Hospital, Nalagarh at about 7 p.m. on the same day, appearing as PW1 at the trial had also testified that when the prosecutrix was brought to her by her father, he had also brought with him a shawl, which was found to be having some mud and bloodstains. According to the opinion of Dr. Urmil Gupta PWl, the prosecutrix had been subjected to G sexual intercourse and the probable duration of the injuries on her private parts, including the vagina, was about 6 to 12 hours. During the cross-examination, a suggestion was put to the doctor that the injuries found on the prosecutrix could have been caused by a fall on some bushes or on the stem of a 'beree' tree but the doctor had categorically denied the suggestion. It was H also suggested to her that the venginal injury could also be caused by inserting

a finger in the vagina. The X-Ray, the skiagrams and the examination of her teeth by Dr. Subhash Chandra Aggarwal PW2 established the age of the prosecutrix to be between 6 to 8 years. The respondent was also examined by doctor C.L. Sharma PW3, medical officer at the Rural Hospital, Nalagarh. He had found the respondent to be potent and capable of sexual intercourse. He denied the suggestion that injuries would necessarily be caused to the penis in case of sexual intercoures by a grown up male with a virgin when during the act her hymen gets torn.

The father of the prosecutrix Nikkoo Ram PW5, the prosecutrix Raksha Devi PW4 and Taru PW7, who had rushed to the scene of occurrence on hearing the alarm and had also seen the respondent running away therefrom carrying with him his underwear supported the prosecution case in its totality.

The learned Sessions Judge after a careful appraisal of the evidence on record found that the respondent had committed the offence of rape and sentenced him to suffer R.I. for a period of five years for the offence under Section 376 IPC. While awarding the sentence, the learned Sessions Judge took into account the age of the prosecutrix, the age of the accused and the other attending circumstances and directed that it would be appropriate if the accused was kept in the open air jail in Bilasput during the term of five years R.I. The respondent appealed to the High Court of Himachal Pradesh and on 16.11.1983. The High Court acquitted him.

We have heard learned counsel for the parties at length and have gone through the evidence on the record. The statement of the prosecutrix, Raksha Devi PW4 is clear, cogent and specific. The learned Sessions Judge before recording her statement was conscious of her age and had, therefore, taken all the precautions required by law to ascertain whether she was capable of giving evidence or not and on being satisfied that she was so capable, recorded her statement. She narrated the occurrence in a simple and straight forward manner. The prosecution case as noticed in the earlier part of the judgment was fully supported by her during her statement and nothing has been brought out in the cross-examination from which any doubt could be caused about her veracity. Her statement receives ample corroboration from the testimony of Nikkoo Ram PW5, her father who even otherwise would be the last person to come forward with a false accusation of the type of rape on his young unmarried daughter.

A His testimony has impressed us and we find him to be a truthful and reliable witness. The medical evidence of Dr. Urmil Gupta has supported the prosecutrix in all material particulars. She has also testified to the presence of mud and blood-stains on the shawl. The evidence of Taru PW7 who had also seen the accused running away from the scene of crime carrying his underwear further lends credence to the prosecution version. The learned Sessions Judge, in our opinion, was therefore justified in relying upon the prosecution evidence and recording an order of conviction against the respondent for an offence under Section 376 IPC. His findings were based on proper appreciation of evidence and were not unreasonable much less perverse. The learned single Judge of the High Court in our opinion, without appreciating or properly discussing the evidence set aside the findings recorded by the Sessions Judge. The High Court appears to have embarked upon a course to find some minor contradictions in the oral evidence with a view to disbelieve the prosecution version. In the opinion of the High Court, conviction on the basis of uncorroborated testimony of the prosecutrix was not safe. We cannot agree. There is no legal compulsion to look for corroboration of the evidence of the prosecutrix before recording an order of conviction. Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity. In the present case the evidence of the prosecutrix is found to be reliable and trustworthy. No corroboration was required to be looked for, though enough was available on the record. The medical evidence provided sufficient corroboration. The High Court, however, while dealing with the medical evidence observed as follows:

> "Lady doctor Urmil Gupta PW1, who had examined the prosecutrix, had admitted in so many words towards the end of her cross examination that the injury found on the private part of the prosecutrix and which is the only injury found in the instant case, could be caused by insertion of a finger by a grown up person like the parents of the prosecutrix. It is true that normally no parents would not do so but in the peculiar circumstances of this case, this possibility may not be ruled out altogether. In any case the mere fact that the hymen of the prosecutrix had been found ruptured, would not prove the prosecution version

and connect the appellant with the offence charged against him." A

The above approach to say the least was highly improper. What were the 'peculiar circumstances' of the case from which the learned single Judge of the High Court thought that the possibility could not be ruled out that the parents of the prosecutrix would have themselves caused injury to B the prosecutrix by inserting finger in her vagina rupturing her hymen is not at all understandable. There is no suggestion that on account of any enmity, the parents of the girl would go to that length to falsely implicate the respondent. Dr. Ghatate, the learned senior counsel was also unable to point out any such 'circumstances' from the record which could show that C there was any possibility of the hymen of the prosecutrix having been ruptured in the manner suggested by the High Court or any reason to falsely implicate the respondent. In fairness to Dr. Ghatate it must be recorded that he did not support the observations of the High Court noticed above.

D

The learned single Judge of the High Court also drew an inference against the prosecution from the fact that only two blood-stains had been found on the shawl by the Chemical Examiner and doubted the prosecution version on that account. According to the learned single Judge:

E

"In natural course if this shawl had been used under the prosecutrix at the time of the alleged offence, the same should have been drenched with blood in the meddle. Moreover, this shawl should have been full of mud as it remained lying on the ground under the prosecutrix for such a long time and when it had rained throughout." F

In making the above observations, obviously the High Court ignored the testimony of Doctor Urmil Gupta who had found the presence of blood-stains and the mud on the shawl and who had opined that the bleeding from the edges of the vagina was slight and that some amount of G clotted blood was also present. The prosecutrix was a girl of tender age and on account of the rape committed on her, there was bleeding from her vagina but to expect that the shawl should have got "drenched with blood" as if the large blood arteries had been cut, is letting the imagination run wild and ignoring the circumstances of the case. The absence of spermatoza on the vaginal slide, which was also pressed into aid by the High H

A Court to acquit the respondent, was not based on proper scrutiny of the evidence. The prosecution case itself was that on being surprised while the respondent was in the act of committing sexual intercourse on the prosecutrix, he ran away carrying his underwear. The absence of spermatoza under the circumstances could not be said to be a circumstance in
B favour of the respondent at all. The judgment of the High Court, in our opinion, is based more on surmises and conjectures than on proper appreciation of evidence. It exposes the insensitivity of the learned Judge to the serious crime committed against human dignity. We are not impressed by the manner in which the High Court dealt with the case. Courts must be wary, circumspect and slow to interfere with reasonable and proper
C findings based on appreciation of evidence as recorded by the lower courts, before upsetting the same and acquitting an accused involved in the commission of heinous offence of rape of hapless girl child.

Dr. Ghatate, learned senior counsel for the respondent submitted, by
D reference to *Rahim Beg & Anr.* v. *State of U.P.,* [1972] 3 SCC 759, that the absence of injuries on the penis of the respondent should be treated as sufficient to the negative prosecution case. We are afraid we cannot agree. Inferences have to be drawn in every case from the given set of facts and circumstances. There is no inflexible axiom of law which lays down that the absence of injuries on the male organ of the accused would always be fatal
E to the prosecution case and would discredit the evidence of the prosecutrix, otherwise found to be reliable. The presence of injuries on the male organ may lend support to the prosecution case, but their absence is not always fatal. *Rahim Beg's* case (supra) was based on its peculiar facts and the observations made therein were in a totally different context and cannot
F advance the case of the respondent. The observations in *Rahim Beg's* case (supra) cannot be mechanically pressed into aid in every case regardless of the specific circumstances of the crime and absence of the fact situation as existing in that case. Every case has to be approached with realistic diversity based on peculiar facts and circumstances of that case. Doctor Sharma who had examined the respondent had found him to be capable
G of sexual intercourse and according to his opinion the absence of injury on his male organ was not suggestive of the fact that he had not indulged in sexual intercourse with the prosecutrix, then of tender years of age. His evidence was not at all challenged on this aspect by the defence.

H Thus, considered on the whole, we are of the opinion that the

judgment of the High Court is based on conjectural findings and cannot be sustained. The same deserves to be set aside and is hereby set aside. The reasoning given by the learned Sessions Judge and the findings recorded by him on appreciation of evidence have appealed to us and we find no reason to take a view different than the one taken by the learned Sessions Judge.

We, accordingly, set aside the acquittal of the respondent and hold him guilty of the offence under Section 376 IPC for having committed rape on the prosecutrix, Raksha Devi, on the date and in the manner alleged by the prosecution.

Having recorded the conviction of the respondent for the offence under Section 376 IPC, the next question is about the awarding of proper sentence. The occurrence took place on 2.8.1982, more than a decade ago. The learned Sessions Judge after recording the conviction under Section 376 IPC had sentenced the respondent to suffer RI for five years. The State did not move the High Court for any enhancement of the sentence. We, therefore, feel that the ends of justice would be met if the sentence to be imposed on the respondent is confined to five years RI as was awarded by the learned Sessions Judge for cogent reasons recorded by him. We may emphasise that though for such an offence a more severe sentence would have been desirable but we have restricted ourselves to the maintenance of the sentence as imposed by the learned Sessions Judge for the reason that the State did not seek any enhancement of the sentence by filing an appropriate petition in the High Court or in this Court and for over a period of seven years, while the case has remained pending here, no notice had been issued to the acquitted respondent to show cause as to why in the event of his acquittal being set aside, a more deterrent sentence, than the one imposed by the Sessions Judge, be not imposed upon him and without putting him on such a notice, the Court cannot enhance the sentence. If the notice were to issue now, it would further delay the disposal of the case and we do not consider that to be a proper course to be adopted. The more stringent minimum sentence prescribed for an offence under Section 376 IPC was also incorporated in the Code by an amendment only with effect from December, 1982, after the offence in the present case had been committed.

The appeal is consequently allowed and the judgment of the High

A Court is set aside. The respondent is held guilty of an offence under Section 376 IPC and sentenced to suffer rigorous imprisonment for a period of five years. The respondent shall be taken into custody to suffer the term of imprisonment.

R.P. Appeal allowed.