IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT SRINAGAR

Reserved on: 30.07.2024
Pronounced on: 14.08.2024

CrlA(S) No.05/2024

SAJAD AHMAD BHAT ALIAS TAIBA BHAT

...**APPELLANT(S)**

Through: - Mr. Mohammad Shafi Bhat, Adv. with
M/S: Mukhtar Ahmad Makroo & Umar Bhat, Advocates.

Vs.

UT OF J&K **…RESPONDENT(S)**

Through: - Ms. Naubahar, Assisting Counsel, vice
Mr. Mubeen Wani, Dy. AG.

CORAM:HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The appellant has challenged judgment dated 22.02.2024 passed by learned Additional Sessions Judge(P.O. Fast Track Court), Kulgam, (hereinafter referred to as "the trial court") whereby the appellant has been convicted of offences under Section 376 read with Section 511 RPC. Challenge has also been thrown to order dated 22.02.2024, whereby the appellant has been sentenced to undergo rigorous imprisonment for four years and to pay a fine of Rs.10,000/ for having committed the aforesaid offences. In default of payment of fine, he has been directed to undergo rigorous imprisonment for a further period of six months.

2) As per prosecution case, on 06.07.2012, PW Mushtaq Ahmad Ganie, father of the victim girl, lodged a written report with the Police alleging therein that on the said day in the evening, while his minor daughter was playing with other children in the house of PW Rafiq Parray, the appellant herein caught hold of her and forcibly committed rape upon her after ousting other children therefrom. It was alleged that the appellant/accused is 25 years old. As per the report, the victim girl raised hue and cry, whereafter the appellant fled away from the spot. The victim girl was left unconscious in the room and the other children upon hearing the noise entered the room. It was further alleged that the complainant was not present in his house at the relevant time and when his wife and elder son went to the house of the appellant, they were attacked by the family members of the appellant and his son was beaten up. It was further stated in the report that the appellant has absconded whereas the victim girl is undergoing treatment.

3) on the basis of aforesaid report (EXPW-1), the police registered FIR No.111 of 2012 for offences under Section 376, 511 of RPC and started investigation of the case, which was entrusted to PW Head Constable Mukhtar Ahmad of P/S Kulgam. During the course investigation, the victim girl was subjected to medical examination. Her date of birth certificate was obtained from the concerned school, the statements of the witnesses under Section 161 of Cr. P. C and the statement of the victim girl under Section 164-A of J&K Cr. P. C were recorded. Potency test of the appellant was also conducted. After

undertaking investigation of the case, offences under Section 376 and 511 RPC were found established against the appellant/accused and the charge sheet was laid before the Chief Judicial Magistrate, Kulgam, whereafter the same was committed to the trial court.

4) The learned trial court, vide its order dated 28.09.2012, framed charges for offences under Section 376 and 511 RPC against the accused, to which he pleaded not guilty and claimed to be tried. Accordingly, the prosecution was directed to lead evidence in support of the charges. The prosecution examined all the eleven witnesses cited in the challan. After completion of prosecution evidence, statement of the appellant/accused in terms of Section 342 of the J&K Cr. P. C was recorded by the trial court on 20.04.2017, in which he termed the case of the prosecution as false and stated that the prosecution witnesses are biased against him. The appellant/accused, however, did not lead any evidence in defence. The learned trial court, after hearing the parties and after appreciation of the evidence on record, came to the conclusion that the charge framed against the appellant stand established beyond any reasonable doubt and, accordingly, in terms of the impugned judgment, he has been convicted of offences under Section 376 and 511 of RPC.

5) The appellant has challenged the impugned judgment of conviction and the order of sentence on the grounds that the same are based upon wrong appreciation of evidence on record. It has been contended that the victim while making her statement before the trial

court has not supported the prosecution case but the learned trial court has relied upon the uncorroborated testimony of PW-5, Showkata Jan, for recording conviction against the appellant which is not in accordance with law. It has been further contended that there are contradictions in the statements of the prosecution witnesses *inter se* on vital aspects of the case, particularly with regard to the site of alleged occurrence, but the same have been overlooked by the learned trial court while passing the impugned judgment. It has been further contended that even the medical evidence does not support the prosecution version and on this ground also, the impugned judgment is liable to be quashed. The appellant has also contended that the Investigating Officer has failed to record statements of other children who were allegedly playing with the victim girl just before the occurrence. Thus, a vital piece of evidence has been withheld by the prosecution. According to the appellant, the presumption is required to be drawn against the prosecution on account of withholding of vital evidence. Lastly, it has been contended that ingredients of offence under Section 376/511 RPC have not been established by the prosecution.

6) I have heard learned counsel for the parties and perused the grounds of appeal, the impugned judgment and the evidence led before the trial court.

7) The first and foremost ground for impugning the judgment of the learned trial court that has been advanced by learned counsel for the

appellant is that the victim girl, while making her statement during the trial of the case, has not stated anything against the appellant but in spite of this, the learned trial court has convicted the appellant on the basis of uncorroborated testimony of PW-5, Showkata Jan. It has been contended that even the medical evidence does not support the version of occurrence given by the prosecution.

8) In order to determine the merits of the aforesaid contention raised by learned counsel for the appellant, it would be apt to refer to the statement of the victim girl made during the trial of the case. Before doing so, it is to be borne in mind that the victim girl at the time of the occurrence was only 6 years old and when she deposed before the trial court she was between 9 – 10 years of age.

9) In her statement, the victim girl has deposed that on the day of the occurrence she was playing with her friends and in the meanwhile appellant/accused came over there. He asked her if she is quarrelling with her sister and thereafter he asked her to accompany him to the house of Naba Kak. She agreed to accompany him but her friends told her not to accompany the appellant/accused but in spite of this, she accompanied the appellant to the house of Naba Kak where appellant bolted the door of a room and sprinkled some water over her. She went unconscious and fell down. There after her friend came over there, who picked up her and made her to take some water. She was taken to the house of her uncle by her friend Mehky Jan. Thereafter she has no knowledge what happened. In her cross examination by the learned

defence counsel, she stated that she had made a similar statement before the Judge. She further clarified that the statement which she made before the court is the correct one.

10) It is to be noted that while making her statement under Section 164 -A of the Cr. P. C during the investigation of the case, the victim had narrated that the appellant had made her to take off her trouser whereafter he sat over her body and passed urine over her. She had further stated that the appellant had also gagged her mouth and that when the appellant fled away from the spot, he was chased by her cousin sister PW Showkata Jan.

11) It would also be apt to refer to the statement of PW Showkata Jan, who is a crucial witness to the present case, upon whose statement the fate of this case hinges. She has stated that on the day of occurrence, when she was sitting in her home, she heard some noise whereafter she went to the compound of the house of PW Rafiq Parray. She saw some children playing over there and they told her that the appellant had taken the victim girl inside the house of PW Rafiq Parray. She went inside the house of PW Rafiq Paray and she saw the appellant running away from there. She found the victim girl lying inside the house in an unconscious state. When she went near the victim girl, she found semen lying on her private part, legs and belly. She picked up the victim girl and brought her to her own house. Thereafter the parents of the victim girl came over there and they took her to their own house. The parents of the victim girl lodged a report with the police.

12) In her cross examination, she stated that there is only one cow shed located in between her house and the house of PW Rafiq Parray. She further stated that one can easily see the house of PW Rafiq Parray from her house. She stated that the occurrence took place half an hour after the evening prayers. She further stated that Mehky Jan, Shivani and Zeeshan were the children who were present over there and that they narrated to her about the occurrence. She also stated that she had told the police about the names of these three children. She also stated that at the time of the occurrence, there was nobody else in the house. She stated that prior to her, nobody including the children, had gone inside the room where the victim girl was lying. She further stated that the victim girl was lying over there without her trouser on. She made the victim girl to put on the trouser after she brought her to her own house where she cleaned the body of the victim girl. The trouser of the victim girl was wet and she was made to wear another trouser. When she reached the place of the occurrence, she saw the appellant/accused running away there from.

13) It is also profitable to refer to the statements of Dr. Rehana, Assistant Surgeon and Dr. Mohammad Rafiq, Specialist in Gynaecology. Dr. Rehana in her statement deposed that upon conducting medical examination of the victim girl, she found one minor injury on the inner side of thigh and on the outside of labia. She also detected fresh blood on her private parts. As per her opinion, sexual assault had been committed upon the victim. In her cross-examination,

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she stated that there were no marks of violence on the body of the victim.

14) Dr. Mohammad Rafiq, Specialist in Gynecology, has stated that on 7th July, 2012, he examined the victim girl and found that her hymen was intact. He proved his final opinion, EXPW-8, according to which the minor injuries on the private part of the victim were suggestive of an attempt to intercourse but actual penetration had not taken place.

15) In the light of the aforesaid nature of evidence on record, the question arises as to whether the prosecution has succeeded in proving the charge of attempt to rape against the appellant/accused. As already noted, the victim girl in her statement before the trial court during the trial of the case has stopped short of levelling any allegation of sexual assault against the appellant/accused. She has only stated that the appellant/accused took her inside the room of the house of Naba Kak, where he bolted the door of the room and thereafter he sprinkled some sort of water upon her and she went unconscious. She did not narrate anything about the sexual assault though in her statement under Section 164-A of Cr. P. C she clearly stated that the appellant/accused had sat over her body, urinated over her and gagged her mouth. In these circumstances the question that arises for determination is as to whether only on the basis of the statement of PW Showkata Jan and medical evidence, it can be stated that the victim girl was subjected to sexual assault by the appellant/accused.

16) In the above context, it has to be noted that the victim girl was aged only six years at the time of the occurrence and a little above nine years at the time when she made statement before the trial court. Having regard to her tender age, she cannot be expected to depose with perfection and narrate minute details of the incident. A child witness is vulnerable and susceptible to be swayed by what others tell and his/her perception of the things is different from adults. Some aspects of the matter, which appear very vital to an adult witness, may not appear to be so to a child witness. Therefore, while assessing and evaluating the statement of a child witness, a different approach has to be adopted by a Court.

17) A Division Bench of the High Court of Delhi has, in the case of **State vs Sujeet Kumar,** 2014 SCC Online Del 1952**,** while discussing the approach that is required to be adopted by a Court in appreciating the testimony of a child witness, observed as under:

> "*48. It is trite that the children have been accorded special treatment by the legislature (of various countries) and courts because of their special needs. The environment of a court room is unfamiliar and definitely intimidating to a child who is required to testify as a witness. The trauma faced by a child witness where a child witness is a victim as well is further aggravated. This important subject has received attention of the United Nations as well which has framed the 'United Nations Guidelines on Justice in matters involving Child Victims and Witnesses of Crime 2005'. The UN guidelines prescribe that the children are particularly vulnerable and need special protection, assistance and support appropriate to their age, level of maturity and unique needs in order to prevent further hardship and trauma that may result from their participation in the criminal justice process. The UN guidelines further prescribe that female child witness is more vulnerable than the male child*

witness and may face discrimination at all stages of the justice system. The UN guidelines stresses the importance of ensuring dignity and physical, mental and moral integrity of the child witness; the justice process should be sensitive to child's age, wishes, understanding, gender, sexual orientation, ethic, cultural, religious, linguistic and social background, caste, socio- economic condition as well as special needs of the child including health, ability and capacities.

49. The assessment of competence of a child witness is not an easy task and fraught with various difficulties, some of which are being enumerated herein under:-

• A court operates in an atmosphere which is intended to be imposing. It is an atmosphere which is foreign to a child. The child has to testify in the presence of accused person and other strangers including the presiding judicial officer, the counsel of the accused, the prosecutor and court officials. The testimony of child is recorded in an atmosphere which is probably bewildering and frightening to the child. Unless appropriately adapted to a child, the effect of the courtroom atmosphere on the child may be to reduce the child to a state of terrified silence. Instances of children who have been so frightened by being introduced into the alien atmosphere of the courtroom they refuse to say anything are not unknown.

• The child is required to give evidence in the presence of the accused. The accused will be a few paces from the child, and will invariably be staring at the child while the child gives evidence. This scares the child to no lengths and he often thinks that he would be punished for speaking the truth. In fact, children worry about seeking the accused again. The research shows that this is the most common and intense court-related worry among testifying children.

• Children worry about not being believed while testifying, especially the children who are victims of sexual abuse. The research on children who are victims of sexual abuse shows that fear of disbelief is a major impediment to disclosure by children. Children assume that the word of an adult will always be taken over the word of a child.

• Children worry about people finding about the offence while testifying. A courtroom is a public place and few witnesses relish the public exposure that testifying entails. Children are no different. Children worry about getting yelled at, getting into trouble or being hurt while testifying.

• Children worry about getting their facts mixed up or forgetting things while testifying.

• Children may be afraid or embarrassed to say what happened. The content of a child's testimony may involve something the child is reluctant to say out loud, perhaps because it involves body parts, sexual acts or the need to repeat rude words or bad language someone said to them. Children worry about repercussions and retaliation by or against their family while testifying. It is normal for witnesses to worry about retaliation for testifying. Children are no different, except they might feel more vulnerable than an adult would.

• Since children see the world differently from adults, some details which may appear to be important to adults like time and place may be missing from the recollection of children.

• Children see adults as authority figures and will therefore accede to what they say to them.

•Young children can be susceptible under specific conditions. These include: when they are asked about personal events that happened a substantial period of time age, with no 'refresher' interview in the interim; when they are questioned by a biased interviewer who pursues a hypothesis single-mindedly.

• Very young children (those aged between three and under) have difficulty understanding that scale models can represent real objects and are confused about their bodies that require them to represent touching on anatomical bodies.

• Children can assign different meanings to words than those generally understood by adults. For example, 'touch' often means only by hand to the children. 'Private part' often means anything under clothing to the children. Children often use words without knowing what they mean or have different understanding from adults as to meaning of a word. For example, a child could use the word 'glue' to mean semen.

• Some concepts are developmentally difficult for children to understand such as 'behind', 'in front of', 'above', 'beneath' etc. Children are reluctant to relate their sad and often sordid experiences to several different people. As a result, repetition tends to heighten the sense of shame and guilt of children as to what happened to them. Children have special difficulty in identifying the source of their beliefs, so if false information is introduced, they will confuse it with the event.

> • *It is not only cognitive abilities, memory and social and emotional factors that affect children's abilities to give detailed and reliable statements that can be used in child abuse prosecutions. Their ability to understand and interpret the questions put to them is also crucial."*

18) In the light of the aforesaid analysis of law with regard to assessment of statement made by a child witness, it is clear that a court has to take into account the fact that a child witness is vulnerable and susceptible under imposing atmosphere which a courtroom presents.

19) It is to be noted that at the time when the statement of the victim in the present case was recorded, there were no vulnerable witness deposition facilities available in this part of the country. Therefore, the victim must have deposed before the trial court in the same atmosphere as an adult witness deposes before the court. She must have also faced the imposing personality of the appellant/accused at the time of her deposition. It is also to be noted that it has come in the statement of the father of the victim that they have settled the issue with the appellant/accused amongst their families. As already noted, a child witness is generally influenced by his/her parents, whom they consider as authority figures. Therefore, once a settlement was arrived at between the families of the victim and the appellant/accused, it is highly probable that the victim girl might have been dissuaded by her parents from deposing against the appellant/accused, but in spite

of this, the victim girl has mustard courage and narrated one part of the occurrence before the trial court by stating that she was taken by the appellant/accused inside a room and the door of the room was bolted by him. The statement of the victim girl in the present case has to be understood, analysed and appreciated in the backdrop of these circumstances. Thus, merely because the victim has not stated anything about the actual assault does not lead to a conclusion that it has not taken place. Her statement, having regard to her tender age and vulnerabilities, has to be appreciated in the light of the other evidence on record.

20) Even without the statement of the victim girl, there is enough evidence on record to connect to the appellant/accused to the crime. PW 5 Showkata Jan has succinctly and in a detailed manner given the sequence of events with regard to the crime. As per the evidence on record, she was the first person who reached the site of crime. She found the victim girl lying without her trouser on and she also found semen on her legs, private part and belly. Her version of the occurrence has not been shaken even though she has been subjected to lengthy cross examination by the defence. In fact, the defence has put scandalous questions to PW Showkata Jan, which, in the opinion of this Court, should not have been allowed by the trial court. During her cross examination, PW Showkata Jan, who is an unmarried girl, has been asked as to

whether she had seen the semen prior to the occurrence. Such a question to an unmarried girl is nothing but indecent and scandalous, which, in view of the provisions contained in Section 151 of the Evidence Act, could not have been put to the witness but the trial court, it seems, has failed to exercise its powers under the said provision, by disallowing the said question. Not even a suggestion has been put to the witness PW Showkata Jan that she has any enmity with the appellant or any axe to grind to depose against him. Therefore, there was no reason for PW Showkata Jan to falsely implicate the appellant/accused. Her statement that she saw the appellant/accused running away from the spot of occurrence coupled with her statement that she saw the victim lying in the room without her trouser on with semen on certain parts of her body, clearly supports the prosecution version of the occurrence.

21) The statement of PW Showkata Jan when read in conjunction with the medical evidence or record, according to which the victim had laceration on her private parts and there was presence of fresh blood, it can safely be stated that the victim had been subjected to sexual assault. In fact, while PW Dr. Rehana has opined that sexual assault was committed upon the victim, the Specialist Doctor PW Mohammad Rafiq has opined that presence of minor injuries on the private part of the victim suggests attempt

to commit sexual intercourse upon her. The victim in her statement has proved the presence of the accused on spot and she has also proved that she was kept confined in a room by the accused. When this statement is read in conjunction with the statement of PW Showkata Jan and the medical evidence, the charge with regard to attempt to commit rape upon the victim is proved beyond reasonable doubt against the appellant/accused.

22) The contention of the learned counsel for the appellant that there are contradictions in the versions given by the prosecution witnesses, particularly with regard to site of the occurrence, is also without any merit. It is true that as per the victim, she was taken to the house of Naba Kak, but as per PW Showkata Jan and the investigating officer, the site of occurrence is the house of PW Rafiq Parray. In this regard, we have to take into account the fact that the victim was aged only 6 years at the time of the occurrence. So, her perception about the site of occurrence may not be correct. There is consistent evidence on record in the shape of statements of all important witness PW Showkata Jan, the owner of the house, PW Rafiq Parray, the parents of the victim and the investigating officer that the site of occurrence is the house of PW Rafiq Parray. Even in the initial report lodged by the father of the victim, EXPW-1, the site of occurrence has been shown as house of PW Rafiq Parray. So, merely because the victim girl, who was a child of 6

years at the relevant time, has given a different name of the owner of the house where the occurrence has taken place does not dent the prosecution version of the occurrence and it does not constitute a contradiction of such a nature as would render the case of the prosecution unreliable.

23) So far as the contention of the learned counsel for the appellant/accused that the prosecution has withheld all important evidence in the nature of statements of children who were playing with the victim just prior to the occurrence, is concerned, the same is also without any merit. The children who were playing with the victim as per the evidence on record were aged in the range of 4 to 5 years, therefore, their capacity to depose with regard to the incident was highly doubtful. The investigating officer has explained this position in his statement given during the trial of the case. The explanation given by the Investigating Officer, PW Mukhtar Ahmed, is plausible and acceptable. Therefore, it cannot be stated that the prosecution has withheld any vital evidence. The argument of learned counsel for the appellant/accused is without any merit.

24) The learned counsel for the appellant/accused has also contended that since there is no proof of penetration in the instant case, as such, the appellant/accused cannot be convicted of offence

under Section 376/511 of RPC. In support of his argument, the learned counsel has relied upon the judgements of the Supreme Court in the case of **Tarkeshwar Sahu vs. State of Bihar,** (2006) 8 SCC 560**,** and **Aman Kumar and Anr. vs. State of Haryana,** (2004) 4 SCC 379**.**

25) I am afraid, the ratio laid down in the aforesaid two judgments cannot be made applicable to the present case as the facts of the instant case are clearly distinguishable. As already noted, in the instant case, it has been established that the appellant/accused had made the victim to take off her trouser. There is evidence on record to show that the appellant/accused has fiddled with the private part of the victim which has resulted in minor injuries to the said part and there is also evidence on record to show that semen was found on certain parts of the body of the victim. Thus, the evidence on record clearly shows that the appellant/accused had done all that was required in accomplishing his evil design of committing rape upon the victim but for the fact that PW Showkata Jan reached the spot in the nick of time, the appellant would have succeeded in his evil design of committing rape upon a child of tender age. Therefore, it is a clear-cut case of attempt to rape. The argument of learned counsel for the appellant/accused in this regard is without any merit.

26) For what has been discussed hereinbefore, I do not find any ground to interfere with the well-reasoned and well-crafted judgment of the learned trial court. In fact, this Court records its appreciation for

the manner in which the judgment has been drafted and the evidence has been appreciated by the trial court in the present case.

27) For the foregoing reasons, I do not find any merit in this appeal. The impugned judgment of conviction passed by the learned trial court is upheld and the appeal is dismissed accordingly. Appellant, who is in custody, shall remain in jail for serving the remaining period of sentence imposed upon him by the trial court.

28) Trial court record along with a copy of the judgment be sent back.

(Sanjay Dhar)
Judge

Srinagar
14.08.2024
"Bhat Altaf-Secy"

Whether the order is speaking: ***Yes/No***
Whether the order is reportable: ***Yes/No***

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