

(1999) 04 AHC CK 0027
In the Allahabad High Court
Case No : Criminal Revision No. 2208 of 1982

Ram Swarup

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 19-04-1999

Acts Referred:

Penal Code, 1860 (IPC) — Section 376

Citation : (1999) CriLJ 3726

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Advocate : Virendra Saran, for the Appellant; A.G.A., for the Respondent

Final Decision : Dismissed

Judgement

B.K. Sharma, J.—This is a revision against the judgment and order dated 4-9-1982 of Sri Parduman Kumar, the then VIII Addl. Sessions Judge (Higher Criminal Court), Badaun whereby he dismissed Criminal Appeal No. 236 of 1981 preferred by accused Ram Swarup against the judgment and order dated 26-9-1981 passed by Sri B. B. Agrawal, the then Assistant Sessions Judge, Badaun in S.T. No. 80, of 1980 convicting the accused-revisionist for the offence u/s 376 I.P.C. and sentencing him to undergo rigorous imprisonment for a period of two years.

2. The prosecution story was that Ram Swarup Accused-revisionist was a partner in agriculture of Smt. Indira, a widow, that on 28-4-1978, in, the evening time at about sun-set accused-revisionist Ram Swarup went to the house of above mentioned Smt. Indira and asked her to accompany him so that common Bhusa could be divided; that Smt. Indira sent her daughter Km. Champa prosecutrix, aged about 14-15 years along with the accused-revisionist Ram Swarup; that when the prosecutrix was returning back after the division of Bhusa and accused-revisionist was behind her in a cart, he called the prosecutrix to help him to pull the wheel of the cart which had got stuck in the earth; that When she (Km. Champa) reached near the cart, the accused-revisionist caught-hold of her and

told her that he had set his heart on her for a sufficiently long time and that it was his luck that she was available that day; that after it, he and his companion Suresh co-accused forcibly dragged her in a nearby field and both of them committed rape on her; that on her cries, her mother, namely Smt. Indira and P.Ws. Ram Singh and Lakhpat reached the spot and saw the occurrence; that on seeking (sic) them, both the accused ran away. Smt. Indira moved an application to the Superintendent of Police, Budaun about the occurrence on the basis of which a case was registered at the police station and investigation was started.

3. The Medical examination of the prosecutrix was made by lady Dr. Swatantrawala Agrawal on 29-4-1978 at 6.00 p.m. at the Women's Hospital, Budaun. She found contusion 2" in length x 1.5" on right side angle of her mouth. She also found contusion 1" x 1" on left side angle of her mouth. Both lips were swollen. Her hymen was torn and admitted two fingers easily but fresh injury was present thereunder which bled on touch". X-ray examination was made in respect of her right elbow and right wrist-joint. It revealed that the medical epicondyle of humerus was in process of fusion with the respective diaphysis and that the lower end of radius and Ulna had not fused with their respective diaphysis. In the opinion of the lady doctor, the age of the prosecutrix was between 14-15 years and the injuries of genitals were simple caused by friction and blunt object and may be due to sexual intercourse and that the external injuries found could come by friction or by blunt object or by pressing the mouth.

4. Both the accused were committed to the Court of Sessions.

5. The learned Assistant Sessions Judge accepted the opinion of lady Dr. Swatantra Wala (P.W. 5) that the age of prosecutrix was 14-15 years. He also accepted the ocular evidence given by the Prosecutrix Km. Champa P.W. 4 against Ram Swarup accused/appellant. He found that her testimony was supported from the medical evidence. He however gave the benefit of doubt to co-accused Suresh and consequently, he convicted accused-revisionist Ram Swarup and sentenced him as aforesaid while he acquitted the co-accused Suresh.

6. The prosecution did not challenge the acquittal of accused Suresh by way of any remedy. The accused-revisionist challenged his own conviction before the learned Sessions Judge and his appeal was dismissed, as above, by the learned Addl. Sessions Judge; hence he has preferred the present revision.

7. I have heard the learned counsel for the parties and perused the record. There is no force in this revision on merit.

8. The contention of the learned counsel for the accused-revisionist was that his conviction was untenable. He relied on the fact that two public witnesses, namely, Lakhpat (P.W. 2) and Ram Singh (P.W. 3) of the occurrence examined at trial had turned hostile and that the learned Assistant Sessions judge himself had acquitted co-accused Suresh though the prosecutrix has given the evidence

against him also and the State had not preferred any appeal against that acquittal. The learned Additional Sessions Judge while hearing the appeal was confronted with the question whether the learned Assistant Sessions Judge committed error in convicting the present accused-revisionist Ram Swarup. It was argued before him that when on the same evidence Assistant sessions Judge had acquitted co-accused Suresh he should have acquitted the present accused-revisionist Ram Swarup also. The learned Additional Sessions Judge discarded the contention of the learned counsel for the accused-revisionist Ram Swarup. The learned Addl. Sessions judge observed in his judgment that in his view the learned Assist. Sessions judge was not fully justified in acquitting accused Suresh but since the State had not thought it fit to file an appeal against his acquittal, the question whether he was rightly acquitted or not was not to be decided by him. However, he observed that if the co-accused Suresh had been wrongly acquitted by the trial Court, then it cannot be a ground for the acquittal of present accused-revisionist. I am in full agreement with the view of the learned Additional Sessions Judge. The present accused-revisionist Ram Swarup is not entitled for acquittal because his co-accused Suresh had been acquitted by the trial Court even though wrongly. The learned Assistant Sessions Judge may be right in not believing the evidence of Smt. Indira (P.W. 1), the mother of the prosecutrix about her having seen the rape taking place in view of the fact that she had stated in her cross-examination that the prosecutrix had come to her house and narrated the occurrence to her. However, there is no reason to disbelieve the evidence of the prosecution about the occurrence that she had gone to the field for dividing of Bhusa with the accused and when the Bhusa was divided, she was returning to the house after its loading on the bullock-cart; that accused-revisionist Ram Swarup called her to help him to pull the wheel of the cart which had got stuck in the earth; and that when she reached near the cart, the accused revisionist caught-hold of her and then she was taken to the Barseem field; that there the accused revisionist Ram Swarup committed rape with her by force. She had also made complaint about the rape to her mother. The medical evidence indicated that it was not a case of sexual intercourse by consent. Moreover, she was not of the consenting age on the medical evidence. So the question of consent was immaterial. The learned lower appellate Court has rightly relied on the observation made by Hon'ble Mr. Justice Krishna Iyer in the authority Krishan Lal Vs. State of Haryana, :

In rape case, Courts must bear in mind human psychology and behavioural probability when assessing the testimonial potency of the victim's (prosecutrix) version. The inherent bashfulness, the innocent naivete and the feminine tendency to conceal the outrage of masculine sexual aggression are factors which are relevant to improbabilise the hypothesis of false implication. The injury on the person of the victim, especially her private parts, has corroborative value. Her complaint to her parents and the presence of blood on her clothes are also testimony which warrants credence. To forsake these vital considerations and go by obsolescent demands for substantial corroboration is to sacrifice common

sense in favour of an artificial concoction called "Judicial" probability.

There was no reason in this case to doubt the testimony of the prosecutrix against the accused revisionist. A suggestion made to her in the cross examination was that she had sexual intercourse with one Ram Bharosey son of Sita Ram is as bad as it could be. There was no reason for her to leave out the real culprit and implicate another in his place. As noted earlier, the medical evidence indicates forcible rape and rules out sexual intercourse by mutual consent. Moreover, in this case, the prosecutrix, being below the age of consent, even a consent would have been immaterial even if it has been a case of consent which it is not.

9. The evidence of the Investigating Officer was also material inasmuch as it showed struggle on her part. The delay in lodging the F.I.R. was found suitably explained and there was no reason to differ from the view taken by the lower appellate Court. The mother of the prosecutrix is an illiterate and poor widow and she had explained the events which prevented them from reaching the police station in the night of occurrence and testified that she had to approach the Superintendent of Police Badaun and move application before him and it was then that the check report was prepared and the case registered on the orders passed by the Superintendent of Police in this regard. So there is no infirmity in the judgment and order of the lower appellate Court sustaining the conviction of the accused-revisionist Ram Swarup for the offence u/s 376, I.P.C.

10. The learned counsel for the accused-revisionist has then made submission on the question of sentence. He claimed that the accused revisionist has already remained in jail for a period of four months as an under-trial and as a convict and that he is on bail from December, 1982 from this Court and that the occurrence being of 1978, the sentence of imprisonment of accused-revisionist may be reduced to the period of imprisonment already undergone by him. In my view, the accused-revisionist does not deserve any leniency on the question of sentence. The learned Assistant Sessions Judge had already imposed a lesser sentence. The normal sentence in the case of forcible rape is five years. A wrong message would go to the wrong doers if in such a case mercy is shown and the sentence is further reduced to the period of less than four months R.I. from the already low sentence of imprisonment imposed by the learned Assistant Sessions Judge.

11. For the reasons aforesaid, this revision has no merit and is consequently dismissed. The conviction and sentence of accused-revisionist for the offence u/s 376 I.P.C. as awarded by the trial Court and as upheld by the lower appellate Court is maintained.

12. The accused-revisionist is on bail from this Court. His bail is cancelled. The C.J.M. concerned shall get him arrested forthwith and consigned to the District Jail concerned to serve out this sentence according to law.

13. Let the complete record of the Courts below be returned to the Assistant

Sessions Judge concerned along with a copy of the judgment within three days from today by special messenger/courier for compliance. The compliance report shall be submitted within 15 days from today to this Court by the Assistant Sessions Judge, Budaun.

14. List this revision again before this Court on 18-5-1999 along with the compliance report of the Assistant Sessions Judge, Budaun for orders.