RAM SINGH @ CHHAJU
v.
STATE OF H.P.
(Criminal Appeal No. 1248 of 2008)

JANUARY 28, 2010

[P. SATHASIVAM AND H.L. DATTU, JJ.]

Penal Code, 1860 – s. 376 – Allegation of commission of rape on victim by accused – Acquittal by trial court – Convicted u/s. 376 and sentenced to rigorous imprisonment for ten years by High Court – Sustainability of – Held: Sustainable – Conviction by High Court based on evidence on record – Testimony of victim corroborated by witnesses as also by medical evidence – At the site of incident, grass and plants found damaged and ruffled – Absence of injuries on the person of victim and her private parts not fatal to the prosecution case – Failure of investigating officer to send blood stained clothes of victim for investigation would not discredit the testimony of victim.

The question which arose for consideration in this appeal was whether the High Court was justified in convicting the appellant for the offence of rape punishable u/s. 376 IPC and sentencing him to rigorous imprisonment for ten years, by setting aside the order of acquittal by trial court.

Dismissing the appeal, the Court

HELD: 1. The accused committed forcible rape on the victim, as alleged by her, and his conviction by the High Court is quite justified being based on evidence on record. It is, therefore, confirmed. [Para 18] [108-C-D]

2.1. The submission that the findings and the

A **conclusion reached by the Sessions Court is one of the possible view in the facts and circumstances of the case and therefore, the High Court ought not to have taken a different view and passed an order of conviction against the appellant, has no merits. High Court on re-**
B **appreciation of evidence on record has differed with the findings of the Sessions Court on the innocence of the accused and has found him guilty of the charges leveled against him. The High Court after evaluating the manner in which the evidence and other materials on record has**
C **been appreciated as well as the conclusions arrived at by the Sessions Court, has come to the conclusion that the findings of the Sessions Court are perverse and has resulted in miscarriage of justice and has found that the appellant is guilty of the offence alleged. [Paras 16 and**
D **17] [106-F-G; 107-G-H; 108-A-B]**

Perla Somasekhara Reddy and Ors. vs. State of A.P. **(2009) 7 SCALE 115;** *Chandrappa and Ors. vs. State of Karnataka* **(2007) Crl.L.J. 2136 – held inapplicable.**

E **2.2. The High Court in its judgment stated that the trial court erred in appreciating the testimony of the witnesses to the extent the victim nowhere mentioned in her statement that the appellant (dead) had taken any particular name when he had requested her to**
F **accompany him to facilitate the delivery of his sister-in-law. High Court also observed that there is no contradiction in the testimony of victim and her son PW-7 as both of them testified that there was reluctance shown by victim to accompany the appellant at around**
G **12.00 a.m. at night, to facilitate the delivery of his sister-in-law. High Court also observed that the trial judge was not justified in coming to the conclusion that PW-7 could not have heard the narration of the incident by the victim to her husband since he was sleeping in the court yard.**

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High Court also noticed that the observation of trial judge that the victim did not name the culprits while narrating the incident to PW-4 of the village contradicts the prosecution case, cannot be held to be correct as the husband of victim in her presence had already told that she was raped by the appellants. Therefore, it is not reasonable to expect from the victim who was under shock due to the incident, to narrate the same to PW-4 in presence of her husband and son. [Para 10] [103-E-H; 104-A-B]

2.3. High Court also found it difficult to accept the reasoning of the trial court about the fact that there were no injuries on the person of the victim belied her testimony that she was subjected to forcible sexual intercourse. High Court observed that the victim was suffering from toothache because of which she was unable to firmly resist, and further she could not raise alarm since her mouth had been gagged by the accused persons. The court also observed that though the blow with the fist was given on her mouth by the appellant, it may not have caused any serious injury. However, being an old lady of more than 40 years at the relevant time and the appellants being young men both around 20 years, the victim could not have put up a strong defence. High Court also pointed towards the finding that the spot where the victim was raped, shown in the spot inspection map and which was proved by the Investigation Officer PW-11 shows that at the site of incident, grass and plants of some crop were found damaged and ruffled. High Court is also not convinced with the trial court's observation that the victim at the late hours of the night should have been accompanied either by her husband or her son. High Court observed that there was nothing unusual about victim going alone with the appellants as it is normal practice to go with male members to facilitate the deliveries as the midwives are respected like mothers.

A **Therefore, there was no reason for herself or her husband and son to disbelieve the appellant and deny the request of appellant in that situation. The entire conspectus of the case was viewed by the High Court in vivid detail to come to the conclusion that the appellant**
B **was guilty of the crime. [Para 11] [104-C-H; 105-A-B]**

2.4. The testimony of the victim inspires confidence. Her testimony is not only corroborated by other witnesses but also by the medical evidence. Even if the statement of PW-4 is not taken into consideration, the
C **other corroborative evidence is sufficient to connect the accused with the crime. [Para 15] [106-D-E]**

2.5. Regarding the submission that there was no injury on the person of the victim, and if there was sexual
D **assault on the victim, she would have resisted the offender and in that process she would have received some injuries on other parts of the body, much importance cannot be given to the absence of defence injuries, because it is not inevitable rule that in the**
E **absence of defence injuries the prosecution must necessarily fail to establish its case. In the FIR and also in the evidence of PW-1, it has come on record that she could not cry out for help since her mouth was gagged by the accused. It has also come in the evidence that the**
F **victim was aged about 40 years and the accused persons were young and aged about 20 years, therefore, she was not in a position of equal strength so as to resist the appellants. Even in the absence of any injuries on the person of the victim, with the other evidence on record,**
G **the prosecution is able to establish that the offence was committed. [Para 12] [105-B-E]**

2.6. It cannot be said that in the absence of any injury on the private parts of the victim, the High Court should have disbelieved the prosecution story. The
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reason being the doctor who was examined as PW-2 found that the victim PW-1 was used to sexual intercourse and as such absence of injury on the private parts of the victim may not be very significant. PW-1 was also used to sexual intercourse. The evidence of the victim has been corroborated by the evidence of PWs. 2 and 3, the two post occurrence witnesses, as well as by the FIR which was lodged without any delay. Therefore, it is difficult to differ from the findings of the High Court. [Para 14] [106-B-C]

2.7. It was submitted that the blood stained clothes which were said to have been handed over to the Officer-in-Charge at the Police Station by the husband of the victim were not sent for chemical examination and, therefore, the corroboration with which such evidence could offer was absent. The failure of the investigating agency cannot be a ground to discredit the testimony of the victim. The victim had no control over the investigating agency and the negligence, if any, of the investigating officer could not affect the credibility of the statement of PW-1-the victim. Having regard to the facts and circumstances of this case, on the basis of the evidence on record, the conviction of the appellant can be sustained. [Para 13] [105-E-H; 106-A]

Case Law Reference:

(2009) 7 SCALE 115 Held inapplicable. Para 16

(2007) Crl.L.J. 2136 Held inapplicable. Para 16

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1248 of 2008.

From the Judgment & Order dated 20.3.2008 of the High Court of Himachal Pradesh at Shimla in Criminal Appeal No. 142 of 1994.

A S.N. Bhardwaj, S. Ramamani for the Appellant.

Naresh K. Sharma for the Respondent.

The Judgment of the Court was delivered by

B **H.L. DATTU, J.** 1. This appeal, by the accused, arises out of the judgment of High Court of Himachal Pradesh in Criminal Appeal No. 142 of 1994 dated 20.3.2008, whereby the appellant is convicted for the offence of rape punishable under Section 376 of Indian Penal Code by reversing the judgment C of Additional Sessions Judge, Kangra Division in Sessions Case No. 9 of 1992 dated 2.8.1993. The High Court has come to the conclusion that the prosecution has brought home the charge under Section 376 of I.P.C. and has sentenced the appellant to suffer rigorous imprisonment for ten years and to D pay a fine of Rs.5000/-, in default of payment of fine to undergo rigorous imprisonment for a further period of one year. The accused feeling aggrieved sought special leave to appeal, on the same being granted, this appeal is before us.

2. Co-accused Naresh Singh alias Titta died during the E pendency of appeal before the High Court.

3. We shall state the facts of the case as put forth by the prosecution:- Smt. Chanchala Devi, hereinafter referred to as the "victim", is the resident of village Dhabian and, was midwife F by profession. Shri Chattar Singh is the husband of Smt. Chanchala Devi. Shri Ashok Kumar (PW-7) is her son. The accused are the residents of village Guriyal, which is situated at a distance of about 2 Kms from village Dhabian. Smt. Chanchala Devi – Victim was present in her house on August G 13, 1989. She had gone to bed along with her husband after taking her meal on that day. Her son Ashok Kumar (PW-7) aged about 24 years was present in the house and was sleeping in the courtyard of the house. That night i.e. on the night of 12/13th August, 1989, PW-7 Ashok Kumar woke up his mother H Chanchala Devi and told her that Naresh Singh alias Titta

(dead) has come to call her as his Bhabi, who was not named by him, has been having labour pains in village Guriyal. The victim went out of the room and saw Naresh Singh alias Titta sitting on the cot of her son in the verandah of the house. The case of the prosecution is that, though the victim refused to the request made by Naresh Singh alias Titta stating that it was not convenient for her as she was having tooth ache, however, after being persuaded by Naresh Singh alias Titta and also by her son PW-7 Ashok Kumar, the victim agreed to accompany Naresh Singh alias Titta to his house situated at village Guriyal. When they had covered a distance of about 30 yards from the house of victim, the appellant Ram Singh alias Chhaju also met them. They all continued walking towards the house of Naresh Singh alias Titta. When they had reached a place known as Tapukar, Naresh Singh alias Titta caught hold of the victim and the appellant Ram Singh alias Chhaju laid her on the ground and opened her trousers. The victim tried to raise alarm, but the Naresh Singh alias Titta dealt a fist blow on her mouth and then gagged it. Both the accused performed sexual intercourse forcibly with the victim and thereafter sneaked away from the place. After returning home, victim had narrated the whole incident to her husband and son. The son of the victim PW-7 Ashok Kumar brought PW-4 Niaz Deen, the Pradhan of the Panchayat on the same night. He was apprised of the incident by the husband of the victim. On his advice, on the following day i.e. on 14.8.1989, the victim being accompanied by her husband reported the matter at police station Nurpur, where her statement was recorded on the basis of which the first information report was registered on 14.8.1989. She was got medically examined at about 12.15 P.M. on the same day. The doctors had opined that victim had been subjected to sexual intercourse 12 to 14 hours prior to her medical examination. The accused were also got medically examined by Dr. Anil Mahajan (PW-3), who had opined that there was nothing suggesting that the accused were incapable of performing sexual intercourse. On completion of the investigation, the final report was filed in the court of Sub-Divisional Magistrate,

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A Nurpur. The case was committed by the learned Magistrate to the Additional Sessions Court, Kangra Division at Dharmashala (Himachal Pradesh) on 6.5.1992, and the same was numbered as Sessions Case No. 9 of 1992. Charges were framed under Section 376 read with Section 34 of Indian Penal Code and B put up for trial before the Additional Sessions Judge, Nurpur.

4. The accused persons pleaded not guilty to the charge. Their defence was that they have been falsely implicated by the victim on account of animosity.

C 5. In support of its case, the prosecution examined the victim Smt. Chanchala Devi (PW1) who has supported the prosecution version in all its material particulars. Niaz Deen (PW-4) was also examined as a witness of fact, but he was declared hostile and cross examined by State counsel. Dr. S. D Mahajan, (PW-2) was examined to prove the medical examination report of the victim. Dr. Anil Mahajan (PW-3) was examined to prove the medical examination report of the accused. Sardar Balwant Singh, (PW-5) was examined to prove the statement of the accused made before the Station House E Officer, but, he was declared hostile and cross examined by the State counsel. Ashok Kumar, (PW-7), son of the victim was examined to corroborate the statement of the victim.

6. The trial court has found that the prosecution has not been able to prove that the accused persons had sexual F intercourse with the victim. Accordingly, has acquitted the appellant herein of the crime.

7. The State of Himachal Pradesh had carried the matter by filing Criminal Appeal No. 142 of 1994 under Section 378 G of the Code of Criminal Procedure before the High Court of Himachal Pradesh against the decision of the trial court. The High Court has allowed the appeal vide its judgment dated 20.3.2008, by setting aside the judgment and order of the trial court and after hearing the accused while deciding on the H quantum of sentence, has convicted the accused under Section

376 of the I.P.C. and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 5,000/-, in default of payment of fine to undergo rigorous imprisonment for a period of one year which has given rise to this appeal. A

8. While assailing the judgment of the High Court, the learned counsel for the appellant has contended that the finding of conviction of the High Court is unreasonable and not justified on the material on record. It is not proved by reliable and independent evidence that the incident alleged had taken place. It is also not proved from the medical evidence that rape had been committed by the appellant and the co-accused and there is no corroboration of the evidence of the victim by any independent evidence and the testimony of the victim is not reliable and trustworthy and the conviction on the sole testimony of the victim is not justified. B C D

9. Learned counsel for the appellant has laid great stress on the proposition that the testimony of the victim required corroboration and as no independent corroboration was available, the trial court rightly had passed an order of acquittal which should not have been upset by the High Court in an appeal filed by the State. E

10. The High Court in its judgment has stated that the trial court has erred in appreciating the testimony of the witnesses to the extent the victim has nowhere mentioned in her statement that the appellant Naresh Singh alias Titta (dead) had taken any particular name when he had requested her to accompany him to facilitate the delivery of his Bhabhi. The High Court has also observed that there is no contradiction in the testimony of victim and her son PW-7 Ashok Kumar as both have testified that there was reluctance shown by victim to accompany the appellant Naresh Singh alias Titta (dead) at around 12.00 a.m. at night, to facilitate the delivery of his Bhabhi. The High Court has also observed that the Trial Judge was not justified in coming to the conclusion that Ashok Kumar (PW-7) could not have heard the narration of the incident by the victim to her F G H

husband since he was sleeping in the court yard. The High Court has also noticed that the observation of Additional Sessions Judge that the victim did not name the culprits while narrating the incident to PW-4 Niaz Deen Pradhan of village Dhabian contradicts the prosecution case, cannot be held to be correct as the husband of victim in her presence had already told that she was raped by the appellants. Therefore, it is not reasonable to expect from the victim who was under shock due to the incident, to narrate the same to PW-4 Niaz Deen Pradhan in presence of her husband and son.

11. The High Court has also found it difficult to accept the reasoning of the Trial Court about the fact that there were no injuries on the person of the victim belied her testimony that she was subjected to forcible sexual intercourse. The High Court has observed that the victim was suffering from toothache because of which she was unable to firmly resist, and further she could not raise alarm since her mouth had been gagged by the accused persons. The Court has also observed that though the blow with the fist was given on her mouth by the appellant, it may not have caused any serious injury. However, being an old lady of more than 40 years at the relevant time and the appellants being young men both around 20 years, the victim could not have put up a strong defence. The High Court has also pointed towards the finding that the spot where the victim was raped, shown in the spot inspection map Ext.PK and which has been proved by the Investigation Officer PW-11 Govardhan Dass, shows that at the site of incident, grass and plants of some crop were found damaged and ruffled. The High Court is also not convinced with the trial court's observation that the victim at the late hours of the night should have been accompanied either by her husband or her son. The High Court observes that there was nothing unusual about victim going alone with the appellants as it is normal practice to go with male members to facilitate the deliveries as the midwives are respected like mothers. Therefore, there was no reason for herself or her husband and son to disbelieve the appellant and

deny the request of appellant in that situation. The entire conspectus of the case was viewed by the High Court in vivid detail to come to the conclusion that the appellant was guilty of the crime. A

12. It was submitted before us by the learned counsel for the appellant that there was no injury on the person of the victim. According to him, if there was sexual assault on the victim, she would have resisted the offender and in that process she would have received some injuries on other parts of the body. Much importance cannot be given to the absence of defence injuries, because it is not inevitable rule that in the absence of defence injuries the prosecution must necessarily fail to establish its case. In the first information report and also in the evidence of PW-1, it has come on record that she could not cry out for help since her mouth was gagged by the accused. It has also come in the evidence that the victim was aged about 40 years and the accused persons were young and aged about 20 years and, therefore, she was not in a position of equal strength so as to resist the appellants. Even in the absence of any injuries on the person of the victim, in our view, with the other evidence on record, the prosecution is able to establish that the offence was committed. B C D E

13. It was contended by the learned counsel for the appellant that the blood stained clothes which were said to have been handed over to the Officer-in-Charge at the Police Station by the husband of the victim were not sent for chemical examination and, therefore, the corroboration with which such evidence could offer was absent. In our view, the failure of the investigating agency cannot be a ground to discredit the testimony of the victim. The victim had no control over the investigating agency and the negligence, if any, of the investigating officer could not affect the credibility of the statement of PW-1 – the victim. Having regard to the facts and circumstances of this case, we are satisfied that on the basis of the evidence on record, the conviction of the appellant can F G H

A be sustained.

14. It is also submitted that in the absence of any injury on the private parts of the victim, the High Court should have disbelieved the prosecution story. In our view, it is difficult to accept the submission of the learned counsel. The reason being the doctor who has been examined as PW-2 has found that the victim PW-1 was used to sexual intercourse and as such absence of injury on the private parts of the victim may not be very significant. PW-1 was also used to sexual intercourse. The evidence of the victim has been corroborated by the evidence of PWs.2 and 3, the two post occurrence witnesses, as well as by the FIR which was lodged without any delay. Therefore, it is difficult to differ from the findings of the High Court.

15. In the present case, the testimony of the victim inspires confidence. Her testimony is not only corroborated by other witnesses but also by the medical evidence. Even if the statement of Niaz Deen, PW-4 is not taken into consideration, the other corroborative evidence in the case is sufficient to connect the accused with the crime.

16. Before we conclude, out of sheer deference to learned counsel for the appellant, we intend to notice the feeble submission made by the learned counsel for the appellant. It is contended by the learned counsel that the findings and the conclusion reached by the Sessions Court is one of the possible view in the facts and circumstances of the case and therefore, the High Court ought not to have taken a different view and passed an order of conviction against the appellant. In aid of this submission, the learned counsel has invited our attention to the observations made by this Court in the case of *Perla Somasekhara Reddy and Ors. vs. State of A.P.* (2009) 7 SCALE 115. In our considered view, the submission of the learned counsel has no merit. This Court in the aforesaid case by way of universal application has not stated, that, whenever there is a judgment and order of acquittal by the Sessions

Court, the High Court under no circumstances would interfere with the said order even when it comes to the conclusion that the findings and conclusion reached by the trial court is based on mere conjecture and hypothesis and not on the legal evidence. In fact, in the aforesaid decision this Court has taken note of what has been stated by this Court in the case of *Chandrappa and Ors. vs. State of Karnataka* (2007) Crl.L.J. 2136, wherein apart from others, it is stated, that the appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded; the Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law; various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion; an appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court; and if two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.

17. In the present case, the High Court on re-appreciation of evidence on record has differed with the findings of the Sessions Court on the innocence of the accused and has found

A him guilty of the charges leveled against him. The High Court after evaluating the manner in which the evidence and other materials on record has been appreciated as well as the conclusions arrived at by the Sessions Court, has come to the conclusion that the findings of the Sessions Court are perverse
B and has resulted in miscarriage of justice has re-appreciated the evidence and materials on record and has found that the appellant is guilty of the offence alleged. Therefore, in our view, the decision on which reliance has been placed by learned counsel for the appellant would not assist him in any manner
C whatsoever.

18. The result of the aforesaid discussion leads to only one conclusion that the accused committed forcible rape on the victim on the intervening night of 12/13th August, 1989, as alleged by her, and his conviction by the High Court is quite
D justified being based on evidence on record. It is, therefore, confirmed.

19. We, therefore, find no merit in this appeal and the appeal is, accordingly, dismissed.

N.J. Appeal dismissed.