2018 INSC 909

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.913 OF 2016

HEMUDAN NANBHA GADHVI ....APPELLANT(S)

VERSUS

STATE OF GUJARAT ...RESPONDENT(S)

JUDGMENT

NAVIN SINHA, J.

The appellant assails his conviction by the High Court under Section 376(2)(f) IPC, sentencing him to ten years rigorous imprisonment, with fine of Rs.5,000/- along with a default stipulation, after reversing his acquittal ordered by the trial court.

2. The prosecutrix PW-2, aged 9 years, was sexually assaulted on 20.02.2004 by an unknown, tall and thin person wearing white clothes. PW-3 Jasiben, accompanying the prosecutrix was also a minor. She informed PW-1 Ambaben, the mother of the

prosecutrix. F.I.R. was lodged by PW-1 the same day. The medical examination of the prosecutrix was also done the same day, by PW-9 Dr. Meghna Narendrabhai Mehta. Sexual assault on PW-2 stood established by rupture of the hymen, with fresh blood oozing, and injury of 1.5 cm to 2 cm extending upto the lower part of the body. The appellant and one Dhirubhai Mulubhai Desai were taken into custody on suspicion. Test Identification Parade (T.I.P.) was conducted by PW-11, the Executive Magistrate, Dilipkumar Kantilal Rathod two days after the occurrence on 22.02.2004. The T.I.P. report Exhibit P-38, bears the thumb impression of PW-2 who was accompanied by her mother. The appellant was identified by PW-2. Six months later, on 31.08.2004 while deposing during trial PW-2 and PW-3 denied the sexual assault and also declined dock identification. The trail court consequentially acquitted the appellant.

3. The High Court, on appeal by the State, reversed the acquittal, and convicted the appellant holding that the F.I.R. lodged by PW-1 had been duly proved by PW-12 Police Sub-Inspector Bachubhai P. Kalsariya. The sexual assault on the prosecutrix stood established by the medical report, corroborated

by the presence of semen on the clothes of the prosecutrix, and the appellant, proved by the FSL serological report as belonging to Group B, which is the same as that of the appellant. The T.I.P. identification of the appellant stood proved by PW-11. The appellant was held to have won over the prosecutrix by sheer passage of time and the consequent delay in trial, but that it could not come to the aid of the appellant in view of the nature of evidence available against him.

4. Learned counsel for the appellant assailing the conviction contended that the T.I.P. is only corroborative evidence, and cannot be put at par with substantive evidence for conviction. There is not an iota of evidence with regard to the identity of the appellant being the perpetrator, and dock identification of the appellant had been declined. Reliance was placed on ***Sheikh Sintha Madhar vs. State Rep. by Inspector of Police***, (2016) 11 SCC 265 and ***Prakash vs. State of Karnataka***, (2014) 12 SCC, 133. It was lastly contended that the serological report was not formally exhibited and neither had the author of the same been examined. No question was put to the appellant under Section 313 Cr.P.C. with regard to the serological report, with an

opportunity of defence, relying on ***Tara Singh vs. The State***, AIR 1951 SC 441. The conviction was therefore unsustainable.

5. Learned counsel for the State opposing the appeal submitted that the sexual assault on the prosecutrix stood established by the medical report. The appellant had been identified in the T.I.P. which was conducted without delay. The presence of semen belonging to Group B as of the appellant, on the clothes of the victim as also the appellant, were together sufficient to sustain the conviction. If PW-1 and 2 due to poverty, with sheer passage of time by six months before deposing in court had been won over, it will not detract from the offence committed by the appellant to warrant acquittal.

6. We have considered the submissions on behalf of the parties. The records have also been perused including necessary translations into English from vernacular language. PW-1 and PW-2 have acknowledged having gone to the hospital on the day of occurrence. PW-9, the doctor has confirmed the sexual assault made on PW-2. The F.I.R. lodged by PW-1 on the same day

stands proved by PW-12 the police Sub-Inspector who stated that it was recorded by him exactly as dictated by the witness. He also proved having forwarded the prosecutrix for medical examination, the seizure of exhibits and sending the same to the FSL. The prosecutrix was also confronted under Section 145 of the Evidence Act with her statement under Section 161, Cr.P.C confirming the sexual assault on her after she turned hostile, contending that she had suffered injury in a fall. The nature of injuries on her person are well nigh impossible due to a fall. Any opinion of the doctor that such injury could be caused by a fall, does not establish the injury as due to fall, as a fact but remains a mere expression of an opinion.

7. The appellant was apprehended on suspicion along with another. The T.I.P. was held without delay on 22.02.2004. Exhibit P-38, the T.I.P. report bears the thumb impression of PW-2 who was accompanied by her mother. The T.I.P. report has been duly proved by PW-11. The appellant was identified by PW-2. There appears no substantive challenge to the T.I.P. Identification in the dock, generally speaking, is to be given primacy over identification in T.I.P, as the latter is considered to be corroborative evidence. But it cannot be generalized as a

universal rule, that identification in T.I.P. cannot be looked into, in case of failure in dock identification. Much will depend on the facts of a case. If other corroborative evidence is available, identification in T.I.P. will assume relevance and will have to be considered cumulatively. In ***Prakash vs. State of Karnataka,*** (2014) 12 SCC 133 it was observed as follows :

> "16.... Even so, the failure of a victim or a witness to identify a suspect is not always fatal to the case of the prosecution. In *Visveswaran v. State* it was held:
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> > 11. ... The identification of the accused either in a test identification parade or in court is not a sine qua non in every case if from the circumstances the guilt is otherwise established. Many a time, crimes are committed under the cover of darkness when none is able to identify the accused. The commission of a crime can be proved also by circumstantial evidence."

8. The family of the prosecutrix was poor. She was one of the five siblings. The assault upon her took place while she had taken the buffalos for grazing. Her deposition was recorded nearly six months after the occurrence. We find no infirmity in the reasoning of the High Court that it was sufficient time and opportunity for the accused to win over the prosecutrix and PW-1

by a settlement through coercion, intimidation, persuasion and undue influence. The mere fact that PW-2 may have turned hostile, is not relevant and does not efface the evidence with regard to the sexual assault upon her and the identification of the appellant as the perpetrator. The observations with regard to hostile witnesses and the duty of the court in ***State vs. Sanjeev Nanda***, 2012 (8) SCC 450 are also considered relevant in the present context:

> "101.....if a witness becomes hostile to subvert the judicial process, the court shall not stand as a mute spectator and every effort should be made to bring home the truth. Criminal justice system cannot be overturned by those gullible witnesses who act under pressure, inducement or intimidation. Further, Section 193 IPC imposes punishment for giving false evidence but is seldom invoked."

9. A criminal trial is but a quest for truth. The nature of inquiry and evidence required will depend on the facts of each case. The presumption of innocence will have to be balanced with the rights of the victim, and above all the societal interest for preservation of the rule of law. Neither the accused nor the victim can be permitted to subvert a criminal trial by stating falsehood and resort to contrivances, so as to make it the theatre

of the absurd. Dispensation of justice in a criminal trial is a serious matter and cannot be allowed to become a mockery by simply allowing prime prosecution witnesses to turn hostile as a ground for acquittal, as observed in ***Zahira Habibullah Sheikh vs. State of Gujarat***, (2006) 3 SCC 374 and ***Mahila Vinod Kumari vs. State of Madhya Pradesh***, (2008) 8 SCC 34. If the medical evidence had not confirmed sexual assault on the prosecutrix, the T.I.P. and identification therein were doubtful, corroborative evidence was not available, entirely different considerations may have arisen.

10. It would indeed be a travesty of justice in the peculiar facts of the present case if the appellant were to be acquitted merely because the prosecutrix turned hostile and failed to identify the appellant in the dock, in view of the other overwhelming evidence available. In ***Iqbal vs. State of U.P.***, 2015 (6) SCC 623, it was observed as follows:

> "15. Evidence of identification of the miscreants in the test identification parade is not a substantive evidence. Conviction cannot be based solely on the identity of the dacoits by the witnesses in the test identification parade. The

> prosecution has to adduce substantive evidence by establishing incriminating evidence connecting the accused with the crime, like recovery of articles which are the subject matter of dacoity and the alleged weapons used in the commission of the offence."

11. The corroboration of the identification in T.I.P is to be found in the medical report of the prosecutrix considered in conjunction with the semen found on the clothes of the prosecutrix and the appellant belonging to the Group B of the appellant. The vaginal smear and vaginal swab have also confirmed the presence of semen. A close analysis of the facts and circumstances of the case, and the nature of the evidence available unequivocally establishes the appellant as the perpetrator of sexual assault on the prosecutrix. The serologist report was an expert opinion under Section 45 of the Evidence Act,1872 and was therefore admissible in evidence without being marked an exhibit formally or having to be proved by oral evidence.

12. The contention on behalf of the appellant that the serological report was not put to him by the court under Section 313 Cr. P.C. and therefore, he has been prejudiced in his defence, has been

raised for the first time before this court. The serological report being available, it was a failure on the part of the trial court to bring it to the attention of the appellant. The prosecution cannot be said to be guilty of not adducing or suppressing any evidence. In view of the nature of the evidence available in the present case, as discussed hereinbefore, we are of the opinion that no prejudice can be said to have been caused to the appellant for that reason, as held in ***Nar Singh vs. State of Haryana***, (2015) 1 SCC 496:

> "32....When there is omission to put material evidence to the accused in the course of examination under Section 313 CrPC, the prosecution is not guilty of not adducing or suppressing such evidence; it is only the failure on the part of the learned trial court. The victim of the offence or the accused should not suffer for laches or omission of the court. Criminal justice is not one-sided. It has many facets and we have to draw a balance between conflicting rights and duties.
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> 33. Coming to the facts of this case, the FSL report (Ext. P-12) was relied upon both by the trial court as well as by the High Court. The objection as to the defective Section 313 CrPC statement has not been raised in the trial court or in the High Court and the omission to put the question under Section 313 CrPC, and prejudice caused to the accused is raised before this Court for the first time. It was brought to our notice that the appellant is in custody for about eight years. While the right of the accused to speedy trial is a valuable one, the Court has to subserve the interest of justice keeping in

view the right of the victim's family and society at large."

13. The present was an appropriate case to direct the prosecution of the prosecutrix under Section 344 Cr.P.C alike ***Mahila Vinod Kumari*** (supra) for tendering false evidence. But considering that the prosecutrix was barely 9 years old on the date of occurrence, that the occurrence had taken place 14 long years ago, she may have since been married and settled to a new life, all of which may possibly be jeopardised, we refrain from directing her prosecution, which we were otherwise inclined to order.

14. The appeal is dismissed.

..............................J.
[RANJAN GOGOI]

..............................J.
[NAVIN SINHA]

..............................J.
[K.M. JOSEPH]

NEW DELHI
SEPTEMBER 28, 2018.