Reportable

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 2238 OF 2010

Md. Ali @ Guddu ... Appellant

Versus

State of U.P. ... Respondent

WITH

CRIMINAL APPEAL NO.425 OF 2015
(@ SLP(Crl.) NO. 9896 of 2011)

CRIMINAL APPEAL NO. 636 OF 2012

J U D G M E N T

Dipak Misra, J.

Leave granted in SLP (Crl.) No. 9896 of 2011

2. The present appeals are directed against the common judgment and order dated 25.03.2009 passed by the High Court of Judicature at Allahabad in Criminal

Appeal No. 602 of 2006 and Criminal Appeal No. 863 of 2006 whereby the learned Single Judge has given the stamp of approval to the judgment and order dated 30.01.2006 passed by the learned Additional Sessions Judge/F.T.C., Hapur, District Ghaziabad whereunder he had convicted the appellants under Section 363, 366 and 376 I.P.C. and sentenced each of them to undergo three years rigorous imprisonment under Section 363 IPC and to pay a fine of Rs.2,000/- with a default clause, five years rigorous imprisonment and to pay a fine of Rs.3,000/- under Section 366 IPC and ten years rigorous imprisonment and to pay a fine of Rs.5,000/- under Section 376 IPC with the default sequitur. All the sentences were directed to run concurrently.

3. The prosecution case, as has been unfurled, is that a written report was filed by the complainant, Smt. Aneesa, PW-2, on 3.12.1996 on the allegation that on 22.11.1996, around midnight, her daughter, Gulistan, PW-1, aged about 14 years, went out of her house to answer the call of nature but did not return for a considerable time. Being anxious, she went in search of her and at that time

Ali Waris, one of the appellants herein, informed her that he had left her daughter at his door. Thereafter, PW-2 and his son Abrar, PW-4, searched for her in the neighbourhood as well as amongst the relatives but as it turned out to be an exercise in futility, she sensed some foul play and eventually informed the police that Ali Waris and Mohammad Ali @ Guddu had kidnapped her daughter. After the criminal law was set in motion, the investigating agency commenced the search of the victim. As the factual matrix would uncurtain, Abrar had along with co-villagers, namely, Arif s/o Md. Rafi, Zulfi, Papat, Shafiq and others had gone in search of his sister, they had reached village Loni and Arif s/o Azam Khan brought Gulistan from a house and handed over to him. All of them along with Gulistan went to the police station on 18.1.1997 and PW-2 and Gulistan, PW-1, submitted an application at the police station Dhaulana. The statement of the victim was recorded under Section 164 of the Code of Criminal Procedure. The investigating agency sent the victim for medical examination, recorded the statements of seven witnesses, prepared the site plan and after

completing other formalities placed the chargesheet against eight accused persons, namely, Ali Waris, Md. Ali, Mehmood, Allahrakha, Sirajoo, Fazal, Shamshad and Sarfraz for the offences punishable under Sections 363, 366, 368 and 376, IPC before the competent Court which in turn committed the matter to the Court of Session.

4. The accused persons abjured their guilt and pleaded false implication due to political rivalry relating to Gram Sabha Pradhan elections.

5. In course of trial, the prosecution, to bring home the charges, examined seven witnesses, namely, Gulistan, PW-1, the prosecutrix, Anisha, PW-2, the informant and the mother of the victim, Liyaqat Ali, PW-3, Abrar, PW-4, the brother of the victim, Maqsood, PW-5, Mahavir Singh, PW-6 and Dr. Rekha Singh, PW-7 who had examined the victim. Be it noted, PWs 3 and 5 have turned hostile.

6. The accused persons in their statements recorded under Section 313 of CrPC denied their involvement in the occurrence. Their plea was that they had supported Ali Waris in village Pradhan election and the rival party Arif, a relative of PWs 1, 2 and 4 was defeated. The defence in

order to establish its plea examined one witness, namely, Jaggi Rana, DW-1.

7. The learned trial Judge on appreciation of evidence brought on record came to hold that the prosecution had been able to establish the charges against four accused persons, namely, Ali Waris, Mohd. Ali @ Guddu, Mehmood and Fazal for the offences under Sections 366, 368 and 376 of I.P.C., but had failed to bring home charges against other accused persons and on that basis convicted and imposed the sentence as has been stated hereinbefore.

8. Being aggrieved by the aforesaid judgment of conviction and order of sentence, Fazal Mohd. Ali and Mehmood preferred Criminal Appeal No. 602 of 2006 and Ali Waris preferred an independent Appeal being Criminal Appeal No. 863 of 2006. It is worthy to state here that the State had not assailed the judgment of acquittal of the four accused persons. The High Court appreciated the evidence and by placing reliance on the testimony of PWs 1, 2 and 4 had opined that the findings recorded by the learned trial Judge was flawless. Being of the said

view, it affirmed the judgment of conviction and the order of sentence.

8. We have heard Mr. Lajja Ram, learned counsel for the appellants and Mr. Ratnakar Dash, learned senior counsel for the State.

9. It is submitted by the learned counsel for the appellants that the learned trial Judge as well as the High Court has absolutely gone wrong by coming to hold that the age of the victim was less than eighteen years on the date of occurrence. It is his further submission that the appreciation of evidence by the trial Court and the High Court is totally perverse inasmuch as in the obtaining factual matrix, the evidence of the prosecution witnesses could not have been remotely given credence to. Learned counsel has seriously criticized the delay in lodging of the FIR, regard being had to the unnatural facet, for PW-2 had lodged the FIR after 11 days whereas any reasonable person would have immediately informed the police about the missing of his/her daughter. It is canvassed by him that the entire allegations of the prosecution are built on an unacceptable plinth and

regard being had to the evidence brought on record which is completely sketchy, the conviction could not have been recorded. Mr. Lajja Ram has submitted that the medical evidence does not support the prosecution version and the present case being not one where the evidence of the prosecutrix is so unmatchable that solely on the basis of her testimony and the conviction can be recorded, said medical evidences gains significance. Learned counsel would submit that the testimony of the victim, the conduct of the mother and the nature of allegations made against the accused persons lead to a definite conclusion that the entire story put forth by the prosecution is wholly incredible and the learned trial Judge has lent credence to the testimony on assumed reasoning and the High Court has concurred with the same without proper appreciation of the evidence which is the obligation of the appellate Court hearing a criminal appeal.

9. Mr. Ratnakar Dash, learned senior counsel appearing for the State in his turn would contend there has been a concurring finding of facts with regard to the age and

there is no justification or warrant to interfere with the same. Learned senior counsel would submit that the prosecutrix was under constant fear as has been stated by her and hence, under the obtaining circumstances there is no reason not to believe her testimony and unsettle the conviction. It is urged by him that findings recorded by the trial Court which have been concurred with by the High Court, by no stretch of imagination, can be called perverse warranting interference by this Court.

10. To appreciate the rival submissions raised at the bar, we have bestowed our anxious consideration to weigh and analyse the evidence brought on record for the purpose whether testimony of the victim deserves acceptance and ultimately the prosecution case deserves acceptation. Though the learned counsel for the parties have urged the point with regard to the age of the prosecutrix, the same need not be adverted to. Suffice it to mention that PW-2, the mother of the victim, had alleged that her daughter was fourteen years of age on 22.11.1996 when she was kidnapped. The ossification test has pointed out that she was approximately eighteen

years of age. The learned trial Judge has opined that she was less than eighteen years and the High Court has accepted the same. The said issue would gain prominence, if the story set forth by the prosecution is accepted to be credible, for then only the question of consent by the prosecutrix for the offences would arise. If the entire prosecution story is discarded as being incredulous, then the said aspect would certainly melt into insignificance.

11. Having stated so, we shall proceed to deal with the pertinent facts in this regard. Prior to that it is essential to address the issue of propriety and the conceptual parameters or conceptions based on well accepted norms and paradigms to exercise the power of this Court under Article 136 of the Constitution.

12. In ***Arunachalam v. P.S.R. Sadhanatha and Anr.***[1] it has been expressed thus:

> "The power is plenary in the sense that there are no words in Article 136 itself qualifying that power. But, the very nature of the power has led the court to set limits to itself within which to exercise such power. It is now the well-established practice of this Court to permit the

[1] (1979) 2 SCC 297

> invocation of the power under Article 136 only in very exceptional circumstances, as when a question of law of general public importance arises or a decision shocks the conscience of the court. But, within the restrictions imposed by itself, this Court has the undoubted power to interfere even with findings of fact, making no distinction between judgments of acquittal and conviction, if the High Court, in arriving at those findings, has acted 'perversely or otherwise improperly'."
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> [emphasis supplied]

13. In ***State of U.P. v. Babul Nath***[2], a two Judge Bench has laid down thus:

> "At the very outset we may mention that in an appeal under Article 136 of the Constitution this Court does not normally reappraise the evidence by itself and go into the question of credibility of the witnesses and the assessment of the evidence by the High Court is accepted by the Supreme Court as final unless, of course, the appreciation of evidence and finding is vitiated by any error of law of procedure or found contrary to the principles of natural justice, errors of record and misreading of the evidence, or where the conclusions of the High Court are manifestly perverse and unsupportable from the evidence on record."

14. In ***Ganga Kumar Srivastava v. State of Bihar***[3], the Court after referring to series of decisions on exercise of the power of this Court under Article 136 of the Constitution culled out following principles:

[2] (1994) 6 SCC 29
[3] (2005) 6 SCC 211

> "(i) The powers of this Court under Article 136 of the Constitution are very wide but in criminal appeals this Court does not interfere with the concurrent findings of fact save in exceptional circumstances.
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> (ii) It is open to this Court to interfere with the findings of fact given by the High Court, if the High Court has acted perversely or otherwise improperly.
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> (iii) It is open to this Court to invoke the power under Article 136 only in very exceptional circumstances as and when a question of law of general public importance arises or a decision shocks the conscience of the Court.
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> (iv) When the evidence adduced by the prosecution fell short of the test of reliability and acceptability and as such it is highly unsafe to act upon it.
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> (v) Where the appreciation of evidence and finding is vitiated by any error of law of procedure or found contrary to the principles of natural justice, errors of record and misreading of the evidence, or where the conclusions of the High Court are manifestly perverse and unsupportable from the evidence on record."

15. In ***Alamelu and Another v. State, represented y Inspector of Police***[4], it has been stated that even though the powers of this Court under Article 136 of the Constitution are very wide, but in criminal appeals, this

[4] (2011) 2 SCC 385

Court would not interfere with the concurrent findings of fact save in very exceptional cases. In an appeal under Article 136 of the Constitution, this Court does not normally appreciate the evidence by itself and go into the question of credibility of witness. Elaborating further, the Court has opined that the assessment of the evidence by the High Court is accepted as final except where the conclusions recorded by the High Court are manifestly perverse and unsupportable by the evidence on record.

16. Keeping the aforesaid principles in view, we shall proceed to scrutinize the materials on record, for we are convinced that the conclusions arrived at by the High Court are totally unsupportable on the basis of the evidence on record. For the aforesaid purpose, first we shall advert to the issue of lodging of the First Information Report. As is demonstrated, the victim missed from the house on 22.11.1996 but the mother lodged the FIR on 3.12.1996 almost after expiry of eleven days alleging the factum of kidnapping by the accused persons, namely, Ali Waris and Md. Ali @ Guddu. It is interesting to note that the mother, had alleged that Ali Waris had left the girl at

her door steps. In such a circumstance, if nothing else, the PW-2, the mother, who is expected to have necessitous concern, could have gone to the police station to lodge a missing report which could have prompted the investigation officer to act. It baffles the commonsense that the mother after searching in the neighbourhood as well as amongst the relatives still, for some unfathomable reason that defeats the basic human prudence approached the police station quite belatedly. It is apt to mention here that in rapes cases the delay in filing the FIR by the prosecutrix or by the parents in all circumstance is not of significance. The authorities of this Court have granted adequate protection/allowance in that aspect regard being had to the trauma suffered, the agony and anguish that creates the turbulence in the mind of the victim, to muster the courage to expose oneself in a conservative social milieu. Sometimes the fear of social stigma and on occasions the availability of medical treatment to gain normalcy and above all the psychological inner strength to undertake such a legal battle. But, a pregnant one, applying all these

allowances, in this context, it is apt to refer to the pronouncement in ***Rajesh Patel v. State of Jharkhand***[5] wherein in the facts and circumstances of the said delay of 11 days in lodging the FIR with the jurisdictional police was treated as fatal as the explanation offered was regarded as totally untenable. This Court did not accept the reasoning ascribed by the High Court in accepting the explanation as same was fundamentally erroneous.

17. Coming to the case at hand, after the mother lodged the FIR implicating Ali Waris and Md. Ali, the brother, PW-2, with his friends recovered the prosecutrix from village Loni and she was examined under Section 164, CrPC. As is evident, she had left home on 22.11.1996. As alleged, she was fourteen years of age. The trial court on the basis of radiological test has opined that she was below eighteen years of age and the High Court has accepted the same. The factum of age only if the findings recorded by the trial court and High Court are accepted, for as we find, there is no proper appreciation of evidence by trial court and definitely the High Court has failed to exercise

[5] (2013) 3 SCC 791

its appellate jurisdiction in proper perspective as is expected from it in law. In ***Kamlesh Prabhudas Tanna v. State of Gujarat***[6] dealing with the duty of the appellate court, this Court observed:-

> "At this juncture, we are obliged to state that though it may be difficult to state that the judgment suffers from sans reasons, yet it is not at all difficult to say that the reasons ascribed are really apology for reasons. If we allow ourselves to say so, one may ascribe certain reasons which seem to be reasons but the litmus test is to give seemly and condign reasons either to sustain or overturn the judgment. The filament of reasoning must logically flow from requisite analysis, but, unfortunately, the said exercise has not been carried out. In this context, we may refer with profit to the decision in *Padam Singh* v. *State of U.P.*[7], wherein a two-Judge Bench, while dealing with the duty of the appellate court, has expressed thus:
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> > "*2*. ... It is the duty of an appellate court to look into the evidence adduced in the case and arrive at an independent conclusion as to whether the said evidence can be relied upon or not and even if it can be relied upon, then whether the prosecution can be said to have been proved beyond reasonable doubt on the said evidence. The credibility of a witness has to be adjudged by the appellate court in drawing inference from proved and admitted facts. *It must be remembered that the appellate court, like the trial court, has to be satisfied affirmatively that the prosecution*

[6] (2013) 15 SCC 263
[7] (2000) 1 SCC 621

case is substantially true and the guilt of the accused has been proved beyond all reasonable doubt as the presumption of innocence with which the accused starts, continues right through until he is held guilty by the final Court of Appeal and that presumption is neither strengthened by an acquittal nor weakened by a conviction in the trial court."

18. In **Rama v. State of Rajasthan**[8] the Court has expressed about the duty of the appellate court thus:

"*4*. ... It is well settled that in a criminal appeal, a duty is enjoined upon the appellate court to reappraise the evidence itself and it cannot proceed to dispose of the appeal upon appraisal of evidence by the trial court alone especially when the appeal has been already admitted and placed for final hearing. Upholding such a procedure would amount to negation of valuable right of appeal of an accused, which cannot be permitted under law."

Similar principles have been reiterated in ***Iqbal Abdul Samiya Malek v. State of Gujarat***[9], ***Padam Singh v. State of U.P.***[10] and ***Bani Singh v. State of U.P.***[11]

19. A three-Judge Bench in ***Majjal v. State of Haryana***[12] has ruled thus:

[8] (2002) 4 SCC 571
[9] (2012) 11 SCC 312
[10] (2000) 1 SCC 621
[11] (1996) 4 SCC 720
[12] (2013) 6 SCC 798

> "It was necessary for the High Court to consider whether the trial court's assessment of the evidence and its opinion that the appellant must be convicted deserve to be confirmed. This exercise is necessary because the personal liberty of an accused is curtailed because of the conviction. The High Court must state its reasons why it is accepting the evidence on record. The High Court's concurrence with the trial court's view would be acceptable only if it is supported by reasons. In such appeals it is a court of first appeal. Reasons cannot be cryptic. By this, we do not mean that the High Court is expected to write an unduly long treatise. The judgment may be short but must reflect proper application of mind to vital evidence and important submissions which go to the root of the matter."

20. The obtaining factual matrix has to be appreciated on the touchstone of the aforesaid parameters. Be it clearly stated here delay in lodging FIR in cases under Section 376 IPC would depend upon facts of each case and this Court has given immense allowance to such delay, regard being had to the trauma suffered by the prosecutrix and various other factors, but a significant one, in the present case, it has to be appreciated from a different perspective. The prosecutrix was missing from home. In such a situation, it was a normal expectation that either the mother or the brother would have lodged a

missing report at the police station. The same was not done. This action of PW-2 really throws a great challenge to common sense. No explanation has been offered for such delay. The learned trial Judge has adverted to this facet on an unacceptable backdrop by referring to the principle that prosecutrix suffered from trauma and the constraint of the social stigma. The prosecutrix at that time was nowhere on the scene. It is the mother who was required to inform the police about missing of her grown up daughter. In the absence of any explanation, it gives rise to a sense of doubt. That apart, the factum that the appellant informed the mother of the victim that he had left the prosecutirx at the door of her house also does not command acceptance. The recovery of the prosecutrix by the brother and her friends also creates a cloud of suspicion. We are not inclined to believe the prosecution version as has been projected that one Arif had informed the brother of the prosecutirx that his sister was at his place but for reasons best known to the prosecution, Arif has not been examined. That apart, the persons who were accompanying the brother have also not been

examined by the prosecution. Thus, the manner of recovery of the prosecutrix from the house of Arif remains a mystery.

21. Be it noted, there can be no iota of doubt that on the basis of the sole testimony of the prosecutrix, if it is unimpeachable and beyond reproach, a conviction can be based. In the case at hand, the learned trial Judge as well as the High Court have persuaded themselves away with this principle without appreciating the acceptability and reliability of the testimony of the witness. In fact, it would not be inappropriate to say that whatever the analysis in the impugned judgment, it would only indicate an impropriety of approach. The prosecutrix has deposed that she was taken from one place to the other and remained at various houses for almost two months. The only explanation given by her is that she was threatened by the accused persons. It is not in her testimony that she was confined to one place. In fact, it has been borne out from the material on record that she had travelled from place to place and she was ravished number of times. Under these circumstances, the medical evidence

gains significance, for the examining doctor has categorically deposed that there are no injuries on the private parts. The delay in FIR, the non-examination of the witnesses, the testimony of the prosecutrix, the associated circumstances and the medical evidence, leave a mark of doubt to treat the testimony of the prosecutrix as so natural and truthful to inspire confidence. It can be stated with certitude that the evidence of the prosecutrix is not of such quality which can be placed reliance upon. True it is, the grammar of law permits the testimony of a prosecutrix can be accepted without any corroboration without material particulars, for she has to be placed on a higher pedestal than an injured witness, but, a pregnant one, when a Court, on studied scrutiny of the evidence finds it difficult to accept the version of the prosecutrix, because it is not unreproachable, there is requirement for search of such direct or circumstantial evidence which would lend assurance to her testimony. As the present case would show, her testimony does not inspire confidence, and the circumstantial evidence remotely do not lend any support

to the same. In the absence of both, we are compelled to hold that the learned trial Judge has erroneously convicted the accused-appellants for the alleged offences and the High Court has fallen into error, without re-appreciating the material on record, by giving the stamp of approval to the same.

22. Resultantly, the appeals are allowed, judgment of conviction and order of sentence are set aside and as the appellants are on bail, they be discharged of their bail bonds.

.....J.
[DIPAK MISRA]

.....J.
[N.V. RAMANA]

NEW DELHI
MARCH 10, 2015.