

**IN THE HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU**

(Through Video Conferencing)

CrLP No. 73/2019

CrIM No. 1157/2019

C/w

CrA (AD) No. 20/2019

Reserved on: 10.03.2020

Pronounced on: 11.05.2020

State of Jammu & Kashmir

.....Appellant(s)/Applicant(s)

Through: Mr. Aseem Sawhney, AAG

V/s

Fazal Hussain.

.....Respondent(s)

Through: None

Coram:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJESH BINDAL, JUDGE

J U D G M E N T

GITA MITTAL, CJ:

1. The instant application has been filed by the State seeking leave to appeal against the judgment dated 28th February, 2019, passed by the learned District & Sessions Judge, Poonch in the case File No. 347/Challan, whereby the respondent stands acquitted of the charges framed against him in the case arising out of FIR No. 195/2010 registered at the Police Station, Surankote under Sections 456/376 RPC.

2. This application is accompanied by an application being CrIM No. 1157/2019 seeking condonation of 91 days delay in filing the application.

3. The facts brought on record by the applicant are that FIR No. 195/2010 came to be registered at the Police Station, Surankote on a written complaint of Hakim Bi W/o Mohd Yousuf against the present respondent. The complainant had alleged that the respondent and she were residents of Mehrote; that on the night intervening 20/21st December, 2010, the respondent entered the complainant's house with criminal intention and

attacked her. It is alleged by the complainant that she was forcibly caught hold by the respondent, who committed rape with her for about half an hour. It was claimed by the complainant that even though she had raised an alarm, however, because it was night time, no one had heard her. So far as the location of her husband was concerned, the complainant alleged that her husband was a labourer working in Punjab and the respondent took the advantage of his absence. It was claimed by her that the respondent had threatened to kill her if she disclosed the occurrence to anybody.

4. Based on this complaint, the aforesaid case was registered for commission of offences under Sections 376/456 RPC. During investigation, ASI Mohd Hameed Malik- the Investigating Officer got the medical of the complainant conducted from Sub-District Hospital, Surankote; prepared the site plan at the spot and the seizure of the clothes which had been worn by the complaint was effected. Statement of witnesses under Section 161 Cr. P. C were also recorded.

5. Based on the investigation conducted by him, ASI Mohd Hameed Malik, presented a final closure report before the JMIC, Surankote as the case not having been proved.

However, this report was not accepted by the learned JMIC, Surankote, who, on 23rd October, 2014, directed further investigation.

6. In compliance of this order, the matter was further investigated; statements of further witnesses recorded under Section 161-A Cr.P.C. The JMIC, Surankote also recorded the statement of the complainant. It appears that during the course of the investigation that the respondent was again arrested in the case.

7. Subsequently, the Additional Special Mobile Magistrate, Surankote committed the case for trial to the Sessions Court.

8. By an order dated 27th January, 2016, formal charges were drawn up against the respondent for commission of the alleged offences. The respondent pleaded not guilty and claimed trial.

9. In support of its case, the prosecution examined ten witnesses. The court recorded the statement of the respondent on 28th July, 2017 under Section 342 Cr.P.C wherein he stated that the witnesses had deposed wrongly against him. The respondent has claimed that he had no knowledge about the medical evidence and informed the trial Court with regard to the pre-existing land dispute with the family of the complainant and that his application with regard to the same has been accepted by the Tehsildar. The respondent had explained that Mohd Yousuf, husband of the complainant had forcibly taken possession of adjacent land to the respondent's land and that, on the application of the respondent, the Tehsildar had conducted an inquiry in accordance with law, passed an order and had dispossessed Mohd Yousuf therefrom.

10. The respondent had further explained that Mohd Yousuf's wife, Hakim Bi had registered another case against him for commission of offence under Section 458 Cr.P.C which was also pending in the Surankote Court. Thereafter Mohd Yousuf had burnt the respondent's grass which matter is also pending before the Surankote Court.

11. It was disclosed that on account of this, the complainant nursed a grievance against the respondent and had lodged the false complaint in retaliation.

12. The respondent was given liberty to enter upon his defence. The respondent examined two witnesses in his defence.

13. After a detailed consideration of the entire evidence, by the judgment dated 28th February, 2019, the learned Trial Judge held that the prosecution had failed to prove its case beyond reasonable doubt and consequently acquitted the respondent of the charges levelled against him.

14. We find that the learned Trial judge has examined the evidence led before him threadbare. It has been noted that it was the case of the victim-complainant that at the time of the incident, she was sleeping in her house with her two children, a son and a daughter. The time of the occurrence, according to her, was around midnight. According to the complainant, the light of the room was on and the respondent had switched it off and committed rape upon her for about half an hour at which time she had made noise. She alleged that her two children who were sleeping in the same room had started crying and hearing their noise, PW-2 Mohd Farooq and PW-3 Mohd Yousuf had come to the spot.

15. So far as Mohd Farooq, PW-2 is concerned, he has referred to a case which was filed by the respondent of ghaas charai against him. This witness refers to private disputes and scuffle between him and the accused. In the witness box, PW-2 stated that he had no knowledge about the present case. The witness was declared hostile and was permitted to be cross-examined by the Prosecutor when he stated that during the night of 20/21-12-2010 at about 12.30 a.m, some noise came from the house of Hakim Bi but the accused had already run away when he and Mohd Yousuf reached there. The witness completely denied the statement attributed to him under Section

161-A Cr.P.C. He also referred to the land dispute between the respondent and the complainant's husband. This witness disclosed that Mohd Yousuf (husband of the complainant) was removed from the ghaas charai land by the court of the Tehsildar and thereafter the respondent had dismantled the house which has been made by the complainant thereon. PW-2 stated that it was only after the respondent had dismantled the house that the very next day Hakim Bi had lodged the complaint against the respondent.

16. Mohd Yousuf, who was examined as PW-3 also denied any knowledge about the instant case. However, he also corroborated PW-2 in the information about the case between the respondent and the complainant about the land. This witness also denied the statement attributed to him by the police under Section 161-A Cr.P. C.

17. The learned Trial Judge has referred to the improvements in material particulars made by the complainant in her testimony. It is observed that in her complaint to the police, she has not given the day or date of the incident.

18. The learned Trial Judge has observed that according to the complainant, her two children were sleeping in the room at the time of the incident, who were stated to have started crying. If this was true, these two children were eye witnesses. The two children have neither been cited as eye witnesses nor any effort has been made to examine them. The testimony of these two children would have been material to the matter. This was a major lapse on the part of the prosecution.

19. The learned Trial Judge has extracted the details of the private disputes between the respondent and Mohd Yousuf, husband of the complainant. It stands established in the evidence, which fact has been noted

by the learned Trial Judge that Tehsildar, Surankote has decided the case filed by the respondent seeking dispossession of the complainant and her husband Mohd Yousuf from the State land. Mohd Yousuf was actually dispossessed therefrom and the house made by the complainant, was demolished by the respondent after the order by the Tehsildar.

It stands established on record that the complainant had lodged a complaint immediately thereafter. Clearly prior enmity to do so stands established.

20. In the witness box, the complainant could not remember the time, date, month or year of the incident.

21. The complainant has also set out the preposterous story about how she could discern the time of the incident. In her evidence, she has stated that it was dark when the respondent entered the house, and that she, the complainant, switched on the light and saw the time on the watch which she has disclosed in the court.

22. It is also noted by the learned Trial Judge that the complainant had stated that there is only one entrance which was bolted from inside. The complainant has not disclosed as to how the respondent gained entry into the room.

23. It has also been observed that the houses of Manzoor Hussain, Ashraf and Khursheed were in the neighbourhood of the complainant's house. Despite the complainant claiming that she had made noise, none of these persons reached her house.

24. Interestingly so far as the witnesses PW-2, Mohd Farooq and PW-3 Mohd Yousuf are concerned, the complainant herself has testified that they took half an hour to reach her house.

25. In her cross-examination, the complainant has further improved her prior statement and testimony recorded in examination-in-chief. She has alleged that during the night, it was about 10.00 P.M that the respondent broke the door of the house, entered into the house and gave a blow from the back side of the axe on her head and threatened to kill her.

26. None of these facts were stated either in the complaint or in the statement recorded under Section 164-A Cr.P. C.

27. So far as the medical evidence led by the prosecution to corroborate and support the case set up by the complainant is concerned, the prosecution examined PW-7, Dr. Nusrat Bhatti, who stated that she has examined Hakim Bi on 21st December, 2010 at 5.15 P.M. The Doctor has opined that there was no evidence of sexual intercourse or sexual assault at the time of her examination and a certificate in these terms was issued by her. The Doctor has stated that there were no marks of violence on any part of the body of the complainant. Even though it is well settled that it is not necessary to have corroborative medical evidence to support the complaint under Section 376 RPC, however, in the instant case, in her statement, as noted above, the complainant had referred to an injury on her head with an axe. The medical evidence did not however, support this assertion by the complainant.

28. The respondent has led the evidence of two witnesses in support of the plea of prior enmity of the husband of the complainant. These witnesses have established the land dispute between the respondent and the complaint.

It is also established in evidence that the respondent had successfully got the complainant dispossessed from the State land which they were illegally occupying. The witnesses have stated that the complainant has, for this reason, lodged the false complaint against the respondent. It has been categorically asserted that the respondent was not present at home on the day of the occurrence and that he was not present on the day of occurrence on the spot.

29. In this background, the learned Trial Judge has observed that the complainant has exaggerated her statement and made improvements in her testimony and that as such her testimony did not inspire confidence.

30. Other than the statement of the complainant, none of other witnesses have deposed on the allegation of rape.

31. For the reasons stated above, we are unable to find any error in the judgment of the learned Trial Judge. We, therefore, concur with the views expressed therein.

32. The present application seeking leave to appeal against the acquittal of the respondent is devoid of any merit and deserves to be rejected.

33. The application seeking leave to file appeal is dismissed.

34. The application seeking condonation of delay in filing the appeal is also dismissed.

(RAJESH BINDAL)
JUDGE

(GITA MITTAL)
CHIEF JUSTICE

Date: 11.05.2020

Tilak

Whether the order is speaking: Yes.
Whether the order is reportable: Yes.