HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU
(through virtual mode)

Reserved on: 14.12.2020
Pronounced on: 24.12.2020

SLA No.38/2018

.....Petitioner(s)

State of J&K

Through :- Mr. Aseem Sawhney, AAG

V/s

Mohd. Imran Khan .....Respondent(s)

Through :- None

Coram: HON'BLE THE CHIEF JUSTICE (ACTING)
HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

Sanjay Dhar-J

JUDGMENT

1. The State has sought leave to file appeal against the judgment dated 29.11.2017 passed by the learned Principal Sessions Judge, Bhaderwah (hereinafter referred to as "the trial Court") in File No.07/Sessions Challan titled *State v. Mohd. Imran Khan*, whereby the respondent herein has been acquitted of the charge for offence under Section 376 RPC.

2. Briefly stated, the case of the prosecution is that on 13.12.2014, the prosecturix went missing and in this regard a complaint was lodged before the police by the maternal grandfather of the prosecutirx. It was found that the prosecutrix had been kidnapped and taken away by the respondent in a car. FIR No.196/2014 for offences under Section 366 RPC was registered and

investigation was set into motion. On 15.12.2014, the prosecutrix was recovered from the custody of the respondent/accused.The statement of the prosecutrix under Section 164-A Cr.P.C. was recorded. After investigation of the case, it was found that the prosecutirx, after being kidnapped, was raped by the respondent and accordingly, charge-sheet for offences under Sections 363/376 RPC was laid before the trial Court.

3. Charge for offence under Section 376 RPC was framed against the accused and he was put to trial. After trial of the case and hearing the parties, the learned trial Court came to the conclusion that the offence against the accused/respondent is not established and he was acquitted of the charge vide the impugned judgment.

4. We have heard Mr. Aseem Sawhney, learned AAG and perused the record.

5. It has been contended by learned counsel for the petitioner-State that the prosecutrix, in the instant case, was minor at the time of the occurrence and she had in her statement recorded before the Court fully supported the prosecution case. According to the learned counsel, the learned trial Court has disbelieved the statement of the prosecutrix on technicalities and for flimsy reasons.

6. Keeping in view the contentions raised by the learned AAG, a prima facie case for grant of leave to file appeal is made out. Accordingly, the application is allowed and the leave to appeal against the impugned judgment is granted in favour of the petitioner.

7. Main appeal be diarized. The same is **admitted** to hearing.

8. Post admission notice be issued to the respondent.

9. The Registry shall prepare the paper-book and process the appeal for hearing in due course.

10. Before parting with the order, it is necessary to comment on certain things, which we have noticed from a perusal of the impugned judgment. The learned trial Judge has mentioned the name of the prosecutrix at several places in the said judgment, which is impermissible in law.

11. Section 228A of IPC prohibits disclosure of identity of the victim of certain offences, which includes offence under Section 376 IPC. In *pari materia* to the aforesaid provision is Section 228A of the J&K Ranbir Penal Code, which was applicable to the case at hand at the relevant time.

12. Although, prohibition contained in Section 228A may not strictly apply to the judgment of a Court, yet the Courts must avoid disclosing the name(s) of prosecutrix in their orders and judgments, so as to avoid embarrassment and humiliation to a victim of rape. Rape is not merely a physical assault but it is destruction of the personality of the victim. Therefore, Courts have to act responsibly and with sensitivity while dealing with the cases of rape, particularly, while referring to the prosecutirx.

13. This issue has been a matter of discussion before the Supreme Court and various High Courts of the country in a number of cases. In **State of Punjab v. Gurmeet Singh, (1996) 2 SCC 384**, the Supreme Court, while emphasizing that victims of sexual abuse or assault need to be treated with sensitivity during investigation and trial and that trial of rape cases should be generally held in camera, made the following observations:

> *"It would enable the victim of crime to be a little comfortable and answer the questions with greater ease in*

not too familiar a surroundings. Trial in camera would not only be in keeping with the self-respect of the victim of crime and in tune with the legislative intent but is also likely to improve the quality of the evidence of a prosecutrix because she would not be so hesitant or bashful to depose frankly as she may be in an open court, under the gaze of public. The improved quality of her evidence would assist the courts in arriving at the truth and sifting truth from falsehood. …….. The Courts should, as far as possible, avoid disclosing the name of the prosecutrix in their orders to save further embarrassment to the victim of sex crime. The anonymity of the victim of the crime must be maintained as far as possible throughout. In the present case, the trial court has repeatedly used the name of the victim in its order under appeal, when it could have just referred to her as the prosecutrix. We need say no more on this aspect and hope that the trial Courts would take recourse to the provisions of Sections 327 (2) and (3) Cr. P.C. liberally. Trial of rape cases in camera should be the rule and an open trial in such cases an exception."

(emphasis supplied)

14. In **Bhupinder Sharma v. State of Himachal Pardesh (2003) 8 SCC 551**, the Supreme Court while referring to Section 228A IPC, held as under:

"We do not propose to mention the name of the victim. Section 228A of the Indian Penal Code, 1860 (in short "IPC") makes disclosure of the identity of victims of certain offences punishable. Printing or publishing the name or any matter which may make known the identity of any person against whom an offence under Sections 376, 376A, 376B, 376C or 376D is alleged or found to have been committed can be punished. True it is, the restriction

> *does not relate to printing or publication of judgment by the High Court or the Supreme Court. But keeping in view the social object of preventing social victimization or ostracism of the victim of a sexual offence for which Section 228A has been enacted, it would be appropriate that in the judgments, be it of a High Court or a lower court, the name of the victim should not be indicated. We have chosen to describe her as "victim" in the judgment."*

15. The afore-noted judgments of the Supreme Court were noted with the approval by the Supreme Court in the case of **Nipun Saxena v. Union of India and others (2019) 2 SCC 703**and it was held that though, the bar imposed under Section 228A IPC did not in term apply to the printing or publication of judgments of the High Courts and the Supreme Court because of the explanation to the said provisions, yet keeping in view the social object of preventing the victims or ostracizing of victims, it would be appropriate that in judgments of all the Courts i.e. trial Courts, High Courts and the Supreme Court the name of the victim should not be indicated.

16. From afore-noted judgments of the Supreme Court, it is clear that all Courts are bound to avoid disclosure of name of rape victim(s) in the court proceedings as well as in their judgments. This dictum of law, it seems, has been ignored by the learned trial Court in the instant case. We, therefore, feel a need to reiterate and remind the trial Courts of the Union Territories of Jammu & Kashmir, and Ladakh to follow the aforesaid dictum in letter and spirit while dealing with cases of rape and crime against women.

17. Another issue that has come to our notice from the reading of the trial Court record and the impugned judgment is that the prosecutrix in this case

has been subjected to "two finger test". The International Covenants on Economic, Social and Cultural Rights, 1966, United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 provide that rape survivors are entitled to medical procedures conducted in a manner that respects their right to consent. As per these Covenants, State is under an obligation to make such services available to survivors of sexual violence and that proper measure should be taken to ensure their safety and there should be no arbitrary or unlawful interference with their privacy.

18. On the basis of aforesaid Covenants, the Supreme Court in the case of **Lillu and others v. State of Haryana, (2013) 14 SCC 643,**came to the conclusion that "two finger test" and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity. Thus, "two finger test" has been declared as unconstitutional.

19. Apart from the above, Ministry of Health and Family Welfare, Govt. of India has issued guidelines and protocols for health professionals for dealing with survivors of sexual violence. Guideline 18-B is relevant to the context and the same is reproduced as under:

> *"18. Local examination of genital parts/other orifices*
>
> *A……*
>
> *B.In case of female survivors, the vulva is inspected systematically for any signs of recent injury such as bleeding, tears, bruises, abrasions, swelling, or discharge and infection involving urethral meatus & vestibule, labia majora and minora, fourchette, introitus and hymen.*
>
> *•Examination of the vagina of an adult female is done with the help of a sterile speculum lubricated with warm saline/ sterile water. Gentle retraction allows for inspection of the*

vaginal canal. Look for bruises, redness, bleeding and tears, which may even extend onto the perineum, especially in the case of very young girls. In case injuries are not visible but suspected; look for micro injuries using good light and a magnifying glass/ colposcope whatever is available. If 1% Toluidine blue is available it is sprayed and excess is wiped out. Micro injuries will stand out in blue. Care should be taken that all these tests are done only after swabs for trace evidence are collected.

•Per speculum examination is not a must in the case of children/young girls when there is no history of penetration and no visible injuries. The examination and treatment as needed may have to be performed under general anaesthesia in case of minors and when injuries inflicted are severe. If there is vaginal discharge, note its texture, colour, odour.

***•Per-Vaginum examination commonly referred to by lay persons as 'two-finger test'**,must not be conducted for establishing rape/sexual violence and the size of the vaginal introitus has no bearing on a case of sexual violence. Per vaginum examination can be done only in adult women when medically indicated.*

•The status of hymen is irrelevant because the hymen can be torn due to several reasons such as cycling, riding or masturbation among other things. An intact hymen does not rule out sexual violence, and a torn hymen does not prove previous sexual intercourse. Hymen should therefore be treated like any other part of the genitals while documenting examination findings in cases of sexual violence. Only those that are relevant to the episode of assault (findings such as fresh tears, bleeding, edema etc.) are to be documented.

• Genital findings must also be marked on body charts and numbered accordingly."

20. From a perusal of the aforesaid guidelines, it is clear that "two finger test", which, as per the medical term is called per-vaginum examination, has been strictly prohibited under the guidelines and protocols issued by the Ministry of Health and Family Welfare, Government of India. It is pertinent to mention here that these guidelines stand adopted by the Government of Union Territory of J&K and are applicable to the health professionals of the Union Territory with full force.

21. Inspite of all this, in the instant case, it appears that the prosecutrix, who was minor at the relevant time, has been subjected to two finger test, which must have violated her privacy, physical and mental integrity and dignity.

22. It is the need of the hour to implement the ban on "two finger test" on rape survivors with full force and in this regard a direction is required to be extended to all the health professionals of Union Territories of Jammu and Kashmir, and Ladakh, so that the judgment of the Supreme Court and guidelines and protocols issued by the Ministry of Health and Family Welfare, Govt. of India, on the subject are taken seriously.

23. In view of what has been discussed hereinbefore, we direct that all the Courts in the Union Territories of Jammu & Kashmir, and Ladakh to avoid disclosing identity of rape survivors in their proceedings and judgments. A further direction is issued to all the health professionals of Union Territory of Jammu & Kashmir, and Union Territory of Ladakh to strictly desist from

undertaking “two finger test” known as “per-vaginum examination” on the rape survivors.

24. Copies of this order be sent to the Registrar General of the High Court and Secretaries to the Govt., Health Department of Union Territories of J&K and Ladakh with a direction to circulate the order to all Courts/Hospitals for ensuring its compliance in letter and spirit.

(Sanjay Dhar)
Judge

(Rajesh Bindal)
Chief Justice (Acting)

Jammu
24.12.2020
Vinod

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

HIGH COURT JAMMU & KASHMIR

VINOD KUMAR
2020.12.24 11:18
I attest to the accuracy and
integrity of this document