

SUPREME COURT OF INDIA**Bench: Justices Abhay S. Oka and Ujjal Bhuyan****Date of Decision: 21st March 2024**

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1753/2023

PANKAJ SINGH ...APPELLANT(S)**VERSUS****THE STATE OF HARYANA ...RESPONDENT(S)****Legislation:**

Sections 342, 376, 201, 365, 354D(1)(ii), 506 of the Indian Penal Code (IPC)

Section 65B and Section 114A of the Indian Evidence Act, 1872

Section 294 and Section 313 of the Code of Criminal Procedure, 1973

Subject: Appeal against conviction in a case involving charges of kidnapping, rape, wrongful confinement, and destruction of evidence, with a focus on the credibility of the prosecutrix's testimony and the application of legal provisions.

Headnotes:

Criminal Appeal – Acquittal of Rape Charges – Appeal by accused challenging conviction by the Trial Court under Sections 342, 376, and 201 of IPC – High Court affirmed the conviction – Supreme Court analysis based on evidence, including WhatsApp conversations and circumstantial aspects – Held, the evidence of the prosecutrix does not inspire confidence due to the consensual nature of the relationship and lack of evidence of forcible intercourse – Conviction overturned and appellant acquitted. [Paras 1-24]

Consent in Rape Cases – Analysis and Consideration – Court examines consent in rape allegations – Considered continuous and consensual communication between the appellant and prosecutrix, mutual travel, and absence of resistance or complaint – Noted absence of injuries or resistance – Held, circumstances and evidence indicate consensual relationship rather than rape – Acquittal based on failure of prosecution to prove charges beyond reasonable doubt. [Paras 12-16, 18-19]

Section 114A of Evidence Act – Inapplicability – Court discusses applicability of Section 114A of the Evidence Act, which presumes absence of consent in rape prosecutions – Held, Section 114A not applicable as the appellant was not charged under the specific clause of IPC required for the presumption to operate – Prosecution required to prove non-consent, which it failed to do. [Paras 11, 17]

Admissibility of WhatsApp Conversations – Legal Principles – Court addresses the admissibility of WhatsApp conversations without a Section 65B certificate under the Evidence Act – Found that even if admitted, such evidence does not conclusively prove non-consent or forcible intercourse in the present case. [Paras 20-21]

Decision – Acquittal on Rape Charges – Court acquits appellant Pankaj Singh of all charges due to insufficient evidence of non-consensual intercourse – Sets aside lower courts’ convictions – Appellant’s bail bond cancelled and pending applications disposed of. [Paras 22-25]

Referred Cases: None.

J U D G M E N T

ABHAY S.OKA, J

1. Heard the learned counsel appearing for the parties.

2. The Trial Court convicted the appellant-accused for the offences punishable under Sections 342, 376 and 201 of the Indian Penal Code, 1860 (for short, “the IPC”). The maximum sentence imposed is life imprisonment for the offence punishable under Section 376 of the IPC with a fine of Rs.1,00,00/-. We must note that charges were also framed against the appellant-accused for the offences punishable under Sections 365, 354D(1)(ii) and 506 of the IPC. The Trial Court acquitted the appellant-accused as far as these offences are concerned. Apart from the appeal against conviction filed by the appellant-accused, an appeal against his acquittal for the three offences mentioned above was filed by the Prosecutrix (victim). The High Court did not interfere in the appeals preferred by the Prosecutrix and the appellant. By the impugned judgment, the judgment of the Trial Court has been confirmed by the High Court.
3. This is a case where, at the time of the incident, the Prosecutrix was 28 years old. Both the appellant-accused and the Prosecutrix were married. It is brought on record that the Prosecutrix was a graduate. The allegation made by the prosecutrix is that the appellant was a friend of her husband’s brother. Therefore, she was acquainted with the appellant. On 22nd May 2018, the appellant visited a place called Hansi to consult a doctor. When she was waiting at a bus stand to board a bus to go back to Bhiwani, where she was staying, the appellant came there. He requested the Prosecutrix to accompany him in his car as he was proceeding to Bhiwani. On the pretext that he was having stomach pain and wanted to relieve himself, he took the appellant to a room in the Jindal Guest House at Bhiwani. He bolted the door from inside and then made a forcible intercourse with the Prosecutrix. After taking her objectionable photographs, he threatened her to show the pictures to her family members if she disclosed the incident to anyone.
4. In a case like this, the Court has to consider whether the evidence of the Prosecutrix inspires confidence. While doing so, the Court must not be

influenced by minor contradictions and omissions in the evidence of the victim of a sexual offence. It is always difficult for a woman to depose in such cases. Considering the victim's position, her evidence needs to be appreciated.

5. The learned counsel appearing for the appellant-accused has taken us through the evidence of the Prosecutrix and the other material prosecution witnesses. His submission, in short, is that the relationship between the appellant-accused and the Prosecutrix was consensual. He submitted that the appellant-accused and the Prosecutrix moved from place to place, and it is an admitted position that the Prosecutrix willingly accompanied the appellant-accused. He further submitted that if the footage of the CCTV camera in the Jindal Guest House, where the incident allegedly took place, had been produced by the Police, it could have shown that both the appellant-accused and the Prosecutrix happily entered the Guest House and happily left the same. His submission is that the evidence of the Prosecutrix deserves to be rejected.
6. The learned counsel appearing for the State supported the impugned judgments. He submitted that the prosecutrix's evidence cannot be discarded on technical grounds when, in substance, the Prosecutrix has established that there was forcible sexual intercourse. He further submitted that the law is settled that the Prosecutrix may not sustain any injuries and, therefore, her version cannot be disbelieved on the ground that she did not suffer any injury. He lastly submitted that there is no scope to interfere with the concurrent findings of fact.
7. The learned counsel appearing for the Prosecutrix relied upon the WhatsApp conversation between the Prosecutrix and the appellant-accused. He submitted that though the certificate under Section 65B of the Indian Evidence Act, 1872 (for short, "the Evidence Act") was not produced about the WhatsApp conversation produced on record, as the appellant-accused had

not objected to the production of the WhatsApp conversation, in view of Section 294 of the Code of Criminal Procedure, 1973 (in short, “the Cr. PC,”), the WhatsApp conversation is admissible in evidence. He relied upon the presumption under Section 114A of the Indian Evidence Act, 1872 (for short, ‘the Evidence Act’). He submitted that it would have to be presumed that the sexual intercourse was without the consent of the Prosecutrix. He submitted that, in this case, the offence is under clause (f) of sub-Section (2) of Section 376 of the IPC. He further submitted that as far as the Prosecutrix is concerned, the appellant-accused was in a position of trust and, therefore, clause (f) of sub-Section (2) of Section 376 of the IPC will apply and, consequently, the presumption under Section 114A of the Evidence Act ought to be invoked in this case. He also submitted that the appellant-accused had not adduced any evidence to prove his innocence. He submitted that no interference is called for considering the concurrent findings recorded by the Trial Court and the High Court.

8. To appreciate the submissions made across the Bar, we are reproducing the material part of the examination-in-chief of the Prosecutrix, which reads thus:

“Stated and devar and he usually visited our house. I along with my family members attended the marriage of accused Pankaj at Village Prem Nagar in the year, 2012, accused along with his wife came in our house in the month of April, 2018 and then I gave my mobile number to him for sending his marriage photographs on my mobile in presence of my family members. After three four days, accused send his marriage photographs on my mobile phone. Today, I do not know remember my mobile number. Thereafter, accused send good morning, good evening and others messages on whatsapp and I replied the same to him. Accused making my ear against my in-laws family and he said that this not enough but it is only 10% but he will tell everything when we met. Accused Pankaj suggested one doctor to Hansi regarding my back pain and on that I along with my family members and Devar visited that doctor for my treatment. Before visit of my Hansi, I informed the accused through whatsapp message that I will visit Hansi to meet the doctor of Hansi on 22.05.2018. Accordingly, on 22.05.2018, I went to Hansi but in the way at Village Bawani Khera, accused Pankaj met me from there we reached Hansi. I took medicine from the doctor of Hansi and after taking medicine, we started for Bhiwani and in between accused Pankaj complained me that he was having severe stomach pain and wanted to get himself fresh then I told to him that you will fresh yourself and I will go to Bhiwani by bus. Accused told that he will drop me there. Accused stopped his car in front of Jindal Guest House, Bhiwani,

firstly he went alone in Jindal Guest House and after some he came before me and told that you should eat something and he would fresh himself by that time. On believing him, I went in Jindal Guest House with him and he took me in a room where accused bolted the inside room and started molested me and committed forcibly rape upon me. In that process, I lost my one ear ring, my bangles were broken and I received injury on my hand and my clothes were torn. Accused also clicked my obscene photographs after committing rape upon me. Accused threatened me if I disclosed the above said incident to anyone then he would kill me and upload the obscene photographs on the internet. Thereafter, I returned my home and due to that incident, I was scared. I disclosed the whole incident to my uncle and aunty and they encouraged me that you would tell the whole incident to your in laws then I disclosed the whole incident to my husband. My husband disclosed the incident to my devar Mahesh. Thereafter, I along with my devar came to the police and moved complaint Exh. PW7/A against the accused duly signed by me at Point-A. Thereafter, I was medico-legally examined from General Hospital, Bhiwani. On the next date, I demarcated the place of occurrence to the police.”

9. Before we analyse the evidence of the prosecutrix, we deal with the argument that Section 114A of the Evidence Act is applicable. Section 114A of the Evidence Act reads thus:

“114A. PRESUMPTION AS TO ABSENCE OF CONSENT IN CERTAIN PROSECUTION FOR RAPE.—In a prosecution for rape under clause (a), clause (b), clause (c), clause (d), clause (e), clause (f), clause (g), clause (h), clause (i), clause (j), clause (k), clause (l), clause (m) or clause (n) of subsection (2) of section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the court that she did not consent, the court shall presume that she did not consent.

Explanation.—In this section, “sexual intercourse” shall mean any of the acts mentioned in clauses (a) to (d) of section 375 of the Indian Penal Code (45 of 1860).”

10. The condition precedent for applicability of Section 114A of the Evidence Act is that the prosecution must be for the offence of rape under various clauses set out therein under sub-Section (2) of Section 376 of the IPC. Clause (f) of sub-Section (2) of Section 376 of the IPC reads thus:

“376. PUNISHMENT FOR RAPE.—(1)***

(2) Whoever,-

...

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman;

or

.....”

11. In this case, no charge was framed against the appellant accused for the offence punishable under clause (f) of sub-Section (2) of Section 376 of the IPC. A perusal of clause (f) of sub-Section (2) of Section 376 shows that the punishment for the offence covered by sub-Section (2) of Section 376 is more stringent than the punishment for the offence under sub-Section (1) of Section 376. In the absence of the charge framed at any stage against the appellant-accused for the offence punishable under clause (f) of sub-Section (2) of Section 376 of the IPC, now, at this stage, neither the prosecution nor the victim can contend that clause (f) of sub-Section (2) of Section 376 of the IPC was applicable. Another important aspect which goes to the root of the matter is that in his examination under Section 313 of the Cr.PC, the case that he was in a position of trust to the victim, was not put to him. In any event, the contention of the learned counsel appearing for the Prosecutrix that the appellant-accused was a person in a position of trust as far as the Prosecutrix is concerned is completely erroneous. There was no fiduciary relationship between the appellant-accused and the Prosecutrix, which will be apparent when we examine the Prosecutrix's evidence. Therefore, on the face of it, the presumption under Section 114A of the Evidence Act will not apply, and, therefore, the burden will be on the prosecution to prove that the sexual intercourse was without the consent of the Prosecutrix. We may also add here that in our jurisprudence unless there is a specific legislative provision which puts a negative burden on the accused, there is no burden on the accused to lead evidence for proving his innocence. The accused may have some burden to discharge in case of a statutory prescription, such as Section 114A of the Evidence Act. In this case, the burden was on the prosecution to lead evidence to prove the guilt of the accused beyond a reasonable doubt.
12. Now, we come to the evidence of the Prosecutrix. The salient features of the evidence can be summarised as follows:

- (a) It was the Prosecutrix who provided her cellphone number to the appellant-accused to enable him to send his marriage photographs;
 - (b) After that, there was a continuous exchange of WhatsApp messages, including good morning, good evening, etc., between the appellant-accused and the Prosecutrix.
 - (c) The Prosecutrix used to reply to the WhatsApp messages sent by the appellant-accused;
 - (d) The Prosecutrix informed the appellant-accused through a WhatsApp message that she would be visiting a doctor at Hansi on 22nd May 2018. According to her, on the way to Hansi, she met the appellant-accused at Village Bawani Khera, and they travelled together to Hansi;
 - (e) From Hansi, they travelled together to Hisar, where they visited Suncity Mall; and
 - (f) They travelled together in the appellant-accused's car.
13. The deposition of the Prosecutrix shows that she went from place to place with the appellant without any protest. Bajrang Lal (PW-8) owns the Jindal Guest House, Bhiwani, where the incident allegedly took place. In his examination-in-chief, he deposed that when the appellant-accused and the Prosecutrix came to his Hotel, they disclosed that they were husband and wife. In the cross-examination, he stated that he obtained the signatures of both of them at the time of their arrival and departure in a register.
14. Mahesh (PW-15) is the brother-in-law of the Prosecutrix, who accompanied the Prosecutrix to the Police Station to lodge a complaint. He stated in the cross-examination that even after the incident and before the registration of the complaint, there was a conversation on WhatsApp between the appellant-accused and the Prosecutrix about 300 to 400 times. Thus, even after the incident, the Prosecutrix was in conversation with the appellant.

15. Thus, the evidence of the Prosecutrix and the other prosecution witnesses shows that more than one month before the alleged incident, the appellant-accused and the Prosecutrix exchanged frequent WhatsApp messages. Secondly, the appellant-accused met the Prosecutrix when she was travelling on the way to Hansi. The Prosecutrix had informed the appellant about her visit to Hansi. Thirdly, while coming out of the hotel room, the Prosecutrix did not raise any protests, did not make any hue and cry, or did not complain. She signed the hotel register while leaving the hotel with the appellant. Lastly, while entering the Hotel, the appellant-accused and the Prosecutrix posed as husband and wife. All this has to be appreciated in light of the fact that we are dealing with a case of a well-educated victim who was married and a graduate. Her age at the time of the incident was about 28 years.
16. It is true that the absence of injury on the person of the victim of the offence of rape is not always relevant. But, in this case, the Prosecutrix deposed that she sustained an injury on her hand as her bangles were broken. However, the Medical Officer (PW9) deposed that there were no external marks of injury on any part of her body.
17. We may also note here that on the way from Hansi, the Prosecutrix travelled in the car of the appellant-accused along with the appellant, and the Guest House where they entered is at Bhiwani, which is close to her matrimonial house as deposed by her in her cross-examination. According to the Prosecutrix's version, the appellant-accused entered the Jindal Guest House first, and she was waiting in the car. If there was any compulsion made by the appellant-accused, the Prosecutrix could have got out of the car and walked up to her residence. However, she did not do that.
18. There is one more critical aspect of the matter. PW-15, the Assistant Sub Inspector of Police, who was investigating the offence, stated that she had called for the CD of what was recorded on the CCTV camera at Jindal Guest

House. She stated that she had seen the footage and had prepared a report on the basis of the footage. However, the prosecution has not produced the said CCTV footage. The prosecution had no reason to withhold such an important piece of evidence.

19. The cumulative effect of the above discussion is that it is very unsafe to rely upon the testimony of the Prosecutrix in this case.
20. The submission made by the learned counsel appearing for the Prosecutrix based on Section 294 of the Cr.PC remains to be dealt with. Section 294 of the Cr.PC reads thus:

“294. NO FORMAL PROOF OF CERTAIN DOCUMENTS.—(1) Where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document.

(2) The list of documents shall be in such form as may be prescribed by the State Government.

(3) Where the genuineness of any document is not disputed, such document may be read in evidence in inquiry, trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed:

Provided that the Court may, in its discretion, require such signature to be proved.”

21. Firstly, the learned counsel appearing for the Prosecutrix admitted that the prosecution did not produce the WhatsApp messages before the recording of evidence commenced. According to his version, the same was produced when the Prosecutrix was under cross-examination. The essential ingredient of sub-Section (1) of Section 294 of the Cr.PC is that when any document is produced by the prosecution or the accused, the parties shall be called upon to admit or deny the genuineness of each such document. In this case, it is nobody's case that the appellant-accused was called upon to admit or deny the genuineness of the WhatsApp chats. Moreover, sub-Section (3) of Section 294 of the Cr.PC indicates that even if a particular document is not disputed, the Court has the discretion to read or not to read the same in

evidence without formal proof of the signature of the person to whom it purports to be signed. The

Court always has the power to require the signature to be proved. Therefore, the contention of the learned counsel appearing for the Prosecutrix based on Section 294 of the Cr.PC has absolutely no merit. In any case, a certificate under Section 65B of the Evidence Act has not been produced.

22. Therefore, in our considered opinion, the prosecution has failed to prove the appellant's guilt beyond a reasonable doubt. Hence, the impugned orders cannot be sustained, and they are hereby quashed and set aside. The appellant-accused is acquitted of the charges framed against him.
23. The Appeal is, accordingly, allowed.
24. The appellant is on bail. Therefore, his bail bond shall stand cancelled.
25. Pending applications, including the application for intervention, stand disposed of accordingly.

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