

Devi Vs. the State of M.P.

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Court : Madhya Pradesh

Decided On : Jun-20-2012

Appellant : Devi

Respondent : The State of M.P.

Judgement :

1 Criminal Appeal No.1845/1996 HIGH COURT OF MADHYA PRADESH
JABALPUR Criminal Appeal No.1845/1996 Devi Vs. State of Madhya Pradesh

----- Present :
Hon'ble Shri Justice N.K. Gupta.

Name of counsel for the parties: Shri Y.P. Sharma, Advocate for the appellant.
Shri G.S. Thakur, Panel Lawyer the respondent/State.

JUDGMENT

(Passed on 20th day of June, 2012) The appellant has preferred this appeal against the judgment dated 1.10.1996 in S.T. No.71/94 passed by the learned 2nd Additional Sessions Judge, Chhindwara, by which the appellant was convicted for the offence punishable under Section 376(1) of IPC and sentenced for four years R.I. with fine of Rs.500/-. In default of payment of fine, the appellant was to undergo for three months R.I. in addition.

2. Prosecution's case in short is that the prosecutrix (PW-8) aged about 14 years stayed in the house of her maternal uncle at Kanhargaon from 12.5.1991 to 10.6.1991. Wife of the appellant was friend of the prosecutrix and therefore, the appellant informed the prosecutrix that wife of the appellant wanted to meet her and with this pretext, he took the prosecutrix to his house. In the house of the 2 Criminal Appeal No.1845/1996 appellant, he committed rape upon the prosecutrix. The appellant threatened the prosecutrix that she should not say about the crime to anyone and therefore, she could not say anything in the family of her maternal uncle. Thereafter, she went to her parents' house but she could not say anything to anyone. In the month of January 1992, the prosecutrix was found pregnant and when she was asked about the incident then she told the entire story to her parents. A report was lodged by the prosecutrix at Police Station, Damua on 13.1.1992, which was transferred to the Police Station, Umreth, which has jurisdiction for investigation. The prosecutrix was examined by Dr. Piyusha Sonunshi (PW-11) and a report Ex.P/10 was given by her. The prosecutrix was found pregnant with a foetus of 30-32 weeks. After due investigation, a charge sheet was filed before the J.M.F.C. Chhinwara and thereafter case was committed to the Sessions Court, Chhindwara.

3. The appellant abjured his guilt. He did not take any specific plea, but he has stated that he was falsely implicated in the matter. No defence evidence was adduced by the appellant.

4. After considering the evidence adduced by the prosecution, the trial Court convicted and sentenced the appellant as mention above.

5. I have heard learned counsel for both the parties.

6. Learned counsel for the appellant has submitted that the trial Court has erred in assessing the age of the prosecutrix. She was above 16 years of age at the time of incident. FIR was lodged after eight months of the incident. The overt act as depicted in the statement 3 Criminal Appeal No.1845/1996 of the prosecutrix herself clearly indicates that either the prosecutrix was a consenting party or the applicant was falsely implicated in the matter. Under such circumstances, the appellant could not be convicted for the offence punishable under Section 376 of

IPC.

7. On the other hand, learned Panel Lawyer has submitted that the learned trial Court has not committed any error in convicting and sentencing the appellant.

8. There are only three points for determination in the present appeal. Firstly that, whether the prosecutrix was above 16 years of age at the time of incident, secondly whether the appellant could be convicted for the alleged offence and thirdly, whether any interference can be done in the sentence imposed upon the appellant? 9. The prosecutrix (PW-8) could not tell her date of birth by her own. Kalabai (PW-4), mother of the prosecutrix and Dhannu (PW- 3), father of the prosecutrix could not say about the date of birth of the prosecutrix. The date of birth of the prosecutrix was established by the Principal Rajabai (PW-6). According to the certificate Ex.P/3, the date of birth of the prosecutrix was shown to be 5.10.1977. However, Rajabai accepted in cross-examination that she gave a certificate on the basis of the entries made in the school admission register. She has also accepted that the date of birth of the prosecutrix was entered in the register as it was informed by her father Dhannu. In the present case, Dhannu could not inform about the basis by which he had given the particulars about the date of birth of the prosecutrix to the school authorities. Learned counsel for the appellant has placed his reliance 4 Criminal Appeal No.1845/1996 on the judgment passed by this Court in case of Makhan Vs. State of M.P. [2003 (3) M.P.L.J.

115] to show that the entries made in the school about the date of birth without any basis cannot be considered as a final proof the age of the prosecutrix.

10. Learned Sessions Judge has assessed the age of the prosecutrix in a haphazard manner. He took a clue from the statement of the prosecutrix and her parents evidence, whereas each of them have stated about the age of the prosecutrix without any basis. Dhannu (PW-3) has informed that age of the prosecutrix was 14 years at the time of incident, whereas he was not in a position to tell the actual date of the incident. The age of any child is to be assessed either by the birth certificate or entry in a Kotwari book, if the same is available. If such type of entries are not available then educational record may be considered.

Evidence of parents etc may also be considered for assessment of the age and if such evidence is not reliable then medical evidence is to be considered for consideration of age of a child. Since it is possible that two years may be added on both the sides in computation of age by ossification test, then such type of assessment depends upon the probability and if age of the accused is to be assessed, then addition of two years may be done with the view that benefit of doubt is to be given to the accused, whereas if age of the prosecutrix is to be considered, then age should be considered in such a manner so that reasonable benefit of doubt is to be given in favour of the accused. Therefore, if age of the accused (a juvenile) is to be assessed then, the lower side of such computation is to be taken into 5 Criminal Appeal No.1845/1996 consideration, but when the age of the prosecutrix is to be considered then, the higher side of the computation shall be considered.

11. In the present case, educational record is submitted but no basis could be found for the assessment of the date of birth of the prosecutrix, which was given to the school authorities. The prosecutrix (PW-8) has herself accepted that she has seven sisters and brothers in all and she is the eldest amongst them. It is nowhere established that what was the age of the her youngest brother or sister. Under such circumstances, a computation of age cannot be based on the testimony of the prosecutrix or her parents in the present case. There is no entry of the Kotwari book and the birth certificate is submitted by the prosecution, therefore, there no option except to assess the age of the prosecutrix on the basis of ossification test.

12. Dr. S.K. Dubey (PW-7) gave his report Ex.P/7 on 24.2.2992 that, the prosecutrix could be of 16-17 years of age at that time. Report was given on the basis of fusion of various joints. Learned 2 nd Additional Sessions Judge tried to compute the age of the prosecutrix on the basis of MLC report given by the Dr. Piyusha Sonunshi (PW-11). If that report Ex.P/10 is perused, then it would be clear that Dr. Piyusha has given her report about the age of the prosecutrix on the basis of development of secondary sex characters and her report was incomplete. She did not count the teeth of the prosecutrix. Learned 2 nd Additional Sessions Judge observed in para 9 of his judgment that the prosecutrix was examined by the doctor on 13.1.1992 and therefore, he deducted the period of 14-16 weeks of

pregnancy from that date and it 6 Criminal Appeal No.1845/1996 was found that the first intercourse was committed with the prosecutrix on 12.5.1991. Under such circumstances, it was observed that the prosecutrix was below 16 years of age at the time of incident. Actually, if MLC report Ex.P/10 is perused, then it would be apparent that Dr. Piyusha Sonunshi (PW-11) found the prosecutrix to be pregnant with a foetus of 30-32 weeks, whereas learned 2nd Additional Sessions Judge computed the age of the prosecutrix with the help of pregnancy of 14-16 weeks without any basis. If, it is presumed that the prosecutrix was about 17 years of age at the time of her examination, then her ossification test was done on 24.2.1992 approximately i.e. one month after her medico legal examination. Under such circumstances, 8+1=9 months should be deducted from that age to consider the age at the time of the incident. Hence, by such computation she still she appeared to be 16 years and 9 months old at the time of incident. There is nothing on the record by which the observations made by the doctor in ossification test may be discarded. If no addition is done in the age computed by the ossification test, then the prosecutrix was above 16 years of age at the time of incident. If ossification test indicates her age to be 16-17 years then lower side of the assessment cannot be considered, because a reasonable doubt is to be given to the accused and if the prosecutrix was of 17 years of age in ossification test then such higher side of the assessment is to be taken. Under such circumstances, it appears that the prosecutrix was above sixteen years of age at the time of the incident. 7 Criminal Appeal No.1845/1996 13. For consideration of second point, the statements of the prosecutrix and her parents may be considered. The prosecution story is that the prosecutrix went to the house of her maternal uncle for the period of 12.5.1991 to 10.6.1991. The appellant took the prosecutrix to his own house with the pretext that she was called by his wife and therefore, the prosecutrix was retained for a night. If the statements of the witnesses including the prosecutrix (PW-8), Kalabai (PW-4), mother of the prosecutrix and Harishchandra (PW-9), maternal uncle of the prosecutrix are perused, then it would be apparent that there is a material contradiction in their statements. The prosecutrix (PW-8) says that the appellant took her with permission of her maternal grand mother, whereas Harishchandra (PW-9), her maternal uncle has accepted that the sister of the appellant took the prosecutrix. Similarly, the prosecutrix has admitted in her cross-examination that

the appellant committed intercourse with her for 2-3 times and she was kept for two days in the house of the appellant, whereas Harishchandra (PW-9) has stated that on the next day morning, the prosecutrix was brought back to his house. On the contrary, Kalabai (PW-4) has accepted that the prosecutrix remained in the house of the appellant for two days but such version was not given in her case diary statement.

14. Thirdly, it is strange that the prosecutrix admitted that there were so many persons in the house of the appellant but she could not make any hue and cry at the time of first instance, because she was given some intoxicant Pan (Betel leaf) to her but no such fact is given 8 Criminal Appeal No.1845/1996 in her case diary statement. She has also added against her first version, which was given in the FIR that she was kept for two days and in those two days, the appellant committed rape for two times upon her. If the appellant committed rape with her for two times, then what was the problem to the prosecutrix, not to mention that fact in the FIR. Under such circumstances, it cannot be accepted that a rape was committed with the prosecutrix for two times.

15. The prosecutrix (PW-8) has also accepted in para 11 that on her shouting, the entire family of the appellant ran away from the house because the crime was being committed with their consent. Such version of the prosecutrix is unnatural. If any rape was committed upon the prosecutrix in the house of the appellant, which was fully crowded with the relatives of the appellant, then it was not possible that all the relatives would immediately run away from the spot. If, at all the incident took place in such a manner, then why it was not mentioned in the FIR itself. Under such circumstances, if the version of the prosecutrix is accepted that when she went to the house of the appellant for a day and the appellant committed intercourse with her, then it is apparent that she did not make any hue and cry. No intoxicant was given to her and also she did not inform anyone for at least three to six months of the incident then certainly she appears to be a consenting party.

16. Learned counsel for the appellant has submitted that FIR was lodged with the delay of at least eight months of the incident and no sufficient ground was mentioned to explain that delay. The versions 9 Criminal Appeal No.1845/1996 of

the parents and relatives of the prosecutrix about the delay in FIR is not acceptable. It is strange that mother of the prosecutrix could not understand that her daughter was pregnant. She claims that she understood the fact, when the doctor opined about the pregnancy of the prosecutrix. There is a lot of contradiction between the statements of various witnesses relating to the knowledge of the pregnancy. Dhannu (PW-3) father of the prosecutrix has accepted in para 6 of his statement that the prosecutrix had informed him about the incident after 2-4 months of the incident and she was shown to the doctor after 6-7 months. They took her to the doctor in a big hospital. He has tried to hide the opinion of the doctor to whom the prosecutrix was shown initially after four months of the incident. Kalabai (PW-4) and the prosecutrix (PW-8) did not say anything about the fact as to when the prosecutrix was taken to the doctor for the first time. Harishchandra (PW-9) has accepted in his cross-examination that he was informed about the pregnancy within three months of the incident. Under such circumstances, it would be apparent that within three months of the incident, the parents of the prosecutrix got the knowledge that their daughter was pregnant but they did not take any step to lodge any FIR. Under such circumstances, FIR is delayed by at least five months and no reasonable ground is established for that delay. Looking to the delay in lodging the FIR, the prosecution story comes under the clouds of doubt.

17. It is also stated by parents of the prosecutrix that the appellant was summoned, then he was given a proposal that he may 10 Criminal Appeal No.1845/1996 get himself married with the prosecutrix in the Court. Kalabai (PW-4) has stated in para 5 of her statement that the appellant accepted his guilt but he refused the proposal of the marriage and ran away but such a fact was not stated in her case diary statement, neither that fact was confirmed by her husband Dhannu (PW-3). FIR should have been lodged just after the parents of the prosecutrix got the knowledge of pregnancy and the incidence. It appears that father of the prosecutrix is making the stories to implicate the appellant. Some portion of statement of Harishchandra (PW-9) appears to be important. In para 2, he has accepted that his brother-in-law Dhannu informed him that the prosecutrix was pregnant but he did not state about the fact that who was the father of the child but, Harishchandra himself presumed that it must be the accused.

18. Defence has suggested its version to the various witnesses that the prosecutrix was already pregnant and she was sent to Kanhargaon in the house of her maternal uncle for her treatment and abortion but, since no abortion took place then entire guilt was imposed upon the appellant. None of the witnesses have accepted the proposal of the defence. No defence witness was examined to prove the defence story. However, the period of pregnancy is considered then it would be clear that pregnancy was due to any other person. Dr. Piyusha on 13.1.1992 found that there was a pregnancy of 30-32 weeks to the prosecutrix and thereafter, the prosecutrix delivered a female child on 16.1.1992, who expired on the same day. The date of delivery may be confirmed by the death register Ex.P/5, then certainly at that 11 Criminal Appeal No.1845/1996 time, eight months were completed. Therefore, the prosecutrix must have been conceived by the intercourse done with her on or before 15.5.1991.

19. According to the prosecution, the prosecutrix remained in the house of her maternal uncle for the period of 12 th May 1991 to 10th June 1991. She has accepted in para 9 (second) of her statement that after three days of the incident, she went to the house of her parents at Damua from the house of her maternal uncle. According to the FIR, she remained in the house of her maternal uncle upto 10 th June 1991, then according to this calculation, the incident must have taken place in between 6th and 7th June 1991 but looking to the computation of the incident from the entire period of her pregnancy, the period comes prior to the date 16.5.1991, which nowhere matches with the actual alleged date of incident. Under such circumstances, it appears that the prosecutrix was pregnant due to any other reason and thereafter, since the prosecutrix went to the house of her maternal uncle for sometime i.e. in the period of 12th May 1991 to 10th June 1991, a story was cooked against the appellant to get advantage of that period. However, no specific interference can be drawn on the basis of evidence adduced by the prosecution. The evidence adduced by the prosecution appears to be shaky. A doubt is created that the prosecutrix was pregnant since before the date of alleged incident. The version of the prosecutrix cannot be believed that a rape was committed with her in a house, which was situated in a dense area and also crowded by so many relatives of the appellant. There was no satisfactory reason established 12 Criminal Appeal No.1845/1996 by the prosecution in relation to the

fact by which the prosecutrix could be sent to the house of the appellant in such a manner. Under such circumstances, a doubt is created that either the prosecutrix was a consenting party at the time of incident or a false case is created against the appellant and if such doubt is created then, the benefit of doubt is to be given to the accused and he cannot be convicted for the offence punishable under Section 376 of IPC.

20. On the basis of aforesaid discussion, the appeal filed by the appellant seems to be acceptable and therefore, it is accepted. The conviction and sentence directed by the trial Court for the offence punishable under Section 376(1) of IPC are hereby set aside. The appellant is acquitted from all the charge appended upon him. He would be entitled to get the fine amount back, if he has deposited the same before the trial Court. Presence of the appellant is no more required hence, it is directed that his bail bonds etc shall stand discharged.

21. Copy of the judgment be sent to the trial Court for information and compliance.
(N.K. GUPTA) JUDGE 20 06.2012 pnkj

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