

Arman Ali Vs. the State of Madhya Pradesh

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Court : Madhya Pradesh

Decided On : Oct-30-2012

Appellant : Arman Ali

Respondent : The State of Madhya Pradesh

Judgement :

HIGH COURT OF JUDICATURE MADHYA PRADESH, JABAPLUR Single Bench:
Hon'ble Shri Justice N.K.Gupta,J.CRIMINAL APPEAL NO.2040 OF 200.Arman Ali.
Vs. State of Madhya Pradesh.

----- Shri Anand
Naik, Advocate for the appellant. Shri Punit Shroti, Panel Lawyer for the
respondent/ State.

JUDGMENT

(Delivered on the 30th day of October, 2012) This criminal appeal is preferred by the appellant being aggrieved by the judgment dated 7/10/2009 passed by the 9th Additional Sessions Judge, Bhopal in ST No.236/2009, whereby the appellant was convicted and sentenced as under:- Conviction Sentence Fine Default U/S (IPC) (Rupees) sentenc

7. years' RI 1000/- RI for 2 month

2. years' RI 500/- RI for 1 mont

3. years' RI 1000/- RI for 2 months All the sentences were directed to run concurrently.

2. The prosecutions case, in short, is that the prosecutrix (PW-3) was a 14 years old girl, who was resident of Tilajamalpura, Bhopal. On 25.1.2009 when her father's birthday party was going on at about 10:30 PM in 2 Cr.A.No.2040/2009 the night the prosecutrix went out to bring some edible goods. On the way back the appellant met him and asked her to go with him. Thereafter he held the hand of the prosecutrix and snatched her. The prosecutrix was taken on a motorcycle, which was driven by one Sahab. The prosecutrix shouted, but since a full volume music was going on in her house, nobody could hear her shouting. The prosecutrix was taken to a house where the appellant committed rape upon the prosecutrix. At about 5:00 AM in the morning, the co-accused Sahab came back and left the prosecutrix nearby her house. In the meantime, the parents of the prosecutrix had lodged a missing report at the Police Station Tilajamalpura (Bhopal). After the recovery of the prosecutrix, she was sent to the hospital for her medico legal examination. Dr. Kiran Badia (PW-8) examined the prosecutrix at Sultaniya Janana Hospital, Bhopal and gave her report Ex.P-10. No external or internal injury was found on the person of the prosecutrix, and therefore two slides of her vaginal swab were prepared and her clothings were also taken by Dr. Badia. Such material was handed over for their forensic examination to the concerned Constable after sealing them,. She was also referred for the Radiological examination. Dr. Neelam Shrivastava (PW-5) on the requisition of Radiological examination gave her opinion that age may be assessed by the educational record and no Radiological examination was required. After due 3 Cr.A.No.2040/2009 investigation, a charge sheet was filed before the JMFC, Bhopal, who committed the case to the Sessions Judge, Bhopal and ultimately it was transferred to the 9th Additional Sessions Judge, Bhopal.

3. The appellant-accused abjured his guilt. He did not take any specific plea, but he has stated that he was falsely implicated in the matter. He has challenged that the date of birth recorded in the school was not correct. The prosecutrix was above 18 years of age. She was a consenting party. In support of his defence, one Kavita (DW-1) was examined.

4. The learned 9th Additional Sessions Judge, Bhopal after considering the evidence adduced by the parties convicted the appellant for commission of offence punishable under Sections 363, 366 and 376 of IPC and sentenced him as mentioned above.

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

6. The learned counsel for the appellant has submitted that the age of the prosecutrix was above 18 years. Though she was shown to be 14 years of age. No ossification test was done. The doctor was not the authority to refuse her ossification test, and therefore an adverse inference needs to be drawn. In the case diary statement of the prosecutrix (PW-3), no age of the prosecutrix was mentioned. The prosecutrix has alleged against both of the accused persons that they committed rape upon her, 4 Cr.A.No.2040/2009 whereas in the case diary statement, she did not allege against the co-accused Sahab, and therefore he was acquitted. No indication was found to suggest that any intercourse was done by the appellant on the prosecutrix. The learned counsel for the appellant read out the various paras of the statements given by the various witnesses like the prosecutrix, Sunil Xavier etc. He has placed his reliance upon the judgments of Honble the Apex Court in the case of Alamelu & another Vs. State. [(2011) 1 SCC (Cri) 688]., Mussaiddin Ahmed Vs. State of Assam., [(2009) 14 SCC 541].. The judgment of the Single Bench of this Court in the case of Kalu Vs. State of MP., [2008(2) MPLJ (Cri) 390]. was also cited. Under such circumstances, it is prayed that the appellant may be acquitted. In the alternate, it is submitted by the learned counsel for the appellant that the appellant was a youth of 20 years of age at the time of the incident and the prosecutrix was in love with the appellant, and therefore the appellant may not be punished with any severe sentence.

7. On the other hand, the learned counsel for the State has submitted that the conviction and the sentence directed by the trial Court appears to be correct and there is no basis by which any interference may be done in the present appeal. 5 Cr.A.No.2040/2009 8. After considering the submissions made by the learned counsel for the parties and looking at the facts and circumstances of the case, it is to be considered as to whether the appeal of the appellant can be accepted?. And

whether the sentence directed by the trial Court against the appellant can be reduced?.

9. First of all, the age of the prosecutrix is to be assessed. The parents of the prosecutrix did not appear in the witness box, and no birth certificate was submitted before the trial Court. The prosecutrix (PW-3) has stated that her date of birth was 2.10.1994. She told her date of birth on the basis of entries of the school register. A child cannot know her own date of birth unless it is told by her parents, and therefore the date of birth told by the prosecutrix is nothing but a hearsay evidence, which cannot be relied upon. Smt. Dropti Talreja (PW-11) the Principal, Tender Higher Secondary School, Bhopal was examined. She has proved the transfer certificate Ex.P-13 which was issued from her school. She was the Principal of the concerned School. She has stated that the prosecutrix took her admission in the school in Class KG-II and she remained in the school for six years. Her date of birth was shown to be 2.10.1994. She was categorically asked about the basis by which her date of birth was written in the school record. She could not tell that whether father or mother of the prosecutrix came with the prosecutrix at the time of 6 Cr.A.No.2040/2009 admission or who gave the date of birth of the prosecutrix. She has accepted that no such document was shown to her. She relied upon the date of birth of the prosecutrix as told by her parents. Under such circumstances, it is apparent that date of birth of the prosecutrix was given to the school by one of her parents, but no basis is shown for such entry of the date of birth.

10. The learned counsel for the State has submitted that the parents of the prosecutrix appear to be literate persons, and therefore they must have informed the school authorities the correct date of birth of the prosecutrix at the time of her admission. Such contention cannot be accepted as a general rule. The parents of the prosecutrix were residents of Bhopal and the birth of the prosecutrix must have taken place in some hospital, and therefore there must be entry of her date of birth in the birth register kept by the concerned authority, and therefore at the time of her admission, the copy of birth certificate must have been shown to the Principal. When the parents of the prosecutrix did not take care to obtain the birth certificate, hence the possibility cannot be ruled out that at the time of admission of the

prosecutrix, her date of birth was informed to the school authorities by memory of the parents. Under such circumstances, an adverse inference is to be drawn against the parents of the prosecutrix that they did not give the correct date of birth to the school authorities. 7 Cr.A.No.2040/2009 11. It is unfortunate that the parents of the prosecutrix did not appear in the Court to give their statement. Priti Singh (PW-1), sister of the prosecutrix examined herself to show that the prosecutrix was 14 years old at the time of the incident, but she herself told her age to be 17 years, and therefore at the time of birth of the prosecutrix, the witness Priti Singh must be of 3-4 years old, hence she must have given details relating to the date of birth of the prosecutrix as informed by her parents, and therefore her version for assessment of the age of the prosecutrix is also a hearsay evidence, which cannot be relied upon. Under such circumstances, the date of birth received from the school record cannot be believed. The possibility cannot be ruled out that there must be variation of 1-2 years in the date of birth recorded in the school. Under such circumstances, the assessment of age of the prosecutrix is to be considered on the basis of the medical evidence.

12. Dr. Kiran Badia (PW-8) had examined the prosecutrix and gave her report Ex.P-10. In that report she did not mention about the development of secondary sex characteristics of the prosecutrix. The prosecutrix was referred for her Radiological examination, but Dr. Neelam Shrivastava (PW-5) refused to do the Radiological examination of the prosecutrix. It was mentioned in her report Ex.P-4 that according to the direction given by Dr. 8 Cr.A.No.2040/2009 Satapthi, Director, Medico Legal Institute, Bhopal, she has directed the prosecution to rely upon the educational record for the consideration of the age of the prosecutrix. The investigation agency cannot refuse to investigate on any point of dispute whether the educational record is believable or not, is to be decided by the Court and not by the doctor, even Director of the Medico Legal Institute, Bhopal could not refuse to perform the ossification test of the prosecutrix. It appears that the ossification test was refused due to some ulterior motive which creates an adverse inference against the prosecution. It can be presumed that if the prosecutrix was examined Radiologically, then her age could be found to be more than of 16 years.

13. Though Dr.Kiran Badia did not mention about the development of Secondary Sex Characteristics, but she has mentioned that the prosecutrix, who was shown to be 14 years of age, was habitual to intercourse. Her vagina had permitted two fingers easily. Her hymen was old torn. Such type of indications could not be found in such a minor girl, unless she is habitual to intercourse. These indications are not useful in assessment of her age, but when Radiological examination was refused, then a doubt is created by such indications that the prosecutrix was above 16 years of age at the time of incident. 9 Cr.A.No.2040/2009

14. Hon'ble the Apex Court in the case of Mussaaddin Ahmed (supra) has laid that it is the duty of the party to lead the best evidence in its possession which could throw light on the issue in controversy and in case such material evidence is withheld, the Court may draw adverse inference notwithstanding that the onus of proof did not lie on such party and it was not called upon to produce the said evidence. In the instant case, neither the parents of the prosecutrix entered in the witness box to show the age of the prosecutrix nor any basis is shown by which the date of birth of the prosecutrix was recorded in the school record. No ossification test of the prosecutrix was done by the concerned doctor, and therefore in the light of the judgment of Hon'ble the Apex Court in the case of Mussaaddin Ahmed (supra) an adverse inference can be drawn and two years variation can be presumed in the age of the prosecutrix. Hence, the prosecution could not prove that the prosecutrix was below 16 years of age. Actually investigation is to be done in a judicious manner. The police cannot ignore any important fact at the time of investigation. It is for the prosecution to prove that the prosecutrix was below 16 years of age at the time of incident, and therefore burden of the prosecution cannot be shifted to the defence. In this context, if the judgment passed by the Single Bench of this Court in the case of Kalu (supra) is considered, then it would be clear that according to 10 Cr.A.No.2040/2009 to the school register the prosecutrix was 13 years of age, but according to the ossification test, she was 16-18 years of age. Her secondary sex characteristics were developed, and therefore the prosecutrix was found to be above 16 years of age. Under such circumstances, the date of birth which is mentioned in the school record cannot be accepted as it is and looking to the entire situation, it appears that the prosecutrix was above 16 years of age. However, at the time of informing the date of birth of the prosecutrix to the

school authority, a variation of two years is quite possible due to the terms and conditions of the admission or by any other reason. But variation of four years cannot be presumed, because the prosecutrix had passed her 9th class examination at the time of incident and it was not possible that she was admitted in the school at the age of eight years, therefore the variation of four years cannot be presumed. Hence the prosecutrix could be above 16 years of age at the time of incident but below 18 years of age.

15. According to the evidence given by the prosecutrix (PW-3), she was coming back with some edible goods to her house at about 10:30 PM in the night and thereafter the appellant took her. Sunil Xavier (PW-4) and Priti Singh (PW-1) have stated that in the night of 25.1.2009, there was a celebration of birth day party of the father of the prosecutrix and the prosecutrix was found missing. She came back at 6:00 AM in the morning, and she 11 Cr.A.No.2040/2009 informed about the incident and also the fact that the accused Sahab left her near her house. They did not state that the prosecutrix was sent in the night to bring some edibles. The prosecutrix has stated that she was held by the appellant and taken on the motorcycle. Thereafter in Kabitpur the appellant kept her in a room and committed rape upon her. On the contrary, Kavita (DW-1) has stated that she was neighbour of the prosecutrix and the prosecutrix was occasionally moving around with the appellant in those days. The version of the witness Kavita (DW-1) is duly confirmed by the photograph Ex.D-1 in which the appellant is shown with the prosecutrix. Similarly, some photographs Ex.D-2 and Ex.D-3 were also shown to her. Such photographs could not be obtained by the appellant from the photographer. Those photographs could be available with the appellant, if they were given to him by the prosecutrix. The prosecutrix could not say that the photograph Ex.D-1 was prepared by the trick photography, therefore by the evidence of the witness Kavita (DW-1), it is apparent that the prosecutrix and the appellant were known to each other. The prosecutrix was in love with the appellant, and therefore her photograph could be shot with the appellant.

16. The prosecutrix has given a reason that she was bringing some edible substance from the shop to her house. It is strange that when a party was arranged in the house 12 Cr.A.No.2040/2009 and arrangement was to be done by

some adult persons, then at about 10:30 PM in the night it was not possible that a minor child girl will be sent to bring some edibles for that party. They did not state that the prosecutrix was sent in the night to bring some edibles. If she was sent to bring some edibles, then the party could not be completed without bringing such edible, and therefore the parents of the prosecutrix must have been eagerly waiting but, there is nothing on the record to show that the parents knew at that time that their daughter was missing. Under such circumstances, the pretext shown by the prosecutrix appears to be incorrect. It indicates that the prosecutrix herself went outside of her house and went with the appellant. Similarly, the prosecutrix has admitted that she remained with the appellant in a room upto 5:00 AM in the morning. She did not make any hue and cry in that room. Thereafter the accused Sahab took her from that room and left her near her house. If an unknown boy had taken the prosecutrix in a room and tried to commit rape, then the prosecutrix must have made hue and cry. She must have resisted and after the incident she must have left the room and rushed towards her house. But the conduct of the prosecutrix clearly indicates that nothing was done by the appellant forcefully and therefore she was a consenting party. 13 Cr.A.No.2040/2009 17. Looking to the conduct of the prosecutrix as depicted in her own evidence, it is clear that she was a consenting party. Since she was above 16 years of age at the time of incident, therefore looking to her consent, no offence under Section 376 of IPC is made out. The appellant cannot be convicted for the offence under Section 376 of IPC. The learned Additional Sessions Judge has erred in convicting the appellant for the offence under Section 376 of IPC. Similarly, as discussed above, the prosecutrix left her house on her own. There was no reason for her to leave her house at 10:30 PM in the night, and therefore she went with the appellant with her consent. Hence the appellant could not be convicted for the offence under Section 366 of IPC. The learned trial Court has wrongly convicted the appellant for the offence under Section 366 of IPC. Hon'ble the Apex Court in the case of Alamelu (supra) has observed the conduct of the prosecutrix and acquitted the accused from the charges of offence under Sections 376 and 366 of IPC. Similarly, in the case of Mussaaddin Ahmed (supra) Hon'ble the Apex Court reversed the conviction directed against the accused for the offence under Sections 376 and 366 of IPC.

18. So far as the offence under Section 363 of IPC is concerned, it depends upon the age of the prosecutrix. Though the prosecutrix was a consenting party, but she was below 18 years of age, therefore offence of kidnapping is 14 Cr.A.No.2040/2009 constituted, because the appellant had taken the prosecutrix without permission of the parents of the prosecutrix. As discussed above, two years variation could be presumed in the date of birth recorded with the school authorities and four years variation could not be presumed. It is concluded that the prosecutrix was below 18 years of age at the time of incident, and therefore since the appellant did not take the permission of the parents of the prosecutrix in taking her, then certainly he had kidnapped the prosecutrix. Under such circumstances, the appellant has committed the offence under Section 363 of IPC by taking a minor girl with him. The learned Additional Sessions Judge has rightly convicted the appellant for the offence under Section 363 of IPC.

19. So far as the sentence is concerned, it is apparent that the appellant remained in the jail through out the trial and at present he is in custody, and therefore he remained in the custody for approximately more than three years, whereas the trial Court has sentenced him for two years' RI for the offence under Section 363 of IPC, and therefore there is no need to interfere in the sentence passed by the trial Court for the offence under Section 363 of IPC.

20. On the basis of the aforesaid discussion, the appeal of the appellant appears to be partly acceptable. Consequently, it is partly allowed. The conviction as well as the sentence directed by the trial Court for the offence 15 Cr.A.No.2040/2009 under Sections 376 and 366 of IPC is hereby set aside. The appellant is acquitted from such charges. But conviction and sentence directed for the offence under Section 363 of IPC are hereby maintained.

21. At present the appellant is in custody, and therefore the Registry is directed to issue a release warrant as early as possible so that the appellant may be released.

22. A copy of this judgment be sent to the trial Court with its record for information and compliance. (N.K.Gupta) Judge 30/10/2012 Ansari.