

Sunil Vs. the State of M.P.

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Court : Madhya Pradesh

Decided On : Oct-18-2012

Appellant : Sunil

Respondent : The State of M.P.

Advocate for Pet/Ap. : Shri. B.R.Koshta

Judgement :

IN THE HIGH COURT OF MADHYA PRADESH, JABALPUR SINGLE BENCH :
HONBLE MR. JUSTICE N.K.GUPTA, J.Criminal Appeal No.1348/1999 Sunil
VERSUS State of Madhya Pradesh
----- Shri B.R.Koshta, counsel
for the appellant. Shri Puneet Shroti, Panel Lawyer for the State/respondent.

JUDGMENT

(Delivered on the 18th day of October, 2012) The appellant has preferred this appeal against the judgment dated 17.4.1999 passed by the learned Sessions Judge, Chhindwara in S.T.No.106/1998, whereby the appellant was convicted for the offence punishable under section 376 of IPC and sentenced for 7 years' rigorous imprisonment.

2. The prosecution's case, in short, is that, on 7.3.1998, the prosecutrix (P.W.4) went to graze her cattle near the field of one Chironji Katya, situated at village Hinotiya (Police Station Junnardev, District Chhindwara). At about 4 p.m. in the evening, the appellant Sunil suddenly went to the spot and threw the prosecutrix on the Earth. He :- 2 :- Criminal Appeal No.1348 of 1999 raised her Sari and after removing his underwear, he committed rape upon the prosecutrix. Thereafter, the appellant ran away. The prosecutrix started weeping. She told the entire story to Hemraj (P.W.1) and Dhundoo. Thereafter, she went to her house in the evening and told the entire story to her mother Leela Bai (P.W.5). The story of the incident was told to Kunjar (P.W.9) and Ishwardas (P.W.8). In the night, the prosecutrix could not go to the Police station and therefore, on the next day i.e. on 8.3.1998, she lodged an FIR, Ex.P/3 at about 11 a.m. in the morning, at Police Station Junnardev (Jamai). The prosecutrix was sent for her medico legal examination to the Community Health Center, Junnardev, where Dr.Manju Jain (P.W.6), examined the prosecutrix and gave her report, Ex.P/4. The prosecutrix told her age to Dr.Manju Jain as 16 years. No external or internal injury was found on her person. No any discharge was found from her private part. However, two slides of vaginal swab were prepared and handed over to the concerned constable after due sealing for their forensic science analysis. The appellant was arrested and he was also directed for for his medico legal examination. Dr. Rajiv Jain (P.W.7) examined the appellant. He found no abnormality to the appellant. He prepared slides of semen sample taken from the appellant and handed over to the :- 3 :- Criminal Appeal No.1348 of 1999 concerned constable after due sealing for its forensic science analysis. After due investigation, a charge-sheet was filed before the JMFC, Chhindwara, who committed the case 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 due to enmity. In defence, Khonja (D.W.1), Kanti (D.W.2) and Dr. Devashish Moitra (D.W.3) were examined.

4. The learned Sessions Judge, after considering the evidence adduced by the parties, convicted the appellant for the offence punishable under section 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 prosecutrix was above 16 years of age and the prosecution willfully did not examine Dr. Moitra (D.W.3). Investigation is to be done in a judicious manner and prosecution is expected to come with the clean hands. Dr. Moitra who is examined as defence witness has proved that the prosecutrix was above 16 years of age at the time of the incident. No external or internal injury was found to the prosecutrix. Looking to her overt-act, it appears that she was a consenting party or she had falsely implicated the appellant in the case. Therefore, the appellant could not be :- 4 :- Criminal Appeal No.1348 of 1999 convicted for the offence punishable under section 376 of IPC. Therefore, it is prayed that the appellant may be acquitted.

7. On the other hand, the learned Panel Lawyer has submitted that the conviction and sentence directed by the trial Court appears to be on proper grounds. A minimum sentence is prescribed for the offence, which is granted by the trial Court and therefore, no interference can be drawn in the findings of conviction and sentence in this appeal.

8. After considering the submissions made by the learned counsel for the parties and looking to the facts and circumstances of the case, it is to be considered as to whether the appeal filed by the appellant can be accepted?.

9. First of all, age of the prosecutrix is to be assessed. It was for the prosecution to prove that the prosecutrix was below 16 years of age. The prosecution has not established the age of the prosecutrix by any birth certificate. No educational record was submitted before the trial Court. The prosecutrix (P.W.4) and her mother Leela Bai (P.W.5) were illiterate persons. They could not tell about the age of the prosecutrix that how it was computed. The prosecutrix told her age to be 17 years before the trial Court but, when she was asked about her age in para 4 of her statement then, she told her age to be 15 to 16 years and therefore, there was :- 5 :- Criminal Appeal No.1348 of 1999 nothing before the trial Court to assess the age of the prosecutrix except with the help of medical examination.

10. The prosecutrix was examined by Dr. Manju Jain (P.W.6). She found that the secondary sex characters of the prosecutrix were well developed. Two fingers could be inserted in her vagina easily. Her hymen was old torn and almost absent. Under such circumstances, though in requisition for medical examination, age of the prosecutrix was mentioned to be 15 years but, Dr. Manju Jain mentioned her age to be 16 years in her report, Ex.P/4. Hence, clinical age of the prosecutrix was found to be above 16 years. Dr. Devashish Moitra (D.W.3) examined the prosecutrix radiologically and found her age to be 16 to 17 years. It is strange that after getting the ossification test done by Dr. Moitra, the prosecution did not examine Dr. Moitra from his side. The report submitted by Dr. Moitra was a prosecution document, which was binding to the prosecution. It is for the prosecution to come with the clean hands. Nothing can be hidden from the Court. In such circumstances, non-examination of Dr.Moitra by the prosecution appears to be an illegal approach done by the prosecution. Dr. Moitra found the prosecutrix to be above 16 years of age by the ossification test. Looking to the development of secondary sex characters of the prosecutrix :- 6 :- Criminal Appeal No.1348 of 1999 as told by Dr.Manju Jain, it was clear that the report given by Dr.Moitra was acceptable. It is true that two years may be added or subtracted in the age computed by the radiological examination but, looking to the report given by Dr.Manju Jain, it is a proper case where no addition or subtraction is required. Under such circumstances, the prosecutrix was above 16 years of age at the time of the incident.

11. The prosecutrix (P.W.4) has stated that when she was grazing her buffaloes, the appellant came to the spot and threw her on the Earth and thereafter, he raised her petticoat and committed rape upon her. She has stated that there was nobody and therefore, nobody has seen the incident, whereas in the cross-examination, she has accepted that there was a brick bhatta of Chironji, maternal uncle of the appellant near to the spot where labourers were working. Thereafter, she denied that nobody was working on that brick bhatta. She has stated that she told the entire story at the spot to Hemraj (P.W.1) and Dhundoo. The witness Dhundoo was not examined before the trial Court whereas, Hemraj (P.W.1) turned hostile. He did not tell that the prosecutrix told him about the incident. On the contrary, the defence witness Kanti (D.W.2) was examined who was the

companion of the prosecutrix in grazing cattle. -:- 7 -:- Criminal Appeal No.1348 of 1999 She has stated that the prosecutrix, Hemraj, Dhundoo and she herself were regularly grazing their cattle in that field and no incident took place with the prosecutrix in her knowledge. Khonja (D.W.2) has stated that he was working in the brick bhatta of Chironji and 2 to 4 persons were regularly working on that brick bhatta. He has also stated that if someone shouts from the Nala then, those shouts will be heard by the persons working on the brick bhatta and also by the persons residing near the house of Chironji.

12. The prosecutrix has stated that at the time of the incident, no worker was working on the brick bhatta because they went to take their lunch. The incident took place at about 4 p.m. in the evening and it was not the lunch time. It appears that the prosecutrix was avoiding to show the presence of workers of the brick bhatta there. It appears that the prosecutrix did not shout at the time of the incident. She did not make any hue and cry, otherwise the workers of the brick bhatta could save her. Similarly, the incident took place at about 4 p.m. and the natural conduct of the prosecutrix would be to go to her house immediately and to tell the entire story to her mother. Leela Bai (P.W.5) has stated that the prosecutrix came to her house after the sunset. She also assaulted the prosecutrix because she did not come back at 4 p.m. itself. Looking to the overt-act of -:- 8 -:- Criminal Appeal No.1348 of 1999 the prosecutrix that after such an incident, she did not visit to her house and she continued to graze her cattle up to the sunset, indicates that either she was a consenting party or nothing had been done with her. The prosecutrix has accepted that she was wearing bangles in her hands but, it is strange that no bangle was broken in the incident. She has accepted that when she was thrown on the Earth, she sustained injuries on her waist but, no such injury was found to her by Dr.Manju Jain. Under such circumstances, if she was injured in the incident and no injury was found to her then, either the story of the incident is fictitious or the prosecutrix did not sustain any injury in the incident. The rape is alleged to be done on an uneven surface and therefore, it is surprising that the prosecutrix did not sustain any injury on her back, buttocks etc.

13. At present, it is the settled view of Hon'ble the Apex Court that the testimony of the prosecutrix can be disbelieved, even if there is no corroboration by the medical

evidence but, if other circumstances, makes her unbelievable then, she may be disbelieved. The learned counsel for the appellant has relied upon the judgment passed by this Court in case of Lal Singh Vs. State of Madhya Pradesh. [(ILR (2011) MP 524]. but, that judgment appears to be relevant for differentiation of offence punishable under section 376 :- 9 :- Criminal Appeal No.1348 of 1999 read with section 511 of IPC and section 354 of IPC. No direction is received by that judgment for appreciation of the evidence of the prosecutrix. Similarly, the learned counsel for the appellant has placed his reliance upon the judgment passed by Single Bench of this Court in case of Roop Singh Vs. State of Madhya Pradesh., [(ILR) (2011) MP 2582]. but, in that judgment an appeal from the judgment of acquittal was considered and it was found that if the prosecutrix alleges about the injuries caused due to beating then, such injuries cannot be treated to be corroborative for the offence of rape. The matter of that case was also different. On the basis of the factual difference, the law laid in the judgment passed in case of Roop Singh (supra) cannot be applied here.

14. The prosecutrix and her mother have stated that in the night, they have told the story of the incident to Kunjar and Ishwardas. Ishwardas (P.W.8) did not support that fact and he was not declared hostile. Kunjar (P.W.9) has stated that the prosecutrix has informed him about the incident. In the cross-examination, he has admitted that he went to the police station along with the prosecutrix and her mother.

15. The learned counsel for the appellant has submitted that the FIR was lodged with delay of at least 17 :- 10 :- Criminal Appeal No.1348 of 1999 hours. The prosecutrix has stated that public vehicles were available to visit the village Jamai (Junnardev) in every 10 minutes and such vehicles are available up to 10 to 11 p.m. in the night and therefore, the prosecutrix could go to the police station in the evening of the same day. Hence, FIR lodged by the prosecutrix is delayed which makes the prosecution's story to be doubtful. If the entire incident and conduct of the prosecutrix and her mother is considered then, it would be clear that the incident took place with the prosecutrix at about 4 p.m. in the evening. She reached to the house after sunset. Thereafter, she told the entire story to her mother when her mother assaulted her. Thereafter, both of them went to the

houses of Kunjar (P.W.9) and others. In doing such things, they were late to go for the police station and therefore, practically it was not possible for them to go and lodge the report at about 10 p.m. in the night. The report was lodged on the next date, at about 11 a.m. and therefore, it is lodged within a reasonable time. Delay in lodging the FIR is properly explained by the prosecutrix and her mother and therefore, due to that delay, no doubt is created in the prosecution story.

16. The main point in the case is that what was the enmity between the parties, so that the prosecutrix could lodge a false FIR against the appellant. The appellant could :- 11 :- Criminal Appeal No.1348 of 1999 not establish any enmity between him and the prosecutrix or with her parents. Therefore, there was no possibility for the prosecutrix to lodge a false FIR against the appellant. Version of the prosecutrix is acceptable to the extent that the appellant had committed intercourse with the prosecutrix.

17. On the basis of the aforesaid discussion, if conduct of the prosecutrix is considered then, it would be apparent that she was thrown on the Earth and she did not sustain any injury on her waist. She did not make any hue and cry at the time of the incident though workers of the brick bhatta were working near the spot. After the incident, she has completed her work of grazing the cattle up to the sunset. She did not take that act as an offence. She did not tell anything to her companions like Hemraj and Kanti. Looking to her physical examination, she was habitual to do the intercourse and therefore, she knew about that act but, she did not complaint to anybody, till she reached to her house. Under such circumstances, where there is no corroboration of medical evidence is found and it is alleged that the rape was committed on an uneven surface of Nala then, looking to the aforesaid overt-act of the prosecutrix, she appears to be a consenting party.

19. The prosecutrix was above 16 years of age at the time of the incident and she was a consenting party. :- 12 :- Criminal Appeal No.1348 of 1999 Therefore, the appellant could not be convicted either for the offence punishable under section 376 of IPC or any inferior offence of the same nature. The learned Sessions Judge has erred in convicting the appellant for the offence punishable under section 376 of IPC. Hence, the appeal filed by the appellant appears to be acceptable.

Consequently, it is hereby accepted. The conviction as well as the sentence directed by the trial Court for the offence punishable under section 376 of IPC is hereby set aside. He is acquitted from all the charges appended against him.

20. At present, the appellant is on bail. His Presence is no more required before this Court and therefore, it is directed that his bail bonds shall stand discharged.

21. A copy of the judgment be sent to the trial Court with its record for information.
(N.K.GUPTA) JUDGE 18 10/2012 Pushpendra

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