

State of Uttarakhand Vs. Pawan Kumar

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Court : Uttaranchal

Decided On : May-09-2013

Judge : Kalyan Jyoti Sengupta

Appeal No. : Government Appeal No. 165 of 2008

Appellant : State of Uttarakhand

Respondent : Pawan Kumar

Judgement :

Kalyan Jyoti Sengupta, J. (Oral)

It is the State appeal against the judgment and sentence of acquittal passed by learned Sessions Judge, Pithoragarh dated 20.09.2001 in Sessions Trial No. 52 of 2001, under Sections 307/306 of I.P.C.

The prosecution case runs as follows:-

The First Information Report was lodged on 15.02.2001 at 22:35 by one Prakash Chandra Joshi resident of Village Thali Post Khawkot, District Pithoragarh at Police Station Askot in the District of Pithoragarh against the accused/respondent Pawan Kumar son of Lal Mani alias Lalit Mohan Pant resident of Village Malli Sangari, Police Station Askot, District Pithoragarh stating that Bhagirathi daughter of Late Narayan Dutt Pant resident of Village Malli Sangari is his niece. She was aged about 22 years at the relevant time. On 15.02.2001 at about 04:30 a.m., she

herself had poured kerosene oil on her person and burnt herself. Thereafter, she was taken to the hospital. In the hospital when complainant asked her what had happened, she told him in reply that one Pawan Kumar Pant son of Sri Lal Mani alias Lalit Mohan Pant committed rape forcibly on her two or three days ago, due to embarrassment she had burnt herself. She was admitted in the Government Hospital Pithoragarh. She had given her dying declaration before Tehsildar and thereby narrated the whole incident of commission of rape.

On the basis of the same Criminal Case No. 19 of 2001 under Section 376 of I.P.C. was registered at Police Station Kotwali Pithoragarh. Thereafter, the investigation was started and the concerned Investigating Officer arrested the accused. The Investigating Officer inspected the spot and prepared the site plan. He also recorded the statements of other witnesses and collected medical report. Bhagirathi died on 19.02.2001. After her death, the inquest report of the dead body was prepared and then the postmortem examination was conducted on 29.02.2001 and report thereof was also prepared. After completion of the investigation, chargesheet was submitted against the accused Pawan Kumar under Section 376 and 306 of I.P.C. before the C.J.M. concerned. Thereafter, the case was committed to the court of Sessions for trial and charge under the said two sections was framed. The defence of the accused was denial and pleaded not guilty and also for trial.

To prove the prosecution case as many as eight witnesses were examined and eighteen documentary evidences were adduced.

After analyzing the evidence, the learned Session Judge came to the conclusion that there was no proof of committing rape. The learned Sessions Judge did not believe the statement of the dying declaration and refused to accept the dying declaration to be a piece of evidence worth for recording conviction.

Learned Session Judge also recorded that even if it is assumed that dying declaration is acceptable under law and there has been a rape, the same was consensual. As far as charge of abetment of suicide is concerned, the learned Session Judge concluded that rape is not the factor for commission of abetment of suicide rather victims possible perception of embarrassment or humiliation owing

to disclosure of secretly sexual relationship with her cousin to the villager was factor. Learned trial judge, therefore, acquitted the accused. The State, with the leave of the Court, preferred this appeal.

Mr. D.K. Sharma, Senior Advocate and learned Deputy Advocate General appearing for the State/appellant contends that the learned trial Judge ought not to have rejected the dying declaration altogether as it is corroborated by the evidence of uncle, namely, Dinesh Pant (P.W.2). She was completely conscious to make dying declaration and such dying declaration was made before the Tehsildar. Doctor (P.W.4), who admitted the victim at the hospital, certified that she was in a position to make the dying declaration. The P.W.4 also deposed before the court that she was completely conscious to make dying declaration. If the dying declaration were read with the supporting evidence of Dinesh Pant (P.W.2) the court ought to have recorded conviction under Section 376 of I.P.C.

By the dying declaration, it is made amply clear that she had to commit suicide because of commission of rape, as she was facing public humiliation and embarrassment because of disclosure of this fact. Hence offence under Section 306 of I.P.C. is proved.

Learned counsel for the accused/appellant submits that the learned trial judge has rightly rejected the dying declaration as being a piece of evidence. This dying declaration could not be made as the victim sustained 95% burn injury and almost all the parts of the body was severely burnt except that was covered by the wearing apparels some portion. Therefore, the lip movement of the victim was completely paralyzed because of the burn injury. It would appear from the evidence of the P.W.4 that he was not present at the time of making alleged dying declaration, even while giving certificate, he did not examine the blood pressure and pulse rate. After few hours of taking of the alleged dying declaration, the victim succumbed to injury. In this circumstance, it is completely unsafe to rely on such dying declaration. In support of his submission he has relied on a decision of Honble Supreme Court in State of Maharashtra Vs Sanjay reported in 2005 SCC (Cri) 231. Apart from dying declaration there is no other evidence to prove the prosecution story.

Next contention is that even if the dying declaration is taken to be a piece of evidence, and if it is read carefully it would appear that there was no offence of rape as she had admitted that she had sexual relationship with her cousin for last three or four months before the date of incident. The victim was aged about 22 years and the accused was at that relevant point of time was 17 years and 8 months and they were related to each other as cousin elder sister and brother. Therefore, it was consensually sexual intercourse. The suicide was committed because their relationship came to be revealed and due to fear of humiliation and embarrassment the victim committed suicide, therefore, there was no abetment on the part of the accused. Accordingly, charges against the accused could not be proved at all.

After hearing learned counsel for the parties and after examining the materials placed before me, the following questions arise:-

1. Whether the learned Sessions Judge has rightly rejected and further disbelieved the dying declaration as a piece of evidence?
2. Even if the dying declaration is accepted to be legally reliable document then whether basing on the same the commission of rape under Section 376 of I.P.C. can be concluded or not?
3. Whether on the facts and circumstances of the case, the case of the abetment of suicide under Section 306 of I.P.C. has been proved or not?

It is an admitted position that the victim died and she was no more to tell the incident before the court so only evidence was her alleged dying declaration. This dying declaration was taken down by the Tehsildar (P.W.3), who was informed by the doctor of the hospital about the incident. He has testified that the victim was completely conscious and she was in a position to make statement. Moreover, doctor certified her health condition that she was conscious and capable of speaking. A certificate was issued to the effect that she was in a position to give statement and this certificate was exhibited. Thereafter, he proceeded to record the dying declaration. In the cross examination (P.W.3) has said that the victim was smoothly giving her statement and narrated whole story. P.W.3 is an official

and independent person, there was no reason to disbelieve his version. I accept, his evidence is acceptable and believable about taking down of dying declaration. The learned trial Judge was wrong in refusing to accept dying declaration. Apart from his evidence factum of taking dying declaration was corroborated by (P.W.4). In his examination-in-chief he has said that when victim was admitted in the hospital with burn injuries, she was conscious and she was in a position to give her statement. He has said that at about 9:00-10:00 p.m. he issued a certificate that victim was in a position to give her statement. He has said that on the same day P.W.3 took the dying declaration of the victim, for which, he had issued a certificate of fitness. In my reading of his evidence, I find he is a very truthful witness and he has stated in his cross examination that he was not present all along when the statement was recorded. He has also said that he had not written down about pulse rate nor before issuing certificate he had taken the blood pressure.

I am of the view that this omission on the part of P.W.4 does not render his testimony to be unbelievable altogether. At the time of admission he was in the hospital, rather it appears from evidence he admitted the victim in the hospital, therefore, he had the occasion to examine the health condition of the victim immediately after admission, and he made statement that she was conscious. He has corroborated the statement of the P.W.3 that at the time of making dying declaration he was present.

This dying declaration is also corroborated by the evidence of Dinesh Pant (P.W.2), uncle of the victim. In his examination-in-chief he has stated when he asked Bhagirathi (victim) about the incident she told that she had burnt herself because accused Pawan Kumar had committed rape forcibly and due to public humiliation and embarrassment she set herself on fire and tried to commit suicide. In cross examination this witness has said that she was conscious, and he has also rejected contrary suggestion, saying that if she was not conscious how she could narrate the whole story to him. He has further said that he was told about the rape by the victim, at about 04:30 a.m. on that day. The evidences to this effect given by P.W.2 in my view are admissible under Section 32 (1) of Indian Evidence Act as the victim is no more and she has narrated the cause of the death and the

incident.

On analysis of the aforesaid evidence, it appears clearly that dying declaration is not the only piece of evidence. Statement made by the victim to P.W.2 is also admissible and the same is another piece of dying declaration. I, therefore, hold that the learned trial Judge is wrong in holding that the dying declaration cannot be relied on as a piece of evidence.

Now examining the evidence in totality and taking note of the dying declaration, it appears to me that the text of the dying declaration does not suggest that rape had been committed forcibly or without consent of the victim. The victim was about 22 years of age, whereas the accused was at that time 17 years and 8 months, therefore, victim was older than five years at least, and it would appear from the dying declaration that sexual relationship between the victim and accused developed and this prolonged for three to four months before the date of incident. I think, had there been no consent, the victim would have divulged the first incident of rape to any relations or any of their kins, but she did not divulge because she obviously enjoyed sexual relationship, therefore, she had consent rather she was in a dominating position to effectively overpower the mind of the accused to get his consent. It is normal in this case sex impulse grew in the body and mind of the victim much earlier than the accused who just crossed adolescence at the relevant time. Hence willingness of the victim came first as she developed sexual relation with her younger cousin. It would appear from the act and conduct that it was her sole effort to keep this relationship secret so that relation and member of the public might not know. The moment victim came to know that the member of the public came to know about this relationship and when she realized that this knowledge will put her in humiliation and embarrassment in the society, she took resort to this extreme path that is to say commission of suicide. The suicide was committed not because of rape but because of her perception of inevitable embarrassment and her humiliation in the society. Her own perception impelled her to commit suicide. Therefore, the learned trial Judge has correctly concluded that the commission of abetment of suicide has not been proved at all. It has also been correctly concluded that the rape was not committed by the accused without consent nor there was any force applied by the accused, who was nearly at least 5 years

younger and he was not in a position to apply any force, as I have already observed that she was in a dominating position to overpower the accused in mind. Thus, the Government appeal fails and the same is dismissed.

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