

Vikki @ Vijaykumar Vs. State of Harihar Town Represented by Its S.P.P.

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Court : Karnataka

Decided On : Apr-01-2008

Reported in : 2008CriLJ3787; ILR2008KAR3344

Judge : V. Jagannathan, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 354, 376, 417 and 420; Code of Criminal Procedure (CrPC) - Sections 313

Appeal No. : Criminal Appeal No. 2250/2006

Appellant : Vikki @ Vijaykumar

Respondent : State of Harihar Town Represented by Its S.P.P.

Advocate for Def. : H.C. Siddagangaiah, HCGP

Advocate for Pet/Ap. : S.G. Rajendra Reddy, Adv.

Disposition : Appeal dismissed

Judgement :

V. Jagannathan, J.

1. The appellant calls in question his conviction for the offences punishable under Sections 376 and 417 of the I.P.C. and consequent sentence passed by the trial court.

2. The prosecutrix aged 22 years, being employed as a sales girl, used to go to several places like Davanagere, Harihara and surrounding villages for the purpose of selling perfume sticks and, being a resident of Davanagere, she often used to go to Harihara to sell the perfume sticks to the shops which are situated in the temple road and in the process, she also went to the photo studio of the accused to sell the perfume sticks. Thus, acquaintance grew between the prosecutrix and the accused and both used to go to the hotel for taking coffee and other things and became friends in the process. The accused used to tell the prosecutrix that he is in love with her and tried to touch her body which was not liked by the prosecutrix and she even admonished the accused for his behaviour.

3. The prosecutrix went to Harihara on a couple of days prior to the incident in question and on 31.12.2005, when she was returning after selling perfume sticks at Harihar, the accused talked to her and told her that he would marry her and the prosecutrix, therefore, moved with him. With this background, on 7.1.2006, as usual, the prosecutrix was returning after selling the perfume sticks at Ranebennur and when she came near the P & T office in the evening at Harihar, the accused, who was proceeding towards Durga Photo Studio, called the prosecutrix and as the prosecutrix was due in Rs. 15/- to the accused and when she tried to give the said amount, the accused declined to take it, but asked her to get him tea and thus, both went to a nearby hotel and drank tea. Thereafter, saying that he was feeling bored, the accused took the prosecutrix towards Iyyappa Temple by the side of the Bank of a canal.

4. After visiting the temple, the accused again told her that he would marry her and then took her towards the riverside and it was 9.30 p.m. when they reached the place of incident. There, the accused forcibly pushed the prosecutrix and made her fall on to the ground and tried to have forcible intercourse with her. The prosecutrix resisted the said approach of the accused and told him to postpone the intended act after the marriage. But, nevertheless, the accused refused to hear her request and forcibly removed the thread of the choodidar pant she was wearing and forcibly pushed cloth into her mouth and then had sexual intercourse with the prosecutrix. The victim questioned the accused for the said brutal act. But, the accused again promised her that he would marry her. Thereafter, both of them

came back to Harihar and the prosecutrix went to Davanagere and, on 9.1.2006, she revealed the incident to her mother.

5. A day prior to the lodging of the complaint, the mother of the prosecutrix approached the accused and questioned him and also asked him to marry the prosecutrix. But, the accused refused to the said request. A complaint was lodged by the prosecutrix on 10.1.2006 at 8.30 p.m. narrating the above incident. This, in short, is the case of the prosecution.

6. Following a case being registered by P.W.7 Pampanagouda in Crime No. 10/2006 initially for the offences punishable under Sections 420 and 376 of the I.P.C. and the F.I.R. as per Ex.P-8 being sent to the Magistrate, the investigating agency came on to the scene. The victim was subjected to medical examination by P.W.8 and the accused by P.W.2, the two doctors examined before the court. P.W.3 drew the sketch map as per Ex.P-4 and the spot mahazar was conducted as per Ex.P-5 in the presence of P. Ws. 4 and 5. The clothes of the victim were seized under panchanama Ex.P-6 in the presence of P.W. 6 The Manager of the company where the victim was employed was examined as P.W. 9 and the owner of the Durga Photo Studio was examined as P. W.1. The prosecutrix herself was examined as last of the twelve witnesses and RWs. 10 and 11 were the two I.Os. and, on completion of the investigation which included securing the final opinion as per Ex.P-10 and obtaining the copy of the M.L.C. register as per Ex.P-9, the charge-sheet was filed.

7. The above witnesses being examined in court following the accused not pleading guilty to the charge levelled against him and the accused also denying the prosecution case when he was questioned under Section 313 of the Cr.P.C. and choosing to lead no defence evidence on his behalf, the learned trial judge, after appreciating the evidence on record, found that the testimony of the prosecutrix was convincing and reliable and, therefore, accepted the case of the prosecution by holding that the offences against the accused have been established beyond all reasonable doubt. Accordingly, the accused was convicted for the offences first above mentioned and was sentenced to undergo seven years rigorous imprisonment and to pay a fine of Rs. 20,000/-and in default of payment

of fine, to undergo rigorous imprisonment for further six months for the offence of rape committed by him and imposed a sentence of one year rigorous imprisonment and fine of Rs. 10,000/- and in default of payment of fine, to further undergo rigorous imprisonment for three months for the offence punishable under Section 417 of the I.P.C. Out of the fine amount to be recovered, Rs. 25,000/- was ordered to be paid to the victim. It is this judgment of conviction and sentence that is assailed by the accused in this appeal.

8. I have heard the submissions made by Shri S.G. Rajendra Reddy for the appellant and Shri H.C. Siddagangaiah, learned Government Pleader for the State, and also perused the entire material on record carefully.

9. The learned Counsel for the appellant contended at the outset that the prosecutrix is not a witness to be trusted because, she has given different versions in the court when compared to the history given before the doctor and being an educated girl and a sales girl for that matter having studied P.U.C., one does not expect the prosecutrix to give different versions, as has been done by her in the course of her evidence. In this regard, it was pointed out that in the history given before the doctor as per Ex.P-9, it is stated that the prosecutrix was standing near the bus stand for the bus and it was from there, the accused picked her, whereas, in the complaint as well as in the evidence before the court, she does not say that she was waiting at the bus stand. Therefore, the prosecutrix cannot be believed is the submission made by the learned Counsel for the appellant.

10. The next and the most important contention put forward is that, no offence of rape had taken place because, on a plain reading of the very complaint itself, it becomes clear that the prosecutrix was well acquainted with the accused and both of them used to move about in several places and they had become friends and, therefore, the prosecutrix permitted the accused to have sexual intercourse with her as she was a consenting party. In the alternative, it was submitted by the learned Counsel for the appellant that the medical evidence on record is not conclusive as to the victim having been subjected to sexual intercourse prior to the examination by the doctor since the opinion given as per Ex.P-10 is that there was no evidence of recent sexual intercourse. In addition to the said contention urged,

it was also submitted that the hymen was found present in the victim and, as such, in the absence of evidence to show rupture of the hymen, it is not possible to draw the inference of sexual intercourse having been undergone by the victim. It is on these material comprised in evidence placed before the trial court, the learned Counsel for the appellant contended that no offence of rape has taken place and the accused, therefore, is entitled to acquittal insofar as the offence of rape is concerned.

11. Another submission made also in the alternative is that, at the most, the evidence on record could only lead to the inference that the accused might have committed the offence of outraging the modesty of the prosecutrix because of the prosecutrix's evidence that the accused often used to touch her body and as the victim also did not show the police the exact place of incident during the spot mahazar, at the most, the case against the accused may fall under Section 354 of the I.P.C. for which, the punishment is imprisonment which may extend to two years. Since the accused has been in custody right from 11.1.2006, more than two years have elapsed and, as such, for the conviction of the accused under Section 354 of the I.P.C. regard be had to the custodial period already undergone and the accused be set at liberty.

In support of the above submissions and particularly with regard to the appreciation of evidence of the prosecutrix, the learned Counsel for the appellant placed reliance on the decisions reported in 2004 (2) KCCR 838 (DB), 2003 (4) KCCR 2888(DB), 2004 (1) KCCR 656 (DB), 2006 (8) Supreme 635 and 2000 Crl.L.J. 4683. Relying on the aforesaid rulings, the learned Counsel for the appellant prayed for acquittal of the accused.

12. On the other hand, the learned Government Pleader for the State argued that the trial court has considered the evidence from every conceivable angle and also referred to several decisions of the Apex Court as well as of this Court with regard to acceptance of the testimony of the prosecutrix without corroboration, once it is established that her testimony is reliable and trustworthy. It is the submission of the learned Government Pleader that, in the instant case, the prosecutrix has deposed before the court consistently when compared to her complaint allegations

and, therefore, there is no scope to take the view that the prosecutrix has spoken differently in the court than what she has said in her complaint. In this regard, the learned Government Pleader took me through the entire testimony of P.W. 12 in particular to submit that her evidence is acceptable and nothing has been brought out in the cross-examination of the prosecutrix either to disbelieve her testimony or to discard the evidence given by her in court.

13. As far as the medical evidence is concerned, it was pointed out that P.W.8, who examined the prosecutrix, has clearly stated in her evidence that the hymen was found ruptured and, therefore, there is no substance in the submission made by the appellant's counsel that no sexual intercourse had taken place. In this connection, it was also pointed out from the medical evidence of P.W.8 that the vagina admits two fingers and, therefore, there is no inconsistency between the medical evidence and that of the prosecutrix. But, on the other hand, the medical evidence also corroborates the testimony of the prosecutrix insofar as the accused having committed the offence of rape is concerned. As far as the prosecutrix being a consenting party is concerned, the learned Government Pleader for the State submitted that a look at the evidence of the prosecutrix will go to show that despite her protest, the accused had forcible intercourse with her by covering her mouth with cloth and this itself is sufficient indication of the refusal on the part of the prosecutrix to have intercourse with the accused and the accused, despite her refusal, having forcible intercourse with the prosecutrix. Therefore, the question of the prosecutrix being a consenting party will not arise. For the aforesaid reasons, it was also submitted that the question of the act of the accused falling under Section 354 of the I.P.C. also will not arise. Hence, the judgment of conviction and sentence passed by the trial court does not require any interference as there are no compelling grounds made out for this Court to disagree with the conclusion reached by the trial court.

14. In the light of the submissions made as above by the learned Counsel for the parties, the point for consideration is whether the prosecution has established beyond all reasonable doubt the commission of the offence of rape by the appellant-accused so as to sustain the judgment of conviction and sentence passed against him by the trial court.

From what has been placed before the trial court from the evidence of the prosecution witness, the most important witness on whom the case of the prosecution mainly rests, is that of the prosecutrix examined as PW-12. Therefore, it is necessary to examine her evidence to find out whether she is a truthful and reliable witness and whether her testimony appears to be a natural one so as to accept the same without any corroboration.

15. Examined as PW-12, the prosecutrix has deposed in her examination-in-chief almost in line with her complaint allegations. She has stated that she used to go to Harihara and other places for selling perfume sticks and came in acquaintance with the accused and both became friends. However, the prosecutrix did not permit the accused to touch her body. On 7.1.2006, while she was coming back towards Harihara from Ranebennur, she went to the photo studio of the accused to hand over Rs. 15/-, which was due by her. But he refused to take it and asked her to get him coffee and both had been to a hotel and thereafter, the accused took her near a canal bank and after visiting the temple, the accused again told her that he wants to marry the prosecutrix and tried to touch her. The prosecutrix tried to avoid from being touched by the accused but the accused forcibly put the cloth into her mouth and afterwards, made the prosecutrix to fall on to the ground and committed rape on her. The prosecutrix told the accused that she had lost her chastity and the accused, after committing the act which is done to a married woman, threatened her not to inform the parents. The prosecutrix stayed in the police quarters on that night and as the accused forced her not to open her mouth to any one, she did not inform the incident to anyone and two days later, she went home and informed her mother. The mother of the prosecutrix asked the accused to marry the victim but the accused refused. Thereafter, the complaint was lodged with the police as per Ex.P-7. The witness has also stated about showing the spot to the police and a mahazar being conducted as per Ex.P-5. In the cross-examination of the prosecutrix, nothing has been brought out to disbelieve her version with regard to the accused committing rape on her. On the other hand, the prosecutrix has given more details of the accused asking her to come with him, but the victim refusing to do so and thereafter, the accused forcibly taking her to a pit and though the prosecutrix tried to scream, the accused did not allow her to do so and had closed her mouth with a cloth and even had caught hold of her hands

after making her to fall on the ground and thereafter he committed the act on her. The witness has denied in the cross-examination that the accused did not put cloth into her mouth.

16. It is thus clear from the testimony of the prosecutrix that the accused forcibly committed rape on her and he did not permit her even to talk as he had closed her mouth with the cloth. The prosecutrix has given the details of the incident in her evidence. A plain reading of which will leave no doubt in any one's mind about the accused having had forcible intercourse with the prosecutrix and that too without her consent.

17. Though the Learned Counsel for the appellant contended that the prosecutrix must have given her consent to the act as she was an educated girl having studied up to P.U.C., it is not possible to infer from a careful reading of the evidence of the prosecutrix that she consented to the act of sexual intercourse by the accused. In fact, even when he was questioned under Section 313 of the Cr.P.C, the accused has not taken any stand that the victim was a consenting party or for that matter, she willingly submitted herself to the accused. Hence, the question of the prosecutrix giving consent to the accused does not arise.

18. It is the further submission of the learned Counsel for the appellant that no offence of rape has been taken place and the medical evidence has ruled out the possibility of the accused having sexual intercourse with the prosecutrix. In support of the said submission, the learned Counsel for the appellant had drawn my attention to the M.L.C. register, a copy of which is produced at Ex.P-9 to point out that the hymen was present and also referred to Ex.P-10 which is the final opinion after collecting F.S.L. report and which is to the effect that there is no evidence of recent sexual intercourse. No doubt, from the above material, it was sought to be argued that the medical evidence does not corroborate the testimony of the prosecutrix with regard to the offence of rape.

19. In my view, a careful examination of the entire medical evidence on record, on the other hand, goes to corroborate the testimony of the prosecutrix that the accused did commit rape on her. The first aspect is in Ex.P-9, though it is stated hymen is present, but we find that the said word is written after striking the word

'absent'. Secondly, in the same document Ex.P-9, there is also a mention that vagina admits two fingers. As far as Ex.P-10 is concerned, the said document was issued long after the incident in question and therefore, it cannot be given much importance particularly in the light of the testimony of the prosecutrix. The next factor is that PW-8 Dr. S. Subhash Chandra has deposed in his evidence that he examined the prosecutrix on 10.1.06 and the prosecutrix was also examined by a lady medical officer and others and on examination, it was found that the hymen was found torn and the vagina admits two fingers. Ex.P9 is the M.L.C. register extract and Ex.P-10 is the report given after receiving the F.S.L. findings.

20. Thus the effect of the above evidence on record is that the testimony of the doctor who was examined as PW-8 has not been discredited in the cross-examination and he deposed to the effect that hymen being found ruptured and vagina admits two fingers. These two features are indicative of the victim being subjected to intercourse. Apart from the medical evidence on record, particularly that of PW-8 who is fully supporting the testimony of the prosecutrix, it is also necessary at this juncture to refer to the opinion of the leading authors on the subject in so far as the learned Counsel for the appellant referring to the observations in Ex.P9 that the hymen is present, the following views expressed by the leading authors are very pertinent.

21. In Modi's Medical Jurisprudence & Toxicology (22nd Edition), at page 504, the following comments are to be found:

The possibility of sexual intercourse having taken place without rupturing the hymen may be inferred if the vaginal orifice is capacious enough to admit easily the passage of two fingers.

22. Taylor's Principles and Practice of Medical Jurisprudence (13th Edition), gives the following information in this connection, at page No.75:

Rupture of the hymen on first penetration is of course very common but it is not inevitable, for the thin elastic hymen is quite capable of stretching to accommodate penetration even by an erect adult penis without frank rupture

In the very same book at page No. 78, the learned author throws some more light on this aspect:

Severe hymeneal lacerations may be indicative of first ever penile penetration, however, and the presence of a hymeneal orifice that will not admit the tip of the examining finger is definite proof of virginity. Conversely, the thin, elastic hymen that allows two examining fingers to pass through the opening is no indication at all of lack of prior virginity.

The question of previous sexual experience is more easy to answer, for the vagina itself undergoes certain changes when it is exposed to fairly frequent sexual intercourse, and these changes do not take place as the result of regular use of internal tampons or of regular digital penetration and stimulation. The vaginal reggae tend to become less pronounced, and the vagina itself lengthens into the posterior fornix. In cases where the vaginal reggae have become smoothed out, and the vagina easily accepts the full length of the examining finger into the posterior fornix, it is safe to give the opinion that the vagina is well used to sexual intercourse.

23. In Dr. K.S. Narayan Reddy's Medical Jurisprudence and Toxicology (1st Edition), the learned author has this to say at page No. 438:

Vaginal examination helps the examiner to assess elasticity of the hymen and to determine the degree of penetration which would be possible without its rupture. If the vaginal opening is enough to admit two fingers easily, sexual intercourse is possible without rupture of hymen.

24. It is thus clear from the above views expressed by the learned authors that in the instant case, the medical evidence on record clearly mentions that vagina admits two fingers and PW-8 also deposing to the effect that the hymen was found ruptured and further the said evidence of the two doctors being consistent with the testimony of the prosecutrix, I do not find any infirmity in the prosecution case so as to disbelieve the natural and trustworthy testimony of the prosecutrix. As far as the capability of the accused is concerned, the evidence of PW-2 Dr. S.G. Bharathi confirms that the accused is capable of having intercourse and Ex.P-3 is the

certificate issued in this connection.

25. Thus the testimony of the prosecutrix coupled with the medical evidence on record clearly establishes the case of the prosecution beyond all reasonable doubt. The learned trial judge, in the course of his judgment, has referred to several decisions of the Apex Court to support his views and I find no error being committed by the learned trial judge in placing reliance on the said decisions. Insofar as the rulings submitted by the learned Counsel for the appellant are concerned, the facts and circumstances of the said decisions are quite different from the one with which we are concerned in the instant case.

26. As far as the discrepancies in the testimony of the prosecutrix when compared to her complaint version and the report given before the doctor is concerned, when the prosecutrix was standing near the bus-stop and she went to the studio of the accused and from there, both of them went towards the river side are concerned, these are minor infirmities and discrepancies and they are of such nature that they can be disregarded because they do not affect the core of the testimony of the Prosecutor. The Apex Court in the case of *State of Himachal Pradesh v. Asha Ram* 2006 CrLJ 139, has laid down the law that where the evidence of the prosecutrix is more reliable, minor contradictions or any discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. The Apex Court also observed in the said case that conviction for rape can be founded on the testimony of the prosecutrix alone unless there are compelling reasons in seeking corroboration.

27. In the case on hand, the testimony of the prosecutrix is natural, truthful and convincing and nothing has been brought out in the cross-examination of the prosecutrix by the defence to disbelieve her version. Merely because the prosecutrix happens to be a girl of 22 years of age, it does not automatically give room to take a view that she was a consenting party. Every case will have to be examined on the basis of the facts and circumstances and viewed from the said angle in the instant case, the testimony of the prosecutrix that her mouth was closed by pushing cloth by the accused, she was made to fall and her hands also were held by the accused, all goes to indicate that the accused committed forcible

intercourse on her without the prosecutrix becoming a consenting party.

28. The rest of the evidence on record does not in any way affect the testimony of the prosecutrix which has been fully supported by the medical evidence on record and therefore, I do not see any infirmity in the judgment of the trial Court so as to warrant interference at the hands of this court. The findings recorded cannot be termed as unreasonable or perverse and hence the appeal lacks merit.

29. In the result, the appeal is dismissed.

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