Honayya Vs. State of Karnataka

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Court : Karnataka

Decided On : Mar-07-2000

Reported in : ILR2000KAR3336; 2000(5)KarLJ57

Judge : H.N. Narayan, J.

Acts : Indian Penal Code (IPC), 1860 - Sections 90, 375, 376, 417, 448 and 506; Evidence Act, 1872 - Sections 3 and 133

Appeal No. : Criminal Appeal No. 156 of 1995

Appellant : Honayya

Respondent : State of Karnataka

Advocate for Def. : Sri G.M. Srinivasa Reddy, High Court Government Pleader

Advocate for Pet/Ap. : Sri S.G. Rajendra Reddy ;for Sri R.B. Deshpande, Adv.

Judgement :

1. This appeal is filed by the accused against the judgment of conviction passed by the Trial Court convicting the accused for offences punishable under Sections 448, 376, 417 and 506 of the IPC. The accused was charged and tried for these offences. It is the case of the prosecution that the accused was running a tailoring shop at a distance of about 300 steps away from the house of the prosecutrix P. W. 3. She was getting her clothes stitched from the accused. They belonged to the

same community. They were unmarried. She attained puberty at the age of 15 years. Her parents used to go to the work of rolling beedies. During their absence, the accused used to visit her. This was after one year after she attained the puberty. He developed friendship with her, started touching her and promised to marry her and thereafter took liberty to have sexual intercourse with her. It is alleged that the accused had forcible sexual intercourse with her whenever her family members were out of the house which continued for about 6 months. But she did not disclose it to her parents and when she became pregnant also she did not reveal it to her parents. It is only after six months that the parents came to know of her affair with the accused. Thereafter the girl was taken to the police station where a complaint was lodged. She was referred to P.W. 1-Dr. Vathsala Mallya on 3-11-1991 for the first time with the history of sexual contact with the accused. She was produced before P.W. 8-Dr. H.S. Adyanthaya for furnishing his opinion regarding the age of the prosecutrix. The complaint which was registered against the accused was thoroughly investigated and the accused was charge-sheeted for those offences. The accused pleaded not guilty to the charges framed against him and claimed to be tried. In proof of the offence, the prosecution relied on the evidence of 10 witnesses and 7 documents. The accused was also examined under Section 313 of the Cr. P.C. Except mere denial of the truth of the prosecution evidence, no additional statement had been made by the accused in his statement under Section 313 of the Cr. P.C. The Trial Judge, after hearing the Counsels on both sides and on perusal of the evidence on record found that the evidence was sufficient to convict the accused for the offences with which he was charged. Hence, he passed the impugned judgment.

2. Learned Counsel for the appellant-accused has taken me through the evidence of P.W. 3 herself and takes pain to point out that the accused and prosecutrix were in love as they were young in age and though there was some promise of marriage, the consent was due to misconception and the consent was free as she was aged more than 17 years as opined by P.W. 8 and the offence of rape under the circumstances is not proved. He has also contended that so far as the other offences under Sections 417 and 448 of the IPC are concerned, there is absolutely no evidence worth the name.

3. Sri G.M. Srinivasa Reddy, learned High Court Government Pleader however justified the order of conviction and sentence rendered by the Trial Judge.

4. The evidence placed by the prosecution shows that the prosecutrix P.W. 3 was aged more than 17 years. The fact that she has undergone sexual intercourse is not in dispute since she delivered a female child during the course of investigation of the matter and virtually she entered the box with a four years child in her hand. The defence had taken a curious defence stating that the child was not born to the accused but the prosecutrix had contacts with different persons including one Shivappa, a neighbour. Except these bare suggestions, there is no sound proof to accept this defence also. It is a settled proposition of law in a case of rape that no corroboration is required. The Supreme Court in Bharwada Bhoginbhai Hirjibhai v State of Gujarat, has laid down the proposition for proof of rape. It reads as follows:

'Corroboration is not the sine qua non for a conviction in a rape case. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society.

On principle the evidence of a victim of sexual assault stands on par with evidence of an injured witness. Just as a witness who has sustained an injury (which is not shown or believed to be self inflicted) is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex-offence is entitled to great weight, absence of corroboration notwithstanding. And while corroboration in the form of eye-witness account of an independent witness may often be forthcoming in physical assault cases, such evidence cannot be expected in sex offences, having regard to the very nature of the offence. It would therefore be adding insult to injury to insist on corroborationdrawing inspiration from the rules devised by the Courts in the western world. If the evidence of the victim does not suffer from any basic infirmity, and the 'probabilities-factor' does not render it unworthy of credence, as a general rule, there is no reason to insist on

corroboration except from the medical evidence'.

5. The evidence of P.W. 3 if scrutinised with utmost care goes to show that she developed intimacy with the accused. She has gone to the extent of calling him her lover as seen from her evidence at paragraph 9. She has no doubt stated that she believed that the accused would marry her. She would not have given consent for sexual intercourse but for this assurance given by the accused. Her evidence clearly shows that she had sexual intercourse with the accused. The question is whether her conduct is hit by Section 90 of the IPC.

6. Learned Counsel for the appellant-accused has relied upon a judgment of the Division Bench of this Court in the case of State of Karnataka v Anthonidas. That is a judgment rendered at the time of admission, dismissing the State appeal which was directed against the order of acquittal passed by the Trial Judge. In the said case, the accused had induced the girl on the basis of assurance of marriage to submit her to sexual intercourse which resulted in pregnancy. The Division Bench held that the facts alleged do not constitute an offence of rape. Therefore, there is generalisation of the law and no law on the question is laid down. However, the judgment rendered by the Calcutta High Court in Jayanti Rani Panda v State of West Bengal and Another, in my opinion is applicable in all its force and I propose to rely upon this judgment. It was canvassed in that case on behalf of the complainant that the consent was given on a misconception of fact as provided by Section 90 of the Indian Penal Code. It was argued that the consent obtained in the case is vitiated by reason of the provisions of Section 90 of the Indian Penal Code. Section 90 reads as follows.--

'A consent is not such a consent as is intended by any section of this Code. If the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception'.

It was argued that a misconception as to the intention of the person in stating the purpose for which the consent is asked is a misrepresentation of a statement of fact within the meaning of Section 3 of the Evidence Act, and a consent given on a misrepresentation of fact is one given under a misconception of fact within the

meaning of Section 90 of the Indian Penal Code. In the said case, the facts were that the accused used to visit the complainant and proposed to marry her. She consented to have sexual intercourse with the accused on a belief that the accused would really marry her, commenting upon this circumstance, the Calcutta High Court held that:

'One thing that strikes us is that if she had really been assured of marriage by the accused who was visiting her house and in whose promise she had faith, why should she keep it a secret from her parents if really she had belief in that promise. Assuming that she had believed the accused when he held out a promise, if he did at all, there is no evidence that at that time the accused had no intention of keeping that promise. It may be that subsequently when the girl conceived the accused might have felt otherwise. But even then the case in the petition of complaint is that the accused did not till then back out.

Therefore, it cannot be said that till then the accused had no intention of marrying the complainant even if he had held out any promise at all as alleged. The failure to keep the promise at a future uncertain date due to reasons not very clear on the evidence does not always amount to a misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. The matter would have been different if the consent was obtained by creating a belief that they were already married. In such a case the consent could be said to result from a misconception of fact. But here the fact alleged is a promise to marry we do not know when. If a full grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact. Section 90 of the IPC cannot be. called in aid in such a case to pardon the act of the girl and fasten criminal liability on the other, unless the Court can be assured that from the very inception the accused never really intended to marry her'.

7. Section 375 defines the offence of rape. A man is said to commit 'rape' who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions.--

'First.-Against her will,

Secondly.--Without her consent.

Thirdly.--With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly.--With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.--With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.--With or without her consent, when she is under sixteen years of age'.

8. This is not a case of sexual intercourse against her will. The prosecutrix is above 16 years. This is not a case where consent is obtained by putting her or any person in whom she is interested in fear of death or of hurt. This is not a case where consent is obtained by reason of unsoundness of mind or intoxication or other reasons explained in Clause 5 and the facts proved also do not fall under Clauses 3 and 4 of Section 375 of the IPC. Therefore, the only question which calls for determination is whether there was consent. If so, whether the consent was obtained under fear or misconception provided by Section 90 of the IPC. I have already extracted the facts as stated in the evidence of P.W. 3-prosecutrix and it is not shown to the satisfaction of the Court that the consent was given by misconception and therefore the consent is hit by Section 90 of the IPC. In my opinion, the prosecution has failed to prove that the act of the accused in having sexual intercourse with the prosecutrix amounts to rape as defined in Section 375 of the IPC. Therefore, the appeal is allowed. The order of conviction and sentence is set aside. The accused is acquitted of the offences alleged against him.