

Dalchand Vs. State

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Court : Allahabad

Decided On : Feb-20-1967

Reported in : AIR1969All216; 1969CriLJ585

Judge : Mahesh Chandra, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 361, 363, 375 and 376

Appeal No. : Criminal Appeal No. 2553 of 1964

Appellant : Dalchand

Respondent : State

Advocate for Def. : A.G.A.

Advocate for Pet/Ap. : P.N. Misra and ;V.B. Gupta, Advs.

Disposition : Appeal partly allowed

Judgement :

Mahesh Chandra, J.

1. Appellant Dalchand has been convicted under Section 366, I.P.C., and sentenced to undergo rigorous imprisonment for a period of seven years and also to pay a fine of Rs. 100 and in default of payment of fine to undergo rigorous imprisonment for a further period of four months. He has also been convicted

under Section 376, I.P.C. and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs. 100 and in default of payment of fine to undergo rigorous imprisonment for a further period of four months. The sentences are to run concurrently.

2. Briefly stated, the prosecution case was this: At about 9 p.m. on 16-3-1964 Kumari Jeet Kaur, aged about five years, was playing outside the house of her father Jogendra Singh. Dalchand, appellant, came to the house and knocked at the door and was informed by Jogendra Singh's wife Smt. Harbans Kaur that Jogendra Singh had gone to the bazar. The appellant then remained sitting near the wall of the house and talked to the girl for five or seven minutes and then took her away to the bazar close-by in his lap. Smt. Harbans Kaur had called her to take food. When there was no response Smt. Harbans Kaur came out of the door and saw the appellant going with the girl in his lap. She called the appellant, who replied that he was taking the girl to the Halwai's shop and would be back within a few minutes. Smt. Harbans Kaur waited for some time and then went to the house of her neighbour, who was also called Jogendra Singh, and informed him that Dalchand, appellant, had taken away the girl and had not yet brought her back. Jogendra Singh also had seen the appellant taking away the girl. But nobody went to the bazar in search of the girl just then. After about half an hour the girl's father Jogendra Singh returned and was informed by Smt. Harbans Kaur, He then went in search of the girl and came to Amar Singh's shop near Koharagir where Nand Ram and P. W. Balwant Singh were sitting.

On hearing about the incident from the father of the girl, Amar Singh, Balwant Singh and Nand Ram went to the appellant's house in search of the girl. The appellant was absent, but the appellant's wife from inside the house informed the party that her husband had brought the girl and had been asked by her to take back the girl to her house. Since they had not met the appellant and the girl on the way, they then went towards the field and the Mandhaiya of the appellant in Mohalla Surkha about two furlongs away. They heard shrieks and cries of a child from a distance of about 15 or 20 paces from the Mandhaiya of the appellant. As they reached close to the Mandhaiya Jogendra Singh flashed his torch and saw the appellant committing rape on the girl. They all then rushed towards the

Mandhaiya. Amar Singh and Balwant Singh caught the appellant. The girl was picked up in an unconscious condition by her father. The appellant and the raped girl were then taken to Koharapir, from where Balwant Singh and Amar Singh went away, because it had become late. Ranjit Singh and Ujaiar Singh (P.W, 4) took charge of the appellant and went with the girl's father Jogendra Singh to Koharapir Outpost and took police help and then took the appellant and the raped girl to P. S. Kotwali, where a first information report was lodged at 12-30 a.m. The girl's frock (Ext. 1) and the accused's dhoti and shirt (Ext. 3) were taken possession of by the police and sealed and later on sent to the Chemical Examiner. At about 2-30 a.m. the same night the girl was examined by Dr. Padma Agarwal at the Dufferin Hospital, Bareilly and the doctor found a tear from the vaginal orifice up to the anal orifice. She was then admitted for examination under general anaesthesia in the daylight.

3. At about 10 a.m. the next morning the examination under general anaesthesia revealed that--

(1) The whole of the hymen was lacerated, bleeding on touch.

(2) There was a tear from 6 O'clock direction of the hymen, 1 inch x 1/3 inch right up to the anal orifice. On opening the tear it was full of faecal matter. On further examination there was a tear 1/3 inch in rectal wall.

4. In the opinion of the lady doctor, the girl had been raped within a period of 24 hours and the estimated age of the girl was five years.

5. The appellant pleaded not guilty and alleged false implication out of enmity. He stated that he was indebted to Jogendra Singh and could not repay the loan. Jogendra Singh then came to the field, abused and beat the appellant and caught him and took him to Koharapir and had made him locked up at the outpost. This was the statement made by him before the Committing Magistrate. In the Sessions Court the appellant stated under Section 342, Criminal P. C., that it was three days after the appellant had been beaten at the field that he went with two baskets of vegetables for selling them in the market. The vegetables of one of the baskets were sold in front of Kararapir Outpost and the empty basket left there. The other

basket of vegetables was taken by the appellant to Kutubkhana and the vegetables sold there. At about 7-30 p.m., the appellant came to take the basket from Koharapir. Jogendra Singh then had him arrested with the help of the outpost police. Then Jogendra Singh went to his own house and brought his daughter and wife.

6. Out of the 11 witnesses examined by the prosecution, Balwant Singh (P.W. 3), Jogendra Singh (P.W. 6), the father of the girl, and Amar Singh (P.W. 7) purport to be eye-witnesses of the actual commitment of the rape by the appellant. Smt. Harbans Kaur (P.W. 5), the mother of the girl, stated that the appellant had taken the girl away from her house and had replied on Harbans Kaur's query that he would bring her after giving her some sweets from halwai's shop. Jogendra Singh (P.W. 9) stated that he also saw the appellant taking away the girl. Dr. Padma Agarwal (P.W. 1) examined the raped girl and Dr. H. S. Amwani (P.W. 2) examined the appellant. Trilok Singh (P.W. 10) was the Investigating Officer. There is no doubt that in view of the statement of Lady Dr. Padma Agarwal the girl Jeet Kaur was five years old at the time of the rape. The doctor's statement also clearly shows that she had been raped.

7. The learned counsel for the appellant contends that it was not the appellant who had kidnapped and raped her and that the prosecution evidence on the point is wholly unreliable.

8. Smt. Harbans Kaur (P.W. 5), the mother of the girl, stated that the appellant came to her house at about 9 p.m. on the date in question and was told by her on enquiry that her husband had gone to the bazar, that thereafter the appellant sat down near the wall and after talking and playing with her daughter Kumari Jeet Kaur for five or six minutes took the girl in his lap without asking Harbans Kaur and that when she called the girl for taking food and there was no response, she went out and saw the appellant taking her away. She further stated that the appellant told her that he was taking her to the halwai's shop and would bring her back soon afterwards. After waiting for 5 or 10 minutes she went, said she, to her neighbour Jogendra Singh and told him that Dalchand, appellant, who had taken the girl had not brought her back till then and that she was informed by Jogendra Singh (P.W.

9) that he had also seen Dalchand taking away the girl. When Smt. Harbans Kaur's husband returned after half an hour, she told him about the incident and the husband went out in search of the girl. Jogendra Singh (P.W. 9) corroborated her on the point that when he was going home at about 9 o'clock after closing his shop, he saw on the way Dalchand, appellant, taking the girl towards Mohalla Surkha and that 15 minutes afterwards Jogendra Singh's wife came to the house of the witness telling his wife that Dalchand, appellant, had taken her daughter. Jogendra Singh (P.W. 9) further stated that he told her that he had also seen Dalchand taking the girl.

9. Jogendra Singh (P.W. 6), the father of the girl, who is a hawker and sells cloth, stated that when he returned at about 9-30 p. m. to his house on the night in question, he was informed that Dalchand., appellant, had taken his daughter away on the pretext of giving her sweetmeats, that thereafter he went in search of the girl and informed Amar Singh at his shop about it and was accompanied by Amar Singh and Balwant Singh and Nand Ram (who were sitting there) to the house of Dalchand, appellant. The witness further stated that at the appellant's house he was informed by the appellant's wife from inside that Dalchand had brought the girl and that she had rebuked him and asked him why he had brought the girl and told Jogendra Singh that her husband had gone to his house to leave the girl there, Getting suspicious because they had not met Dalchand on the way, Jogendra Singh and his three companions went to the Mandhaiya at the appellant's field on the east of his house. According to the witness, when they were about 15 or 20 paces from the Mandhaiya they heard a shriek of a girl and rushed towards the Mandhaiya flashing his torch when the Mandhaiya was five or six paces away from them and then saw the appellant actually raping Jeet Kaur.

Balwant Singh and Amar Singh caught the appellant and Jogendra Singh took the girl in his lap and brought the girl and the appellant to Koharapir. From there Amar Singh, Nand Ram and Balwant Singh went home and Ujagar Singh and Ranjit Singh and Jogendra Singh brought the girl and the appellant to Koharapir Outpost and went from there with a head constable to the Police Station Kotwali and dictated the report there at 12-30 a.m. He has been corroborated by Balwant Singh (P.W. 3) and Amar Singh (P.W. 7) on the point that they went with him to

the appellant's house and were informed by the appellant's wife that the appellant had been rebuked by her and that he had taken the girl to Jogendra Singh's house. They were also corroborated by Jogendra Singh (P.W. 6) on the point that they went with him to the appellant's Mandhaiya and heard the shrieks and saw the appellant actually committing rape and then brought the appellant and the girl to Koharapur and thereafter the two witnesses went away to their houses. Ujagar Singh and Ranjit Singh met them and were prepared to go with Jogendra Singh, the girl and the appellant to the police station. Ujagar Singh (P.W. 4) corroborates Jogendra Singh on the point that the girl and the appellant had been brought to Koharapur by Jogendra Singh, Balwant Singh, Nand Ram and Amar Singh and thereafter Balwant Singh, Nand Ram and Amar Singh went home and he went with Jogendra Singh, the appellant and the girl to the police outpost and thereafter to the police station where the first information report was lodged.

10. The first contention of the learned counsel for the appellant is that the entire prosecution story is false since the medical examination of the appellant goes against the prosecution story that the rape was committed by the appellant. According to the learned counsel for the appellant the rape could not have been committed by the appellant without receiving any injury on his person, particularly the penis.

11. It is true that Dr. H. S. Amwani found no injury on the genital region or anywhere in the appellant's body and no clotting of the hair. In the opinion of the doctor, there were no signs of struggle, but the absence of smegma round the corona suggested that there could have been sexual intercourse. There could possibly be no injury caused to the appellant at the hands of the raped girl because she was only five years old. As for the absence of injuries on the genital region of the appellant, Dr. H. S. Amwani was of the view that if there was not full penetration there would be no lacerations on the frenulum of the penis. He further explained that if only the corona went inside the private parts of the girl, there would be no lacerations.

12. In Modi's Medical Jurisprudence and Toxicology, 14th Edn. at p. 339, it is mentioned that--

'Modi had seen cases in which there was no injury to the penis of the accused although there were lacerations of the hymen posterior perineum and even the vaginal walls of the victim.'

In Taylor's Principles and Practice of Medical Jurisprudence, 10th Edn. at p. 83, the case of R. v. Crowley has been quoted in which the prisoner, aged twenty-four, was tried for a criminal assault on his own daughter Catherine aged less than 4 years. The labia majora of the girl was swollen and bruised. The fourchette has been torn across as well as the posterior wall of the vagina, for a depth of over a quarter of an inch extending backwards; from this there was a laceration which came up to the anterior wall of the rectum. The anterior part of the external sphincter, i.e., that part between the anal orifice and the central tendon of the perineum had been torn. There was bleeding on her private parts, and even on admission to hospital there was slight oozing of blood. The prisoner himself desired to be examined by a doctor. No marks of violence on his person nor any stains of blood or semen, etc., were found. The apron in which the child had been wrapped when she was taken to the hospital contained blood and spermatozoa on one spot and blood only on the other. Nothing was found elsewhere. The prisoner's pudenda was unusually clean for a man or his employment and cleaner than the rest of the body. The jury wished to know why no marks of violence were found on the prisoner, and the medical witness had stated that the male organ, being pressed against the soft parts, would not show marks of violence. The prisoner was on the evidence convicted and sentenced to 10 years* penal servitude. This case and the medical evidence produced in that case supports what has been said in Modi's Medical Jurisprudence and Toxicology that there are cases in which in spite of all these injuries on the private parts of the victim, there may be no injury whatsoever on the penis of the accused. It would not be, therefore, correct to discard the prosecution evidence only on the basis that no injuries were found on the person of the appellant.

13. The next contention of the learned counsel for the appellant is that the time factor goes against the prosecution case. His contention is that in the first place, a child aged five would not be given her meals after 9 p.m., that the shops could not be open at the time when Amar Singh's shop is said to have been open and that if

we proceed backward from the time at which the report was lodged it is not possible for Jogendra Singh and the other alleged witnesses to have witnessed the actual rape or even to have found the appellant in the hut. It is true that usually children are often given food earlier than 9 p.m., but it cannot be said to be an invariable rule. There may be occasions when the meals to be given to a child may be delayed. Smt. Harbans Kaur was not cross-examined on the point. After all it was only a hawker's family and there may have been good reasons for delay in giving the food to the girl on that day. No conclusion can, therefore, be drawn from the fact that the girl had not been given her meals till the time she was taken by the appellant from her house. It is true that according to Balwant Singh (P.W. 3) he had reached at Amar Singh's shop at about 9 or 9-30 p.m. with Nand Ram to have cloth given to Nand Ram by Amar Singh on credit. But he says that he knew Amar Singh from before and left for Amar Singh's shop at 8 p.m. It is clear from the statement of Amar Singh that Amar Singh's shop and house adjoin each other and that he sells cloth at the shop and also goes about as a hawker selling cloth. It is therefore, not surprising that Balwant Singh and Nand Ram had reached his shop after 8 p.m. In fact, according to Amar Singh it was at about 10 or 9-25 p.m. that they had reached there. Since the house and the shop adjoin each other, there is nothing Strange in the statement of Amar Singh when he says that sometimes he closes his shop even after the closing time of shops. He says that at the latest he closed his shop at 10 p.m. It may be that he had acted against law in keeping his shop open after the closing time, but the mere fact that on that day Balwant Singh and Nand Ram had reached his shop adjoining his house after the closing time would not necessarily demolish the prosecution version that they were with Amar Singh when Jogendra Singh came home and informed him about the disappearance of the girl.

14. As for the time given in the first information report, there is no doubt that the time at which the first information report was dictated would be 12-30 a.m. as mentioned in the first information report. But it would not be correct to arrive at a fixed time by working backward from the time given in the first information report, for so many factors, like the time taken by the complainant in getting a rickshaw to the field at the Mandhaiya and the time taken by the accused while talking to his own wife and having a heated exchange of words with her, the time taken at the

Koharapir Outpost and the time taken by the complainant and his party in talking to the appellant's wife at his house, have to be considered. None of the complainant's party is said to have a watch with them, and their idea of the arrival at various places and the time taken there and in doing various acts cannot be said to be accurate or even approximately correct. Nor can it be said that the time mentioned by Smt. Harbans Kaur as 9 or by Jogendra Singh as 9-30 p.m. are accurate. There can consequently be always a difference of half an hour or an hour or even more in the time given by the various persons when they are not speaking with reference to any watch or clock.

There is thus no reason to disbelieve P.Ws. 3, 6 and 7 when they say that they saw the appellant in the very act of committing rape on the girl when they rushed to the Mandhaiya after hearing her shrieks from a distance of about 20 or 25 paces. But even they did not see the actual rape (although I agree with the Court below that they saw it), there is ample evidence to show that it was the appellant who had taken the girl from her house at 9, that she was recovered in the appellants Mandhaiya in a raped condition soon afterwards and that the appellant was also found there alone with the girl. It is also in evidence that his dhoti, which was taken possession of by the police and sent to the Chemical Examiner, was found by the Chemical Examiner and the Serologist to be covered with human blood. The frock of the girl was found to have spermatozoa by the Chemical Examiner. There could then be no doubt that Kumari Jeet Kaur was raped by the appellant in the Mandhaiya.

15. It was also contended by the learned counsel for the appellant that the witnesses would not leave the appellant without giving him a severe beating if they had found him committing rape, particularly when, according to him, the complainant and all his witnesses were Sikhs. No doubt there would be a natural reaction to take revenge on the person committing the heinous offence. But there are two courses open to one desirous of taking revenge. One is to beat the person responsible then and there, and the other is to take him to the police after catching him red-handed. The punishment under law for such a heinous offence is very heavy extending up to life imprisonment. There is then nothing strange or incredible if the complainant and his party preferred to take the appellant to the

police station instead of taking the law into their hands.

16. The story as given by the appellant has been rightly discarded by the Court below. He says that he owed money to Jogendra Singh and examined D.W. 1 Liladhar to prove the loan. But D.W. 1 himself admits that no loan was taken by the appellant from Jogendra Singh in his presence. There is no other evidence of the alleged loan. He says that his Mandhaiya is close to Dalchand's Mandhaiya, but he does not support Dalchand's allegation that there was a marpit between Dalchand and Jogendra Singh two or three days before the appellant was caught. Nor is there any reason to believe that merely for the sake of taking revenge for a loan the complainant would make out a concocted case alleging rape of his own daughter and implicating the appellant.

17. After a consideration of the entire evidence on record I find that the appellant has been rightly convicted of the offence under Section 376, I.P.C. As for the offence under Section 366, I.P.C., it is not clear from the evidence on record when he had taken the girl in his lap to his own house, he had done so with the intention of committing rape. According to the prosecution evidence the witnesses were informed at the appellant's house that he had come there with the girl and that it was his wife who had asked him why he had brought the girl and had told him to take the girl back to her house and leave her there. If he had the intention of committing rape from the very beginning, he would not have taken the five-year old girl to his wife. It is not unlikely that the intention to commit rape arose in his mind some time later on while he was taking back the girl from his house. There is, however, no doubt that the appellant had taken or enticed the five-year old girl out of the keeping of the lawful guardian without the consent of the mother in the absence of the father. He had not taken the girl merely to the halwai's shop, but had taken her elsewhere including his own house. In fact, we do not know whether he actually took her to halwai's shop also or not. There was no consent, either implied or express, for taking her to any other place.

Section 361, I.P.C., defines 'kidnapping' as follows:--

'Whoever takes or entices any minor under sixteen years of age, if a male, or under eighteen years of age, if a female, or any person of unsound mind, out of

the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation.--The words 'lawful guardian' in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception.....

The taking need not be by force and it is immaterial whether the minor girl consents or not. All that is necessary is that there must be taking of a child out of the keeping of the parents. Nor need enticement be confined to any single form of allurements. Offer of sweetmeats is one such form. Even the enticing away of a child playing on a public road is sufficient. The act of taking is not, in the proper sense of the term, a continuous act. But where the minor has been actually taken out of the keeping of her guardian, the act is a completed one. There is consequently not the slightest doubt that the minor girl was kidnapped.

18. Section 363 runs as follows:--

'Whoever kidnaps any person from India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.'

There is thus not the slightest doubt that an offence of kidnapping under Section 363, I.P.G., was committed by the appellant. But it has not been established as we have already seen that there was any intention of rape at the time of kidnapping. There is no question of any knowledge that it was likely that she would be forced or seduced to illicit intercourse, for it was later on he himself who committed the rape. An offence under Section 366 I.P.C., cannot, therefore, be said to have been made out. The appellant is, therefore, liable to conviction under Section 363, I.P.G., only.

19. The result is that the appeal is partly allowed. His appeal against the conviction under Section 376, I.P.C., is dismissed. The sentence of imprisonment under that section is upheld, but that part of the sentence which relates to fine is set aside. The

appeal is allowed in respect of the conviction and sentence under Section 366, I.P.C. and they are set aside. The appellants convicted instead under Section 363, I.P.C. and is sentenced to undergo five years' rigorous imprisonment under that section. These sentences shall run concurrently.

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