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Court : Allahabad

Decided On : Apr-02-1973

Reported in : 1973CriLJ1466

Judge : M.L. Sinha, J.

Appellant : Jai Singh

Respondent : State

Judgement :

M.L. Sinha, J.

1. This appeal arises out of the judgment and order dated 10th of August, 1970, passed by the Second Additional Sessions Judge, Muzaffarnagar, convicting the appellant of the offence under Section 376 read with Section 511, Indian Penal Code and sentencing him to undergo five years' R. I, and to pay a fine of Rupees 500/-. In default of payment of fine the appellant has been directed to undergo six months' further R. I.

2. The prosecution case briefly stated was as follows:-

During the period the occurrence took place the appellant ran a betel-shop in Mu-halla Malhupura, Muzaffarnagar. Zainud-din (P. W. 7) lived in a house situate close to that shop. On 2nd of September, 1968, at about mid-day Zainuddin sent

his niece Kumari Shabnam (P. W. 6), a child aged about 7 years, to purchase betels from the shop of the appellant. When she reached the shop of the appellant, the latter caught hold of her, took her into an adjoining kothri which was lying vacant, bolted it from inside and started making efforts to commit rape on her. Km. Shabnam, however, raised cries, as a result of which there came up Zainuddin (P. W. 7), Khalilur Rahman (P. W. 5) and a couple of other witnesses, They knocked at the door of the kothri and, when the appellant did not open the door, they broke open the same. It is alleged that the witnesses then found Km. Shabnam lying naked on a cot and the appellant lying over her, trying to commit rape. The appellant was arrested on the spot.

3. A report about the occurrence was lodged by Zainuddin (P. W. 7) at police station Kotwali Muzaffarnagar the same day at 1 P. M. i.e.. within one hour of the occurrence. A distance of three miles intervened between the place of the occurrence and the police station. The appellant was also handed over at the police station at the same time. A case under Section 376/511, Indian Penal Code was registered against him on the basis of that report and investigation followed.

4. Dr. Kumari S. K. Bhatnagar (P. W. 3) medically examined Kumari Shabnam on 2nd September 1968. According to the findings of the doctor, Km. Shabnam was 3' 10' tall and weighed 33 Kgs. Her breasts were not developed. No hair were present in axillary and pubic region. The vulva was found congested with faint reddish colour of the skin. The navieular fossa was found red and congested. Hymen admitted tip of probe and was very tender. The age of the girl in the opinion of the doctor was between 6 and 8 years. On the basis of the appearance of the congestion on the vulva and navieular fossa the doctor stated the duration thereof as six hours. In her statement in the trial court, the doctor said that the injuries could be due to friction caused by male organ.

5. After completion of investigation the police submitted a charge-sheet for the prosecution of the appellant.

6. The appellant, in his statement in the committing court, merely denied the prosecution case and did not add anything beyond it. During his examination in the Trial Court the appellant added that his money was outstanding against Zainuddin

and that a quarrel had taken place between him and Zainuddin because he had made a demand for his money. The appellant said that Zainuddin and his companions, therefore, caught hold of him, took him to the police station and implicated him in this case.

7. The prosecution, in order to prove its case against the appellant, placed reliance on the direct evidence of Khalilur Rahman (P. W. 5), Km. Shabnam (P. W. 6) and Zainuddin (P. W. 7). Other witnesses examined in the case gave evidence of a formal nature which needs no reference. The appellant did not examine any witness in his defence. The Trial Court, on a consideration of the entire evidence, came to the conclusion that the case was made out beyond reasonable doubt against the appellant and, in the result, convicted and sentenced him in the manner indicated earlier. Feeling aggrieved against it, he has come up in appeal before this Court,

8. I have heard learned Counsel on either side and have also perused the record of the case.

9. The first contention raised on behalf of the appellant was that the plea set up by the appellant regarding his false implication in this case was true, and that the Trial Court committed an error in discarding that plea. Reference was made in that connection by learned Counsel for the appellant to the injuries shown to have been received by the appellant. According to the evidence of Dr. D. D. Gupta (P. W. 1), he had medically examined the appellant on 2nd of September 1968 and found 6 contusions on his body. One of the contusions has been described as comprising of five smaller contusions. I am afraid the mere fact that the appellant was found to have injuries on his body cannot lead to the conclusion that the plea set up by him had any substance. It is the consistent case of the prosecution that the appellant had been arrested by the residents of the locality inside the kothri with the child sought to be raped. It is natural that the fury of the people of the locality would have fallen on the appellant and they would have consequently given him a beating. The existence of the injuries on the body of the appellant, therefore, more lends support to the prosecution case than to the defence theorv. Needless to say that the appellant did not examine any witness in support of his

plea. It is also worthy of notice in this connection that the appellant did not set up that plea when examined in the committing court. It was only at the conclusion of the trial in the court of session that hs put up that plea.

10. Apart from what has been stated above, it cannot be accepted for any moment that a person would bring a false accusation of this nature in order to implicate another person. Whether a man is rich or poor and whether he belongs to a high caste or low caste, the fact remains that such an accusation brings bad repute to the family to which the girl belongs. No person, therefore, would bring such a charge falsely against another.

11. I have therefore no doubt in my mind that the plea set up by the appellant was an afterthought, invented for the purposes of the defence.

12. learned Counsel for the appellant then contended that the evidence of the three witnesses who gave eye-witness account of the occurrence was not consistent. Learned out that according to Khali-lur Rahman (P. W. 5), when he and the other witnesses entered the kothri, they saw the appellant getting away from over the girl, while according to Km. Shabnam the appellant had already left her when the witnesses started knocking at the door of the kothri. learned Counsel then referred me to the evidence of Zainuddin who stated that when the door of the kothri was broken open the girl was lying naked on the cot and the appellant was lying over her. learned Counsel stressed that the aforesaid inconsistencies in the prosecution case should lead to the conclusion that the entire case Was cooked up against the appellant. I am once again unable to agree. So far as Khalilur Rahman (P. W. 5) is concerned, he made, a clear statement to the effect that it was after the door had been broken open that the appellant cot away from over the girl. Zainuddin (P. W. 7) no doubt in the examination-in-chief stated that when the door was broken open he found the appellant lying over the girl. In his cross-examination, however, he clarified that statement and said that when they entered into the kothri, the appellant was getting away from over the girl. Therefore, so far as Khalilur Rahman and Zainuddin are concerned, their statements in that connection are quite consistent. As for Km. Shabnam (P. W. 6), she no doubt stated that the appellant got away from over her when the witnesses had started

knocking at the door. Km. Shabnam was, however, a child aged 7 years. The inconsistency in her statement and the other two witnesses could therefore very well be due to lapse of memory on her part.

13. But, even if it be accepted for a moment that the appellant had left the girl the moment the witnesses started knocking at the door of the kothri, and that the statement made by the prosecution witnesses to the contrary is an embellishment, I do not think much can turn on it. Even in that case it will have to be accepted that when the door of the kothri was broken open the girl was found lying naked on the cot inside that kothri; that the appellant was present inside the kothri with no-one else; and that when the girl was medically examined, she was found having marks indicative of the fact that rape was attempted on her. These circumstances put together can lead to only one conclusion, namely that it was the appellant who tried to commit rape on the girl. Merely for the reason that the witnesses made some exaggerations their whole testimony cannot be rejected.

14. learned Counsel next contended that the Trial Court committed illegality in recording the evidence of Km. Shabnam without satisfying itself whether she was a competent witness within the meaning of Section 118 of the Evidence Act. Reference was made by learned Counsel for the appellant in that connection to the case Ram Hazoor v. State, 1959 All LJ 239 : (1959 Cri LJ 796) as also to the case Ramesh-war v. The State of Rajasthan : 1952 CriLJ547 . A perusal of the reports of the two cases cited above does lend support to the contention raised on behalf of the appellant that it is the duty of a Presiding Officer to put some questions to a child witness, unconnected with the case, to satisfy himself whether the witness is able to understand the questions put to him/her and to return coherent answers. Unless a person is capable of understanding the questions put to him and giving rational answers he would not be a person competent to be a witness within the meaning of Section 118 of the Evidenc Act. In the case of 1959 All LJ 239: (1959 Cri LJ 796) (Supra) this Court observed:-

The question naturally arises how is the. Court to determine whether a particular child witness is capable of understanding the questions and capable of giving rational answers unless the Court resorts to some sort of preliminary examination

of the child witness before the witness is actually put into the witness box to give evidence.

The Court then referred to a certain decision of the Supreme Court of the United States and observed:

From the above quotation it would be clear that it is very desirable that a trial Judge, who has a child witness before him, should preserve on the record, apart from the child witness's evidence in the case, some other questions and answers which could help the Court of Appeal to come to the conclusion whether or not the trial Judge's decision in regard to the competency of the child witness was right or erroneous.

In the case of : 1952 CriLJ547 the Supreme Court, after making reference to the provisions contained in the Oath's Act and to Section 112 of the Evidence Act, said:-

I would add however that it is desirable that Judges and Magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witnesses may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether.

It is really regrettable that despite the aforesaid two decisions the Presiding Officer has not indicated on record as to how did he come to hold the opinion that Km. Shabnam did not understand the sanctity of oath. The learned Sessions Judge should have put some questions to the witness before coming to a conclusion on the point whether she understood the duty of speaking the truth and also whether she was able to understand the questions put to her and to return rational answers. The questions put to the witness and the answers given by her should have been brought on record. However, the omission of the Sessions Judge in that regard does not render the evidence of Km. Shabnam inadmissible. In the case of 1959 All LJ 239 : (1959 Cri LJ 796) (Supra) this Court only stressed what was desirable for the Sessions Judge to do while dealing with the child witnesses. It has nowhere been stated in that case that omission on the part of the Sessions

Judge to make a preliminary examination of the child witness and to incorporate that preliminary examination in the record of her statement, renders the evidence of such child witness inadmissible or unworthy of reliance. In the case of : 1952 CriLJ547 the Supreme Court said:

But whether the Magistrate or Judge really was of that opinion can, I think, be gathered from the circumstances when there, is no formal certificate. In the present case, it is plain that the learned Judge had the proviso in mind because he certified that the witness does not understand the nature of an oath and so did not administer one but despite that went on to take her evidence. It is also an important fact that the accused who was represented by counsel, did not object. Had he raised the point the Judge would doubtless have made good the omission.

In the case before me also the Presiding Officer made a note on the top of the statement of Km. Shabnam that she did not appear to understand the sanctity of oath, but she had been asked to tell the truth. It is, therefore, apparent that the Presiding Officer was aware of the proviso appended to Section 4 of the Oaths Act of 1969. The fact that Km. Shabnam was a competent witness within the meaning of Section 118 of the Evidence Act can be ascertained by this Court by itself going through the statement of Km. Shabnam. A perusal of that statement indicates that by and large she understood the questions that were put to her and she returned coherent answers. Under the circumstances the omission on the part of the Presiding Officer of not making a preliminary examination in order to reach the conclusion whether Km. Shabnam was or was not a competent witness is of no consequence in this case.

15. learned Counsel for the appellant contended that the occurrence took place in a populated area of the town and yet the prosecution did not examine any person except Khalilur Rahman (P. W. 5) and Zainud-din (P. W. 7), besides the girl. learned Counsel urged that since no independent witness has been examined in the case, it may not be safe to act on the testimony of the witnesses actually examined. I am once again unable to agree. It cannot be ignored that the occurrence took place at 12 O'clock noon when people generally are inside their houses. It could not be elicited in cross-examination of the prosecution witnesses

that other independent witnesses were available and that the prosecution has withheld them. Further, as already stated earlier, people do not generally bring false cases of rape even against their enemies. The want of independent witnesses in cases of rape should not, therefore normally have a damaging effect on the prosecution case

16. Having given my careful consideration to the evidence on record and to the contentions raised, I find no good ground for refusing to act on the testimony of Khalilur Rahman (P. W. 5), Km. Shabnam (P. W. 6) and Zainuddin (P. W. 7). The charge under Section 376/511, Indian Penal Code was brought home beyond reasonable doubt against the appellant on that evidence.

17. learned Counsel for the appellant lastly contended that in view of the fact that the appellant is an old man aged 65 years, leniency may be shown on the point of sentence. In the first instance, it does not appear to be true that the appellant is aged 65 years. In the memorandum of statement of the appellant prepared by the Trial Court the Presiding Officer has made a note that he appeared to be only 55 years. That apart, when an elderly person tries to commit rape on a child aged 7 or 8 years, it indicates a very perverted mind and such offences call for deterrent sentences. The sentence of five years' R. I. that has been awarded to the appellant, therefore, does not call for any interference. However, since a substantive sentence of imprisonment was awarded to the appellant, it was not necessary for the court below also to award a sentence of fine on him. The sentence of fine should, therefore, be set aside.

18. In the result, this appeal is allowed to this extent only that while the conviction recorded against the appellant under Section 376/511, Indian Penal Code and the sentence of five years' R. I. thereunder are confirmed, the sentence of fine of Rs. 500/-awarded to him by the court below is set aside. The appellant is on bail. He must surrender forthwith to serve out his sentence. His bail bonds are cancelled.

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