

thepar Singh Vs. State of U.P.

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Court : Allahabad

Decided On : Sep-13-2001

Reported in : 2002CriLJ612

Judge : S.K. Agarwal, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 376; Code of Criminal Procedure (CrPC) - Sections 161 and 164

Appeal No. : Crl. Appeal No. 1811 of 1995

Appellant : thepar Singh

Respondent : State of U.P.

Advocate for Def. : A.G.A.

Advocate for Pet/Ap. : Lokendra Dobhal, Adv.

Disposition : Appeal allowed

Judgement :

S.K. Agarwal, J.

1. This appeal arises from a judgment and order dated 28-10-1995 passed by Sri R.P. Singh, Sessions Judge, Tehri Garhwal in S.T. No. 37 of 1994 whereby he convicted the appellant under Section 376 I.P.C. and sentenced him to 7 years'

R.I. and a fine of Rs. 3,000/-. In default of payment of fine a further sentence to 2 years' R.I. was also imposed on the appellant.

2. In brief the prosecution story is as under :

On 12-11-1993 Km. Kalini (P.W. 4), daughter of Sunder Singh alias Moosa Singh reported to have pain in her abdomen. She was taken to a nurse by P.W. 1 Bhura Singh and P.W. 2 Kamal Singh. They were told by the nurse that she is carrying a child of 5-6 months in her womb and the pain is due to foetal movements and not for any other reason. The girl was brought back by these witnesses to her father's place. On an enquiry made from her she disclosed that in the month of Asarh in the evening while her parents were away from the house and she was carrying Dhaan for thrashing in the Okhal, the appellant, who is Headmaster in Junior High School, Garakot, forcibly took her into his room and criminally assaulted her. She was raped again 2-3 days after. She was told that she should not disclose this fact to any body else she would be killed. Being afraid of the threat she did not inform any person including her parents. It is, further disclosed that the accused appellant promised to marry her. She disclosed that the child in her womb is of this appellant. She was aged about 16 years at that time.

3. A report was lodged at P.S. Deoprayag on 15-11-1993 at 5.45 P.M. This report is Ext. Ka-2. It was registered at the above said police station by Head Moharir Purshottam who prepared chick report (Ext. Ka-5). The G.D. entry of this report is Ext. Ka-6. All these formalities were completed in presence of P.W. 9 Genda Singh Verma, who investigated the case. The appellant was arrested on 16-11-1993. The investigation of the case was completed by P.W. 6 Ompal Singh. He recorded the statement of Km. Kalini at Nari Niketan, Narendranagar, on 31-1-1994 nearly after 2- months. Her statement under Section 164 Cr. P.C. was also got recorded on 24-2-1994.

4. Km. Kalini was medically examined on 16-11-1993 by P.W. 7 Dr. Rita Dhawan at Combined Hospital, Tehri. Her medical examination report is Ext. Ka-3. She also advised for her X-Ray examination for determination of her age. The X-Ray examination was conducted and a report on the basis of the same about her age was given by the Chief Medical Officer, Dr. Vijai Singh Pal (P.W. 8) on 1-2-1994. It

is Ext. Ka-4. According to this medical examination report her age was about 17 years.

5. The prosecution, in support of its case, has examined P.W. 1 Bhura Singh, who is cousin of Km. Kalini, P.W. 2 Kamal Singh, P.W. 3 Shyam Singh Pradhan, who scribed the written report Ext. Ka-2 on the dictation of P.W. 1 Bhura Singh. P.W. 4 is Km. Kalini, the ravished girl. P.W. 5 is Hukum Singh. He is Pradhan of Gram Sabha. He had proved the written confession made by the appellant. P.W. 6 Ompal Singh is the second I.O. P.W. 7 Dr. Rita Dhawan had medically examined Km. Kalini and proved her report Ext. Ka-3. P.W. 8 Dr. Vijai Singh Pal, C.M.O., Tehri, had proved the report on age, Ext. Ka-4. P.W. 9 Genda Singh Verma, S.H.O., initially investigated the case.

6. The appellant in his defence has denied the charges and stated that he has falsely been involved in the present offence because the settlement of the marriage of his uncle's son was broken with the prosecutrix at his instance. When wives of Madan and Kamal disclosed that Kalini is carrying a child in her womb. He did not adduce any evidence, oral or documentary. It is contended by the learned counsel for the appellant that there is no evidence to connect the appellant with the offence of rape. The statements of the witnesses are false and based on enmity. So far as Km. Kalini is concerned, her evidence is not truthful. She is deposing because of malice and at the instance of her brother against the appellant. The medical evidence shows that she was 18 or 19 years of age and not 16 or 17 years, as alleged by the prosecution. Her evidence further shows that even if the appellant is father of the child in her womb the intercourse was under her consent and it is not rape.

7. The most important piece of evidence in this case is that of P.W. 4 Km. Kalini. She has clearly admitted that she had told her brother that she is carrying a child in her womb. She was taken to the doctor, who told him that she is carrying a child in her womb of 8 months. It is further stated by her that she was taken to the hospital by only her brother Bhura Singh and none else, whereas the prosecution case is that Kamal Singh also accompanied them to the hospital. When she disclosed about the presence of a child in her womb after coming back from the

hospital, there were none else in the house. She further admitted that she had not disclosed any other fact to her brother. She had not disclosed the fact of her carrying a child in the presence of any other person except her brother. The report was scribed by the S.I. She further admitted that when she had gone to the hospital where the doctor told her that she is carrying a 8 months' foetus in the womb and no abortion is possible. This clearly means that she was taken to the doctor for abortion. She was accompanied to the police station by her brother and the Pradhan. From the police station she was sent to Nari Niketan. She claimed that when she was carrying grain for thrashing she was picked up by the appellant and taken to his room and raped there. It was still day. She did not raise any alarm when she was dragged to the room by the appellant. It is highly improbable in the facts and circumstances of the present case. It clearly show her to be a consenting party. She has admitted that for about a month and two she was visiting the appellant and returning to her house. He was visiting her when her parents remain away from her house. She further claimed that she used to go to the appellant at his house when she was teaching his students and after having a talk with him she used to come back. It is clearly indicative of the circumstance that she was a consenting party and used to visit him to tell him that none is present in her house. She has further admitted that Bhawani Singh and his family members came to her house to settle her marriage with Bhawani Singh. Photos were taken. Everything was all right till then. On 8th day of Baisakh they had come to fix the date of marriage. Her marriage with Bhawani Singh was broken at the instance of the appellant. He informed Bhawani Singh's family that the girl is carrying a child in her womb. She admitted that the wife of Bhura Singh had also aborted an illegitimate child. Vimla too had aborted an illegitimate child. It could not be known whose child it was. No paternity test was undertaken by the prosecution. Vimla is her father's elder brother's daughter. They had gone for abortion to Srinagar. She had denied that the child in her womb is of Surveer. In the circumstances, as adverted to above, it is apparent that it is not a case of rape, as alleged by Km. Kalini. It is also proved beyond doubt that the appellant was not involved in rape or enjoying enormous pleasure with this girl under any threat. Her conduct, as discussed above, negatives completely any such possibility.

8. The next witness is P.W. 1 Bhura Singh. He is brother of this girl (P.W. 4). He has disclosed the fact that his sister has told him that the child in her womb is of the appellant. The appellant was summoned and he gave in writing that the child is his. His claim that he had not gone to the doctor is against the statements of his sister (P.W. 4). According to him he had taken his sister to the hospital and the nurse told him that the girl is carrying a child of 5-6 months. He is unable to give out the address of the doctor to where he had taken his sister. He could not give any detail about the nurse. He admitted that the girl is carrying a child in her womb of 4-5 months was told by the nurse and not by the doctor. Although in the trial Court he stated that he had contacted the doctor who checked her pulse and then directed the nurse to examine her but this fact is missing in the FIR (Ext. Ka-2). The omission is admitted to the witness and he failed to offer any explanation for its absence. It is also admitted to this witness that Kamal Singh was sent to call the appellant from his house. He had already abandoned the village about a year ago, He had not disclosed the fact that the appellant was summoned on 14th and a Panchayat was held wherein he had admitted his guilt. This omission in his statement under Section 161, Cr. P.C. completely demolished the written confession of the appellant. It cannot be acted upon against the appellant. The fact is not disclosed even in the FIR (Ext. Ka-2). The witness failed to offer any explanation for this omission. He had evaded the response to the question put by the defence regarding settlement of his sister's marriage with Bhawani Singh, uncle's son of the appellant, and breakage of the marriage at his instance. He claimed that since he was not present in the house, therefore, he could not tell anything about it., He had also denied any quarrel with the appellant on account of breakage of the marriage on 8th day of Baisakh. This fact is admitted by P.W. 4. Surveer is his son and the suspicion of the village men was on Surveer. He has further denied the suggestion that when the nurse had refused to abort the child then they had lodged the FIR on account of enmity against the appellant. He had aborted an illegal child of his son's (Raju') wife. He has further admitted that his brother is Madan Singh. His sister is Vimla. She had also aborted an illegal child before November, 1993. This fact is admitted to P.W. 4. He has very categorically admitted that this appellant has left the village about a year before the occurrence and thereafter he had never visited his village. In the circumstances, specially in

the face of the statement that the appellant has abandoned the village about a year before this incident, no reliance can be placed upon the testimony of this witness that the rape was committed by the appellant.

9. Statement of P.W. 3 Shyam Singh cannot be given much weight as P.W. 4 has categorically admitted that she had not disclosed anything in the presence of any other person than her own brother P.W. 1 Bhura Singh. P.W. 2, Kamal Singh claimed that he was present when the statement was made by the girl to her brother. In the circumstances it is not safe for me to accept the testimony of this witness. According to him the girl had first denied that she was carrying any child. When she was chastised she admitted after 15/20 minutes that she is carrying a child who belong to the appellant. P.W. 4 Km. Kalini has denied even his presence at the hospital. He did not know the name of the nurse. He claimed that he had gone to the village of the master to call him on 14th and returned with him to the village in the evening. Though he had gone to the house of the appellant, but yet he is not able to tell the precise number of children the appellant has. The appellant has denied any admission (confession) by him in the presence of any villager. He has also denied going to the village on 14th or 15th of this witness. He also denied settlement of marriage of P.W. 4 Km. Kalini with Bhawani Singh, although it is categorically admitted by P.W. 4 Km. Kalini herself. The appellant, according to him, was living in the village with his 18/19 years old son. He claimed that he had gone to lodge the report along with others, but on this point he was contradicted by P.W. 4. She has stated that she went to the police station to lodge the report with her brother P.W. 1 Bhura Singh and Pradhan. Thus, no reliance can be placed on his testimony.

10. P.W. 3 is Shyam Singh. He is Pradhan of Gram Sabha. He is the scribe of the FIR. According to him he prepared the FIR on the dictation of Bhura Singh. He claimed that he was busy in the election at Deoprayag. Bhura Singh, Kamal Singh and Hukum Singh met him there. Bhura Singh requested him to transcribe the report. He did not prove anything against the appellant.

11. P.W. 6 Ompal Singh is the second I.O. There is no explanation from the side of the prosecution as to why Section 161, Cr. P.C. statement of this girl P.W. 4

Km. Kalini was recorded after 2 months. She was present in the police station at the time FIR was registered, yet her statement was not recorded. This creates serious doubt in the truthfulness of the prosecution story.

12. P.W. 7 is Dr. Rita Dhawan, who had examined the victim, P.W. 4. She had only proved her medical examination report.

13. P.W. 8 is Dr. Vijai Singh Pal, C.M.O., Tehri Garhwal. He had proved the age certificate issued by him. According to his statement in the hand fusion of radius was complete. In the lower end fusion was not yet complete. The ulna in its lower end was fused completely. In cross-examination he had admitted that according to Modi fusion of the distal end of ulna is complete in Uttar Pradesh in the females at the age of 18/19 years. Tehri Garhwal to where the victim belongs is in U.P. Therefore, her age presumable is about 18/19 years. By mistake he has written 17 years in his report. He had further admitted that fusion in the head of radius occur at the age of 16 years. By mistake he has written 14 years. The distal end of the ulna fuses at the age of 18/19 years. Finally he made a statement that the age of P.W. 4 Km. Kalini would be between 16 and 19 years. In the circumstances, the age of this girl apparently was above 16 years and below 19 years. Due to this reason also no case of rape can be proved against the appellant. As already held in this judgment while discussing the evidence of P.W. 4 Km. Kalini that she was a willing party to the sensuous pleasure which resulted into presence of a foetus in her womb.

14. P.W. 9 Genda Singh Verma is the first I.O. He has recorded the statement of the witnesses, viz. P.Ws. 1, 2, 3, 5 etc. but has deliberately not recorded the statement of the prosecutrix. The explanation offered by him in this regard is that because of election duty he could not do so.

15. Thus from the statements of the witnesses following fact emerge out that the false story in collusion with the informant was brought on record that the appellant has been prosecuted in this case on account of breakage of marriage of Km. Kalini with his uncle's son Bhawani Singh. On the date when they had gone to settle the date of marriage, wives of Madan and Kamal Singh had disclosed the fact of this girl carrying a child in her womb, as a consequence to that wreckage of the

marriage at his instance occurred. They also falsely involved him in the offence to take revenge. As the evidence discloses presence of animosity between the appellant and the family of the victim on account of the breaking of the marriage of P.W. 4 Km. Kalini with Bhawani Singh, son of the uncle of this appellant, the probability that he was falsely involved on account of that to seek revenge for the loss of face cannot be completely eliminated. The fact that Km. Kalini was a consenting party as is apparent from her own testimony also cannot be ruled out. That he had left the village a year ago also rules out occurrence of any such event. It was some other person who is liable for her this situation is probable.

16. In the circumstances discussed above, the offence against this appellant is not proved beyond reasonable doubt. As such he is entitled to get benefit of doubt.

17. In the result this appeal is allowed. The conviction of the appellant under Section 376, IPC is hereby set aside. He is acquitted of this charge. He is on bail. He need not surrender. His bail bond is cancelled and sureties are hereby discharged.