

Amar Nath Vs. State of U.P.

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Court : Allahabad

Decided On : Nov-04-2004

Reported in : 2005CriLJ1379

Judge : K.N. Ojha, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 326, 363 and 376; Code of Criminal Procedure (CrPC) - Sections 161; Arms Act - Sections 27

Appeal No. : Crl. Appeal No. 2899 of 1998

Appellant : Amar Nath

Respondent : State of U.P.

Advocate for Def. : A.G.A.

Advocate for Pet/Ap. : J.N. Rai and ;V.K. Sharma, Advs.

Disposition : Appeal dismissed

Judgement :

K.N. Ojha, J.

1. Instant criminal appeal has been preferred against order of conviction and sentence dated 7th November, 1998 passed by learned 1st Additional Sessions Judge, Agra in Session Trial No. 463/1997 State v. Amarnath, whereby the

appellant has been convicted under Sections 363 and 376, I.P.C. and has been sentenced to undergo Rigorous Imprisonment of three years and 10 years respectively. A fine of Rs. 5000/- has also been imposed under Section 376, I.P.C. In default of payment of fine, he has to further undergo Rigorous Imprisonment of one year. The learned Additional Sessions Judge has not directed as to whether both the sentences are to run concurrently, or consecutively.

2. Heard Shri J.N. Rai, learned Amicus Curiae and learned AGA have gone through the record.

3. According to prosecution, Amir Uddin, resident of 15/134, Bari Hathai, Nai Ki Mandi, P.S. Nai Ki Mandi, District Agra lodged First Information Report against appellant-Amarnath on 19th May, 1997 at about 11.50 a.m. under Sections 363 and 376, I.P.C. contending the fact that he along with his grand-daughter were sleeping in Mohalla Bari Hathai, Nai Ki Mandi, District Agra and when he got up in the morning, he found his grand-daughter missing from the cot. He accompanied with his son Nisar-father of the girl, Aleemuddin, Nawabuddin started to make search. When they were going beside Railway line near Edhgah Indian Railway Depot, they heard shrieks of the girl and found that the appellant was indulged in sexual intercourse with the girl. The informant and other persons caught hold of the appellant at about 10 a.m. on 19-5-97 and carried him and lodged him at the Police Station, F.I.R. was lodged.

4. The Investigating Officer took bloodstained underwear of the girl and underwear and shirt of the appellant and prepared its recovery memo. The girl was medically examined by Dr. Smt. Sudharani Agarwal in Woman Hospital, Agra on 19th May, 1997 at 5.30 p.m. An abrasion of about 1 cm x 1 cm. on the face below the right eye, was found.

5. Internal examination was done under anesthesia in O.T. under supervision of Chief Medical Superintendent, Women Hospital, Agra. There was a tear of about 1 cm. x 1 mm. on both sides of Labia majora and Labia minora fresh tear was present. There was bleeding on touch. There was perineal tear at 6 'o' clock position standing up to anus. There was vaginal tear about 4 cm. at 6 'o' clock position. Lateral vaginal tear was present on right side of about 4 cm. in length and

5 mm. in depth. Bleeding was present on touch. Vaginal smear was taken and sent to Pathologist, District Hospital, Agra. The prosecutrix was referred to surgery department, S.N. Medical College at Hospital, Agra for further management and treatment. The weight of the girl was 12 kg. In the opinion, she was aged about four years and injury was caused by blunt object within 24 hours.

6. After recording statement of witnesses under Section 161, Cr. P.C. and getting the girl medically examined completing the investigation, charge-sheet was submitted against the appellant under Sections 363 and 376, I.P.C.

7. The accused denied his participation in the crime and alleged that he was not arrested from the spot of alleged occurrence. It was also alleged that he was falsely involved in the crime.

8. Prosecution examined P.W. 1 Amir Uddin-informant and grandfather of the girl, P.W. 2 Nisar Uddin-father of the girl, P.W. 3-the girl herself, P.W. 4 Constable Clerk Ram Gopal and prepared Chick Report No. 46 dated 20-5-97 at Crime No. 87/97 under Section 363 and 376, I.P.C. The prosecution also examined P.W. 5- Constable Ranvir Singh who on the basis of the report of Amir Uddin, prepared Chik Report, P.W. 6 S.I. Satyavir, Singh, P.W. 7 Rajpal Singh made investigation in the case who submitted charge-sheet. P.W. 8 Dr. Smt. Sudharani Agarwal was also examined who proved medical examination report.

9. The accused did not examine any witness in defence. The informant Amir Uddin-P.W. 1 and his son Nisar Uddin-P.W. 2 are resident of Chauraha Mira Hussini, P.S. Nai Ki Mandi, Agra and accused is resident of Chhwwa Nagla, P.S. Shaganj, District Agra. They are resident of different places and enmity has been suggested for false implication. While making cross-examination of Amir Uddin-P.W. 1, it was suggested that the girl was injured in accident. She was helped by the appellant who was carrying her to her guardian and he was falsely involved in the case. If the girl would have been injured in some accident, injuries would have been on her outer part of the body rather than on private part. Besides it, if the defence is taken by the accused, it is the accused who has to prove the theory of defence. But there is no evidence adduced by the accused-appellant to show that the girl had gone to some place. She suffered injuries and was being carried by

the appellant to the residence of her guardian. There is clear statement of both eye-witnesses that the girl was sleeping with her grandfather and was found missing in the morning and when search started, she was found in possession of the appellant besides the Railway line and her shrieks attracted her father and grandfather. When P.W. 3 who is prosecutrix, aged about four years was produced before the Court. She showed the appellant and by nodding head in making reply in confirmation, stated that appellant was the person who had carried her away and from his possession, she was recovered by her father and grandfather. Thus, the fact of the girl being kidnapped from natural guardianship of her father and grandfather is proved against the appellant.

10. There is clear statement of eye-witnesses Amir Uddin-P.W. 1, and Nisar Uddin-P.W. 2. They saw the offence of rape being committed by the appellant on the girl and they apprehended the appellant on the spot. Both these witnesses as well as P.W. 8-Dr. Smt. Sudharani Agarwal, Medical Officer, Women Hospital, Agra stated that bleeding was present from the vagina of the girl. The lady doctor has also stated that there were tears on both sides of Labia majora and Labia minora. Blood was found on her underwear also. Blood was found on the cloth of the appellant also. Dr. Smt. Sudha Rani Agrawal specifically stated that tears which had taken place in private part of the girl and the bleeding which was present, confirm that the appellant committed rape on the girl. The girl aged about four years is an innocent person having no malice against the appellant to involve him falsely in the case. Therefore, the statement of the grandfather, father of the girl as well as of the girl herself supported with the statement of both Investigating Officer and P.W.8 Dr. Smt. Sudharani Agarwal prove the fact that when the girl was sleeping with her grandfather-Amir Uddin in the night, she was taken away by the appellant and carried to a solitary place near Railway line where she was subjected to rape. Since the girl was not co-operating, she was raising alarm. The appellant had no occasion to take her away to some other place. Therefore, he found it safe to detain the girl and commit rape on her at a solitary place near Railway line but when the search was started by her father and grandfather to all places near the residences, ultimately they were successful in searching-out the girl from the custody of the appellant. Thus, there is sufficient evidence to prove the offence of kidnapping and rape being committed by the appellant on the girl.

11. Section 376, Clause 2(f) of Indian Penal Code contemplates that whoever commits rape on woman when she is under 12 years of age shall be punished with Rigorous Imprisonment for a term which shall not be less than 10 years but which may be for life and he will also be liable to fine, provided that the Court may have adequate and special reasons to be mentioned in the judgment to impose a sentence of imprisonment of either description for a term of less than 10 years. In the instant case, the father, grand father, Dr. Smt. Sudha Rani Agrawal have made statement about the age of the girl to be four years. When girl was examined by the doctor, the doctor found that height of the girl was 3 feet and weight was 15 Kg. Teeth were 10/10. The doctor opined that she was aged about four years and the same statement was made by her natural guardians. Since the girl was a small child in this case, this was the reason that she made reply by nodding her head. Thus, it is proved that the prosecutrix in this case was below twelve years at the time of occurrence. Therefore, if the minimum sentence of 10 years R.I. has been imposed under Section 376 I.P.C. and three years has been imposed under 363 I.P.C., the sentence imposed is proportionate to the nature and gravity of the offence committed by the appellant.

12. The learned Amicus Curiae Shri J. N. Rai advocate has submitted that since the time the appellant was apprehended at the time of the occurrence, he is in jail and about 7 1/2 years have passed away. Therefore, lenient view be taken and sentence of the period already undergone in jail be imposed on the appellant. But this contention of the learned counsel is not maintainable.

13. The law has been laid down by Hon'ble Apex Court as is reported in 2004 (6) SCC 513 : (AIR 2004 SC 4122 : 2004 Cri LJ 3879) Surjit Singh v. Nahara Ram and Anr. as cited below (at para 2 of AIR) :--

'The trial Court found the respondent-accused guilty of the offence punishable under Section 326 IPC and Section 27 of the Arms Act. He was sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs. 2000 with default stipulation for the offence relatable to Section 326 IPC. He was also sentenced to undergo rigorous imprisonment for one year in respect of the offences under the Arms Act. On appeal, however, the High Court while upholding

the conviction reduced the sentence to the period of custodial sentence already undergone. The fine was, however, enhanced to Rs. 25,000. The appellant complainant/ victim was before the Supreme Court by special leave.

The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross-cultural conflict where living law must find answer to new challenges and the Courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protector of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of 'order' should meet the challenges confronting the society. In operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system, to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every Court to award proper, sentence having regard to the nature of the offence and the manner in which it was executed or committed, etc.

Criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably, these considerations cause a departure from just deserts as the basis of punishment and create cases of apparent injustice that are serious and widespread.

When the factual scenario as noted by the trial Court, and the principles of law as noted above are considered, the inevitable conclusion is that the High Court was not justified in reducing the custodial sentence. Taking into account the enhanced fine as imposed by the High Court which admittedly had been paid, it would be appropriate to fix the custodial sentence at eighteen months. The accused-respondent I shall surrender to custody forthwith to serve the remainder of sentence. The custodial sentence has been fixed taking note of the peculiar facts of the case. Out of the fine deposited a sum of Rs. 10,000 shall be paid to the appellant.'

14. In 2004 (5) SCC 721 : (AIR 2004 SC 2608 : 2004 Cri LJ 2100) Dayal Singh v. State of Rajasthan, it was laid down by Hon'ble Apex Court that when the accused was already imposed minimum prescribed sentence, stringent laws will have no meaning if the offenders could get away with mere fine and strict adherence of the said Act was essential for safe guarding the interest of the public. In the case of rape, Section 376 I.P.C. contemplates a general Clause (1) providing punishment of seven years and also fine but Clause (2) of the Section lays down specified categories of the offences of rape wherein minimum sentence of 10 years R. I. and fine has been provided. In this case, the girl was so small that she even did not know as to what offence was being committed on her and if she could not have been traced out, it would have caused endless misery to her and her family. The appellant was aged about 26 or 27 years and he had full knowledge about the gravity of the offence which was being committed on the innocent child. Therefore, there is no adequate reason to impose a sentence of imprisonment less than ten years in this case.

15. Considering the circumstances and his financial position, imposition of fine of Rs. 1,000/- (Rupees one thousand) only in addition to sentence of 10 years Rigorous Imprisonment under Section 376 I.P.C. would be the proper sentence.

16. With this observation, the appeal deserves to be dismissed.

17. The appeal is dismissed. The conviction of the appellant Amar Nath under Section 363 and 376 I.P.C. is confirmed. The sentence of three years Rigorous Imprisonment under Section 363 I.P.C. and 10 years R.I. under Section 376 I.P.C.

is also confirmed subject to modification that the fine is reduced to Rs. 1,000/- (Rupees one thousand) only. In default of payment of fine, he will have to undergo one month Rigorous Imprisonment in addition to the R.I. of ten years imposed under Section 376 I.P.C. Both the sentences shall run concurrently. The appellant is already in jail. He will remain in jail till he serves-out the sentence. Shri J.N. Rai, learned Amicus Curiae is entitled for Rs. 1,000/- (Rupees one thousand only) as his fees.

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