

Ashok Alias Pappu Vs. State of M.P.

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Court : Madhya Pradesh

Decided On : Jan-25-2005

Reported in : 2005CriLJ2301; 2005(2)MPLJ490

Judge : S.L. Kochar, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 341, 354, 376, 376(2) and 511

Appeal No. : Criminal Appeal No. 1128 of 2004

Appellant : Ashok Alias Pappu

Respondent : State of M.P.

Advocate for Def. : A. Upadhyaya, D.G.A.

Advocate for Pet/Ap. : Rohit Rawal, Adv.

Judgement :

S.L. Kochar, J.

1. The appellant has filed this appeal against the judgment passed by Sessions Judge, Shajapur, whereby convicting the appellant under Section 376(2)(f) read with Section 511 of IPC to undergo seven years R. I. with fine of Rs. 1000/- and in default of payment of fine to undergo further R. I. for three months, in Sessions Trial No. 125/2004 on 27-10-2004.

2. The prosecution case in short is that on 7-7-2004 at 1.00 p.m. prosecutrix Ritu aged nine year was studying in her school. She saw that her she-calf was going towards forest upon which she went from the school to catch it. The appellant Ashok was fixing fencing in his field. The prosecutrix Ritu asked the appellant to help her to catch the she-calf. The appellant instead of helping her, made the she-calf to run away on which prosecutrix also tried to follow the she-calf but her way was obstructed by the appellant. Appellant threw her on the ground, thereafter opened his pant as well as undergarment of the prosecutrix and tried to commit bad act. The prosecutrix raised alarm and ran away from the place of incident. After reaching her house, she disclosed the incident to her parents. Her father Amritlal lodged the report on 7-7-2004 at 3.15 p.m. in police station Salsalai. The police got the prosecutrix examined medically and after necessary investigation, filed the charge-sheet against the appellant Under Sections 376/511 and 341 of IPC.

3. The appellant denied the charges. According to him, he was falsely implicated on account of land dispute. He did not examine any witnesses in his defence. The learned trial Court, after examining the prosecution witnesses and hearing both the parties, convicted the appellant as mentioned above. Hence this appeal filed by the appellant.

4. The contention of the learned counsel for appellant is that even if the complete prosecution case is accepted, the offence at the most would fall Under Section 354 of IPC. The learned counsel has placed reliance in support of his submission, judgments rendered by this High Court in *State of M. P. v. Babulal* (AIR 1960 MP 155) : (1960 Cri LJ 612), *Ankariya v. State of M. P.*, (1991 Cri LJ 751), *Gangaram v. State of M. P.*, (1987 Vol. 2 MPWN 81), *Narayan v. State of M. P.*, (2003 Cri LR (MP) 6) : (2003 Cri LJ 268) and judgment passed by Madras High Court in *State (Tamil Nadu) v. P. Balari* (1996 Cri LJ 3705).

5. In oppugnation, the learned counsel for State has supported the impugned judgment of conviction Under Section 376(2)(f) read with 511 of IPC.

6. Having heard the learned counsel for parties and after perusing the entire record, as well as the impugned judgment, this Court is of the view that there is

substance in the argument of learned counsel for appellant. According to the statement of prosecutrix Ku. Ritu (P.W.1), she requested the appellant to help her in catching the she-calf but instead of helping her, the appellant made the she-calf to run away. Thereafter appellant took the prosecutrix towards forest and on the road, obstructed her way. The appellant thrown her on the ground and thereafter opened his pant and underwear of the prosecutrix, but on cry raised by the prosecutrix, appellant ran away from the scene of occurrence and prosecutrix came back to her house and reported the incident to her mother, father and other relations. In cross examination, paragraph eight, she has stated that she was thrown on the ground but she did not receive any injury on her person. After throwing her on the ground, appellant opened his pant, in between she raised cry because of which appellant ran away and she returned to her house. In paragraph 10, she has admitted the defence suggestion that on the date of incident, she-calf of the prosecutrix entered inside the soyabean crop of the appellant and grazed some crop. But she has denied other suggestion that the appellant abused her because of causing damage to his crop and the prosecutrix reported only this much incident to her parents but because of previous ill-will with one Bhagwansingh, at his instance a false report was lodged by the father of the prosecutrix in the police station.

7. Dr. Smt. Aruna Vyas (PW.4) medically examined the prosecutrix and did not find any injury externally or internally on her person. She has not given any positive opinion about attempt to commit rape with the prosecutrix.

8. Amritlal (PW.6), the lather of the prosecutrix has deposed that the prosecutrix return back while weeping to the house from her school at that time Bhagwansingh was also standing with him. The prosecutrix disclosed before him that appellant thrown her on the ground, thereafter removed her underwear and tried to commit bad act. This witness thereafter went to police station along with the prosecutrix and lodged the report (Ex. P. 8). In paragraph seven, this witness has also admitted that his she-calf caused damage to the crop of the appellant. He also deposed in the same paragraph that Bhagwansingh (P.W. 7) had disclosed that he had witnessed the incident and Bhagwansingh was the person who told him about removing of underwear of the prosecutrix and opening of the pant by the appellant.

According to this witness Amritlal, Bhagwansingh appears to be eye-witness but Bhagwansingh (PW.7) has not said so.

9. According to Bhagwansingh, he was sitting on the platform of temple. At that juncture, prosecutrix was going weeping. He asked prosecutrix regarding reason for weeping but she did not disclose anything to him and she went to her house. He also reached at the house of the prosecutrix where she disclosed about the incident. According to this witness, prosecutrix has disclosed about removal of the pant by the appellant and also removal of her underwear, thereafter commission of bad act. This witness also went along with the prosecutrix and her father in police station for lodging the report. The prosecutrix Ku. Ritu (PW. 1), in paragraph nine has deposed that when she reached at her house, her father was not in the house. Her father went to village Godna and Bhagwansingh (PW.7) was sitting on handpump situated outside her house. She disclosed about the incident to Bhagwan Singh and went to the police station with Bhagwan Singh where Bhagwan Singh had lodged the report.

10. This version is completely at variance with the statement of her father Amritlal (PW.6) as well as Bhagwan Singh (PW.6). Out of the statement of prosecutrix and her father Amritlal (PW.6), one common feature has emerged that the she-calf of the prosecutrix/Amritlal (PW.6) entered inside the field of the appellant and also damaged his standing crop.

11. Bhagwansingh (PW.7) has improved the statement and stated that prosecutrix disclosed before him about commission of bad act whereas according to prosecutrix herself, appellant tried to commit bad act and the moment she raised cry, appellant ran away from the scene of occurrence. Prosecutrix has nowhere said that appellant removed his pant completely and his private part was visible. According to her own version, it appears that the prosecutrix was thrown on the ground and her underwear was removed, thereafter appellant opened his pant, in between all these acts, she cried, upon which appellant ran away. This shows that appellant did not remove his pant completely and there is no statement of the prosecutrix that, after throwing her on the ground, appellant sat on her body and tried to penetrate male organ into her private part. In this view of the matter, even

if the complete statement of the prosecutrix is accepted about the incident, the offence would not fall Under Section 376/511 of the IPC.

12. In case of State of M. P. v. Babulal (1960 Cri LJ 612) (supra), this High Court has considered the difference between attempt to commit rape and to commit indecent assault in the following words :--

'The distinction between an attempt to commit rape and to commit indecent assault is sometimes very meagre. For the former, there should be some action on the part of the accused which would show that he is just going to have sexual connection with the prosecutrix. For an offence of an attempt to commit rape the prosecution must establish that it has gone beyond the stage of preparation. The difference between mere preparation and actual attempt to commit an offence consists chiefly in the greater degree of determination'.

13. In this case, Justice S.B. Sen has referred the judgment rendered by Division Bench consisting of Justice Mirza and Broomfield of Bombay High Court and in that case the complainant, a milkmaid, aged 12 or 13 years, who was hawking milk, entered the accused's house to deliver milk. The accused got up from the bed on which he was lying and chained the door from inside. He then removed his clothes and the girl's peticoat, picked her up, laid her on the bed, and sat on her chest. He put his hand over her mouth to prevent her crying and placed his private parts against hers. There was no penetration. The girl struggled and cried and so the accused desisted and she got up, unchained the door and went out. It was held that the accused was not guilty of attempt to commit rape but of indecent assault. The point of distinction between offence to commit rape and to commit indecent assault is that there should be some . action on the part of the accused which would show that he is just going to have sexual connection with her. In the Bombay case, the cries of girl desisted the accused.

14. In case of Ankariya v. State of M. P., (1991 Cri LJ 751 (M.P.) (supra), the facts where that accused loosened cord of her petticoat and was about to sit on her waist but when she cried out for her husband, the appellant could not commit any act thereafter, the High Court has held that the appellant would be guilty for the offence punishable Under Section 354 of IPC and not Under Section 376/511 of

IPC.

15. In the instant case also the cries of the girl desisted the accused and accused even did not lay himself on the body of the prosecutrix and also did not expose his male organ but immediately ran away from the scene of occurrence. In this view of the matter, this Court is of the considered view that the offence against the appellant punishable Under Section 376/511 of IPC would not be made out but at the same time he would be liable for outraging the modesty of the prosecutrix by removing her underwear and which is punishable Under Section 354 of IPC.

16. In the result, the conviction of the appellant Under Section 376(2)(f) read with Section 511 of IPC is hereby set aside and he is convicted Under Section 354 of IPC. The appellant is in jail since 10-7-2004. He has completed total jail sentence uptill now of six months and twelve days. The learned counsel has submitted that the appellant is a first offender. He is a young lad aged 22 years and agriculturist. He is a married person having responsibility to maintain his wife, children and other members of the family. Therefore, he may be sentenced to the period already undergone, for the offence Under Section 354 of IPC, jail sentence is not mandatory. Therefore, in the opinion of this Court, the appellant has suffered sufficiently looking to the facts and circumstances of the case. Therefore, he is sentenced to the period already undergone with fine of Rs. 1,000/- as imposed by the trial Court, in default of payment of fine, he shall further undergo R. I. for three months. The learned trial Court is directed to release the appellant forthwith upon his depositing the fine amount.