

Dilip Vs. State of Madhya Pradesh

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Court : Madhya Pradesh

Decided On : Feb-14-1986

Reported in : 1987CriLJ212

Judge : K.L. Shrivastava, J.

Appellant : Dilip

Respondent : State of Madhya Pradesh

Judgement :

K.L. Shrivastava, J.

1. This appeal is directed against the judgment dated 22-10-1982 passed by the IXth Additional Sessions Judge, Indore in Sessions Trial No. 101 of 1982 convicting the appellant Under Section 376 of the Indian Penal Code and sentencing him to undergo rigorous imprisonment for six months.

2. According to prosecution case the appellant on 16-3-1982 met the prosecutrix Ku. Sandhya (P.W. 1), a school girl aged 16 years, and proposed to marry her. He, under threat, took her in an auto-rickshaw to Bank Colony, Indore. From there in the evening he took her to Rajendra Nagar and from there to Mhow by bus. Then they boarded the train for Khandwa and reached there by 3 A.M. From there they proceeded to Kalyan (Maharashtra). On 17-3-1982 at Kalyan the appellant thrice committed rape on her in the residence of his elder brother Umesh. On 19-

3-1982 the elder brother of the appellant brought them back to Indore and she was handed over to her parents.

3. At Indore, when the prosecutrix did not return home on 16-3-1982 her father Balkrishna (P.W. 3) lodged the report Ex.P6. After recovery of the girl the first information report vide Ex. P-7 was recorded against the appellant and investigation was set afoot.

4. At the conclusion of the investigation the appellant was prosecuted for offences under Under Sections 363, 366 and 376 of the I.P.C. with the result already stated. The learned trial Court relying on the decision in S. Varadarajan's case : 1965 CriLJ33 has acquitted the appellant of the offences u/ss 363 and 366 of the IPC.

5. The case of the appellant at the trial was one of denial. According to him he had been falsely implicated.

6. The principal point cropping up for consideration in this appeal is whether on the material date the prosecutrix was below 16 years of age.

7. The contention of the appellant's learned Counsel is that the material on record is insufficient to sustain the conclusion that on the relevant date the prosecutrix was under 16 years of age. Reliance was placed on the decision in Ram Murti v. State of Haryana : 1970 CriLJ991 . He urges that the birth-certificate of the prosecutrix was produced at the fag-end of the trial and the learned trial Judge erred in taking it into consideration in determining the age of the prosecutrix. Inviting my attention to the report of the Radiologist which is to the effect that on 22-3-1982 the prosecutrix was between 16 to 18 years of age, he contends that at any rate it has to be held that the prosecution has been unable to prove beyond reasonable doubt that her age, on the relevant date, was under 16 years.

8. The learned trial Judge held that the birth certificate, a public document, clearly shows that a daughter was born to Balkrishna and Shantabai in M. Y. Hospital, Indore on 7-9-1966. learned Counsel for the State contends that on a cumulative consideration of the material on record the conclusion arrived at by the learned trial Judge is unassailable.

9. It cannot be gainsaid that in a case Under Section 376 of the I.P.C, the controversy as to the age of the prosecutrix being under or above sixteen years on the relevant date is always of importance and the evidence touching it has to be carefully examined. Now as to the evidence in this case. Balkrishna (P.W. 3) is the father of the prosecutrix and Shantabai (P.W. 2) is her mother. Both of them have stated that the prosecutrix was born on 7-9-1966. In her cross-examination Shantabai has stated that the prosecutrix was born in M. Y. Hospital, Indore. The birth certificate Ex. P-II issued by the Municipal Corporation Indore shows that a daughter was born to Balkrishna and Shantabai in M.Y. Hospital Indore on 7-9-1966. It is a public document and has rightly been admitted.

10. Smt. Sakorikar (P.W. 5) is the Principal of Malava Kanya Vidhyalaya, Indore. According to the School register produced by her, the date of birth of Ku. Sandhya is 7-9-66. This date was recorded on the basis of mark-sheet of the Middle School vide Ex. P-2.

11. Dr. R. K. Khare(P.W. 7) had on 22-3-1982 taken skiagram (vide Ex.P-4) of the elbow and wrist joints of the prosecutrix. He has opined that on that date the age of the prosecutrix was between 16 to 18 years with a margin of 3 years on either side due to variety of reasons. Ex. P-5 is his report. Due to the margin stated by the witness it cannot be said that the medical evidence militates against the other consistent evidence regarding the age of the prosecutrix. The Supreme Court decision in Ram Murti's case (1970 Cri LJ 991) is clearly distinguishable. In that case despite medical advice for x-ray examination of the prosecutrix to find out her age, it was not got done. The appellant had been acquitted of the offence Under Section 376 of the I.P.C. and in the circumstances it was observed that for the offence Under Section 366 of the I.P.C. the question of age deserved to be 'examined more closely. On the material on record the trial Court's conclusion that the prosecutrix was under sixteen years is upheld.

12. The testimony of the prosecutrix Ku. Sandhya (P.W. 1) that the appellant thrice had sexual intercourse with her at Kalyan is, in the circumstances of the case, entitled to credence though she had not complained of it to any one earlier. This omission is explicable as according to the finding of the learned trial Judge she

had willingly eloped with the appellant.

13. Section 375 of the I.P.C. defines the offence of 'rape' and Section 376 ibid embodies the penal provision for it. Section 375 has five clauses. According to clause fifth read with the exception, a man is said to commit 'rape' who has sexual intercourse with a woman not being his wife, with or without her consent, when she is under sixteen years of age. It may be noted that consent of such a woman is wholly immaterial and furnishes no defence.

14. Dr. J. Engineer (P.W. 4) who had examined the prosecutrix on 20-3-1982 has stated at the trial that there were no signs of rape on her and she was habituated to sexual intercourse but as the prosecutrix has been found to have been under 16 years, there is no escape from the conclusion that the appellant is guilty of the offence of rape.

15. The appellant's learned Counsel also contended that as the offence of rape was committed by the appellant at Kalyan in Maharashtra the Court below had no jurisdiction. In view of the provisions embodied in Sections 184(a) and 220(1) of the Code of Criminal P.C. 1973, his trial at Indore for this offence together with the other offences was legally permissible. The provisions are in these terms:

184. Place of trial for offences triable together.-- Where --

(a) the offences committed by any person are such that he may be charged with, and tried at one trial for, each such offence by virtue of the provisions of Section 219, Section 220, or Section 221,

(b)....

the offences may be inquired into or tried by any Court competent to inquire into or try any of the offences.

220. Trial for more than one offence --

(1) If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence.

In this connection the decision in *State of Karnataka v. Balakrishna* 1980 Cri LJ 1145 (Kant) may usefully be perused. Therein it has been observed as under:

Therefore, it is clear, to constitute 'same transaction' the series of acts alleged against the accused must be connected together in some way as for instance by proximity of time, unity of place, unity or community of purpose or design and continuity of action and the main test must really be continuity of action by which is meant the following up of some initial act through all its consequences and incidents until the series of acts or group of connected acts come to an end.

It is the intention mentioned in the former part of Section 366 of the I.P.C. which gives an indication whether the offence of kidnapping and rape form part of the same transaction.

16. The learned Counsel for the appellant next contended that at any rate, the appellant having been acquitted of the offences Under Sections 363 and 366 of the I.P.C. it cannot be held that the learned trial Court was left with any jurisdiction to enter conviction for the offence Under Section 376 of the I.P.C. The contention is wholly devoid of merit. Section 177 of the Code lays down that the question of Court's territorial jurisdiction for trial of offences is ordinarily determined with reference to the place where the acts constituting the alleged offences are committed. That jurisdiction is not ousted only because it is ultimately held that the acts do not in the eye of law constitute one or more of the offences. Then there being no failure of justice, the provision Under Section 462 Cr. P.C. cures any error as to territorial jurisdiction.

17. The learned trial Court relying on the decision in *Gajraj v. State* 1968 MPLJ (Notes) 48 has rightly sentenced the appellant who is in his teens to undergo rigorous imprisonment for six months.

18. In the ultimate analysis, the appeal fails and is dismissed. The conviction of the appellant Under Section 376 of the I.P.C. and the sentence passed thereunder are maintained. The appellant shall surrender to his bail bonds and shall serve out the sentence imposed on him.

