

Jhalli Vs. State of M.P.

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Court : Madhya Pradesh

Decided On : Apr-17-2001

Reported in : 2001CriLJ4606; 2001(3)MPHT113

Judge : Mr. R.B. Dixit, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 376 and 376(2); Code of Criminal Procedure (CrPC) , 1974 - Sections 313 and 374(2)

Appeal No. : Criminal Appeal No. 239/97

Appellant : Jhalli

Respondent : State of M.P.

Advocate for Def. : Shri P.D. Bidua, Panel Lawyer

Advocate for Pet/Ap. : Shri V.D. Sharma, Adv.

Disposition : Criminal appeal dismissed

Judgement :

R.B. Dixit, J.

1. Feeling aggrieved by the judgment and order of conviction dated 27-12-1996 passed in S.T. No. 112/89 of Additional Judge to Sessions Judge, Morena at Sabalgarh, thereby convicting appellant under Section 376, IPC and sentencing

him with 10 years' RI and fine of Rs. 1,000/- appellant has come up in appeal seeking redress praying for setting aside the aforesaid order of conviction and sentence passed against him.

2. Facts shorn of details necessary for the disposal of this appeal lie in a narrow compass.

On 17-8-1989 when prosecutrix Meena (P.W. 1), a minor girl, aged 9 years, was playing in her house with her younger sister, Mamta, co-accused Rampa, came there and asked her to accompany him upto Haar (fields), he will offer ground-nuts. She, therefore, left with Rampa and when she reached in the field, appellant-accused Jhalli, who was already waiting there, caught hold of her and threw her on the ground and then raped her. When she tried to cry, appellant placed his hand on her mouth. When bleeding started from vagina, appellant released her, however, co-accused Rampa soon took her under his control and raped her. On being released by Rampa, both the accused persons left her and she came to her house and related the incident to her mother and other family members, who took her to Police Station, Kelaras, where she lodged first information report (Ex. P-1).

3. The prosecutrix was referred for medical examination and Dr. (Smt.) Pradeep Saxena (P.W. 8), who examined her found following injuries on her person :--

'(1) Abrasion 1' x 1/4' traverse over middle of right side of back of chest;

(2) Abrasion 1/2' x 1/4' about 1' below the injury No. 1.

(3) Laceration 1 cm linear at 6 O'clock position at introitus. Dirty blood stained found; and

(4) Hymen torn and swollen. Reddish in colour.'

The lady doctor, who examined the prosecutrix, has also noticed some secondary sex characters in her report (Ex. P-4) indicating height 4', pubic hair-absent, breast not developed and menses not started. On the basis of clinical examination, her approximate age was found between 9-12 years.

4. For the confirmation of the age of the prosecutrix, ossification test (Ex. P-7) was conducted by Dr. Yogendra Singh (P.W. 6). According to him, the age of the prosecutrix on the basis of ossification test was 9 years. He has admitted that there can be a margin of 2 years either side in case of ossification test. Thus the age of the prosecutrix, if margin of two years is added cannot be more than 11 years.

5. Appellant was referred for medical examination and he was found capable of performing intercourse. His age was found between 17 to 19 years. Co-accused Rampa alias Rampal was found between aged 10-13 years and, therefore, his case was referred to Juvenile Court.

6. The Chhaddi and the Pant worn by the prosecutrix at the time of occurrence were collected in a sealed packet from the hospital and sent for chemical examination. Chaddi of appellant was also recovered and sent for chemical examination. These articles were found stained with human blood.

7. The defence of appellant was one of complete denial and false implication out of enmity. The learned Trial Court after recording prosecution evidence and examining accused under Section 313, Cr.P.C. found the appellant guilty of offences under Section 376, I.P.C. and sentenced him to 10 years' RI and fine of Rs. 1,000/-.

8. The learned counsel of the appellant has submitted that there are material contradictions in the evidence of the prosecutrix and the first information report lodged by her. There is no definite finding in her medical examination regarding rape being committed on her. The learned Govt. Advocate on the other hand has supported the findings of the Trial Court. I have heard learned counsel of the parties at length and perused the evidence on record.

9. Prosecutrix, Meena (P.W. 1) has stated that accused Rampa called her from her house and she went with him unaware of what is going to be happened. On reaching the appointed place of occurrence, appellant Jhalli committed rape with her. When she tried to raise hue and cry, he placed his hands on her mouth and also gagged her mouth with cloth. Thereafter she was raped by co-accused

Rampa. After she was released by the accused persons, she came to her house and told what had happened with her to her mother. She was taken to police station where she lodged first information report.

10. The learned counsel of the appellant has drawn my attention to the statement of prosecutrix towards para 5 of her cross-examination where she has admitted that she was first raped by accused Rampa while appellant was standing at a distance. Rampa kept himself busy in intercourse for about an hour and on being seen by appellant, she started crying. According to learned counsel of the appellant, this indicates that appellant had not committed any rape with her, but his name was dragged with co-accused Rampa on her being seen by the appellant. I am of the opinion that the prosecutrix was examined after about more than a year from the date of the incident and in such a situation, she might have forgotten as to which of the accused had first committed rape on her. The evidence of a witness has to be seen in its totality and in this view of the matter, if the entire evidence of the prosecutrix is to be looked into, it is amply clear that both the accused persons had taken her in the field where both of the accused persons one by one had raped her. That was further made clear in para 7 of her cross-examination where she had denied that only Rampa had committed rape on her and categorically stated that she was raped by both the accused persons. The evidence of the prosecutrix in such a circumstance inspires confidence and cannot be disbelieved only for the reason that she forgot as to which of the accused had raped her first.

11. Gomti (P.W. 2) is mother of the prosecutrix to whom she informed about the occurrence first. Her evidence is further corroborated by medical evidence of Dr. (Smt.) Pradeep Saxena. In the circumstances, there is nothing to disbelieve the evidence of the prosecutrix which stands duly corroborated by medical evidence. It has to be noticed that it is a case of gang rape. However, the learned Trial Court has not clearly mentioned as to under which part of Section 376, IPC the conviction was awarded. However, it is a simple curable irregularity and can very well be corrected in the appeal. The conviction of the appellant, therefore, is modified to one under Section 376(2)(f)(g) of IPC. The learned counsel of the appellant has further argued that the lady doctor, who examined prosecutrix, has

nowhere stated that rape was committed with her. I am of the opinion that where hymen is found torn and swollen is a sufficient indication that the rape was committed with prosecutrix.

12. In case of *Ranjit Hazarika v. State of Assam* reported in (1998) 8 SCC 635, even in case of non-rupture of hymen or absence of injury on victim's private parts, it was held that it does not believe her testimony as she nowhere stated that she bled per vagina and her statement remained virtually unchallenged in cross-examination. To constitute rape penetration, however, slight is sufficient.

13. In so far as sentence is concerned, the learned counsel of the appellant has urged that at the time of occurrence, the appellant was only about 17 or 18 years of age and has already remained in jail for more than 4 years. On this point, in case of *State of Andhra Pradesh v. Polamala Raju*, reported in 2000 AIR SCW 3009, where rape was committed on a child below 12 years of age, it was observed that the Courts are obliged to respect this legislative mandate when the case falls under the proviso to Section 376(2) IPC, wherein it has been laid down that in exceptional cases, 'for special and adequate reasons', sentence of less than 10 years' RI may also be awarded in a given case. It has further been pointed out that if there are no extenuating or mitigating circumstances available on the record which may justify imposition of sentence less than the prescribed minimum on the appellant. To show mercy in a case like this, would be travesty of justice. The plea that because of long time has elapsed subsequent to the date of offence and the possibility that the prosecutrix, as also the accused may have got married and settled in life during the pendency of these proceedings cannot be countenanced. The sentencing Court must bear the loud cry for justice by the society and more particularly, in case of heinous crime of rape of innocent helpless children, as in this case, of the victim of crime and respond by imposing a proper sentence.

14. I am of the considered opinion that the young age of the accused in itself does not constitute a special and adequate reason for reduction of period of sentence in the present case also.

15. For the reasons stated hereinabove, there is no reason to interfere with the findings of the conviction and sentence against the appellant as returned by the Trial Court. This appeal fails and is dismissed accordingly.

16. Criminal Appeal dismissed.

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