

Premnarayan Vs. State of M.P.

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Court : Madhya Pradesh

Decided On : Dec-31-1988

Reported in : 1989CriLJ707

Judge : R.C. Lahoti, J.

Appellant : Premnarayan

Respondent : State of M.P.

Judgement :

R.C. Lahoti, J.

1. The accused/appellant has been held guilty of an offence punishable under Sections 376/511 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for two years with a fine of Rs. 500/- and further rigorous imprisonment for 3 months, in default of payment of fine. An amount of Rs. 400/-, out of the fine realised, has been directed to be paid as compensation to Suman Bai the prosecutrix.

2. Savitri Bai (P.W. 2) is the widow of Sukhnandan. Suman, who was aged about 9 years at the time of the incident, is her daughter. Sukhnandan was alive at the time of the incident, but died during the trial and could not be examined as a witness. Sukhnandan used to run a flour-mill at the outskirts of the village and near the fields. It is alleged that on 26-8-81 at about 5 p.m., Suman went to the flour-mill

to relieve her father Sukhnandan so as to enable him taking his meals. Sukhnandan went home, leaving Suman alone at the flour-mill, for keeping a watch. The accused/appellant taking advantage of loneliness approached the innocent girl with an indecent offer, which she naturally declined. The accused/appellant overpowered by his lust, forcibly dragged Suman towards the fields and made her lie down behind the thick bushes of Babool and Chhola. With one hand he kept Suman lying on the ground forcibly and with the other hand he removed the undergarments of Suman as also the undergarments of his own. Then he committed rape on Suman. Suman pierced a cry. She started bleeding profusely. Her cry was heard by Sukhnandan, who had returned to the flour-mill by that time. Sukhnandan responded by shouting - what was the matter? At this, the accused ran away leaving the bleeding and weeping girl behind. Suman was taken home, where she narrated the incident to her mother Savitri Bai (P.W. 2). Savitri Bai applied pads over the bleeding private parts of Suman, Sukhnandan contacted the village patel, arranged for a bullock cart and took Suman to the Police Station Unnai, situated at a distance of 11 Kms. where Suman lodged the F.I.R., Ex. P/1, at 11.20 p.m.

3. Suman was referred for medical examination. She was examined by Dr. (Mrs.) Dipika Chaudhary, Lady Assistant Surgeon at the Female Hospital Datia. She found the girl to be 9 years of age. The sex characters were not developed. Marks of violence were not seen over the body. Labia majora and minor a were not still developed. Fresh blood was oozing out from torn hymen. Vagina admitted only the tip of the little finger with difficulty. On account of pain, Suman did not permit P/V examination. Dr. (Mrs.) Chaudhry could not give a definite opinion about rape by mere clinical examination. However, she prepared slide of the vaginal swab, also seized the underwear and pads of the victim and delivered them to the Police, after sealing them, for chemical examination.

4. The Chemical Examiner in his report, dt. 31-12-1981 (Ex. P/7) confirmed the presence of blood on the slide, underwear and pads, but seminal stains and spermatozoa could not be detected over them. The Serologist also confirmed the presence of human blood on the underwear and pads.

5. The accused could be apprehended only on 7-10-1981. He was promptly referred for medical examination. But nothing incriminating could be found on his person, though he was found sexually capable. Needless to say that by the time the accused was medically examined, about one and a half month had elapsed from the date of the incident.

6. On completion of usual investigation, the accused/appellant was challaned and charged under Section 376, I.P.C. On appreciation of the evidence, the trial Court expressed dissatisfaction at the manner in which Dr. (Mrs.) Chaudhry had examined the victim of rape. Giving the maximum benefit to the accused, the trial Court held that penetration could not positively be held to have taken place and as such convicted the accused under Section 376 read with Section 511, I.P.C. holding the accused responsible only for attempting to commit rape.

7. The learned Counsel for the appellant before this Court seriously criticised the evidence of Suman, the prosecutrix and submitted that the implication of the accused is an outcome of enmity entertained against him by one Dr. Ramesh who has been instrumental in concocting the story. Alternatively, it is submitted that the offence committed by the accused would, at worst, be punishable under 'Section 354, I.P.C. and not under Sections 376/511, of the Penal Code.

8. It is submitted by the learned Counsel for the appellant that Suman is a child witness, who has not been administered oath by the trial Court because she did not understand the sanctity of oath and as such her testimony should not have been accepted without corroboration; and corroboration cannot be had from the statement made by her to her mother Savitri Bai (P.W. 2) because that statement was not voluntarily made but was made in reply to a query. The counsel placed reliance on the dictum of this Court in *Pratapsingh v. State of M.P.* 1970 Jab LJ 797 : 1971 Cri LJ 172. It is also submitted that the medical evidence does not corroborate the prosecutrix and the F.I.R. too was not lodged by the prosecutrix, but by her father, as admitted by Suman (P.W. 1) herself in her cross-examination, and as such the F.I.R. could also not have been used to corroborate the statement and conduct of prosecutrix. 'plus if the testimony of Suman is discarded there remains nothing on which the conviction could rest.

9. In the light of the submissions made by the learned Counsel for the appellant, the first point is to find out who actually lodged the F.I.R. (Ex. P/1). Suman (P.W. 1) in her examination-in-chief stated that the report, Ex. P/1, was lodged by her. In the Court, the contents of the F.I.R. were read over to her by the prosecuting counsel and she admitted that such was the report as was made by her. During cross-examination, she stated that having reached the Police Station, she had remained lying down presumably because of pain suffered by her and thereafter in answer to a vague question she stated that because of being unconscious 'she did not state anything' that 'she put her thumb mark on being asked by her father'. In my opinion, such a vague cross-examination does not help the defence at all. In view of the positive and categorical statement made by her in the examination-in-chief that she was the author of the F.I.R., it was expected of the defence to have probed further in cross-examination so as to clearly establish that she was not the author of the F.I.R. It may be stated that she did deny the defence suggestion to the effect that all was stated by her father at the Police Station.

(9.1). Further, B. S. Sahi, Sub-Inspector of Police, who recorded the F.I.R., was examined as P. W. 6, and he stated in so many words that F.I.R., Ex. P/1; was recorded at the instance of Suman and bore her thumb mark. This witness was left totally uncross-examined. If at all the defence wanted to develop a case that the F.I.R. was taken down not at the instance of Suman the prosecutrix, but at the instance of some one else, it is expected that such a suggestion should have been made to this witness. If only, the father of the prosecutrix, who unfortunately died before he could be examined at the trial, would only have been available, the little ambiguity introduced by the defence, would have been removed without any difficulty.

(9.2). The argument that Suman was not the maker of the F.I.R. is sought to be built-up on the unfortunate situation arising, from the fact of the prosecutrix being an innocent child and her father, who accompanied her to the Police Station, having died. It will be useful to read para 17 of the judgment of the Apex Court in *State of U.P. v. Anil Singh* AIR 1988 SC 1993 : 1989 Cri LJ 88, wherein their Lordships refused to accept a similar submission of the defence counsel because concerning prosecution witness was not specifically cross-examined on that matter,

by observing, that the Court could not presume something adverse to the witness unless its attention was specifically drawn to and because the records contained unimpeachable evidence to the contrary. In the present case, Suman having not been specifically cross-examined and unimpeachable evidence to the contrary being available in the shape of the statement of B. S. Sahi, S.I., (P.W. 6), the defence contention that the F.I.R. was not lodged by Suman cannot be accepted and stands discarded.

10. It is well settled that in sexual offences the need of corroboration of prosecutrix is more a rule of prudence and not one of law. If a Judge of facts is convinced that the testimony of a young victim of sexual offence can be relied on and the witness is one of truth, the need for corroboration is rendered unnecessary.

In Gurucharan Singh v. State of Haryana : 1973 CriLJ179 their Lordships observed -

A prosecutrix cannot be considered as an Accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence. As a rule of prudence, however, Court normally looks for some corroboration of her testimony so as to satisfy its conscience that she is telling the truth and that the person accused of rape on her has not been falsely implicated.

True, it is that oath was not administered to Suman because the trial Judge was of the opinion that she did not understand the sanctity of oath, but that does not in any way create a hurdle in the way of her testimony being accepted. It will be useful to recall the law laid down by the Apex Court in the leading authority of Rameshwar v. State of Rajasthan : 1952 CriLJ547 , viz.-

A Judge who recorded the statement of a girl of seven or eight years certified that she did not understand the sanctity of an oath and accordingly he did not administer one to her. He, however, did not certify that the child understood the duty of speaking the truth. The question was whether this omission rendered her evidence inadmissible.

An omission to administer an oath, even to an adult, goes only to the credibility of the witness and not his competency. The question of competency is dealt with in Section 118, Evidence Act. The Oaths Act does not deal with competency and under Section 13 of the Act omission to take oath does not affect the admissibility of the evidence.

It therefore follows that the irregularity in question cannot affect the admissibility of the evidence of the girl.

It is, however, desirable that Judges and Magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether.

Whether the Magistrate or Judge really was of that opinion can, however, be gathered from the circumstances when there is no formal certificate. One can presume that the Judge had that in mind from the fact that he examined the child after referring to a fact which arises out of the proviso.

11. In the present case reading the statement of Suman (P.W. 1) as a whole, it is clearly borne out that she fully understood the questions which were asked of her and she gave a very natural and truthful version Of the incident as it occurred. She was cross-examined at length, for two days, but nothing could be brought out to detract from the weight of her testimony. There does not appear any likelihood of her being tutored. She stands corroborated by the testimony of her mother Savitribai (P.W. 2) and another villager Brijkishore (P.W. 4) to whom she narrated the gist of the incident soon after the occurrence on being asked and when she was still under impulse of sexual assault on her. The F.I.R. (Ex, P/1) having been held to have been lodged by her shortly after commission of the crime also lends corroboration to her testimony. She also stands corroborated by the medical evidence. In my opinion, the trial Court committed no error in placing reliance on her testimony.

12. As noticed earlier, the learned Counsel for the appellant has laid a vehement attack on the testimony coming from the mouth of Savitribai (P.W. 2) and Brijkishore (P.W. 4), contending that it would not be admissible under Section 6 of the Evidence Act, because it has come in the Evidence that the statement made by the prosecutrix was not voluntary but was made on being questioned by her mother and Brijkishore. This argument has to be rejected.

13. The subject treated in English and American books under the head of 'Res Gestae' is found spread over Sections 6, 7, 8 and 9 and partially over Section 14 of the Indian Evidence Act. Sir James Stephen defined 'res gestae' as a group of facts so connected together as to be referred to by a single name, as a crime, a contract, a wrong or any other subject of enquiry which may be in issue. The rule of the evidence is admit res gestae and exclude res inter alios. Illustrations deducible from the decided cases reveal that a statement of wife : immediately upon a hurt received and before she had time to devise anything to her own advantage, was held admissible. The statement of a victim shortly after he sustained injuries that the accused inflicted them was held admissible under Section 6. State of excitement may well continue to exist after the exciting fact has ended and it is this human factor that renders declaration made under excitement admissible in proof of the exciting fact. The declaration, though subsequent to the occurrence, is yet held admissible because the Judge of fact is persuaded to accept the assumption that the influence of the exciting fact continued till the declaration was made, there being proximity of time between the exciting fact and the declaration. The test is to exclude the possibility of fabrication or the possibility of anything having been devised to one's own advantage, meaning thereby that there was a substantial contemporaneity between the declaration and the fact though the declaration may be made during or immediately before or after its occurrence. If a Judge of fact is convinced that the interval, howsoever slight, between a declaration and the fact, is one that probalised fabrication, the declaration ceases to be part of res gestae. On the contrary, the interval, not short, but is such as permits deduction of an inference that declarant was stilt under excitement of the fact, the declaration would be part of res gestae.

14. Pratap Singh 1971 Cri LJ 172 (SC) (supra) needs a closer peep into its facts because implicit reliance has been placed by the learned Counsel for the appellant on it. In a charge for murder, the husband and brother of one Mst. Mahadevi were the accused and Mahadevi was the sole eye-witness. She turned hostile and did not support the case of the prosecution. One Sarfaraz Beg had passed by the house of the accused-appellants, after the incident and when the accused had fled away. He was told by Mst. Mahadevi that her husband and brother had run away after committing the murder. Mst. Mahadevi, at the trial, disowned having made any such statement and the question was whether the testimony of Sarfaraz Beg deposing to Mst. Mahadevi's statement made to him could be admitted in evidence. Their Lordships observed that the statement of Mst. Mahadevi made to Sarfaraz Beg did not at all appear to be spontaneous and appeared to have been made some time after the incident in answer to a query. (Emphasis supplied). Needless to say that these observations of their Lordships were based on evidence of that case. Their Lordships also held : 'If no one had asked her, how it happened, she would not have made any statement at all' (Emphasis supplied). It is in the background of these findings that their Lordships held that the statement made by Mst. Mahadevi, coming to the Court from the mouth of Sarfaraz Beg, was not admissible in evidence under Section 6 and was excluded from consideration. It may also be stated that the question of applicability of Section 157 of the Evidence Act did not arise at all because of Mst. Mahadevi having disowned the making of such a statement at the trial.

15. The present case is distinguishable from the case of Pratapsingh 1971 Cri LJ 172 (SC) (supra). It cannot be inferred that Suman had been tutored for fabrication of that she was devising something to her own advantage between the time of outrageous assault on her and the time when she made her statement to her mother and to Brijkishore. She was weeping. She was wearing bloodstained underwear. She was coming to home straight from the place of incident and had not met anyone else on way. It cannot be said that Suman would not have made the statement to her mother and Brijkishore if she were not questioned.

16. In Para 12 of Pratapsingh the Division Bench cited with approval, a decision of Calcutta High Court in Chhotka v. State AIR 1953 Cal 482 : 1958 Cri LJ 1170

holding that the requirement of Section 6 is that the statement must have been made contemporaneously with the act or immediately after it and not at such an interval of time as to make it a narrative of past events or to allow time for fabrication.

17. The word 'spontaneous' has been defined to mean 'of one's free will, acting by its own impulse; produced of itself. (Chamber's 20th Century Dictionary, New Edition). The Division Bench in Pratapsing (1971 Cri LJ 172) was emphasising 'contemporaneity' and 'spontaneity' in juxtaposition with 'a delay making it a narration of past event' and 'availability of time for fabrication'. It, therefore, follows that the statements by Suman to her mother and Brijkishore, though in answer to a question posed by each of the two to her, were spontaneous. They were made when she was still under excitement of the incident that had taken place with her. The statements would certainly be admissible under Sections 6 and 8, Illus. (j) of the Evidence Act.

18. Situations may arise where a statement though not admissible under Section 6, may yet be admissible under Section 8 as evidence of the conduct or as a former statement corroborating the testimony of a witness under Section 157 of the Evidence Act. It has been held that the statement of Suman made to her mother and Brij Kishore is admissible under Sections 6 and 8, Illus. (j) of the Evidence Act. Yet, I hasten to add that even if the statement would have been excluded from consideration under S.6 of the Evidence Act, it would certainly have been admissible under Section 157 of the Evidence Act.

19. The F.I.R. (Ex. P/1) held to have been lodged by Suman, and admissible in evidence under Section 157, Evidence Act, though not as a substantive piece of evidence, lends corroboration to her statement made in the Court.

20. There is equally no substance in the submission that the entire story has been concocted at the instance of Dr. Ramesh. He does not figure as a witness in the case. Only this much has come on record that after happening of the incident and before the prosecutrix accompanied by her father went to lodge the F.I.R., Or. Ramesh had come to the house of the prosecutrix. He too, having become aware of the incident, had suggested the father of the prosecutrix to report the matter to

the Police. It is difficult to infer that merely because of this, the F.I.R. should be presumed to be a false one. There is nothing to infer that the F.I.R. would not have been lodged but for instigation by Dr. Ramesh. It will be too much to hold that the parents of the prosecutrix would have agreed to the lodging of a false report involving the repute of their daughter, bringing a bad name to them and their young girl of tender age, merely to satisfy an evil design of Dr. Ramesh.

21. Lastly, the exact nature of the crime committed by the accused remains to be examined. Would the act of the accused amount to an indecent assault merely, punishable under Section 354, I.P.C., as contended by the learned Counsel for the appellant? A few authorities may be noticed.

(i) In *Sittu v. State*, it was held that forcibly making a girl naked and repeatedly trying to force the male organ into her private parts despite strong resistance from her amounts to attempt to commit rape and not merely indecent assault.

(ii) In *Bhartu v. Emperon* AIR 1933 Lah 1002 (II) : 1934-35 Cri LJ 432, the accused caught hold of a girl, threw her down, put sand in her mouth, got on her chest and attempted to have intercourse with her. The accused could not succeed on account of resistance offered by the prosecutrix and the witnesses having attracted by the screams of the prosecutrix, whereupon, the accused ran away. It was held that the accused had gone much beyond the stage of 'preparation', and his act clearly amounted to an attempt to commit rape and not merely an offence under Section 354, I.P.C.

(iii) In *Maria raj Din v. Emperor* AIR 1927 Lah 222 : 1927-28 Cri LJ 244, a lad of 18 stripped of the trousers of a female child of five and a half years and seated her on his naked thighs; there was no bleeding from the private parts of the prosecutrix, but there was fresh redness at the entrance of the vagina; there was no other mark of injury and her hymen was intact. It was held that the act of the accused had gone beyond an indecent assault and amounted to an attempt to effect penetration, though unsuccessfully and hence the offence was an attempt to commit rape.

(iv) In *Kishen Singh v. Emperor* AIR 1927 Lah 580 : 1927-28 Cri LJ 663, the accused caught hold of the girl, sat on to the charpoy of the prosecutrix, having undone the string of her Pyjama and was seen struggling with her when the witnesses came up in answer to the prosecutrix's cries, whereupon the accused ran away; it was held that the facts rightly attracted conviction under Sections 376/511 of the Indian Penal Code.

(v) In *Khadam v. Emperor* (1910) 11 Cri LJ 611 (Punj), the girl's statement as to penetration was not found safe to be acted upon, but the evidence proved that the accused had stripped her nearly naked and was lying upon her when her cries attracted people to the spot. It was held that offence fell under Sections 376/511 and not merely under Section 354, I.P.C..

(vi) In *Shankar Tukaram Ursal v. State of Maharashtra* 1977 Cri LJ 476 (Bom) also the statement of the prosecutrix as to penetration in the vulva was discarded, yet, it was found that the accused had already proceeded in the action and hence his act was punishable as an attempt to commit rape.

22. Every criminal act of rape or an attempt thereof does involve an indecent assault. In order to amount to an attempt to commit an offence, the act of the accused must have proceeded beyond the stage of 'preparation'. If the act of the accused does not constitute anything beyond preparation and falls short of an attempt, he may escape the liability under Sections 376/511, I.P.C, and may be liable to be convicted only for an offence amounting to an indecent assault. Their Lordships of the Supreme Court observed in *Abhaynand Mishra v. State of Bihar* : 1961 CriLJ822 :

There is a thin line between the preparation for and an attempt to commit an offence. Undoubtedly, a culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offence, if it fails due to reasons beyond his control, he is said to have attempted to commit the offence. Attempt to commit an offence, therefore, can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment

he commences to do an act with the necessary intention, he commences his attempt to commit the offence. A person commits the offence of 'attempt to commit a particular offence,' when (i) he intends to commit that particular offence; and (ii) he, having made preparations and with the intention to commit the offence, does an act towards its commission, such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence.

23. In the present case, it has been found proved that the accused caught hold of the prosecutrix at the flour-mill of her father and forcibly dragged her by the side of bushes and trees; he threw her down on the ground and removed her undergarments making her naked; he got over her; and he did attempt at penetration. The prosecutrix started bleeding from her private parts. In fact, Dr. (Smt.) Dipika Chaudhry deposed that the hymen of the prosecutrix had ruptured and she was bleeding therefrom, though the exact extent of tear could not be known because the prosecutrix being in severe pain and agony did not permit internal examination. I have grave doubts whether the trial Court was justified in acquitting the accused of the offence under Section 376, I.P.C. on the material that was available. I do not think it proper to enter into that question, for the present, because the State has not chosen to prefer an appeal from acquittal of the accused from charge under Section 376, I.P.C.

24. The learned Counsel for the appellant has relied upon an unreported decision of this Court in Pannalal v. State of M.P. Criminal Appeal No. 22/81, decided on 17-1 -83 at Gwalior. In that case, the facts found proved show that the accused was seen upon the prosecutrix, but the judgment does not disclose the exact position of the clothes of the accused and the prosecutrix. Further, the victim was a deaf, dumb and idiot girl who could not be examined as a witness and thus the best part of incriminating testimony was impossible to secure. The Court gave benefit of doubt and chose to act safer by holding the accused a guilty of minor offence punishable under Section 354, I.P.C. only.

(24.1). In Bhurasingh v. State of M.P. (1977) 1 MP WN 435 what was found to be proved was that the accused, aged about 70 years and so infirm as having tremble

in his hand, was found to have committed some act to outrage the modesty of the girl and in doing so caused, bleeding injuries to her, but it was riot proved beyond doubt that the accused inserted or attempted at inserting his penis in the private part of the girl. The accused was held to have committed an offence punishable under Section 354, I.P.C.

(24.2) Needless top to say that both these cases are distinguishable and do not have any applicability in the facts and circumstances of the present case.

25. In the opinion of this Court, the trial Court did no error in holding the accused-appellant guilty of having committed at least an attempt of committing rape on the prosecutrix. No fault can be found with that finding, at the instance of the accused-appellant.

26. Lastly, it is submitted by the learned Counsel for the appellant that the sentence is too severe and deserves to be reduced. I have already expressed a doubt that the accused has erroneously escaped conviction under Section 376, I.P.C. and has been held liable only for an attempt. It cannot be lost sight of that a girl of tender age has been the victim and the conduct of the accused shows an act of depravity and attrocity on his part. No further mercy is called for. Reference may be had to a recent decision of this Court in *Purshottam v. State of M.P.* (1988) 2 MP WN 236 on the question of sentence in such cases.

27. The result is that the conviction of the accused-appellant under Sections 376/511, I.P.C. recorded by the trial Court with sentence of two years' rigorous imprisonment and a fine of Rs. 500/- with rigorous imprisonment for 3 months in default, is maintained. The appeal is dismissed. The appellant shall surrender to his bail bonds and shall be taken into custody to serve out the remaining part of sentence.