

Kaptan Singh Vs. State of Madhya Pradesh

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Court : Madhya Pradesh

Decided On : Aug-12-2008

Reported in : 2008(5)MPHT228

Judge : A.P. Shrivastava, J.

Appellant : Kaptan Singh

Respondent : State of Madhya Pradesh

Disposition : Appeal dismissed

Judgement :

A.P. Shrivastava, J.

1. This appeal is directed by the appellant against judgment of conviction and sentence dated 2-3-2002 passed by VI Additional Sessions Judge, Gwalior (M.P.) in Sessions Trial No. 248/2001, whereby the appellant has been convicted under Section 366 of IPC and sentenced to undergo Rigorous Imprisonment for five years with a fine of Rs. 2,000/- and under Section 376 of IPC, sentenced to undergo Rigorous Imprisonment for seven years with a fine of Rs. 3,000/- with default stipulations.

2. According to the prosecution, the facts of the case are that a report (Exh. P-I) was lodged by the complainant Ramkali (P.W. 1), mother of the prosecutrix (P.W.

2) at Police Station Padav that after taking food at about 9 in the night while she got slept her daughter was reading near her. When she woke up in the night she found that her daughter was not in the house. She enquired from Lakhan, Ramesh and Deepak, who were also residing in the same locality. When she was searching her daughter, her daughter came out from the house of the appellant. On seeing her by the locality, her daughter disclosed that the appellant had assured to marry her and on this pretext gave a Pudia for mixing in the food for which her mother got slept and she was taken by the appellant to his house and committed sexual intercourse with her. After lodging the report, she was sent for medical examination. After completion of investigation, challan was filed before the Court from where the case was committed to the Court of Session. The learned Sessions Court acquitted the appellant of the charge under Section 363 of IPC but convicted under Sections 366 and 376 of IPC and sentenced him accordingly as stated above.

3. During the course of arguments, Counsel for the appellant challenged the conviction on the ground that the incident took place in the intervening night of 12-13 April, 2001 at about 9:00 p.m. - 3 a.m. but the report was lodged at 13-4-2001 at about 1:45 p.m. The distance of the police station from the place of occurrence is only 1 kilometer. The relatives of the complainant was present in the house. Therefore, the explanation given by the complainant is not satisfactory. Further, regarding the age of the prosecutrix no documentary evidence has been adduced by the prosecution. As per First Information Report, the age of the prosecutrix was shown to be 14 years but in ossification test, her age was found above 16 and below 19 years. The report is Exh. P-3. Therefore, it is not conclusively established that the age of the prosecutrix is below 18 years on the date of occurrence. Further, it is also submitted that the way the incident took place; the prosecutrix went to the house of the appellant who was also residing in the same locality and they know to each other, it appears that she was a consenting party. Therefore, the learned Trial Court has committed an error in convicting the appellant under Sections 366 and 376 of IPC.

4. Counsel for the respondent-State supported the judgment of the learned Trial Court and submitted that from the testimony of the prosecutrix, it does not appear

that she is a consenting party. She was taken away by the appellant by giving some thing to the prosecutrix so that her mother may sleep. So, she is not a consenting party.

5. Counsel for the appellant also submits that the story of the prosecutrix about love letters (Exh. D-3 to Exh. D-45) written by her and that she was forcibly taken by the appellant before the commission of act, is not truthful story. He submits that letters were written by her is not possible to be written just before commission of the act.

6. Ramkali (P.W. 1) who corroborated the version of given in Exh. P-I has deposed that appellant committed sexual intercourse with her daughter (P.W. 2) who is prosecutrix in the case.

7. Prosecutrix (P.W. 2) deposed that in the intervening night of 12-13 when she woke up for toilet. After opening the door, while she was going towards bathroom, she was caught hold of by the appellant, and thereafter threatened her by showing knife. Then he took her to his house by pressing her mouth. He forced her to write letters and thereafter committed sexual intercourse with her. When appellant heard the noise of people of the locality, she came out from the house and informed about the incident to her mother. In cross-examination, she deposed that when appellant caught hold of her, the appellant threatened her by showing knife. But this fact was omitted in her police diary statement (Exh. D-2). This fact was also omitted in the police diary statement that when she cried the appellant had shut his mouth. In her cross-examination, material contradictions and omissions came out. She also disclosed that in the house of the appellant, paternal and maternal uncle of the appellant were present and closed the door. Her statement is also omitted in her police diary statement (Exh. D-2). She denied that letters (Exh. D-3 to Exh. D-45) were written previously. But she admits that the letters were written by her hand. In cross-examination, she also disclosed her age is 6-1-1987 but he cannot say it is correct or not. No documents regarding the age of the prosecutrix have filed.

8. Deepak (P.W. 3) and Ramesh (P.W. 4) stated that Ramkali, mother of the prosecutrix came and informed that her daughter is in the house of the appellant.

After some time, she came out from the house of the appellant at about 3 in the morning. Similar statement has been given by Dilip (P.W. 5) but Ashok Kumar (P.W. 6) not corroborated the prosecution case and was declared hostile.

9. Dayal Singh (P.W. 7) and Mishrabai (P.W. 8) are also relatives of the prosecutrix, disclosed that prosecutrix informed them that appellant was taken her forcibly and committed sexual intercourse with her.

10. Dr. Amit Saxena (P.W. 12) examined the prosecutrix on 13th April, 2001 and opined that the possibility of sexual intercourse cannot be ruled out. In cross-examination, doctor submits that the some injury sustained on her hymen is not possible by self-infliction. The report is Exh. P-8.

11. The learned Trial Court acquitted the appellant under Section 363 of IPC by holding that it is not established that she was below 18 years of age at the time of occurrence but relying on the testimony of the prosecutrix found the appellant guilty for committing an offence of sexual intercourse with the prosecutrix and the act was committed by the appellant against her will.

12. Counsel for the appellant submits that the learned Trial Court has committed an error in holding that the appellant found guilty for commission of offence. Regarding material contradictions and omissions, he relied on Kheek Ram v. State of M.P. reported in 1997 (I) MPWN 94, in which it is held that under Section 161 of Cr.PC, 1973, police statements are the very foundation of prosecution case. No witnesses can be relied on for a fact which he does not state in police statement. Similarly, in the case of Dilip and Anr. v. State of M.P. : 2001 CriLJ4721 , it is held that truthfulness of version of the prosecutrix being doubtful, cannot be relied upon. In the case at Sagir v. State of M.P. 1989 C.Cr.J. NOC 45, it is also held that if a minor girl leaving her house voluntarily, a person commits intercourse with her, would be liable for conviction under Section 376 of IPC even though the intercourse has been done by her own will. But there is no medical evidence regarding this. Neither the statement of the prosecutrix is corroborated by any other evidence. Her own statement is exaggerated and unnatural hence unreliable. Counsel for the appellant also placed reliance in the case of Pappu v. State of M.P. 2005 (II) MPWN 132, in which it is held that statement of the

prosecutrix not corroborated by any witness alleged to have come on spot. Prosecutrix alleging that she was thrown on the earth but no injury was found. Medical evidence not giving definite opinion on rape. Therefore, the accused is entitled to benefit of doubt. Lastly, Counsel for the appellant relied on a decision of Hon'ble Apex Court in the case of Ujjagar Singh v. State of Punjab 2008 (1) CCSC 523 (SC), in which the appellant-accused was tried under Sections 376 and 302 of IPC. Appellant uncle alleged to have raped his niece. As vaginal swab and clothes taken from her dead body indicated presence of semen. But, absolutely no evidence to suggest that intercourse committed by appellant without her consent or against her will. From two injuries other than gunshot wounds on the dead body of victim not indicating any attempt to commit rape or commission of rape. Moreover, no attempt made by prosecution to get appellant medically examined to ascertain his capacity to perform sexual intercourse. Conviction of appellant under Section 376 of IPC is unsustainable.

13. During the course of arguments, much emphasis has been made about the consent of the prosecutrix.

The crux of the offence of rape under Section 375, IPC is sexual intercourse by a man with a woman against her will and without her consent under any one of the six circumstances mentioned in the section.

Consent is of paramount importance to determine the liability of a person for the offence of rape. Consent exonerate the accused from liability altogether. It may be either express or implied depending upon the nature and circumstances of a case. A woman is said to consent, only when she freely agrees to submit herself, while in free and unconstrained possession of her physical and moral power to act in a manner she wanted. Consent implies the exercise of a free and untrammelled (not hampered) right to forbid or withhold what is being consented to, it always is a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former.

Consent of the woman in order to relieve the accused of the charge of rape, must be an act of reason, accompanied with deliberation, after the mind has weighed as in a balance, the good and evil on each side, with the existing capacity and power

to withdraw the assent according to one's will or pleasure.

Submission under the influence of fear or terror is not consent and will not exonerate a person from liability. There is difference between consent and submission. In the case of *Rao Harnarain Singh, Seoji Singh v. State* reported in , it is held that consent is an act of reason accompanied by deliberation, a mere act of helpless resignation in the face of inevitable compulsion, quiescence non-resistance and passive going in cannot be deemed to be consent to exempt a man of the charge of rape. It was observed by the Court that a mere act of helpless resignation, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be 'consent' as understood in law. Consent, on the part of a woman as a defence to an allegation of rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge, of the significance and moral quality of the act, but after having freely exercised a choice between resistance and assent. It was further observed by the Court that there is a difference between consent and submission. Every consent involves a submission, but the converse does not follow, and a mere act of submission does not involve consent. Consent of girl in order to relieve an act of a criminal character like rape, must be an act of reason, accompanied with deliberation, after the mind has weighed as in a balance, the good and evil on each side, with existing capacity and power to withdraw the assent according to one's will or pleasure. Therefore, a woman is said to consent only when she freely agrees to submit herself, while in free and unconstrained possession of physical and moral power to act in a manner she wanted.

14. Therefore, looking to the above facts and circumstances of the case specially testimony of the prosecutrix, it appears that she was compelled to sexual intercourse by the appellant without her willingness and although she may have love affairs with the appellant but it cannot be said that on the date of incident, she was a willing party and had given her consent to the appellant for sexual intercourse. The learned Trial Court has rightly observed in Paras 49, 51 and 52 of its judgment.

15. Regarding the delay, the fact about the incident came to the knowledge of the complainant in the early morning at about 3 and the report was lodged on the same day at about 1:45 p.m. In cases of offence of rape, there are various factors which may cause some delay in lodging the report. Looking to the facts and circumstances of the case, delay of a few hours is not fatal to the prosecution case. Further, the objection regarding non-compliance of Section 157 of Cr.PC will not vitiate the trial of the case.

16. In view of the above submissions and the considerations of the entire evidence as adduced by the prosecution, I think the learned Trial Court has rightly found the appellant guilty under Sections 366 and 376 of IPC.

17. Thus, the finding of conviction and sentence as recorded by learned Trial Court does not require any interference.

18. Therefore, the conviction and sentence awarded by learned Trial Court is hereby affirmed. If the appellant is on bail, his bail bond shall stand cancelled. He is directed to surrender before the Trial Court to serve out the remaining part of sentence.

19. In me result, the appeal stands dismissed.