

State of M.P. Vs. Narendra Kumar

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Court : Madhya Pradesh

Decided On : Nov-05-1999

Reported in : 2000CriLJ2379; 2000(2)MPLJ399

Judge : D.N. Dharmadhikari and Usha Shukla, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 376; Code of Criminal Procedure (CrPC) - Sections 377(3); [Probation of Offenders Act, 1958](#) - Sections 4 and 4(1)

Appeal No. : Cri. Appeal No. 703 of 1988

Appellant : State of M.P.

Respondent : Narendra Kumar

Advocate for Def. : S.C. Datt, Adv.

Advocate for Pet/Ap. : A.K. Verma, Adv.

Disposition : Appeal dismissed

Judgement :

D.N. Dharmadhikari, J.

1. This appeal has been preferred by the State of Madhya Pradesh seeking enhancement of the sentence imposed upon the respondent-accused and for assailing the judgment dated 23-3-1986 of the Court of IVth Addl. Sessions Judge,

Durg whereby on conviction of the respondent-accused for an offence punishable under Section 376 of I.P.C., he has been released on probation on executing a bond under the Provisions of [Probation of Offenders Act, 1958](#).

2. Shri A.K. Verma, learned Panel Lawyer appearing for the State submits that the offence under Section 376 of I.P.C. is punishable for life imprisonment and, therefore, Section 4(1) of the [Probation of Offenders Act, 1958](#) cannot be taken aid of by the trial Judge for releasing the respondent-accused on probation for a good conduct; by executing a bond. It is pointed out that the decision of learned single Judge reported in 1965 MPLJ Note No. 42; Daulat v. State is misleading. It is not a full report of the judgment and most likely in that case the conviction was not under Section 376, IPC but some other lesser offence. Hence benefit of Section 4 of the Probation of Offenders Act was given to the accused in that case.

3. Since the accused is not represented by any counsel, on our request Shri S.C. Datt, learned Senior counsel appears to assist us and we thankfully acknowledge his services. Shri Datt submits that decision reported in 1965 MPLJ Note No. 42 appears to be a mis-reporting and Section 4 of the Probation of Offenders Act cannot be made applicable to an accused who is convicted of an offence under Section 376, IPC which is punishable for life imprisonment. Learned counsel on behalf of the accused, further submits that when the appeal by the State is preferred, under Section 377(3) of the Code of Criminal Procedure for enhancement of the sentence, the accused has a right not only to oppose the prayer for enhancement of sentence but is also entitled to plead for his acquittal or reduction of sentence.

4. Taking into consideration the scope of appeal under Section 377(3) of the Code of Criminal Procedure and the right of accused in such an appeal to pray for acquittal, we have heard learned counsel for the parties on the merits of the case.

5. The prosecutrix Miss Paramjeet Kaur in her statement as P.W. 1 has accepted in her examination and cross examination that there was a love affair between her and the accused. She also admits that she had accompanied him by train to Nagpur and lived there with the aunt of the accused. They shared the same bed and had sexual intercourse. It was, therefore, a clear case of consent on the part

of the prosecutrix to cohabit with the accused with whom, she had eloped for marriage with him.

6. On these facts, the learned trial Judge convicted the accused on a finding that the prosecutrix on the date of incident 22-3-1986 has been found on medical examination to be between 14 to 16 years of age.

7. Learned counsel appearing to assist the accused relies on a decision *Jaya Mala v. Home Secretary, Government of Jammu and Kashmir* AIR 1982 SC 1297 : (1982 Cri LJ 1777) to contend that radiological and orthopaedic tests only give an approximate age of the person medically examined and margin of error of two years on either side can be assumed. The observation in the case of *Jaya Mala* (supra) of the Supreme Court are as under :-

However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side.

8. In view of the above pronouncement and law laid by the Supreme Court, the finding on age reached by the learned trial Judge that the prosecutrix was between 14 to 16 years is merely an approximation and two years margin on either side could be given. The prosecution, therefore, has failed to conclusively prove that the prosecutrix was below 16 years of age.

9. If she was above 16 years of age, had carried on love affair with the accused, eloped with him for marriage and had sexual intercourse with him for number of days, the reasonable inference is that she consented to cohabit with the accused. The accused was unmarried young boy aged 24 years and his act of sexual intercourse with the prosecutrix with her consent cannot be held to be an offence under Section 376 of the I.P.C.

10. As a result of the aforesaid discussion, we dismiss the appeal preferred by the State for seeking enhancement of the sentence but instead in exercise of powers under Section 377(3) of the Code of Criminal Procedure acquit the respondent-accused of the said charge.

