

Santosh Vs. State of Madhya Pradesh

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Court : Madhya Pradesh

Decided On : Aug-22-2008

Reported in : 2009(3)MPHT196

Judge : Sushma Shrivastava, J.

Appellant : Santosh

Respondent : State of Madhya Pradesh

Disposition : Appeal dismissed

Judgement :

Sushma Shrivastava, J.

1. Appellant has preferred this appeal challenging his conviction and order of sentence passed by Vth Additional Sessions Judge, Bhopal in S.T. No. 36/93, decided on 5-4-94.
2. Appellant has been convicted under Section 376 of IPC for committing rape on a minor girl aged about eight years and sentenced to Rigorous Imprisonment for seven years by the impugned judgment.
3. According to prosecution, on 21-11-92 in the evening at Motinagar, Bhopal, when complainant's daughter aged eight years (hereinafter referred to as 'victim') was playing outside her house, appellant came there and took her to cattle-shed

and committed sexual intercourse with her. When she shouted, appellant intimidated and threatened her not to disclose the incident to anyone at her house. When the mother of the girl discovered the injuries on her private part while giving bath to her, she enquired from her. The girl then narrated the incident of rape to her mother. The matter was then reported to Police by the father of the victim. On the basis of FIR lodged by her father, Sheikh Peeru at Police Station Govindpura, Bhopal, an offence was registered against the appellant and was investigated. The victim was sent for medical examination and her vaginal smear was taken. Her underwear was also seized. On being arrested, appellant was also sent for medical examination and was found competent to commit the sexual act. After due investigation, appellant was prosecuted under Section 376 of IPC and put to trial.

4. Appellant abjured the guilt and pleaded innocence.

5. Learned Additional Sessions Judge, after trial and upon appreciation of the evidence adduced in the case, found the appellant guilty under Section 376 of IPC, convicted and sentenced him as aforesaid by the impugned judgment. Hence, this appeal.

6. Learned Counsel for the appellant submitted that the Trial Court gravely erred in convicting the appellant, though no offence under Section 376 of IPC was proved against him. He further submitted that the learned Trial Judge failed to consider that there was delay of five days in lodging the FIR and the appellant was falsely implicated. Learned Counsel for the State, on the other hand, justified and supported the conviction of the appellant.

7. Perused the evidence on record.

8. The victim in the instant case is eight years' old female child examined as P.W.

3. The victim (P.W. 3) categorically deposed in her evidence that in the evening time when she was playing outside her house, appellant took her to the cattle-shed, undressed her and inserted his male organ into her vagina (esjh is'kkc dh txg esa viuh is'kkc Mkyh Fkh) and intimidated her not to disclose it to anybody.

9. The mother of the victim, namely, Shahnaz Bi (P.W. 2) also stated in her evidence that when she was giving bath to the girl in the morning, she discovered some injuries and redness around her vagina and while stains in her underwear. Then she enquired from her daughter, who told her that appellant had committed rape on her in the cattle shed. She narrated the incident to her neighbour Salma Bi (P.W. 5) and to her sister-in-law Jameela Bi (P.W. 6), who informed Sheikh Peeru when he came back from duty. The father of the victim, Sheikh Peeru then took the girl to the Police Station and lodged the FIR.

10. Salma Bi (P.W. 5) also corroborated the fact that on being called by Shahnaz Bi (P.W. 2), she had seen the vagina of the victim, which had redness. Jameela Bi (P.W. 6) also deposed in her evidence that on being informed by Shahnaz Bi (P.W. 2), she had enquired from the victim, who told her that appellant committed rape on her. Then she had gone to Police Station alongwith the victim and her father Sheikh Peeru to lodge the report. Sheikh Peeru (P.W. 1) also supported the factum of lodging of the FIR (Exh. P-I), which was recorded by ASI S.P. Shrivastava (P.W. 9) at Police Station, Govindpura.

11. Medical evidence also lends corroboration to the version made by victim (P.W. 3) that she was subjected to rape. Dr. Minakshi Patel (P.W. 11), who examined the victim (P.W. 3) on 26-11-92, found redness and bruising present on her labia majora and labia minora and redness over vestibule. Dr. B.K. Athwal (P.W. 7), who also examined the victim (P.W. 3) on 28-11-92 at Medico Legal Institute, Bhopal also found her vagina inflamed and severely stained with whitish discharge, labia majora and labia minora on lower 2/3rd of perineum eroded having thick mucoid covering, severely inflamed and bruised; the introitus was also inflamed and tender on slight cleaning blood was oozing. In the opinion of Dr. Athwal (P.W. 7), the girl was sexually violated.

12. Learned Counsel for the appellant submitted that the victim (P.W. 3) was a child witness tutored by her parents and she admitted in her cross-examination that she had named the appellant at the instance of her father and aunt Jameela Bi, her evidence, therefore, could not be relied upon.

13. The law relating to evidence of child witness is well settled. As held by the Apex Court in the case of Panchhi and Ors. v. State of U.P. reported in : 1998 CriLJ4044 , it is not the law that if a witness is child, his evidence shall be rejected even it is found reliable, though the evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is an easy prey to tutoring.

14. No doubt, the victim (P.W. 3) admitted the suggestion given in cross-examination that while going to the Police she was told by her father and aunt Jameela Bi to give the name of the appellant, but there was no such suggestion or whisper that she was asked to name the appellant falsely. On the other hand, the victim (P.W. 3) clearly stated in last paragraph of her evidence that she already knew the name of the appellant. She refuted the suggestion that some other Santosh had committed the offence of rape. In second paragraph of her deposition, she categorically stated and identified the appellant as the person who committed rape on her, which virtually remained unshattered and unrebutted. In fact, the evidence of the victim (P.W. 3) on the whole does not reveal that she was tutored witness or gave a tutored version of the incident. Upon close and careful scrutiny of her entire evidence it is found to be natural and reliable.

15. Learned Counsel for the appellant also submitted that the mother of the victim, namely, Shahnaz Bi (P.W. 2) and her aunt Jameela Bi (P.W. 6) made inconsistent statements regarding time when the incident of rape was disclosed and narrated to them by the victim. However, that does not dilute the act of the appellant, nor does it render their statements unreliable. Such discrepancy could also occur due to lapse of memory and passage of time. The fact remained that their basic version was the same that the victim narrated the incident to them after her mother discovered the redness and injury over her private part. The fact that the girl (P.W. 3) suffered redness and swelling around her vagina was also clearly established from the medical evidence.

16. The delay in lodging the FIR (Exh. P-1) was also explained by the facts brought on record that when the matter came to light and was discovered, it was reported to the Police. The delay of five days in lodging the FIR in the instant case

does not cause any doubt on the prosecution case. It does not appeal to reason, as suggested in the cross-examination of some of the prosecution witnesses, that for a petty sum of money due to appellant's father for the small quantity of milk taken from him, the family members of the victim would falsely implicate his son, the appellant, at the stake and risk of the honour and modesty of their female child of tender years. It has also been held by the Apex Court in the case of Ramdas and Ors. v. State of Maharashtra reported in : AIR 2007 SC155 , which has been relied upon by learned Counsel for the appellant, that mere delay in lodging of the report may not by itself fatal to the case of prosecution and the delay has to be considered in the background of the facts and circumstances of the case. Delay in FIR has been justified in the instant case.

17. Learned Counsel for the appellant next submitted that as per the evidence of both Dr. B.K. Athwal (P.W. 7) and Dr. Minakshi Patel (P.W. 11), the hymen of the victim was found intact. Therefore, it could not be said that the offence of rape was committed, as also opined by Dr. Minakshi Patel (P.W. 11), and at the most, it could be an attempt to commit rape. The identical question was considered by the Apex Court in the case of Madan Gopal Kakkad v. Naval Dubey and Anr. reported in 1992 J.L.J. 377 (Supreme Court), and Santosh v. State of M.P. reported in 2006 AIR Supreme Court Weekly 4550 and then again in the case of Rajendra Datta Zarekar v. State of Goa reported in : 2008 CriLJ710 , and the following extract from Modi's Medical Jurisprudence and Toxicology 21 Edition at Page 369 was reproduced in this behalf:

Thus, to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva of pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is, therefore, quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape is a crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be

made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one.

18. It was also held in the case of *Ranjit Hazarika v. State of Assam* reported in : (1998)8SCC635 , that to constitute an offence of rape penetration, however, slight is sufficient and non-rupture of hymen or absence of injuries on the private part of victim would not belie the testimony of the prosecutrix.

19. In view of the legal position, as emerging from the aforesaid decisions of the Apex Court, the submission of the learned Counsel for the appellant that due to non-rupture of hymen no offence of rape was committed, has no merit. The citations referred to by learned Counsel for the appellant, as reported in 1987 Cri.L.J. 605 (Orissa High Court) *State of Orissa v. Sukadev Pradhan and MPWN* 1989 1 Short Note 79 have turned on different facts of those cases and are of no avail to the appellant in the instant case.

20. In view of the clear and cogent evidence of the victim (P.W. 3), in Para 2 of her deposition coupled with the medical evidence of Dr. Minakshi Patel (P.W. 11) and Dr. B.K. Athwal (P.W. 7) that swelling, bruise and redness were found around labia majora and labia minora of the girl, it was clearly evident and established that there was penetration sufficient to constitute the offence of rape.

21. In view of the aforesaid discussion, it was established from the evidence on record that the appellant committed rape on the victim, a minor girl aged eight years. Thus, the conviction of the appellant under Section 376 of IPC, as recorded by the Trial Court, does not suffer from any infirmity so as to warrant any interference in this appeal.

22. As regards the sentence, appellant was already awarded lesser sentence than required under Section 376(2)(f) of IPC for committing rape on a girl aged eight years. There are no special or adequate reasons for reducing the impugned sentence of seven years' Rigorous Imprisonment awarded to the appellant.

23. Appeal being bereft of any merit is dismissed. Appellant is on bail. He shall forthwith surrender to his bail bonds to serve out the remaining part of his

sentence.

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