

Chidda Ram Vs. State

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Court : Delhi

Decided On : Jul-14-1992

Reported in : 1992CriLJ4073; 1992(2)Crimes1140; 1992(23)DRJ344

Judge : Usha Mehra, J.

Appeal No. : Criminal Appeal No. 359/76

Appellant : Chidda Ram

Respondent : State

Advocate for Pet/Ap. : S.P. Kaira, Adv

Judgement :

Usha Mehra, J.

1. Chidda Ram son of Shri Birbal had been convicted under section 366/376, I.P.C. and was sentenced to undergo rigorous imprisonment for two years on each count. It was further ordered that the sentences were to run concurrently. Against this order of conviction and sentence, Chidda Ram has come up in appeal inter alias on the grounds that the prosecution failed to produce the report of the analyst with regard to the vaginal swab of the prosecutrix. In the absence of the medical report of the prosecutrix, the petitioner could not have been convicted. Trial Court has also ignored the report of the prosecutrix lodged with the police post

Shadipura which circumstances establishes that subsequent story given by the prosecutrix is afterthought and built up. The learned Sessions Judge has also ignored the testimony of Prem Prakash, Police Officer of police post, Shadipura. Further he has also ignored the evidence regarding the age of the prosecutrix. In fact the trial Court has completely given a go-bye to the evidence adduced and has sentenced the accused on surmises and conjectures.

2. In order to appreciate the contention of the petitioner, in nutshell the case of the prosecution as set up is that Indra Wati, the prosecutrix who had been residing with her parents at Yusuf Sarai was enticed by the Chidda Ram, the present petitioner. Chidda Ram is the brother-in-law of her sister. He was having evil eye on the prosecutrix. He ultimately succeeded in eloping her by offering to provide her good clothes and food. She was minor in the age group of 14 and 16 years and she came under his allurements. On 28th May, 1975. On the asking of the petitioner accused, Indra Wati went to the prosecutrix and from there he took her to his house known as DCM quarter. He kept her for the night in the said quarter and committed rape on her. Next day, he took her to another quarter which belonged to his brother-in-law. On 29th May, 1975, he along with two associates brought the prosecutrix to the police post Shadi Pura and pressurised her to make a statement that she left her home of her own accord. This statement according to the prosecution the prosecutrix made at the asking of the petitioner. Since the prosecutrix was missing, her mother Surjeet Kaur lodged the report with the police. On 29th May, 1975, the mother of the prosecutrix went to the quarter of the petitioner but could not trace the prosecutrix and the petitioner showed his ignorance. However, the police official handed over the prosecutrix to her mother. On being medically examined it was found that her age was between 14 and 16 years. It was in this background that the petitioner was challaned.

3. The prosecution examined as many as 12 witnesses. Similarly, the petitioner besides giving his own statement examined two witnesses. In our society respect for the dignity of the woman is on the decline, mobilisation (molestation ?) and rapes are on the increase, though these offences are committed by sick minds but since it deals with the decency and morality in the public life and touches the honour of womanhood hence the offenders are to be dealt with strictly. It is also a

well settled principle of law that prosecutrix is a victim of crime. Her evidence can be accepted without being corroborated in material particulars. She is a competent witness under section 118 and her evidence must receive the same weight as is attached to an injured in case of physical violence. But at the same time Courts have to strike balance while evaluating the evidence of the prosecutrix, her testimony has to be evaluated like that of a witness or a complainant with care and caution. If her testimony inspires confidence and is trustworthy then there is no need of any corroboration. But this all depends on the facts and circumstances of each case. With this view of the law we have to see whether in this case Indra Wati's testimony regarding petitioner's committing sexual assault or rape on her inspires confidence.

4. According to the prosecutrix she was known to the petitioner from before. He is the brother-in-law of her sister and had been visiting her house. As per her testimony she left for the bus stand to meet the petitioner. From there she went to his quarter known as DCM quarter. In her testimony she stated that when her parents came in search of her she was in the quarter of the petitioner but the petitioner told them that the prosecutrix was not there. This shows that she was aware of her parents coming and if the rape on the previous night i.e. 28th May, 1975 was committed on her she had the opportunity to shout or cry or raise the alarm to attract the attention of her parents but she did not do any such thing. According to her petitioner took her to his brother-in-law's quarter and from there he took her to the police station where she lodged the report that she went with the petitioner of her own accord. The said brother-in-law has not been cited as a witness nor produced by the prosecution. She further admitted that in the police post she went herself while the petitioner and his two friends were standing outside. When subjected to cross-examination she admitted that on the morning of 29th May, 1975 at about 8 A.M. the petitioner's house was searched by the police accompanied by her parent but could not find the prosecutrix there. Though according to her she was very much in the house of the petitioner but was in the other room. Then went on to say that the petitioner was arrested in the market on 29th May, at about 10 a.m. on her pointing. If she could point out the petitioner in the market what prevented her from telling the police in the Police Post Shadipura that the petitioner had committed rape on her. These facts are irreconcilable and

therefore her testimony does not inspire confidence. She further went to the extent of saying that she was not produced before the Magistrate on the day she was recovered but when pointed out she admitted that she was produced before the Magistrate and made a statement Ex. P.W. 1/B where she did not mention that she was sent to the police post Shadipura for making the statement at the instance of the petitioner. It is only after making the statement to the Magistrate Ex. P.W. 1/B that she started implicating the petitioner to the extent that she was forced to go to the police post and lodge the report. If what she now states the same she had ample opportunity to say so before the magistrate at the first instance when she was produced before him. But in her statement Ex. P.W. 1/B she did not state that she lodged the report with the police post at the instance of the petitioner. therefore, the present story set up by her is an afterthought and cannot be relied upon. Moreover, she admits that she had been having this sort of affair with the petitioner for the last five years. She did not tell her parents that she was agreeable to the suggestion of the petitioner and now at the instance of her parents she implicated the petitioner. Having an affair gets proved from the medical report which says that the petitioner was habitual in sexual intercourse. For all those reasons. I find that the testimony of the prosecutrix that the petitioner committed rape on her is belied from the facts which have come on record.

5. But closely connected with this aspect is the question whether the prosecutrix was minor when this offence was committed Was she below the age of 16 years The age of the prosecutrix is important especially where according to the medical evidence she was used to sexual intercourse. A school certificate or an admission form is not a conclusive evidence of the age of the prosecutrix. The unproved and un-exhibited school certificate cannot be treated as evidence. In fact the ossification test is not a sure test as to the age of the prosecutrix. It gives only an approximate age which may vary by two years on either side. The medical opinion that the prosecutrix was below 16 years, this fact only gives approximation of the age. The fact that the prosecutrix could not be more than 16 years cannot be ruled out. It is also not disputed that the ossification test is relevant though solely by itself not conclusive, the value to be given to such test depends on the facts of each case. Some of the High Courts have gone to the extent of saying that doctor's evidence is not more than an opinion regarding the age of a girl gathered

from her physical examination nor can it give her correct age.

6. Keeping this legal position in mind what we have to see is whether beside Dr. Y. Singh's statement is there any other witness produced by the prosecution to prove the age of the prosecutrix. The prosecution has adduced the evidence of the mother of the prosecutrix Surjeet Kaur as P.W. 2 She could not tell the age of the prosecutrix. According to her she was married in 1974 and her eldest child was born after 5 years of her marriage. She could not tell the age gap between the first child and the prosecutrix nor she could tell the year of the admission of the prosecutrix in the school. She also could not tell what age proof was given at the time of admission of the prosecutrix in the school. Sheesh Pal the brother of the prosecutrix was examined as P.W. 3. He also could not tell the date of birth of the prosecutrix or her age. Jhuman the father of the prosecutrix appeared as P.W. 4. According to him the prosecutrix was born in 1960 but this was only by approximation. According to him the prosecutrix was admitted in school in the year 1970 and studied for 2-1/2 years or three years and thereafter left the school five or six years prior to from the date of recording the statement. When subjected to cross examination he admitted that he could not tell the date of birth of any of his child. According to Dr. N. Tribunayat, P.W. 6's report, the age of the prosecutrix was declared as 17 years when brought to him on 30th May, 1975. The Teacher of the prosecutrix was examined as P.W. 9 who testified that in the admission form the date of birth was given 6th August, 1960 but no proof of the date of birth was furnished along with the application form. The date of birth was given by Mr. Jhuman Singh her father. The school authorities accepted the same without proof.

7. Mr. Kaira counsel for the petitioner contended that no reliance can be placed on the testimony of these witnesses regarding the age of the prosecutrix because by an oral statement the admission form was filled up. There is not an iota of proof regarding the date of birth of the prosecutrix. The prosecution in fact failed to produce the date of birth certificate of the prosecutrix. Smt. Surjeet Kaur mother of the prosecutrix appearing as P.W. 2 has categorically stated in her cross examination that her eldest daughter Savitri was born in Lady Harding Hospital after five years of 1947 riots. After three years a son was born and then two daughters were born within a gap of three years and then the prosecutrix was

born. Nowhere it is stated that in which hospital she was born. If what Surjeet Kaur has stated is taken to be correct then the age of the prosecutrix would be between 16 to 17 years. On the basis of the gap between the birth of her first child and the prosecutrix, the prosecutrix, the prosecutrix would have born somewhere in 1958 or 1959. In this view of the matter it cannot be said that the prosecutrix was minor in May, 1975. The school certificate or the admission form is not a conclusive evidence of the age because it is based on no evidence at all. This in fact remained unproved and thereforee cannot be treated as conclusive evidence. The birth certificate has not been produced thereforee the conviction based on the age on the basis of doctor's opinion cannot be sustainable. In fact there is a conflict regarding the date of birth of the prosecutrix as given by her parents and that opined by the doctor. As per the mother's version the prosecutrix cannot be said to be below the age of 16 years whereas the ossification test shows that she was below the age of 16 years. If the two years margin is taken then it cannot be said that she was below the age of 16 years at the date of the incident. In view of the two ages of the prosecutrix having come on record the accused can claim to choose one which shows the age of the prosecutrix above 16 years. thereforee, to my mind the learned Additional Sessions Judge was not justified in coming to the conclusion that the prosecutrix was below age of 16 years at the time the offence was committed. In fact he completely ignored the aspect that there was no evidence worth the name placed on record to establish the age of the prosecutrix. The entry in the municipal record or the date of birth certificate, to my mind, had been intentionally kept back by the prosecution. If it had been produced it would have established the correct age of the prosecutrix. As already observed, the ossification test is not a sure test regarding the age. It gives only an approximation which may vary by two years on either side. If the variation and margin is taken into account then it cannot be said that the prosecutrix was below the age of 16 years. Hence the observation of the learned Additional Sessions Judge that the prosecutrix was minor at the time of offence cannot be accepted. Having held that the prosecutrix could not be below 16 years at the time of the offence, the rest of the reasoning given by the learned Additional Sessions Judge naturally falls to the ground and cannot be sustained. The learned Addl. Sessions Judge's basis for conviction was the age of the prosecutrix. On the basis of the evidence adduced

before him he came to the conclusion that the prosecutrix was a consenting party in eloping from her house but convicted the petitioner on the account because prosecutrix being minor her consent had no meaning. But since I have held that she was not minor her consent assumes importance. If she was a consenting party in eloping from her house with the petitioner then it cannot be called a case of kidnaping. thereforee this offence against the petitioner, to my mind, is not established. Similarly as regards the rape, there is not an iota of evidence to establish that the petitioner committed rape on her on the night of 28th May and 29th May, 1975. On the contrary from the testimony of Dr. N. Trigunayat, P.W. 6 it has come on record that the prosecutrix was used to sexual intercourse. In the absence of the medical report of vaginal and cervical swabs it cannot be said that the petitioner committed sexual intercourse with the prosecutrix on the night of 28th May, 1975. Even otherwise the story given by the prosecutrix after being handed over by the police to her mother does not inspire confidence nor any credence can be attached to the same. Her version vary from stage to stage and from point to point. thereforee, no much reliance can be placed on the testimony of the prosecutrix particularly when there is no corroboration for the same.

8. For the above reasons, I accept the appeal. The conviction and sentence are accordingly set aside.

9. Appeal allowed.