

Baleshwar Vs. State

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Court : Delhi

Decided On : Jan-04-1989

Reported in : 1989(1)Crimes765; 37(1989)DLT341

Judge : S. Duggal, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 366

Appeal No. : Criminal Appeal No. 164 of 1987

Appellant : Baleshwar

Respondent : State

Advocate for Pet/Ap. : Usha Kumari and; B.T. Singh, Advs

Judgement :

S. Dnggal, J.

(1) This is an appeal, sent through jail, against the conviction and sentence of the appellant, for offences under Sections 366/376 Ipc, vide judgment dated 20th Deceimber, 1985. The order of sentence was separately recorded on the same date whereunder the appellant was awarded RI for two years under Section 366 Indian Penal Code and sentence for seven years under Section 376 Indian Penal Code with a fine of Rs. 600.00 in default of payment of fine to undergo Rf for six months. The sentences were however, to run con- currently. The appellant

challenges both his conviction as well as sentencing.

(2) The appellant was sent up for trial, on the allegations that on 31st March, 1984, at about 11.30. A.M., he deceitfully enticed away a minor girl :Anarsa Devi, then aged about 13 years from the custody of her elder sister Smt. Meera Devi, resident of B-2/90, Nand Nagri, Delhi with an intent that she may be seduced to illicit intercourse, and further that after kidnapping the said girl in the manner aforesaid, the accused, (appellant herein), raped her during the period from 31st March, 1984 till her recovery on 11th April, 1984.

(3) The appeal was admitted for hearing and Ms. Usha Kumar Advocate, of this Court was appointed as amicus curiae The matter has been heard with her assistance, when Shri B.T. Singh, Advocate, appeared for the respondent-State. The trial court record has been gone through and the judgment examined, in the light of the arguments advanced by both the learned counsel.

(4) Ms. Usha Kumar has pointed out that the prosecution case is full of inconsistencies, and that the statement of the prosecutrix herself suffered from such glaring discrepancies that made the whole case unreliable, and that it was a matter where corroboration to the statement of the prosecutrix was necessary but the same did not exist inasmuch as the medical certificate of her physical examination after recovery throws considerable doubt on her version, and that other brother-in-law Som Nath (P.W. 3), and that since the doctor herself has not been available for examination; the doubt thrown by the record of examination, remains unexplained, and that the benefit ought to have gone to the accused. She further submitted that in this case there is no independent evidence except for the statements of the prosecutrix, her sister and brother-in-law, and that the investigating officer has not even shown any attempt to have the recovery of the prosecutrix effected, or trace her out, and that only the brother-in-law has produced both the prosecutrix. as well as the accused at the police station, and even thereafter the I.O. has not taken any steps to verify the facts, as given out by the prosecutrix or examine persons, named by her. Ms. Usha Kumar argued, therefore, that this is a case, where the prosecution evidence was not worthy of reliance and the conviction has been erroneously recorded.

(5) Shri B.T. Singh. however, pointed out that the age of the prosecutrix has been proved as a result of the age of the prosecutrix has been proved as a result to the ossification test to be between 11-12 years at the relevant time, as proved by Dr. B. Bhattacharya of the Jai Parkash Narain Hospital, Public Witness 9) by his report Ex. PW9/A and supported by X-rays Ex. Public Witness 9/B-1 and Public Witness 9/B-2 He contended that .even though the variation of 1-2 years be taken into account, as conceded by the doctor, then also the age would not be more than 14 years, and in that view of the matter the offences rightly held to have been made out against the appellant. Amongst other factors, Shri B.T. Singh drew my attention to the admission made by the accused during his statement under Section 313 Cr.P.C. when he admitted as correct the fact that S.I. Raj Kumar (Public Witness II) took into possession at the police station, the petticoat of the prosecutrix, under memo Ex. PWI/A and also underwear of the petitioner , under recovery memos prepared separately. According to the learned counsel this clearly shows that the appellant-accused admitted before the court as having been produced before the police and brought along with the prosecutrix in the manner deposed by PW3 Som Nath, as well as PWI Anarsa Devi, and S.I. Raj Kumar (Public Witness 1).

(6) That being so, the prosecution case of recovery of the prosecutrix, in the company of the accused, had to be taken as been established. He has. however, conceded that the investigation was faulty in the sense that no steps were taken by the 1.0. to proceed to the places where the prosecutrix alleged to have been kept by the accused after being taken away from the house of her sister. He has also no answer to the Court observation that on the basis of the statement made by the prosecutrix, after recovery, it was a clear case where the sister of the accused, (appellant) , was also involved in the case, and was prima facie guilty of the offence under Section 368 Indian Penal Code and that the fact that no steps were taken by 1 0. even to question her, about her alleged role in the matter nor a visit to the village, where the prosecutrix alleged to have been taken and kept as well as raped, much less to implead the said sister as an accused under Section 368 Ipc, suggests that there was some thing else to the case, and that the statement of the prosecutrix remained uncorroborated on the point as to the places and in the manner in which the accused allegedly kept her after kidnapping.

(7) I have carefully gone through the record, and I find that the statement of prosecutrix recorded under Section 164 Cr P.C., as proved by Shri P.C. Ranga then Metropolitan Magistrate, Shahdara, Delhi as Public Witness 10 is to the effect that she was taken forcibly away by the accused in the presence of her sister and thereafter taken by him to the house of his sister in village Shadipur where she was kept for four days that where she was 3, 4 times raped inspire of protestations, and that the sister of the appellant also threatened her not to raise any noise, and that when her brother- in-law traced her at that house; then the accused even tried to as suit him but he, (brother-in-law), succeeded in bringing her from there together with Baleshwar accused. She goes further on to say that first of all Baleshwar was brought to the mohalla where her sister and brother-in-law were living, and Baleshwar was given beatings by the people there and thereafter brought to the police station.

(8) She has abandoned all these allegations in the statement before court and there is no suggestion of her forcible removal. The name of the village where the sister of the appellant resides, and where he allegedly kept her for 3-4 days, is given by her as Seelampur, and that she was raped there for 4-5 times, and thereafter her brother-in-law Som Nath noticed her working as labourer, Along with Baleshwar and brought them with him. The date of recovery according to PW3 Som Nath as well as the 1.0. S 1. Raj Kumar is on the other hand 11th April, 1984 that is after a gap of li days. The doctor who examined her after the recovery namely. Dr. Sunita was not available, having left the hospital, and the Mlc has been proved by a record Clerk of L.N.J.P Hospital, examined as PW8. The doctor alone could explain as to in what circumstances she could describe the condition of the vagina as of 'fresh tear' after 12 days of the alleged first act of rape. In view of the glaring lacunae in the prosecution case, namely, that' no attempt by the 1.0., altogether to obtain corroboration to the allegations of the prosecutrix about her forcibly having been taken away, and having been kept there in the house of his sister and. In view of discrepancies in her statement in court, vis-a-vis the statement under Section 164 Cr.P.C,astotheplace of recovery and the place where she was kept and as to number of times allegedly raped and the medical evidence being not available, I think it to be a case where the accused deserves benefit of doubt in so far as charge under Section 376 Indian Penal Code is concerned. I,

accordingly, find to be a fit case where the judgment of the learned trial court deserves to be set aside in so far as findings of the question on guilty under Section 376 Indian Penal Code is concerned.

(9) The only evidence against the accused is the admission in response to one question only, in his statement under Section 313 Cr P.C. regarding his having been brought to the police station by brother-in-law Som Nath together with the prosecutrix. That may be treated as an admission that he had taken away the prosecutrix with him and she was recovered from his possession. However, the ingredients of Section 366 of the Indian Penal Code which postulates that Kidnapping must be with the object of subjecting the woman to illicit intercourse, or intention that she be so subjected are not satisfied this case as the appellant has been already found to be deserving of benefit of doubt, in respect to offence under Section 376 of the Indian Penal Code The provisions of Section 366 Indian Penal Code would also, therefore, be not attracted. The prosecutrix has, however, been proved to be a minor girl of about 12-14 years of age at the relevant time. The case of enticing away by deceitful means, of the minor girl, from the custody of her lawful guardianship, as punishable under Section 363 Indian Penal Code is thus made out. The petitioner stands already charged with offence under Section 366 Indian Penal Code which includes the lesser offence under Section 363 IPC. Ms. Usha Kumar conceded that conviction from that of offence under Section 366 Indian Penal Code can be converted to the offence under Section 363 IPC.

(10) In view of the above, the appeal is allowed partly to the effect that the judgment dated 20th December, 1985 and the order of sentence of the same date are set aside in so far conviction and sentence under Section 376 Indian Penal Code are concerned and the judgment is modified to the extent that the conviction under Section 366 Indian Penal Code is converted to that of Section 363 IPC. The appellant was sentenced to RI for two years for the offence under Section 363 Ipc, the same sentence is maintained for the offence under Section 363 IPC. It appears from the record that he has been in custody throughout the trial as well as during the pendency of this appeal. He has thus undergone, on face of the record, sentence RI for two years and even more than that. It is, therefore, directed that warrants be issued to the jail authorities forthwith directing release of the appellant

in case he is not required in any other matter.

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