

Kanchan Dass Vs. State

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Court : Delhi

Decided On : Nov-24-1989

Reported in : 1991CriLJ2036; 40(1990)DLT401; 1990(18)DRJ250

Judge : P.K. Bahri, J.

Acts : Indian Penal Code (IPC) - Sections 363, 366 and 376

Appeal No. : Cri. Appeal No. 76 of 1989

Appellant : Kanchan Dass

Respondent : State

Advocate for Def. : G.S. Vashisht, Adv.

Advocate for Pet/Ap. : Neelam Grover, amices Curia

Disposition : Appeal allowed

Judgement :

P.K. Bahri, J.

1. This appeal has been brought against judgment dated February 28, 1989, by which the appellant has been convicted of offence punishable under Sections 363, 366 and 376 of the Indian Penal Code and against a separate order of even date by which he has been sentenced to undergo rigorous imprisonment for three years

and to pay a fine of Rs. 500/-and in case of default, to undergo further rigorous imprisonment for three-months on the first count, and rigorous imprisonment for five years and to pay a fine of Rs. 1,000/- and in case of default, to undergo further rigorousimprisonment for six months on the second count and rigorous imprisonment for ten years and to pay a fine of Rs. 2,000/- and in case of default, to undergo further rigorous imprisonment for one year on the third count, with the direction that all the sentences would run concurrently. The period spent by the appellant as under trial prisoner was to be adjusted in the said sentences.

2. The case of the prosecution, in brief, is that this by appellant, an elderly person, was given access to the house of the prosecutrix by her parents as the appellant pretended to be a hermit. The appellant is stated to be enjoying a lot of respect from the family of the prosecutrix and is alleged to have misused the said respect in reducing the prosecutrix, who was stated to be aged about 15 years at the time of occurrence and having taken her to different places, namely, Hardwar, Bulandshehar, Sultan Puri, Anwar Pur and lastly to a brick kiln in village Mandoli from where the prosecutrix was recovered and the appellant was apprehended.

3. The prosecutrix was stated to be missing from her house since September 2, 1986, but a report regarding her missing was lodged after four days and later on the prosecutrix's father Sant Singh expressed the involvement of the appellant in abduction of his daughter and thus, the case was registered on January 3, 1987. The crucial question which needed decision was with regard to the age of the prosecutrix. In the report got recorded by Sant Singh as per D.D. No. 9 A dated September 6, 1986 (copy Ex. PW2/ DB), the age of the prosecutor-Bimla was shown as 16 or 17 years. The learned Additional Sessions Judge has, however, given a finding that, the prosecutrix was aged about 15 years at the time of the occurrence and the said finding is based on the date of birth recorded in the school leaving certificate of Bimla Devi which is Ex. PW9/A. This certificate shows that one Bimla Devi daughter of Sant Singh had attended the Government Girl Senior Secondary School, Nand Nagari, for the period July 22, 1983 to November 30, 1984 and she studied in Class VII. It is pertinent to mention that no residential address or any other address of Bimla Devi her father has been shown in this certificate. Sant Singh appearing as PW3 stated that be had filled in some

admission form on the basis of which her daughter was got admitted in that particular school but no copy of the said admission form was proved on the record. Even the admission form was not summoned to get it proved from the testimony of Sant Singh. PW9 M P. Gupta, a teacher from the said school, had appeared in the witness box and proved the signature of S. Chandel appearing on the school leaving certificate and he deposed that he had brought the admission form purported to bear the signatures of Sant Singh. Still the admission form was not proved in this case, Mr. M.P. Gupta obviously had no personal knowledge of the matter and thus, he could not possibly prove the signatures of Sant Singh appearing on the said form. It was also not brought out from his statement that as to what was the address of Sant Singh given out in that admission form. By no stretch of reasoning the said school leaving certificate could be connected with the prosecutrix. At any rate, Sant Singh admitted that the prosecutrix was first got admitted in a primary school in Nand Nagari in the 1st Class surprisingly enough no record of that school had been taken into possession by Investigating Officer and proved in the case. So, the Additional Sessions Judge, in my opinion, was not right in placing implicit faith in the said school leaving certificate proved on the record to return a finding that the said school leaving certificate related to the prosecutrix and date of birth given in that certificate was correct.

4. Smt. Chander Wati (PW2), Prosecutrix's mother frankly admitted that she was an illiterate lady and was not in a position to give the dates of birth of her four children although she deposed that the prosecutrix was her eldest child and was born after four years of her marriage which according to her took place about 20 years ago. PW3 Sant Singh, prosecutrix's father, on the other hand, deposed that his marriage took place in the year 1965 or 1966 and he also could not give the exact years of births of his' four children Sant Singh is employed as an L.D.C. in the Municipal Corporation of Delhi. Still he has not been able to give the exact year of birth of his daughter Bimla. He has not explained how he had given the age of prosecutrix as 16 or 17 years in the D.D. report. He admitted that the prosecutrix was born in a village. If that is so, a birth entry of the child made in the register maintained by the Village Chowkidar could have been the best evidence to show the date of birth of the prosecutrix. At any rate, the onus was heavy on the prosecution to prove beyond any shadow of reasonable doubt that the prosecutrix

was aged less than 18 years at the time of the occurrence. The prosecutrix was examined by a radiologist, who on that basis of the X ray films Exs PW11/B and PW11/C gave his report Ex PW11/A and found that all the epiphyses at elbow, shoulder, wrist and iliac-crest stood united which place the bony age of the prosecutrix above 19 years. The learned Additional Sessions Judge has brushed aside this piece of evidence on the ground that the statements of the parents of the prosecutrix and the date of birth recorded in the school leaving certificate which came into existence much prior to the occurrence are more reliable pieces of evidence and he placed reliance on certain observations of Calcutta High Court in the case of Sachindra Nath Mazumdar v. Bistupada Das and Ors. Wherein it has been held that the best evidence as to the age of the prosecutrix is her date of birth as per the school admission register and in absence of birth certificate the ossification test has to be taken into consideration. It was further observed that the ossification test is not a sure test although it is generally accepted as the best available test for determination of the age of human beings. In the cited case, the prosecution had relied on the date of birth given in horoscope and the court held that such evidence is not sufficient to prove the age of the prosecutrix. However, these observations made in the Calcutta High Court had been made in context of the facts appearing in that case. In the present case, when there is doubtful oral evidence and suspicious evidence in the shape of school leaving certificate the court should have given all importance to the opinion of the radiologist regarding the bony age of the prosecutrix. In Brij Mohan v. State : 38(1989)DLT15 . in somewhat similar facts this Court preferred the assessment of age given on the basis of ossification test. At any rate, there arises a lingering doubt regarding the case of the prosecution that the prosecutrix was minor at the time of the occurrence and the benefit of doubt should have been given to the appellant and not to the prosecution. So, it has to be held that the prosecutrix was not proved to be aged less than 18 years at the time of the occurrence.

5. The testimony of PW1 prosecutrix and her previous statements made to the police with which she was duly confronted left no room for doubt that the prosecutrix had gone with the appellant with her own sweet will and if she had sexual intercourse with the appellant she was more than a willing partner. The Additional Sessions Judge had been swayed by the appellant being posing as a

sadhu in giving the finding that in all probability he exercised undue influence on the mind of the prosecutrix in persuading her to accompany him to different places and live with him as a wife. The testimony of the prosecutrix, in my opinion does not indicate that she had been given any inducement or allurements by the appellant in taking her away from her house. I, hence hold that the charges against the appellant are not proved beyond shadow of reasonable doubt.

6. I allow the appeal and set aside the conviction and sentence of the appellant and direct that the appellant be set at liberty if not required to be detained in any other case.

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