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Court : Rajasthan

Decided On : Nov-23-1951

Reported in : AIR1952Raj153

Judge : Sharma, J.

Acts : Evidence Act, 1872 - Sections 118; Indian Penal Code (IPC), 1860 - Sections 376

Appeal No. : Criminal Appeal No. 1 of 1951

Appellant : Jagannath

Respondent : State

Advocate for Def. : R.A. Gupta, Government Adv.

Advocate for Pet/Ap. : J.K. Mathur, Adv.

Disposition : Appeal allowed

Judgement :

1. Jagannath has been convicted by the Additional Sessions Judge, Bara under Sections 376 and 451, Penal Code and sentenced to 2 1/2 years rigorous imprisonment and a fine of Rs. 51/- in default to undergo further rigorous impisonment for four months. It was alleged by the prosecution that on the 5th February, 1950 when Mt. Pana a girl of about eight years was engaged in

sweeping the grains at the platform near her house in village Bhanwara some time in the afternoon the accused Jagannath came to her and took her away inside the house and in the IKDARA committed rape upon her. At that time there were only some children at the place; two of whom were a girl Mt. Kessar and a boy Krishna both about seven years old. When her father returned to the house she told him about the act of the accused.

The girl's father Madna went to the Police Station to lodge a report but it was not recorded. He therefore, made an application before the Sub-Divisional Magistrate, Chabra who directed the police to record a report and investigate the case. The first information report was, therefore recorded on the 7th February 1950 at about 6 in the evening. The girl and Jagannath accused were medically examined and after necessary investigation the case was challaned under Section 451 as well as 376 in the Court of Sub-Divisional Magistrate, Chabra who committed the accused to take his trial underboth the sections to the Additional Sessions Judge's Court at Baran.

2. The accused denied the charge and pleaded that the case was an outcome of enmity. The learned Additional Sessions Judge, however, was satisfied that offence under both the sections was proved against the accused and consequently convicted and sentenced him as above. The accused Jagannath has filed this appeal.

3. I have been taken through the evidence by the learned counsel for the appellant Mr. Jugal Kishore Mathur who appears for him. He referred to the statement of Mt. Pana, the victim of the alleged offence who had to admit in cross-examination that she had stated in committing Magistrate's Court that whatever she had stated was at the instance of her father and that she did notunderstand many things which she had mentioned in her examination. Mt. Pana was confronted with this statement in the Sessions Court and the statement was put on record as Ex. P. W. 3.

The learned counsel argued that in the first instance the girl was of tender years and her statement carried not much weight, and looking to thefact that she who was the victim herself had to admit that whatever she had stated, she had done at

the instance of her fattier the evidence was simply a scrap of waste paper. All other evidence was in corroboration of the evidence of Mt. Pana and when her evidence itself had to be totally discarded, the question of acting upon the corroborative evidence does not arise. He has also argued that in her statement before the committing Magistrate with which she was confronted in the trial Court, there are admitted facts which showed that there was no penetration at all. In the circumstances of the case the offence of rape was not at all made out.

4. The learned Government Advocate had to concede that so far as the offence of rape is concerned term (sic) made out on the record is from the evidence of the girl. It was not established that any penetration took place. He further argued that there is sufficient evidence to prove that the the case under Section 451 and. Section 354 at the least was made out. To this the reply of the learned counsel for the appellant is that even if offence under Sections 451 and 354 has been committed, there was no evidence which can be relied upon. The only evidence about the entry of the accused inside the house of Mt. Pana at the time of alleged incident is that of Mt. Pana and two other child witnesses Krishna and Mt. Kesar. Each of them admitted that whatever has been stated by them was on the basis of the knowledge derived from the other and that neither the one witness nor the other had any personal knowledge.

5. The case gives rise to another great difficulty. On the one side there is the evidence to show that marks of semen were found on the DHOTI of the accused and also on the petti coat of the girl. There is also medical evidence to show that private part of the girl was slightly injured although her hymen was not ruptured. However whatever be the medical evidence it cannot be acted upon in the evidence (sic) of the girl's clear admission in the committing Magistrate's Court that penetration did not at all take place. It is on the basis of this that the learned Government Advocate himself had to concede that the offence under Section 376 was not made out. The question, however, is whether the evidence which has been produced by the prosecution is sufficient even for the offence under Section 451 or 354 or for any other offence for which the accused can be convicted by the appellate Court although he was not charged with it.

The evidence for house trespass is that of Mt. Pana and the two other child witnesses Krishna & Mt. Kesar. Children's witness is risky as they often mistake dreams for reality, repeat glibly as of their own knowledge what they have heard from others and are greatly influenced by fear of punishment, by hope of reward and by desire of notoriety. It is necessary for a Court before examining a child of tender years as witness to satisfy itself that the child is sufficiently intellectually developed to comprehend what he has seen and to give an intelligent account of it to the Court. If the Court is of the opinion that by reason of tender years and defective or immature understanding, the child could not have perceived the particular incident to prove which he is produced as a witness, the Court should not only refrain from administering the oath to him but should also decline to examine him as a witness. In the present case all the three children were about seven or eight years old and no attempt was made by the Court to find out if they were intellectually developed, could understand questions and give rational answers. As appears from their statements themselves, none of thethree witnesses understood as to what they were deposing.

Mt. Pana in the examination-in-chief related to the incident as if she was stating from her knowledge. In the committing Magistrate's Court however, she had to admit that whatever she was stating she was doing at the instance of her father. She was confronted with this portion of the statement which was placed on the record. If this statement is true it clearly shows that she was tutored and whatever she has stated was on account of tutoring. It is clear that she did not understand the implication of whatever she was stating. For this reason the statement of Mt. Pana cannot be relied upon. Similar is the case with the evidence of Krishna and Mt. Kessar. In their examination-in-chief they made statements as if they were making from their own knowledge. In cross-examination, however, Mt. Kessar has stated that whatever she had stated about the accused was on information received from Krishna & Krishna has stated that his statement was based upon what Mt. Kessar had told him. It is curious that the lower Courts administered oath to such witnesses.

The learned committing Magistrate as well as the learned Sessions Judge failed in their duty before recording the statements of these three witnesses that they

understood questions put to them and were capable of giving rational answers. They also failed to put some introductory questions in order to find out whether these three witnesses were intellectually developed and whatever they would state would be worth relying upon. It is only the evidence of these three witnesses which shows that Jagannath entered the house of Mt. Pana's father and took her inside. If the statements of these three witnesses cannot be acted upon, there remains no question to act upon their evidence. The simple fact that the doctor found some spots of semen by the medical examination on the DHOTI of the accused or they were found on the petti coat of the girl or there were three slight bruises over the private parts of the girl is not only to prove that it was the accused who committed rape upon the girl.

Of course the offence with which the accusedwas charged was very serious and some suspicionmay be attached to him but suspicion cannot takeplace of legal evidence and the criminal Court isopen to do its duty of giving the benefit of doubtto the accused howsoever it may suspect that itmight have been the accused who committed theguilt. I regret to say that the case was very mismanaged in the lower Courts on behalf of the prosecution and the lower Courts do not fully realisethat they have to decide the case on the evidenceof child witnesses and therefore, they were boundto take all precautions to satisfy themselves thatwhatever would be stated by these witnesses would be truth and nothing butthe truth. The statement of three witnesses was garble and it is very difficult to separate the children (sic) from the Court and I amconstrained to give the accused the benefit of doubt.The appeal is allowed, the conviction and sentenceis set aside and the accused is acquitted. He shallat once be released unless required with some othercase.

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