

Banshilal Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Sep-04-1997

Reported in : 1998CriLJ297

Judge : P.C. Jain, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 363, 376 and 511

Appeal No. : Criminal Appeal No. 35 of 1997

Appellant : Banshilal

Respondent : State of Rajasthan

Advocate for Def. : D.S. Rathore, Public Prosecutor

Advocate for Pet/Ap. : B.K. Pareek, Amicus Curiae

Disposition : Appeal allowed

Judgement :

P.C. Jain, J.

1. The accused-appellant Banshilal has filed this appeal through the Superintendent, Central Jail, Jodhpur against the Judgment dated 20-12-1996 passed by the learned Additional Sessions Judge No. 3, Jodhpur, by which, the accused-appellant Banshilal was found guilty of the offences under Sections 363

and 376 read with Section 511 IPC and was sentenced 7 years rigorous imprisonment together with a fine of Rs. 1,000/- and in default of payment of fine ;to further undergo simple imprisonment for 'six months for the offence under Section 363 IPC and to 10 years rigorous imprisonment together with a fine of Rs. 1,000/- and in default of payment of fine to further simple imprisonment for six months.

2. The accused-appellant was charged with the offences under Sections 363 and 376 IPC on the allegations that on-3-8-1994, at about 6.30 p.m., he kidnapped Mst. diksha aged 8 years while she and her cousin Rajendra Rathi both were sitting on the shop of her father PW-1 Heeralal Rathi. According to the prosecution story, Heeralal left the shop at about 5.30 p.m. leaving Diksha and Rajendra on the shop. When he returned at about 6.30 p.m. his nephew Rajendra enquired from him whether Diksha reached the house. Thereupon, Heeralal told that she had not reached. Heeralal became anxious and worried and set out in search of his daughter Diksha. Rajendra told Heeralal that one person wearing Dhoti and Kurta and who was sitting on the Chabutara near the shop took Diksha with him for purchasing Supari. When Heeralal could not trace out Diksha he lodged the first information report at the Police station, Pratapnagar, Jodhpur on the same day at 8.50 p.m. The police registered a case and started investigation.

3. It appears that PW-6 Lunaram, an employee in RSEB Department, happened to go to the vacant field in front of RSEB sub-station where he found Diksha standing and weeping. He brought Diksha to the police station and thereafter, she was handed over to her father Heeralal. On interrogation, she stated that the person who took away her committed rape after taking her to a lonely place. She resisted and cried but could not get rid of that person. Eventually the accused was apprehended. It may be stated that during the identification parade which was got conducted during the course of investigation Mst. Diksha and Rajendra Rathi could not identify the accused.

4. The accused pleaded not guilty to the charges framed against him and claimed to be tried. In order to prove the above offences, the prosecution examined as many as 15 witnesses. The learned Addl. Sessions Judge after appreciation of the

evidence on record came to the conclusion that an attempt was made to commit the rape on Mst. Diksha. The medical evidence also shows that there were injuries on her private parts and even her cheeks bore biting marks. The learned Addl. Sessions Judge further held that the person responsible for committing the above heinous crime was none other than the accused. He also held that the accused did so by kidnapping Diksha from the shop of her father Heeralal. He, therefore, convicted and sentenced the accused-appellant as aforesaid.

5. I have heard Mr. B. K. Pareek, the learned Amicus Curiae for the accused-appellant and Mr. D.S. Rathore, the learned Public Prosecutor for the State and have carefully gone through the evidence on record.

6. Learned counsel appearing for the appellant has very vehemently contended that the learned Addl. Sessions Judge has committed a grave error in accepting the prosecution version that the identity of the accused was established beyond doubt; that Diksha identified the accused in the Court and that the above evidence was sufficient to prove the offences against the accused. According to Mr. Pareek, when the accused was put up for identification. Diksha and Rajendra could not identify him. Mst. Diksha has also admitted in her cross examination that the accused was shown to her in police custody 3-4- times. In such a situation, no reliance can be placed on the identification made by Diksha in Court. In support of his contention, Mr. Pareek has relied on *Kishan Chand v. Delhi Administration and Anr.* AIR 1979 SC 1128 : 1979 Cri LJ 921

7. The learned Public Prosecutor has supported the impugned judgment of the learned Addl. Sessions Judge.

8. I have very carefully perused the evidence on record and after taking into consideration the statement of Mst. Diksha and the testimony of the Medical Officer as also the medical report, I hold that the prosecution has been successful in proving that an attempt to commit rape on Diksha was made and external injuries were found on her private parts.

8-A. Now, the most important question that falls for determination in this case is whether the appellant was the accused. In other words, a serious question

regarding identification of the accused arises for decision. It may be stated that when the identification parade was held during the course of investigation, Mst. Diksha and Rajendra could not identify the accused. It may further be stated that even Rajendra did not identify the accused in Court when he gave his statement. Mst. Diksha, of course, identified the accused in Court but she did not identify the accused during identification parade which was held during the course of investigation. The most important fact stated by Mst. Diksha is that she was shown the accused while he was in police custody. In such a situation, the identification made by Diksha in Court is rendered useless and no reliance can be placed on such an identification.

9. It was held in Kishanchand's case [supra] that where a witness identifies an accused who is not known to him in the Court for the first time his evidence is absolutely valueless unless there has been a previous test Identification parade to test his powers of observations. The idea of holding test identification parade under Section 9 is to test the veracity of the witness on the question of capability to identify an unknown person whom the witness may have seen only once. If no test identification parade is held then it will be wholly unsafe to rely on his bare testimony regarding the identification of an accused for the first time in Court.

10. For the above reasons, the identification made by Mst. Diksha of the accused in the Court is worthless. There is no other link to connect the accused-appellant with this heinous crime. For want of legally acceptable evidence regarding identification of the accused, the accused cannot be held guilty of the above offences and deserves to be acquitted.

11. Before parting with the case I may observe that the Investigating agency has not discharged its duties properly. In order to pacify the public opinion which may revolt against the police for non-detection of such heinous crimes, the Investigating agency avoids the embarrassing situation by implicating a person who cannot be connected with the crime by legally acceptable evidence. In the instant case it appears that the prosecuting agency miserably failed to apprehend or book the culprit. From the record, it is not clear how the police came to apprehend the accused.

12. For the above reasons, I accept this appeal, set aside the judgment of conviction and sentence passed by the learned Addl. Sessions Judge dated 20-12-1996 and acquit the accused appellant of the offences under Sections 363 and 376 read with Section 511 IPC. The appellant is in Jail. He be set at liberty forthwith, if not required in any other case.

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