

Ota Ram Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Oct-30-2001

Reported in : 2002(4)WLN686

Judge : Sunil Kumar Garg, J.

Acts : Indian Penal Code (IPC) - Sections 366, 376 and 511

Appeal No. : S.B. Criminal Appeal No. 250 of 1987

Appellant : Ota Ram

Respondent : State of Rajasthan

Advocate for Def. : Mahipal Bishnoi, Public Prosecutor

Advocate for Pet/Ap. : Doongar Singh, Adv.

Judgement :

Garg, J.

1. This appeal has been preferred by the accused appellant against the judgment and order dated 16.7.87 passed by learned Additional Sessions Judge, Ball in Sessions Case No. 55/85 (14/84) by which he while Sections 376 I.P.C. convicted the accused appellant for offence under Sections 376/511 and 366 I.P.C. and sentenced him as under:

Offence Sentence awarded Section 366 I.P.C. 1 year's R.I. Section 376/511 IPC 1 year's R.I.

Both the sentences were ordered to run concurrently.

2. This appeal arises in the following circumstances:-

i) A report Ex.P/10 was addressed to the Dist. Collector, Pali by one Bhika Ram (might be P.W. 3), alleged to have written on 22.1.79 stating that on that day P.W. 3 Bhika Ram had gone outside from his house and his daughter P.W. 1 Bhanwari aged 7 years (hereinafter referred to as the child Prosecutrix) went to take flowers at the well of Panna. The accused who was a student in one college at Falna had also come to his village. When the prosecutrix. Thereafter he met De. Futar Mal Jain who was Ball and Dr. Futar Mal told him to bring report was lodged. In report Ex.P/10, it is also mentioned that the incident took place on 28.12.78.

ii) P.W. 17 Raghu Nath, Dy. S.P. Bali has slated that he received the complaint Ex.P/10 and he enquired from P.W. 3 Bhika Ram whether he had lodged such report Ex.P/10, upon this P.W. 3 Bhika Ram who is father of the child prosecutrix stated that the facts narrated in the report Ex.P/10 are correct one, but he did not lodge that report. Thereafter P.W. 17 Raghunath on 3.2.79 took the statement (Ex.P/1) of P.W.3 Bhika Ram where P.W. 3 Bhika Ram stated those facts which are found in the report Ex.P/10 and apart from that it was further stated that after that incident P.W.1 Bhanwari came weeping in injured condition and told the whole story to her mother P.W. 2 Janja who went to the house of accused appellant to make complaint about the conduct of the accused appellant, where his mother met and stated that such type of thing could not have been done by his son (accused appellant). It is also mentioned in the statement Ex.P/1 that thereafter the incident was narrated to P.W.4 Mukut Bihari and P.W. 15 Chunnilal. It was further stated in that statement that blood was coming out and he and her wife (PW. 2 Janja) took PW. 1 Bhanwari to the doctor, at that time P.W. 4 Mukut Bihari and P.W. 15 Chunnilal were with them and the doctor told them to come in night because there were many patients at that time. When in the night, they went again, the doctor told that there was nothing wrong with the child prosecutrix and she was kept in the hospital for seven days and thereafter P.W. 1 Bhanwari Devi was discharged

and from the hospital, he went to the police station to lodge the report and PW. 4 Mukut Bihari was with her, but no report was taken by the police and police advised them first to go to the hospital, then he again came to the hospital and the doctor again told him that nothing was wrong with the child prosecutrix.

3. Then on the above statement Ex.P/1, police chalked out regular FIR Ex.P/2 and started investigation.

4. During investigation site plan Ex.P/4 was prepared and the prescription of medical treatment which the child prosecutrix took earlier was seized by the police and the same is Ex.P/6 and this prescription is dated 3.1.79. On 4.2.79 medical examination of the child prosecutrix was got conducted and the same is Ex.P/35 and thereafter a Medical board for medical examination of the child prosecutrix was constituted and the report of medical board is Ex.P/39.

5. After usual investigation, police filed challan against accused appellant and five more persons namely Lumba, Galia, Umaram Bhera and Bal Chand in the Court of Magistrate from where the case was committed to the Court of Additional Sessions Judge, Bali.

6. The learned Additional Sessions Judge vide his order dated 24.7.86 discharged Galia, Lumba, Uma Ram, Bhera and Bal Chand for all offences, but framed charges for offence under Sections 376 and 366 I.P.C. against the accused appellant who pleaded not guilty and claimed trial.

7. During trial, 19 witnesses have been produced by the prosecution and thereafter statement of accused appellant under Section 313 Cr.P.C. was recorded and four witnesses were examined in defence.

8. At the conclusion of the trial, the learned Additional Sessions Judge vide his judgment and order dated 16.7.87 convicted the accused appellant for offence under Section 376/511 in place of Section 376 I.P.C. and 366 I.P.C. and sentenced him as stated above.

9. Aggrieved from the said judgment, this appeal has been filed by the accused appellant.

10. In this appeal, the following submissions have been made by the learned counsel for the appellant:

i) In the order dated 24.7.86 whereby charges were framed against the accused appellant, it was specifically mentioned that the incident took place before one month back from the date of 3.2.79 and the statement Ex.P/1 of P.W.3 Bhika Ram was recorded on 3.2.79. Thus, there is delay. Hence this delay shatters the whole case of the prosecution and on this point alone, the case of the prosecution should be thrown out and the findings of conviction recorded by the learned Additional Sessions Judge are palpably wrong one.

ii) That the statement of P.W. 1 Bhanwari should not have been relied on by the learned Additional Sessions Judge even for offence under Section 376/511 I.P.C. as when he has come to the conclusion that no rape was committed with her, therefore, placing reliance on her statement for offence under Section 376/511 I.P.C. is also wrong as the statement of PW. 1 Bhanwari is not corroborated by any other evidence, even from medical evidence. Therefore, findings of conviction from this point of view also suffers from basic infirmities.

11. On the other hand, the learned Public Prosecutor has opposed the submission made by the learned counsel for the appellant and submits that the judgment of the trial Court is based on correct appreciation of evidence and the same does not require interference by this Court,

12. I have heard both and perused the record of the case.

13. Before proceeding further it may be stated that there is no dispute on the point that the incident took place one month back before 3.2.79. In the report Ex.P/10 the date is mentioned as 28.12.78. In the statement Ex.P/1, P.W. 3 Bhika has clearly admitted that the report Ex.P/10 was not lodged by him. The FIR can be lodged by anybody and even if report Ex.P/10 was lodged by anybody other than P.W. 3 Bhikha Ram, but the fact that it was lodged on 22.1.79 is not in dispute. Thus, it can easily be said that it was lodged with the delay of 25 days. The statement of PW.3 Bhika was recorded by the police for the first time on 3.2.79 and the same is Ex.P/1 and on the basis of statement Ex.P/1 police chalked

out FIR Ex.P/2. This is one aspect of the matter. Other aspect of the matter is that after lodging the report Ex.P/2, the child prosecutrix P.W.I Bhanwari was got medically examined on 4.2.97 and her medical examination report is Ex.P/35 which shows that:-

- i) she is of about 9 years of age
- ii) There is no evidence of any injury on her person.
- iii) There is no discharge of any nature from vagina
- iv) There is no stain on these parts.
- v) Hymen - normal
- vi) There is nothing to opine that rape was committed.

14. After that report Ex.P/35, a medical board was further constituted for medical examination of the child prosecutrix and the medical report of Medical Board is Ex.P/39. The medical board has given the same report which was given by another doctor in report Ex.P/35. Thus, from the medical point of view, the prosecution case is nil so far as commission of rape is concerned. The prescription slip Ex.P.6 which is dated 3.1.79 reveals that P.W. 1 Bhanwari was being examined by the doctor for treatment of diarrhea.

15. In light of the above facts, now the statements of prosecution witnesses has to be examined.

16. PW.3 Bhika Ram who is father of the child prosecutrix states that on the date of incident he found the condition of PW. 1 Bhanwari very bad as she was having swelling on her private part and blood was also coming from her vagina and she was not in a position to speak and he was told by her mother PW.2 Janja that rape was committed by the accused appellant on her and then he took her to the doctor and he also went to the police station, but no report was taken by the police, he has further admitted that Ex.P/6 is the same prescription which was written by the doctor concerned when in the night she was examined by the doctor. Similar is the statement of PW 2 Janja, mother of the child prosecutrix.

17. P.W.I Bhanwari is the child prosecutrix who states that on the relevant day the accused appellant lifted her first and thereafter he committed rape with her. In cross-examination she has been contradicted with her police statement Ex.D/1 and she also admitted that there were some ladies there but nobody came and she also cried. She has further admitted that there were some ladies near well, but she did not talk to them.

18. In this case P.W.4. Mukut Bihari, P.W. 6 Narayan Ram, PW.13 Chiman Singh, PW. 15 Chunni Lal and PW 18 Shanti have been declared hostile and PW4 Mukut Bihari and PW 15 Chunni Lal are those witnesses whose name have been mentioned by PW. 3 Bhika ram in his report ex.P/1, but both have been declared hostile.

19. The next question that arises for consideration is whether in the above facts and circumstances of the case statement of Child prosecutrix P.W. 1 Bhanwari can be believed or not and whether findings of conviction for offence under Section 376/511 and 366 IPC recorded by the learned Additional Sessions Judge are liable to be confirmed one or not.

20. Before proceeding further it has to be seen whether corroboration is essential in rape cases before convicting an accused person and for that a case reported in Rameshwar Kalyan Singh v. State of Rajasthan, AIR 1952 SC 54, may be referred to where following proposition of law has been laid down by the Hon'ble Supreme Court:

i) 'The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration as a matter of prudence, except where where the circumstances make it safe to dispense with it, must be present to the mind of the Judge, and injury case must find place in the charge before a conviction without corroboration can be sustained. The tender years of the child which is the victim of a sexual offence, coupled with other circumstances appearing in the case such, for example, as its demeanour, unlikelihood of tutoring and so forth, may render corroboration unnecessary but that is a question of fact in every case. The only rule of law is that this rule of prudence must be present to the mind of the judge or

the jury as the case may be and be understood and appreciated by him or by them. There is no rule or practice that there must, in every case, be corroboration before a conviction can be allowed to stand.'

21. Thus, no doubt corroboration as a rule is not required, but if the facts and circumstances of the case are of such a nature which requires corroboration, the Court may in proper cases insist upon corroboration. No hard or fast rule can be laid down. The corroboration is required or not, depends in facts and each and every case.

22. It is well settled that although legally there is no bar in accepting the uncorroborated testimony of a child witness yet prudence requires that courts should not act on the uncorroborated evidence of a child whether sworn or unsworn. This was so held by their lordship of Privy Council in *Mohamed Sugul Esa Mamasan Rer Alalah v. King*, AIR 1946 PC 3, 1946 ALJ 100. The same view was taken by their lordships of the Hon'ble Supreme Court in the case of *Rameshwar Kalvan Singh* (supra) and later on in so many cases.

23. Whenever a witness appears before the Court, the court will proceed on the basis that he is competent to testify. The satisfaction to be arrived at by preliminary examination of witness depends on the facts of each case, however, his/her evidence does not become inadmissible in evidence in absence of such preliminary examination.

24. In *Raja Ram Yadav v. State of Bihar*, JT 1996(4) SC 140, the Hon'ble Supreme Court observed that the evidence of a child witness is not required to be rejected per se but the Court, as a rule of prudence, considers such evidence with close scrutiny and only on being convinced about the quality of such evidence and its reliability, basis the conviction by accepting the deposition of the child witness.

25. In this respect, the latest judgment of the Hon'ble Supreme Court in *Suryanarayana v. State of Karnataka*, JT 2001(1) SC 230, may be referred to.

26. If the above principles are kept in mind, in my considered opinion, the statement of PW.I Bhanwari Chand Prosecutrix on the point that accused

appellant attempted to commit rape on her does not inspire confidence and the findings of learned Additional Sessions Judge are liable to be set aside for the following reasons:-

i) The alleged incident took place before one month of 3.2.79 and as per Ex.P/10 the incident took place on 28.12.78. PW.3 Bhika has admitted that the contents in report Ex.P/10 are correct one and thus, there is delay of near about one months in lodging the report in the present case and it appears to be fatal one as the same has not been properly explained.

ii) Had the child of tender age of 8-9 years would have been subjected to forcible intercourse by accused person, she must have received injuries on her person including her private parts and in the present case there is no medical report to show that she received any injury and thus from this point of view, the case of prosecution is nil.

iii) There is clear admission by PW 3 Bhika and PW 2 Janja that after Incident they took her to the doctor and they further stated that she was having injury on her private part, but from prescription slip Ex.P/6, it appears that she was having stomach problem and not any injury. Not only this in statement Ex.P/1 which was given by PW. 3 Bhika Ram on 3.2.79, there is clear mention of the fact that both the times, the doctor advised him that nothing was found wrong with the prosecutrix PW 1 Bhanwari. Therefore, the allegation that blood was coming out from her private part cannot be accepted.

iv) In the statement Ex.P/1, the name of PW.4 Mukut Bihari and PW. 15 Chunnilal are mentioned and as per PW 3 Bhika Ram, he also informed these two witnesses that rape was committed by the accused appellant with her daughter PW. 1 Bhanwari, but both these witnesses have been declared hostile. Thus these two witnesses also did not corroborate to the statement of PW 1 Bhanwari, PW 3 Bhika Ram and PW 2 Janja on the point of alleged commission of rape.

v) Not only this, from the statement of PW. 4 Mukut Bihari, it further appears that he went to the hospital along with PW 1 Bhanwari PW 3 Bhika Ram and PW 2 Janja where it was stated by them to the doctor that PW 1 Bhanwari was having

some stomach problem and this fact the PW Bhanwari was having stomach problem gets corroboration from medical prescription slip Ex.P/6. Therefore, from this point of view also the case of alleged rape is negated totally.

vi) P.W. 16 Asharam who was compounder in that dispensary where PW 1 Bhanwari was examined by the doctor has been produced by the prosecution and this witness also states that entry Ex.P/16 was made by him in the outward register and the entry at place 'C' to 'D' date 2.1.79 was made by him and at place 'A' to 'B', name of Bhanwari PW 1 is mentioned. From perusing the register Ex.P/16, it appears that she was given treatment for stomach problem. Since it is a very valuable piece of evidence, therefore, the case of PW 1 Bhanwari, PW 3 Bhika Ram and PW 2 Janja that the child prosecutrix was raped or accused appellant tried to molest her as a result of which she received injuries on her private part cannot be found to be proved, rather the case of the prosecution becomes doubtful on the point of commission of rape as the child prosecutrix was treated only for stomach problem and not for other purpose.

vii) There is evidence that at the well there were some ladies also and out of those ladies, PW 18 Shanti has been produced who has been declared hostile. Therefore, from this point of view also the case of the prosecution becomes doubtful.

viii) One of the fundamental principles of law is that every accused person must be presumed to be innocent unless and until he has been proved beyond reasonable doubt to be guilty and burden always lies on the prosecution to prove its case and the accused is entitled to the benefit of every reasonable doubt. The approach of the learned Additional Sessions Judge in convicting the accused appellant for offence under Sections 366 and 376/511 IPC is erroneous on the point that he treated the case as if burden lies on the accused appellant. From this point of view also, the findings of conviction recorded by learned Additional Sessions Judge are liable to be set aside and the accused appellant is entitled to acquittal.

ix) Thus, in the above background, when there is considerable delay in lodging the report medical evidence is nil and rather medical evidence reveals that the child

prosecutrix was treated for stomach pain, therefore, in these circumstances the case of alleged commission of rape cannot be accepted and in the facts and circumstances mentioned above, the statement of child Prosecutrix PW. 1 Bhanwari that she was raped by the accused appellant does not inspire confidence and her statement is not to be believed as there is no corroboration to her statement by any sort of evidence except that of mother and father PW 2 Janja and PW 3 Bhika Ram and their statements also become falsified because of prescription slip Ex.P/6 and further more had the incident as alleged by PW 1 Bhanwari would have taken place, the report would have been certainly lodged by PW 3 Bhika Ram in the police station or anywhere.

27. Hence, findings of learned Additional Sessions Judge by which he convicted the accused appellant for offence under Section 376/511 and 366 IPC are set aside and his appeal is liable to be allowed and the accused appellant is liable to be acquitted for offence under Section 376/511 and 366 IPC.

For the reasons mentioned above, the present appeal filed by the accused appellant Ota Ram is allowed and judgment and order dated 16.7.87 passed by the learned Additional Sessions Judge, Ball by which he convicted and sentenced the accused appellant for offence under Section 366 and 376/511 IPC are set aside and the accused appellant is acquitted for offence under Sections 366 and 376/511 IPC.

Since accused appellant is on bail, he need not surrender. His bail bonds are hereby forfeited.

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