Malaram Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Mar-06-1991

Reported in : 1991WLN(UC)74

Judge : Farooq Hasan, J.

Appeal No. : S.B. Criminal Appeal No. 332 of 1989

Appellant : Malaram

Respondent : State of Rajasthan

Disposition : Appeal allowed

Judgement :

Farooq Hasan, J.

1. This appeal is directed against judgment dated 15.9.89 passed by the Additional Sessions Judge, Neem Ka Thana (District Sikar) convicting & sentencing the appellant under Section 376, IPC, to undergo eight year's RI & to pay a fine of Rs. 4,000/-(in default, further 2 years' R.I.).

Brief facts-

2. A written report (Ex. P.5) was lodged at police station Patan on 6.2.88 by Jal Singh alleging therein that his two daughters, namely, Ummed aged 13 years &

Santosh aged 9 years, had gone to the forest to graze his male & female calves; Ummed being dumb, upon her, Malaram (appellant) committed rape at 5 p.m. and when her sister, Santosh tried to save Ummed, she was slapped to go away; that, thereupon, Santosh started to her house where she was found weeping and she narrated tale of woe about rape upon her sister, Ummed and thereafter Shishupal Singh arrived at the house alongwith Ummed and stated that Malaram has committed rape upon Ummed which he had seen and when he rescued, Malaram went away; he; clothes were stained with blood. It had been alleged therein that upon narration of the tale of woe about rape at his house, he, Amar Singh, Bhopal Singh, Jaswant Singh went in search of Malaram to the colony of Bheels and made enquiries but they were beaten by Mahavir, Moolram Meena thereby they sustained injuries.

3. Upon the said report, criminal case was registered at the police station and the investigation commenced. The challan was presented in the Court of Munsif & Judicial Magistrate, Neem Ka Thana against the appellant for the offence punishable under Section 376, IPC. The Magistrate committed the case for trial to the Court of Sessions. The charge was framed and read over to the appellant who pleaded not guilty claiming trial. The prosecution examined 17 witnesses. The appellant was examined under Section 313, Cr.P.C. He examined Khet Singh as DW 1. The learned trial Court after hearing the parties, and discussion of the eveidence on record, found the appellant guilty of the offence under Section 376, IPC, and sentenced him as indicated above. Hence this appeal.

4. Learned Counsel for the appellant urged that the trial Court failed to take into consideration the fact that the medical evidence does not support the prosecution story unfolded by the prosecutrix inasmuch as her statement suffers from inconsistencies which have been brushed aside by the trial court whereas it goats to raise presumption of innocence in favour of the appellant. The evidence of the prosecutrix does not inspire confidence because her evidence is full of inconsistencies & unworthy of credence as being a dumb witness she could not explain the circumstances in which the alleged rape has been committed by the appellant and her evidence which has been adduced by way of indicating signs which too were like tutored by her parents, cannot be believed.

5. Mr. Balwada argued that both the child witnesses were tutored by their parents. Besides, only other witness who was produced to support the prosecution version from the very inception, was Shishupal (PW 7) but he failed to fortify the rape story put by the child witnesses and he resiled from his earliest version. Therefore, he was declared hostile, Mr. Balwada stressed that it was Shishupal (PW 7) who had fetched the prosecutrix and her sister Santosh, from the place of incident and handed over them to their parents at the house, narrating the story of rape. But he came up with a different story before the trial Court which bore hostility to the appellant. Therefore, it is argued, the prosecution case has not been proved beyond reasonable doubt against the appellant.

6. Learned Public Prosecutor contrarily contended that in view of the statements of the prosecutrix and her sister, Santosh, the trial Court was justified in convicting the appellant on the consistent & reliable evidence.

7. I have considered the points raised by the defence counsel and Public Prosecutdr and have perused the entire record. In the instant case, the statements of Ummed (PW 10) (prosecutrix), her sister, Santosh (PW 1), & Shishupal (PW 7) who were held as principal witnesses to the incident of alleged rape, and that of Dr. R.R. John (PW 12), are acted upon as a basis by the trial Court for a finding of guilt against the appellant which calls for a more intrinsical examination than has been done by the trial Court.

8. Having browsed through the judgment of the trial Court, I may state that the Court has only considered the circumstances which are against the appellant. It cannot but be said that the Court did not advert to the cardinal principles that should be followed in finding the accused guilty on the evidence in the cases of carnal assault.

9. Undisputedly, the prosecutrix, (Ummed) was aged 12/13 years, and dumb being unable to speak at the time of incident of the alleged rape. Before the chief examination of Ummed began, the trial Court put a note while recording her evidence, that she albeit could not clearly speak but to some extent, after understanding, she, by not clearly speaking, answered by moving her head. And, it declared the prosecutrix as competent witness.

10. It is very significant to state that Section 282 Cr.P.C. 1973 contemplates that the Court can make use of the services of an interpreter to assist the court to examine a witness. In the case at hand, it is not clear from the judgment or the evidence of Ummed (PW 10) as to who assisted the court to elicit the answers given in the chief examination. Even, as held in Ah. Soi v. King Emperor A.I.R. 1926 Cal. 922 followed by the Disivion Bench of the Kerala High Court in Kadungoth. Alavi v. State of Kerala 1982 Cr.L.J. 94, a witness who took active part during the investigation of the case and who gave evidence before the committing Magistrate and who was willing to give evidence on the prosecution side cannot be chosen as interpreter. That apart, a Presiding Officer of the Court cannot have anything more than a layman's knowledge in conversing with a deaf and dumb person. Perusing the records in the case at hand, I find that the trial Court had no assistance of any expert or any person familiar with Ummed (PW 10) for her examination. Viewed, the trial Court was unjustified to embark upon the examination of PW 10 without the help of an expert or a person familiar with his mode of conveying ideas to others in day to day life. In these circumstances, the evidence of such dumb witness which had been recorded with no assistance of an expert or person familiar with PW 10, who might have also been able to decipher the gesture of and converse with her/him, (dumb) would not have been made used of or acted upon to base the conviction against the accused in this case.

11. There is one more significant reason which convinces this Court to hold that the evidence of Ummed (PW 10) could not have been used of so as to convict the appellant, because of her mentally retarded condition. She was proved to be mentally retarded as is established by Ex. P.10 which stated that she was not of sane mental age as her physical age seemed to be and also dumb. Ex. P.10 has been proved by its author, Dr. Vinod Kumar (PW 15) in his evidence which proved by saying that mental age of the prosecutrix was not as was appearing from her physical age and that she was mentally retarded. That being her mentally retarded condition, obviously she answered by motion of her head to every question which was interpreted by the Court as positive.

12. Even if her evidence is used of then also it tends to disclose variations and different versions in cross and examinations in chief which goads to the

presumptions of innocence in favour of the appellant as would be evident from the following admissions wrung out from her

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13. In view of the above evidence and admissions wrung out from cross examination of Ummed (PW 10), it is abundantly clear that nothing happened with the prosecutrix and if happened, the appellant cannot be held responsible.

14. Now averting to the evidence of a child witness. I may state that it is trite law that the evidence of a child witness is notoriously dangerous unless immediately available and unless received before any possibility of coaching is eliminated, in as much as judicial prudence requires that Court should not act on the uncorroborated evidence of a child witness whether sworn or unsworn as was held by the Apex Court in : 1952 CriLJ547 . To seek such corroboration, all that is required is that there must be some additional evidence independently rendering it probable that the story of the child witness is true and it is reasonably safe to act upon it. Besides, the independent evidence must not only make it safe to believe that the crime was committed by the accused but it must reasonably connect or tend to connect the accused with it by confirming the story put by the child witness, that the accused committed the crime.

15. In the present case, I find that the aforesaid principles have been eschewed and rule of prudence was over looked by the court below. Present one is a case where the evidence of child witness, Kumari Santo was not avaiblable and received immediately after the impugned incident. The incident allegedly took place on 5.2.88 at about 5 P.M. and its report was lodged at dead hours in the

night at about 2.30 O' clock of 5th & 6th intervening night of February, 1988. Her evidence was recorded by the police on next day 6.2.88.

16. Averting to the evidence of child witness, Santo (PW 1), she is the sister of the prosecutrix. Her father is Jal Singh (PW 8). Her age has been shown to be of nine years, in her statement recorded during trial. In the Voir Dire she was found to have undrstanding for the sanctity of oath. She in chief examination deposed that she alongwith her sister (Ummed) was in the field where the accused came and slapped her twice/thrice, then dragging Ummed, got her fell on the earth; removed his parallel trouser (Payjama) and her kirtle; thereupon the witness told him that she would send for her parents to which the accused showed himself having no dare. Then she deposed that the accused inserted his penis into vagina of Ummed. At the spot, Shishupal Singh is deposed to have reached and seeing Shishupal the accused fled away. She deposed that her sister was fell down below the 'bar' (banyan tree) and her kirtle was drenched with blood.

17. At the very beginning of cross-examination, Santo (PW 1) admitted that it was about 10 O'clock in the morning and half an hour thereafter the accused came there where was no body except them whilst grazing catties.

18. She resiled from most of material particulars stated in her police statement rather in whole hog to support the story she exaggerated in equivocations. In chief examination, she deposed that Shishupal had reached the spot and upon his arrival, Mallaram fled away. Contrarily, in version before police, she stated that when she was threatened by the accused, She rushed to the village in a weeping condition; that she was not seen in the way by any body and she had gone to her home straight way; that she narrated the whole event to her parents; thereupon her father went to fetch her sister (Prosecutrix) and after some time, her father returned alongwith Shishupal Singh fetching her sister Ummed.

19. The above version from her evidence (Ex.D.l) before police was marked as A to B and put in cross examination, to which she deposed to have given such version before the police and she resiled from her version stated in chief examination before court. Even she has gone to the extent of deposing during cross-examination (after deposing that in version marked A to B of her police

statement, fetching of Ummed by Shishupal Singh and her father was given out by her) that it is true that she has come back alongwith Shishupal Singh and she had not returned all alone and that Shishupal Singh had not arrived at the field in her presence. Thus, she resiled from her version and deposed during chief and cross examination about the presence of Shishupal Singh. Whereas from the version given out at the earliest after the impugned incident, in the FIR and police statements of the parents of the prosecutrix and child witness (Santo) it is clear that the presence of Shishupal Singh was shown to be as of eye witness.

20. From the circumstances, the possibility of coaching the child witness is eliminated. The position therefore, boils down to this that I am chary and reluctant of putting absolute reliance on the evidence of this child witness.

21. In Ex. P.5 lodged by her father, Jal Singh (PW 8) it has been stated that when the accused slapped Santo, she came to her house and narrated the events and in the meantime, Shishupal Singh came alongwith Ummed. According to the FIR the incident took place at about 5 P.M. whereas as stated earlier, from cross examination of Santo, it took place at about 10.30 O'Clock in the morning Similarly, the report given out that Shishupal had seen the commission of rape upon Ummed by the accused whereas the evidence of the child witness does not make it safe to believe that the crime was committed by the accused nor her evidence tends to connect the accused with it.

22. Her evidence does not transpire from the contents recited in FIR (Ex. P.5) that she has seen the eye witness Shishupal Singh at the spot. In Ex. P.5, the whole incident has been recited on the basis of the information given to Jal Singh by Shishupal Singh when he came with Ummed. Contrarily, Shishupal Singh has been declared hostile and he bore hostility to the defence, because he confronted with his version given out to the police and his evidence does not tend to connect the accused with the crime of rape.

23. There are certain other striking features also which persuade me to hold that the evidence duly not corroborated by independent other evidence, renders it probable that the story propounded by her is not of sterling worth rather it tends to disclose it to be tutored one.

24. Site inspection memo discloses the jujube tree (Bair) whereas child witness stated that her sister was fell down below the baniyan tree which was not there.

25. The investigating officer arrived on the spot next day to the occurrence, and prepared the site plan (Ex. P.5) and site inspection memo. In memo, the place has not been shown as to where Shishupal was standing and from where had he seen the occurrence. Curiously enough, that place has not been shown in memo where child witness (Santo) was standing or sitting and from where she had seen the occurrence. In fact, in memo, the name of Santo was not at all been mentioned. This is a serious infirmity and damages the prosecution case beyond repair.

26. Even in Ex. P.4, version of Shishupal Singh before police which has been marked as G to H (which states that he saw santo going to the village in a weeping condition) is denied before the trial Court to have been narrated to the police. It shows that Santo was not on the spot having seen the accused committing rape. All these circumstances rent it probable that she was not ocular witness of the commission of the rape. Therefore, the evidence of Shishupal Singh and Santo render no corroboration to their evidence which do not tend to connect the accused with crime of rape.

27. Taking these various striking infirmities into consideration, the testimony of Santo (PW 1) does not inspire confidence. At any rate, she is not a witness of truth. The possibility of her being tutored by her father cannot be totally ruled out. Her evidence neither reasonably connect nor tend to connect the accused with the crime of rape nor it can be acted upon so as to base impugned conviction.

28. Several reasons are on record which make it impossible to believe that the appellant was at the place of the occurrence when Shishupal Singh is alleged to be eye witness of the commission of rape and when the appellant had committed rape on Ummed in the presence of Santo. It is chimrical that Shishupal Singh who is admittedly in relation to Jal Singh being cousin uncle of the prosecutrix and who is alleged to have seen the appellant in the complicity of the crime of rape upon Ummed, at the place of occurrence, he would not chase or catch hold of him red handed. Normal human being would have instinctively caught hold of him even by chasing him in case of his fleeing away while seeing some body.

29. In fact, as stated earlier, the claim of santo that on the spot Shishupal came and on his arrival, the appellant fled away, seems to me a clear improvement over what he narrated to the police immediately after the incident. He did not tell the police, anything of the kind. This was far too important a happening which he has failed to disclose to the police. Santo has given out before the police different sequence of events than to the court. Her claim that Ummed was dragged at few distance towards tree in his field by the accused and he used some force as to lay her down earth during which Ummed was screaming then and there, seems to me a clear omission on her part during evidence before the Court and she eschewed this significant piece of evidence. Nothing at all was said by her regarding the dragging of the prosecutrix in the rough earth passing through fenced trees obviously because the doctor found no injuries caused due to dragging and screaming, in as much as marks of violence on body have been shown to be nil according to the report (Ex. P.9).

30. The course of contemporaneous and subsequent events strengthens the inference that the appellant was not at the place of incident when the prosecutrix was taken to her parents. It is reasonable to expect that if the appellant's complicity in the crime of rape in the presence of Shishupal-stout man, was stated or suspected, attempts would have been made immediately to catch hold him on the spot or to arrest him. But, surprisingly there is not a word on the record to show as to who arrested the appellant and from where. No arrest memo has been proudced nor exhibited whereas he was arrested on 16.2.1988 nor the investingating officer has stated in his evidence about his arrest. The upshot of the matter is that Santo did not tell the police that Shishupal Singh was present at the scene of the incident and had seen the appellant in complicity of the crime of rape upon Ummed whereas she in her evidence before the court and her parents claimed his presence on the spot at the crucial time but it is not proved beyond doubt. Secondly, had shishupal Singh been present at the crucial time on the spot. It is charlimrical that he would have allowed the accused fled away without his chasing nor there is an iota of evidence of any such chasing nor any attempt was made for accused's arrest, immediately after seeing the accused in the commission of rape upon her cousin niece. There is no evidence on the point as to who arrested him from where and in what circumstances.

31. As I have stated earlier, the crucial link in the chain of circumstances is the presence and complicity of the appellant in the offence of rape at the crucial time. Once that link snaps, the entire case would have to rest on slender titbits here and there. The discovery of Ummed's kirtle with blood and sememstains is also enveloped in suspicion. The kirtle was recovered & sealed by the doctor during medical examination after about 24 hours of the alleged rape. Sealed packet of kirtle duly allegedly stained with blood & semen was sent for chemical examination on 8.3.1988 after about one month. The FSL report which has been written on 17.9.88 but proudced in court on 23.6.89 and has not been exhibited by the trial Court, denotes only the detection of human semem at petticoat and no semen in soil (taken from the spot) and in vaginal smear swab and pubic hair of Ummed. The discovery of human semen on the petticot is circumstance far too feeble to establish that the appellant raped Ummed. No effort was made to exclude the possibility that the semen belonged to the appellant. Petticot with semen stain was recovered after 24 hours of the rape. It casts aspersion. No compelling inference can arise that the stain was caused during the course of the alleged sexual assault committed on the girl and that too it belonged to the appellant.

32. Another circumstance which furnishes a link in the chain of causation, is that the doctor albeit opined that the possibility of rape cannot be ruled out but she expressed that final report can be given after receipt of chemical examination report which is lacking and FSL denotes no detection of semen in vaginal smear swab, pubic hair taken by the doctor on 6.2.88 at 6 p.m., in as much as no serologist report has been filed and further more, FSL report was produced after the doctor was examined by the trial Court so as to establish the possibility of rape itself. Even on cross examination by accused's counsel, the doctor stated that the positive signs have not been disclosed only possibility of rape was expressed. Further, on court question, the doctor disclosed the duration of injury on the private part within 12 hours whereas alleged offence of rape is said to have been committed 24 hours before her medical examination. This belies the prosecution case itself which casts aspersions probabilising the defence plea of concoction of the case due to sheer political enmity aroused during the election.

33. There is another snag in the prosecution--evidence on the record. The finding of the trial Court at page 13 of the judgment is that the accused slapped Ummed's sister Santo and got her fled away. So obviously, Santo cannot be held to have seen the accused committing the rape. Other circumstances point failingly to the complicity of the accused in the crime. The judgment of the trial Court tends to disclose that the finding of guilt, has not been reached after a proper and careful evaluation of circumstances, pointed out above in order determine whether they are compatible with any of the reasonable hypothesis.

34. Suffice it to say that in the absence of corroboration to a material extent in all material particulars, it was extremely hazardous to convict the appellant on the basis of the testimony of the highly interested, inimical and partisan witnesses who in the case at hand, as held above, are tutored and made up ones as their evidence sacanned above, bristles with improbable versions and material infirmities. Their evidence does not goad to the complicity of the appellant with the alleged crime.

35. In the result, this appeal succeeds and is allowed. The impugned judgment dated 15.9.89 of the Addl. Sess. Judge, Neem Ka Thana is sess. case No. 9/88 covicting & sentencing the appellant under Section 376, IPC, is set aside. Appellant, Malaram, is acquitted of the offence charged. He is in jail and is ordered to be released forthwith, if not required in any other case.

The record be sent back.