

Jagdish Vs. State of Rajasthan

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Court : Rajasthan

Decided On : May-06-2003

Reported in : RLW2004(1)Raj90

Judge : Sunil Kumar Garg, J.

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

Appeal No. : S.B. Criminal Jail Appeal No. 689 of 2000

Appellant : Jagdish

Respondent : State of Rajasthan

Advocate for Def. : S.S. Sharma, Public Prosecutor

Advocate for Pet/Ap. : Chaitanya Gehlot, Adv. for; Krishna Sharma, Adv.

Disposition : Appeal allowed

Judgement :

Garg, J.

1. This appeal has been filed by the accused appellant from Jail against the judgment and order dated 17.11.2000 passed by the learned Addl. Sessions Judge No. 2, Bhilwara in Sessions Case No. 29/2000 (191-1997) by which he convicted the accused appellant for the offence under Sections 366 and 376 IPC

and sentenced in the following manner: -

Name of accused appellant

Conviction Made u/s

Sentence awarded

Jagdish

3761PC

Ten years 'RI and to pay fine of Rs. 1000/-, in default of payment of fine, to further undergo six months' SI.

366 IPC

Seven years 'RI and to pay fine of Rs. 1000/-, in default of payment of fine, to further undergo six months' SI.

Both the substantive sentences were ordered to run concurrently.

2. By the same judgment, the learned Addl. Sessions Judge No. 2, Bhilwara acquitted the accused appellant of the charge for the offence under Section 368 IPC and also acquitted another accused Om Prakash of the charge for the offence under Section 366 IPC.

3. It may be stated here that the learned Judge, Special Court (Women Atrocities and Dowry Cases), Bhilwara through judgment and order dated 18.5.1998 acquitted another co-accused Banna of the charge for the offence under Section 366 IPC.

4. It arises in the following circumstances :-

PW3 Onad lodged a written report Ex. P/1 dated 6.5.1990 in the Police Station Pander District Bhilwara before PW12 Suganchand, SHO stating inter-alia that 7-8 days before, his niece Ghisi (hereinafter referred to as 'the prosecutrix') daughter of Uda (PW1) was taken away forcibly by 3-4 persons for the purpose of keeping

her in Nata after putting her in a Jeep and there was apprehension that this incident would have been done by the members of her in-laws' family but later on, it came to his knowledge that the accused appellant had taken away the prosecutrix and one Gangaram (PW6) when he went to Kota, he met with the prosecutrix PW2 Ghisi in Khari Baori, where she narrated the whole story to him and she also informed him that the matter be reported to her Mama (PW3 Onad) and thus, the report was lodged by PW3 Onad in the above circumstances.

On this report Ex.P/1 PW12 Suganchand registered the case and chalked out regular FIR Ex. P/2 and started investigation.

During investigation, the prosecutrix PW2 Ghisi was got medically examined for ascertaining her age as well as for ascertaining whether rape was committed with her or not. The age certificate is Ex. P/7 where it was stated that the age of the prosecutrix PW2 Ghisi was 18-19 years. That certificate was admitted by the learned counsel for the accused appellant appearing in the trial court.

The examination report for rape is Ex. P/9 where the doctor observed that there was no injury on private part of the prosecutrix and she was habitual to sexual intercourse etc. etc.

The accused appellant was arrested through arrest memo Ex. P/13 on 8.5.1990.

After usual investigation, police submitted challan for the offence under Sections 366, 376 IPC against the accused appellant and co accused Om Prakash and Banna before the Court of Magistrate and from where the case was committed to the Court of Session.

Thereafter, the learned Addl. Sessions Judge framed charges against the accused persons in the following manner:-

S.No.	Name of accused	Charges
1.	Jagdish	

(Present accused appellant)	366, 368 & 376 IPC	2. Om Prakash	366 IPC	3.
Banna	366 IPC	The charges were read over and explained to the accused persons. They denied the charges and claimed trial.		

During trial, the prosecution examined as many as 14 witnesses and got exhibited several documents. Thereafter, statements of the accused persons under Section 313 Cr.P.C. were recorded. No evidence was led in defence.

It may be stated here that through judgment and order dated 18th May, 1998, the learned Judge, Special Court (Women Atrocities & Dowry Cases), Bhilwara acquitted the co-accused Banna of the charge for the offence under Section 366 IPC.

Therefore, after conclusion of trial and after hearing the parties, the learned Addl. Sessions Judge No. 2, Bhilwara, through judgment and order dated 17.11.2000 acquitted the accused Om Prakash of the charge for the offence under Section 366 IPC and also acquitted the accused appellant of the charge for the offence under Section 368 IPC, but convicted and sentenced the accused appellant for the offence under Sections 366 and 376 IPC in the manner as indicated above holding inter-alia the accused appellant first kidnapped the prosecutrix PW2 Ghisi forcibly and thereafter, committed rape with her in the house in which she was kept for many days.

Aggrieved from the said judgment and order dated 17.11.2000 passed by the learned Addl. Session Judge No. 2, Bhilwara, the accused appellant has preferred this appeal from jail.

Since this appeal was filed from jail and nobody was representing accused appellant, therefore, this Court through order dated 28.3.2001 appointed Ms. Krishna Sharma as Amicus Curiae.

5. In this appeal, it has been submitted by the learned counsel for the accused appellant that looking to the fact that the prosecutrix ix PW2 Ghisi was a married lady of matured age and since she was habitual to sexual intercourse and no injury was found on her private part and she remained in the company of the accused appellant for many days, therefore, in these circumstances, it was a case of consent and hence, the findings of conviction recorded by the learned Addl. Sessions Judge No. 2, Bhilwara against the accused appellant for the offence under Sections 366 and 376 IPC are wholly erroneous one and cannot be

sustained and the accused appellant is entitled to acquittal.

6. On the other hand, the learned Public Prosecutor supported the impugned judgment and order dated 17.11.2000 passed by the learned Addl. Sessions Judge No. 2, Bhilwara.

7. I have heard the learned counsel for the accused appellant and the learned Public Prosecutor and perused the record of the case.

8. Before proceeding further, it may be stated here that there is evidence on record that the prosecutrix PW2 Ghisi was a married lady, but she was not living with her husband for the last ten years and her marriage was performed with another person when she was child of tender age.

9. So far as the medical evidence in the present case is concerned, there is no dispute on the point that as per certificate Ex. P/7, the age of the prosecutrix PW2 Ghisi, at the relevant time, was 18-19 years.

10. So far as the examination report about rape is concerned, from perusing the report Ex. P/9, it reveals that no injury was found on private part of the prosecutrix and she was habitual to sexual intercourse.

11. Thus, medical evidence in the present case is Nil and rather it goes to show that the prosecutrix PW2 Ghisi was habitual to sexual intercourse.

12. Thus, in the present case, there remains solitary statement of the prosecutrix PW2 Ghisi and before examining her statement, something should be said about legal aspect with respect to appreciation of evidence of prosecutrix.

Whether corroboration is essential in rape cases before convicting an accused person ?

13. If prosecutrix is found habitual to intercourse, her statement in order to base conviction of accused persons, must be corroborated in some material particulars from independent source as held by Hon'ble Supreme Court in Ram Murti v. State of Haryana (1).

14. In *Gurucharan Singh v. State of Haryana* (2), the Hon'ble Supreme Court has stated.

'As a rule of prudence, however, court normally looks for some corroboration of her testimony so as to satisfy its conscience that she is telling the truth and that the person accused of rape on her has not been falsely implicated.'

The Hon'ble Supreme Court has further stated in the above case that-

'The matter is not res-integra and this Court has, on more occasions than one, considered and enunciated legal position.'

15. On nature and extent of corroboration necessary for such offence the Hon'ble Supreme Court in *Sheikh Zakir v. State of Bihar* (3), has stated in the following manner :-

'Even though a victim of rape cannot be treated as an accomplice, the evidence of the victim in a rape case is to be treated almost like the evidence of an accomplice requiring corroboration. Hence there must be an indication in the course of the judgment that the judge had this rule in his mind when he prepared the judgment and if in a given case the judge finds that there is no need for such corroboration he should give reasons for dispensing with the necessity for such corroboration. But if a conviction without any corroboration it will not be illegal on that sole ground. In the case of a grown up and married woman it is always safe to insist on such corroboration. Whether corroboration is necessary it should be from an independent source but it is not necessary that every part of the evidence of the victim should be confirmed in every detail by independent evidence. Such corroboration can be sought from either direct evidence or circumstantial evidence or from both.'

16. On this aspect, the decisions of the Hon'ble Supreme Court in the following cases may be referred to :-

(i) *R.K. Agrawal v. State of Orissa* (4)

(ii) *Rafiqu v. State of UP* (5)

(iii) Karnel Singh v. State of M.P. (6)

(iv) State of Punjab v. Gurmit Singh (7)

17. The net result of above cases decided by Hon'ble Supreme Court from time to time can be summarised in the following manner:-

(1) That corroboration of the testimony of prosecutrix in rape case is not required as a rule of law.

(2) That corroboration in such cases is, however, required as a matter of prudence and this rule of prudence has now almost hardened into rule of law.

(3) That the rule of prudence which has been hardened into rule of law is that the rule as to corroboration must be present in the mind of judge and must have been incorporated in the judgment.

(4) That if the evidence of the prosecutrix does not suffer from any basic infirmity and the probabilities factor does not render it unworthy of credence, as a general rule, corroboration should not be insisted upon.

(5) That the corroboration of the prosecutrix evidence may be dispensed with where the circumstances of a case make it safe to do so. But the reasons for dispensing with the necessity of such corroboration should be forthcoming in the judgment.

(6) That corroboration should ordinarily be required in the case of woman having attained majority and who is habitual to sexual intercourse as in such cases there is likelihood of her having leveled such an accusation on account of instinct of self preservation or when the probabilities factor is found to be out of time.

(7) That the view that though corroboration should ordinarily be required in the case of a grown up woman, it is unnecessary in the case of a child of tender years is not correct. Whether corroborations unnecessary is a question of fact in every case.

18. If the victim is unwilling to yield to sexual intercourse, she is expected to receive injuries on her person. The absence of injuries on the body of the prosecutrix, generally, gives rise to an inference that she was consenting party to coitus. Where the prosecutrix had received multiple injuries on the various parts of her body it indicated that she offered resistance when she was subjected to sexual intercourse. It would be too much to hold that whenever a prosecutrix is found to have sustained no visible injury in a case of rape, consent on her part should be presumed. It would amount to leaving the unprotected girls at the mercy of the wolves on the accused or on the prosecutrix shows the prosecutrix did not resist but absence of injuries is not by itself sufficient to hold that the prosecutrix was a consenting party.

19. Before proceeding further, it may be stated here that where the prosecutrix had sufficient opportunity not only to run away from the house but she could have also taken the help of the neighbors and the medical evidence also indicated that there were no injuries on the person of the prosecutrix including her private parts, it can be said that she was a consenting party.

20. Consent or absence of it is generally gathered from the attendant circumstances.

21. Keeping in mind the above basic principles of law, the statement of the prosecutrix PW2 Ghisi is being examined.

22. The prosecutrix PW2 Ghisi in examination-in-chief has stated that the accused appellant Jagdish and co-accused Banna had first caught-hold her and then put her in the Jeep and took her to Khari Baori where she was kept in the house of Ram Charan, where the accused further stated that no doubt she was taken away by accused appellant Jagdish and co accused appellant Jagdish alone used to have sex with her. She has further stated that she did not want to become the wife of accused appellant Jagdish. She has further stated that PW6 Gangaram met her and she told whole story to him.

In cross-examination, she has admitted the following facts :-

(i) That in the house where she was kept nobody was there and alongwith her, the accused appellant used to live there and the accused persons did not allow her to go outside from that house and in that house, she remained for near about 15-16 days and she used to eat food etc. and drink water.

(ii) That she was having one pair of clothes and at the time when she used to take bath, she first put off these clothes and after washing them, she used to wear these clothes again.

(iii) That she did not see Ramcharan in the house.

(iv) That she herself used to prepare food and the accused appellant used to bring material for preparing food.

(v) That it is also correct to say that after living for some days with the accused appellant, she came to know that the accused appellant was a man of penny-less and because of this fact, she did not want to live with him.

23. The question that arises for consideration is whether in the above facts and circumstances, the findings of the learned Addl. Sessions Judge No. 2, Bhilwara that prosecutrix PW2 Ghisi was first kidnapped and thereafter, she was raped against her will by the accused appellant, are liable to be confirmed or not.

24. In my considered opinion, from perusing the statement of the prosecutrix PW2 Ghisi and other evidence on record, it cannot be accepted that the prosecutrix was kidnapped by the accused appellant and thereafter, the accused appellant had sex with her against her will and on the contrary, it clearly appears that it was a case of consent because of the following reasons:-

(i) That the medical evidence in the present case is nil and thus, from medical evidence, there is no corroboration to the statement of the prosecutrix PW2 Ghisi.

(ii) That the fact that the prosecutrix remained in the company of the accused appellant for near about 15-16 days itself goes to show that she was living in the company of the accused appellant with her own will and not under pressure.

(iii) That the fact that since she came to know that the accused appellant had no money, therefore, she did not want to live with him itself goes to show that initially when she was taken away by the accused appellant, she wanted to live with him, but later on she changed her mind because the accused appellant was not having any money and thus, it is evident that she was a consenting party.

(iv) That as per the earlier statement of PW12 Suganchand, SHO who prepared Ex.P/3, fard of recovery of the prosecutrix, the prosecutrix PW2 Ghisi was found alone in the house and thus, if she was found alone, she had opportunity to run away from that house and when she had not run away from the house, it means that she was living there with her own will and that fact goes to show that she was a consenting party.

(v) That the fact that the prosecutrix did not receive any injury when accused appellant committed rape with her itself goes to show that she was a willing partner to the sexual intercourse.

(vi) That the medical evidence, therefore, clearly discloses that the prosecutrix does not appear to have put up any resistance to the alleged onslaught committed on her by the accused appellant. From this, the only irresistible inference can be that the prosecutrix was a consenting party.

(vii) That the fact that the prosecutrix was a married lady of matured age and she was habitual to intercourse further goes to show that she was a consenting party. Furthermore, absence of injuries on the person of the prosecutrix negatives the allegation of rape and show that the accused appellant had intercourse with her with her tacit consent.

25. Thus, for the reasons stated above, looking to the entire facts and circumstances of the case, the only irresistible conclusion that can be drawn is that the prosecutrix PW2 Ghisi was a consenting party and all the activities right from the beginning were going on with her tacit consent and she voluntarily participated in such act and, therefore, the statement of the prosecutrix on the point that the accused appellant first forcibly kidnapped her and thereafter, he committed rape with her against her will cannot be said to be reliable and trustworthy and in view

of this conclusion, the findings of the learned Addl. Sessions Judge No. 2, Bhilwara by which the accused appellant was convicted for the offence under Sections 366 and 376 IPC cannot be sustained and liable to be set aside and this appeal deserves to be allowed and the accused appellant is entitled to acquittal.

Accordingly, this appeal filed by the accused appellant Jagdish from jail is allowed and the judgment and order dated 17.11.2000 passed by the learned Addl. Sessions Judge No. 2, Bhilwara are set aside and the accused appellant is acquitted of the charges framed against him.

Since the accused appellant is in jail, he be released forthwith, if not required in any other case.

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