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Court : Rajasthan

Decided On : Feb-13-1998

Reported in : 1998CriLJ1947; 1998(2)WLC576; 1998(1)WLN199

Judge : Mohd. Yamin, J.

Acts : Rajasthan Children Act, 1970 - Sections 2 and 5; Juvenile Justice Act; Uttar Pradesh Children Act - Sections 2(4); Indian Penal Code (IPC) - Sections 376; Code of Criminal Procedure (CrPC) - Sections 164 and 313

Appeal No. : Criminal Appeal No. 704 of 1980

Appellant : Kajod

Respondent : State of Rajasthan

Advocate for Def. : B.S. Bhati, Public Prosecutor

Advocate for Pet/Ap. : Sanjay Mathur, Adv.

Judgement :

Mohd. Yamin, J.

1. This is an appeal against the judgment of conviction passed by Additional Sessions Judge. Rajasamand in Sessions case No. 12/80 by which he convicted the accused appellant under Section 376, IPC and sentenced him to 5 years

rigorous imprisonment with a fine of Rs. 1000/- and in default to undergo six months' rigorous imprisonment.

2. The case of the prosecution is that a report was lodged on 1-7-79 at 8 a.m. at police station Railmagra by Geeta aged about 8 years that about 12 or 13 days ago she was going to her field at about 7 a.m. from her house. Kajodia was in his field and was managing. He told Geeta that some thieves were sitting in the way and that if she would go on the path way she would be killed by them. Therefore, she should take the lower path in order to reach the field. He thus misguided Geeta. Geeta taking the lower path way reached near a tree of 'Khakhra' where Kajodia asked her to lie down. She did not obey him and then he caught hold of Geeta and fell her on the ground. Then he over turned her 'ghaghra' and committed rape. She started bleeding profusely per vagina. Then the accused Kajodia gagged her mouth. Kesia and Vardia also came there. Kajod ran away seeing them. Geeta then came back to her house and told her mother that she was suffering from fever and, therefore, she had come back. She did not tell the incident to her mother. After two days she narrated it to her parents. Thereupon a village panchayat gathered before which a person named Ekling jolted down the report. General condition of Geeta was not well, therefore, she was taken to Rajnagar and shown to a doctor. Appellant's father came to Rajnagar and told that he would bear all the medical expenses and then Geeta was taken to Nathdwara hospital. She was kept there for two days and when she did not recover she was brought back to the village. On 29-6-79 constable Khuman Singh came on patrolling duty to the village. He came to know about this incident. He made an inquiry and then took Geeta to Dy. S. P. of Kankroli. The Dy. S. P. recorded the statement of Geeta and thereupon a case under Section 376, IPC was registered at police station Railmagra. The statement which was recorded by Dy S. P. is Ex. P/3 and it is dated 30-6-79. On its basis report Ex.P/5 was registered. During the investigation site plan Ex.P/7 was prepared. 'Ghaghri' of Geeta was seized vide Ex.P/8, Dhoti of Kajod was recovered vide Ex.p/11. Geeta was medically examined and report Ex.P/12 was prepared. According to medical report, age of Geeta was between 9 to 10 years. During the investigation Geeta. Mangia, Smt. Anchhi, Kesuram and Vardia were examined under Section 164 Cr.P.C. After investigation, charge sheet was submitted before the judicial Magistrate Rajsamand who committed the case

to the learned Sessions Judge. Udaipur. He transferred it to the learned Additional Sessions Judge, Rajsamand before whom accused appellant was tried. It may be stated that no enquiry was made about the age of accused appellant by any Court. Learned Additional Sessions Judge considering appellant not to be a 'child' proceeded with trial. Accused appellant denied his indictment when he was charged for offence. under Section 376, IPC on 14-3-80. Thereupon the prosecution examined as many as 8 witnesses on its behalf. Dr. B. P. Gupta was examined as court witness. Accused appellant was examined under, Section 313, Cr.P.C. He stated that he was only 15 years of age. He produced Kishan as defence witness. Defence of accused appellant was that the parties were having inimical terms and, therefore, he had been falsely implicated. The learned Additional Sessions Judge after hearing both the parties convicted and sentenced the accused appellant as stated above.

3. I have heard the learned Counsel for the accused appellant as well as learned Public Prosecutor at length.

4. Learned counsel for the appellant submitted that there was extraordinary delay in lodging the FIR and the same has not been explained. He also submitted that there were chances of embellishment in the story and, therefore, the accused appellant should be given benefit of doubt. In the alternative he submitted that the accused appellant was a child within the meaning of Section 2(d) of the Rajasthan Children Act, 1970 which was applicable at the relevant time and his case should have been dealt with by a Children Court established under Section 5 of the Rajasthan Children Act and not by the regular Court. He has submitted that since the accused appellant was convicted after trial by the learned Additional Sessions Judge, Rajsamand and now the appellant is more than 33 years of age, the only course open is that his conviction may be maintained but the sentence may be quashed in view of *Bhoop Ram v. State of U.P.* 1989 SCC (Cri) 486 : 1990 Cri LJ 2671.

5. On the other hand, learned PP has contended that the case is well proved against the accused appellant and that he was not a child under the Rajasthan Children Act at the relevant time.

6. PW-1 Kumari Geeta has stated that when she was going towards the field of her father, accused appellant misguided her and said that if she went on the same path way on which she was going she would find thieves who would kill her. He advised her to take the other way and then he came to her and asked her to lie down on the ground. She did not agree. Then the accused appellant fell her on the ground and then inserted his penis into her vagina. She started bleeding. Kesiaand vardia came and then accused appellant ran away. She was subjected to a lengthy cross-examination. She did admit that accused appellant was not having good relations with her parents. Learned counsel for the appellant, taking thread from this line of cross-examination, submitted that the accused appellant was falsely implicated. I do not agree with this contention because no other witness has supported it. Secondly it is unbelievable that the parents of an unmarried minor girl would implicate accused appellant at the cost of honors of their daughter. She stated that she did not tell the story to anybody for a day or two but later on she told it to her parents. From her statement it appears that after the matter was reported to the police she was taken from one hospital to another and delay in her physical examination occurred. From the statement of PW-2 Anchhai, who is the mother of Geeta, it appears that Geeta returned and told that she suffered from fever and in the evening she did not take food. Instead she took a small quantity of milk. She, has stated that Geeta told her about the event on its third day. Geeta has given a reasonable explanation by saying that she was afraid of beatings by her parents. Anchhai has stated that she inquired from Geeta as to why she did not tell. Then Geeta hold her that she was afraid of beatings and that she was also shameful. She has stated that Geeta was taken to hospital at Rajnagar. She has also given the explanation of delay by saying that the father of accused appellant came and told that the girl would earn a bad name in the society and that she will have to go from the village to the police as well as to Court and will be thus harassed. He also assured that he would pay the amount to be spent on treatment of Geeta. She also stated that the prosecutrix was also taken to a doctor in Nalhdwara and treatment was given but she did not recover Thus there is reasonable explanation of delay. Both these witnesses are believable.

7. Prosecution also examined Kesuram and Vardichand, PW-4 Kesuram has stated that at the time of incident, he and Vardichand were going together with goats to graze. The accused appellant saw them and thereafter' went away. He found that Geeta was standing there. He has stated that he saw accused appellant tying his dhoti at that time. The accused appellant is his cousin. PW-5 Vardichand has stated that he saw the accused appellant Kajod running. He also saw Gceta. But he denied that he had seen accused appellant committing rape with Geeta. He was declared hostile. The reason is obvious. He is also a relation of accused appellant. So these two witnesses were not expected to support the case of the prosecution. They arc partly true.

8. PW 3 Maniga, who is the brother of Geeta, has stated that he returned in the evening and his mother told that the accused appellant had committed rape with Geeta. It is corroborated by Geeta. He stated that Geeta was not keeping well and, therefore, she was taken to Rajnagar where she was shown to a doctor who asked that the matter should be first reported to the police or the girl should be taken to Railmagara or Udaipur. However, the doctor had administered an injection. He has further stated that the father of the accused appellant came to Rajnagar and offered assistance and then Geeta was taken to Nathdwara. Later on a constable came to his village who took him and Geeta to Rajnagar. Statement of Geeta was recorded by a police officer. From the record I find that the statement of Geeta Ex. P/3 was recorded by Dy. S. P. On 30-6-79. PW-7 Eking has stated that a panchayat took place. He also went on invitation of Mangu. There the report Ex. P/4 was written by him as told by Geeta and Uda. He has stated that Geeta narrated the story before the punches and that the witness recorded in Ex.P/4. Learned counsel for the appellant submitted that as per the medical report her hymen was not ruptured and there was no injury on any part of the body of Geeta when she was examined by CW-1 Dr. B. P. Gupta who prepared Ex.P/12. CW-1 Dr. B. P. Gupta has stated that the examination of Geeta was performed on 2-7-79. As per his report, the hymen was found intact. It did not allow admission of even a little finger but there was slight congestion. He has explained in his statement that in small children hymen being situated higher in the canal is not usually ruptured but may become red and congested along with the inflammation and bruising of labia or if considerable violence is used there is often

laceration of the fourchette and perineum. According to him penetration was not done with force in the vagina of Geeta but he opined that penis might have touched the vagina of Geeta. Congestion was found in her vagina which was possible in these circumstances. So from the evidence on record I find that offence under Section 376, IPC is proved beyond doubt against the appellant. '

9. Now I take up the alternative argument of the learned Counsel for the appellant. So far as the age of the accused appellant is concerned, he was of 15 years of age on the date when he was examined under Section 313, Cr.P.C. by learned trial Court on 29-5-80. If it is taken to be true the age of the appellant ,was only 14 years on the date of occurrence. It is not assailed by prosecution. No enquiry was held about his age at any stage. In view of *Bhola Bhagat v. State of Bihar* 1998 SCC (Cri) 125 : 1997 AIR SCW 4205, it must be assumed that accused appellant was a 'child'. He should have been dealt with under Rajasthan Children Act which was a beneficial legislation. In *Bhola Bhagat's* case (supra) it has been held that in case the Court entertains any doubt about the correctness of age, due enquiry must be made by giving opportunity to the parties to establish their claims and record a positive finding regarding the age of accused. It has also been held that benefit of Children Act should not be refused on technical grounds. It has also been held that if the correctness of the age given by the accused in trial Court is not assailed it must be assumed that on the date of offence the accused was a 'child'.

10. For the cases which have already been decided and when the accused cannot be dealt with under the Children Act or Juvenile Justice Act, it has been observed that the only course was that the conviction may be maintained and the sentence imposed should be quashed.

11. Accused appellant has completed 33 years of age now and has to be dealt with in accordance with *Bhoop Ram's* case (1990 Cri LJ 2671) (supra) in which it was observed as under (para 8):

Since the appellant is now aged more than 28 years of age, there is no question of appellant now being sent to an approved school under the U.P. Children Act for being detained there. In somewhat similar situation, this Court held in *Jayendra v.*

State of U.P. 1982 Cri LJ 1000 that where an accused had been wrongly sentenced to imprisonment instead of being treated as a 'child' under Section 2(4) of the U.P. Children Act and sent to an approved school and the accused had crossed the maximum age of detention in an approved school viz. 18 years, the course to be followed is to sustain the conviction but however quash the sentence imposed on the accused and direct his release forthwith. Accordingly, in this case also, we sustain the conviction of the appellant under all the charges framed against him but however quash the sentence awarded to him and direct his release forthwith.

12. In a later case, Pradeep Kumar v. State of U.P. AIR 1994 SC 104 : 1994 Cri LJ 148 the appellants were more than 30 years of age at the time of decision of the appeal by Supreme Court and the three Judges' Bench of the Apex Court also quashed the sentence. The law laid down by the Apex Court has to be followed.

13. Consequently, the appeal is partly allowed. Conviction of the accused appellant is maintained but the sentence passed against him is quashed.