

Fota and Damra Vs. State

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Court : Rajasthan

Decided On : Jan-21-1999

Reported in : 1999CriLJ1677; 1999WLC(Raj)UC227

Judge : G.L. Gupta, J.

Acts : Arms Act - Sections 25(1B); Code of Criminal Procedure (CrPC) - Sections 313 and 374(2); [Indian Penal Code \(IPC\), 1860](#) - Sections 34 and 376

Appeal No. : Criminal Appeal No. 239 of 1998

Appellant : Fota and Damra

Respondent : State

Advocate for Def. : Chandralekha, P.P.

Advocate for Pet/Ap. : Pradeep Shah and; D.S. Udawat, Advs.

Judgement :

G.L. Gupta, J.

1. Through this appeal under Section 374(2), Cr. P.C. Fota and Damra have called in question the judgment dt. 23-3-98 passed by the learned Addl. Sessions Judge, Barmer where by he convicted Fota under Section 376, IPC and sentenced him to undergo R.I. for five years and pay a fine of Rs. 1,000/-, and Damra Under Section

376/34, IPC and Under Section 25(1-B) of the Arms Act and sentenced him to five years R. I. and a fine of Rs. 1,000/- under the first count, and one year R. I. and a fine of Rs. 100/- under the second count.

2. The case relates to an occurrence which is said to have taken place on 5-8-97 at 3 p.m. in village Dhanau, 30 kms. away from Police Station Chauhatan. The prosecution case is that Kumari 'B' (name withheld by me) (PW 12) was returning to her house from the flour mill along with Rama (PW 13) when the two accused met her and dragged her to some distance. It is alleged that she was raped by Fota and accused Damra remained standing having a gun in his hand. The victim reported the matter to her mother and father and other persons whereupon report Ex. P-4 was lodged on the next day at 5 p.m. After the registration of the case, the police inspected the site, interrogated the witnesses and arrested the accused. The prosecutrix was medically examined by Dr. K. C. Chopra, P. W. 1, Dr. Anil Kumar Goyal, P.W. 14 and Dr. Saroj Choudhary, PW 15. After the accused were arrested, weapons were recovered at their instance. On the completion of the investigation a challan was filed.

3. Learned Addl. Sessions Judge framed a charge Under Section 376, IPC against Fota and charges u/ Section 376/34, IPC and Under Section 25(1-B) of the Arms Act against Damra. Both the accused pleaded not guilty. The prosecution examined as many as 21 witnesses. Accused in their statements Under Section 313 Cr. P.C. denied accusation. They led no evidence in defense. After hearing the learned counsel for the parties, the Addl. Sessions Judge found the charges proved. He, therefore, convicted and sentenced them as stated above.

4. Mr. Shah, learned counsel for the appellants pointed out that the occurrence is alleged to have been witnessed by three persons but they do not support the prosecution case. He further pointed out that even the parents and maternal uncle of the prosecutrix do not support the prosecution story. He submitted that the testimony of the prosecutrix is not sterling worth on which conviction can be founded. For the reports of the Forensic Science Laboratory and Serologist, his contention was that they could not be acted upon as they were not put to the accused in their statements Under Section 313, Cr. P.C.

5. Ms. Chandralekha, on the other hand, supported the judgment of the trial Court. Her contention was that there could not be any reason for the prosecutrix to implicate the accused in a false case. Her submission was that the parents have not supported the prosecution story because of the compromise entered into between them and the accused.

6. I have carefully considered the above arguments. The prosecution case, as deposed by the prosecutrix, is that she was returning along with Rama when the accused met her on the way having axe and gun in their hands. Fota told her to accompany him to Maharashtra and on her refusal he inflicted four injuries to her and Damra remained standing at some distance having a gun in his hand. She deposes that her brother Rama, P.W. 13 rushed to inform Tiku, but in the meantime Fota took her behind the bushes and committed rape on her. According to her, when Fota was assaulting her Tiku had reached there but Damra threatened him to be killed if he went nearer. Her further statement is that blood had come out from her private parts.

7. The statement of the prosecutrix indicates that the occurrence was witnessed at least by two persons Rama and Tiku. Rama, P.W. 13 is the maternal uncle of the prosecutrix, which fact is evident by the statement of Rupa, PW. 10 (mother) who says that her brother Rama was accompanying the prosecutrix. However, Rama does not say that he had seen any part of the occurrence. Though he says that the prosecutrix was going with him from the flour mill, but he adds that she had stayed in the company of Seriya and he had left her there. He does not say that there was assault on the prosecutrix by the accused. Tikma, P.W. 9 who is said to have reached the place of occurrence on the information of Rama does not say that he had seen the accused assaulting the prosecutrix. He says in unequivocal terms that he did not see Fota nor the prosecutrix lying. This witness is the cousin of the prosecutrix. Thus both the witnesses who are close relations of the prosecutrix do not support the prosecution version.

8. P.W. 17 Khinya Ram is the other person, who according to the prosecution, had seen the sexual assault on 'B'. He also does not give evidence on this fact. Thus, the eye witnesses Rama, Khinya Ram and Tikma Ram do not support the

prosecution case.

9. The second set of witnesses are Rupa, P.W. 10 and Ramlal, P.W. 11, who are parents of 'B'. Both these witnesses do not say that their daughter ever complained that the accused had sexually assaulted her. The F.I.R. Ex. P-4 was of course lodged by Ramlal, P.W. 11, and it was stated therein that the accused had sexually assaulted his daughter but the F.I.R. was not written by Ramlal as he is an illiterate person. The prosecution has not examined the person who had scribed the version of Ramlal. Ramlal clearly deposes that he had not got written the facts of sexual assault in the report Ex. P-4. It is evident that it was not the version of Rama when he got the F.I.R. written that the accused had sexually assaulted his daughter. |

10. It has come in the statements of the parents that there was compromise between the parties. On this part of the statement, the P. P. argued that because of the compromise the parents have deliberately suppressed the truth. It has not been asked to the witnesses that there was incident of rape which was compounded. In the deposition of Rupa, P.W- 10 it has come that her daughter had complained that Fota had caused some injuries to her by a 'lathi'. It is obvious that when the witnesses depose about the compromise, it is in respect of this part of the occurrence. It can hardly be believed that the parents would compound the offence of sexual assault on their unmarried daughter of 16 years. There could not be any cause for the parents to come to the rescue of the accused in preference to the prestige and honour of their daughter.

11. Coming to the evidence of the prosecutrix herself, it has to be accepted that she is not a reliable witness. According to her, when she was assaulted she has suffered various contusions and abrasions and even lacerated injuries, but not a single injury was found on her person at the time of her medical examination. This clearly shows that whatever she deposes is not correct.

Apart from that, according to the prosecutrix, she did not have sexual relation with any-one before the incident, but the medical evidence indicates that her hymen was absent and vaginal orifice admitted 2 fingers. There was neither tenderness on her private parts nor mark of injury. Accused Fota who was 25 years of age had

normal health. It cannot be believed that if forcible intercourse had been done by him the victim, who did not have sexual intercourse before, would not suffer laceration and other injuries on her private part. The very fact that no mark of violence was found on the private part of 'B' goes to show that the incident of sexual intercourse had not taken place.

12. Though in the matter of sexual assault it is not required that there should be corroboration of the testimony of the victim by other evidence, yet the conviction on the sole testimony of the prosecutrix is possible only when if she is found to be a reliable witness;. In the instant case as no injuries on the back, legs, hands; etc. were found on the prosecutrix though according to her various injuries were sustained by her, and even no marks of assault on her private part were found, it cannot be accepted that the testimony of 'B' is sterling worth.

13. The learned Addl. Sessions Judge has taken help of the reports of the F.S.L. Ex. P-27 and Serologist report Ex. P-31 to hold the accused guilty. The learned counsel for the appellant is justified in arguing that the trial Court could not have taken help of these documents as they were not put to the accused in their statements Under Section 313, Cr.P.C. The statements of the accused had already been recorded on 24-2-98 and thereafter these two documents were produced by the prosecution. The accused had thus no opportunity to say against these documents. The use of the documentary evidence without putting the same to the accused in their statement Under Section 313, Cr. P.C. is not permissible.

14. Apart from that, the report Ex. P-31 only shows that human blood was found on; the 'Lehanga', Vaginal swab and V.V. Smear. The presence of human blood on the 'Lehanga' or vaginal swab does not indicate that the prosecutrix was sexually assaulted. It is relevant to state that according to report Ex. P-1 the prosecutrix was in menstrual period at the time of her examination. The blood, if found on the aforesaid items, could be of menstruation.

15. In the report Ex. P-27 it has been opined that human semen was detected on the 'Kachha' and 'Lehanga'. There could be semen on the 'Kachha' of the accused. But that would not establish that he had sex with prosecutrix. 'Lehanga' is said to have been seized from the prosecutrix on 8-8-97. The Investigating Officer had

inspected the site on 6-8-97 and even the prosecutrix had been interrogated on that day. There is no plausible explanation as to why her 'Lehanga' was not seized on that day. Moreover, the prosecutrix deposes that she had already washed the 'Lehanga' worn by her at the time of alleged occurrence. If that part of her statement is accepted as correct, there could not have been semen on 'Lehanga' seized by the police on 8-8-97. It is significant to point out that during the course of statement of prosecutrix the 'Lehanga' was not shown to her. It is thus not proved that the 'Lehanga' sent for chemical examination was worn by 'B' at the time of the Occurrence. In view of these infirmities the presence of human semen on the 'Lehanga' cannot be said to be evidence of significance against the accused.

16. The prosecution has, however, been able to establish that a gun at the instance of Damra for which he did not have the licence was recovered. His conviction under the Arms Act is, therefore, well merited.

17. Consequently, the appeal of Fota is allowed. His conviction and sentence Under Section 376, IPC are set aside, he is acquitted of the offence under Section 376, IPC. The appeal of Damra is partly allowed. His conviction Under Section 376/34, IPC and sentence are set aside. However, his conviction and sentence Under Section 25(1-B) of the Arms Act are maintained. He has already suffered the sentence awarded to him. Both the appellants, if not required in any other case, are directed to be released forthwith.

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