

Padam Chand Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Sep-01-2006

Reported in : 2007CriLJ90; RLW2006(4)Raj3229

Judge : Shiv Kumar Sharma and; Prem Shanker Asopa, JJ.

Acts : Rajasthan Police Rules, 1965 - Rule 6.22; Indian Penal Code (IPC) - Sections 302, 307 and 376; Code of Criminal Procedure (CrPC) - Sections 313

Appeal No. : D.B. Criminal Appeal No. 1056 of 2001

Appellant : Padam Chand

Respondent : State of Rajasthan

Advocate for Def. : R.P. Kuldeep, Public Prosecutor

Advocate for Pet/Ap. : Alka Bhatnagar, Adv.

Disposition : Appeal allowed

Judgement :

Shiv Kumar Sharma, J.

1. Padam Chand, the appellant herein, was charged for having committed rape and murder of a young lady before the learned Additional Sessions Judge (Fast Track) Bandikui. Learned Judge although did not find charge under Section 376

IPC proved against the appellant, convicted and sentenced him under Section 302 IPC to suffer imprisonment for life and Fine of Rs. 500/-, in default to further undergo simple imprisonment for two months. Challenge in this appeal is to the said judgment dated October 29, 2001 of the learned trial Judge.

2. It is the prosecution case that on December 13, 1999 Badri Prasad (PW. 6) submitted a written report (Ex. P. 6) at Police Station Manpur stating therein that on the said day he and his wife had gone to the mines for loading stones leaving his daughter Mamta alone in the house, Padam (appellant) along with his two brothers viz. Pappal and Kanji came to his house committed rape on Mamta poured kerosine oil over her body and set her ablaze. The incident had been witnessed by Jagdish Bairwa and his younger daughters Rekha and Pushpa. Hearing cries of Mamta he and his wife rushed to his house and found Mamta lying burnt. She was immediately removed to Gejgarh hospital. On that report a case under Sections 307 and 376 IPC was registered and investigation commenced. Necessary memos were drawn and statements of witnesses were recorded. After Mamta succumbed to the injuries Section 302 IPC was added and dead body of Mamta was subjected to autopsy. The appellant and the co-accused were arrested and on completion of investigation charge sheet was filed. In due course the case came up for trial before the learned Additional Sessions Judge (Fast Track) Bandikui. Charges under Sections 376 and 302 IPC were framed against the appellant, who denied the charge and claimed trial. The prosecution in support of its case examined as many as 13 witnesses. In the explanation under Section 313 Cr.P.C., the appellant claimed innocence and stated that because Mamta loved him and a day before the incident he got engaged with another girl, it was possible that she committed suicide. No witness in defence was however examined. Learned trial Judge on hearing Final submissions convicted and sentenced the appellant as indicated herein above.

3. Having pondered over the rival submissions, we notice that the superstructure of prosecution case is founded on the dying declaration of deceased allegedly recorded by Hanuman Singh, SHO (PW. 9) and the testimony of eye witnesses Rekha (PW. 2) and Pushpa (PW. 3). Before analysing the evidence of Hanuman Singh, Rekha and Pushpa, we deem it appropriate to consider the medical

evidence adduced by the prosecution. Mamta was examined by Dr. S.R. Jindal (PW. 12) in the Primary Health Centre Geejgarh at 7.40 PM on December 13, 1999. Her Medical Injury Report (Ex. P. 22) reads as under:

Burn with scarring almost whole body as face, neck, chest, back of leg, both leg & thigh - IIIrd degree Bruise (80% burn approximately)

Carosine smell was found present.

As per autopsy report (Ex. P. 21) death of Mamta was caused due to shock brought about as the result of antemortem dryflame burns.

DYING DECLARATION:

4. Coming to the evidence of dying declaration we notice that Dr. Sita Ram Jindal (PW. 12) in his deposition stated that on December 13, 1999 he was posted as Medical Officer in PHC Geejgarh Dausa. On that day he got examined the burn injuries sustained by Mamta vide injury report Ex. P. 22. In his cross examination Dr. Sita Ram Jindal deposed thus:

;g lgh gS fd tokc eerK iwjh rjg ls nsus dh fLFkfr esa ugha Fkh D;ksafd mldh fLFkfr fcxM+rh tk jgh FkhA vFkkZr eerK cksy ugha ik jgh Fkh le rks jgh FkhA ;g lgh gS fd eqls bl izdkj dk izek.k i= ugha fy;k x;k fd et:ck c;ku nsus o leus dh fLFkfr esa FkhA ftl le; et:ck vLirky esa ykbZ xbZ Fkh ml le; 70&80 vkneh FksA ;g ckr lgh gS fd ftl le; et:ck eerK vLirky esa vkbZ Fkh og v)Z eqfNZr voLFkk esa Fkh tc et:ck vLirky vkbZ mlds vkkk ?kaVs ckn gugeku flag vLirky vk;k ;g ckr lgh gS fd ogka tks [kMs yxsx Fks os eerK dks crk jgs Fks fd ,slk gqvka ;g lgh gS fd eerK ogka crk;s yxsxksa ds vuqlkj gh bkkjs dj jgh Fkh eerK pwaFd iw.kZ :i ls cksyus dh fLFkfr esa ugha Fkh blfy, geus tks c;ku vFkkZr Fkkusnkj us tks c;ku fy, og mlls iwNdj dUQeZ fd;k fd turk tks dqN dg jgh gS og lgh ;k ugha ml fglkc ls geus viuh Hkkkkk o foods ds vuqlkj c;ku fy[kS] geus ls] eryc ,l ,p vks ls g SA

6. From the testimony of Dr. Sita Ram Jindal, it is established that Mamta, at the time, when her statement was recorded was not in a position to speak and after she was questioned by the persons present there, she gave reply by nod of the head or glance of the eye. In order to examine as to in what manner the statement

of Mamta was recorded, when we look at alleged dying declaration (Ex. P. 24), we notice that it was not recorded on the basis of nod of head or glance of eye. The verbatim reproduction of statement (Ex. P. 24) appears necessary. The statement reads as under:

c;ku dqekjh eerK D/o cnzh izlkn tkfr cSjok mez 16 lky R/O xhtx<+ cSjok eksgYyk eqrkfyd eqdnek uEcj 517@99 u/S. 376, 306 IPC Fkkuk ekuiqj fnukad 13-12-99

ceqdke

PHC xhtx<+

us nfj;klr iqfyl ij c;ku fd;k fd vkt fnu dks esjs ekrk firk o ifjokj okys iRFkj dh jksMh rksM+us x;s gq, FksA ?kj ij eSa vdsyh Fkh vkt 'kke dks djhc 6 ctsa dh ckr gS fd iliy o dkuth iq=ku [;kyhjke [kVhd esjs ?kj ds lkeus vkdj [kM+s gks x;sA o mudk HkbbZ ine [kVhd esjs edku ds vUnj vk;kA eSa edku ds vUnj Fkh rks eq>s idM+dj dejs esa ys x;k tks cSBd ls PkkSd esa tkus ij nf{k.k dh rjQ vk;k gqvK Fkk ftldk njoktk mRrj dh rjQ g SA ftl dejs esa eq>s ckFk HkjDj uhps QIZ ij iVd fy;k vkSj tcjnLrh esjk ?kk?kjk apk djds esjh is'kkc djus dh txg esa viuk fyax ?kqlsM+ fn;k o esjs lkFk dqN le; rd dqdeZ djrk jgk eSa fpYykrh jgh o eSaus gkFkksa eqDdksa ls mlds nsrh Hkh jgh og esjs lkFk dqdeZ dj [kM+k gksdj dgk fd fdLh dks dguk er ugha rks tku ls ekj nwaxkA eSa fpYykus o gYyk djus ls ugha :dh rks ine us ikl dsjkslhu rsy dk tjhdsu j[kk Fkk ftlesa dsjkslhu rsy Fkk esjs dks tku ls ekjus ds fy, tjhdsu mBkdj eq> ij rsy Mky fn;k vkSj ekfpl dh rqyh flyxkdj esjs yxkdj Hkkx x;kA mlh oDr esjh NksVh cgu iq'ik o js[kk Hkh vk xbZ o txnh'k iq= ekaxhyky cSjok o vU; eksgYys dh O;fDr Hkh vk x;sA ftUgksaus esjs dks vLirky ysdj vk;s g SA esjk iwjk 'kjhj ty pqdk g SA

mijksDr c;ku eerK dks i dj lgh ekuk o gkFk o vaxqfy;ka o vaxwBk ty tkus ls peM+h mrj tkus ls vaxwBk ugha dj ldhA uk gh gLrk{kj dj ldhA

7. Evidently aforequoted statement could not have been made by a girl who was unable to speak. From the statement of Hanuman Singh it is clear that Mamta was not wearing 'Ghaghra' at the time of occurrence but in the alleged dying declaration it was stated that the appellant lifted her 'Ghaghra' and committed intercourse with her. This fact creates doubt in the truthfulness of dying declaration

and possibility of concoction of dying declaration in the facts and circumstances of the case cannot be ruled out. In *Godfrey v. State* 1858 31 All. 321 where the declarant merely nodded his head to question by friends, his mind being also weak and lethargic at the time, the declaration was not admitted as verbal statement and was rejected because it did not appear that he understood their words or could know what they understood as his meaning.

8. This Court in *Bashir Shah v. State of Rajasthan* 1994 Cr.L.J. 2526 (Raj.) observed that the practice of Investigating Officer himself recording the dying declaration should not be encouraged. It is against the mandatory provisions as contemplated under Rule 6.22 of the Rajasthan Police Rules, 1965.

9. In the instant case even learned trial Judge rejected the part of alleged declaration of Mamta and acquitted the appellant of the charge under Section 376 IPC. It is well settled that for placing reliance on the dying declaration, a strict screening of the statement is required to be made because it is not a statement on oath and its veracity cannot be tested on cross examination. Before acting on the dying declaration it should be of such a nature as to inspire confidence of the court regarding the correctness and further that it is not a result of tutoring or prompting. The Investigating Officer being interested in the success of the investigation, the dying declaration recorded by him has to be scrutinised very cautiously and if after close scrutiny of the dying declaration the court is satisfied that it is truthful then conviction can be based on it.

10. Since alleged dying declaration of Mamta does not inspire confidence, in our opinion, it cannot be made basis of conviction of the appellant.

EVIDENCE OF EYE WITNESSES:

11. That takes us to the testimony of eye witnesses examined by the prosecution Rekha (PW. 2), real sister of deceased was 10 years of age at the time of incident, stated that when the appellant and his two brothers entered their house, she was playing in the street. She saw appellant pouring kerosene oil from the window-net (Jali) of the house. According to her the incident occurred after sun set. Pushpa (PW. 3), another real sister of deceased was 6 years of age. She stated that

around 3-4 PM she and her sister Rekha. were playing out side of her house. At that time she saw appellant and his brothers pouring kerosene oil on her sister Mamta. Hanuman Singh, 10 (PW. 9) in the cross examination deposed that no window existed in the room where the incident occurred. He further stated thus:

?kVuk Lfky ds edku dh nhokj dh nwjh yxHkx 3 QqV gksxh mlds ckn xsV Fkk tks djhc nks kbZ QqV pk SM+k Fkk mlds ckn fQj nhokj vk tkrh FkhA ;g lgh gS fd pcwrjk vkSj vke jkLrk ij dksbZ [kM+k gks rks dejs dh dksbZ oLrq utj ugha vkrh FkhA

12. Child witnesses are generally prone to tutoring and when something is repeated to them by their elders, they begin to imagining them and really feel them to be the truth. Their innocent brains are like blank papers and can retain anything written over there by repeated communications. The testimony of a child witness should only be accepted after the greatest caution and circumspection. The rationale for this is that it is common experience that a child witness is most susceptible to tutoring. Both on account of fear and inducement, he can be made to depose about things which he has not seen and once having been tutored, he goes on repeating in a parrot like manner what he has been tutored to state.

13. In the case on hand the evidence of Rekha and Pushpa is most unsafe to be relied on. The reasons are:

(i) At the time of incident Rekha and Pushpa, both were playing in the street and it was not possible for them to see the incident occurred inside the room as according to Hanuman Singh. 10, person standing on the street could not see anything of the room.

(ii) Rekha stated that the incident did occur after sunset whereas according to Pushpa it occurred around 3-4 PM.

(iii) Rekha stated that she peeped into 'Jali' of the Room and saw the incident whereas according to Hanuman Singh there was no window or Jali in the room where the incident occurred.

EXPLANATION OF APPELLANT UNDER SECTION 313 Cr PC:

14. In the explanation under Section 313 Cr.P.C the appellant pleaded innocence and stated as under:

eerK eq>ls l;kj djrh FkhA ?kVuk ls ,d fnu igys esjh yxu vkbZ gqbZ FkhA gks ldrk gS bl dkj.k mlus vkRegR;k dh gksA eSa funksZ'k gwaA

Badami (PW. 1), mother of Mamta, admitted this fact in her cross examination that a day prior to incident ceremony of engagement of appellant and his brother Pappal was performed. She stated thus:

;g dguk lgh gS fd ?kVuk ls ,d fnu igys ine vkSj iliy dh yxu vkbZ FkhA

Hanuman Singh, IO (PW. 9) was also asked in the cross examination about the love affair between the appellant and the deceased and the engagement of appellant. Hanuman Singh gave reply to the questions thus:

;g eq>s /;ku ughs fd ?kVuk ls ,d fnu igys inepUn o ykypUn dh yxu vkbZ gksA ;g eq>s irk ugha o tkap ugha dh fd eerK inepan ls izse djrh Fkh ;k ughaA

15. Section 313 Cr PC empowers the court to put the accused such questions as may be necessary with a view to enabling him to explain anything in the evidence against him and the answers given by him may be taken into consideration in weighing the evidence.

16. On weighing the prosecution evidence in the light of explanation of the appellant, the possibility that Mamta committed suicide cannot be ruled out. The fact that Mamta and appellant had love affair was not denied by the prosecution. It was quite probable that finding the appellant engaged with other girl, Mamta became depressed and took such a drastic step.

17. In the ultimate analysis we find that the prosecution has failed to establish charge under Section 302 IPC beyond the reasonable doubt against the appellant. The short comings noticed by us in prosecution escaped notice of the learned trial Judge.

18. For these reasons, we allow the appeal and set aside the impugned judgment of learned trial Judge. We acquit the appellant Padam Chand of the charge under

Section 302 IPC. Appellant Padam Chand, who is in jail, shall be set at liberty forthwith, if not required to be detained in any other case.

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