

Shanker Vs. State of Rajasthan

Shanker Vs. State of Rajasthan

SooperKanoon Citation : sooperkanoon.com/764643

Court : Rajasthan

Decided On : Aug-08-2001

Reported in : 2002(2)WLN470

Judge : Sunil Kumar Garg, J.

Acts : Indian Penal Code (IPC) - Sections 376; Juvenile Justice Act - Sections 2H

Appeal No. : S.B. Criminal Appeal No. 160 of 2001

Appellant : Shanker

Respondent : State of Rajasthan

Advocate for Pet/Ap. : Public Prosecutor; Sanjay Mathur, Adv.

Disposition : Appeal dismissed

Judgement :

Garg, J.

1. This appeal has been preferred by the accused appellant against the judgment and order dated 21.8.2000 passed by learned Sessions Judge, Dungarpur in Sessions Case No. 46/99 by which the learned Sessions Judge convicted the accused appellant for offence under Section 376 I.P.C. and sentenced him as under:-

Offence

Sentence awarded

376 I.P.C.

7 years' R.I. and a fine of Rs. 100/- in default to further undergo 1 months' R.I.

2. This appeal arises in the following circumstances:

1) On 20.6.99 at about 4.10 p.m. PW. 2 Manesh Kumar lodged a report Ex.P/2 before Police Station Bichhiwara, Dist. Dungarpur before PW. 11 Lal Singh, SHO stating that on 19.6.97, he and his wife Laxmi PW. 5 went to his in-laws' house at village Vagdari and they left her daughter Reena P.W.1 (hereinafter referred to as 'the prosecutrix') alone. It is further stated in the report that in the evening at 7 p.m., when they returned to their house, PW. 1 Reena was lying on cot and she was weeping. When they asked about cause of weeping, the prosecutrix told them that after some time when they had gone to Vagdari, accused Shankar came to their house and took her to bushes of Nilgiri and there put her on the ground and pressed her mouth and committed rape, as a result of which blood was oozing from her female organ and seeing the blood, the accused appellant ran away. It is further stated in the report that there was profuse bleeding. In the night he took her to Himlaghar Hospital where the doctor advised that first the matter should be reported to the police and thus, in these circumstances, he lodged the report Ex.P/2 on 20.6.99,

ii) On this report, police registered the case and chalked out FIR Ex.P/9 and started investigation.

iii) During investigation, medical examination of PW 1 Reena was got conducted by PW. 10 Dr. B.P. Verma for the purpose of determining the age as well as for the purpose whether rape was committed with her or not and the medical report of P.W. 1 Reena is Ex.P/1. PW. 10 Dr. B.P. Verma after examining her physically and clinically and after taking x-rays, he has determined the age of the prosecutrix on 20.6.99 between 8 to 10 years and for the purpose of rape, he found clotted blood around vagina etc. The medical examination of the accused appellant was

also got conducted by PW. 10 Dr. B.P. Verma and his medical report is Ex.P/8. The age of accused appellant has been determined between 16 to 18 years.

iv) After usual investigation, challan for offence under Section 376 I.P.C. was filed against the accused appellant in the Court of Magistrate, from where the case was committed to the Court of Sessions Judge, Dungarpur.

3. That the learned Sessions Judge framed charges against the accused appellant for offence Under Section 376 I.P.C. on 31.7.99 who pleaded not guilty and claimed trial.

4. During trial, 11 witnesses have been produced by the prosecution and thereafter statement of accused under Section 313 Cr.P.C. was recorded and two witnesses were examined in defence. The accused appellant examined himself as D.W. 1.

5. After the conclusion of the trial, the learned Sessions Judge vide his judgment and order dated 21.8.2000 convicted and sentenced the accused appellant for offence under Section 376 IPC inter alia holding that:

(1) On the date of occurrence the age of prosecutrix was between 8 to 10 years.

ii) On placing reliance on the statement of PW. 1 Reena, P.W. 2 Mahesh and the medical evidence, the learned Sessions Judge came to the conclusion that the rape was committed by the accused appellant with the prosecutrix and he convicted the accused appellant as stated above.

6. Aggrieved from the said judgment, this appeal has been filed by the accused appellant.

7. In this appeal, following submissions have been made on behalf of the accused appellant:

i) Since in this case there is no evidence that on the penis of the accused appellant there was injury and further living sperm were not found and, therefore, offence under Section 376 I.P.C. should not be held to be proved.

ii) Since, on the date of occurrence, the accused appellant was of the age between 16 to 18 years, therefore, it was duty of the learned Sessions Judge before passing the order of conviction that his age should have been determined and benefit of provisions of Juvenile Justice Act, 1986 (hereinafter referred to as 'the Act of 1986) should have been given to him.

iii) Non-production of younger sister of the prosecutrix is fatal to the prosecution case and also he argued that the accused' appellant should be acquitted or benefit of Act of 1986 should be given to the accused appellant on point of sentence.

8. On the contrary, the learned Public Prosecutor has opposed the submissions made by the learned counsel for the appellant and submits that the judgment and order passed by the learned trial Judge are based on proper appreciation of evidence and do not call for interference.

9. I have heard both.

10. To appreciate the above contention, first medical evidence in this case has to be looked into.

11. The medical examination report of the prosecutrix is Ex.P/1 and to prove that, PW 10 Dr. B.P. Verma has been examined. This doctor on 20.6.99 was posted and Medical Jurist and he examined the prosecutrix in respect of determination of her age as well as for ascertaining the fact whether rape was committed with her or not and for ascertaining her age, x-rays of knee, and ankle joint were taken and he has stated that:-

i) There was no fusion of bones.

ii) She was having 24 teeth.

iii) Breasts were not developed

iv) Nipples were not found in the breast.

v) No hair on axilla and pubic region

vi) Her weight was 20kgs. and height was 124 cms.

In the above factors, he came to the conclusion that the age of the prosecutrix on 20.6.99 was between 8 to 10 years.

12. So far as determination of age of PW. 1 Reena is concerned, in the Court statement she has stated her age as 8 years and her father PW 2 Mahesh has stated her age to be 9 years and there is also no dispute on the point that she was schooling girl and no school certificate has been produced neither birth certificate has been produced.

13. For determining the accurate age of an individual, especially in early years, the following examination of the body is must:

1. Teeth
2. Height
3. Weight
4. Ossification of bones
5. Minor Signs

14. On this point, the decision of the Hon'ble Supreme Court in *Jaya Mal v. Home Secretary, Government of Jammu and Kashmir* (1), maybe referred to where it has been held that margin of error in age ascertained by the radiological examination is of two years of either side.

Secondary Sex characters:

15. The growth of hair appears first on the pubes and then in the axillae (armpits). The first sign of beginning puberty is found with the appearance of hair along labia. In the case of girls, it commences with the appearance of soft and pale coloured downy hair on the pubes at the age of about 13 years and a few spares dark hairs appear at about 14 years. The growth becomes thicker in the course of a year or two when hair commences to grow in the axillae. The development of breasts in

girls commences from thirteen to fourteen years, but it is liable to be affected by loose habits and social environments.

16. Keeping the above principles in mind, the factors of age of PW. 1 Reena has to be seen.

17. In the present case, medical examination report of PW 1 Reena is Ex.P/1 and the salient features of that for repetition are summarized as follows:

Height = 124 cms.

Weight : 20 kgs.

Breast not developed

Pubic hair not developed

fusion of bones not found

18. PW 10 Dr. B.P. Verma after taking into consideration the radiological age and after examining her from clinical point of view has determined the age of prosecutrix between 8 to 10 years and in my considered opinion, looking to the symptoms which were found on the body of the prosecutrix on the date of examination, the age has been rightly determined by PW 10 Dr. B.P. Verma and she was below 10 years of age on the date of examination on 20.6.99. In this regard, the findings of the learned Sessions Judge are liable to be confirmed one.

19. PW 10 Dr. B.P. Verma also examined the prosecutrix for the purpose of ascertaining the fact whether rape was committed with her or not and he found the following factors on her body:

That there was clotted blood around her vagina.

Himen torn

Small finger not passed.

Lacerated wound $1/3 \times 1/4 \times 1/4$ cm on the post vaginal wall.

Inner wall of the vagina tendered inflamed and painful and she was feeling pain on touching of finger.

20. From the above examination, he gave his opinion in the following manner:

- i) Sexual intercourse done within 12 to 36 hours.
- ii) Duration of vaginal injury was also 12 to 30 hours.

21. In the cross-examination, this doctor has admitted following facts:

- i) on penis of the accused appellant spermatazoa was not found and no injury was also found.
- ii) if some part of penis is put in vagina, injury would not be caused on penis

22. Thus, from the abovementioned facts, it is very well established that PW 1 Reena received injuries on her private part and as per the opinion of the doctor PW 10 Dr. B.P. Verma rape was committed with her.

23. The next question for determination is whether forcible intercourse has been committed with the prosecutrix by the accused appellant or not?

24. Before proceeding further, appreciation of evidence of child witness and legal position in respect of child witness has to be seen.

25. It is well settled that although legally there is no bar to accepting the uncorroborated testimony of a child witness yet prudence requires that courts should not act on the uncorroborated evidence of a child whether sworn or unsworn. This was so held by their Lordship of the Privy Council in Mohamed Sugul Esa Mamasan Rer Alalah v. King (2). The same view was taken by their Lordships of the Hon'ble Supreme Court in Rameshwar Kalyan Singh v. State of Rajasthan (3), and later on, in so many cases. The following cases may also be referred to on this aspect:

- i) R.K. Agarwal v. State of Orissa (4)
- ii) State of M.P. v. Sundar Lal (5)

26. As to the nature and extent of corroboration, which should be required, it may be stated here that it did not mean that the corroboration as to the identity must extend to all circumstances necessary to identify the accused with the offence, yet there has to be independent evidence which would make it reasonably safe to believe the witness story that the accused was the one who committed the offence.

27. Whenever a witness appears before the Court, the Court will proceed on the basis that he is competent to testify. The satisfaction to be arrived at by preliminary examination of witness. However, his evidence does not become inadmissible in evidence in absence of such preliminary examination.

28. In *Raja Ram Yadav v. State of Bihar* (6), the Hon'ble Supreme Court observed that the evidence of a child witness is not required to be rejected per se but the court as a rule of prudence, considers such evidence with close scrutiny and only on being convinced about the quality of such evidence and its reliability, basis the conviction by accepting the desposition of the child witness.

29. In this respect, the latest judgment of the Hon'ble Supreme Court in *Suryanarayana v. State of Karnataka* (7), may be referred to.

30. Keeping in view the above principle, evidence of PW 1 Reena would be discussed.

31. PW 1 Reena is a child prosecutrix. While she was being examined in the Court, question were put in the beginning as to satisfy whether witness is competent to give statement or not and after her preliminary examination, the trial Court came to the conclusion that she is competent and thereafter oath was administered and thus, court found her a competent witness and thereafter statement was recorded.

32. PW 1 Reena has stated that the accused appellant took her towards bushes of Nilgiri and put her on the ground. She further stated that he lied upon her and he put his penis in the place from where she used to urine, as a result of which, there was profuse bleeding and seeing the blood, the accused appellant ran away and

when PW 2 Mahesh and PW 5 Laxmi came, she narrated the story to them. In cross-examination, she admitted only one fact that her father PW 2 Mahesh and accused appellant are not on speaking terms and rest cross-examination does not affect her testimony, so far as commission of rape is concerned by the accused appellant.

33. From perusing the statement of the prosecutrix, one thing appears that what she wanted to say is that she was raped by the accused appellant. The Court is aware that this is not the alone evidence in the present case, but apart from this, there is medical evidence as well as other evidence which is found in the statements of PW. 2 Mahesh and PW 5 Laxmi to whom she narrated the story just after the occurrence. PW. 3 Hanja and PW 4 Ganesh Lal are other witnesses who also corroborate the statement of PW 1 Reena, PW 2 Mahesh and PW 5 Laxmi on the point that after the occurrence PW 3 Hanja and PW 4 Ganesh Lal were called upon by PW. 2 Mahesh. Thus there is ample evidence to corroborate the statement of the prosecutrix that the rape was committed by the accused appellant though in law corroboration as a rule of law is not mandatory.

34. In the present case, the learned counsel for the accused appellant has argued that since in the present case sperm was not found on the penis of the accused appellant, and there was no injury on his penis, therefore, offence of rape alleged to have been being committed by the accused appellant should not be held to be proved.

35. The learned counsel for the accused appellant has placed reliance on the judgment of the Hon'ble Supreme Court in *Rahim Beg v. State of U.P.* (8), especially on para 26, where it was held that if a girl of 10 or 12 years who is virgin and whose hymen is intact is subjected to rape by a fully developed man, there are likely to be injuries on the male organ of the man. Relying on these observations, the learned counsel for the accused appellant submitted that since in the present case, there was no injury on the male organ of the accused appellant, therefore, the case of the prosecution should not be believed.

36. In this case, injury on the male organ of the accused is not found, but injury on the private part of the prosecutrix is found and injuries of the prosecutrix are

clearly of the suggestive nature that the rape was committed with her.

37. In the present case, since the victim (child prosecutrix PW 1 Reena) was child of 8 to 10 years of age, therefore, no question of penetration in full sense arise and by putting the penis into her vagina, the offence is complete and it is possible that when accused appellant would have tried to put his penis with force into her vagina, bleeding started and matter ends. In these circumstances, no question arises that penis of the accused appellant must have received injuries.

38. In this respect; it may be stated here that to constitute the offence of rape, it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is, therefore, quite possible to commit legally the offence of rape without producing any injury to the genital part of victim or to the male organ.

39. The Hon'ble Supreme Court in the case of Rafiq v. State of U.P. (9), has held that the absence of marks of injury on the accused is not fatal in each case nor does the absence of such physical injuries on the prosecutrix warrant the presumption of consent on her part.

40. Thus, in the present case if injury on the penis of the accused appellant is not found or spermatazoa is also not found on the penis, it will not negative the statement of prosecutrix PW1 Reena and, therefore, this argument of learned counsel for the accused appellant stands rejected for the reasons mentioned above.

41. For the aforesaid reasons, the statement of prosecutrix inspires confidence and suffers from no infirmity and thus she is a reliable witness and the learned Sessions Judge has tightly relied on her statement. From her statement, the case of prosecution that accused appellant committed rape with the prosecutrix is well proved.

42. The fact that her sister though as per the statement of the prosecutrix was present on the scene has not been produced by the prosecution would not be fatal in view of the remaining evidence which is found in the present case and has been discussed above.

43. So far as the argument that since there was dispute between PW. 2 Mahesh father of the prosecutrix and the accused appellant and for that PW. 2 has lodged false report against the accused appellant is concerned, in my opinion this argument is absurd one as father of the prosecutrix PW. 2 Mahesh would not ordinarily subscribe a false story of rape of his daughter and thereby inviting ignominy. For that following three cases of the Hon'ble Supreme Court may be referred to :

Balwant Singh v. State of Punjab (10)

Promod Mahto v. State of Bihar (11)

State of Rajasthan v. N.K. (accused) (12)

44. For the aforesaid reasons, the findings of conviction as recorded by the learned Sessions Judge against the accused appellant for offence under Section 376 I.P.C. are liable to be confirmed and the appeal is liable to be dismissed.

The plea of accused appellant in passing sentence as per provisions of Juvenile Justice Act. 1986.

45. The case of accused appellant in this respect is that since on the date of occurrence, he was between 16 to 18 years as per medical report Ex.P/8, therefore, he should have been dealt with under the provisions of the Juvenile Justice Act and it was duty of the trial Court that before recording conviction, finding about his age should be given.

46. To meet the above argument in this case, first it is to be seen as to what was the age of the accused appellant on the date of occurrence as per the record available.

47. In the lower court file arrest memo is available and same has not been exhibited neither by the prosecution nor by the counsel for the accused appellant. In that arrest memo the age of accused appellant has been mentioned 18 years and he was arrested on 22.6.99 though incident is alleged to be of 20.6.99. In the statement recorded Under Section 313 Cr.P.C. the age as stated by the accused appellant was 16 years on 4.5.2000. But the court estimated his age as 18 years. The accused appellant has been examined as DW.1 and in that statement, he has stated his age as 16 years.

48. To determine the age of the any person, the best evidence is school certificate and in absence of that, exact date of birth cannot be determined and by medical evidence, the age cannot be determined in perfect manner.

49. It is also not in dispute that in this case from beginning of the trial till the conclusion of the trial, no application in any manner has been presented by the accused appellant making a prayer that since he was below 16 years of age on the date of occurrence, therefore his case should have been dealt with under the provisions of Act of 1986. Thus, no effort has been made by the accused appellant for applying provisions of Act of 1986.

50. As per the statement of PW 10 Dr.B.P. Verma, the age of the accused appellant has been determined between 16 to 18 years. Thus so far as the present case is concerned, the Sessions Judge has estimated the age of the accused appellant as 18 years on the basis of statement of accused recorded under Section 313 Cr.P.C. and no school certificate or birth certificate has been produced. In these circumstances, on the date of commission of crime i.e. on 20.6.99, the age of the accused appellant in no circumstances can be determined below 16 years and on the date of occurrence he was above 16 years of age.

51. As per provisions of Section 2H of the Act of 1986 'juvenile' means a boy who is not above the age of 16 years or a girl who is not above the age of 18 years. Thus, a boy who has not attained the age of 16 years is juvenile and as discussed above, it has been found that on the date of occurrence the accused was not below the age of 16 years meaning thereby that he was not juvenile and thus his trial is not affected.

52. The learned counsel for the accused appellant has placed reliance on a case reported in Gopi Nath v. State of West Bengal (13) and in that case, since the age of the accused was found between 16 to 17 years, on the date of incident and it was held that Magistrate could not commit him to Court and the entire trial was found vitiated. In my opinion, the learned counsel for the accused appellant has not read the full judgment. That judgment was passed under the provisions of West Bengal Act, 1959 and in that Act as per provision of Section 2D 'Child' means a person who has not attained the age of 18 years, but position in the present case is different one. Distinction has been made between the age of male child and female child and for female child, the age has been fixed as 18 years and for male child, the age has been fixed as 16 years. Since, it is a case under the Juvenile Justice Act, 1986, hence observations of the Hon'ble Supreme Court would not be helpful to the learned counsel for the accused appellants.

53. So far as argument that it was bound on duty of the Court below that his age should have been determined first is concerned, the argument in the above facts and circumstances of the case is not to be appreciated as no application was ever made by the accused appellant in the trial Court for claiming the benefit under the provisions of Juvenile Justice Act, 1986 and further more, the accused appellant has not been found below the age of 16.

54. The Hon'ble Supreme Court in the case of Gopi Nath v. State of West Bengal (supra) held that even the accused can claim for the first time before the Hon'ble Supreme Court that he was below the age of 18 years on the date of occurrence, but as discussed above, in the West Bengal Act, the age of the child was 18 years while in the Act of 1986, the male child below 16 years if found child. Hence, in all respects, the plea raised by the learned counsel for the accused appellant is not to be appreciated so far as facts and circumstances of the present case are concerned.

55. For the reasons mentioned above, the argument that the accused appellant should have been dealt with under the Act of 1986 stands rejected.

55. As per provision of Section 376(2)(f) I.P.C. if a woman on which rape has been committed is under 12 years, the minimum sentence is of 10 years. In the present

case, PW. 1 Reena has been found below 12 years of age, but the learned Sessions Judge has sentenced the accused appellant for 7 years' R.I. and he has given some reasons also. Since lenient view has already been taken by the learned Sessions Judge, no further leniency is required.

55. In the result, the appeal filed by the accused appellant Shankar is dismissed after confirming the judgment and order dated 21.8.2000 passed by the learned Sessions Judge, Dungarpur by which he convicted and sentenced the accused appellant for offence under Section 376 I.P.C.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com