State of Rajasthan Vs. Shanker

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Court : Rajasthan

Decided On : May-13-1999

Reported in : 2000CriLJ266; 1999(3)WLC263; 1999(1)WLN634

Judge : V.G. Palshikar and; S.C. Mittal, JJ.

Acts : Constitution of India - Articles 19, 20 and 114; Indian Penal Code (IPC), 1860 - Sections 376; Code of Criminal Procedure (CrPC) , 1974 - Sections 376

Appeal No. : Criminal Appeal No. 209 of 1979

Appellant : State of Rajasthan

Respondent : Shanker

Advocate for Def. : B.S. Chouhan, Adv.

Advocate for Pet/Ap. : Panney Singh, Public Prosecutor and; K.L. Thakur, Adv.

Disposition : Appeal allowed

Judgement :

V.G. Palshikar, J.

1. Being aggrieved by the judgment and order of acquittal dt. 19-12-78 passed by the learned Additional Sessions Judge No. 1, Hanumangarh in sessions case No. 93/77, the State of Rajasthan has preferred this appeal challenging the acquittal

on several grounds mentioned in the memo of appeal. The appeal was admitted in 1979.

2. This appeal has come up for hearing today on 29-4-99. Leave to appeal was granted and appeal was admitted exactly twenty years ago on 20th April, 1979. While admitting the appeal, the accused was directed to be arrested and released on furnishing bail in the sum of Rs. 5000/-. The accused is on bail since then for last twenty years.

3. Reasons for pendency of this appeal and appeals of this kind is required to be mentioned at this stage as it is only after twenty years thereabouts that this Court has reached the stage of taking up for consideration non-custodial appeals i.e. appeals where the accused person is not in custody either after conviction or after acquittal and the judgment of conviction or acquittal, as the case may be is pending consideration in this Court and the accused is enlarged on bail pending such consideration. It has been an established tradition of this Court as is also prevalent in many of the High Courts in the country to take up with priority for hearing criminal appeals in which the accused or convict, as the case may be is in jail custody and since the question of his liberty guaranteed by Articles 19 and 20 of the Constitution of India is in issue and concerned utmost priority of all available nature is given to those appeals. The necessary consequence of it being pendency of appeals in which the accused or convict, as the case may be is enlarged on bail and is not deprived of his right to liberty. Without going into the multifarious reasons of pendency of cases in the High Courts and the causes for it, it is sufficient for the purposes of this case to point out that mounting arrears is one of the major causes for the pendency of this appeal. It is true that appeal is pending for long time (twenty years) and it does seriously wave with this Court every time such appeal whether against conviction or acquittal comes up for hearing.

4. In the instant case, the accused has been acquitted of an offence punishable under Section 376 of the Indian Penal Code. Rape of a minor girl is indisputably a heinous crime which must be punished regardless of time laid in relation of the offence and its punishment. The offences of such kind are on the increase. One of

the basic theories of punishment is deterrent e&ample; that follows from punishment. It is consequently necessary for the maintenance of Rule of Law that the guilty of such heinous crime are punished regardless of time. Punishment to such accused persons must act as a deterrent to the possible criminal who intend to violate chastity and integrity of a person. It is undisputable that the body of a woman is violated against her desire, her mind and soul is also permanently injured. After keeping in mind these reasons that we propose to approach this appeal. We are fortified in our view that the delay in hearing of the appeal or the pendency of the appeal for long period is no cause for not interfering with an order of acquittal. The Supreme Court of India has held in AIR 1996 SC 3041, State of Karnataka v. Moin Patel page 3042:

In the instant case the Supreme Court found that the judgment of the High Court acquitting the accused from charge of committing murder was not reasonable but was a laboured one. Material evidence has been ignored, unimpeachable evidence has been rejected on surmises and conjectures, undue importance has been given to and emphasis laid on trivial and ignorable contradictions and some conclusions have been drawn which are self-contradictory. In fine, on the materials on record it was impossible to accept the conclusions of the High Court that the prosecution had failed to establish its case. It is in the context of these glaring and severe errors which had led to gross failure of justice, that the threshold plea raised on behalf of the accused that having regard to the long interval between the acquittal and the hearing of appeal by the Supreme Court it may not interfere with the judgment of the High Court, could not be accepted.

5. It has been then laid down in unequivocal terms by the Supreme Court of India that delay in hearing of appeals is no cause for not interfering with the impugned orders. The delay of twenty years in the hearing of this appeal should not therefore deter us for reappreciating the evidence on record in the light of the established principle of law.

6. We are also aware of the several decisions of the Supreme Court in the matter of interference in case of acquittal. The principles have well summarised by the Supreme Court of India in its decision reported in AIR 1996 SC 2478 : 1996 Cri LJ

3516. The observations of the Supreme Court can always bear repetition as the dicta of the Supreme Court is binding precedence of reason under Article 144 of the Constitution. The Supreme Court has held in the aforesaid decisions as under:

11. Though the Code does not make any distinction between an appeal from acquittal and in appeal from conviction so far as powers of the appellate Court are concerned, certain unwritten rules of adjudication have consistently been followed by Judges while dealing with appeals against acquittal. No doubt, the High Court has full power to review the evidence and to arrive at its own independent conclusion whether the appeal is against conviction or acquittal. But while dealing with an appeal against acquittal the appellate Court has to bear in mind: first, that there is a general presumption in favour of the innocence of the person accused in criminal cases and that presumption only strengthened by the acquittal. The second is, every accused is entitled to the benefit of reasonable doubt regarding his guilt and when the trial Court acquitted him, he would retain the benefit in the appellate Court also. Thus, appellate Court in appeals against acquittals has to proceed more cautiously and only if there is absolute assurance of the guilt of the accused, upon the evidence on record, that the order of acquittal is liable to be interfered with or disturbed. (Durgacharan Nail v. State of Orissa AIR 1966 SC 1775 : 1966 Cri LJ 1491; Caetano Pleadede Fernandesv. Union Territory of Goa, Daman and Diu AIR 1977 SC 135 : 1977 Cri LJ 167; Tota Singh v. State of Punjab AIR 1987 SC 1083 : 1987 Cri LJ 974; Awadesh v. State of M.P. AIR 1988 SC 1158 : 1988 Cri LJ 1154; Ashok Kumar v. State of Rajasthan AIR 1990 SC 2134 : 1990 Cri LJ 2276.

It will be seen that the Supreme Court has noticed several previous judgments of the Supreme Court on this point while coming to the above quoted conclusion.

7. We are therefore, duly cautions as desired by the Supreme Court in the above decision in reappreciating the evidence in this case. We now proceed to deal with the facts giving rise to the acquittal in the present case.

8. First information report in writing was lodged by one Ishar Ram s/o Uda Ram resident of village Chak Chidiyandhi in Hanumangarh on 20-5-77 alleging that his daughter Sursala aged 10 years was raped by accused Shanker. On the basis of

this report, investigation was carried on and the accused was tried under Section 376 of the Indian Penal Code by the Additional Sessions Judge, Hanumangarh. During the trial, the prosecution has examined seven witnesses to prove its case and the accused has examined one witness in support of his claim for innocence. On hearing both the sides, the learned Additional Sessions Judge No. 1, Hanumangarh came to the conclusion that the prosecution has failed to prove the guilt of the accused beyond reasonable doubt and therefore, gave benefit of doubt to the accused and recorded the order of acquittal which is impugned in this appeal. With the assistance of the learned Public Prosecutor and the learned counsel for the accused as also the complainant, we have scrutinised the entire record and reappreciated the evidence thereon.

9. PW. 1 is the prosecutrix Sursala who at the time of deposition was 10 years old child and was therefore, thoroughly questioned by learned Judge to ascertain whether she was in a position to state on oath and depose before the Court. The learned Judge came to the conclusion that she is competent to depose before the Court. She deposed on oath before the Court that 5-6 months prior to the date of deposition, she was grazing the cattle near the village with another boy called Hakim aged seven years. When they were so grazing the cattle at the same time, accused Shankar came there. He asked the witness to give him some water, she therefore, entered the hut to bring the water, when she was followed by the accused to get hold of her and threw her on the floor, removed her garments and raped her. The child witness has given the description of the body attack on her person. She cried and shouted as a natural result of the inhumane violation of her person. Hearing the shouts, Moman and Ram Pratap arrived and tried to apprehend the accused who dosed them and ran away. She has admitted in the cross-examination that she does not remember if some blood fell on the earth. When she was raped, she was unable to state or remember whether she sustained some other bodily injuries or not. She has denied the suggestion that she is falsely implicating the accused. It is pertinent to note that the clothes she was wearing did carry blood and were duly seized by the police and it has been proved that the blood was from the body of the prosecutrix. The prosecutrix who is a girl of 10 years old obviously a minor has given the best possible description of the violation of her body brutally done by a person who had no right even to touch

her.

10. P.W. 2 Moman who is resident of the same village and who arrived on the scene of occurrence immediately on hearing the shouts of the witness P.W. 1 has stated that he heard shouts from the hut and when he reached the hut, he found Shanker violating the person of PW. 1. Accused then ran away. The witness then stated:

^^tc ge >ksiM+h esa igqps rkslqjlyk ds lkFk 'kadj cqjk dke dj jgk Fkk A 'kadj us lq'khyk dh Vkaxs mij mBkdjviuh mUnzh mldh xqIrkax es Mky j[kh Fkh A lqjlyk csgs'k gks jgh Fkh] 'kadj gedksns[k dj Hkkx x;k A brus esa 'ksjkjke Hkh ogka vk x;k A geus 'ksjkjke dks dgk fdge 'akdj dks idM+ dj ykrs gSaa rqe lqjlyk dks ys tkvks A geus 'kadj dks 6&7eqjOck ds Qklyk ij idM+k A 'kadj us ges dg eSa vkidh dkyh xk; gwa] vk;Unk ,slkdke ugha d:axk] eq>s NksM+ nks A geus dgk rsjs dks ekjaxs ugha] xkao esaxksih esEcj ds ikl ys pysaxs A xkao esa 'kadj dks ge ys x;s o xksih esEcj dsgokys dj fn;k o mls crk;k fd 'kadj us bZlj dh yM+dh lqjlyk ds lkFk [kksVk dkefd;k gS** A

11. It will be seen from the deposition of this witness that he not only saw the rape being committed but also succeeded catching hold of the accused and handing over to the member of the Gram Panchayat by name Gopi. The witness has been cross-examined on behalf of the accused and in spite of very broad scrutiny, we do not find in the testimony of this witness which can be used to discredit to testimony of PW. 1. The testimony of this witness could not be disbelieved.

12. P.W. 3 is the father of the prosecutrix. He states that he was told by P.W. 2 and Ram Pratap regarding rape committed on his daughter by the accused. There is thus immediate disclosure of the incident to the father of the prosecutrix by the witness. He has lodged the first information report which he has proved.

13. P.W. 4 is Gopi Ram to whose place, the accused was taken and he was told that:

^^eq>s dgk fd ;g 'kadj gS blusbZlj dh yM+dh ds lkFk cqjk dke fd;k gS] bldks iqfyl vk;s rc rd vius ikl j[kks Aftl 'kadj dks eq>s lEHkyk;k og vkt eqyfte gkftj vnkyr gS A

iqfyl 21 rkjh[kdks vk x;h 9&10 cts lqcg vk x;h Fkh A iqfyl vk;h rks mlds 'kadj dks ns fn;k**

He thus fully corroborates the testimony of P.W. 2 in relation to the catching hold of the accused and handing over to the member of the Panchayat for custody till the police arrived on the scene of offence. The witness has kept the accused in custody till the police arrived on the scene of offence and handed over the accused to the police. His cross-examination is wholly inconsequential.

14. P.W. 5 Dharmiram is the Constable who recorded the first information report at the instance of Ishar Ram. P.W. 6 Pyarey Lal is the Constable who seized the clothes of the prosecutrix. He has proved the seizure and he has stated that both the blouse and the Salwar of the prosecutrix were stained with the blood, Salwar was also stained with semen.

15. P.W. 7 is the Doctor who examined the prosecutrix. He has stated in unequivocal terms that the hymen of the prosecutrix was ruptured. There are blood stains on the cloths. When attempt was made to see that two fingers can enter into the vagina, the prosecutrix complained of severe pain and discharged blood. He has therefore opined that the girl has been raped within last 24 hours of the examination. He has also examined the accused and deposed that the accused was capable of intercourse. He has proved the document that he executed. The defence has examined owner of the land where the incident occurred and he has stated that no such incident occurred in his field. His testimony is wholly inconsequential. It was the appreciation of this evidence that the learned Judge recorded the order of acquittal on 19-12-78 for reasons which according to us are wholly unsustainable in law. In our opinion, the order of acquittal and the reasons given for it, cause gross failure of justice, unimpeachable evidence has been rejected on surmises and conjecture, material evidence has been ignored, undue importance has been given to trivial and ignorable contradictions and conclusions are bas.ed on surmises and conjectures. The order of acquittal in our opinion is palpably perverse and must be set aside. The prosecution has proved beyond reasonable doubt the guilt of the accused. We have no hesitation in holding that there is absolute assurance of the guilt of the

accused upon the evidence on record and the order of acquittal is liable to interfere with. The learned Judge has rejected the direct testimony of the prosecutrix P.W. 1 Sursala on the ground that she appears to be tutored witness. The learned Judge came to this conclusion on the ground that she was not able to give answer to same of the questions of cross-examination. Aperusal of the cross-examination of the testimony of the witness in general completely shows that the learned Judge has ignored material evidence by giving undue importance to trivial and ignor-able contradictions. His finding that the evidence of the prosecutrix is liable to be rejected is therefore, perverse and deserves to be set aside. The learned Judge then proceeded to observe that there is no delay in lodging the first information report.

16. Then the learned Judge proceeded to reject the eye-witness count of P.W. 2 on the ground that testimony is not believable because when they saw the accused in the act of committing rape, they could easily apprehend him. Failure on their part should give rise to the conclusion that they never saw anything. The learned Judge however lost sight of the fact that the accused was then apprehended by these very witnesses immediately thereafter. The learned Judge then doubts credibility of this witness by observing that they should hand over the accused to the police and not to the member of the Panchayat. Assuming that this is an order how can it effect the credibility or veracity of the testimony of P.W. 2. The learned Judge has thus rejected the material evidence which is unimpeachable on surmises and conjectures. His rejection of the evidence of P.W. 1 and P.W. 2 is thus against every tenets of evidence and therefore, unsustainale in law.

17. The learned Judge has ignored the medical evidence and the reasons given for so doing is ridiculous apart from being perverse. At page 11 of the impugned judgment, the learned Judge has observed that there is no statement made by the Doctor regarding length of penis of the accused. It is therefore, not proved that it was the penetration by the accused which resulted in ruptured hymen and there is therefore, no proof that it is the accused who committed the rape. The learned Judge ignored the provisions of Section 376, Cr. P.C. in this regard. Therefore, we are of the opinion that his finding is ridiculous and perverse. According to the

provisions of Section 376, IPC. Penetration however insignificant in sufficient to constitute rape. Unfortunately, the learned Additional Sessions Judge was oblivious to this basic provisions of law and hence he recorded the perverse finding that there is no rape. We find it difficult to uphold such judgment which acquits the accused for heinous crime on surmises and conjectures which have neither basis nor' reliability on the basis of fact. The prosecution has proved beyond reasonable doubt the guilt of the accused. The evidence of P.W. 1 prosecutrix is duly corroborated by independent evidence of P.W. 2 and is further corroborated by the medical evidence of Doctor P.W. 7 who has stated unequivocally that the prosecutrix was raped and the accused was capable of intercourse.

18. We must observe yet another aspect considered by the learned Judge in coming to conclusion of acquittal. The learned Judge has observed that the medical jurisprudence states and the Doctor agrees that normally the vagina of 10 years old will admit only one finger. Learned Judge then refers to the statement of the Doctor that the vagina of the prosecutrix admitted two fingers and therefore, there is no question of any rape. These observations are equally perverse and ridiculous. In the face of deposition of the Doctor that when attempt was made to put two fingers, the prosecutrix bled profusely and complained of severe pain. In the face of this evidence, it is perverse to conclude that no rape has taken place. The chemical report shows that semen was found on the Salwar of the prosecutrix and on the clothes i.e. Kachha and Pajama of the accused. Viewed from any point, we find the judgment of the learned Additional Sessions Judge unsustainable in law. We therefore, set aside the same and hold the accused guilty of committing rape. The accused who has been found guilty of rape has roamed the free world in spite of being guilty of heinous crime for last twenty years. In spite of making gross misuse of right to liberty in violating the body of prosecutrix, he is enjoying the liberty for last twenty years. The deterrent in our opinion in such circumstances is a legal necessity. We have no hesitation in imposing the sentence of rigorous imprisonment for a period of 10 years under Section 376 of the Indian Penal Code. Consequently, the accused Shanker is hereby convicted for the offence punishable under Section 376 of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for ten years. The bail bonds of the accused shall be

cancelled. He shall be taken into custody to undergo his sentence.