

Ganesh Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Mar-28-1995

Reported in : 1995(1)WLN537

Judge : R.P. Saxena, J.

Appeal No. : S.B. Criminal Jail Appeal No. 403 of 1992

Appellant : Ganesh

Respondent : State of Rajasthan

Judgement :

R.P. Saxena, J.

1. This jail appeal has been preferred against the judgment dated 30.3.1992 passed by the learned Sessions Judge, Sirohi whereby he convicted the appellant for the offence under sections 363 and 376 IPC and sentenced him under each count for 7 years rigorous imprisonment and a fine of Rs. 100/- in default to further undergo imprisonment for the month.

2. Briefly the facts necessary for the disposal of this appeal are that on 22.12.1987, prosecutrix Usha (P.W. 7) aged about 14 years alongwith her cousin sister Kamla (P.W. 3) and brother Bhuriya (P.W. 6) had gone to collect wood in the jungle near village Gadiya. At about 12.00 noon, co-accused Chuniya, who is

eldest brother of the prosecutrix, alongwith appellant Ganesh came there. It is alleged that Chuniya and appellant caught hold the hands of the prosecutrix and took her away. Kamla and Bhuriya rushed to their house and informed the matter to P.W. 2- Bhura, who alongwith Bhagga went to the jungle and saw Chuniya and appellant forcibly taking away to prosecutrix. They were also threatened by Chuniya and the appellant.

3. On 5.1.1988 Chogga Ram, brother of the prosecutrix, submitted a criminal complaint under section 366A IPC against Chuniya and appellant in the court of Munnisff and Judicial Magistrate, Abu Road, who in turn transmitted the same under section 156(3) Cr.PC directing the SHO Pindwada to register a case and to investigate the matter. On 14.1.1988 at 10.00 AM, P.W. 12 Hari Singh, SHO Pindwada registered the case and drew formal FIR Ex.P. 19.

4. It is the case of the prosecution that on 15.1.88 while the prosecutrix Usha was being taken by the appellant in the bus from village Ajari to Pindwada, she was spotted by her brother- Chhoga Ram and that thereupon the appellant alighted from the bus and made good his escape. The prosecutrix was medically examined and the doctor found that her genitals were well developed. Her hymen had already ruptured. There was no mating on pubic hair and there was no evidence of any fresh or old injury on her genitals, thigh, lower abdomen and breast. Dr. Chotha Ram (Pw.9) vide Ex.P. 16 opined that no opinion could be given regarding sexual inter-course with the prosecutrix. On radiological examination, her age was determined about 14 years.

5. After usual investigation, police submitted challan against the appellant and co-accused Chuniya. The learned Magistrate committed the case to the learned Sessions Judge, Sirahi.

6. The appellant was charged for the offence under sections 363 and 376 IPC. He denied the inducement. The prosecution examined as many as 12 witnesses. The appellant in his plea recorded under section 313 Cr.PC denied the circumstances appearing against him in the prosecution evidence and claimed that he was innocent and has been falsely implicated. However, no evidence was adduced in defence. After trial, the learned Sessions Judge acquitted co-accused Chuniya.

He, however, convicted and sentenced the appellant in the manner indicated above. Hence, this appeal.

7. I have heard Mr. Rastogi, learned Amicus curiae for the appellant and Mr. Rathore, learned Public Prosecutor at length and carefully perused the record of the trial court.

8. Mr. Rastogi has strenuously canvassed that in this case the alleged eye witnesses have turned hostile and not supported the prosecution case. The age of the prosecutrix was about 16-17 years at the time of incident. Her testimony is inconsistent and has not been corroborated either by medical evidence or by any independent witness and in such circumstances, offence under section 376 IPC is not made out against the appellant. He has contended that the learned trial Judge has misread the evidence and committed illegality of fact and law in convicting the appellant.

9. On the other hand, Mr. Rathore, learned Public Prosecutor has reiterated the reasonings given by the learned trial Judge and supported the impugned judgment.

10. I have given my thoughtful consideration to the rival submissions.

11. PW. 10 Smt. Lassi, who is mother of the prosecutrix, deposed that on the day of incident, her husband was ill and was confined to bed. She deposed that Kanila came to her house and informed that appellant Ganesh had abducted Usha. She further deposed that the age of Usha was 15 years and she had informed about the incident to her husband. However, in the cross examination, she could not say as to in which month on year or samvat, Usha was born. She could not assign any reason as to why she or her husband did not lodge any report about the incident to the police station.

12. PW.3 Karnla, whose age has been estimated by the trial court as 17 years, has deposed that Usha is her mother's sister. She deposed that on the day of incident, she alongwith Usha and her cousin brother Bhurlya had gone to jungle for collecting wood. She deposed that she did not see any person forcibly taking

away Usha. This witness was declared hostile. She has disowned her police statement. Therefore, this witness does not support the prosecution case.

13. PW.6 Bhurlya aged 12 years has stated that he alongwith Kamla were coming from the Jungle and at that time they heard haet cry raised by Usha. He has specifically stated that he did not see any accused at the place of occurrence. This witness was also declared hostile. He has disowned her police statement. In the cross-examination, he has stated that the prosecutrix Usha had herself come back to her house and had met her brother Chhoga Ram. Therefore, this witness also does not help the prosecution case.

14. PW.2 Bhura has stated that Kamla informed him that three persons had abducted Usha. But, she did not name the appellant. He stated that thereupon he alongwith Bhagga gone to jungle and chased accused persons, who had threatened them. This witness was declared hostile.

15. PW.4 Bhagga has also not supported the prosecution story and has been declared hostile.

16. PW. 5 Chhoga Ram, elder brother of the prosecutrix, had deposed that on the day of alleged occurrence, his cousin brother Bhuriya had come to Workshop Sirohi Road, where he was working and informed him about the incident. Thereupon, he came to his house and, thereafter, he lodged a report in the police station. But, PW. 11 Babu Singh and PW. 12 Hari Singh have specifically stated that no such report was lodged by Chhoga Ram. Chogga Ram has further stated that he submitted a criminal complaint Ex.P-5 in the court of Munsiff and Judicial Magistrate, Abu Road. He has not given any explanation for his inordinate delay in filing complaint dated 5.1.1988 i.e. after about 14 days of the alleged incident. This itself raises strong suspicion about the prosecution case.

17. PW.7 Usha was examined on 23.10.1991. She stated that her age was 16-17 years. She deposed that while she was collecting wood in the jungle, her eldest brother Churrtya and appellant Ganesh came there and they caught hold her. At that time, Bhuriya and Kamla, who were with her, fled away. She has stated that the appellant took her on foot to village Ajari where she stayed in the house of PW.

1 Katua.

18. PW. 1 Katua has specifically stated that the appellant alongwith prosecutiix had never stayed in his house. This witness was declared hostile.

19. PW.7 Usha further deposed that thereafter appellant took her to village Sanwada by bus where they stayed from 8-9 days and where the appellant has committed rape with her. Thereafter, the appellant took her to village Ranpur in bus where they stayed for 4-5 days. Again she was took to village Beda where they stayed for 3-4 days and thereafter to village Ranpur, Sanwada, Ajari and when they were going in bus to Pindwada, her brother spotted her and thereafter the appellant alighted from the bus and went away. She was cross-examined at length. She has given different version different from her police statement and tried to materially improve and alter the prosecution case. Her testimony regarding rape has not been corroborated either by medical evidence or by any independent witness.

20. PW. 9 Dr. Chotha Ram, who had examined prosecutrix, specifically stated that he did not find any old or fresh injury on her genitals. However, he has stated that the age of the prosecutrix was 14 years.

21. PW.8 Hukam Kumbhat, who had radiologically examined the prosecutrix, had stated that her age was about 14 years.

22. PW. 11 Babu Singh is the Investigating Officer.

23. After carefully going through the statement of PW. 7 Usha, which does not find corroboration either by medical evidence or by any independent witness, I am of the considered opinion that the prosecution has been unsuccessful in bringing home offence under section 376 IPC against the appellant beyond reasonable doubt. But from her statement as also from the testimony of the doctor, it stands established that at the time of alleged incident, the prosecutrix was a minor and was also about 14 years of age. This is true that at the time of alleged incident, her eldest brother Chuniya was also with the appellant, but, her natural guardian was her parents. Her mother P.W. 10 Lassi has not stated that Usha was taken away

with her consent. Therefore, offence under section 363 IPC has been proved against the appellant beyond any reasonable doubt. In my opinion, the learned trial judge has not correctly scanned and evaluated the prosecution evidence and has committed an illegality in convicting the appellant for the offence under Section 376 IPC and for the offence he deserves to be acquitted.

24. The sentence passed against the appellant for the offence under section 363 IPC is also excessive, keeping in view the nature of the offence and facts and circumstances of the case. The appellant Ganesh has been under detention from 31.3.1988 to 5.7.1988 and thereafter, from 16.1.1991 till this date, thus he has already undergone sentence for a period more than 4 years 7 months and 11 days. Ends of justice would be secured if the sentence of the appellant for the offence under section 363 IPC is reduced to the period already undergone by him.

25. In the result, this appeal is partly allowed and the conviction and sentence of the appellant Ganesh for the offence under section 376 IPC is set-aside. However, his conviction for the offence under section 363 IPC is maintained. But, his sentence is reduced from 7 years rigorous Imprisonment to the period already undergone by him. The fine of Rs. 100/- and in- default to further undergo simple imprisonment for one month for the offence under section 363 IPC stands confirmed. The superintendent, Central Jail, Jodhpur be informed accordingly.