

Nand Kishore Vs. State of Rajasthan

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Court : Rajasthan

Decided On : May-22-2002

Reported in : 2002CriLJ4157; RLW2003(2)Raj765; 2002(3)WLC567

Judge : Khem Chand Sharma, J.

Acts : Indian Penal Code (IPC) - Sections 366 and 376

Appeal No. : S.B. Criminal Appeal No. 253 of 2001

Appellant : Nand Kishore

Respondent : State of Rajasthan

Advocate for Def. : Pratap Singh, Public Prosecutor

Advocate for Pet/Ap. : S.S. Hora and; Manish Kumawat, Advs.

Disposition : Appeal allowed

Judgement :

Sharma, J.

1. Appellant Nand Kishore has filed this criminal appeal under Section 374 Cr.P.C. challenging the judgment and order dated 11.4.2001 passed by the learned Special Judges, Mahila Utpidan and Dahej Prakaran Cases, Jaipur whereby he has convicted and sentenced the appellant as hereunder:

Under Section 366 IPC

to undergo imprisonment for 3 years with a fine of Rs. 3000/-, in default thereof, 3 months' rigorous imprisonment.

Under Section 376 IPC

to undergo imprisonment for 7 years with a fine of Rs. 5000/-, in default thereof, six months' rigorous imprisonment.

2. The substantive sentences were ordered to run concurrently.

3. Briefly stated the facts leading to this appeal are that on 2.12.99 PW.2 Bhanwar Lal lodged a written report, Ex.P.4 at Police Station, Mahesh Nagar, Jaipur alleging therein that on 21.11.99, his village neighbour Nand Kishore has taken away with him his daughter Mamta aged 13 years and that she could not be traced till date. It was further alleged that his daughter had Rs. 2000/-, a golden chain and a wrist watch. On this report, police registered a case vide FIR, Ex.P.5 and proceeded with the investigation.

4. In the course of investigation, the police recovered the girl from Gurjar-ki-thadi, Jaipur vide memo Ex.P1 and seized her petticoat and underwear vide memo Ex.P.2. The police then got the girl medically examined on 8.12.99 and collected her medical report, Ex.P.3. The medical report shows that the doctor who examined her, did not find any injury on her person and he did not give any opinion as to the commission of rape. However, he found the hymen of the prosecutrix absent (torn). The accused was arrested on 7.12.99 and his trouser and chaddi were seized and sent to the FSL for chemical examination. In the opinion (Ex.P9) of Medical Jurist, based on X-ray plates (Ex.P10 to P.15), the age of the prosecutrix was 14 to 16 years.

5. On completion of usual investigation, police submitted a charge sheet against the accused appellant in the court of Additional Chief Judicial Magistrate No. 7, Jaipur. The learned Magistrate having found the offence exclusively triable by the court of Sessions, committed the case to the court of Sessions.

6. The learned trial court after hearing the arguments of both the counsel and considering the evidence and material available before it, framed charges against the appellant under Sections 363, 366 and 376 IPC. The appellant denied the charges and claimed trial. In the course of trial, the prosecution, in support of its case, examined as many as 15 witnesses and exhibited 20 documents. Thereafter, the accused was examined under Section 313 Cr.P.C. and he also examined two witnesses in his defence.

7. At the conclusion of trial, the learned trial court found the prosecution case, as alleged, proved and accordingly convicted and sentenced the appellant in the manner stated hereinabove. Hence the present appeal.

8. I have heard learned counsel for the parties and gone through the impugned judgment and the evidence and material on record.

9. In the cases involving sexual assault, the age of the prosecutrix plays vital role. In the case at hand, the learned trial court, on appraisal of evidence, has arrived at a conclusion that the age of victim girl was less than 16 years at the time of commission of offence.

10. In order to prove the age of the prosecutrix below 16 years at the time of commission of offence, the prosecution has relied upon oral as well as documentary evidence. The documentary evidence consists of certificate, Ex.P9 issued by the Medical Board, which is based on the report dated 18.12.99, Ex.P3 of Dr. Sheetal Jain, the X-ray plates dated 9.12.99 (6 in number), and the transfer certificate, Ex.P20 issued by the Head Master of the School, wherein the date of birth of the prosecutrix has been mentioned as 20.4.87, according to which her age on the day of commission of offence was only 12 years 7 months and 2 days.

11. From a perusal of the judgment under appeal it appears that the trial court has not placed reliance on the transfer certificate Ex.P.20 and have assigned reasons in doing so. In the opinion of the trial court, Kumari Mamta was admitted in School on 4.11.93 in Class II and on 20.4.96 she appears to have passed class V, which cannot be said to be beyond doubt. Considering the statements of the prosecutrix and her father that she had taken admission in Class 1st and within 5 years she

had passed out Class IV, the trial Court came to the conclusion that it would not be safe to ascertain her age on the basis of transfer certificate, Ex.P.20. It also appears from the judgment that the trial court has not taken into consideration the statement of PW.10 Dr. Sheetal Jain, who had medically examined the prosecutrix, for the reason that his statement remained incomplete and no efforts were made on behalf of the prosecution to get Dr. Sheetal Jain summoned. However, the trial court, on the basis of medical report, Ex.P.3 and the family structure of the prosecutrix concluded that her age, in any case, was below 16 years at the time of commission of offence.

12. To judge the correctness of the finding as to the age of the prosecutrix arrived at by the trial court, I consider it appropriate to reappraise the prosecution evidence.

13. PW. 1 Mamta, the prosecutrix, her father PW.2 Bhanwarlal, PW.3 Ishwar Lal, younger brother of Bhanwarlal and PW.5 Smt. Kani W/o Bheru Lal, brother of Bhanwarlal have stated the age of the prosecutrix as 13 years at the time of commission of offence. PW.2 Bhanwar Lal in his cross examination has disclosed that when Mamta was born, his age was 18 years. The witness also admitted that his father got entered his age correctly in the voters list as also in the application form for Ration Card: He further admitted that in the voter list of 1994, his age has correctly been entered as 35 years. As per his own admission he was 18 years old in the year 1977 when Mamta was born and therefore, the age of the prosecutrix comes to 22 years in the year of incident i.e. 1999.

14. Ex. D.2 is the application form dated 4.7.88 for Ration Card, wherein, the age of Bhanwar Lal and Mamta has been mentioned as 28 years and 6 years respectively. Though Bhanwar Lal has denied the correctness of the age mentioned in the application form Ex.D.2, yet on calculation, the age of the prosecutrix comes to 17 years in the year 1999.

15. It is an admitted position that PW.2 Bhanwar Lal could not state the date of birth of his other children and therefore, it cannot be concluded merely on the basis of his statement that the age of his daughter Mamta, the prosecutrix was 13 years at the time of commission of offence. Similarly, Ishwar Lal, brother of

Bhanwar Lal also could not state the age of other family members. In this view of the matter, the oral evidence available on record is not sufficient to conclude that the age of the prosecutrix was less than 16 years at the time of incident.

16. Having held that oral evidence is not the conclusive proof of the correct age of the prosecutrix, I shall now deal with the medical evidence. PW.12 Dr. M.R. Goyal, Medical Jurist, one of the members of the Medical Board constituted for the purposes of ascertaining the correct age of the prosecutrix has stated that the Medical Board, examined the clinical report No. 270/99 dated 8.12.99 prepared by Dr. Sheetal Jain and the X-ray plates dated 9.12.99 and 28.12.99 (in all six in number) and found that the epi & lysis of the medial epicondyle and head of radius have appeared and are in the process of fusion. Lateral epicondyle and decranon centres have appeared and fused. The doctor also found the epi & lysis of the lower end of radius and ulna have appeared but not fused. The doctor further found that epi & lysis of iliac crest and ischial tuberosity have appeared but not fused.

17. It is an admitted position that the Medical Board did not examine the prosecutrix personally for ascertaining her age and Board has based its finding on the report, Ex.P.3 prepared by Dr. Sheetal Jain and the X-ray plates dated 9.12.99 and 28.12.99. It is also an admitted fact that the prosecution has failed to examine the person who took the X-rays on 8.12.99 and 28.12.99. Even the X-ray report dated 8.12.99 has not been exhibited. It is also not established from the record as to on whose requisition the X-ray was again done on 28.12.99. Neither the said requisition nor the report have been produced on record. On the other hand, the prosecutrix has stated that she was X-rayed only once. PW.13 Prahlad Singh, Investigating Officer has also admitted that he got the prosecutrix medically examined only once on 8.12.99 for determining her age and to find out whether rape was committed on her. In this uncontroverted fact situation, it would not be safe to place reliance on the X-ray plates dated 28.12.99 and the opinion of the medical board, which is based on such X-ray plates. Be that as it may, assuming it to be true that according to the ossification test, the age of the prosecutrix was between 14 to 16 years, still it is well settled that margin of error of 2-3 years in age on either side is permissible.

18. On the question of margin of error of 2-3 years on either side is permissible, learned counsel for the appellant has placed reliance on *Jaya Mala v. Home Secretary, Govt. of Jammu & Kashmir* (1), *Mangal Singh v. State of Rajasthan* (2), *Gurinder Singh v. State of Punjab* (3), *Narendra Singh v. State of Madhya Pradesh* (4), *Sheela Bai and Anr. v. State of M.P.* (5) and *Sribatcha Khamari v. State of Orissa* (6).

19. I have gone through the case laws cited above and the ratio of all the cases referred to above is that margin of error in age by 2-3 years is permissible on either side.

20. Per contra, learned counsel, appearing for the complainant has placed reliance on *Krishan Kumar v. State of Haryana* (7), *Rama Kant v. State of Rajasthan* (8), *Sohan Singh v. State of Rajasthan* (9), *Biju Singh v. The State of Rajasthan* (10), and *Bhoop Ram v. State of U.P.* (11).

21. I have gone through the case laws cited by the counsel for the complainant. Having carefully gone through the case laws, I am of the considered view that law laid down in the aforesaid cases are not applicable to the facts and circumstances of the present case as the facts involved in those cases and that of involved in the present case are entirely distinguishable, inasmuch as, the oral as well as documentary evidence viz., the school leaving certificate have been considered and found highly untrustworthy and unreliable.

22. Thus, as stated above, there is no direct documentary or oral reliable evidence about the age of the prosecutrix, except the medical evidence, according to which her age, as per the ossification test was between 14 to 16 years when the offence as alleged was committed. However, keeping in view the margin of error in age ascertained by ossification test may be 2-3 years as propounded in the case laws cited by the counsel for the appellant, the question that emerges is as to whom the benefit of margin should be given. Considering the fact that it is a case of criminal liability, the benefit of margin should go in favour of the accused appellant unless such margin is explained by some piece of evidence. In the instant case, as discussed above, there is no explanation by any substantial piece of evidence. Therefore, I am inclined to give marginal benefit to the accused appellant. Keeping

in mind the permissible variance of 2-3 years in the age, it is held that the age of the prosecution, at the time of incident, was 18-19 years. Reference may be made to a decision of the Apex Court in *Jaya Mala v. Home Secretary, Government of J & K* (supra), wherein their Lordships of the Supreme Court had an occasion to deal with the case of age of a school going boy who was under detention and held as under :

'...However, it is notorious and one can take judicial notice that the margin of error in the age ascertained by radiological examination is two years on either side. Undoubtedly, therefore, the detenu was a young school going boy, it equally appears that there was some upheaval in the education institutions. This young school going boy may be enthusiastic about the students' rights and on two different dates he marginally crossed the bonds of the law, it passes comprehension to believe that he can be visited with drastic measure of preventive detention. One cannot treat young people, may be immature, be a little more enthusiastic, with a sledge hammer. In our opinion, in the facts and circumstances of this case the detention order was wholly unwarranted and deserved to be quashed.'

23. Reference may also be made to a decision of Madhya Pradesh High Court in *Narendra Singh v. State of M.P.* (supra), wherein it has been held as under :

'....However, without entering into the controversy regarding the margin that may be 2 or 3 years, the position is this as to whom the benefit of margin should be given. I think that it is a case of criminal liability and benefit of margin should go in favour of the accused, unless such margin is substantiated and corroborated by some piece of evidence. In the present case there is no substantiation or corroboration by any substantial piece of evidence. I am inclined to give marginal benefit to the appellant accused.'

24. Having established that the age of the prosecutrix, at the time of commission of offence was 18-19 years, it has now to be seen whether the conviction of appellant as recorded by the trial court is sustainable or not? To decide the controversy, it would be appropriate to discuss the prosecution evidence.

25. PW.1 Mamta, the prosecutrix has stated that her father Bhanwar Lal, Narayan Lal and appellant Nand Kishore came to her plot at Jaipur on 19.11.99. On the third day i.e. on 21.11.99, when her father and uncle left for labour, appellant Nand Kishore asked her aunt (Mausi) that Mamta has been called by her mother and requested her to send Mamta along with him. Accordingly, the Mausi permitted her to go with Nand Kishore. She further stated that Nand Kishore took her to Railway Station in a Taxi. He told her that they were husband and wife in their previous birth and instead going to village, they should go else where. She stated that on her refusal to go with him, the appellant threatened her that he will burn her parents by magic. Thereafter, Nand Kishore took her by train to Loonkaran Sahar and kept her there for two days in the house of Kumhar and then he kept her in a house of Muslims for another 3 days. During this period, Nand Kishore committed rape on her. Thereafter, Narayan called them telephonically at Bagru and from Bagru, Narain took her to the police station.

26. In cross examination the prosecutrix has stated that there was crowd at the railway station. She admitted that neither she cried nor raised an alarm. She also did not disclose anything to any one. The passengers were there in the compartment. She further stated in her cross examination that Nand Kishore had purchased Petticoat and blouse for her. She admitted to have left with Nand Kishore at her sweet will. According to her, she was subjected to X-ray for once.

27. PW.2 Bheru Lal, brother of Bhanwar Lal (uncle of the prosecutrix) has stated in his statement that Narayan, Rampal and Ram Babu brought Mamta on 1.12.99 and the report was lodged on 2.12.99.

28. PW.5 Smt. Kani wife of Bheru Lal (aunt of the prosecutrix) has deposed that the family members were annoyed with Nand Kishore for the reason that Nand Kishore had conjured on her family.

29. PW.6 Anandi, neighbour of Bhanwar Lal has stated that she got telephone of Nand Kishore to get him in touch with Smt. Kani and she managed her to talk to Nand Kishore.

30. PW.7 Narayan Lal, a resident of the village of Bhanwar Lal, who was a witness to the memo, Ex.P.1 by which Mamta was apprehended, memo Ex.P.2 in respect of seizure of petticoat of the prosecutrix, memo Ex.P6 in respect of arrest of the accused appellant and Ex.P7 in respect of seizure of trouser and underwear of the appellant, and is a person who accompanied the accused appellant and Bhanwarlal to his house and produced the girl at Police Station, has stated entirely a different story and has been declared hostile.

31. PW.8 Rampal who was also a witnesses to the memos Ex.P1, P2, P6 and P7 and had produced the girl at the police station has been declared hostile.

32. PW.9 Dr. Rajesh Khunteta had examined the prosecutrix to find out whether rape was committed on her. On her medical examination, the doctor found that her hymen was old ruptured. In the report, Ex.P.3 prepared by him he has not given any opinion in respect of commission of rape on the girl.

33. PW.10 Dr. Sheetal Jain examined the prosecutrix on 8.12.99 for the purpose of ascertaining her age and he referred the matter to the Medical Board. It may be stated that his statement remained incomplete and therefore, it cannot be read in evidence.

34. PW. 11 Ram Niwas, Constable is a witness who deposited the articles with the Forensic Science Laboratory and obtained receipt Ex.P8.

35. PW.13 Prahlad Singh, Investigating Officer of the case has certified the written report Ex.P.4 lodged by PW.2 Bhanwar Lal on 2.12.99. The witness has stated that he apprehended the prosecutrix and prepared memo Ex.P.1. He seized her petticoat and underwear, which according to the prosecutrix she was wearing at the time of commission of offence, and prepared seizure memo Ex.P.2. He arrested the accused appellant and seized his trouser and underwear in the presence of Rampal and Narayan and prepared seizure memos Ex.P6 and P7. In cross examination, the witness has stated that he got the prosecutrix medically examined only once i.e. on 8.12.99 for ascertaining her age and to find out the fact of commission of rape. He further admitted that he got her X- rayed once on 8.12.99.

36. PW.14 Guman Mal Kumhar and PW.15 Liyaqat Ali, in whose houses, as per the prosecution story, the accused appellant and the prosecutrix stayed have not supported the prosecution case.

37. As per the prosecution case instituted on the written report Ex.P.4 lodged by father of the prosecutrix, it appears that on 21.11.99 appellant kidnapped Mamta, a minor girl aged 13 years. But, from the prosecution evidence, in particular the evidence of prosecutrix herself and the evidence of her family members, as discussed here-inabove, it appears that appellant Nand Kishore asked PW.5 Mst. Kani that mother of Mamta had called her in village and therefore, she may be allowed to accompany him to her village. Undisputedly, the police was informed after about 12 days of her alleged kidnapping by the appellant, as is evident from the written report Ex.P4 lodged by the father of the prosecutrix. However, the fact that she left with the appellant after she was permitted by Mst. Kani, on the call of her mother, to accompany the appellant has not been mentioned in the written report.

38. It has come in evidence that the appellant and the father of the prosecutrix both had come together from their village to Jaipur and the father never instructed Mst. Kani to send his daughter with the appellant. Had there been any call from the side of prosecutrix's mother to send her to the village, the father of the prosecutrix who was very much present at Jaipur would have certainly instructed Mst. Kani to send his daughter to the village. But he never instructed Mst. Kani to send his daughter alongwith the appellant. In cross examination, Mst. Kani has also disclosed their strained relations with the appellant. It is true that Mst. Kani is none other but the aunt of the prosecutrix herself. She has disclosed in her cross examination about their strained relations with the appellant and under such circumstances it was not expected of Mst. Kani that she would, in any event, permit the prosecutrix to accompany with the appellant, specially without seeking instructions from Bhanwarlal, father of the prosecutrix, who was physically present in Jaipur.

39. The conduct of the prosecutrix is also suspicious and it appears that she herself was willing to accompany the accused appellant. On scrutiny of her

evidence it becomes clear that appellant had disclosed his intention just after the prosecutrix and the appellant together left the house of Bhanwar Lal. But still there is nothing in his evidence to suggest that she either offered any resistance or raised an alarm. On the contrary, it appears that she accompanied the appellant in the train and also visited with him to the market to purchase wearing items viz., petticoat and blouse. Thus, it can safely be concluded that the prosecutrix was a willing party to go with the appellant, else she would have certainly offered resistance or raise an alarm immediately after she became aware of the ill intention of the appellant. It is evident that she remained with the appellant for 17 days and during this period she never complained to any one about the incident. The prosecutrix, as held above, was a fully grown up girl and she was in the age of discretion, sensible and aware of the intention of the appellant that he was taking her away for a purpose and it was expected of her to put up struggle and in any case raise an alarm to protect her. From the evidence on record, it appears that no such steps were taken by her. The Apex Court in *Shyam & Anr. v. State of Maharashtra* (12), while dealing with a case of similar nature, observed as under :

'...The prosecutrix cannot be said to have been tied to the bicycle as if a load while sitting on the carrier, thereof. She could have easily jumped off. She was a fully grown up girl may be one who had yet not touched 18 years of age, but still she was in the age of discretion, sensible and aware of the intention of the accused-Shyam, that he was taking her away for a purpose. It was not unknown to her with whom she was going in view of his earlier proposal. It was expected of her then to jump down from the bicycle, or put up a struggle and, in any case, raise an alarm to protect herself. No such steps were taken by her. It seems she was a willing party to go with Shyam, the appellant on her own and in that sense there was no taking out of the guardianship of her father. The culpability of neither Shyam, A-1 nor that of Suresh, A-2 in these circumstances, appears to us established. The charge against the appellants/accused under Section 366 IPC would thus fail. Accordingly, the appellants deserve acquittal...'.

40. In view of what has been discussed above, the testimony of the prosecutrix does not inspire confidence nor it stands corroborated by any evidence whatsoever. Therefore, the version of the prosecutrix that she was subjected to

forceful intercourse without her consent also does not inspire confidence and cannot be believed. Even the medical evidence, as discussed above, also does not support her version, inasmuch as PW.9 Dr. Rajesh Khunteta who examined her for to find out the fact of commission of rape did not find any external injury on her body and he has not given any opinion as regards rape, in his report Ex.P.3. Under the circumstances that the prosecutrix left her father's house with the accused appellant, went to railway station, travelled in the train, visited the market along with the appellant to purchase cloths for herself, not offering any resistance or even not raising alarm so as to get rid of the clutches of appellant, not making any complaint to any one during the period she remained with the appellant, it is too difficult for me to accept the truthfulness of the version of the prosecutrix that any sexual assault as alleged was committed on her. It must, therefore, be held that the prosecutrix in the case is one on whose testimony no reliance can be placed. The argument of the learned counsel for the appellants holds good that the prosecutrix was a willing party to go with the appellant on her own and the culpability of the appellant, in the above circumstances does not stand established.

41. The argument of learned counsel for the complainant that non rupture of hymen or absence of injury on the victim's private parts do not belie the version of the prosecutrix has no substance and worthy of rejection in view of the findings recorded in the earlier part of the judgment. I have also carefully gone through the judgment of this court in Pappu and Balwant v. State of Rajasthan (13), relied upon by the counsel for the appellant in support of his argument. In this case the version of the prosecutrix was that the accused flung her on the ground and committed rape at the point of pistol. The prosecutrix was held to be a girl not more than 16 years. Thus, the facts involved in the case relied upon being entirely different than that of the facts involved in the present case, it has no help to the complainant.

42. For the reasons aforesaid, it is held that the prosecution has not been able to establish the charges under Sections 363, 366 and 376 1PC against the accused appellant and his culpability remains unestablished. Accordingly, the appellant deserves acquittal.

43. In the result, the appeal is allowed. The conviction of the appellant under Sections 363, 366 and 376 IPC and the sentences awarded thereunder are set aside and he is acquitted of the offences charged with. The appellant is in jail and he be set at liberty, if not required in any other case.

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