

Kasan Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Jan-07-2002

Reported in : 2002CriLJ1460

Judge : O.P. Bishnoi, J.

Acts : Evidence Act; [Indian Penal Code \(IPC\), 1860](#) - Sections 161, 363, 366 and 376; Code of Criminal Procedure (CrPC) 1974 - Sections 161, 164 and 313

Appeal No. : Criminal Appeal No. 217 of 2001

Appellant : Kasan

Respondent : State of Rajasthan

Advocate for Def. : Ramesh Purohit, Public Prosecutor

Advocate for Pet/Ap. : Mridul Jain, Adv.

Disposition : Appeal allowed

Judgement :

O.P. Bishnoi, J.

1. This is an appeal against the judgment dated 23-3-2001 delivered by the learned Additional District and Sessions Judge, Banswara holding camp at Kushalgarh whereby the accused-appellant was found guilty and convicted for the

offences under Sections 363, 366 and 376, I.P.C. For the offences under Sections 363 and 366 and 376, I.P.C. For the offences under Sections 363 and 366 identical sentences of rigorous imprisonment for three years' and fine of Rs. 500/- in each case were awarded and in default of payment of fine one month's extra simple imprisonment was awarded for each offence. For the offence under Section 376 sentence of seven years' rigorous imprisonment and fine of Rs. 1000/- was awarded and in default of payment of fine further simple imprisonment for three months' was awarded.

2. The facts of the case, in brief, are that Kaliya (P.W. 1) on 4-5-1999 at 3.15 p.m. lodged the written FIR Ex. P1, at Police Station Kalinjara. According to the FIR the accused on 2-5-1999 took away Kumari Jesi (P.W. 2) from her house on the pretext that she was called by the school teacher and thereafter she never came back for two days. A search was made, which remained futile and consequently the FIR Ex. P1, was lodged on which a case under Section 363 and 366, I.P.C. was registered.

3. Meanwhile, private search also continued and Ladji (D.W. 1) was sent to Ahmedabad where he found the address of Kumari Jesi and he brought her back and produced in the police station. Her statement, Ex. D1, was recorded under Section 161, Cr.P.C. She denied the story of abduction or kidnapping and stated that she left the house of her on accord and went to another village 'Padi-Lasodiya' in search of some employment. Thereafter the accused left for Ahmedabad for the same purpose and she accompanied him and both were employed at Ahmedabad as labourers where they remained for about 8 days. She stated that Ladji (D.W. 1) came there searching for her and brought her back. She also made a mention that the accused is her cousin and nothing untoward happened between them.

4. According to the prosecution story, some 3-4 days after the recording of the statement Ex. D1, Kumari Jesi allegedly told her parents that actually she was kidnapped by the accused and was taken to various places and was subjected to rape by the accused a number of times. Her father made a complaint to the Superintendent of Police whereupon her supplementary statement under Section 161, Cr.P.C. was recorded and statement under Section 164, Cr.P.C. was also got

recorded by the Judicial Magistrate, Bagidora. She stated that she was forcibly taken on bicycle by the accused to 'Beel Kuan' from where they boarded a bus and went to Gujarat at the house of maternal uncle of the accused where they remained for 5 days. She stated that she was subjected to rape, there at a number of times and thereafter she was taken to the house of the sister of the accused in another village where they stayed for about a couple of days and she was again subjected to rape there. Thereafter she was taken to a house belonging to the cousin of the accused where Ladji (D.W. 1), Bheraji and Krishna came to fetch her and she was admittedly brought to the police station where her first statement under Section 161, I.P.C. was recorded because she was threatened to state like that.

5. After the investigation was completed, the challan was filed in the Court of Additional C.J.M., Kushalgarh who committed the case in the Court of Sessions Judge, Banswara from where it was transferred to the said trial Court. The accused was charged for the said offences and he pleaded not guilty. The prosecution examined Kaliya (P.W. 1), Kumari Jesi (P.W. 2), Smt. Itu (P.W. 4), Jeetmal (P.W. 1), Vinesh (P.W. 5), Dinesh Bohra (P.W. 6) and Dr. S. K. Bhatnagar (P.W. 7). The statement of the accused were then recorded under Section 313, Cr.P.C. He denied the whole story and examined Ladji (D.W. 1) in his defence. Ladji's testimony is to the effect that the father of Kumari Jesi instructed him to search Kumari Jesi and he went to Ahmedabad where Kumari Jesi and the accused were found working as labourers and he brought them back and produced them in the police station. He further made it clear that Kumari Jesi did not support the version that she was kidnapped or abducted by the accused or was subjected to rape. He further stated that Kumari Jesi (P.W. 2) and the accused are cousins. Thereafter, the arguments were heard and the judgment was delivered against which this appeal has been filed.

6. Kaliya (P.W. 1) is the maternal uncle of Kumari Jesi and has stated that Jesi's mother informed him about the incident and he lodged the FIR Ex. P1. In the cross-examination, the witness stated that the accused is the uncle of Kumari Jesi. He further admitted that nobody told him prior to the lodging of the FIR that Kumari Jesi was taken away by the accused or anybody else. Thereafter, he stated that

the accused was named to him by the mother of Kumari Jesi (P.W. 2). Smt. Itu (P.W. 3) is the mother and Jeetmal (P.W. 4) is the father of Kumari Jesi and they have stated that in their absence Kumari Jesi was taken by the accused-Vinesh (P.W. 5) is the younger brother of Kumar Jesi who has stated that the accused took Kumar Jesi away on the pretext that the school teacher had called her. Dinesh Bohra (P.W. 6) SHO, Police Station, 'Kalinjara' has stated that the accused was arrested by him during the investigation of the case. Dr. S.K. Bhatnagar (P.W. 7) has stated that on 26-5-1999 he examined Kumari Jesi daughter of Jeetmal and after X-ray he found her to be aged between 16 to 17 years and the report Ex. P5 was prepared by him. In the cross-examination the doctor admitted that there could be a further fluctuation of 3 years in her age.

7. The learned Public Prosecutor during the course of arguments submitted that so far as the question of age was concerned the progress report of the school Ex. P6 discloses that her date of birth was 17-8-1984 and, thus, she was below 16 years' of age in May, 1999.

8. I however, find that there is no satisfactory evidence to establish that she was less than 18 years' at the time of the alleged incident. The progress report Ex. P6 is not worth the paper on which it is printed. Nobody has been called from the concerned school to prove this document. The document has been exhibited as Ex. P6 during the statement of Kumari Jesi who stated that the progress report Ex. P6 was handed over to police by her, during the investigation of the case. There is no evidence of any Police Officer that this document was actually recovered by him, nor recovery memo to that effect has been produced in evidence. Needless to say that the concerned teacher or employee of the school alone could prove the progress report and could state as to on account of which evidence, the date of birth 17-8-1984 was recorded in Ex. P6. In this way the document has not been proved as per the provisions of the Indian Evidence Act.

9. So far as the testimony of Dr. S.K. Bhatnagar is concerned it does not establish that the girl was necessarily below 18 years' of age at the time of the incident. As pointed out earlier Dr. S.K. Bhatnagar has stated that her estimated age was 16 to 17 years' and the doctor further admitted, in cross-examination, that there was

further scope of fluctuation of about 3 years' in the aforesaid estimation. It is, thus, clear that there was no evidence to establish that Kumari Jesi (P.W. 2) was necessarily aged below 18 years' in May, 1999.

10. I further find that there is no evidence to prove that Jesi was actually taken away against her will or was subjected to sex act against her will. The testimony of Kumari Jesi (P.W. 2) is highly unsatisfactory. She was confronted with her first statement, Ex. D1, recorded under Section 161, Cr.P.C. Initially she stated that her statement Ex. D1 was recorded by the police and she deliberately did not allege about the act of rape because she was threatened of dire consequences. Later on she gave another story and disowned the statement Ex. P1 by stating that no such statement was ever recorded. About the relationship with the accused, initially she stated that there is no relationship. Then she had to admit that the accused is her cousin. In her examination-in-chief, she has stated that initially she was taken on the bicycle and thereafter they travelled in a bus and subsequently from village to village they went on foot. In her examination-in-chief, it is nowhere stated that she did not go willingly nor were made any allegation that she made any hue and cry during the bus journey or elsewhere. However, in the cross-examination, she improved the story and deposed that at the bus stand, she did raise hue and cry but nobody came to her rescue although many people were present. She further stated that during the bus journey also she raised hue and cry but to no avail.

11. I find that the testimony of Kumari Jesi (P.W. 2) is wholly unacceptable. The Investigating Officer has not investigated the case properly and not even a single person of the various places where she was allegedly taken has been produced in support of the prosecution story. The evidence which has come on record leads to only one conclusion that Kumari Jesi (P.W. 2) was not taken against her will nor was subjected to rape as alleged by her. The fact that in her first statement Ex. D1 her version has been that she left her house all alone and went to Ahmedabad without any persuasion from the accused is very significant. It supports the defence arguments that subsequently, at the instance of her father, she was made to change the whole story.

12. Consequently, the accused cannot be found guilty under Sections 363, 366 or 376, I.P.C. The appeal is accepted and the judgment of the learned trial Court dated 23-3-2001 is set aside. The accused is acquitted of all charges. Amount of fine, if deposited by the accused, shall be refunded to him.

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