

Johnson Vs. State

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Court : Kolkata

Decided On : Dec-19-2005

Reported in : 2006(4)CHN870

Judge : Maharaj Sinha and ;Sadhan Kumar Gupta, JJ.

Acts : Indian Penal Code, 1860 - Sections 366, 376, 457 and 380 ; ;Code of Criminal Procedure - Section 313

Appeal No. : Cr. A. No. 005 of 2003

Appellant : Johnson

Respondent : State

Advocate for Def. : S.K. Mondal, Adv.

Advocate for Pet/Ap. : A.K. Ray and ;G. Binu Kumar, Adv.

Disposition : Appeal dismissed

Judgement :

Sadhan Kumar Gupta, J.

1. This appeal has been preferred against the judgment and order of conviction dated 11.8.2005 passed by the learned Sessions Judge, A & N Islands, Port Blair in Sessions Case No. 29 of 2001 (Sessions Trial No. 36 of December, 2003)

whereby the appellant was convicted for the offence under Sections 366 and 376 IPC and sentenced to suffer rigorous imprisonment for two years and to pay a fine of Rs. 5,000/- in default to suffer R. I. for two months so far as the offence under Section 366 IPC is concerned. The accused/appellant was further sentenced to suffer R.I. for ten years and to pay a fine of Rs. 20,000/- in default to suffer R.I. for eight months for the offence under Section 376 IPC and both the sentences were directed to run concurrently. Being aggrieved by, and dissatisfied with, the said order of conviction the accused/appellant has preferred this appeal.

2. The prosecution case, in short, is that on 22.11.1999 at Garacharama within P.S. Pahargaon the accused/appellant abducted two minor girls viz. S. Vijayalaxmi aged about 7 years and S. Dhanalaxmi aged about 5 years from near their house and they were taken by him to the nearby jungle with intent that they might be forced or seduced to illicit intercourse. After abducting those minor girls the accused committed rape upon S. Vijayalaxmi. It is the case of the prosecution that on that day while the accused was sitting in the nearby jungle along with those two minor girls at that time one Ramnath Ram, who was passing through that place, saw them there and after returning home he informed the matter to the mother of those two minor girls. Immediately on hearing this information, the mother of those two girls rushed to the said jungle along with neighbours viz. Nandia, Vividan Toppo and Ramnath Ram. They were searching for those two girls by calling their names. While doing so, they found the accused/appellant to run away from the bushes. Immediately after that both the girls came out from the bushes and at that time they were crying. When the matter was enquired, the eldest daughter S. Vijayalaxmi informed her mother that the accused forcibly took her and her sister to the bush and thereafter, the accused committed rape on her. She also informed that due to such act of the accused she sustained pain in her vagina. Hearing that, the complainant examined the vagina of her eldest daughter S. Vijayalaxmi and found that there was swelling present. She then took the victim S. Vijayalaxmi to the PHC, Garacharama. There the victim was examined by the medical officer who informed the police about the incident. On receiving the said information, police went to the said PHC and recorded the statement of the mother of the victim. On the basis of the said statement, Garacharama P.S. Case No. 399/99 dated 22.11.99 was started. On the same evening the victim girl was examined by

the medical officer. The accused was searched for and was arrested and brought in the said PHC for medical examination. The doctor medically examined both the victim and the accused and submitted his report. After completion of the investigation, chargesheet under Section 376 IPC was submitted against the accused. During trial, charges under Sections 366 and 376 IPC were framed against the accused/appellant. Same was read over and explained to the accused/appellant who pleaded not guilty and claimed to be tried.

3. Prosecution in all had examined seven witnesses to prove the charges against the accused who did not examine any witness in his defence. The defence case, as it has transpired from the trend of the cross-examination as well as from the statements as made by the accused under Section 313 Cr. PC is that of denial and complete innocence. During cross-examination the accused had taken a defence to the effect that the P. W.2 i.e. the mother of the victim had an illicit relationship with the P.W.3 Ramnath Ram and as he protested about that illicit relationship, he had been falsely implicated in this case by the P.W. 2. On the contrary, in his statement made under Section 313 Cr. PC, the accused had tried to set up a claim to the effect that P.W.2 took some amount of money from him as loan and as the accused asked for repayment of the same, the P.W. 2 became annoyed and as such she had falsely implicated the accused in this case.

4. It has already been pointed out that the accused/appellant has been charged under Section 366 and under Section 376 IPC. So onus lied upon the prosecution to prove that it was the accused who actually abducted the two minor girls viz. S. Vijayalaxmi and S. Dhanalaxmi in front of their house at Garacharama and took them to the nearby jungle with intent that they might be forced or seduced to illicit intercourse. Secondly, the prosecution was also bound to prove that the accused committed rape upon S. Vijayalaxmi who was a minor girl aged about 7 years in the said jungle. Let us now see how far the prosecution has been able to discharge this onus. The prosecution in order to establish the charges against the accused has examined seven witnesses. Out of those seven witnesses, P.W. 1 is S.Vijayalaxmi, is the minor daughter aged about 7 years who is the dc facfo-complainant and the victim of this case. P.W. 2 is the mother of the victim. P.W. 3 is Ramnath Ram, the person who first noticed the accused in the jungle along with

those two minor girls. P.W.6 is Dr. D Bairagi who examined the victim as well as the accused and submitted his report. As such, it appears that so far as the present case is concerned the evidence of the P.W. 1, P.W. 2, P.W. 3 and P.W.6 are most important. It may be mentioned here that P.W. 4 is the seizure witness and P.W. 5 was only tendered for cross-examination. So far as P.W. 7 S.I. Devdas is concerned, he is the Investigating Officer who investigated this case.

5. I have perused the statements of the witnesses very carefully. It appears that P.W.1 S. Vijayalaxmi has stated in her evidence that on the date of incident i.e., on 22.11.99 the accused took her and her sister to the nearby jungle and thereafter, the accused opened his pant, forced the P.W. 1 to lie down and after taking off her wearing apparels, the accused committed rape on her. This witness in her evidence has given a vivid account of the alleged commission of rape on her by the accused/appellant. She has further stated that while the accused was trying to commit that act, she tried to raise alarm but she was prevented in doing so and she was threatened with dire consequences by the accused. This witness clearly identified the accused in dock as the person who actually committed rape on her. She has also categorically stated that after the act was over, her mother was calling by taking her nick name. According to this witness, hearing that sound the accused fled away from that place and thereafter, this P.W. 1 along with her sister came out of the jungle and narrated the entire incident to her mother. This witness has categorically stated that she sustained pain in her vagina due to the rape committed by the accused on her. This witness has also claimed that after hearing the incident, her mother checked her body and then took her to the hospital where she was examined by the doctor. So it appears from the evidence of P.W. 1 S. Vijayalaxmi that she has categorically stated that it is the accused/appellant who actually committed rape on her. The manner in which this witness has deposed certainly raises confidence in the mind of the Court. There is practically no element of doubt in the evidence of this P. W. 1 even after cross-examination.

6. It is the settled principle that in a sexual violence, an accused can be convicted on the basis of the sole testimony of the victim provided it is reliable. In this respect the decision reported in : 1996 CriLJ1728 , State of Punjab v. Gurmit Singh and Ors., is most relevant. It has been held in the said decision by the

Hon'ble Apex Court that conviction can be based on the sole testimony of the victim unless there are compelling reasons for seeking corroboration. Court may look for some assurance of her statement to satisfy its judicial conscience. So, the ratio as decided in this decision certainly gives credence to the theory that in a sexual assault case conviction can be made on the basis of the sole testimony of the victim provided her evidence is trustworthy. So far as the evidence of the P.W.I in connection with this case is concerned, I have already pointed out that there is practically no room for doubt regarding the statement made by the victim. We must not forget that the victim was aged about seven years at the time of the incident. It is very hard to believe that such a minor child would unnecessarily give false evidence against the accused.

7. Learned Advocate for the appellant, at the time of argument, submitted that there is room for doubt regarding the actual age of the victim. In this respect he has drawn my attention to the evidence of the P.W. 1 where it has been noted that the victim at the time of her deposition was reading in Class-X. By pointing out this portion of the evidence of the P.W.I, learned Advocate for the appellant argued that if that is the position then the victim cannot be aged about seven years at the time of the incident, as claimed. But if we look into the heading of the deposition sheet, then it will appear that there it has been clearly mentioned that the victim was aged about 10 years at the time of the deposition. There is reason to believe that there may be some mistakes somewhere in recording the age of the victim. But at the same time we cannot ignore the fact that the doctor in his evidence has clearly given the opinion that at the time of the incident the victim was aged about seven years. There is no cross-examination at all on this point. Moreover, even if we accept the contention of the learned Advocate for the appellant that since the victim claimed that at the time of her giving evidence she was reading in Class-X and as such she could not be aged seven years at the time of the incident, then also there is no escape from the conclusion that at the time of the incident the victim certainly was a minor. Under such circumstances, the argument, as advanced by the learned Advocate for the appellant regarding the age of the victim has got no relevance at all so far as this case is concerned. Moreover, the victim was examined in open Court by the learned Sessions Judge and it appears that before recording her evidence the learned Sessions Judge put some questions to

her in order to ascertain as to whether she was capable in giving rational answers. This step was obviously taken by the learned Sessions Judge as the victim appeared to him to be a minor. Due to all these reasons, there cannot be any doubt that the prosecution has been able to prove that at the time of the incident the victim was a minor girl. This minor girl has given a vivid description as to how she was ravaged by the accused/appellant.

8. I have already pointed out that there is nothing to disbelieve the statement of the victim girl in this respect. In view of the decision reported in 1996(2) SCC 384 (supra) it is permissible for the Court to convict an accused solely on the basis of the statement of the victim without seeking for corroboration. But so far as the present case is concerned, it appears that in addition to the statement of the victim, there are other corroborating evidences to prove that the victim was raped and accused was involved in commission of the said offence.

9. In this respect first of all I can mention the evidence of the P.W. 6 Dr. D. Bairagi. He in his evidence has clearly stated that the victim was raped on the date of the incident. It should be remembered that this doctor examined the victim within two hours of the incident. There is no cross-examination of this doctor in respect of his opinion. As such, there cannot be any valid reason for disbelieving the statement of the doctor. So the fact remains that the claim of the victim that she was raped has been clearly corroborated by the P.W.6 i.e. the doctor.

10. Learned Advocate for the appellant argued that the doctor in his evidence had stated that the victim was habituated to sexual intercourse. By pointing out this portion of the evidence, the learned Advocate for the appellant argued that the version of the victim should not be relied upon. It is true that the doctor has made such a statement in his evidence. I fail to understand as to how the doctor could give such opinion in his oral evidence, when he admitted that at the time of the examination of the victim on 22.11.1999 the said victim was aged about seven years. It is unthinkable that a girl of seven years would be habituated to sexual intercourse, as stated by the doctor. If we look into the written opinion of the doctor which was given immediately after the incident and which has been marked as exhibit in connection with this case, then it will appear that there the doctor clearly

opined that the victim was not habituated to sexual intercourse. So it appears that there are contradictions in this respect in the evidence of the doctor and the written opinion which was given by him immediately after the incident on examination of the victim. There is no explanation on the part of the doctor as to how and why such a statement was made by him in his evidence. I am also at a loss as to how such a statement could be made by the doctor in his evidence before the Court when there is completely contradictory statement in his written opinion. There may be various reasons for giving such statement before the Court by the doctor. But to my mind, that statement of the doctor during his evidence in Court is not of much importance in view of his written opinion given on the date of incident. Even if for argument sake I accept the statement of the doctor as made in his oral evidence, then also it does not help the cause of the accused/appellant. It is the settled position that even if a girl/woman is habituated to sexual intercourse that does not mean that a person is given licence to commit rape upon her. The point that is to be considered is whether the girl/woman was subjected to forcible intercourse or not. So far as this case is concerned, it appears from the statement of the P.W.1 that it was the accused/appellant who actually committed rape on her on that day. As I have already pointed out there is nothing to disbelieve the statement of the said minor girl who is the victim of this case, so I do not attach any importance to this contradictory statement of the doctor as made in his evidence and as given in his report so far this point is concerned.

11. So far as corroboration of the statement of the P.W.1 is concerned, it appears that the prosecution has adduced the evidence of the P.W.2 and P.W.3. P. W.2 is the mother of the victim and P.W.3 is a neighbour. P.W.3 in his evidence has stated that while he was returning he found the accused along with those two minor girls in the jungle. He has stated that on his return to his house he immediately reported the matter to the P.W.2 who is the mother of the victim. It has transpired from the evidence that P.W. 2 and P.W. 3 along with others rushed to the place of occurrence and when they reached near the spot at that time they noticed that the accused/appellant was fleeing from the said spot. The P.W. 2 and P.W. 3 have been extensively cross-examined by the defence. But their evidence remained unshaken even in cross-examination and I find nothing to disbelieve their statements in this respect. P.W.2 has stated in her evidence that immediately

thereafter, the P.W.I came out from the jungle crying and narrated the incident to her. P.W.2 has further stated that on hearing the incident from the P.W.I she checked the private parts of the P.W.I and found there was swelling. According to the P. W.2, the P.W.I also informed her that due to the act of rape, she sustained pain in her vagina. It has transpired from evidence that immediately thereafter, the P.W.I was taken to the hospital where the doctor examined her. I have already pointed out that the claim of the P. W. 2 that the P.W.I sustained swelling and pain on her vagina has been totally corroborated by the P.W.6, the doctor. In addition to that, the doctor has clearly opined that the P.W.I was subjected to rape before one or two hours of the examination. Under such circumstances I have got no hesitation to hold that the statement of the P.W.I that it was the accused/appellant who committed rape on her, has been sufficiently corroborated by the evidence of the P.W.2, P.W. 3 as well as by P W.6. I find no reason to disbelieve their statements.

12. Learned Advocate for the appellant pointed out certain discrepancies regarding mentioning of the time of the incident by the prosecution witnesses. In fact, if I look into their evidence, then it will appear that there are some discrepancies regarding the exact time of the incident. There is a difference of about one hour. But if I consider the status of the witnesses of the prosecution then it will appear that they are villagers with not much sense of precision of time. As such the little difference in mentioning the exact time of occurrence of the offence cannot be regarded as unnatural and it cannot be said that the evidence of those witnesses should be discarded only because of some minor discrepancies regarding exact time of commission of the alleged offence. In this respect I can also rely upon the decision reported in : 1996 CriLJ1728 (supra) wherein it has been clearly laid down that minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. Learned Advocate for the State relied upon the decision reported in : 1997 CriLJ774 , State of A.P. v. Gangula Satya Murthy, wherein the Hon'ble Supreme Court has clearly held that minor contradictions or insignificant discrepancies in the statement of the witnesses should not be a ground for throwing out the allegation of rape.

13. Learned Advocate for the appellant further argued that in this case the sister of the victim, who is allegedly the only eye-witness of the incident, had not been examined by the prosecution although, she was cited as a witness in the chargesheet. True it is that prosecution did not examine the said girl. It is also correct that there is no explanation given by the prosecution in this respect. But we must not forget that the said girl was aged about five years when the incident took place. It is difficult for such a minor girl to depose in open Court about the incident of rape. When the other minor girl who was actually raped has given evidence before the Court and narrated the incident in a trustworthy manner, I am of the opinion that non-examination of the other minor girl who witnessed the incident, should not be vital particularly when, the incident of rape has been clearly established by the prosecution by adducing other cogent evidence. As such, I reject this contention of the learned Advocate for the appellant.

14. Learned Advocate for the appellant has further argued that the victim in her evidence has mentioned that the rape was committed by 'that uncle' and as such he argued that specifically the accused/appellant was not identified. That apart, he laid much stress upon the fact that this accused was never, placed in the T I parade during investigation and there is no explanation for that. According to him since the accused was first identified in Court during evidence, so that identification has got no value in the eye of law. In this respect he has relied upon the decision reported in 2005 Cr. LJ 57, Ayyappan v. State of Kerala. With respect to the learned Advocate for the appellant, I am unable to agree with such contention. The case before the Kerala High Court was in respect of an offence under Sections 457 and 380 of the IPC. The fact of that case is completely different from the fact of the case in hand. So far as this case is concerned it is an admitted position that the accused/appellant was known to the victim and her family members from before. The victim has clearly identified the accused/appellant in open Court at the time of her deposition. There is nothing to disbelieve this statement of the victim to the effect that it was the accused who actually committed the rape on her. That apart if look into the evidence of the P.W.7 S.I. Devdas, who is the Investigating Officer of this case, then it will appear that at page 2 he has stated 'on 22.11.1999 at about 7.50 p.m. the police party brought the accused at PHC and the people who were present on victim side

identified that accused in my presence at PHC and about 8 p.m on 22.11.99'. From this statement it is very much clear that the accused was arrested immediately after the incident and he was duly identified by the victim as well as by the P.W.2 and others. So there is no basis of the argument of the learned Advocate for the appellant that the accused was not at all identified during investigation. As such, I reject this contention of the learned Advocate for the appellant that the accused was not at all identified during investigation.

15. Learned Advocate for the appellant further argued that there was no sign of any injury on the male organ of the accused and as such presumption should be that there was no rape at all on the victim girl. In this respect he has cited decisions reported in : 1972 CriLJ1260 , Rahim Beg v. State of U.P. But if we look into the evidence of the doctor and the report submitted by him, then it will appear from his report clearly that he was of the opinion that the victim was subjected to forcible intercourse. There is no cross-examination at all of the doctor regarding the point, as raised by the learned Advocate for the appellant in this respect. In fact, the doctor was not cross-examined at all. As such, I am not in a position to presume that there was no rape merely because there was no injury to the male organ of the accused. In order to constitute a case of rape the prosecution does not always have to establish injury to the male organ of the accused. It is by now well-known that in order to constitute an offence of rape even proof of slightest penetration will suffice. The above case of the Hon'ble Apex Court was based on its own peculiar facts where the Supreme Court found that the entire evidence on record did not sufficiently prove that the two accused were guilty of rape and murder of the victim. The above case, in my opinion, has no bearing on the facts of the present case at all. Therefore, this argument of the learned Advocate for the appellant at this stage is not sustainable.

16. That apart, learned Advocate for the appellant further cited a decision reported in 1976 Cr. LJ 452, Suresh Chand v. State of Haryana, in support of his contention that since there was no evidence that the hymen of the victim was not injured so it should be presumed that there was no penetration at all and as such there was no rape on the victim as alleged by the prosecution. I have gone through the said decision. It appears that in that case the opinion of the doctor was that vaginal

canal of the victim was so narrow that it was difficult to admit even the little finger. But that case has got no bearing so far as the present case is concerned. Here the doctor i.e. the P.W.6 has clearly opined that there was forcible intercourse on the victim girl. Whether the hymen was injured or not is immaterial so far as the case in our hand is concerned since the doctor being an expert in the matter unequivocally stated that the victim was subjected to rape and there was no cross-examination at all on this point. The doctor in fact examined the victim within one or two hours of the commission of the offence. In absence of any material it is not possible for the Court to disbelieve the evidence of the doctor. As such, I reject this contention of the learned Advocate for the appellant.

17. It may be pointed out here that the accused has claimed that he is innocent and did not commit the offence of rape on the victim girl. The appellant has set up a case while cross-examining the witnesses to the effect that as there was illicit relationship in between P.W. 2 and P.W.3 and as he protested against that, so he was falsely implicated in this case by the P.W.2. At the same time if we look into the statement of the accused made under Section 313 Cr. PC, then it will appear that the appellant has taken a stand to the effect that he gave loan of money to the P.W.2 and as he demanded return of the said money from the P.W.2 she became annoyed and falsely implicated the accused in this case. So it appears that the accused/appellant has shifted his stand frequently in order to justify his claim of innocence. He is thus not sure about his own stand. It is not difficult to understand the motive for which the accused took those inconsistent stands at different times during the trial. Be that as it may when the accused has taken a specific plea in order to prove his innocence, then it is obligatory on his part to prove the same by adducing sufficient evidence. But so far as the present case is concerned, it appears that the accused has thoroughly failed to establish all those claims to counter the prosecution case. There is no iota of evidence in support of all those claims as made by the accused and to my mind the learned Sessions Judge was perfectly justified in ignoring those claims of the accused so far as this case is concerned.

18. Therefore, from the above discussion I have got no hesitation to hold that the prosecution has been able to prove both the charges against the

accused/appellant without any shadow of doubt and to my mind the learned Sessions Judge was perfectly justified in holding the accused/appellant guilty of those charges and convicted him accordingly.

19. From the judgment of the learned Sessions Judge it appears that he has meticulously scrutinized the evidence on record and thereafter came to the conclusion that it was the accused/appellant who was guilty of committing rape on the victim who was a minor girl at the time of incident. The reasoning as given by the learned Sessions Judge in holding the accused guilty for the offence under Section 366/376 IPC appears to me to be cogent and I find no reason whatsoever to interfere with the said finding of the learned Sessions Judge. To my mind the learned Sessions Judge was perfectly justified in holding the accused guilty for the commission of the offence under Section 366/376 IPC. In this respect, it may be pointed out here that for the offence of rape the learned Sessions Judge sentenced the accused to suffer R.I. for 10 years. There cannot be any dispute that rape is not only a crime against a person of a woman, it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. So far as the present case is concerned, the matter is much more serious in nature. A child aged about seven years has been brutally raped by the accused/appellant. Needless to mention that due to such act of the accused the victim suffered a trauma which she is to bear through out her life. The action of the accused is not only an offence against the entire society but it has also practically taken out the normal childhood happiness from the victim. I can easily understand the mental and physical agony which the victim girl sustained as a result of the action of the accused/appellant and as such I am of the view that severest punishment could have been imposed upon the accused/appellant. But since there is no prayer made on behalf of the prosecution to that extent and since I find that the learned Sessions Judge sentenced the accused/appellant to suffer at least imprisonment for ten years by giving sufficient reasons, so I am not willing to interfere with the said finding of the learned Sessions Judge. As such, I refrain myself from passing any comment in respect of the period of sentence, as imposed upon the accused/appellant by the learned Sessions Judge.

20. In the result, the appeal is dismissed on contest. The order of conviction and sentence as passed by the learned Sessions Judge on the accused/appellant is confirmed.

21. Send a copy of this judgment along with the LCR to the Court below at once for its information and necessary action.

Maharaj Sinha, J.

22. I have had the advantage of reading the judgment prepared by my Lord Justice S.K. Gupta, and I am in complete agreement with the views expressed by His Lordship in his judgment I too think that the learned Trial Judge in the facts and circumstances of the instant case could and should have imposed the maximum punishment provided under Section 376 of the Indian Penal Code for the crime committed by the appellant against a minor girl of only seven years of age but for the reasons given by my learned brother in his judgment. I do not wish to interfere with the quantum of punishment given by the learned Trial Judge for the most heinous crime of the appellant.

23. I would also like to add in concurrence with the opinion of my learned brother Justice Gupta that in order to constitute a case of rape proof of injury to the male organ of the accused is not at all necessary and absence of such injury is no valid ground for innocence of the accused. Indeed, the decision of the Supreme Court in *Rahim Beg v. State of U.P.* (supra) was decided on its own peculiar facts. The above case, I agree has no bearing on the established facts of the present case at all.

24. As observed by His Lordship Justice Sabyasachi Mukherjee (as His Lordship then was) in the case of *Ambica Quarry Works v. State of Gujarat and Ors.*, reported in : AIR 1986 SC1620 , 'the ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it (See Lord Halsbury in *Quinns v. Leathern*)' (Para 18 at page 221).

25. I therefore agree that the appeal should be dismissed.

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