

Chamaru Ram Vs. State of H.P.

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Court : Himachal Pradesh

Decided On : Jan-07-2005

Reported in : 2005CriLJ1943

Judge : K.C. Sood, J.

Acts : Evidence Act - Section 118; ;[Indian Penal Code \(IPC\), 1860](#) - Sections 376 and 506; ;Criminl Procedure Code - Sections 154 and 161

Appeal No. : Crl. Appeal No. 58 of 2004

Appellant : Chamaru Ram

Respondent : State of H.P.

Advocate for Def. : S.D. Vasudeva, Addl. Adv. General

Advocate for Pet/Ap. : Anup Chitkara, Adv.

Disposition : Appeal allowed

Judgement :

K.C. Sood, J.

1. This appeal is directed against the judgment of the learned Additional Sessions Judge, Mandi, dated 26th September, 2003, whereby the appellant Chamaru Ram, hereinafter referred to as the 'accused', has been convicted for an offence

punishable under Section 376 of the Indian Penal Code. The accused is sentenced to suffer rigorous imprisonment for seven years and to pay a fine of Rs. 10,000/-. In case of default in the payment of fine, he is to undergo simple imprisonment for one month.

2. Prosecution case 'S' (P.W. 1) was more than seventeen years of age at the relevant time. She is mentally retarded. On 11th September, 2002 at about 12 Noon she was going back to her house, after having plucked a pumpkin from the fields, accused accosted her. He snatched the pumpkin from her hands and threw it on the ground. He took her behind the house, forced her on the ground, broke the string of the salwar and subjected her to forcible sexual intercourse. She bleed, however, she washed herself from the tap water. She also washed her pajama. She raised alarm, but nobody was around. Chamaru Ram threatened her that if she disclosed this incident either to her parents or his wife then 'he would see her'. She went back to her house. At about 9.00 in the night she disclosed the incident to her mother Premi Devi. Neither her father nor brother were in the house. Both of them had gone out for work. They returned back on 17th September, 2002 and the report was lodged with the incharge, Police Post, Pangna on 19th September 2002. On the basis of this report a case under Sections 376 and 506 of the Indian Penal Code was registered against the accused.

3. Accused was tried for the offences punishable under Sections 376 and 506 of the Indian Penal Code. After the trial, he was acquitted for the offence punishable under Section 506 of the Indian Penal Code, but, was convicted, as noticed earlier, for the offence punishable under Section 376 of the Indian Penal Code.

4. Aggrieved, the accused is in this appeal.

5. It may be noticed at the outset that the State did not file any appeal so far acquittal of the accused for the offence punishable under Section 506 of the Indian Penal Code is concerned.

6. Heard Mr. Anup Chitkara learned counsel for the accused and Mr. S. D. Vasudeva, learned Additional Advocate General for the State. I was also taken

through the evidence and relevant record.

7. Mr. Chitkara, learned counsel for the accused, prays for acquittal of the accused on the grounds :

(a) 'S' is not a competent witness being mentally retarded since birth and therefore her evidence without corroboration is not sufficient to convict the accused, particularly when her mental age has not been assessed either by the Doctor, who medically examined her, or by the Court.

(b) The evidence of 'S' is neither reliable nor inspires confidence. She has materially contradicted herself with the statement recorded under Section 154 of the Code of Criminal Procedure.

(c) The version given by 'S' is not supported by the medical evidence.

(d) The prosecutrix has been tutored by her parents and had given tutored version in the Court.

(e) Inordinate delay in lodging First Information Report which is result of deliberations, concoctions,

(f) 'S' made false allegations against the accused, on tutoring by her parents, because of enmity between the parties.

(g) The accused has demanded Rs. 7,000/- from the parents of 'S' for defaming him and it is thereafter that the First Information Report was lodged.

8. There is no dispute that 'S' is mentally retarded from birth. 'S', appearing as P.W. 1, in answer to the question by the learned trial Judge, answered, 'I am disabled since childhood as my legs are weaken I also not mentally perfect.'

9. Premi Devi, mother of 'S' (P.W. 2) in her evidence categorically states, 'my daughter, the prosecutrix, is disabled from the childhood and also some mentally retarded from the childhood'.

10. Nant Ram, father of the prosecutrix (P.W. 3), tells us, 'the prosecutrix is disabled and mentally retarded from birth time'.
11. Doctor Maulshree Lata (P.W, 10), the Medical Officer, who examined 'S', deposed. 'On examination of the prosecutrix she looked mentally retarded and handicapped.'
12. It is true that no assessment of the mental age was made either by the doctor or by the that Judge. That Judge, however, noticed that 'S' was unable to understand any question put to her un Hindi, therefore, he appointed one Nadia Ram to put the question to the prosecutrix in local language and interpret the same to the Court.
13. Learned trial Judge did not ask 'S' whether she understand the sanctity of the oath and whether she think that such oath was binding on her conscience or not ?
14. Section 118 of the Evidence Act provides that all persons are competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. The explanation to Section 118 mandates that a lunatic is not competent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.
15. I must hasten to add that there is no presumption that witness is incompetent. Mental competency, to give evidence, depends not upon age but upon understanding or intelligence. Before examining a mentally retarded child or person it is necessary that the Court should satisfy itself that the person is sufficiently intellectually developed to comprehend what he has seen to give an intelligent account of it to the Court. If the Court is of the opinion that by reason offender years or defective or immature understanding, a person cannot give intelligent answers to the questions it should decline to examine the witness. On the other hand, if such person respond rationally to the questions put to him then his capacity to give evidence is on the same footing as that of any other adult. Nevertheless it is always necessary for the Court to test his intellectual capacity by

putting a few sample and ordinary questions to such a person and to record a brief proceeding so that the appellate Court at least may be satisfied as to the capacity of the person to give evidence.

16. Any statement made by a witness who is mentally retarded must, in any event, be received with extreme caution and considered with the other evidence of fact in question. In other words, the Court must look to corroboration to the evidence of such a witness.

Mekelvey's Evidence at page 217 records.' 'A person incapacitated to such an extent that he is unable to understand the subject, in reference to which he is called as a witness is incompetent. Naturally incapacitated persons are not permitted to testify. This rule has always existed, and exists today. The question of whether a person has sufficient capacity to testify is a question of fact for the judge to decide, and he may hear testimony on the point, as well as examine the person himself.'

17. In the present case undoubtedly 'S' is mentally handicapped. Unfortunately the trial Judge failed to assess the capacity of 'S' to testify. In the circumstances, evidence of 'S' has to be viewed with great caution looking for corroboration. The evidence of 'S' has been recorded in question in answer form. Question No. 4 reads :

'Q. No. 4. What happened with you ?

Ans. On that day, my mother had gone to collect fuel wood from the jungle, my father and brother had gone to Shana village for work. I went to collect pumpkin to the field situate at some distance from our house and after collecting the same, I was returning to my house, when I reached the field which previously belongs to us and was occupied by the accused, present in the Court, there accused present in the Court, caught hold me and kept my pumpkin on the ground and thereafter forcibly committed sexual intercourse (Burakam) with me. After opening my pajama with jerk as a result of the act of the accused, it started bleeding from my private part. It was so profuse bleeding as if goat is slaughter. Thereafter the accused washed my blood soiled salwar (pajama) and also my private part with

water and thereafter he put on my salwar. Thereafter accused went towards his house.'

18. Story of having blood from her private part comparable to slaughter of the goat because of sexual intercourse is nothing but imagination and result of tutoring.

19. In answer to question No. 4, she states that after her pajama was opened with jerk she immediately started bleeding from her private parts, in her own words :

'After opening my pajama with jerk as a result of this act of the accused it started bleeding from my private part. It was so profuse bleeding as if goat is slaughtered.'

20. This version of 'S' is neither credible nor does it come from a witness with intelligent understanding. In cross-examination she states that she received injury on her thigh, but the medical evidence negatives the same. It is her evidence that doctor gave her medical aid including bandage etc.

21. It is her evidence that it took about 10 or 12 days to heal the injury received by her on thigh. Now, 'S' was examined by Dr. Ramesh Chand Guleria (P.W. 9) on 20th September, 2002. He did not notice any injury on her person. She was also examined by Dr. Maulshree Lata. Gynaecologist at Mandi on 23rd September, 2002. She also did not notice any injury on the person of 'S'. Her statement that she was examined after 2/3 days of the occurrence also shows that the entire story is either concocted or flight of imagination. It is not the case of the prosecution that she was examined by any doctor after two or three days of the incident. It may be noticed that 'S' in her evidence in the Court states that accused washed her blood soiled salwar and also her private parts with water and thereafter he put on her salwar. She has materially improved from her statement under Section 154 of the Code of Criminal Procedure Ex. PW-1/A. In that statement version of 'S' is, blood oozed out from her private parts which she immediately washed with water from the tap. She also washed her pajama. For this reason too the evidence of 'S' becomes unreliable. So far statement Ex. PW-1/A is concerned, it is not disputed. In fact, 'S', in answer to question No. 6, states that 'statement Ex. PW-1/A was given by me to the police on which I appended my thumb impression and my father also put signatures'. This statement indeed bears

signatures of Nant Ram, father of the victim (P.W.-3).

22. This apart, it is noticed that salwar of 'S', her shirt, slide of vaginal smear were sent to the State Forensic Science Laboratory. No blood or semen was found either on the clothes or on the vaginal smear slide or on the pubic hair of either 'S' or the accused which also negatives version of 'S'. Gynaecologist Dr. Maulshree Lata, who examined 'S', is categorical that 'S' has been exposed to coitus. Her hymen was found torn and healed. If 'S' was used to sexual intercourse and hymen had not torn recently it would only show that no blood could have come from her vagina if she was subjected to sexual intercourse as she would have us believe. The entire story, in my view, is after-thought and made up to get even with the accused with whom the parents of 'S' had inimical relations.

23. This view strengthen from the fact that according to Premi Devi, mother of 'S', accused confessed his guilt and promised to pay Rs. 5000/-, but he did not pay any money, rather he claimed Rs. 7000/- for having falsely defamed him. It is her evidence;

'It is correct that we had visited police post at Pangna on 14th and the incident was narrated to them. The police called the accused in the police station and he confessed his guilt and promised to pay Rs. 5000/- to us. But he did not pay single penny, rather he claimed Rs. 7000/- from us on the pretext that we had falsely defamed him. We also did not pay him the amount of Rs. 7000/-. It is correct that on 14th the accused was mercilessly beaten when he refused to confess the allegation of rape. Self stated on 14th prosecutrix and my husband had gone to police station and from them I had, come to know about his beating.'

24. Now, this part of the testimony of Premi Devi clearly indicates that accused was called to the police station on 14th where he was given beatings and he, therefore, confessed before the police and promised to pay Rs. 5000/- to Premi Devi. But when he came out from the police station, he claimed Rs. 7000/- as damages for having made false allegations against him. Even father of 'S' Nant Ram (P.W. 3) in his evidence tells us that as accused though first refused, but then confessed and agreed to pay Rs. 5000/-.

25. Indisputably, there is enmity between the parties. Accused according to the father of 'S', encroached some of his land in front of the court yard and fenced that portion.

The accused refused to make any payment for that land. He also refused to vacate the encroached land of Nant Ram. He admits, 'it is correct that accused demanded Rs. 7000/- from him on the pretext that he was defamed. Self stated this demand was made by the accused after he was released by the police and while he was consuming liquor with three other persons and thereafter on the next day case was registered against him by us'. It may be pertinent to notice that demand of Rs. 7000/- as compensation was made on 14th September, 2002 and case was registered on 19th September, 2002.

26. Now, even though both Nant Ram and Premi Devi, father and mother of 'S', state that they visited the police post, Pangna on 14th September, 2002, but ASI Keshav Ram denies it. In his cross-examination ASI Keshav Ram says, 'it is incorrect to suggest that on 14-9-2002 Nant Ram, Premi Devi along with 'S' came to him at P. P. Pangna with the proposal that accused had constructed house on their land of which the accused either pay the cost or give his land in exchange thereon.'

27. Premi Devi (P.W. 2), mother of 'S', categorically admits that their family had strained relations with the accused. In her own words :

'It is correct that accused has forcibly constructed house on our land. It is also correct that we insisted on either demolition of house or payment of money in lieu of our utilized land. But the accused is not ready for either of the things. It is correct that land was exchanged with the accused and we left the exchanged portion in his favour but he is not doing the same. It is correct that on this count we are having strained relations with the accused. It is correct that the accused has also raised fencing on our land which is in front of the house of the accused constructed by accused on our land. The accused is also not removing the fencing.'

28. Tutoring :-- 'S' appearing as P.W. 1 admits in her cross-examination, 'it is correct that I am deposing in the Court on tutoring of my father and mother'. This renders the evidence of 'S' unworthy of reliance.

29. Reading the evidence as a whole of 'S', her mother Premi Devi (P.W. 2), her father Nant Ram (P.W. 3), false implication of the accused cannot be ruled out.

30. Inordinate delay in registration of the FIR :

There is inordinate delay in lodging the first information report. The allegedly incident took place on September 11, 2002. The first information report in terms of the statement of 'S' was recorded with the Police Post Pangna, Ex. PW-1/A on 19th September, 2002. The reason for this delay, according to the prosecution, is that father and brother of 'S' were away for work who returned back on 17th September, 2002 and it is only thereafter that report could be lodged. Both Premi Devi and her husband Nant Ram in their respective statements under Section 161 of the Code of Criminal Procedure maintain that Nant Ram returned back to the house on 17th September, 2002 and it was thereafter that report could be lodged with the Police on 19th September, 2002. But 'S' in her testimony, an answer to question No. 2, states, 'my father had come back to the house after about 2/3 days in the night time, whereupon the occurrence was also narrated to him'. In other words, according to her, her father returned back on 13th or 14th September, 2002. Even Premi Devi, appearing as P.W. 2, states that her husband returned back 2/3rd days after the incident. She in her cross-examination states, 'my husband and son returned from the labour work on 12th and we organized Panchayat on 13th, My statement was recorded by the police and the portion 'A' to 'A' of my statement Ex. DA is incorrect. I did not make such statement to the police'. It may be noticed that in her statement under Section 161 of the Code of Criminal Procedure, Ex. DA, she has stated that her husband returned back to house on 17th September, 2002. Nant Ram contradicts his earlier statement under Section 161 of the Code of Criminal Procedure and states that he came to his house after 5th day of occurrence. But then both Premi Devi and Nant Ram say that they visited police post Pangna on 14th September, 2002 and the incident was narrated to the police. When police called the accused he promised to pay

Rs. 5000/-.

31. Thus, the father of 'S' came to know about the incident on or about 13th September, 2002, yet report was not lodged with the police till 19th September, 2002. This delay has not been explained by the prosecution. Mr. Vasudeva, learned Additional Advocate General, urges that in such cases victim and parents are always reluctant to go to the police and lodge a report. He submits that in the present case, parents of the victim might have been hesitant to go to the police and complain about the incident as it would adversely affect the reputation of the victim and honour of the family.

32. I am afraid, this is not the case of the prosecution. The case of the prosecution is that report could not be lodged earlier as father and brother of 'S' were away and they returned back only on 17th September, 2002 and thereafter report was lodged on 19th September, 2002. This explanation, in view of the evidence discussed above, is untenable. The Apex Court, time and again, emphasized the importance of prompt lodging of the FIR in criminal cases. Delay in lodging of FIR, observed the Apex Court, in *Thulia Kali v. The State of Tamil Nadu*, AIR 1973 SC 501 : (1972 Cri LJ 1296), results in embellishment which is a creature of afterthought. Their Lordships observed (at para 12) :

'On account of delay, the report not only get bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is, therefore, essential that the delay in the lodging of the First Information Report should be satisfactorily explained.'

33. In the present case, there is unexplained delay in the lodging of the First information Report, of not merely few hours but about eight days. The possibility, particularly in view of the unreliable and incredible evidence of 'S', her mother Premi Devi and her father Nant Ram of coloured version after consultation having been introduced, cannot be ruled out, more so, when admittedly there is enmity between the parents of 'S' and the accused and accused has admittedly claimed damages for having been falsely accused of rape.

34. It may be noticed that it is the case of the mother and father of 'S' that Panchayat was called. But surprisingly no Member of such Panchayat was examined in which matter about rape on 'S' was discussed.

35. It is true that conviction can be based on the sole evidence of victim of rape which requires no corroboration, if such evidence is found to be satisfactory and reliable. In the present case, as noticed earlier, the evidence of 'S', apart from being that of a mentally challenged person, is result of tutoring by the parents and therefore, unreliable and conviction cannot be based on her sole testimony.

36. To conclude, there is no acceptable and reliable evidence on record to convict the accused. The possibility of accused having falsely been implicated, due to enmity, cannot be ruled out. The prosecution has failed to prove the charge beyond reasonable doubt. The learned trial Court, in view of the evidence on record, erred in convicting the accused.

37. No other point is urged.

38. In result, the appeal is allowed. Conviction of the appellant as recorded by the learned trial Court, is set aside. The accused stands acquitted.

39. The bail bonds furnished by the accused shall stand discharged. Fine, if deposited, shall be returned to the accused-appellant immediately.

40. Even though the sentence imposed on the accused was suspended by this Court on 25th February, 2004, but, if the petitioner is still in jail, he shall be set free immediately. The Registry shall immediately send a copy of this judgment to the Superintendent of the concerned jail.