

Ajay Kumar Vs. State of H.P.

Ajay Kumar Vs. State of H.P.

SooperKanoon Citation : sooperkanoon.com/890564

Court : Himachal Pradesh

Decided On : Jul-07-1994

Reported in : 1995CriLJ3431

Judge : D.P. Sood, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 109, 375 and 376; ;Code of Criminal Procedure (CrPC) - Section 313

Appeal No. : Cr. Appeal No. 25 of 1994

Appellant : Ajay Kumar

Respondent : State of H.P.

Advocate for Def. : Om. Parkash, Addl. Adv. General

Advocate for Pet/Ap. : J.P.S. Chadha,; R.C. Puri and; Anup Chitkara, Advs.

Judgement :

D.P. Sood, J.

1. Shri Ajay Kumar (along with Shri Rajesh Kumar, a co-accused, who has been acquitted), was tried, convicted and punished to seven years rigorous imprisonment and to pay a fine of Rs. 15,000/- (Rupees Fifteen Thousands) for the commission of the offence under Section 376 of the IPC. In default of payment

of fine, he has also been directed to suffer rigorous imprisonment for three years. In case of recovery of fine, the same has been ordered to be paid to the prosecutrix as compensation vide impugned judgment passed by the learned Sessions Judge, Shimla on 23-3-1994 in Sessions Trial No. 17-S/7 of 1993/89.

2. The prosecution story as unfolded by the prosecutrix may now be stated broadly. PW-6, Kanya Kumari, aged 15 years hails from village Todsa located at a distance of 16 Kms. from Police Station, Rohru. On 7-8-1989 at 8-00 a.m. she boarded a bus for Rohru and reached there at 9-00 a.m. in order to purchase household articles i.e. 'Gur' and oil. After having kept the Canny at the sale depot, she went to the shop of the accused, Ajay Kumar, which is run under the name and style of 'Ajay General Store', Rohru. She demanded 9 Kgs. of 'Gur' for animals and paid Rs. 507- as its price to the accused. It is alleged that accused Ajay Kumar forcibly took the prosecutrix inside a room which was being used as a godown for keeping his articles. The further case is that the accused called his co-accused, Rajesh Kumar (since acquitted) and asked him to close the door of the store interlinked with the shop. Thereafter, the accused, Ajay Kumar directed the prosecutrix to lay on a Nutri bag lying in the store. Later, he indulged in sex against her will and consent, consequent to which blood started oozing out from her private parts. The accused is stated to have cleaned his male organ with the paper and asked the prosecutrix not to disclose this fact to anyone. Subsequently, the door was got opened by the accused Ajay Kumar through his co-accused and the prosecutrix left the place for bus stand, where PW, Satya Dev, a co-villager of the prosecutrix met her. On seeing him, she started weeping whereupon the latter asked him as to what had happened to her. Consequently she narrated the entire incident naming the accused to have forcibly committed rape on her without her consent and her will. P.W. 2 took the prosecutrix Kanya Kumari (PW-6) to the police station, where she reported the incident on the basis of which First Information Report No. 134 of 1989 dated 7-8-1989 was recorded at 11-40 a.m.

3. The Investigating Officer, Inspector Roop Lal (PW-7) on receiving the information, alongwith other police constables, visited the spot, prepared the site plan, took into possession the Nutri bag after emptying the same as also the papers stained with blood and empty 'Gur' bag after observing code formalities. He

also arrested the accused on the same date. Apart from the above, he got both the accused as also the prosecutrix medically examined on the same date and obtained their respective medico-legal certificates from the concerned Medical Experts. He also took into possession the wearing clothes, namely, T-Shirt, underwear of the accused as also the 'Salwar' worn by the prosecutrix at the material time and sent these articles to the Chemical Examiner for seeking opinion with respect to the blood stains found to be appearing upon them after duly taking into possession the said articles in accordance with the rules. Thus, both the accused were ultimately prosecuted on completion of the investigation for the commission of the offence under Section 376 read with Section 109 of the IPC. On consideration of the material collected by the police against both the accused, a charge was framed against the appellant for the commission of the offence under Section 376, IPC, whereas his co-accused was charge-sheeted for the commission of the offence under Section 376 read with Section 109 of the IPC.

4. The prosecution produced nine witnesses in support of its version and the accused also produced three witnesses in defence.

5. In his statement under Section 313 of the Cr. P.C., the accused raised a defence of denial simpliciter. According to him, the case was fabricated against them due to existence of strained relations, both of them having settled there from district Kangra. The defence so raised in verbatim is: .

'I am out-sider. My father took the shop on rent wherein I started business. The local people did not like this. They tried to force me to close the shop and leave the place during apple growers agitation the local residents were looting the shops of outsiders. When I resisted then this case was planted against me with intention to force me to leave the place permanently. I am innocent.'

6. On appraisal of the entire evidence adduced by the parties, the trial court concluded that the prosecution had been able to prove the case against the accused, Ajay Kumar beyond reasonable doubt, though not against his co-accused, Rajesh Kumar and consequently convicted and punished the appellant, Ajay Kumar vide the impugned judgment as indicated above.

7. The main contention which has been raised by Shri Anup Chitkara, learned counsel appearing on behalf of the appellant is that no direct evidence, oral or documentary is available on record about the age of the prosecutrix nor such evidence is available about the nature of her behaviour to indicate that the offence so committed by the accused was against her will and without her consent. Learned counsel has candidly and fairly conceded that the fabrication of the case on the basis of existence of strained relations as contended by the accused, cannot be supported by any iota of evidence and that may not be taken into consideration. However, his emphasis is on the above said contentions that the prosecutrix is proved to be more than sixteen years on the basis of the record and natural behaviour of the prosecutrix indicating the sex indulgence with the accused shows that she was a passive agent and a consenting party to the commission of the act in question. He has drawn my attention to various circumstances arising out of the evidence adduced by the prosecution and emphasised that by no stretch of imagination, it can be deduced that the prosecutrix, Kanya Kumari (PW-6) had been subjected to or was under any fear or compulsion such as would justify an inference of forcible rape having been committed upon her against her will and against her consent.

8. On the contrary, Pt. Om Parkash, learned Additional Advocate General, appearing on behalf of the State has vehemently contended that there is cogent, consistent and reliable evidence as to the age of the prosecutrix indicating that she was below sixteen years of age on the date of occurrence. He has fairly and squarely conceded that, no doubt, the natural behaviour of the girl indicated from her own testimony coupled with that of the circumstances appearing from the statements of other witnesses do indicate that she was a consenting party and no other inference except the fact that she became a passive agent in the commission of the offence, but this fact does not in any way exonerate the accused from the criminal liability for his acts. According to him, the act committed by the appellant falls within the ambit of Section 375 fifthly of the IPC.

9. In order to appreciate rival contentions raised by the learned counsel appearing on behalf of the parties, it would be appropriate firstly to consider the question as to what was the age of the prosecutrix on the material date when the offence in

question is alleged to have been committed.

10. The only material on this aspect of the case is found in the statement of PWs. 5, 6, 7 & that of DWs. 1 & 3 besides medical evidence. Apart from it, First Information Report (Ext. PC) reveals the age of the prosecutrix as fifteen years. It is well settled that the First Information Report cannot be used as a substantive evidence. It has only a corroborative value. Thus, in order to see as, to what is the age of the prosecutrix, I shall refer to the statements of the aforesaid witnesses.

11. In the first instance, it is to be noted that both P.Ws. 5 and 6 are illiterate. PW-5, Smt. Tara Devi, is the mother of the prosecutrix. She has given her age as forty years on 26-2-1993. In her examination-in-chief she states that she was married at the age of twenty years and the prosecutrix was born after two years of the marriage, she being the eldest daughter. She further states that she gave birth to four other children. However, she states nothing about the ages of the other children nor she has given the date of birth of either of them to connect the age of prosecutrix. In her cross-examination, she has admitted that she gave her age when she was married on the basis of estimation. Strangely enough, even the learned defence counsel appearing on behalf of the accused during trial has not attempted to elicit any information about the ages of other children or their respective dates of birth.

12. The testimony of PW-5, when read as a whole, does not give any definite age of the prosecutrix. In case the age is taken as twenty of the mother of the prosecutrix on the date of the marriage, positively, the prosecutrix is found to be below sixteen years of age on the date of occurrence, but this inference cannot be allowed to be inferred for the reason of indefiniteness about her statement with respect to her age. She has also failed to specify her date of birth or that of other children. In that view of the matter, her testimony is not reliable.

13. PW-6, Kanya Kumari is the prosecutrix. She is also illiterate. She has, no doubt, given her age as eighteen years on the date when her statement was recorded, but she has failed to specify her date of birth. On the same analogy, no help can be derived by the prosecution from her testimony in this behalf.

14. PW-7 is Shri Roop Lal, the Investigating Officer. He states to have collected evidence from 'Parivar Register' in the form of extract in relation to the age of the prosecutrix. The original 'Parivar Register' has been retained. Ext. DW-I/A is the extract of the said register at page -25 of the original register which has also been perused by this Court. According to the entry in the 'Parivar Register', the date of birth of the prosecutrix, Kanya Kumari (PW- 6) is 4-8-1970. However, a perusal of the said entry shows that the 'figure '0' has been tampered with. Apart from it, even the...Secretary of the Gram Panchayat, in whose custody the said register remains appearing as DW-1, has categorically stated that the entries at page-25 of the said register have been made in one ink, by one person and on the same date. If that be so, on whose information the said entries were made, who gave the date of birth of respective persons, particularly belonging to the family of the parents of the prosecutrix, stands unproved. In that view of the matter coupled with the factum of the tampering of the entry in question, no reliance can be placed as to the age of the prosecutrix.

15. So far as extract of the voters' list pertaining to the family including the prosecutrix (Ext. DW-3/ A) is concerned, suffice it to state that no reliance can be placed upon this evidence inasmuch as no evidence has been adduced by the prosecution as to how, in what manner and at whose instance and when and by whom the said voters list was prepared. In this view of the matter, no reliance can also be placed on this piece of evidence emerging from the record of this case.

16. I am now left with the medical evidence in respect of the clinical age of the prosecutrix. PW-I, Dr. Suman Gupta and PW-9, Dr. Neeru Pandit Kapoor have given her clinical age to be 14 1/2 and 15 years on the basis of ossification test conducted and examination thereof carried on by them. Skiagrams of the prosecutrix are Exts. P-I to P-8. The relevant form filled in by PW-9 is Ext. PJ which not only indicates the number of the Medico-Legal Certificate as 67/89, but also indicates the number of X-ray i.e. Skiagrams as X-1451. The name, address and M.L.C. No. is also found on each one of the skiagram and it tallies with that of the form filled in by PW-9, who stated that it pertains to PW-6, Kanya Kumari prosecutrix. It is well settled that ossification test is a weak type of evidence and as per the medical jurisprudence there is variation of two years either way. In other

words, according to Medical Experts also, i.e. PWs. 1 and 9, who have given the age of the prosecutrix to be between 14 1/2 and 15 years, it cannot be ruled out that the age of the prosecutrix is in between 16 1/2 to 17 1/2 years. In other words, from the proved facts on record, from whatsoever angle they may be viewed, the prosecutrix is not proved to be below sixteen years of age. The suggestion in cross-examination regarding the age of the prosecutrix has been put to be more than 19 years on the date of occurrence not only to PW-5, but also to PWs. 6 and 7 during their cross-examination besides the concerned Medical Experts. The cumulative effect of the entire evidence adduced by the prosecution on this aspect of the case is that the prosecutrix has not been proved to be below sixteen years of age.

17. As regards the second point as to whether the offence committed by the accused was with consent or not, I have already observed that there are several circumstances emerging from the record, which do indicate that Kanya Kumari (PW-6) had passively submitted herself to the wishes of the accused. She was medically examined by doctor Neeru Pandit (PW-9) in the first instance. Her medico legal certificate issued by the said witness, is Ex.PG. On medical examination, the prosecutrix was found to be of average built body, possessing sound physique. Apart from it, other observations with respect to her person were as under:

(1) Secondary sex characters present.

(2) Breast-firm elastic, hemispherical.

Undeveloped nipples surrounded by dark brown areola.

(3) Clothes - the salwar was stained with blood on posterior part.

(4) Abrasion of one cm. length reddish in colour present on the medial side of left leg. Victim had difficulty in walking.

(5) Pubic hairs were not matted. No seminal stains were present on external genitals and thighs. Slight bleeding per vaginum. No bruising/laceration of external genitals. Hymen lacerated having two radiate tears, edges, red swollen painful.

Bleed on touch. Little finger on being introduced caused great pain. Vaginal secretions taken from posterior for mix, thin films were made and fixed and sent for examination. No signs of venereal infections seen.

(6) Blood samples taken and sent for blood grouping, cross matching and serological examination.

It is to be noted that the girl was examined just within six hours of the occurrence. No doubt, PW-9 has stated that prosecutrix had difficulty while walking, yet she has not been able to state whether the prosecutrix was lame or normally fit, nor this witness has stated as to whether she was passing through menstruation period at the material time. A close scrutiny of the certificate indicates that clothes worn by the prosecutrix, namely, salwar was stained with blood on posterior part. However, pubic hairs were not matted nor seminal stains were present on external genitals and thighs, excepting a slight bleeding per vagina. No other injury was found on the person of the prosecutrix, except an abrasion of one c.m. length, reddish in colour present on the medial side of left leg. Whether this injury occurred in the occurrence or was existing since prior to that, is also not clear from the statement of this witness. Apart from this fact, if we look to the statement of PW-6 deeply, she has categorically admitted in cross-examination that she remained with the accused inside the store, where the alleged offence is stated to have been committed, for one and half hour. She also admits in her cross-examination that after the sex indulgence with her, the accused asked to open the door and it having been opened, she left the place. She did not raise any alarm till she saw Satya Dev (PW-2) on the bus stand. According to her, on seeing the said witness, she started crying. The sworn testimony of PW-2 and PW-7 establish on record that the shop of the accused is surrounded by a dhaba on one side, hotel on the other and a big shop confronting it. Apart from it, this is a three storeyed building and some persons were residing in the first and second storey of the building in which the shop in question belonging to the accused is located. The offence is alleged to have been committed in the broad day light in between 9 a.m. to 10-30 a.m. People were coming to and fro. Not only that, bus stand is at a nearby distance, i.e. 13' from the shop in question and that too at a higher level. Apart from this fact, even as per the case set up by the prosecutrix, the moment

she paid the price to the extent of Rs. 50/- in respect of Gur purchased by her, the accused is stated to have caught hold of her hand and then took her inside the store and thereafter he fulfilled his lust. In the normal course, the natural behaviour of a girl of her age would have been to raise alarm and seek the help of the passers-by. Had the prosecutrix raised cries, it would have positively attracted the adjoining shopkeepers and passers-by, who could have extended their help. Her statement that the door was closed by the other accused, namely, Rajesh and she cried inside the store, appears to be a concocted version on her part. Not only that, from her testimony it emerges that during the act of sex indulgence, neither she slapped the accused nor gave a bite to any portion of his person nor she tried to put resistance to the physical advances made by the accused. It has also come in her evidence that during the course of act committed by the accused, he had held her face in his both hands, meaning thereby that while the accused had laid himself over the body of the prosecutrix, her hands were free and she could have at least put resistance in many ways, but this has not been done. The mere assertion that she had come for the first time to Rohru on that day and she did not know the accused prior to the incident in question and that she had reported the matter to the police after the occurrence, does not, in any way, make her allegations free of doubt, in view of the various circumstances discussed above.

18. The cumulative effect of the entire circumstances emerging from the record coupled with the circumstance that no mark of injury was found on her person except a superficial abrasion referred to at Serial No. 4 of the MLC Ex.PG, and her conduct in having left the shop upto Bus Stand, not having raised alarm till she met PW-2 Satya Dev, goes a long way to indicate that the alleged intercourse was a peaceful affair and the story of her helplessness in putting up resistance, is all false.

19. My above said view is supported by another circumstance appearing from her (prosecutrix's) testimony to the effect that she admits in her cross- examination that after the commission of the act in question, she went to the police and as she was not knowing the name of the accused, she returned to the place of occurrence alongwith the police and thereafter went back and lodged the report. At the same time, PW-7 states to have visited the place of occurrence for the first time after the

recording of the report at the behest of the prosecutrix as well as PW-2. In case the statement of the prosecutrix is believed, it appears that the investigation made by the police is of shady character. They had earlier visited the spot, took into possession not only nutri bag but also empty gunny bag and clothes of the accused, prepared the site plan and also arrested him and then brought him to the police station, entered the report and registered the case. This fact finds further support from the contents of the FIR Ex.PC. wherein the name of the accused has been mentioned but PW-6 categorically deposes that she earlier did not know the accused nor she knew his name and she came to know of his name only from the police and Satya Dev after she had revisited the shop along with the latter.

20. In view of what I have said above, no other irresistible conclusion except the one that the sexual intercourse in question had been committed by the accused with the passive submission of the prosecutrix to the wishes of the accused, who fulfilled his lust, can be concluded from the entire evidence. In other words, the prosecution has miserably failed to bring home the guilt against the accused beyond reasonable doubt to the satisfaction of this Court. Learned Sessions Judge has not adverted to the above said circumstances, clearly emerging from the record. Had he done so, he would not have committed the above said error in having convicted and sentenced the accused on such a weak type of evidence, adduced by the prosecution. It has to be borne in mind that the onus is always on the prosecution to prove affirmatively each ingredient of the offence it seeks to establish and that such onus never shifts. True it is that accused had denied the occurrence, by raising a defence of denial simpliciter. It is also true that the defence taken by him is false to the above-said extent, but the circumstances in hand do show that the occurrence took place between the accused and the prosecutrix in connivance with each other and with the consent of both. In that view of the matter, the impugned judgment is liable to be set aside.

21. In view of the discussion made above, the appeal is accepted, the impugned judgment dated 23-3-1994, passed by the learned Sessions Judge, Shimla in Sessions Trial No. 17-S/7 of 1993/89 is set aside and the appellant is acquitted of the charge. He is directed to be set at liberty forthwith, if not required in any other case. Fine, if deposited, is ordered to be refunded to the accused.

