

Manoj Kumar Vs. State

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Court : Jammu and Kashmir

Decided On : Apr-28-2000

Reported in : 2001CriLJ3270

Judge : Tejinder Singh Doabia, J.

Acts : Ranbir Penal Code (IPC), 1989 Smvt. - Sections 149, 201 and 376

Appeal No. : Cr. Ist Appeal 6 of 1992

Appellant : Manoj Kumar

Respondent : State

Advocate for Def. : P.C. Sharma and; S. Shehkhar, GAs.

Advocate for Pet/Ap. : D.C. Raina, Adv.

Judgement :

Tejinder Singh Doabia, J.

1. The appellant who has been convicted for having committed an offence under Section 376 of the Penal Code, was 17 years of age. He was a student of 10th Class. The prosecutrix was also almost of the same age. She was around 16 years of age. She was also a student. They were neighbours. The events came to light when symptoms of pregnancy could no longer be kept secret from the

parents. This was almost four months after the first sexual contact. The alleged offence is said to have been committed ten years ago. Besides seeking reversal of the judgment of conviction recorded by the Court below, the learned Counsel for the appellant submits that the age of the appellant at the time of commission of offence and the fact that both sides have settled in life, be taken note of and reformatory approach be adopted in this case. The appellant is said to be looking after his wife, children and parents. The prosecutrix is married to another person, who, as per the appellant's counsel, is not aware of the occurrence, which took place ten years ago. Any adverse publicity at this stage might affect her relationship with her present husband. The pregnancy which was said to be caused on account of the alleged relationship between the appellant and the prosecutrix did not result in an offspring coming in this world. It is, accordingly submitted that the case be examined in the light of these developments also. This aspect of the matter would be adverted to again. The question as to whether a case is made out for reversing the judgment, be examined at the first stage.

2. The young and unmarried prosecutrix who was a student of 5th class at the time of occurrence was found to have been seduced into sexual relationship by the appellant. This was somewhere in the month of February, 1991. This activity continued for quite sometime. This as per the prosecution was repeated on occasions more than once. It was middle of May '91 (15th May, 91), the mother of the prosecutrix noticed that she was having continuous vomiting. When the prosecutrix was got medically examined, it was found that she was pregnant. The prosecutrix stated that on 15th May, 91, she had gone out to attend the call of nature. Even on this day, the appellant sexually assaulted her notwithstanding the fact that she protested against it. It was this behaviour of the appellant which prompted the prosecutrix to disclose the identity of the perpetrator of the crime to the mother. The mother of the prosecutrix in turn took her husband into confidence. The father of the prosecutrix made a complaint with the parents of the appellant. Instead of expressing sympathy and sorry for the act committed by the appellant, the appellant along with his parents and other relations came to the house of the prosecutrix, armed with sticks and other weapons and threatened the prosecutrix and her mother. This happened on 16th May, 91. It was in these circumstances a case was registered under Sections 376, 149 and 201 of the

Penal Code. When the matter was taken up by the Sessions Judge, it was found that the charges of rape are independent of the incident which took place on 16-5-1991. The appellant was charged on two counts. This was on account of the first act of sexual assault committed by the appellant on 15th Feb. 91 and the other was the sexual assault committed on 16th May 91. With a view to support the prosecution case, the prosecutrix, her mother and father as also some other witnesses including the medical expert and Investigating Officer appeared in the witness-box. The appellant also lead evidence in defence. After the conclusion of the final arguments, the prosecutrix was got medically examined. This was done at the instance of prosecution. The prosecution case was that the age of prosecutrix was less than 16 years and that this factor was known to the appellant. It was urged that the appellant had taken the benefit of the tender age of the prosecutrix and violated her person. The prosecution relied on the school certificate of the prosecutrix where her date of birth was recorded as 23rd Jan. '78. A perusal of this certificate indicated that the age of the prosecutrix was between 13 to fourteen years when the acts attributed to the appellant were committed. The appellant, however, relied on the certificate of the Chowkidar. If the above certificate is taken into consideration, then the prosecutrix would be more than 16 years of age at the time of occurrence. As the prosecutrix was found to be below sixteen years of age and as it was found that the appellant was responsible for violating her person, he was found guilty of the offence under Section 376 of the Penal Code. The Court of Session was of the view that the appellant had allured the young girl to have sex with him. Five years' rigorous imprisonment was imposed. This was done by taking into consideration the age of the appellant.

3. As the view expressed by the Supreme Court is that it is possible to record conviction in such cases on the basis of the evidence of the prosecutrix alone, it would be apt to notice what was said by her when she appeared in the witness-box.

4. The prosecutrix stated that the appellant is her next door neighbour. Both of them belong to the same community and knew each other. She stated that it was in the month of Feb. 91, she came back from her school. She had gone to attend call of nature. The appellant reached there. He allured her to have sexual

relationship with him. After having quenched his lustful thrust, the appellant told the prosecutrix not to disclose regarding this act to anybody else. She was told that in case she does so, then her life would be at peril. The prosecutrix stated that these acts were repeated at the same place on number of occasions. It was in the month of May 91, she started having repeated vomiting sensation. She was got examined from the medical practitioner who testified to the effect that the prosecutrix is pregnant. The prosecutrix stated that on 15th May, she had gone out to attend the call of nature. The appellant again came and caught hold of the prosecutrix. The prosecutrix pleaded that she is not well and told the appellant that he should not force her to sexual intercourse. He, however, did not spare her. He satisfied his lust notwithstanding the fact that the prosecutrix was not feeling well. This conduct of the appellant appears to be the factor which led the prosecutrix to disclose the name of the appellant to her mother. The mother in turn informed the father of the prosecutrix. The prosecutrix stated that on the next day i.e. on 16th May 91 the appellant along with his parents and other persons attacked her and her family members. A First Information Report was lodged. This is Ex. PW-3. The place where the appellant is said to have sexual relationship with the prosecutrix is said to be just behind her house.

5. It be seen that the prosecutrix made a categorical statement to the effect that it was the appellant who was responsible for having sexual intercourse with her. This process started in the month of Feb. 91 and continued up to 15th May 91. In the meanwhile, she became pregnant. Therefore, one aspect of the matter that someone had sexual relations with her stands established. The question is whether it was the appellant or it was some other person who was responsible for this act. This is being mentioned because a suggestion was made that it was her uncle who was responsible for the pregnancy. With a view to find out as to whether the story put forward by the prosecutrix that it was the appellant who was responsible for this act, the corroborative evidence in this regard be also taken note of.

6. The mother of the prosecutrix appeared in the witness-box. She is a natural witness as in such cases, a daughter is likely to confide only with the mother. When the mother came to know that her daughter is pregnant, she enquired from

her regarding the person who was responsible for the same. The prosecutrix was silent for quite some time. It was in the evening the prosecutrix informed the mother that it was the appellant who was responsible for pregnating her. It appears that on this day, the appellant again sexually assaulting her notwithstanding the fact that she protested against it. This appears to be the factor which hit the young girl. She felt that instead of sympathising with her, the appellant was interested only in satisfying his sexual lust. This led the prosecutrix to reveal the name of the appellant to her mother that it was he who was responsible for pregnating her. There appears to be no justification to not to believe the prosecutrix and her mother. The prosecutrix was examined by doctor V.K. Sharma. He was of the view that the girl examined i.e. the prosecutrix was carrying 14 weeks pregnancy. The prosecutrix was again medically examined after two days of occurrence i.e. on 17th May '91. One doctor Rajeev who examined her was of the view that she could have had sexual intercourse two days prior to her examination. He also confirmed that clinical examination confirmed pregnancy. As indicated above, from the evidence which has come on the record, it has been established that:

- (i) somebody was having sexual intercourse with the prosecutrix;
- (ii) this process started somewhere in the month of Feb. 91;
- (iii) that the conclusion at (ii) above becomes apparent when the opinion of the doctors that the pregnancy carried was of 14 weeks, is taken note of. This would take us back to the month of February 91;
- (iv) that the question as to whether the appellant was responsible for this, has necessarily to be answered against the appellant because the prosecutrix after some hesitation named the appellant. It was only when her sentiments were hurt and when she realised that the appellant was only concerned about his lustful satisfaction, she disclosed the name to the mother.

In this situation, the statement of the prosecutrix and her mother has to be believed.

7. The defence version may now be examined. The stand taken by the defence is that it was the uncle of the prosecutrix who was responsible for her pregnancy, it was sought to be projected that the appellant has been falsely implicated and it was the uncle of the prosecutrix who had done this act. Nothing has been brought on record that there was any previous enmity, between the family members of the prosecutrix and the family members of the appellant.

8. When the father of the prosecutrix appeared in the witness-box, no suggestion was made to him regarding the involvement of his brother. The uncle of the prosecutrix, Naseeb Chand also appeared in the witness-box. He denied the suggestion. Therefore, the defence version that it was Naseeb Chand, the uncle of the prosecutrix who was responsible for the act cannot be believed. In this regard, it would be worth mentioning that one Krishnan Kumar D.W. was asked to project the case that there was some rumour in the village where Naseeb Chand lives i.e. village Ghagwal that the prosecutrix had been pregnated by his uncle Naseeb Chand. There is no suggestion in the statement of DW Kumar that there was any such rumour in the village where the prosecutrix and the appellant reside. This village is Harsath. As there was no such rumour in village where the parties reside, therefore, to say that such a rumour existed in village where Naseeb Chand lived, cannot be believed. Therefore, the defence story regarding the involvement of Naseeb Chand, the uncle of the prosecutrix has to be rejected and it was rightly rejected by the trial Court.

9. The question regarding the age of the prosecutrix be now examined. The parents of the prosecutrix had in all nine children. Six of them are alive and three have died. The date of birth of the children and the date of death as given by the village Chowkidar who appeared as a defence witness has been summarised by the Court of Session. A perusal of this Court shows that the date of birth of the prosecutrix is 17th Jan. '83.

10. Dr. K.K. Sethi who is Radiologist, has expressed his opinion as under :

Epiphysis for head of humerus has appeared and not fused. Epiphysis around elbow joint, knee joint and ankle joints have appeared and fused. Epiphysis around wrist joint have appeared and not fused. Epiphysis for iliac crests and ischial

tuberosities have appeared and not fused. Foetal skelter parts seen in the pelvis, the radiological age was more than fifteen years and less than seventeen years.

11. If the opinion expressed by the Radiologist and the date noticed on the basis of statement made by the village Chowkidar is taken note of then the prosecutrix would definitely be less than sixteen years of age. It has been correctly observed in para 34 of the judgment under appeal that:

the prosecutrix will definitely be less than 16 because the fusion of epiphysis of upper and lower end of tibia take place between the age of 14 and 15 which according to Dr. Sethi epiphysis had appeared but not fused. Even if we take the outer age, she could not be more than 15.

12. Thus, the age of the prosecutrix was rightly held to be below sixteen years. This was concluded on the basis of the certificate prepared by the village Chowkidar. This was again done by taking note of the statement made by the Radiologist. In this situation, it would be safe to hold that the prosecutrix was below sixteen years of age at the time of occurrence. I am accordingly of the view that the prosecution story as put forward by the prosecutrix has to be believed because :

(i) the prosecutrix had named the appellant as the person responsible for pregnating her. She originally was silent about this but when she found that the appellant was interested only in satisfying his lustful thirst, she disclosed the name of the appellant to her mother;

(ii) that the story put forward by the defence that it was the uncle of the prosecutrix who was responsible for the pregnancy of the prosecutrix cannot be believed. This is because there was no such rumour in the village where the parties reside and the rumour in the other village where the uncle of the prosecutrix lived would be of no consequence and such a plea of the defence cannot be accepted;

(iii) that the age of the prosecutrix was less than 16 years at the time of occurrence and any sexual relation with her would bring the person responsible for this act within the mischief of Section 376 of the Penal Code.

As such, so far as the merits of controversy are concerned, no case is made out for reversing the findings as recorded by the Court below. The other argument with regard to the nature of punishment and whether the appellant should be directed to undergo jail sentence or any other mode can be adopted, be now examined.

13. This consideration has been made primarily by taking into consideration the age of the appellant and the prosecutrix at the time offence was committed, the time which has lapsed and other intervening circumstances noticed in the beginning of the judgment. In this regard, what was said by K.T. Thomas, J. in the case of State of Gujarat v. Hon'ble High Court of Gujarat (1998) 7 SCC 392 : (1998 Cri LJ 4561) can well be taken as a guide. It was observed that 'the retributive theory of punishment has waned into a relic of primitivity because civilised society has realised that retribution cannot solve the problem of escalating criminal offences. Crime is now considered to be a problem of social hygiene. That modern diagnosis made by criminologists is now causing a sea change to the whole approach towards crime and punishment. The emphasis involved in punishment has now been transposed from retribution to cure and reform so that the original man, who was mentally healthy, can be recreated from the ailing criminal.' What was said in paragraph 29 of the judgment is being quoted again (at Pages 4568-4569 of Cri LJ) :

To Mother Teresa, 'the prisoner is Jesus to me'. The world-renowned philanthropist as she was, would have been very much inspired by the scriptural words pronounced by Lord Jesus as quoted in the gospel according to Matthew (Chapter 25 verse 36):

Then the King will say to those on his right hand 'Come ye, who are blessed by my Father in Heaven, for, I was in prison and you came to see me'. To those on the left the King said: 'Go away from me you cursed ones, for, I was...in prison and you did not visit me.

14. The grand transformation recorded in the epics regarding Hunter Valmiki who turned out to be a poet of eternal recognition, is referred to in para 30 of the judgment. It was observed :

If the powers which brought about that transformation had remained inactive, the world would have been poorer without the great epic 'Ramayana'. History is replete with instances of bad persons transforming into men of great usefulness to humanity.

15. In this regard, it would again be apt to refer to the decision reported as Mohd. Giasuddin v. State of A.P. (1977) 1 SCC 287 : (1977 Cri LJ 1557) which decision was noticed in the case of State of Gujarat (supra). In the above case it was observed as under :.The aphorism that 'if every saint has a past every sinner has a future' is a tested philosophy concerning human life.

It was accordingly observed that:

A reformatory approach is now very much intertwined with a rehabilitative aspect to a convicted prisoner....

16. No doubt, the above decision deals with the question of forced labour, which is resorted to when the convicts are in jail, nevertheless, what has been said in the aforementioned judgment, can be of some advantage for the purposes of this appeal also.

17. In an earlier decision, reported as AIR 1978 SC 480 : (1978 Cri LJ 641), Nadella Venkatakrishna Rao v. State of A. P., the harmful part of imprisonment was highlighted in the following words :

The most harmful part of the imprisonment is the initial stage, when the person is confined in the prison. Thereafter he gets sufficiently hardened and callous with the result that by the time he is processed through the years inside the prison, he becomes more dehumanised. The whole goal of punishment being curative is thereby defeated. The accent, therefore, be more and more on rehabilitation rather than retributive and punitive inside the prison.

18. Again in Ashok Kumar v. State AIR 1980 SC 636 : (1980 Cri LJ 444) the fact that the offender had married was given due consideration. What was said in paragraph 7 of the judgment is being noticed below (at Page 445 of Cri LJ) :

More important than these circumstances is the social urgency of making this student: offender a non-offender. These are the two circumstances which weigh in our mind. The young man has married and has three children. This is a measure of assurance that he will not play with his freedom recklessly. Family life is an assurance against a career of crime.

19. It be seen that in offences involving punishment under Section 376 of the Penal Code, the provisions of Probation of Offenders Act are not attracted. The benefit of this was given where there was attempt to commit rape. This was the case of 1997 SCC (Criminal) 1176, State of Haryana v. Prem Chand. The facts in the present case no doubt, disclose that what has happened in this case was beyond the attempt, nevertheless, the factors indicated above i.e. the age of the appellant at the time he committed the offence, the time gap between the occurrence and hearing of this appeal and also the fact that both sides have adjusted themselves and have married and are staying apart cannot be ignored. The observations made in Ashok Kumar's case *supra*, would also apply. In these circumstances, a direction is given that the sentence imposed on the appellant shall remain suspended. The appellant shall be deemed to be on parole for five years i.e. period of sentence. In case, the State brings to the notice of this Court that during this period, the appellant has shown criminal characteristic and has indulged in any crime, then on the happening of such an event, the concession which has been given shall be liable to be withdrawn. Thus, upholding the findings of the Court below, a direction is given that the sentence imposed shall remain suspended.

The appellant, as indicated above, shall remain on parole for five years.

Disposed of accordingly.