

Ashok Kumar Vs. State of J and K

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Court : Jammu and Kashmir

Decided On : Apr-01-2005

Reported in : 2006(3)JKJ527

Judge : S.K. Gupta, J.

Acts : Ranbir Penal Code (IPC), 1989 - Sections 376, 377 and 511

Appeal No. : Cr. Appeal No. 18-A/2004

Appellant : Ashok Kumar

Respondent : State of J and K

Advocate for Def. : B.S. Salathia, Sr. Addl. AG

Advocate for Pet/Ap. : Babu Ram Sharma, Adv.

Disposition : Appeal dismissed

Judgement :

S.K. Gupta, J.

1. This appeal is directed against the judgment and order dated 24.07.2004 in case 'State v. Ashok Kumar' for offences under Sections 376, 377 & 511 R.P.C., passed by the learned Additional Sessions Judge, Jammu. By the aforesaid judgment, the Trial Court has convicted the accused/appellant to suffer five years'

rigorous imprisonment and a fine of Rs. 2,000/-, and in the event of default of payment of fine to further undergo three months' simple imprisonment in proof of offences under Sections 377 & 511 R.P.C.

2. The accusations against the accused stemming out of the record, in nutshell, are that Kamlesh Kumari was married to Des Raj and four female children were born out of this wedlock. After the death of her husband, Kamlesh Kumari contracted second marriage with the appellant, Ashok Kumar, son of Jagat Ram resident of Nai Basti, Jammu. Soon after the marriage, Ashok Kumar started causing her harassment and forced her to leave the matrimonial house. In consequence whereof, she started living with her children in a rented house at R.S. Pura. The accused also subsequently shifted to R.S. Pura. Kamlesh Kumari was making her both ends meet by working in residential houses in the neighbourhood. On the day of occurrence, when she returned home at 7 P.M., after doing the work in the residential houses in the neighbourhood, found her younger daughter namely Meenakshi, aged 11 years, missing. During search, she went to the shop of the accused/appellant and found shutter down. On opening the shutter of the shop, she found the accused and the prosecutrix in naked condition. She further saw Meenakshi, her daughter, holding the penis of the accused in her mouth on the point of a knife held by the accused. When the complainant raised the alarm, the accused threw the knife and fled away. On the complaint filed by Kamlesh Kumari with the Police Station, R. S. Pura, a case under F.I.R. No. 58/2001 under Sections 376, 377 & 511 R.P.C., was registered and investigation proceeded.

3. On the conclusion of investigation, the accused was sent up for trial for the offences under Sections 376, 377 & 511 R.P.C., in the Court of Additional Sessions Judge, Jammu. The Trial Court after recording the evidence and hearing the parties, found the appellant guilty and sentenced him, accordingly vide judgment impugned in this appeal.

4. Mr. B.R. Sharma, learned Counsel appearing for the appellant argued that the Trial Court has not appreciated the evidence in its proper perspective. A false case has been engineered against the appellant on account of his strained relations

with the mother of the prosecutrix, who happens to be the wife of the appellant. The witnesses examined by the prosecution are related to the prosecutrix and their evidence is tainted and, thus, insufficient to warrant the conviction of the appellant unless corroborated by independent witnesses. That the case has been fabricated by the mother of the prosecutrix in order to secure divorce from the appellant and re-marry a person of her taste.

5. Whereas, on the other hand, Mr. B.S. Salathia, Sr. Addl. AG argued that the evidence relied upon by the prosecution unambiguously established the guilt of the accused to have attempted to commit sexual assault on the hapless minor girl of 13 years old by detaining her in the shop after closing its shutter, beyond any pale of doubt.

6. I have heard the arguments advanced by Mr. B.R. Sharma, learned Counsel appearing for the appellant, as well as Mr. B.S. Salathia, learned Sr. Addl. AG appearing for the respondent, in extenso. A minute examination of facts on file has been given.

7. The case of the prosecution hinges on the testimony of the prosecutrix, supported by Mst. Kamlesh Kumari, her mother, who happens to be the complainant in the case, Neetu & Nisha, her sisters, to whom the prosecutrix narrated the episode immediately after the occurrence.

8. PW- Mst. Meenakshi, prosecutrix, a minor girl of 13 years age stated that on the day of occurrence, her mother had gone to work in the houses of others in the neighbourhood and she was alone at home. The accused, who had contracted second marriage with her mother, called her to clean his shop. As soon as the prosecutrix entered the shop, the accused/appellant closed its shutter and started fondling her. It is also in the evidence of the prosecutrix that the accused opened the zip of his trousers and exposed himself and forcibly opened her shalwar. The prosecutrix when tied her shalwar, the accused removed the shalwar which she was wearing at the time of incident and insisted the prosecutrix to hold his penis in her mouth and suck it. The accused also pulled down her shalwar and made her to lie on him. Her mother in the meantime opened the shutter of the shop and came on spot, and saw the occurrence.

9. The defence, however, could not elicit anything from her pungent cross examination to cause a spec of doubt of her veracity. The prosecutrix reiterated in her cross examination that her mother arrived on spot, when the accused attempted to commit sexual intercourse with her, by opening the shutter of the shop. It is also in her evidence that the accused was holding a knife and put her to fear of death and insisted to suck his penis after he had opened the zip of his trousers.

10. Further support to the statement of the prosecutrix is found in the testimony of her mother, Kamlesh Kumari, who stated that when she returned home in the evening after working in the houses in the neighbourhood at R. S. Pura, did not find her daughter in the house. She went out for search and found the shutter of the shop pulled down by the accused. She opened the shutter and found the accused with zip of his trousers opened and Meenakshi without shalwar. Whereas, the evidence provided by Neetu and Nisha, who were away from home when the occurrence took place, is to the effect that on reaching the home after their daily occupation, saw their sister-Meenakshi and the accused in semi-nude condition. It is also in their evidence that the shalwar of Meenakshi was pulled down and the accused with zip of his trousers opened. The entire woeful fate of the occurrence was narrated by Meenakshi as to how she was called inside the shop by the accused on the pretext of sweeping the shop, untied her shalwar and opened the zip of his pant, exposed himself and attempted sexual assault on her.

11. Nothing has been trotted out from their cross examination to doubt their credibility. The evidence provided by the prosecutrix and supported by her mother, Kamlesh Kumari- complainant in the case, and also the sisters of the prosecutrix, is consistent, straightforward, natural, cogent and positive, and nothing inherently improbable and unnatural is exacted from their evidence to impeach their credibility. The substratum of the prosecution evidence unambiguously establishes the guilt of the accused beyond any pale of doubt in stating that the accused taking the advantage of helplessness of the prosecutrix, a minor girl, when called her on the excuse of sweeping the shop, pulled down the shutter, untied her shalwar, opened the zip of his trousers, exposed himself, made her to lye on him and thereafter on a point of knife insisted to hold his penis and suck it. It is

indisputably gatherable from their evidence that the accused made the prosecutrix to lye on him after pulling down her shalwar and opening the zip of his trousers and made an attempt to commit sexual intercourse with her but could not succeed to the proximate act of gratifying his inhuman lust as the mother of the prosecutrix opened the shutter and entered the shop and saw the prosecutrix with her shalwar pulled down and the accused with zip of his trousers opened and exposed himself.

12. The trial court has accepted the evidence and concluded that the appellant was guilty of sexual misbehaviour with Mst. Meenakshi in the manner alleged by the prosecution and established by the evidence of the prosecutrix, Kamlesh Kumar- her mother, Neetu & Nisha, her sisters. Their evidence has been considered to be worthy of acceptance. It is a pure finding of fact recorded by the trial court based on the positive and consistent evidence provided by the witnesses. This finding can be interfered with only when it is based on no evidence; or that the finding is perverse, it being such as no reasonable person could have arrived at even if the evidence was taken at its face value; or the finding is based and built on inadmissible evidence, which evidence, if excluded from vision, would negate the prosecution case or discredit substantially or impair it.

13. The present case in my view is not the case of such a nature. I am, therefore, of the opinion that the trial court has weighed the evidence provided by the prosecution fairly, appreciated the witnesses correctly and reached the result rightly.

14. It is apt to point out that on principle the evidence of a victim of sexual assault stands at par with the evidence of an injured witness. Just as a witness who has sustained an injury (which is not shown-or believed to be self inflicted) is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex-offence is entitled to great weight, absence of corroboration notwithstanding.

15. Mr. B. R. Sharma, appellant's counsel vehemently urged that the evidence of prosecutrix cannot be relied upon without corroboration by independent source as she had made a statement at the instance of her mother and a false case has

been bolstered against the appellant. The necessity of corroboration by independent witness is further imperative as is vouched by appellant's counsel as the other witnesses are related and their evidence being tainted and smack of partisanship, is collectively insufficient to warrant the conviction of the accused.

16. The contentions of the appellant's counsel though appear to be attracted but cannot be accepted on multiple grounds. The prosecutrix in her searching cross-examination, when suggested by the defence, categorically stated to have not made any statement at the instance of her mother. While corroboration in the form of eye witness's account of an independent witness may often be forthcoming in case of physical assault cases but such evidence cannot be expected in sex offences, having regard to the very nature of the offence. It would, therefore, be adding insult to the injury to insist on corroboration drawing inspiration from the rules devised by the Courts in the Western World. It is settled proposition of law that where the evidence of the victim does not suffer from any basic infirmity, corroboration cannot be insisted upon as a general rule.

17. In case 'Bharwada Bhoginbhai Hirjibhai v. State of Gujarat' : 1983 CriLJ1096 , the Apex Court considered the similar proposition and held as under:

7. It is now time to tackle the pivotal issue as regards the need for insisting on corroboration to the testimony of the prosecutrix in sex-offences. This Court, in Rameshwar v. State of Rajasthan, : 1952 CriLJ547 , has declared that corroboration is not the sine qua non for a conviction in a rape case. The utterance of the Court in Rameshwar may be replayed, across the time-gap of three decades which have whistled past, in the inimitable voice of Vivian Bose, J. who spoke for the Court-

The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the Judge,....The only rule of law is that this rule of prudence must be present to the mind of the Judge or the Jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before

a conviction can be allowed to stand.

18. There is always a built-in-assurance in the testimony of the prosecutrix that the charge is genuine rather than fabricated. The contention raised by the appellant's counsel, therefore, is devoid of any legal force and cannot be accepted. It was next contended by the appellant's counsel that the evidence provided by the witnesses in support of the testimony of the prosecutrix is of related witnesses and their evidence is interested and, thus, is rendered unreliable to establish the guilt of the accused.

19. The judgment of the trial court clearly shows that it analyzed the testimony of each material witness and in reaching its conclusion on the issues of fact, it narrated some instances upon its own appraisal in the manner in which the witnesses present before it rendered their testimony and weighed with great care the probative value with the evidence in the context of established fact and the probability. In doing so it adopted an approach, which in my view, is proper, significant and positive after proper exercise of care and circumspection.

20. The relationship or the interested nature of the witnesses by themselves cannot be the indication to brand them as unreliable and after scanning the deposition on the merits to reliability if found to be acceptable, the evidence cannot be discarded. In fact interested and related witnesses ordinarily may not show any tendency to give evidence in order to implicate innocent person. In other words, the evidence of the witnesses which is otherwise uniform cannot be discarded and whittled down simply because they are related to the prosecutrix.

21. In the present case, the presence of the mother when found the prosecutrix, her daughter, not at home, at the place of occurrence after opening the shutter of the shop of her husband-accused/appellant, where she had seen the accused/appellant attempting sexual assault on the prosecutrix, cannot be doubted. Her evidence is further corroborated by Neetu and Nisha, sisters of the prosecutrix, who also reached there by that time and saw the accused with open zip of his trousers in exposing himself and also the prosecutrix, their sister-Meenakshi, with shalwar pulled down and narrated the episode to them as to manner in which the accused attempted to commit sexual intercourse with her.

The mere fact that the witnesses are related to the prosecutrix is not a ground to dub them as interested witnesses. The imputation of interestedness could be made only in cases where it is shown that the witnesses are inimically disposed towards the appellant/accused. It is only when it is established that there is either discord or hostility between the accused person and the witnesses that the evidence of a witness could be treated as tainted. The accused/appellant, admittedly, is the husband of PW- Kamlesh Kumari. They were residing in a rented house and the shop in which the occurrence took place forms a part of the rented premises. The accused though pleaded that Mst. Kamlesh Kumari wanted a divorce from the appellant in order to marry with a person of her choice but this fact is not forthcoming from the material on record so as to throw a doubt on the trustworthiness of the witnesses. Credibility in the witness box is more valuable in assessing the evidentiary value of the testimony of witnesses than kinship or standing. This argument of the appellant's counsel is, therefore, without substance to merit consideration.

22. An overt act of the accused, in untying the cord of the shalwar coupled with further act of opening the zip of his trousers and making prosecutrix to lie on him, is certainly a proximate act towards the commission of rape constituting offence of attempting to rape. On appraisal of the evidence produced by the prosecution which consisted the statements of the prosecutrix, her mother and two sisters, in its cumulative, it is proved to the satisfaction of the Court that the conduct of the accused/appellant in the manner he had called the prosecutrix inside the shop, pulled down the shutter, removed her shalwar and after opening the zip of his trousers made her to lie on him indicated a determination to gratify his passions at all events. This particular act is further proved by convincing and reliable evidence of the witnesses including the prosecutrix to have been done by the accused with the requisite intention towards the commission of an offence and is sufficiently proximate to its commission to constitute an attempt to sexual assault.

23. When the accused called the victim girl of 13 years age inside his shop, removed her shalwar, exposed his private part by opening the zip of his trousers and made her to lie on him is certainly proved to be an intention of committing the offence and which is a step towards the commission of the offence.

24. The appellant in this case has behaved in a shockingly indecent manner. The appellant has tricked the prosecutrix into his shop, pulled down her shalwar and taking the undue advantage of the situation attempted sexual assault on her and is a crime which warrants a serious view to be taken. The prayer of the appellant's counsel addressed for leniency in the sentence awarded does not envisage any consideration in the facts and circumstances of the case.

25. The entire gamut of evidence, as noticed above, unerringly point-out to the guilt of the accused/appellant and is inconsistent with his innocence.

26. I do not find any infirmity, legal or factual, in the impugned judgment and order of the trial court necessitating interference in appeal. I am in agreement with the findings of the trial court and, thus, confirm the same and uphold the conviction and the sentence awarded.

27. This appeal, therefore, possessing no merit, is dismissed, accordingly.

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