Mohd. Basharat Vs. State

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SooperKanoon Citation : sooperkanoon.com/901581

Court : Jammu and Kashmir

Decided On : Apr-03-2008

Reported in : 2009CriLJ3626

Judge : Virender Singh, J.

Appellant : Mohd. Basharat

Respondent : State

Disposition : Appeal dismissed

Judgement :

Virender Singh, J.

1. Appellant, Mohd. Basharat S/o Baqa Mohd. R/o Ghani, Tehsil Mendhar (hereinafter to be referred to as an accused) has suffered conviction under Section 376 R. P. C, vide impugned judgment of learned Sessions Judge, Poonch, dated 26-12-2003 and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs. 10,000/- (Rupees ten thousand), in default thereof to further undergo rigorous imprisonment for two years more. The amount of fine has been ordered to be paid to the victim. Hence this appeal.

2. The accused is stated to be in custody since the date of his arrest.

3. Adverting to the prosecution case, in brief.

4. Name of the girl is not being disclosed in my judgment. She, hereinafter, will be referred to as 'victim' only. At the time of occurrence, which is of 21-6-2001, she was of hardly eight years. The accused was of the age of 22/23 years. On the fateful day, she was grazing the cattle in her land where the accused was also grazing the cattle in the adjacent land. He took her to nearby jungle in a lonely place, undressed her, made her to lie on the ground and committed rape on her, resultantly she became unconscious. The accused left her in a state of unconsciousness outside her house and fled away. On regaining the consciousness, she narrated the entire episode to her mother. The matter was then taken up with the Biradhari panchayat, but to no effect. Ultimately, a written complaint was lodged on 24-6-2001 by father of the victim upon which F. I. R. No. 77/2001 came to be registered against the accused under Section 376 RPC. The police swung into action, got the victim medically examined, went to the site, prepared the site plan, took into possession the blood stained salwar and blood stained earth for sending them to Forensic Science Laboratory and recorded the statement of the prosecution witnesses under Section 161 Cr. P. C. The investigation culminated into filing of the challan against the accused. He was thereafter charged under Section 376 R. P. C.

5. The prosecution, in support of its case, examined Mohd. Shafiq-father, Gulzar Begum mother and Mohd. Sher grandfather of the victim. Mohd. Sher is also witness to the recovery of the underwear of the accused. Besides this, Mohd. Sadeeq and Hassan Mohd., the other witnesses to the recovery have also been examined. Mohd. Azam and Abas Ali are the witnesses, who were informed of the occurrence by the complainant's side. PW-Dr. Rema Anand had examined the victim in the Government Hospital when she was brought by the police. ASI Abdul Gani is the investigating officer. This is all about the prosecution evidence produced before the trial Court.

6. The accused was examined under Section 342 Cr. P. C, in which he denied all the allegations taking the plea of false involvement. However, he did not choose to produce any evidence in defense. Ultimately, he stands convicted in the aforesaid terms.

7. Heard Mr. Anil Sethi, Advocate, at length and Mr. A. H. Qazi, Additional Advocate General, appearing for the respondent-State. With their assistance, I have rescanned the entire evidence on record.

8. The first attack launched by Mr. Sethi while assailing the impugned judgment is that the articles lifted by the investigating officer from the place of occurrence on 24-6-2001 and admittedly sent to Forensic Science Laboratory for examination, have not been produced during the trial. Not only that, even FSL report has not been placed on record. According to the learned Counsel, all these articles just vanished in the office of FSL. This was a very vital link with the prosecution to corroborate the case of the victim and withholding this material evidence would adversely affect the case of the prosecution.

9. Dwelling his case upon the aforesaid aspect, Mr. Sethi has taken me through the recovery memos and submits that Mohd. Sher, grandfather of the victim, was also given one seal on superdginama. When he appeared in the Court, his statement was deferred as he had not brought the seal. Thereafter, the case was adjourned on different dates and ultimately the prosecution was given last opportunity by the Court. Despite that, Mohd. Sher was not produced by the prosecution. Ultimately, the Public Prosecutor had closed the prosecution case. According to learned Counsel, non production of the articles allegedly recovered from the scene of occurrence or subsequently coupled with the non-production of FSL report or even the seal used for the purpose of taking the articles into possession, has its adverse affect being interlinked with each other. Had the prosecution brought this piece of evidence on record, it would have not only corroborated the case of the prosecution to a great extent, but would have also lend assurance to the statement of the victim. Mr. Sethi on this Count relies upon the judgment of Hon'ble Apex Court rendered in case State of U.P. v. Pappu : AIR 2005 SC 1248 : 2005 Cri LJ 331 (Paras 9, 11 & 13 referred).

10. Mr. Sethi then makes an attempt to demolish the case of the prosecution from medical angle also submitting that according to the statement of Dr. Rema Anand, who medicologically examined the victim on 24-6-2001, has stated that before her examination, her vagina was already clinically touched. The case of the

prosecution is that the victim was examined on the very day of occurrence itself i.e. 21-6-2001. However, the prosecution has intentionally withheld the medical evidence of 21-6-2001 from the Court despite the fact that the victim became unconscious after she was subjected to rape and her salwar was also got blood stained. Taking it on the point of delay, learned Counsel submits that generally in such type of cases, delay in lodging the report is considered to be immaterial, but the delay of three days in lodging the F. I. R. in this case is seen in the aforesaid background, it would assume importance to create doubts.

11. Mr. Sethi, in his endevour to demolish the case of prosecution, has made yet another attempt to project that the injury on the private part of the victim could be caused by the horns of oxen. In this regard he has drawn my attention to the cross-examination of Dr. Rema Anand. He submits that, no doubt, initially this witness had opined that injury on the vagina could not be caused by the horns of oxen, but subsequently on word 'not' there is an overwriting and it is initialed by the doctor. Therefore, this word 'not' is not to be now read. From this all, Mr. Sethi wants to submit that it changes the entire complexion of the case vis-a-vis medical aspect and it appears that a false case has been cooked against the accused.

12. Mr. Sethi lastly submits that the questions put to the victim by the learned trial Court were not sufficient to declare her to be a competent witness to depose against the accused. Even otherwise, the victim was of very tender age at the time of her examination before the trial Court and, therefore, chances of her being tutored from outer source (parents' side) could not be ruled out. According to him, if the statement of this star witness is appreciated in the light of the statement of other witnesses especially her mother, one can easily make out that there are many material flaws in the very case set up by the prosecution. Appreciation of evidence in its right perspective would indicate that the prosecution is even not clear about the place of occurrence or the place where the victim was allegedly left in an unconscious condition after the occurrence. Therefore, the statement of the victim in this case calls for applying the test of 'great care and caution'. Learned Counsel submits that had the prosecution corroborated the case of the victim by placing on record the FSL report, it would have certainly given lot of strength to the case of the prosecution and in that case, her statement alone could be said to be

sufficient. But withholding of said evidence by the prosecution causes great damage to her statement so as to maintain the serious charge of rape.

13. Mr. Sethi, thus, prays for acquittal of the accused.

14. In the alternative, Mr. Sethi prays for a concessional tilt with regard to reduction of substantive sentence imposed upon the accused. He submits that there is also a provision in Section 376 RPC for the reduction of sentence may be by recording adequate reasons and the present case calls for the same. The other point developed by Mr. Sethi is that after the accused had suffered conviction, he moved an application for suspension of substantive sentence, which was allowed by this Court. Since no order was passed for releasing him on bail while suspending his substantive sentence, the accused could not be released from jail. This constrained him to file another application asking for release from jail, but the said prayer was also declined. This is the reason that the accused is in custody for the last about seven years. According to learned Counsel, the accused was of the age of 22/23 years at the time of occurrence and had he been released on bail, he could make a prayer for the concessional tilt taking the plea of being out of jail for a reasonable good time. To strengthen his view-point, Mr. Sethi relies upon a judgment of Hon'ble Apex Court rendered in case State of Chhattisgarh v. Derha : 2004 (9) SCC 699 : 2004 Cri LJ 2109, in which the rape was committed on a minor girl by an accused of eighteen years who had served 6 1/2 years imprisonment out of the total awarded sentence of ten years. His sentence was ultimately reduced from ten years to seven years rigorous imprisonment.

15. Repudiating the submissions advanced by Mr. Sethi, Mr. Qazi submits that the present case does not call for any sympathy on any count keeping in view the seriousness of offence, where a girl of very tender age (8 years) had fallen prey at the hands of the accused. He submits that there appears to be no reason to disbelieve the statement of the victim, who was held to be a competent witness by the Court after putting her certain questions and in her statement she in very clear terms has fixed the accused to be the culprit. Even in her cross examination the accused could not dig out any material flaw which would come at his rescue. According to Mr. Qazi, the statement of the victim, otherwise, gets corroboration

from the medical evidence and certain contradictions as pointed out by Mr. Sethi are just ignorable in such type of case. Therefore, according to Mr. Qazi, not only the conviction as already recorded by the trial Court deserves to be upheld, it is not a case for even reducing the sentence already imposed.

16. After hearing rival contentions of the either sides and going through the record minutely, I am of the view that the prosecution has been able to prove the charge against the accused to the hilt. I am now putting forth my reasons for arriving at that conclusion considering all the arguments advanced by Mr. Sethi.

17. In my considered view, the case on hand is to be tested solely on the evidence of the victim. No doubt, she in this case was a minor girl, aged about eight years, but the Evidence Act does not prescribe any particular age as determining factor to treat a witness to be a competent one. Rather Section 118 of the Indian Evidence Act envisages that all persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions because of tender age, extreme old age, disease, whether of mind or any other case. Therefore, a child of tender age can be allowed to testify ,i he or she has intellectual capacity to understand the questions and rationally answer them. For the purpose of appreciating the present case from that angle, I have perused the statement of the victim from the trial Court record especially the questions put to her before declaring her to be a competent witness and find no infirmity in it. The argument advanced by Mr. Sethi that the questions put to her were not sufficient to declare her to be a competent witness does not appeal to me at all. We should not question the wisdom of the trial Court on this aspect. Even otherwise, all the questions were most relevant and appropriate on the subject. Therefore, I do not hesitate in holding that the victim was a competent witness to depose before the trial Court. What would be the effect of her evidence, is the subject matter of discussion in the later part of my judgment.

18. The attempt made by Mr. Sethi, in order to disturb the conviction, was with regard to the withholding of the FSL report and non-production of certain articles, in my view, would not demolish the case of prosecution. No doubt, it is borne out from the trial Court record that certain articles including blood stained salwar were

taken into custody by the investigating officer, PW-10, and were also sent to the FSL, as is clear from the receipt placed on judicial record. Even the recovery memos in this regard are also exhibited during the trial. There is, no doubt, that the blood stained salwar, the underwear of the accused and the FSL report have not been produced by the prosecution during the trial. But in my view, this weakness by itself cannot be said to be sufficient for throwing the prosecution case in its entirety. Had the FSL report been produced by the prosecution, it would have certainly lend corroboration to the case of the prosecution, but at the same time its non production also, by itself, cannot considered to be fatal in such type of a case. At the same time, non-production of the seal used for the purpose of seizing the aforesaid articles or as a matter of fact the witness to said recovery (Mohd. Sher) as his incomplete statement, cannot be read into evidence, would also have no adverse effect if the prosecution case is otherwise trustworthy. I, however, agree with Mr. Sethi to say that in such type of factual backdrop, the Court should apply the test of more care and caution that too in a case of a child witness as is the position in the case on hand. I, therefore, apply the same test while appreciating the evidence of the victim.

19. Much has been said by Mr. Sethi to demolish the case of prosecution with regard to medical evidence, but in my view, he cannot derive any advantage from it. He has picked up one part of the statement from the cross-examination of Dr. Rema Anand, where she had stated that injury on the victim could be possible with the horns of oxen. I do not enter into the controversy on word 'not' inserted in between 'can' and 'be' as she had put her initial on word 'not'. There is also some overwriting on the word 'not'. Be that as it may, I am now reading her entire statement. She made it clear that in a child of such age, the evidence of rape is tearing of hymen and this is the chief evidence to presume the committal of rape. She noticed P/V Hymen to be ruptured and bleeding. She then noticed swelling on labia minora and Labia majora and also noticed tears on the vaginal orifice with bleeding. Otherwise also, this Court should not loose sight of the fact that in this case the victim was the child and her hymen was not in its original shape as noticed by the doctor. This indicates that some penetration was certainly there. Mere penetration is sufficient to constitute the offence to commit sexual intercourse for the purpose of bringing it within the explanation enumerated in

Section 375 RPC. To constitute the offence of rape, neither Section 375 RPC nor explanation attached thereto require that there should necessarily be complete penetration of penis into private part of the victim. Even partial or slightest penetration of the male organ with the labia majora or vulva would be quite enough for the mischief of Section 375 RPC punishable under Section 376 RPC. I have appreciated the medical evidence in this context also. Therefore, there remains no doubt to hold that the victim was subjected to sexual intercourse in this case.

20. Let us now come to the delay part. No doubt, there is a delay of three days in lodging the F. I. R. with the police and if, one goes by the medical evidence, it is also clear that before the victim was examined by Dr. Rema Anand, some intervention was don with her private part by some other doctor and the prosecution has not brought evidence on this aspect. But at the same time the parents of the victim have given a very true account of the entire episode without concealing any fact from the Court. It has been brought on record that some Biradari discussion was going on in between this period, but to no effect. This has also come on record that the victim was taken to the hospital by the complainant side. It appears that some laxity is shown by the investigating officer in this regard. Otherwise, he could very comfortably collect documentary evidence on this aspect. Simply that remiss-ness is shown by the investigating officer while collecting some material which could be available to him during investigation, that by itself, would not be a ground to dislodge the case of the prosecution. If this case is seen from that angle, the delay, if any, is very well explained. I, otherwise, do not attach any importance to it in light of present set of circumstances. Therefore, the argument advanced by Mr. Sethi on this aspect is, hereby, repelled.

21. The next vital question now crops up is as to whether the evidence of a child witness (victim) is to be rejected out-rightly primarily for the reason that she being a child of tender age could be tutored from outer agency. Rule of prudence is that the evidence of a child witness does not call for rejection per se and it needs to be considered with close scrutiny. I am applying the same yard stick while rescanning her statement. No doubt, I do find certain discrepancies with regard to place where she was found lying in an unconscious condition after the incident, but in my

considered view, these discrepancies are not to be given weightage in the present case. Mother of the victim is a rustic lady and on the aforesaid aspect, certain discrepancies have occurred when read with the statement of her husband or even the victim, but in my view, these are ignorable. What is to be appreciated is, as to whether the victim or her mother is projecting a case, which is inherently weak so as to dislodge the entire prosecution case as set up and they could go to the extent of falsely implicating the accused. The answer would be 'No'. The moment the victim regained consciousness, she narrated the entire incident to her mother, and when she appeared into the witness box she reiterated as to what was told to her by the victim. This important piece of evidence has its value. If one reads the statement of the victim minutely, she has given the vivid account as to how she was subjected to sexual intercourse. Certainly, there cannot be any case of mistaken identity of the accused in this case. Her statement depicts the true account of occurrence without any tinge of adulteration in it. This, in my view, is a pure narration of the entire episode. It cannot be said to be a case of false implication of accused at all may be that he has taken defence of false implication when examined under Section 342 Cr. P. C, which otherwise, hangs by a tenuous thread having no strength in it. Therefore, in my view, the conviction can be comfortably maintained on the statement of the victim, which is not only reliable and most truthful, but gets support from the evidence of her mother also.

22. I may observe here that judgment relied upon by Mr. Sethi in support of his arguments on merits, is distinguishable on facts and does not put the accused on any advantageous position.

23. After churning the entire evidence in its right perspective, as discussed hereinabove, the net result now surfaces is that the prosecution has been able to prove the charge of Section 376 RPC against the accused beyond any shadow of reasonable doubt and as such his conviction as already recorded by the trial Court deserves to be upheld. Ordered accordingly.

24. Let us now advert to quantum of sentence. Mr. Sethi prays for diluting the sentence from 10 years to a lesser period may be the period already served by the accused, but in my considered view, there appears to be neither any special or

adequate reason in this case for resorting to provisions to Section 376(2) RPC.

25. In fact, inadequate sentence in such type of case, would do more harm to the justice system and, therefore, the Courts are expected to properly operate sentence system by keeping in view socio economic status, prestige, race, caste or creed of the accused or victim. These are the relevant considerations in sentencing policy as held by the three Judges' Bench of Hon'ble Supreme Court in case State of Karnataka v. Krishnappa : AIR 2000 Supreme Court 1470 : 2000 Cri LJ 1793. In the said case also, the victim was a girl of 7-8 years. The sentence of 10 years imposed by the learned trial Court was reduced by the High Court to four years' rigorous imprisonment. The State went in appeal and ultimately their Lordships enhanced the sentence from four years to 10 years. Their Lordships observed in para 14 as under:

14. Sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends herself-esteem and dignity- it degrades and humiliates the victim and where the victim is a helpless innocent child, it leaves behind a traumatic experience. The Courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. Dealing with the offence of rape and its traumatic effect on a rape victim, this Court in State of Punjab v. Gurmit Singh : (1996) 2 SCC 384 : 1996 AIR SCW 998 : AIR 1996 SC 1393 : 1996 Cri LJ 1728 observed (para 20 of AIR):Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a greater responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity.

25A. In State of Rajasthan v. Om Parkash : 2002 Supreme Court Cases (Cri) 1210 :2002 Cri LJ 2951, the victim was again a girl of eight years and the accused was of the age of eighteen years. The trial Court had imposed the sentence of seven years; whereas the High Court had acquitted the accused. Ultimately, in appeal filed by the State, their Lordships while dealing with the case on many vital aspects, disturbed the finding of the High Court and convicted the accused. By the time, the appeal was decided by the Hon'ble Supreme Court, thirteen years from the date of. occurrence had elapsed and a prayer for lenient approach was made, which was turned down on the ground that the accused had played with the life of the child and does not deserve any leniency.

26. In Ravji v. State of Rajasthan : 1996 (2) SCC 175 : AIR 1996 SC 787 it has been observed by the Hon'ble Supreme Court that it is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial and the Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and the victim belong.

27. In State of Karnataka v. Puttaraja : 2004 (1) RCR (Crl.) 113 : 2004 Cri LJ 579, it has been observed by their Lordships of the Apex Court that a rapist not only causes physical injuries but also indelibly leaves a scar on the most cherished possession of a woman i.e. her dignity, chastity, honour and reputation.

28. The judgment cited by Mr. Sethi on the point of reduction of sentence is not applicable to the facts of the case on hand. In the said case, while reducing the sentence, the Hon'ble Apex Court, besides other factors, had also considered the factum of married life of the accused. That is not the factual position in this case.

29. Crime against women that too in a case of child has to be dealt with stern hands and any leniency shown in such type of case, with regard to the sentence, has to have its repercussions. In the case on hand, a poor girl of tender age (8/9 years), who was grazing the cattle in her field, has fallen prey at the hands of beastly sexual lust of the accused and such type of person does not deserve the least sympathy of the Court as his conduct is revolding to all and much more to the

judicial conscience. Therefore, in my considered view, he does not deserve any concessional tilt in respect of reduction of sentence and as such the substantive sentence often years already slapped upon him by the trial Court being most adequate, is affirmed.

30. Resultantly, the instant appeal is dismissed on all counts being devoid of any merit in it.