

Pusi Vs. State of U.P.

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Court : Uttaranchal

Decided On : Apr-05-2010

Judge : Nirmal Yadav, J.

Appellant : Pusi

Respondent : State of U.P.

Disposition : Appeal dismissed

Judgement :

Nirmal Yadav, J.

1. The accused-appellant has challenged the judgment and order dated 16.01.1997 passed by the Additional Sessions Judge/Special judge, Nainital in Sessions Trial No. 501 of 1995 whereby the accused appellant has been convicted for the offences punishable under Sections 363, 366 and 376 of the Indian Penal Code, 1860 (for short I.P.C.). The appellant has been sentenced to undergo rigorous imprisonment for five years under Section 363 read with Section 366 of the I.P.C. and he has been sentenced to undergo rigorous imprisonment for five years under Section 376 of the I.P.C. All the sentences have been ordered to run concurrently.

2. The criminal law was set in motion on a complaint Ex. Ka-1 submitted by Ram Chandra Joshi, father of a minor girl (hereinafter referred to as victim) on

03.04.1995. [Name of the victim has not been mentioned to prevent social victimization or ostracism of the victim of the sexual offence for which Section 228-A of the I.P.C. has been enacted. It is advisable for the courts below not to indicate the name of the victim of sexual offences in their judgments.] According to Ram Chandra Joshi (complainant), the accused-appellant was involved several cases of dacoity, murder and serious offences. He was also a absconder and warrants of arrest had been issued. The accused had been occasionally visiting the complainant's house. The complainant did not know about the criminal activities of the accused. On 10th March 1995 at about 8 or 9 p.m. the accused-appellant enticed away the minor daughter of Ram Chandra Joshi and since then the accused is absconding. The complainant came to know about his daughter's absence during the night of 10th March 1995. Smt. Pushpa and Manoj, the sister and brother-in-law of accused were seen by the police patrolling party about two kilometers away from village Bhimnagar. They also helped the accused in taking away the daughter of the complainant. On the basis of complaint Ex. Ka-1, the first information report was registered on 03.04.1995 at about 11:30 a.m. under Sections 363 and 366 of the I.P.C. The victim was recovered from the custody of accused-appellant on 15.04.1995 from Meerut by the police. On interrogation the victim revealed that she was kidnapped by accused-Pusi and was taken to Meerut. She was subjected to illicit and forcible sexual intercourse during her stay at Meerut against her will. The victim was handed over her father's custody.

3. On completion of the investigation, the challan was presented and accused-Pusi Singh was charge sheeted under Sections 363, 366 and 376 of the I.P.C. to which he pleaded not guilty and claimed trial.

4. The prosecution in order to prove its case produced as many as six witnesses. Ram Chandra Joshi is the complainant and father of the victim (PW-1). PW-2 is the victim herself. Smt. Bishambari Devi is the mother of victim (PW-3). Shreedhar is the uncle of victim (PW-4). Dr. Bandana Goyal (PW-5) medically examined the victim and Sri P.C. Verma, the Investigating Officer (PW-6).

5. On conclusion of prosecution evidence, statement of the accused-appellant was recorded under Section 313 Cr.P.C. He denied all the allegations of prosecution

and claimed innocence and false implication.

6. The accused-appellant was on bail. When the appeal was listed for hearing, the accused did not put in appearance, therefore, non-bailable warrants were issued against him and his sureties. As per the report of Chief Judicial Magistrate, Nainital, the accused-appellant had left his residence without leaving any address, therefore, warrants could not be served. Therefore, Mr. H.S. Rawal, Advocate was appointed as amicus curiae to assist the Court.

7. I have heard Mr. H.S. Rawal, learned Amicus curiae for the appellant and Mr. Nandan Arya, learned A.G.A. for the State and perused the material available on record.

8. In support of the appeal, learned amicus curiae submitted that the learned trial court did not consider the very relevant material aspects i.e. considerable delay in lodging the first information report and the absence of any injury on the private parts of the victim. As per Dr. Bandana Goyal, no opinion could be given regarding rape as the victim was used to sexual intercourse. Learned amicus curiae, therefore, argued that the victim was habitual to sexual intercourse and thus proved to be a consenting party.

9. Learned amicus curiae pointed out that though as per the F.I.R, the victim was 15 years of age but she was not less than 18 years at the time of occurrence. She accompanied the accused on her own will. The victim categorically stated that she was taken away on the promises made by the accused that he will make her life luxurious, as such, she was a consenting party to the entire episode. Learned amicus curiae further argued that the accused-appellant has already undergone two years of sentence, as such, the period of sentence may be reduced to the period already undergone.

10. On careful consideration of rival submissions and the material facts available on record, this Court is of the view that no interference can be called for with the order of the trial court specifically keeping in view the age of the victim. It is true that as per the first information report the age of the victim has been mentioned as 15 years on the date of occurrence, however, her father Ram Chandra Joshi while

appearing as PW-1 and her mother Bishambari Devi appearing as PW-3 and the victim (PW-2) herself mentioned her age as 13-14 years at the time of occurrence. As per the school leaving certificate Ex. Ka-6, her date of birth has been shown as 18th May 1982, as such, the victim had not even completed 13 years of age at the time of occurrence. Thus, the argument of learned amicus curiae that the victim was about 18 of age at the time of alleged occurrence cannot be accepted. Admittedly, the victim was below 16 years of age at the time of occurrence and therefore, whether she herself accompanied the accused or she was influenced by the accused in joining him is irrelevant.

11. It is being well proved from the statement of Ram Chandra Joshi, father, Bishambari Devi, mother and Shreedhar, uncle (PW-4) of the victim that she was a minor girl and was enticed away out of keeping of lawful guardianship without the consent of such guardian and thus, the accused kidnapped her from lawful guardianship. The victim while appearing in the court categorically stated that she was sleeping in the house of her uncle on 10th March 1995 when accused-Pusi came there and prevailed upon her to accompany him taking advantage of her tender age and showing her the imaginary dreams to have a luxurious life with him. The accused was certainly in a dominant position; she therefore, became victim of the deceitful means used by the accused. The victim was, of course, recovered by the police from the custody of the accused at Meerut, Pratappur Road. There is nothing to disbelieve the evidence brought by the prosecution that the victim was recovered from the custody of the accused.

12. The argument of learned amicus curiae that victim accompanied the accused on her own freewill and that she was a consenting party, does not have any force as she admittedly was minor and her consent was meaningless. The victim has categorically stated that she was taken away by the accused to Meerut where she was subjected to illicit sexual intercourse 3-4 times against her will. Thus, she can never said to be a consenting party

13. The medical evidence also fully supports the prosecution version. Dr. Bandana Goyal (PW-5) on examination of the victim found the hymen torn and healed up. She further opined that victim could have been subjected to sexual intercourse ten

days to one month prior to the medical examination. She however, mentions that no definite opinion can be given regarding rape. This could naturally be the opinion as victim remained with the accused appellant from 10th March 1995 to 15th April 1995, when she was recovered from the custody of the accused-appellant. She must have subjected to sexual intercourse throughout this period and therefore, the doctor found the victim habitual to sexual intercourse. There cannot be any other evidence with regard to sexual intercourse except that of the victim herself.

14. In view of the above-discussed evidence, this Court finds no ground to interfere with the finding of the trial court that there is no improbability in the prosecution case and the prosecution has been able to satisfactorily prove the case against the accused-appellant under Sections 363, 366 and 376 of the I.P.C.

15. The learned amicus curiae argued that the accused is a young man of 25 years of age and therefore a lenient view may be taken keeping in view the conduct of the victim. It is further argued that there are sufficient grounds for reducing the sentence. According to him, the victim accompanied the accused on her own will and there was a considerable delay in lodging the first information report. The parents of the victim themselves stated that the victim was 15 years of age and there could be a variation of two years on either side in assessing the age. He further argued that no injury was found on the private part of the victim and the accused-appellant had already undergone the custodial sentence of about two years. In his support the learned amicus curiae referred the judgment of Apex Court in the case of *Premiya alias Prem Prakash v. State of Rajasthan* reported in 2009(1) SCC (Cri) 20 and *State of Himachal Pradesh v. Suresh Kumar alias Chhotu* reported in 2009(1) SCC (Cri) 24.

16. The argument of learned amicus curiae does not find favour with this Court as discussed in the earlier part of the judgment. The victim was minor at the time of occurrence. It is true that she was taken away by allurement of leading a luxurious life by the accused. As per Section 376 of the I.P.C., the punishment for committing rape is for a term which shall not be less than 7 years but which may be for life or for a term which may extend to ten years. However, there is a proviso to Sub-section (1) of Section 376 that the court may, for adequate and special

reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years. A perusal of the order for sentence passed by the trial court, this Court finds that the court below has not specified any reason what to say of special and adequate reasons to impose the sentence of imprisonment for a term of less than seven years. The trial court has awarded five years sentence for the offence punishable under Section 376 of the I.P.C. without giving any adequate reasons.

17. In these circumstances, I am of the opinion that the sentence awarded by the trial court for five years was not justified. It is relevant to mention here that the trial court fell into error while awarding the sentence for five years without subscribing to any special reasons for awarding lesser than the minimum sentence provided under the Act. The Apex Court in the case of State of M.P. v. Santosh Kumar reported in 2006 (3) SCC (Cri) 1 observed as under:

Both, in cases of Sub-sections (1) and (2) of Section 376 the court has the discretion to impose a sentence of imprisonment less than the prescribed minimum for 'adequate and special reasons'. If the court does not mention such reasons in the judgment there is no scope for awarding a sentence lesser than the prescribed minimum. In order to exercise the discretion of reducing the sentence, the statutory requirement is that the court has to record 'adequate and special reasons' in the judgment and not fanciful reasons which would permit the court to impose a sentence less than the prescribed minimum. The reason has not only to be adequate but also special. What is adequate and special would depend upon several factors and no straitjacket formula can be indicated.

18. In the present case as discussed above, of course, the occurrence relates to the year 1995 and the accused-appellant at that time was a young man of 25 years of age. The State Government not has filed any appeal challenging the order of the sentence passed by the trial court. In such circumstances, it would be in the interest of justice that the sentence awarded by the trial court is maintained. The learned trial judge, who has passed the impugned order, is however advised to be careful in future while awarding the sentence in such cases.

19. In view of the detailed discussion, I find no merit in the appeal and the same is dismissed. Conviction and sentence awarded against the appellant is affirmed. The appellant is on bail, his bail bonds are cancelled and sureties are discharged and he shall be taken into custody forthwith to serve out the sentence awarded by the trial court.

20. The office is directed to send back the lower court record for compliance of the order.

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