

Mukesh Dhyani Vs. State

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Court : Uttaranchal

Decided On : Apr-20-2010

Judge : Dharam Veer, J.

Appellant : Mukesh Dhyani

Respondent : State

Disposition : Appeal allowed

Judgement :

Dharam Veer, J.

1. This appeal, preferred by the appellant under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as Cr.P.C.), is directed against the judgment and order dated 13.5.1997 passed by the Ist Additional Sessions Judge, Dehradun in Sessions Trial No. 155/1995 State v. Mukesh Dhyani, whereby the learned Ist Additional Sessions Judge has convicted the appellant/accused Mukesh Dhyani under Sections 363, 366 and 376 of Indian Penal Code, 1860 (for short, IPC) and sentenced him to undergo five years' R.I. under Section 376(1) IPC and to pay a fine of Rs. 5,000/-, five years' R.I. under Section 366 IPC and to pay a fine of Rs. 5,000/- and two years' R.I. under Section 363 IPC and to pay a fine of Rs. 2,000/-. So far as the default in payment of fine is concerned, the accused in default of payment of fine Under Section 376 IPC, was directed to further undergo an imprisonment of six month; in default of payment of

fine Under Section 366 IPC, he was directed to further undergo an imprisonment of six months and in default of payment of fine Under Section 363 IPC, he was directed to further undergo and an imprisonment of three months. However, the substantive sentences under Sections 363/366/376 were directed to run concurrently.

2. In brief, the prosecution case is that PW2 Kundan Singh lodged an FIR on 4.3.1995 at 8.10 pm in reporting police chowki Patel Nagar, Dehradun with the averments that his daughter Km. Seema (PW3) aged about 16-17 years had gone for studying at Bhuntu Wala. As usual when she did not return by 2 pm, the complainant and his wife went out to search her. In the meantime, PW1 Pawan Singh informed the complainant on the same day that he had seen her daughter and accused appellant Mukesh Dhyani together near Indian Wildlife Institute at about 9 am. It was further averred that accused appellant Mukesh Dhyani, a neighbour of the complainant, enticed his daughter and had taken her away with him. On the basis of this report, chick FIR Ex. Ka-5 was prepared by Head Constable Harendra Singh. He also made the necessary entries in the GD. Copy of GD is Ex. Ka-6. The investigation of this case was entrusted to PW5 SI Prem Prakash Sharma. The victim was recovered along with the accused appellant on 9.3.1995 at 6.20 pm from the Bus Stand, Dehradun by PW6 SI Narendra Singh Rana, who also prepared the recovery memo Ex. Ka-10. The victim Km. Seema (PW3) was medically examined by PW4 Dr. Renuka Naithani on the same day i.e. on 9.3.1995 at 7.15 pm and prepared the medical report Ex. Ka-2 and supplementary report Ex. Ka-3 on the basis of X-ray report Ex. Ka-4. During the course of investigation, the I.O. inspected the place of occurrence and prepared the site plan Ex. Ka-7. He also prepared the site plan from where the victim was recovered, that site plan is Ex. Ka-11. During the course of investigation, he recorded the statements of the witnesses and after completing the investigation, he filed the chargesheet Ex. Ka-12 against the accused appellant.

3. Learned CJM, Dehradun, after giving the necessary copies of the documents to the accused appellant as prescribed under Section 207 Cr.P.C., committed the case to the Court of Sessions on 24.5.1995. Learned Sessions Judge, Dehradun transferred the case to Ist Additional Sessions Judge, Dehradun for its disposal

according to law.

4. On 21.7.1995, learned Ist Additional Sessions Judge, Dehradun framed the charges against the appellant/accused under Sections 363, 366 & 376 IPC. The charges were read over and explained to the accused appellant, who pleaded not guilty and claimed to be tried.

5. To prove its case, the prosecution has examined PW1 Pawan Singh; PW2 Kundan Singh, the complainant and father of the victim; PW3 Km. Seema, the victim; PW4 Dr. Renuka Naithani, who medically examined the victim and prepared the medical report Ex. Ka-2 and supplementary report Ex. Ka-3; PW5 SI Prem Prakash Sharma, the I.O. of the case and PW6 SI Narendra Singh Rana, who recovered the victim along with the accused appellant and prepared the recovery memo Ex. Ka-10.

6. Thereafter, the statement of the accused appellant was recorded under Section 313 of Cr.P.C. The oral and documentary evidence were put to him in question form, who denied the allegations made against him and in reply to a question, he has stated that victim was about 19 years' old at that time and she wanted to marry him, but since she was of a bad character, therefore, his father had rejected the idea to marry the accused appellant with her and, therefore, he was falsely implicated in this case due to enmity. In the defence, Prem Singh Rana has been examined as DW1. A document, which is the photocopy of the voter list, has also been filed on behalf of the accused appellant.

7. After hearing learned Counsel for the parties and after appreciating the evidence on record, the learned Ist Additional Sessions Judge, Dehradun vide his judgment and order dated 13.5.1997 convicted and sentenced to the accused appellant as discussed above. Against the aforesaid judgment and order dated 13.5.1997, the accused appellant has preferred the present appeal.

8. I have heard learned Counsel for the parties and have carefully perused the entire material available on the record.

9. Before any further discussion, it would be pertinent to reproduce the medical report Ex. Ka-2 of victim Km. Seema who was medically examined by PW4 Dr. Renuka Naithani on 9.3.1995 at 7.15 pm and the same is reproduced as under:

MI - Small flat mole on left side of neck.

Teeth - 7 + 7/7 + 7, ht. 4' 10', wt. 50 Kgs.

General Exam. No marks of injury on her body and private parts seen. Breast and axillary hairs, public hairs well developed.

Local Exam. No marks of injury seen on her private parts. Hair not matted & not stained. Hymen old torn, no fresh injury seen. Vagina admits two fingers tight. Vaginal smear taken and sent for histopathological examination.

Opinion No opinion regarding rape can be given at present. Final report shall be given after seeing histopathological report.

Adv. X-ray wrist, ankle, knee and elbow joints. Girl sent for X-ray.

10. Thereafter the victim Km. Seema was x-rayed by Dr. BC Ramola, Radiologist, who prepared the X-ray report Ex. Ka-4 and on the basis of the said X-ray report, PW4 Dr. Renuka Naithani prepared the supplementary report Ex. Ka-3 and the same is reproduced as under:

X-ray report duplicate received on 2.6.95 of X-ray plate No. 1069 of 10.3.1995.

(1) All the epiphysis around elbow & ankle joint are fused with their respective shaft.

(2) Epiphysis lower end radius ulna not yet fused.

(3) All the epiphysis around knee joint are fused except upper end tibia are fused with their respective shaft.

Opinion (1) Regarding rape no definite opinion can be given, girl is used to sexual intercourse.

(2) Regarding age according to X-ray report the age of girl is between 16 years to 17 years.

11. To prove the abovementioned medical report Ex. Ka-2, supplementary report Ex. Ka-3 and X-ray report Ex. Ka-4, prosecution has examined PW4 Dr. Renuka Naithani, who has proved the contents of same.

12. To further prove its case, the prosecution has examined PW1 Pawan Singh who has stated that on 4.3.1995 at about 9 am, he had seen the accused appellant and Km. Seema near the Wildlife Institute.

13. PW2 Kundan Singh, the informant and father of the victim has reiterated the version made in the FIR and proved the same as Ex. Ka-1.

14. PW3 Km. Seema, the victim has stated that on the date of incident i.e. on 4.3.1995 at about 8.30 am, she was going to her school. The appellant accused Mukesh Dhyani, the resident of same village, met her in the way. She has further stated that the accused had taken her to Manak Singh Mandir. Thereafter she was taken to a woman's place. They passed night at that place. On the next day, they went to Kotdwar where they stayed in a hotel, where the accused appellant forcibly committed rape on her. The prosecutor has refrained the accused appellant not to commit rape, but the accused appellant did not refrain and committed rape on her. On 6.3.1995, the accused appellant took her to Lansdown, where they stayed for two days in the house of aunt (Mausi) of the accused appellant. On 8.3.1995, they came back to Dehradun and again stayed in a hotel where the accused appellant again forcibly committed rape on her. Thereafter on 9.3.1995, the accused appellant was taking her to Ludhiana, but on the bus stand they were caught by the police. Thereafter she was medically examined at Dehradun Hospital and her X-ray was also done. Thereafter she was given in the custody of her father.

15. PW5 SI Prem Prakash Sharma, the I.O. of the case, has stated that chick FIR Ex. Ka-5 of this case was prepared by Head Constable Narendra Singh, who also made the necessary entries in the GD, copy of which is Ex. Ka-6. During the course of investigation, he recorded the statements of the witnesses and prepared

the site plan of the place of occurrence and the place of recovery, which are Ex. Ka-7 and Ka-11 respectively. On 9.3.1995, the victim Km. Seema was recovered along with the accused appellant by PW6 SI Narendra Singh Rana, who also prepared the recovery memo Ex. Ka-10. Km. Seema was medically examined. After completing the investigation, he filed the chargesheet Ex. Ka-12 against the accused appellant.

16. PW6 SI Narendra Singh Rana has stated that the victim Km. Seema and the accused appellant were recovered by him on 9.3.1995 at 6.20 pm and thereafter he prepared the recovery memo Ex. Ka-10.

17. Thereafter, the statement of the accused appellant was recorded under Section 313 of Cr.P.C. The oral and documentary evidence were put to him in question form, who denied the allegations made against him and in reply to a question, he has stated that victim was about 19 years' old at that time and she wanted to marry him, but since she was of a bad character, therefore, his father had rejected the idea to marry the accused appellant with her and, therefore, he was falsely implicated in this case due to enmity. In the defence, Prem Singh Rana has been examined as DW1. A document, which is the photocopy of the voter list, has also been filed on behalf of the accused appellant.

18. DW1 Prem Singh Rana has stated that on 9.3.1995, he met the accused appellant who had come to his house for some money. He was friend of his nephew (Bhanja). He has further stated that at that time he was in the school and his nephew had come to call him. Thereafter he went to his house and told him that his parents were very worried. He told him that he had to get himself arrested as the forfeiture of his property was going to take place. He further asked him as to where he had kept Seema. Thereafter at about 2.30 pm, the accused appellant took him to Basant Vihar where Seema was staying. He asked both of them as to why they did so. Seema replied that she loved Mukesh and she would marry him. Thereafter they proceeded towards the court in order to surrender before it. The Advocate told him that the court closed at 4 pm and had he come earlier, he would have surrendered before the court. They had reached the court at 4.30 pm. Thereafter his friend Manmohan Singh Chauhan told him that he knew Inspector

NS Rana (PW6) being his friend and thereafter Seema and Mukesh were handed over to Inspector Rana at about 5.30 to 6 pm. Seema had told the said policeman that she loved Mukesh and wanted to marry him. This witness has further stated that he too had asked Km. Seema while going towards the court as to what she wanted, upon which she had replied that she wanted to marry Mukesh. The house of the accused appellant Mukesh Dhyani and Km. Seema were located opposite to each other. This witness has tried to explain that there was a love affair between Km. Seema and the accused appellant Mukesh Dhyani and she had willingly gone with the accused appellant out of her own free will and consent.

19. Learned Counsel for the accused appellant argued that the Km. Seema (PW3) was major on the date of incident and she had gone with the appellant out of her own free will and consent and the prosecution has not proved the case against the accused appellant beyond reasonable doubt and the appellant is entitled to get the benefit of doubt. I find substance in the argument of learned Counsel for the accused appellant for the following reasons:

(i) That as per the statement of PW4 Dr. Renuka Naithani, the age of victim Km. Seema at the time of incident was between 16 to 17 years. It is settled law that two years margin either on the upper side or lower side can be given. If two years margin on upper side is applied in this case, then her age is worked out as more than 18 years' old and thus, she was major at the time of incident.

(ii) That as per the statement of victim Km. Seema (PW3), on 4.3.1995 the appellant accused Mukesh Dhyani intercepted him in the way when she was going to her school. Thereafter she was taken to Manak Singh Mandir. After that she was taken to a woman's place in the same city i.e. Dehradun. They passed night at that place. On the next day, they went to Kotdwar where they stayed in a hotel, where the accused appellant allegedly committed rape on her. On 6.3.1995, the accused appellant took her to Lansdown, where they stayed for two days in the house of aunt (Mausi) of the accused appellant. On 8.3.1995, they came back to Dehradun and again stayed in a hotel where allegedly the accused appellant again committed rape on her. Thereafter on 9.3.1995, the accused appellant was taking her to Ludhiana, but on the bus stand they were caught by the police. The

distance between Dehradun and Kotdwar is about 130 kilometers and Lansdown is about 50 kilometers away from Kotdwar. Thus, Km. Seema admittedly remained with the accused appellant from 4.3.1995 to 9.3.1995 and she travelled nearly 360 kilometers along with the accused appellant during the aforesaid period in densely populated cities like Dehradun, Kotdwar and Lansdown and crossed through a number of places like bus stand, etc. and also stayed at hotels as well as in the houses of the relatives and friends of accused appellant, but she never made any hue and cry nor she complained to anybody in the way. This conduct of Km. Seema shows that she was a consenting party and had accompanied the accused appellant Mukesh Dhyani out of her own free will and consent.

(iii) That admittedly Km. Seema lived with the accused appellant from 4.3.1995 till the evening of 9.3.1997. In between this period, she was allegedly raped twice by the accused appellant in the hotel on 5.3.1995 at Kotdwar and on 8.3.1995 at Dehradun. But as per the medical report Ex. Ka-2 and supplementary report Ex. Ka-3, no sign of rape or forceful intercourse was found. There was no mark of any struggle nor was any injury found over her private parts. Rather, she was found habitual to sexual intercourse. Thus, statement of Km. Seema is not corroborated by the medical report.

(iv) That DW1 Prem Singh Rana has stated that on 9.3.1995, he met the accused appellant who had come to his house for some money from his nephew, who was his friend. He told him that his parents were very worried and he had to get arrested as the forfeiture of his property was going to take place. He further asked him as to where he had kept Seema. Thereafter at about 2.30 pm, the accused appellant took him to the place at Basant Vihar where Seema was staying. He asked both of them as to why they did so. Seema replied that she loved Mukesh and she would marry him. Thereafter they proceeded towards the court in order to surrender before it but since the court time was over, therefore, he could not surrender and was ultimately handed over to PW6 SI Narendra Singh Rana, who was known to one of his friends. Seema had told the said policeman in his presence that she loved Mukesh and wanted to marry him. He had also asked Km. Seema while going towards the court as to what she wanted, upon which she had replied that she wanted to marry Mukesh. The house of the accused appellant

Mukesh Dhyani and Km. Seema were located opposite each other. All these facts and circumstances of the case indicate that there was a love affair between Km. Seema and Mukesh Dhyani and she had willingly gone with the accused appellant out of her own free will and consent.

(v) That as discussed above, Km. Seema was more than 18 years' old and was a major at the time of incident and she had gone with appellant Mukesh Dhyani with her own consent, therefore, charge of kidnapping is not proved against the accused appellant by the prosecution beyond reasonable doubt and he is entitled to get the benefit of doubt.

20. For the foregoing reasons, prosecution has failed to prove its case against the accused appellant beyond reasonable doubt for the offence punishable under Sections 363, 366, 376 IPC and he is entitled to get the benefit of doubt. As such, the impugned judgment and order of the trial court is not correct and justified and the same is liable to be set aside.

21. Resultantly, appeal is allowed. Judgment and order dated 13.5.1997 passed by the 1st Additional Sessions Judge, Dehradun in Sessions Trial No. 155/1995 State v. Mukesh Dhyani, convicting the appellant Mukesh Dhyani under Sections 363, 366 and 376 IPC is hereby set aside and sentence awarded to him to undergo five years' R.I. Under Section 376 IPC along with fine of Rs. 5,000/-, five years' R.I. Under Section 366 IPC along with fine of Rs. 5,000/- and two years' R.I. Under Section 363 IPC and to pay a fine of Rs. 2,000/- is hereby quashed. The appellant is on bail. His bail bonds are cancelled. He need not surrender unless required in any other case.

22. Let the lower court record be sent back.

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