

Dharmendra Vs. State of U.P.

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Court : Allahabad

Decided On : Sep-23-2010

Judge : S.C. Agarwal; Ashok Srivastava, JJ.

Appeal No. : Criminal Appeal No. 7125 of 2006

Appellant : Dharmendra

Respondent : State of U.P.

Advocate for Pet/Ap. : Sri. Brijendra Kumar

Judgement :

1. This criminal appeal has been filed by appellant Dharmendra against the judgment and order dated 7.11.2006 passed by Addl. Sessions Judge, Court No. 2, Aligarh in S.T. No. 596 of 2004, whereby the appellant was convicted under Section 376 IPC and Section 3 (2) (v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (in short SC/ST Act) under Section 376 IPC, the appellant was sentenced to undergo R.I. for 12 years alongwith the fine of Rs. 5000/- , in default to further undergo R.I. for 5 months ; and under Section 3 (2) (v) of the SC/ST Act to undergo imprisonment for life alongiwth the fine of Rs. 5000/-, in default to undergo further R.I. for 5 months. Both the sentences were directed to run concurrently.

2. Alongwith the appellant Dharmendra, the co-accused Lalit Kumar was also convicted under Section 376/114, 506 IPC and 3(1) (12) of the SC/ST Act. He was

declared a juvenile and his case was thereafter referred to Juvenile Judge, Mathura for further action. In this appeal we are concerned only with appellant Dharmendra.

3. The incident took place on 30.11.2003 at 5 p.m. in village-Bahona Kotra, P.S. Pali Muqeempur, District- Aligarh. The FIR dated 4.12.2003 given to S.P. Rural, Aligarh was registered at Police Station and 6.1.2004 at 14.45 hours at the instance of Yashpal (P.W.-2)- father of the victim.

4. The prosecution story as unfolded in the FIR is that on 30.11.2003 at 5 p.m., the victim (name withheld) aged about 13 years had gone to the fields for easing herself. There, appellant Dharmendra and co-accused Lalit caught her and made her lie down. Lalit placed the knife at her chest and threatened her with death, whereas the appellant Dharmendra committed rape with her forcibly. The victim raised alarm, whereupon, witnesses Charan Singh and Vijai Singh reached there and both the accused ran away. The victim disclosed the whole incident to the complainant (P.W.-2). He went to the police station but his report was not lodged. The complainant belongs to Schedule Caste whereas both the accused belongs to upper caste. The accused persons were also threatening the complainant with death to his family if FIR was lodged. A typed report dated 4.12.2003 was given to S.P. Rural, Aligarh, who directed enquiry on 5.12.2003. Thereafter the victim was medically examined on 5.12.2003 and ultimately police lodged report FIR on 6.1.2004.

5. On the basis of written report Ext. Ka-2, constable Dinesh Babu registered the case, prepared chick report Ext. ka-4 and made an entry in the G.D. at report no. 21 (copy Ext. Ka-5). Investigation was taken over by C.O. S.P.Dwivedi (P.W.-7), who visited the place of occurrence, interrogated the victim, inspected the spot and prepared site-plan Ext. Ka-8. His companion S.I. Vivek Vashney (P.W-8) took the clothes of the victim i.e. salwar and kurta in possession, sealed the same and prepared recovery memo Ext. Ka-1. After investigation, charge-sheets were submitted against the appellant and co accused.

6. On 5.12.2003 at 3 p.m., the victim was medically examined by Dr. Poonam Sharma (P.W.-6) of Mohan Lal Gupta Women Hospital, Aligarh, who was brought

to the hospital by constable Kumkum Raghav. As per the doctor's report, the victim was of average body built, breast fully developed, auxiliary and pubic hair present. Scratch mark on right thigh on the inner side. On internal examination, hymen torn old tear at 9 O' clock position. Vagina admits two fingers. Vaginal smear was taken and sent for pathological examination to District Hospital. The girl was referred to X-ray department for determination of age. Dr. Poonam Sharma prepared injury report Ext. Ka-6.

7. Dr. S.K. Gupta (P.W.-4) took X-rays of wrist, knee and elbow of the victim and prepared X-ray Report Ext. Ka-3.

8. On the basis of X-ray report, Dr. Poonam Sharma (P.W.-6) prepared supplementary report Ext. Ka-7. No sperms were found in the vaginal swab. The age of the victim was found about 17 years. As per the injury report, the injury was caused by blunt object and could be caused by male sex organ. In cross examination, she stated that hymen was torn old. It meant that hymen could be torn two days ago or earlier or could be six months old torn.

9. The salwar and kurta of the victim were sent to Forensic Science Laboratory, Agra for examination. As per the report of the Forensic Science Laboratory Ext. Ka-11, there was human blood stains on large parts of salwar and kurta of the victim and human semen was also found on salwar.

10. The charge under Section 376 IPC and Section 3(2) (v) SC/ST Act was framed against the appellant and charge under Section 376/114, 506 IPC and 3 (1) (12) SC/ST Act were framed against the co-accused Lalit.

11. The appellant in his statement under Section 313 Cr.P.C. denied the prosecution allegation and stated that his father Thakur Das had given a written report to the police against the victim (P.W.-1), her mother and brother Umesh, on the basis of which case crime no. 6 of 2004 under Section 354, 504 IPC was registered on 1.12.2003 and a false case was cooked up as a counter blast.

12. The prosecution examined 8 witnesses in this case. P.W.-1 is the victim herself, who has narrated the whole prosecution story as described in the FIR.

Yashpal (P.W.-2) and Vijai Singh (P.W.-3) are the witnesses of fact, who reached the spot on alarm being raised by the victim and saw both the accused running away from the place of occurrence. Dr. S.K. Gupta (P.W.-4) is the Radiologist, who proved X-ray report. Constable Dinesh Babu (P.w.-5) had proved chick report and copy of G.D. Dr. Poonam Sharma (P.W.-6) was examined to prove injury report and supplementary report. S.P. Dwivedi (P.W.-7) is the investigating Officer and S.I. Vivek Vashney (P.W.-8) had taken the clothes of the victim in possession and sealed the same.

13. The appellant did not adduce any oral evidence in his defence.

14. Relying upon prosecution version and the evidence adduced on behalf of prosecution, learned Trial Judge convicted and sentenced the appellant as aforesaid. Co-accused Lalit, after his conviction was referred to Juvenile Judge, Aligarh for further action.

15. We have heard Sri Brijendra Kumar, learned counsel for the appellant, learned AGA for the State and perused the records.

16. Learned counsel for the appellant has not challenged the finding of fact recorded by the learned trial court on merits.

17. Learned counsel for the appellant submitted that the mere fact that the appellant belongs to the upper caste and the victim belongs to Scheduled Castes is not sufficient to bring the case within the purview of Section 3 (2) (v) of the SC/ST Act and therefore, the conviction of the appellant under Section 3 (2) (5) SC/ST Act is unwarranted and bad in law. It was also submitted that sentence of 12 years R.I. under Section 376 IPC was also excessive.

18. Learned AGA supported the impugned judgment.

19. We have examined the statement of the victim (P.W.-1). She has specifically stated that the appellant and co-accused Lalit caught hold of her and fell her on the ground. Lalit placed the knife on her chest and threatened with her death. Dharmendra committed rape with her. On alarm being raised, witnesses reached on the spot and accused persons ran away. She disclosed all the facts to her

father, who went to the police station but his report was not lodged. Thereafter they went to the police station, Aligarh many times but report was not lodged. The report was lodged later on the intervention of the higher police authorities. The victim was thoroughly cross examined by the learned counsel for the defence but nothing in the cross examination could be elicited, which could create a doubt about her testimony. The testimony of the victim also finds support from the statement of Yashpal (P.W.-2) and his brother Vijai Singh (P.W.-3), who reached the spot on hearing alarm raised by victim and saw the accused persons running away. They further stated that the victim immediately disclosed that Dharmendra had committed rape with her.

20. The testimony of victim is also supported by the medical evidence and is further supported by the report of Forensic Science Laboratory, which found human blood on large parts of the salwar and kurta of the victim and also found semen stains on her salwar. Thus the finding of fact recorded by learned Sessions Judge that rape was committed with the victim by appellant Dharmendra is based on proper appreciation of evidence and does not require any interference by this Court and thus the charge under Section 376 IPC is proved against the appellant beyond reasonable doubt and does not require any interference.

21. As far as the argument of learned counsel for the appellant regarding applicability of Section 3 (2) (v) of the SC/ST Act concerned, we find sufficient force in the same. Section 3 (2) (v) of the SC/St Act provides as under :-

"3 (2) whoever, not being a member of a scheduled caste or a scheduled tribe,- .

v) commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Schedules Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine"

22. It is apparent from the above provision that Section 3 (2) (v) SC/ST Act shall apply only if the offence under the Indian Penal Code punishable with imprisonment for a term of ten years or more is committed by a person of upper caste against a person of scheduled caste or scheduled tribe on the ground that such person is a member of scheduled caste or scheduled tribe. It is not sufficient that if the accused belongs to upper caste and the victim belongs to scheduled caste. It is also necessary to prove that the offence was committed on the ground of the victim being of scheduled caste. No such allegation has been made in the FIR that the offence was committed because of victim belonged to scheduled caste nor there is any such evidence of record. Thus the conviction of appellant under Section 3 (2) (v) SC/St Act cannot be sustained.

23. In Ram Das and others v. State of Maharashtra, AIR 2007 SC 155, the Apex Court held as under :-

".....the mere fact that the victim happened to be a girl belonging to a scheduled caste does not attract the provisions of the act. Apart from the fact that the prosecutrix belongs to the Perdhi Community, there is no other evidence on record to prove any offence under the said enactment. The High Court has also not noticed any evidence to support the charge under the Schedule Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and was perhaps persuaded to affirm the conviction on the basis that the prosecutrix belongs to a schedule caste community. The conviction of the appellant under Section 3 (2) (v) of the Schedule Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 must, therefore, be set aside".

24. Similar view was expressed by the Apex Court in Dinesh @ Buddha v. State of Rajasthan, AIR 2006 SC 1267 and Rajbir Singh v. State of U.P. & another, AIR 2006 SC 1963.

25. In the instant case also there is no evidence on record to show that the incident was caused by the appellant on the ground that the victim belonged to

scheduled caste. The fact that the victim belongs to a scheduled caste, by itself is not a sufficient ground to bring the case within the purview of Section 3 (2) (v) of the SC/ST Act. Thus in our considered opinion, conviction of the appellant under Section 3 (2) (v) of the SC/ ST Act cannot be sustained and is liable to be set aside.

26. As regards sentence, we noticed that the charge under Section 376 (2) (g) regarding gang rape has not been framed against the appellant and appellant has been convicted under Section 376 IPC, simplicitor which provides minimum punishment of R.I. for 7 years alongwith the fine. The age of the appellant at the time of his statement recorded under Section 313 Cr.P.C. was 22 years and on the date of incident he must have been 19-20 years old. Considering the age of the accused on the date of incident and also the age of the victim found to be about 17 years, we are of the considered opinion that that minimum sentence prescribed under Section 376 Cr.P.C. i.e. 7 years R.I. would meet the end of justice.

27. The appellant remained in jail from 29.1.2004, the date of his surrender to 27.9.2006 when he was released on bail and thereafter he is in jail since his date of conviction i.e. 7.11.2006. He has almost spent a little more than six and a half years in jail.

28. The appeal is partly allowed. The conviction of the appellant under Section 3 (2) (v) of the SC/ST Act and the sentence awarded to him thereunder is set aside.

29. The conviction of the appellant under Section 376 IPC is maintained but the sentence of 12 years R.I. is modified and reduced to a period of R.I. for 7 years. However, the fine of Rs. 5000/- imposed by the trial court under Section 376 IPC with default clause is maintained. The period already spent by the appellant shall be adjusted against his sentence.

30. The records of the trial court be returned alongwith a copy of this judgment within a week for compliance.