

Mahesh Vs. State of Madhya Pradesh

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Court : Madhya Pradesh

Decided On : Dec-02-2011

Judge : The Honourable Shri Justice U.C. Maheshwari

Appeal No. : Criminal Appeal No. 895 of 1996

Appellant : Mahesh

Respondent : State of Madhya Pradesh

Judgement :

U.C. Maheswari, J.

1. The applicant/accused has filed this appeal under Section 374 Cr.P.C. being aggrieved by the judgment dated 07.10.1996 passed by Sessions Judge, Dewas, in Sessions Trial No.22/95, convicting and sentencing the appellant for offence under Section 363,366 and 376 of IPC with direction to undergo 3 years rigorous imprisonment in the first count, 5 years in the second count and 7 years in the last count.

2. The facts giving rise to this appeal in short are that on 06.04.1994 at about 2.30 when the complainant Ashabai came back to her home from outside, then she found her both the daughters Umabai and Nirmalabai are missing. Thereafter she started searching them, but they were not found, on which a report of missing person was lodged by the Police Kotwali on 13.04.1994. In the course of enquiry, it was found that the appellant, who was also the tenant of the complainant, had

taken away her daughters by misguiding them and also committed rape with Nirmalabai, one of the daughter of the complainant on which Crime no.289/94 was registered against the appellant for the offence of Sections 363, 366 and 376 of the IPC.

3. After holding investigation, appellant was charge sheeted for such offence. After committing the case to the sessions Court, on evaluation of the charge sheet, the charge of the aforesaid offence were framed against the appellant. He abjured the guilt, on which after holding the trial, the trial Court on appreciation of the evidence on record held appellant guilty for the aforesaid Sections and also punished with the sentence as stated above. Thereafter, the appellant has come to this Court with this appeal.

4. Appellant's counsel after taking me through the evidence led by the prosecution alongwith the exhibited papers of the charge sheet and the impugned judgment, stated that on proper appreciation of the evidence and the exhibited papers, the prosecutrix Nirmalabai would not have been held to be the age of below 18 years and in such premises, the appellant could not have been convicted for the offence of kidnapping Nirmalabai with intention to perform intercourse or to get married with her and in such premises conviction of the appellant under Section 363, 366 of IPC is not sustainable. In continuation, he argued that mere perusal of the deposition of the prosecutrix Nirmalabai (PW-2), it is apparent that she voluntarily alongwith her elder sister Umabai went with the appellant and visited so many places and also resided with him and performed intercourse with the appellant with her own consent. Such evidence is sufficient to draw an inference that the alleged intercourse was performed by the appellant with the consent of the prosecutrix, therefore, the conviction of the appellant under Section 376 of IPC is also not sustainable and prayed for acquittal of the appellant by allowing this appeal.

5. On the other hand, by justifying the findings of the impugned judgment of conviction and sentence, stated that the same is in consonance with the evidence led by the prosecution and also in accordance with law. It does not require any interference either to hold the age of the prosecutrix above 18 years or to extend him acquittal in any manner. However, if it is deemed that the alleged intercourse

was committed by the appellant with the consent of the prosecutrix, even then, as per the available evidence, proving the age of the prosecutrix between 14-15 years, such consent, does not bearing any legal sanctity and therefore, the impugned conviction and sentence of the appellant in all the aforesaid sections could not be interfered and prayed for dismissal of the appeal.

6. Having heard the learned counsel, I have perused the record alongwith the impugned judgment. Before proceeding further, I deem fit to examine the case, to determine the exact age of the prosecutrix, although the same has been held to be between 14-15 years, by the trial Court and in such premises, the appellant has been convicted under Sections 363 and 366 of the IPC. It is apparent that initially on missing the prosecutrix alongwith her elder sister, a missing person report was lodged by her mother Ashabai. In this enquiry, the prosecutrix Nirmalabai was traced out and on her version, the impugned offence was registered. It appears from the FIR, Ex.P-4 that the age of the prosecutrix was not stated in it, but after sending the prosecutrix to the hospital for medical examination, during such examination, for preparing the MLC report, her age was stated to be 17 years by Dr. Kumud Verma in MLC report, Ex.P-3. According to such MLC report, to determine the age of the prosecutrix, the advice for ossification test was also given. It is apparent fact on record that such test was not carried out by the prosecution as no such report or X-ray plate are available on the record and the said doctor has not stated anything in this regard.

7. On the other hand, in the investigation, a certificate Ex.P-1 was obtained by the Investigating Officer from the concerning school of the prosecutrix and photocopy of some other certificate Ex.P-2 were also obtained, according to which, date of birth of the prosecutrix was stated to be 06.01.1980, but it is apparent fact on record that on recording the deposition of the teacher Smt. Kanti Sodange, PW-1 of the school by which the aforesaid certificates were issued, she has not stated anything about on what basis such date of birth was mentioned in those certificates. The original record of the school on which the certificates were issued have neither been produced nor proved on record. In these circumstances, Court has to consider and decide the exact age of the prosecutrix. I am of the considered view that in the lack of original record, on which the aforesaid

certificates were issued by the school, the certificates Ex.P-1 and P-2 could not be relied upon to hold the age of the prosecutrix below 18 years.

8. It is apparent fact that birth certificate of the prosecutrix issued by any authority has also neither been produced nor proved on the record. In the lack of it, Court has to decide the age of the prosecutrix only on the basis of the testimony of Dr. Kumud Verma, PW-4, who examined the prosecutrix and prepared the MLC report, Ex.P-3. In her testimony, she categorically stated the age of the prosecutrix as 17 years. It is apparent fact on record that inspite her advice, ossification test of the prosecutrix was not carried out, which is apparent from the record. So in the lack of ossification test report, age of the prosecutrix stated by the doctor should be treated to be her approximate age. In the absence of the ossification report, it could not be said that the prosecution has proved the age of the prosecutrix below 18 years beyond reasonable doubt. It is settled principle of medical jurisprudence that on deciding the age of a person, two years variance of either side is taken into consideration and when such principle of variance is adopted, then, in the available circumstances, Court is bound to adopt that version which is favourable to the accused and not to the prosecution. So in such premises, keeping in view the age of the prosecutrix as 17 years, as stated by the doctor, on applying the principle of variance, her age comes to 19 years and the same is hereby held. In such premises, the findings of the trial Court holding the age of the prosecutrix below 16 years or between 14-15 years is not sustainable and therefore till this extent, the findings of the trial Court is hereby set aside.

9. Besides, this, from the deposition of the prosecutrix Nirmalabai herself, it has not been proved that she was taken away by the appellant from her home without permission or consent of her parents on the contrary, it has been proved that Nirmalabai accompanied with her elder sister Umabai had gone with the appellant. So in such circumstances, it could not be said that she was taken away or kidnapped from the lawful custody of her parents. Pursuant to it, also it could not be deemed that any offence of kidnapping of the prosecutrix from the lawful custody was committed by the appellant.

10. Keeping in view the aforesaid circumstances, now Court has to decide whether in the available factual matrix, the appellant has carried out intercourse with the prosecutrix, contrary to the wish or will of the prosecutrix or the same was carried out by him with her consent. Again on perusing the deposition of PW-2 Nirmalabai, it is apparent that she accompanied her elder sister, went with the appellant voluntarily and did not make any annoyance at any time wherever she resided with the appellant and performed intercourse with him, but only after tracing her out by the Police, in connection with the report of missing person, she stated to the Police some ingredients of the offence of rape which were recorded by the Police in the interrogatory statement. So in such circumstances, it is apparent that in spite of having opportunity at various stages and various places, she did not make any complaint to any one or did not make any annoyance saying that she is being taken by the appellant without her will or wish or the alleged intercourse was committed by the appellant against her will. Such circumstances are showing that initially the prosecutrix went with the appellant, accompanied with her elder sister with her own consent and also resided with the appellant and performed the intercourse with him, but because her parents were angry with such incident, then under their pressure, she had made the allegation of rape against the appellant. So in such circumstances, it appears to be a case of consent and not a case of contrary to the wish and will of the prosecutrix. Besides this whatsoever interrogatory statement of the prosecutrix and other witnesses placed on record, the same are signed by the concerning witnesses. So the same being hit by Sections 161 and 162 of Cr.P.C. could not be treated to be the interrogatory statements and in the lack of requisite interrogatory statements of the witnesses as per provision of Section 161 and 162 of Cr.P.C. the prosecution case loses its sanctity. In the lack of such case diary statement, in consonance with Sections 161 and 162 of Cr.P.C., the version stated by the prosecutrix for the first time in the Court could not be held to be reliable in its entirety. Thus, it is held that the case of rape is also not made out against the appellant.

11. In view of the afore said discussion, it is held that trial Court has committed grave error and perversity in holding guilty to the appellant in the alleged offence of Sections 363, 366 and 376 of IPC. Pursuant to it, impugned judgment, deserves to be set aside.

12. Therefore, by allowing this appeal, the impugned judgment is hereby set aside. Pursuant to it, the conviction of the appellant under Sections 363, 366 and 376 of the IPC alongwith the imposed sentence is hereby set aside and he is acquitted from the alleged charges. His bail bonds are hereby discharged.

Appeal is allowed, as indicated above.

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