Prithi Chand

Vs

State of Himachal Pradesh

Criminal Appeal No. 738 of 1981

(S. Natarajan, A. M. Ahmadi JJ)

17.01.1989

JUDGMENT

AHMADI, J. –

1. The appellant Prithi Chand, a youth of about 18 years was prosecuted for committing rape on PW 1 Kanchana Devi, a girl of tender age of 11 or 12 years, on the afternoon of June 15, 1979 at a place known as Kutkharpati in village Kot, Tehsil Palampur of Himachal Pradesh. The learned Sessions Judge convicted him under Section 376, IPC, and sentenced him to suffer imprisonment for life and to pay a fine of Rs. 2000, in default to suffer rigorous imprisonment for a further period of two years. On appeal, the High Court while confirming his conviction under Section 376, IPC, reduced the substantive sentence from imprisonment for life to rigorous imprisonment for seven years but retained the order regarding payment of fine and the punishment in default thereof. Thereupon the appellant has approached this Court under Article 136 of the constitution of India.

2. The facts in brief are that PW 1 Kanchana Devi had gone to Balarahi Khad with her two younger sisters on the morning of June 15, 1979 for taking a bath. After the bath when she was returning to her residence the appellant met her on the way and asked her to permit sexual intercourse with her. She resented this behaviour of the appellant and with a view to avoid him changed her route. But appellant intercepted her and her Rs. 5 for permitting him to have sexual intercourse with her. On the prosecutrix refusing, the appellant physically lifted her and took her to a shallow place, removed her trousers (salwar) and after removing his clothes committed rape on her, on account whereof she began to bleed profusely. After satisfying his lust the appellant gave her a few leaves to wipe her vagina, On hearing a call from PW 7 Sandhi Devi who was looking for her daughter, the appellant ran away. The prosecutrix returned home. Her trousers were stained with blood. She narrated the incident to her mother PW 6 Vijaya Devi and thereafter to the other ladies of the village who had in the meanwhile collected at her residence. The mother and the other ladies examined the vagina and found that the same was ruptured and bleeding. As her father was not at home, her mother could not decide on the course of action. On the return of her father PW 3 Bali Ram, she narrated the incident to him, whereupon the Sarpanch of the village PW 12 Chaturbhuj was informed about the incident who advised them to report the matter to the police in the morning since it was too late to travel to the police station. On the next morning the prosecutrix, her parents and the Sarpanch went to the police station where the girl filed the report which is on record at Ex. P-A.

3. PW 1 Kanchana Devi narrated the incident as stated above in detail in her deposition before the court also. Except for one or two minor omissions, her evidence is consistent with the report Ex. P-A. She has stated that on that afternoon the appellant forcibly lifted her and took her to the lower level where he had sexual intercourse with her. According to her the appellant removed her trousers,

thereafter removed his clothes and despite resistance from her inserted his organ into her vagina, as a result whereof she experienced great pain and began to bleed profusely. She disclosed this fact to her mother PW 6 Vijaya Devi as well as to the neighbours PW 7 Sandhi Devi and PW 8 Phulan Devi. On the return of her father PW 3 Bali Ram, she narrated the incident to him. All these witnesses support the version of the prosecutrix. The Sarpanch PW 12 Chaturbhuj has also stated that when the prosecutrix was brought to him she was wearing a blood-stained salwar and had complained that the appellant had raped her. PW 4 Julfi, chowkidar of the village stated that the prosecutrix had pointed out the place of occurrence wherefrom blood-stained leaves were attached by the police under seizure Memo Ex. P-B. PW 5 Kishori Lal supports him.

4. The prosecutrix was examined by Dr. C. S. Vedwa, who had issued the medical certificate, Ex. P-E dated June 16, 1979. The medical certificate shows that the prosecutrix had not developed secondary sex characters, auxiliary band public hair were absent and there were abrasions of 3" x 1/8" and 2" x 1/8" on the lumbar region. She also found signs of inflammation around the vulva; the vagina was bleeding, the hymen was absent with the edges torn and there was tenderness all around. The hymen was bleeding on touch and the vagina admitted one finger with difficulty. The girl's salwar was blood-stained. It was taken in a sealed packet along with two slides and swabs. Unfortunately, this lady doctor who had delivered a child was not available for giving evidence as she had proceeded on long leave. The learned Sessions Judge felt that it would not be possible to secure her presence without undue delay, and therefore, permitted the prosecution to prove the certificate through PW 2 Dr. Kapila, who was conversant with her handwriting and signature, he having worked with her for about two years. He stated that the carbon copy of the certificate Ex. P-E was prepared by Dr. Vedwa by one process and bears her signature. The learned counsel for the appellant contented that this certificate was inadmissible in evidence since the prosecution had failed to prove that the original certificate was lost and not available. Section 32 of the Evidence Act provides that when a statement, written or verbal, is made by a person in the discharge of professional duty whose attendance cannot be procured without an amount of delay, the same is relevant and admissible in evidence. Besides, since the carbon copy was made by one uniform process the same was primary evidence within the meaning of Explanation 2 to Section 62 of the Evidence Act. Therefore the medical certificate Ex. P-E was clearly admissible in evidence. That apart, there is strong reliable and dependable evidence of the prosecution witnesses which clearly proves that the prosecutrix was raped by the appellant.

5. PW 2, Dr. Kapila examined the appellant on July 31, 1979. He found him to be well-nourished and well developed for his age, the bear had started to grow, public hair were present and the scrotum and penis were well developed. In the opinion of the witness the appellant was fit to indulge in sexual intercourse. It was however argued that having regard to the girl's age and the fact that her vagina admitted only one finger with difficulty, it is not possible to believe that there was penetration. The argument overlooks the fact that in the absence of penetration there would not be absence of hymen with the edges torn and profuse bleeding from the vagina staining the salwar. Merely because the doctor found that the vagina admitted one finger with difficulty, it cannot be inferred that there was no penetration as the muscles must have contracted by then. The appellant, a robust man must have penetrated the vagina for otherwise there would not have been so much bleeding. Surprisingly no question was put to Dr. Kapila to solicit his opinion in this behalf.

6. PW 9 Dr. Mahajan examined the prosecutrix with a view to ascertaining her age. After her radiological examination, he opined that she was between 8 1/2 and 12 years of age on the date of the incident. The evidence of this witness corroborates the say of the prosecution witnesses that she was around 11 or 12 years of age on the date of the incident.

7. The leaves attached from the place of occurrence, the slides, the swabs and the salwar were forwarded to the Chemical Analyser and Serologist for examination and report Ex. P-N shows that there was blood on the leaves and the salwar. However, no spermatozoa were found on any of the exhibits. The report of the Serologist Ex. P-Q shows that the salwar was stained with human blood while the origin of the blood stains on the leaves could not be determined on account of disintegration. The evidence would also go to support the say of the prosecution witnesses that there was profuse bleeding from the vagina.

8. The learned counsel for the appellant submitted that there was delay in filing the first information report. We do not think so. Immediately after the incident was narrated to the mother and other ladies, a decision was taken to await the return of the father before deciding the course of action. On the arrival of the father the sarpanch was contacted, who advised that the police should be informed about the incident. The Sarpanch, however, stated that he would accompany them next morning since it was already dark. The girl was taken to the Palampur police station on the next morning and FIR was lodged. We, therefore, do not think that there was any delay in reporting the matter to the police

9. It was next contended that the appellant was falsely involved due to a long standing enmity between the father of the appellant and the girl's father. The prosecutrix has in her deposition stated that the two families were not on talking or visiting terms, since the relations were strained. It was suggested in the course of cross examination that Ratna, the son of PW 8 Phulan Devi was intimate with the prosecutrix and he had raped the girl. In his statement under Section 313 of the Code of Criminal Procedure, he put forth the case at that when he returned to his village in the evening he saw some ladies at the girl's house and heard the girl saying that she was subjected to rape by Ratna. It is not possible to believe that the prosecutrix and her parents would allow the real culprit to escape and falsely involve an innocent person for the commission of the crime. Except for the suggestion made in the cross-examination of PW 8 Phulan Devi, Ratna's mother and the statement under Section 313 of the Code of Criminal Procedure there is no other material on record which can give credence to the suggestion.

10. Lastly it was argued by reference to A. W. Khan v. State, (AIR 1962 Cal 641 : 1962 (2) Cri LJ 751) Gorakh Daji Ghadge v. State of Maharashtra (1980 Cri LJ 1380 (Bom HC)), and Padam Bahadur Darjee v. State of Sikkim (1981 Cri LJ 1317 (Sikkim HC)) that since the girl was of tender age the possibility of her wrongly involving the appellant cannot be ruled out and this possibility is strengthened by prior enmity, absence of spermatozoa and infirm medical opinion. We have already examined the argument of enmity as well as the so-called infirmity in medical evidence. Mere absence of spermatozoa cannot cast a doubt on the correctness of the prosecution case. We have carefully gone through these decisions and we think we turn on the facts of each case.

11. In view of the above, we see no merit in this appeal and dismiss the same.

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