State of Karnataka

Vs

Mahabaleshwar Gourya Naik

Criminal Appeal No. 713 of 1979

(M. M. Punchi, S. R. Pandian JJ)

15.05.1992

JUDGEMENT

S. RATNAVEL PANDIAN, J.

1.This appeal by special leave under Art. 136 of the Constitution of India is preferred by the State of Karnataka challenging the judgment of the High Court of Karnataka rendered in Criminal Appeal No. 413 of 1978.

2. The brief facts giving rise to this appeal are as follows:

The respondent, Mahabaleshwar Gourya Naik who was aged about 18 years at the time of alleged incident was tried for an offence punishable under Ss. 341, 354, 376 and 323, I.P.C. on the allegation that on 3-10-77 at about 2.10p.m. on Nidagod-Heggodmane road at a distance of 2 furlongs away from Nidagod cross, wrongfully restrained the victim girl, who before the trial of the case is said to have committed suicide, and committed rape without her consent by forcibly taking her to the nearby 'ungle which is at a distance of about 40 metres from the road and that during the course of the said offence, the respondent caused hurt to the victim. At the time of the occurrence, the girl was aged about 15 years, studying in IX Standard in Siddavinayaka Girls' High School at Siddapur. As the prosecutrix Palakashi died even before the trial commenced, the prosecution has rested its case only on the evidence of P.Ws. 3, 4 and 6 as well as the evidence of the Medical Officer, P W. 1. Of the witnesses examined, P.Ws. 3 and 6 are the brother and mother of the victim girl.

3. It is the evidence of P.W. 4, when he was going from Heg6dm'ane to Siddapur, he heard cries emanating from the right side of the road. He went towards that side and saw the respondent standing there under a tree, raising his underwear (chaddi). P.W. 4 further states that the respondent on seeing him ran away from that place. Then P.W. 4 was told by the prosecutrix that the respondent had spoiled her while she was returning from the school. At the request of the victim girl, P.W. 4 took her to her house.

4. It is the evidence of P.Ws. 3 and 6 that the prosecutrix told both of them that the respondent had spoiled her' while she was coming from,the school by forcibly taking her inside the jungle. In respect of this incident, P.W. 3 made a complaint at Siddapur Police Station. On the basis of the complaint, a case was registered in Crime No. 202 of 1977.

5. P.W. 8 took up. the investigation. He, after seizing certain articles from the scene of the occurrence and examining the victim and the others, sent the victim girl for medical examination.

On the same day, the respondent was arrested near Nidagod bus stand. He seized his underwear, pen-knif and handkerchief marked as M0s 4, 1, and 6 respectively. At about 9.30 p.m. both the respondent and the victim were simultaneously sent for medical examination. P.W. 1, the Medical Officer examined the victim and opined that the girl might have been raped by vulval penetration if not by forceful penetration in which case there would have been rupture of hymen. However, he gives the following symptoms as having been found on the person of the victim:

> "Hymen was intact. No bleeding or dried blood mark was seen. No discharge was seen. Fourchette was intact..... There was no swelling."

6. On examination of the respondent/ accused, the medical officer, P.W. 1 stated:

> "..... There was no blood stains nor any hair was seen on the penis. The pubic hair were not matted. There was small amount of smegma on the dorsal side of posterior 1/4th glands."

7. He admits that he has not mentioned in Exh. P2 that he found any symptom proving the commission of sexual intercourse having been committed by the respondent.

8. P.W. 1 sent vaginal smear taken from the victim and the urethral smear taken from the respondent for microscopic examination. The garments of both the victim and the respondent were also sent for chemical test. The microscopic and chemical tests were negative and that there ' was no detection of semen or spermatozoa in the two slides of vaginal smear and two slides of urethral smear.

9. After completing the investigation, the charge-sheet was filed. The case of the respondent was one of denial.

10. The trial Court convicted the respondent for offences under Sections 341 and 323, IPC and sentenced him to undergo simple imprisonment for 4 months under each of the convictions with a direction that the sentences are to run concurrently. In respect of the offences under Sections 376 and 354, the respondent was acquitted.

11. Feelingaggrievedbythejudgmentof the trial Court, the State preferred an appeal before the High Court which agreed with the conclusion of the trial Court holding," In regard to the offences under Sections 354 and 376, the accused is entitled to the benefit of doubt." But coming to the conviction of the respondent under Sections 341 and 323, IPC, the High Court held that the conviction under Section 341 and the sentence of four months' simple imprisonment imposed therefor cannot be sustained. In other words, the High Court has confirmed the conviction only under Section 323, IPC and the sentence of four months' imprisonment awarded therefor.

12. The reason for recording an acquittal of the offence under Section 376, IPC by both the Courts below is the non-availability of the victim for examination. As we have already pointed out, the victim is stated to have committed suicide on 15-11-77 i.e. nearly one and a half months after the occurrence. Whatever might be the reason for her death, the question would be whether the case of the prosecution should be thrown overboard because of the non-availability of the victim for examination on account of her death or whether the Court can record a conviction for any offence that is made out on the available evidence let in by the prosecution.

13. In fact, both the Courts below have convicted the respondent for the offence under Section 323, IPC on the finding that the respondent had caused simple hurt to the victim girl. In our considered

opinion, the circumstances attending the case, the evidence of PWs 3, 4 and 6 coupled with the medical evidence has established that there was an attempt of rape if not the offence of rape having been committed by the respondent. We arrive to the conclusion that the offence is only an attempt of rape on the medical evidence which does not clingingly establish the proof of rape as required by law. The presence of smegma was inconsistent with a recent intercourse and that it would take about 24 hours to accumulate if the smegma is rubbed during intercourse. See Parikh's Textbook of Medical Jurisprudence and Toxicology p. 439.

14. Admittedly, the respondent was arrested on the very same day and taken for medical examination along with the victim girl within seven hours and that it was during that examination, the Medical Officer found smegma on the dorsal side of the posterior glands.

15. As stated supra, merely because a victim is dead and consequently could not be examined can never be a ground to acquit an accused if there is evidence otherwise available proving the criminal act of the accused cocerned.

16. On an assessment and evaluation of the evidence, we hold that the respondent has made himself liable to be punished under Section 376 read with 511, IPC. Accordingly, we allow the appeal, set aside the findings of the High Court agreeing with the trial Court that the respondent cannot be convicted for the offence other than the one punishable under Section 323, IPC.

17. In the result, we convict the respondent under Section 376 read with 51 1, IPC and sentence him to undergo rigorous imprisonment for five years. The conviction recorded by the High Court under Section 323, IPC and the sentence of four months' imprisonment is retained.

18. The appeal is allowed accordingly.

Order accordingly.

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