SUPREME COURT OF INDIA

Parhlad & Anr.

Vs.

State of Haryana

Crl.A.No.983 of 2015

(Dipak Misra and Prafulla C.Pant,JJ.,)

03.08.2015

JUDGMENT

Dipak Misra,J.,

1. The present appeal depicts a sordid situation and sketches a morbid scenario, for the sad story commences with total trust, as it has to be, inasmuch as the first appellant, the uncle of the prosecutrix, being the cousin of her father, takes her with him but does not return and thus betrays the trust, definitely inconceivable, for the young girl, PW 7, who had remotely no idea about his dubious design when she accompanied him to the house of the appellant No. 2, the maternal uncle of the first appellant, that she would be sexually assaulted first by the appellant No. 1 and thereafter by the appellant No.2 who also succeeded in his threats to the uncle – and at the end, they, after being sent up for trial for the offences punishable under Sections 363,366A/376/34 of the Indian Penal Code, 1860 (IPC) in order to escape the charge and in justification of their carnal desire and perverted acts, pleaded consent.

2. As the factual score would uncurtain, the case of the prosecution from the very beginning was that the prosecutrix was below sixteen years of age. The trial court believed the prosecution as regards the age of the prosecutrix as a consequence of which the plea of the defence had to collapse like a pack of cards which entailed conviction for the charged offences as per judgment dated March 10, 2003 which led to the sentence of rigorous imprisonment of ten years underSection 376(2)(g) IPC with separate sentence under Section 363 IPC with the stipulation that all the sentences shall be concurrent.

3. The judgment of conviction and order of sentence passed by the learned Additional Sessions Judge, Sirsa in Sessions Case No. 55 of 2002 were assailed before the High Court in Criminal Appeal No. 914 of 2003 and the learned Single Judge referred to the evidence of Manohar Lal, PW-1, Principal of the Govt. Primary School, Rupana Khurd, Dist. Sirsa, Bhajan Lal, PW-9, the father of the prosecutrix, Dr. Santosh Bishnoi, who had examined the accused and the prosecutrix and took note of the ossification test report, Ext. DA, and upon due appreciation of ocular and documentary evidence brought on record concurred with the view expressed by the trial court that the prosecutrix was below 16 years of age. Be it stated

that the High Court did not think it appropriate to rely on the ossification test report as it found a number of flaws with it and opined that it was not worthy of credence. Additionally, the High Court has opined that the prosecutrix had no idea about the evil design of accused Parhlad, her uncle and she had proceeded with him in good faith and under compulsive circumstances she was raped by the accused persons and, therefore, there was really no consent. On the basis of the said analysis, it affirmed the judgment of conviction and order of sentence passed by the trial court. Hence, this appeal by special leave.

4. We have heard Mr. Harinder Mohan Singh, learned counsel for the appellant and Mr. Shekhar Raj Sharma, learned counsel for the respondent- State.

5. The core issues that arise for consideration in this appeal are whether the finding as regards the age of the prosecutrix is based on the proper appreciation of evidence on record or it is so perverse that it deserves to be dislodged in exercise of jurisdiction under Article 136 of the Constitution, and further whether the opinion of the High Court relating to consent withstands scrutiny. On a perusal of the findings returned by the learned trial Judge as well as by the High Court, it is noticed that the learned trial Judge has relied upon the testimony of the prosecutrix, her father, and the school leaving certificate, which has been brought on record and tendered in evidence; and the High Court, on re- appreciation of the testimony of the prosecutrix and her father coupled with the testimony of PW-1, the Head Master of the concerned school has found that the version of the prosecution is truthful. As is perceptible, the prosecutrix has deposed that she was about 14 years of age at the time she went with her uncle and made a prey of the uncontrolled debased conduct of the appellants. The father of the prosecutrix has testified in a categorical manner about the factum of age of the prosecutrix. The Principal, PW-1, who has proved the school leaving certificate has stood embedded in his testimony and not paved the path of tergiversation despite the roving cross-examination. Nothing has been elicited to create on iota of doubt in his testimony. On the said premises, as we find, the conclusion has been arrived at that the prosecutrix was below 16 years of age.

6. It is requisite to state here that the radiologist who had conducted the ossification test had opined that the age of the prosecutrix might be 16-17 years. The High Court in its analysis has recorded that the said piece of evidence was not beyond reproach inasmuch as it had not depicted the true situation as the eruption of teeth, number of teeth and many other aspects were not observed by the doctor conducting the ossification test. In this context reference to the decision in *Ramdeo Chauhan alias Raj Nath v. State of Assam*[1] would be apposite. In this case, Sethi, J while considering the evidentiary value of radiological examination opined that:-

> "The statement of the doctor is no more than an opinion, the court has to base its conclusions upon all the facts and circumstances disclosed on examining of the physical features of the person whose age is in question, in conjunction with such oral testimony as may be available. An X-ray ossification test may provide a surer basis for determining the age of an individual than the opinion of a medical expert but it can by no means be so infallible and accurate a test as to indicate the exact date of

birth of the person concerned. Too much of reliance cannot be placed upon textbooks, on medical jurisprudence and toxicology while determining the age of an accused. In this vast country with varied latitudes, heights, environment, vegetation and nutrition, the height and weight cannot be expected to be uniform." Be it noted, Phukan, J. concurred with the view expressed by Sethi, J.

7. In this regard, we may, with profit, refer to the decision in *Vishnu alias Undrya vs. State of Maharashtra*[2] wherein a contention was raised that the age of a prosecutrix by conducting ossification test was scientifically proved, and that it deserved acceptance. The court rejected the said submission by stating that:-

"We are unable to accept this contention for the reasons that the expert medical evidence is not binding on the ocular evidence. The opinion of the Medical Officer is to assist the court as he is not a witness of fact and the evidence given by the Medical Officer is really of an advisory character and not binding on the witness of fact." Similar view has been expressed in *Arjun Singh v. State of Himachal Pradesh*[3].

8. Tested on the touchstone of aforesaid legal premises, we do not find any perversity of approach as regards the determination of age of the prosecutrix.

9. The next facet relates to the facet of consent. It needs no special emphasis to state that once it is held that the prosecutrix is below 16 years of age consent is absolutely irrelevant and totally meaningless. However, as has been stated earlier the High Court has addressed itself with regard to the plea of consent advanced by the accused persons. The material brought on record clearly reveal that Parhlad, first cousin of the father of the prosecutrix in the absence of her parents at home had asked her to go with him for harvesting wheat crop to village Rupana Ganja and accordingly she had accompanied him to the residence of the appellant No. 2, who is the maternal uncle of Parhlad. The prosecutrix has deposed that she was in a totally helpless situation and despite her resistance she was sexually abused. The mental and physical condition of a young girl under the dominion of two grown up males who had become slaves of their prurient attitude can be well imagined. The consent, apart from legal impermissibility, cannot be conceived of. In this context reference to certain authorities would be appropriate. *In State of H.P. v. Mango Ram*[4] a three-Judge Bench while dealing with the consent has stated thus:-

> "13. … Submission of the body under the fear of terror cannot be construed as a consented sexual act. Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances."

10. *In Uday v. State of Karnataka*[5] while reiterating a similar view the Court observed:-

> "21. … We are inclined to agree with this view … that there is no straitjacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the courts provide at best guidance to the judicial mind while considering a question of consent, but the Court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them." Similar view has been echoed in *Deelip Singh v. State of Bihar*[6], *Pradeep Kumar alias Pradeep Kumar Verma v. State of Bihar and another*[7] *and Dilp v. State of Madhya Pradesh*[8]

Viewed on this prismatic reasoning, the conclusion arrived at by the High Court on the obtaining factual score cannot be faulted.

11. Learned counsel for the appellant has submitted that the appellant are in custody for more than 8 years. Needless to say, it is an alternative submission pertaining to quantum of sentence. The learned trial Judge has sentenced the appellants to suffer rigorous imprisonment for a term of 10 years each for the offence under section 376 (g) of IPC apart from other offences. Sentence in respect of the offence of rape has to be in consonance with the law. The concept of special reasons as engrafted in IPC prior to the amendment brought in force by Act 13 of 2013 with effect from 3.02.2013 is not to be invoked for the asking. We need not enumerate anything in that regard, for there is no justification or warrant for thinking of reduction of sentence in this case. The appellants, to say the least, had taken advantage of their social relationship with the prosecutrix. She had innocently trusted the first appellant and, in fact, there was no reason to harbour any kind of doubt. The devilish design of the appellant No. 1 and the crafty manipulation of the appellant No. 2 is manifest. It has to be borne in mind that an offence of rape is basically an assault on the human rights of a victim. It is an attack on her individuality. It creates an incurable dent in her right and free will and personal sovereignty over the physical frame. Everyone in any civilised society has to show respect for the other individual and no individual has any right to invade on physical frame of another in any manner. It is not only an offence but such an act creates a scar in the marrows of the mind of the victim. Anyone who indulges in a crime of such nature not only does he violate the penal provision of the IPC but also right of equality, right of individual identity and in the ultimate eventuality an important aspect of rule of law which is a constitutional commitment. The Constitution of India, an organic document, confers rights. It does not condescend or confer any allowance or grant. It recognises rights and the rights are strongly entrenched in the constitutional framework, its ethos and philosophy, subject to certain limitation. Dignity of every citizen flows from the fundamental precepts of the equality clause engrafted under Articles 14 and right to life under Article 21 of the Constitution, for they are the "fon juris" of our Constitution. The said rights are constitutionally secured. Therefore, regard being had to the gravity of the offence, reduction of sentence indicating any imaginary special reason would be an anathema to the very

concept of rule of law. The perpetrators of the crime must realize that when they indulge in such an offence, the really create a concavity in the dignity and bodily integrity of an individual which is recognized, assured and affirmed by the very essence of Article 21 of the Constitution.

12. Consequently, the appeal being, sans stratum, stands dismissed.

[1]*(2001) 5 SCC 0714*
[2] *(2006) 1 SCC 0283*
[3] *(2009) 4 SCC 0018*
[4]*(2000) 7 SCC 0224*
[5]*(2003) 4 SCC 0046*
[6]*(2005) 1 SCC 0088*
[7]*(2007) 7 SCC 0413*
[8]*(2013) 14 SCC 0331*