

(2010) 07 CHH CK 0028
In the Chhattisgarh High Court
Case No : Criminal Appeal No. 265 of 1991

Dileep and Shambhooram	Vs	APPELLANT
The State of Madhya Pradesh		RESPONDENT

Date of Decision : 16-07-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Evidence Act, 1872 — Section 114, 118
Penal Code, 1860 (IPC) — Section 363, 366, 376

Citation : (2010) 07 CHH CK 0028

Hon'ble Judges : T.P. Sharma, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

T.P. Sharma, J.—Challenge in this appeal is to the judgment of conviction and order of sentence dated 16.1.1991 passed by the Additional Sessions Judge, Kanker, in Sessions Trial Nos. 200/89 and 202/89, whereby and whereunder learned Additional Sessions Judge after holding the appellants guilty for the offence punishable under Sections 363, 366 and 376 of the Indian Penal Code sentenced them to undergo rigorous imprisonment for three years, rigorous imprisonment for four years and rigorous imprisonment for five years, respectively.

2. Conviction is challenged on the ground that without there being any iota of evidence, the trial Court has convicted and sentenced the appellants as aforementioned and thereby committed illegality.

3. Case of the prosecution, in brief, is that on 12.5.1989 at early part of the night the prosecutrix (PW-1) aged about 14 years (name not mentioned) was playing in her village Chichgaon, Police Station Bhanupratappur where appellant Shambhoo met her and told to accompany him which she refused, then appellant Shambhoo dragged her, he took her to his house where he committed forcefully intercourse with her and told her that he will marry with her. At morning at about

4 a.m. they woke up, then they were boarding in truck with other labourers which was driven by co-accused Dileep, they went to Sambhalpur and again they proceeded for Dhamtari where they unloaded bags. Co-accused Dileep took the prosecutrix towards bus stand and committed rape with her. Appellant Shambhoo took her in different places and finally she was recovered. Kanhaiya (PW-2), father of the prosecutrix, lodged the F.I.R. vide Ex.P/6. The prosecutrix was sent for medical examination, she was examined by Dr. Smt. R. Yadu (PW-6) vide Ex.P/7 and she was found that the prosecutrix was accustomed to sexual intercourse. During the course of investigation, marksheet of the prosecutrix Ex.P/1 was seized along with letter Ex.P/3 and underwear vide Ex.P/2. Spot map was prepared vide Ex.P/4. Truck was seized from Santosh vide Ex.P/8. Accused Shambhoo was examined by Dr. S. Yadu (PW-7) vide Ex.P/10 and was found that he was capable for committing sexual intercourse. Undergarment of accused Shambhoo was seized vide Ex.P/12. Numberi F.I.R. was lodged vide Ex.P/17. Accused Dileep was also examined by the doctor vide Ex.P/21 and he was found capable for committing sexual intercourse.

4. Statements of the witnesses were recorded u/s 161 of the Code of Criminal Procedure, 1973 (in short "the Code") and after completion of investigation, charge sheet was filed before the Judicial Magistrate First Class, Bhanupratappur, who in turn committed the case to the then Court of Sessions, Bastar, from where learned Additional Sessions Judge, Kanker received the case on transfer for trial.

5. In order to prove the guilt of the accused/appellants, the prosecution has examined as many as 9 witnesses. The accused/appellants were examined u/s 313 of the Code where they denied the circumstances appearing against them and pleaded innocence and false implication in the crime in question.

6. After providing opportunity of hearing to the parties, learned Additional Sessions Judge convicted and sentenced the appellants as aforementioned.

7. I have heard learned Counsel for the parties, perused the judgment impugned and record of the trial Court.

8. Learned Counsel for the appellants vehemently argued that as per evidence of the prosecutrix and other witnesses, the prosecutrix was consenting party. The Court has assessed the age of the prosecutrix as 14 years. In case of marginal age of 16 years, the prosecution is under obligation to prove the age of the prosecutrix below 16 years by adducing cogent and reliable evidence, but in the present case, the prosecution has not proved the age of the prosecutrix below 16 years. As per medical evidence, the prosecutrix was accustomed to sexual intercourse, she was able to understand what is good and what is bad, she herself has left her parental shelter and has accompanied the appellants, therefore, conviction of the appellants under Sections 363, 366 and 376 of the Indian Penal Code is not sustainable under the law.

9. Learned Counsel placed reliance in the matter of Sudhari alias Shivadhari

Singh v. State of C.G.1 in which this Court has held that father of the prosecutrix could not tell the date of birth of the prosecutrix, radiological examination of the prosecutrix for confirmation of her age was not done, Kotwari register was also not produced, prosecutrix admitted in her statement recorded on 25.7.2001 that she was aged 17 years, the possibility that the prosecutrix was aged 16 years or more on the date of occurrence cannot be ruled out. Learned Counsel further placed reliance in the matter of Sunil v. State of Haryana² in which the Apex Court has held that in the absence of cogent evidence and statement of father giving age of prosecutrix only approximately, conviction of the accused on such evidence would not be proper.

10. On the other hand, learned State counsel supported the judgment impugned and argued that the prosecution has proved the age of the prosecutrix below 16 years on the date of alleged commission of the offence. Even otherwise, the prosecutrix has specifically deposed that she has never consented for sexual intercourse and both the appellants have committed forcefully intercourse with her which is punishable u/s 376 of the Indian Penal Code. Learned Counsel further argued that both the appellants have kidnapped and abducted the prosecutrix for illicit intercourse.

11. In order to appreciate the arguments advanced on behalf of the parties, I have examined the evidence adduced on behalf of the prosecution.

12. In the present case, age of the prosecutrix and consent is material. While examining the prosecutrix in the Court as PW-1, the Court has assessed her age as 14 years. She herself has deposed in her evidence that her age was 14 years on the date of examination. Kanhaiya (PW-2), father of the prosecutrix, has deposed in his evidence that age of the prosecutrix is 14 years. He has further deposed that at the time of admission of his daughter he has informed the school authorities about the date of birth after asking the same from Kotwar who has recorded the date of birth of the prosecutrix. In para 4 of his cross-examination, he has specifically deposed that at the time of birth of his daughter he has informed Kotwar and Kotwar has recorded her date of birth, but he has filed any document relating to entry of date of birth of the prosecutrix by Kotwar. Dr. Smt. R. Yadu (PW-6) has assessed the age of the prosecutrix as 13 years. She has deposed that she has examined the prosecutrix vide Ex.P/7. Her medical examination report Ex.P/7 reveals that menstrual cycle of the prosecutrix has started one year back. Pubic hairs were scanty. These show that the prosecutrix was not physically matured woman.

13. The prosecutrix (PW-1) has deposed in para 9 of her evidence that her marksheet Ex.P/1 has been seized vide Ex.P/2. Marksheet reveals the date of birth of the prosecutrix as 25.1.75 and if her date of birth is considered as 25.1.1975, then at the time of commission of the offence her age would be fourteen years and four months. Defence has cross-examined the prosecutrix in detail. In para 13 of her cross-examination she has admitted that she has told her age approximately.

14. Kanhaiya (PW-2), father of the prosecutrix, has specifically deposed in paras 1 and 4 of his evidence that age of his daughter is 14 years and he has informed the school authorities at the time of admission of his daughter after asking date of birth from Kotwar. Dr. Smt. R. Yadu (PW-6) who has examined the prosecutrix has also assessed the age as 13 years.

15. In the present case, the prosecution has not produced primary document, but father of the prosecutrix responsible person for proving the age of his daughter has specifically deposed that at the time of admission of his daughter in school he has informed the school authorities relating to date of birth of his daughter on the basis of Kotwari entry after asking the same from Kotwar, although birth register is conclusive proof for determining the age of the person, but if the same is not found satisfactorily, then age may be ascertained on the basis of other relevant factors like physique as ascertained by father, mother and other persons, age as determined by the doctor, date of birth recorded in the school register and age as ascertained by the Court during examination of the prosecutrix. While dealing with the question of determination of age, the Apex Court in the matter of State of H.P. v. Mango Ram³ has held that age of the prosecutrix shall be determined on the basis of all relevant factors, including physical features. Para 12 of the said judgment reads as under:

12. As regards the age of the prosecutrix, there is evidence of PW 2 Dr. Veena Sehgal who examined the prosecutrix and after taking note of the physical features stated that the prosecutrix must be of the age between 13 to 14 years. PW 3 Dr. Lokender Badotra, who examined the prosecutrix also supported this version. This view is more strengthened by the family history which showed that she was born in the year 1979. Therefore, in all probability, the age of the prosecutrix at the time of the occurrence was about fourteen years. The certificate of PW 13, the Medical Officer-cum- Radiologist, also gives only the probable age of the prosecutrix. Therefore, the finding of the learned Sessions Judge that the prosecutrix was above the age of sixteen is based on faulty reasons and is unsupported by evidence.

16. At the time of examination of the prosecutrix, the Court has assessed her age as 14 years. The doctor has also assessed her age as 13 years. Her physique reveals that pubic hairs were scanty and her menstrual cycle has started only one year back.

17. If these circumstances are considered together, especially specific evidence of Kanhaiya (PW-2), father of the prosecutrix, supported by documentary evidence Ex.P/1 marksheet, then it would be safely inferred that at the time of incident, the age of the prosecutrix was below 15 years. The prosecutrix (PW-1) has specifically deposed that while she was coming back after playing with the children to her house, appellant Shambhoo met her and told to accompany him which she refused, then he caught hold her hands and took her with him in his house, he took her inside the room, then she started weeping, thereafter, the appellant Shambhoo committed forcefully sexual intercourse with her, at that

time she was weeping. In para 7 of her evidence, she has specifically deposed that appellant Shambhoo has committed sexual intercourse with her. She has further deposed that at 4 a.m. appellant Shambhoo took out her from his house and took her towards Bhanupratappur by truck which was driven by appellant Dileep, finally they reached to Dhamtari and at the time of unloading of truck at Dhamtari, appellant Dileep took her towards field where he committed sexual intercourse with her. Defence has cross-examined this witness in detail. She has admitted in her cross-examination that appellants took her in different places but she has not told the incident or has not raised alarm because appellant Shambhoo has directed her not to tell anything to any person. She is a solitary witness relating to the aforesaid offence, lodging of the F.I.R., her medical examination and seizure of the clothes corroborated by other evidence.

18. Normally in case of sexual offence, the Court is required to consider the evidence of the prosecutrix. A prosecutrix of a sex offence cannot be put on a par with an accomplice. She is in fact a victim of the crime. While dealing with the question of corroboration, the Apex Court in the matter of State of Maharashtra v. Chandraprakash Kewalchand Jain⁴ has held that the prosecutrix cannot be put on a par with an accomplice. She is in fact a victim of the crime. Para 16 of the said judgment reads as under:

16. A prosecutrix of a sex offence cannot be put on a par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness u/s 118 and her evidence must receive the same weight as it attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence....

19. As held by this Court in the matter of Sudhari (supra), in absence of any

other circumstances and statement of the prosecutrix relating to her age as 17 years, it cannot be ruled out that the age of the prosecutrix was 16 years or more than 16 years, but in the present case, the prosecutrix and her father have specifically deposed that the age of the prosecutrix was 14 years. The facts involved in Sudhari case are clearly distinguishable from the facts of the present case.

20. As held by the Apex Court in the matter of Sunil (*supra*), in the absence of any other factors and evidence of the father for determining the age of the prosecutrix, conviction would not be proper. But, in the present case, statement of the prosecutrix, her father, age ascertained by the doctor, physique of the prosecutrix mentioned in Ex.P/7 and material evidence are sufficient for drawing inference relating to age of the prosecutrix. The facts involved in Sunil case are clearly distinguishable from the facts of the present case.

21. The evidence of the prosecutrix (PW-1) clearly reveals that 14 years aged girl who was not mentally matured was playing with other children and while she was going to her house, she was enticed by appellant Shambhoo, thereafter he caught hold her hands and took her in his house where he committed forcefully sexual intercourse with her. Evidence of the prosecutrix clearly reveals that at the time of commission of intercourse and prior to commission of intercourse, she was weeping. Definitely the prosecutrix has accompanied with the appellants till Dhamtari. Co-accused Dileep who was driving the vehicle at Dhamtari took the prosecutrix from place of reloading of truck on the pretext that they will walk and after taking benefit of loneliness at field, he also committed sexual intercourse with her. The prosecutrix again came near the truck and she was weeping, even she narrated the incident to appellant Shambhoo. This shows that the prosecutrix was within clutches and grip of the appellants and they have enjoyed by their ravish act. The evidence of the prosecutrix (PW-1) does not whisper about any consent or willingness, she was helpless within clutches of the appellants, the appellants have kidnapped and abducted her for illicit intercourse and they committed sexual intercourse with her without her will and consent. The evidence adduced on behalf of the prosecution is sufficient for conviction of the appellants under Sections 363, 366 and 376 of the Indian Penal Code. The trial Court has rightly convicted the appellants.

22. As regards the question of sentence, the trial Court has sentenced the appellants to undergo rigorous imprisonment for three years, rigorous imprisonment for four years and rigorous imprisonment for five years. Considering the age of the prosecutrix and the manner in which the appellants have committed the offence, the trial Court has not awarded adequate sentence and at the time of awarding the sentence the trial Court was liberal and has not taken care of minimum punishment at least which is necessary. The State has not filed any appeal for enhancement of the sentence.

23. For the foregoing reasons, I do not find any merit in the appeal. The appeal being devoid of merit is liable to be dismissed and it is hereby dismissed. The

appellants are on bail, they shall surrender immediately before the Additional Sessions Judge, Kanker or its successor in office for serving remaining part of sentence imposed upon them in Sessions Trial Nos. 200/89 and 202/89.