
(2012) 03 MP CK 0155
In the Madhya Pradesh High Court
Case No : Criminal Appeal No. 252 of 1997

Dilip

APPELLANT

Vs

State of M.P. thr. Police Station , BNP Dewas

RESPONDENT

Date of Decision : 27-03-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 374
Penal Code, 1860 (IPC) — Section 363, 366, 376

Citation : (2012) 4 MPHT 243

Hon'ble Judges : U.C. Maheshwari, J

Bench : Single Bench

Advocate : Sunil Jain, for the Appellant; Mukesh Kumawat, Panel Lawyer for the State, for the Respondent

Final Decision : Allowed

Judgement

U.C. Maheshwari, J.—The appellant accused has prepared this appeal u/s 374 of the Cr.PC being aggrieved by the judgment dated 25-2-1997 passed by Sessions Judge, Dewas, in Sessions Trial No. 86/1994 convicting the appellant under Sections 366 and 376 of the IPC for RI for 5 years in the earlier section while RI for 7 years in the later. The fact giving rise to this appeal in short are that on dated 16-1-1994 the prosecutrix Chandrakalabai was all alone at her residence as her parents went to field for the agricultural work from where they were returned in the evening. On their return they did not find their daughter Chandrakalabai at home on which they tried their level best to trace her out in the village and also the adjoining areas including her matrimonial family. When she could not get success to find her out for days together, then on dated 31-1-1994 the father of the prosecutrix lodged a missing person report at Police Station Bank Note Press, Dewas. The same was recorded in Rojnamcha Sanha (Exh. P-5). In the course of the enquiry of such report the prosecutrix was recovered on dated 17-2-1994 and after making the interrogation of the witnesses in the enquiry of missing person report the FIR (Exh. P-7) for the offence of Sections 363, 366 and 376 of IPC was registered at the same Police

Station. In course of the further investigation the prosecutrix was sent to the hospital where after her medical examination the MLC Report (Exh. P-2) was prepared. The interrogating statements of witnesses were recorded and appellant was arrested. On completion of the investigation, it was found that the prosecutrix being minor was kidnapped from the lawful custody of her parents without their consent by the appellant and committed rape on her on which the appellant was charge-sheeted for his prosecution u/s 376, 363 and 366 of the IPC.

2. After committing the case to the Session Court, on evaluation of the charge-sheet, the charge of Sections 376 and 366, IPC was framed against the appellant. He abjured the guilt on which the trial was held after recording the evidence on appreciation of the same, the appellant was held guilty for the above mentioned offence and was punished with the above mentioned punishment on which the appellant has come to this Court with this appeal.

3. Shri Sunil Jain, learned Counsel for the appellant after taking me through the record of the Trial Court along with the impugned judgment by referring the deposition of the prosecutrix Chandrakalabai (P.W. 10) said that on proper appreciation of the testimony of the prosecutrix the impugned case was apparently the case of consent as she voluntarily went with the appellant at various places and also residing for days together and performed the alleged intercourse with him. As per available evidence during these days she did not complain to anyone on the way or to any person residing nearby where the alleged act was committed by the appellant with her. In continuation by referring the deposition of Dr. A.K. Vyas (P.W. 9) it was said that on carrying out the Ossification Test of the prosecutrix according to his report (Exh. P-8) based on X-ray plate (Exh. P-9) the age of the prosecutrix Chandrakalabai was found between 16 to 17 years and as per medical jurisprudence the principle of variation of two years either side is applicable to ascertain the approximate age of the person. In such premises, the Counsel has further argued that whenever on appreciation if two views or two approaches are probable from the evidence then out of them the approach which is favourable to the accused like appellant should be adopted by the Court and with these submissions, he prayed for extending the acquittal to the appellant from the aforesaid charge by setting aside the impugned judgment by allowing this appeal. He also placed reliance on some decided cases.

4. On the other hand, responding the aforesaid argument Shri Mukesh Kumawat, learned Panel Lawyer for the respondent/State said that the impugned judgment of conviction of the appellant being based on proper appreciation of the evidence do not require any interference at this stage. In continuation he also said that mere testimony of Chandrakalabai (P.W. 10) is sufficient to maintain the impugned conviction and sentence of the appellant and prayed for dismissal of this appeal.

5. Having heard the Counsel at length keeping in view their argument I have

carefully gone through the record of the Trial Court as well as the impugned judgment.

6. It is apparent from the impugned judgment that after holding the age of the prosecutrix Chandrakalabai between 16 to 17 years in Para 14 the appellant has been convicted and sentenced under the above mentioned Sections of 366 and 376 of the IPC. Initially, such finding has been challenged by the appellant Counsel saying that in view of the available medical evidence and the deposition of Dr. A.K. Vyas (P.W. 9) there is sufficient circumstance on the record to hold the age of the prosecutrix more than 18 years on the date of the incident. I am of the considered view that if the age of the prosecutrix is found to be more than 18 years, then Court has to consider the question whether it was a case of consent or the alleged act of rape was committed by the appellant with the prosecutrix contrary to her wish and will and, accordingly, Court has to decide the matter and the sustainability of the impugned judgment.

7. On perusing the record it is apparent fact that on 16-1-1994 as per allegation of the prosecution, the prosecutrix was kidnapped/taken away from her lawful custody of the parents by the appellant, and thereafter the alleged act of rape was committed on her. So to decide the age of the prosecutrix on perusing the record, I have not found any document like mark-sheet, birth certificate or any other document except the ossification test report (Exh. P-8) based on Exh. P-9 the X-ray plate prepared by Dr. A.K. Vyas (P.W. 9). So Court has to consider the question regarding age of the prosecutrix on the basis of the aforesaid report and the available evidence. True it is after taking out the X-ray (Exh. P-9) on that basis the aforesaid doctor had given his report (Exh. P-8) according to which he found the age of the prosecutrix between 16 to 17 years. On entering such doctor in the witness box, in his chief he categorically stated that he found the age of prosecutrix between 16 to 17 years but in cross-examination he categorically stated that the age of the prosecutrix may be more than 2 years from the age stated in the report or it may be less than 2 years.

8. It is a settled proposition of law that whenever on appreciation of the available evidence if two views or two approaches are possible then Court is bound to adopt the view which is favourable to the accused. In such premises, there is no option with the Court except to adopt the view of the aforesaid doctor in which he stated that the age of the prosecutrix may be more than 2 years from the age stated by him in the ossification test report (Exh. P-8). My such view is based on catena of the decisions of the Apex Court out of which, such principle is laid down in the matter of Harchand Singh and Another Vs. State of Haryana,

9. In the aforesaid premises, the finding of the Trial Court holding the age of the prosecutrix below 18 years being no sustainable is, hereby, set aside and it is held that the prosecutrix was more than 18 years of the age on the date of the alleged incident on which she was taken away by the appellant or she went with him and was remained for days together till she was recovered by the Police.

10. After holding the age of the prosecutrix, I proceed to appreciate the evidence to answer the question whether in the available circumstance it could be said that the prosecutrix was kidnapped by the appellant from her lawful custody or she voluntarily went and resided with him for days together with her own consent. Chandrakalabai (P.W. 10) the prosecutrix in her deposition categorically stated that under criminal intimidation to beat her she was taken away by the appellant from her parental home in the absence of her parents and thereafter brought to Mohalla Momentola where they remained near about a month and during this period, the alleged intercourse (rape) was committed on her by the appellant. Subsequent to that she was taken by the appellant to Jaora from where they came back to Dewas, and went to the Court where the appellant was caught hold by the Police along with the appellant, she was also taken to the Police Station where she met her parents and their other relatives. In her cross-examination she categorically stated the facts that she was married earlier with some other person from whom she did not get divorce. In Para 6, she categorically stated that appellant brought her to Dewas, by Tempo, in such Tempo she was all alone with the appellant as there was no any other passenger in the same. She also saw various persons and villages on the way but she did not cry. Although she had stated the reason in this regard that because of the above mentioned criminal intimidation of the appellant she did not cry. In further deposition she stated that on residing for a month in the aforesaid Mohalla of Dewas, she did not make any complaint in this regard to any neighbour or the other persons, of such locality. On going through her entire deposition, I have found that till the arrest of the appellant in Dewas Court as stated by the prosecutrix, she had not made any complaint to anyone against the appellant regarding the alleged incident. In such premises, it is held that the prosecutrix voluntarily went with the appellant and resided for days together with him not only at one place but at various places and during such period performed the alleged intercourse with the appellant with her own consent but because of the missing person report of her father in the course of its enquiry the appellant was arrested and thereafter the prosecutrix was also taken to Police Station and because of such intervention of the parents of the prosecutrix, the offence was registered and the appellant was placed for prosecution.

11. Besides the aforesaid, on going through the depositions of the other examined witnesses namely Mansingh (P.W. 3), Kadir Khan (P.W. 4), Kailash (P.W. 5), Kamalsingh (P.W. 6) and Bondarsingh (P.W. 7), I have not found any material in their depositions incriminating the appellant with the alleged offence.

12. Apart from the aforesaid, deposition of the prosecutrix, on going through the deposition of Dr. Smt. Vidya Velhankar (P.W. 2), who after medical examination of the prosecutrix prepared her MLC report, I have found that on examination of the prosecutrix by this doctor, she did not find any external injury on the person of the prosecutrix. She was also found to be habitual to perform the intercourse. According to her opinion, at the time of the examination, the sign of rape was not found on the person of the prosecutrix. So in such premises also, it could not

be said that the appellant has committed the alleged intercourse with the prosecutrix against her will or wish. So in such premises it is held that the prosecutrix being adult woman went with the appellant voluntarily and performed the alleged intercourse with him with her own consent. Pursuant to it the approach of the Trial Court holding guilty the appellant for the alleged offence being apparently perverse and contrary to the record is not sustainable under the law.

13. In view of the aforesaid discussion, by allowing this appeal the impugned judgment of the Trial Court holding conviction and sentence against the appellant is, hereby, set aside and the appellant is acquitted from the above mentioned charge of Sections 366 and 376 of the IPC. The bail bond of the appellant is, hereby, discharged. Appeal is allowed as indicated above.