
(2010) 03 AHC CK 0001
In the Allahabad High Court
Case No : Criminal Appeal No. 2459 of 1981

Din Dayal @ Deenaand Others (In Jail) APPELLANT
Vs
State of U.P. RESPONDENT

Date of Decision : 19-03-2010

Acts Referred:

Penal Code, 1860 (IPC) — Section 363, 366, 369, 376

Citation : (2010) 03 AHC CK 0001

Hon'ble Judges : V.K.Verma, J

Final Decision : Allowed

Judgement

Vijay Kumar Verma,J.

1. Challenge in this Appeal under section 374(2) of the Code of Criminal Procedure (in short, "the Cr.P.C.") is to the judgement and order dated 20.10.1981 passed by the 1st Addl. Sessions Judge, Maradabad in S.T. No. 597 of 1978 (State Vs. Dindayal @ Deena and others), whereby the appellants Dindayal @ Deena and Surya Kumar @ Surya Prakash have been convicted and sentenced to undergo rigorous imprisonment for five years under section 366 and 376 IPC. By the same judgement, the appellant Vinod Kumar has been convicted and sentenced to undergo three years" rigorous imprisonment under section 368 I.P.C. All the sentences have been directed to run concurrently.

2. The First information Report was lodged by Mathura Prasad Sharma s/o Ram Prasad Sharma resident of Village and Post Office Pawasa, District Moradabad, who is the maternal uncle of the prosecutrix Km. Pushpa. The case of the prosecution as appearing from the chik FIR Ext. Ka6, in brief, is that Smt. Snehlata with her two daughters aged about two years and 13 years had come to appear in High School Examination at Shankar Bhushan Inter College, Sambal and she was staying with her uncle Jai Prakash Sharma. On 07.04.1977 Smt. Snehlata came to her brother Mathura Prasad Sharma at Village Pawasa at about 3.00 p.m. and told him that her daughter Km. Pushpa had gone to purchase biscuits from the market, but she has not yet come back. On this information,

search for Km. Pushpa was made. When the complainant came to Sambhal, he was told by the witnesses Ravindra Gupt, Sipattar Singh Raghav and Munshi that they had seen his niece Km. Pushpa going with Surya s/o Brij Ram and Deena s/o Ram Charan of village Pawasa on motorcycle at about 12 O'Clock in the day on the road near Suryakund Temple. It is also alleged in the FIR that these accused have enticed away the niece of the complainant, as they were having enmity with him.

3. On the basis of the written report Ext. Ka1, the then Constable Moharrir Lajpat Singh prepared chik FIR Ext. ka6 on 07.04.1977 and registered a case under section 363, 366 IPC at 7.10 p.m. against Surya and Dina. Entry of Registration of the case was made in G.D. no. 45 (Ext. Ka7) at the same time.

4. The case was registered in presence of S.I. Satyapal Singh, who was posted as Station Officer at P.S. Sambhal, District Moradabad. He started the investigation immediately after lodging of the FIR. The statement of the witnesses were recorded on 08.04.1977 and search for the prosecutrix was made. The accused Dina Nath was arrested on 10.04.1977 and on the basis of the information received from him, search for rest accused was made in Village Kajiwali Milk, but in vain. On the same day i.e. 10.04.1977, the prosecutrix was recovered at about 8.45 p.m. at the time when she was coming from train and the accused Surya Kumar and Vinod Kumar are also said to have been arrested when they were fleeing away. Recovery memo Ext. Ka8 was prepared in this regard. After making spot inspection site plan Ext. Ka9 was prepared. The underwear of the accused Surya Kumar and bellbottom of the prosecutrix were taken into possession and recovery memo Ext. Ka11 and Ka12 were prepared. The statement of Km. Pushpa and other witnesses were recorded. The rest investigation was carried out by the Inspector S. N. Goshal, who after completing the investigation submitted charge sheet Ext. Ka14 against the accusedappellants.

5. On the case being committed to the Court of Session for trial, the appellants Deendayal and Surya Kumar were charged under section 363, 366 and 376 IPC, whereas the appellant Vinod Kumar was charged under section 368 IPC, to which the appellants pleaded not guilty and claimed to be tried.

6. In order to prove its case, the prosecution examined eleven witnesses in all. P.W. 1 Km. Pushpa is the prosecutrix. P.W. 2 Mathura Prasad is the complainant, who has proved written report Ext. Ka1 in his statement recorded on 28.01.1981, P.W. 3 Smt. Snehlata is the mother of prosecutrix. Both these witnesses are not the eyewitnesses of the alleged incident. P.W. 4 Sippattar Singh and P.W. 9 Ravindra Gupta are said to be the eyewitnesses of the incident of carrying the prosecutrix by the accused Surya Kumar and Dindayal. P.W. 5 Mamraj Singh was posted as Head Master in Junior Basic School, Pawasa. He has proved Ext. Ka3, a document about admission of the prosecutrix in the school. P.W. 6 Smt. Ram Katori Devi was posted as Head Mistress in Kanya Junior High School, Pawasa. She has proved Ext. Ka5, which is extract of admission register

showing the admission of Km. Pushpa. P.W. 7 Satpal Singh is the Investigating Officer, who has proved various papers, which have been mentioned hereinabove. P.W. 8 Dr. (Km.) Laxmi Nandan had medically examined the prosecutrix on 11.04.1977 in Victoria Women Hospital, Moradabad. She has proved the medical report (Ext. Ka15). P.W. 10 Dr. Harnam Singh has proved Ext. Ka16. XRay of Km. Pushpa was made in his supervision. Copy of the Xray Report Ka17 has also been proved by this witness. P.W. 11, Ram Chandra was posted as Head Constable at P.S. Sambal. He has deposed that he searched the Xray plate of Km. Pushpa in the hospital, but the same could not be traced out.

7. In their statements recorded under section 313 Cr.P.C., the accused persons denying all the allegations of the prosecution have stated that due to enmity they have been falsely implicated in this case. The following statement has been made by the appellant Surya Kumar:

8. The appellants did not lead any evidence in their defence, but certain love letters were shown to the prosecutrix at the time of her examination, which have been filed by them, being Ext. Kha1 to Ext. Kha17.

9. After hearing parties' counsel and taking the entire evidence into consideration, the learned court below convicted and sentenced the appellants as stated in para 1 above. Hence, this appeal.

10. I have heard arguments at length of Sri Brahma Singh and Shiv Nath Singh, Advocates appearing for the appellants and AGA Sri Surendra Singh for the State.

11. The first and foremost submission made by learned counsel for the applicants was that the prosecutrix was a consenting party in going with the appellant Surya Prakash and since she was above 16 years of age, hence no offence is made out against the appellants, because neither the prosecutrix was taken or enticed by the applicants, nor sexual intercourse was committed with her against her will. It was also submitted in this context that the prosecutrix was having love affairs with the accused Surya Kumar @ Surya Prakash and she used to write letters also to him, which are available in the trial court record being Ext. Kha1 to Kha 17, from which it is fully established beyond reasonable doubt that the prosecutrix was having love affairs with the accused Surya Prakash and they were making plan to marry each other. It was further submitted in this context that from the statement of the prosecutrix recorded in the trial court, this fact is borne out that she had gone with the accused from place to place, but she did not raise any alarm to attract the people towards her and no complaint was made by her to any person that she is being carried by the accused persons forcibly. The contention of the learned counsel was that this conduct of the prosecutrix indicates that she herself had gone with the accused Surya Prakash, with whom she was having love affairs and it was for this reason that she never raised any noise at the bus stand or any other place where she had gone with the accused and on this ground it can very well be said that she was a consenting party in going with the accused Surya Prakash and having sexual

intercourse, if any, and hence no offence would be made out in present case against the appellants.

12. About the age of the prosecutrix, it was submitted by learned counsel for the appellants that the date of birth of the prosecutrix written in School Certificate has been falsified from the FIR itself, because according to the FIR, age of the prosecutrix at the time of alleged incident was about 13 years, whereas according to the School Certificate, her age comes less than 11 years and on this ground, no reliance can be placed on the School Certificate. It was also submitted by learned counsel that the date of birth of the prosecutrix at the time of admission in the school was got written by her maternal uncle Mathura Prasad by guess only and hence implicit reliance cannot be placed on the School Certificate in which the date of birth of the prosecutrix has been shown as 16.06.1966, which is falsified by the FIR itself. About the age of the prosecutrix, it was further submitted by learned counsel for the appellants that according to the medical certificate Ext. Ka15, the age of the prosecutrix was below 17 years and if margin of error of two years in the medical opinion about the age is given, then her age becomes less than 19 years and in any case her age was more than 16 years and hence on this ground no offence will be made out against the appellants, as being consenting party in going with the accused Surya Prakash and having sexual intercourse by her free will, the accused cannot be convicted either under section 366 or 376 IPC, because the prosecutrix was neither enticed or taken by the accused, nor sexual intercourse, if any, against her will or without her consent was committed by the accused. Drawing my attention towards the case of *Java Mala vs. Home Secretary, Government of Jammu & Kashmir* 1982AIR (SC)1297, it was submitted by learned counsel for the appellants that margin of error in the medical opinion about the age is two years on either side. It was also submitted by learned counsel that it is not mentioned in the medical report Ext. Ka 15 that the prosecutrix was less than 16 years and giving margin of error of two years in the medical opinion about the age of the prosecutrix, her age will be considered more than 16 years at the time of alleged incident.

13. About committing gang rape by the accused Din Dayal, Surya Prakash and one third person Radhey Shyam as stated by the prosecutrix in her statement recorded in trial court, it was submitted by learned counsel for the appellants that the theory of gang rape by three persons is not supported from the medical evidence, as no injury in private part of the prosecutrix was found at the time of her medical examination on 11.04.1977 by Dr. Km. Laxmi Nandan P.W.8. It was further submitted in this context by learned counsel that according to Dr. Km. Laxmi Nandan, the Vagina of the prosecutrix was admitting two fingers tightly and no recent tear and laceration was found present in the vagina, which shows that gang rape by three persons was not committed with the prosecutrix as stated by her in her statement in trial court. The contention of the learned counsel for the appellants was that if sexual intercourse would have been committed forcibly by three persons, then vagina of the prosecutrix would have

become loose and there was every possibility to sustain some injury in the vagina, but as opined by Dr. Km. Laxmi Nandan, the vagina of the prosecutrix was admitting two fingers tightly and no recent tear or laceration was found present in vagina, which indicates that gang rape by three persons was not committed with the prosecutrix. It was also submitted in this context by the learned counsel that at the time of her interrogation during investigation, the prosecutrix did not name Radhey Shyam and it was for this reason that Radhey Shyam has not been made accused in present case, whereas making improvement, the prosecutrix in her statement as P.W.1 has introduced one Radhey Shyam also as accused and it is stated by her that rape was committed by Radhey Shyam also, which shows that statement of the prosecutrix recorded in trial court is not worthy of reliance, because making material improvement one more person namely, Radhey Shyam has been introduced as accused, whereas no such statement was made by her at the time of her interrogation under section 161 Cr.P.C. during investigation, as is evident from the statement of P.W. 7 Satya Pal Singh (Investigating Officer), who has stated at page 47 of the paper book that the prosecutrix did not name Radhey Shyam at the time of her interrogation during investigation. It was further submitted by learned counsel in this context that at the time of her interrogation during investigation, the prosecutrix did not state that the rape was committed with her by the accused Din Dayal also and hence on this ground, no reliance can be placed on the testimony of the prosecutrix about committing gang rape with her by three persons, as it was not stated during investigation that sexual intercourse by accused Din Dayal and third person Radhey Shyam was also committed with her, whereas in trial court, she has made improvement in her statement and rape is said to have been committed by these persons also, whereas no such statement was made by her during investigation.

14. About the testimony of alleged eyewitnesses Sipatter Singh P.W. 4 and Ravindra Gupta P.W.9, it was submitted by learned counsel for the appellants that on the basis of the testimony of these persons, it cannot be said that accused persons were enticing or taking the prosecutrix against her will or without her consent as these witnesses had not make any talk at the time of allegedly seeing the prosecutrix and accused going on the motorcycle and hence testimony of these witnesses is not material in bringing home the guilt to the accused persons, because these witnesses have not stated that the accused were forcibly carrying the prosecutrix.

15. Refuting aforesaid submissions made by learned counsel for the appellants, it was vehemently contended by the learned AGA that consent, if any, of the prosecutrix is not material, because she was aged about 11 years according to the School Certificate at the time of incident and hence interference by this Court in the impugned judgment is not warranted, as on the basis of the testimony of the prosecutrix, it is fully established that she was enticed by the accused Surya Prakash and Din Dayal and gang rape was committed with her by these accused and one more person Radhey Shyam, as stated by the prosecutrix in her

statement recorded in trial court. It was further submitted by learned AGA that there is no serious infirmity in the testimony of the prosecutrix and merely on the basis of nonraising of any noise, it cannot be said that the prosecutrix was consenting party in going with the accused. About the letters, which are said to have been written by the prosecutrix, it was submitted by learned AGA that these letters were forcibly got scribed from her by the accused persons and hence on the basis of these letters, it cannot be said that the prosecutrix was having any love affair with the accused Surya Prakash.

16. Having considered the submissions made by learned counsel for the parties and after going through the entire evidence on record carefully, I am of the considered opinion that aforesaid submissions made by learned counsel for the appellants have got force and must be accepted. First, I come to the point of age of the prosecutrix. Although the date of birth of the prosecutrix has been written as 16.06.1966 in the School Certificate, but no reliance can be placed on this document, as the date of birth as mentioned in School Certificate is falsified by the FIR it self, according to which the prosecutrix was aged about 13 years at the time of alleged incident, whereas according to the School Certificate, her age comes less than 11 years. On the basis of the medical report Ext. Ka 15 also, the date of birth of the prosecutrix as mentioned in the School Certificate becomes false, as according to the medical report, the age of the prosecutrix was below 17 years. Therefore, having regard to the observations made by the Hon'ble Supreme Court in Java Mala case (supra), if margin of error of two years is given to the medical opinion about the age of the prosecutrix, then in all probability, the age of the prosecutrix was above 16 years at the time of alleged incident.

17. I have carefully gone through the letters Ext. Kha1 to Ext. Kha 17. These letters were written on different dates and on the papers of different size. The contents of the papers shows that these letters have been written in different context and such matters have been written in these letters which cannot be dictated by the accused persons. Therefore, statement of the prosecutrix that these letters were got scribed from her by the accused persons forcibly is not at all reliable, as she has deliberately made false statement about getting these letters scribed forcibly from her by the accused. Hence no reliance can be placed on the testimony of the prosecutrix Km. Pushpa, who has deliberately made a false statement and suppressed the real facts. On the basis of these letters, it is fully established beyond reasonable doubt that the prosecutrix was having love affairs with the accused Surya Prakash. In one letter there is indication that they both were making plan to marry each other, as is usual in the case of modern lovers. In one letter, the prosecutrix has narrated the manner, in which their plan to marry each other can be materialised. The prosecutrix has addressed the accused Surya Prakash as "my Raja Ji" and she has addressed herself as "your Rani" . Some filmy songs have been written in these letters and there is clear indication in these letters that the prosecutrix and accused Surya Prakash were in deep love. Certain minor gifts were also exchanged between them as is evident from one or two letters. In one letter, the prosecutrix has narrated the

story of love affair of another boy with another girl, whose letter came into the hands of prosecutrix, in which vulgar language was written, which has been repeated by the prosecutrix in same language in one letter. This type of letter cannot be dictated by the accused persons and hence, no reliance can be placed on the statement of the prosecutrix about forcibly getting these letters scribed by accused persons. As stated hereinabove, on the basis of these letters, it is established that the prosecutrix was having love affairs with the accused Surya Prakash with whom she wanted to marry.

18. On the basis of the statement of the prosecutrix made by her as P.W. 1, this fact is borne out that she was carried from place to place, but she never raised any noise to attract other people towards them. She never made any complaint to any person. As is evident from the statement of the prosecutrix, she was carried to Kashipur and Moradabad bus stand, where large number of people were present, but she did not make any complaint to any person. It is stated by the prosecutrix at page 25 of the paper book that she did not cry after seeing the police personnel at Moradabad railway station. On the same page, the prosecutrix has further stated that she did not make any complaint to railway police personnel at Kashipur and in the train also, she did not tell any person that she is being carried forcibly by the accused persons, although about 50 persons were travelling in the bogi according to the statement made by her at page 25 of the paper book. Had the prosecutrix was being enticed or taken forcibly by the accused persons, then she could make complaint to any person in the train or to the police personnel at railway station Kashipur and Moradabad, but she did not make any complaint to them. It is stated by the prosecutrix at page 27 of the paper book that there was huge gathering of people at the bus stand Moradabad. On the same page, it is also stated by her that in the bogi of train also there was huge gathering of people. As stated hereinabove, the prosecutrix did not raise any noise or alarm to attract the people towards her and she did not make any complaint to any person about enticing or taking her forcibly by the accused persons. This conduct of the prosecutrix indicates that she was a consenting party in going with the accused Surya Prakash, with whom she was having love affairs and was making plan to marry him. Therefore, for the reasons mentioned hereinabove, I find force in the submission of learned counsel for the appellants that being more than 16 years of age at the time of alleged incident and being a consenting party in going with the accused Surya Prakash and having sexual intercourse, if any, by her will or consent, no offence against the accused persons is made out in present case.

19. Although the allegation of committing gang rape by the appellant Din Dayal, Surya Prakash and one third person Radhey Shyam has been labelled by the prosecutrix in her statement recorded in trial court, but no reliance can be placed on this statement. As stated hereinabove, allegation of committing rape by three persons does not get support from the medical evidence. P.W. 8 Dr. Km. Laxmi Nandan has stated at page 50 of the paper book that if sexual intercourse for the first time is committed three times by three persons, then vaginal tear would

come, but as stated by Dr. Km. Laxmi Nandan at page 48 of the paper book, no recent tear and laceration was found present in the vagina of the prosecutrix at the time of her medical examination on 11.04.1977. As stated by Dr. Nandan at page 48, the vagina of the prosecutrix was admitting two fingers tightly, which indicates that the allegation of committing gang rape by three persons with her is false. As stated hereinabove, making improvement in trial court, the prosecutrix has introduced Radhey Shyam also as accused. From the letters, which I have mentioned hereinabove, this fact is borne out that Radhey Shyam was well known to her. Had the complicity of Radhey Shyam was there in the alleged incident of committing rape, then she could name him at the time of her interrogation during investigation, but as stated by S.I. Satya Pal Sing (Investigating Officer), the prosecutrix did not name Radhey Shyam. It was also not stated by the prosecutrix at the time of her interrogation under section 161 Cr.P.C. that the accused Din Dayal @ Dina also had committed sexual intercourse with her. Therefore, for all these reasons, no reliance can be placed on the statement of the prosecutrix about committing rape with her by the appellant Din Dayal and third person Radhey Shyam. There is sufficient indication in the letters written by the prosecutrix that she and accused Surya Prakash were in deep love and they both were making plan to marry each other. As stated hereinabove, being above 16 years of age and consenting party in going with the accused Surya Prakash and having sexual intercourse, if any, no offence against Surya Prakash also would be made out.

20. In view of the foregoing discussion, I come to the conclusion that the learned trial court has not properly appreciated the evidence led by the prosecution. For the reasons mentioned hereinabove, this appeal has to be allowed, as the prosecution has not succeeded in bringing home the guilt to the accused persons.

21. Consequently, the appeal is allowed. The impugned judgment and order are set aside and the accused appellants Din Dayal @ Dina, Surya Kumar @ Surya Prakash and Vinod Kumar are hereby acquitted of the offences with which they have been charged.

22. The accused appellant Din Dayal @ Dina is in jail. He shall be set at liberty, if not required to be detained for some other case.

23. Rest accused appellants are on bail. They need not surrender. Their bail bonds are cancelled and the sureties are discharged.

24. The Office is directed to send a copy of this judgment immediately to the trial court concerned for necessary action and lower court record also be returned without causing any delay.