

(2012) 09 MP CK 0176

In the Madhya Pradesh High Court

Case No : Criminal Appeal No. 888 of 1998

Dinesh @ Vinod @ Durga

APPELLANT

Vs

The State of Madhya Pradesh

RESPONDENT

Date of Decision : 04-09-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173

Evidence Act, 1872 — Section 157

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

Citation : (2012) 09 MP CK 0176

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

Bench : Single Bench

Advocate : B.L. Pavecha, Assisted by Mr. Nitin Phadke, for the Appellant; Rahul Vijayvargiya, Learned Panel Lawyer for the State, for the Respondent

Final Decision : Allowed

Judgement

Hon"ble Shri Justice U.C. Maheshwari

1. The appellant / accused has filed this appeal being aggrieved by the judgment dated 23.07.1998 passed by the 2nd Additional Sessions Judge, Neemuch in Sessions Trial No. 62/1997, convicting and sentencing him under Sections 363, 366 and 376 of the Indian Penal Code for three years rigorous imprisonment with fine of Rs. 3,000/-separately in earlier two counts and for five years rigorous imprisonment with fine of Rs. 5,000/-in the last count; in default of depositing the fine amount in every section, some alternative imprisonment has been awarded. Facts giving rise to this appeal, in short, are that on 18.01.1997 one Radheshyam, father of the prosecutrix Mamta, lodged a missing person report at Police Station, Neemuch, contending that on 17.01.1997 his wife and daughter boarded the bus from Nimbaheda to Narayangarh. On the way at Neemuch, his daughter, after asking her mother that she is going to wear the sandal, stepped down from the bus. Thereafter, she did not come back, on receiving such information from his brother, he came to the Police Station and lodged the

missing person report (Ex. P-5). In the course of it's enquiry on recovery of the Mamta, it was revealed that under the criminal threat she was taken away by the appellant and committed intercourse contrary to her wish. On which the FIR for the offence of Sections 363, 366 and 376 of the Indian Penal Code was registered against the appellant. On medical examination of the prosecutrix, her MLC report was prepared. After holding the investigations, the appellant was charge-sheeted for the aforesaid offences.

2. After committing the case to the Sessions Court, on evaluation of the charge-sheet, charges of Sections 363, 366 and 376 of the Indian Penal Code were framed against the appellant. He abjured the guilty; on which, the trial was held. After recording the evidence on appreciation, the appellant was held guilty for the alleged charge and punished with the above mentioned punishment. Being dissatisfied with the conviction and sentence, the appellant has come to this Court with this appeal.

3. Shri B.L. Pavecha, learned senior counsel appearing for the appellant, after taking me through the record of the trial Court along with the impugned judgment by referring the ossification test report Ex. P/7 and the deposition of Dr. Umrao Singh Sisodiya (PW-10), argued that according to this report, the age of the prosecutrix was ascertained between 16 to 18 years, and as per the settled proposition, on application of the margin of error and variation with respect to the age i.e. two years, it could not be said that the prosecutrix was minor on the date of alleged offence, but such aspect was not taken into consideration by the trial Court. In continuation, he said that as per the trite law on appreciation if two possible views on the same issue is found in a criminal case, then the Court is bound to adopt the view, which is favourable to the accused. So in such premises, there was sufficient circumstance to draw an inference that the age of the prosecutrix was near about 19 years at the relevant time of the incident. Pursuant to it, he said that on holding such age of 19 years of the prosecutrix in the light of evidence, it was a case of consent as the prosecutrix went with the appellant with her consent and was not taken away against her wish or contrary to the consent of her parents. So in such premises, conviction of the appellant under Sections 363 and 366 of the Indian Penal Code is not sustainable. In continuation, he argued that if the initial case of the prosecution is accepted in its entirety, even then it could not be said that the prosecutrix was taken away by the appellant with force from the lawful custody of her parents, on the contrary on perusal of the deposition of the prosecutrix, it is apparent that on stationing the bus at Neemuch, she herself stepped down from the bus and without asking her mother. She went with the appellant and on the way from Neemuch till reaching the village Kotada where they stayed for some days, she did not make any complaint to any person. Only after her recovery on recording her statement in the enquiry of missing person report at the first time she stated some incriminating thing against the appellant and not prior to that. But on recording her deposition contrary to the case diary statement something more was stated by her. According to FIR, she was taken

away by the appellant under some fear while on recording the deposition the prosecutrix stated that she was taken away by the appellant under the threat of knife. Such material omission was not considered by the trial Court with proper approach. He further argued that in the available scenario, it should be assumed that due to some affairs the prosecutrix voluntarily went with the appellant and resided with him and alleged intercourse was also committed with her consent. In addition to it, by placing reliance on some decisions of the Apex Court as well as of this Court, he argued that as per record, in the course of enquiry of the missing person report, after recovery of the prosecutrix, the FIR was registered but for the reasons best known to the prosecution at trial, the same was neither proved nor marked exhibit on record. The first information report being basic foundation of the prosecution case unless the same is proved by cogent, admissible and reliable evidence, the appellant could not have been convicted in the impugned case. With these submissions, he prayed for setting aside the impugned judgment of conviction and sentence and extending the acquittal to the appellant by allowing this appeal.

4. On the other hand, responding to the aforesaid arguments Shri Rahul Vijayvargiya, learned Panel Lawyer by justifying the impugned conviction and sentence of the appellant submitted that the findings of the trial Court in this regard being based on proper appreciation of the evidence and is in conformity with the law, do not require any interference at this stage either for extending the acquittal or to reduce the jail sentence and prayed for dismissal of this appeal.

5. Having heard learned counsel for the parties, keeping in view their respective arguments, having carefully gone through the entire record of the trial Court along with the impugned judgment, I am of the considered view that due to the following reasons the impugned conviction of the appellant is not sustainable under the law.

6. As per the story of the prosecution, stated in former paras, the prosecutrix boarded the bus with her mother for Narayangarh from Nimbaheda. On the way, when the bus was stationed at Neemuch, the prosecutrix after asking her mother that she is going to wear sandal, stepped down from the bus, and thereafter, she did not come back, on which missing person report was lodged. In such premises, to prove the factum that the prosecutrix was taken away or kidnapped by the appellant from Neemuch, Smt. Gitabai, the mother of the prosecutrix, who was travelling with her, was the material witness but for the reasons best known to the prosecution instead of mentioning her name in the list of witnesses in the police report filed u/s 173 of the Criminal Procedure Code, she was not examined at the trial. Such non-examination of the material witness with respect to the incident gives a circumstance to hold the the case of prosecution suspicious.

7. Apart from the above, as per prosecution the prosecutrix and her mother were travelling in the bus in the day time and the alleged offence of kidnapping was

happened at Bus Stand, Neemuch. The Bus Stand of Neemuch is not so small place but it being a public place, it is assumed that various persons including the shop keepers, passengers and others were present there but it is apparent fact that after stepping down from the bus till reaching to village Kotada with the appellant the prosecutrix had neither made any complaint to any one nor annoyed in any manner that she was taken by the appellant without her wish. Although she tried to explain such circumstance on recording her case diary statement saying that she was taken away by the appellant by showing some fear, but on recording the deposition, she exaggerated such statement and stated that she was taken away by the appellant under the threat of knife. This material omission and inconsistency could not be discarded by the trial Court in a simpliciter manner specially when such story is not supported by any independent witness present at the bus stand and also at the places where she stayed for some days with the appellant. On going through the entire record if such thing is examined then it appears that prior to the incident there was some affairs between the appellant and the prosecutrix and due to that, she voluntarily after stepping down from the bus went with the appellant and resided with him and also permitted him to commit intercourse with her. So in such scenario, it is held that it is an apparent case of consent. My aforesaid approach is squarely based on the deposition of the prosecutrix (PW-8), in which she categorically stated that the appellant was known to her prior to the incident and the appellant took her away as his wife and thereafter they resided at the place of the appellant for some days and during such period, the alleged intercourse was carried out.

8. Pursuant to aforesaid finding of consent on further appreciation if it is found that the prosecutrix was aged between 16 to 18 years, then only the conviction of the appellant Sections 363 and 366 of the Indian Penal Code could be maintained and affirmed, but if such age is found more than 18 years, then such conviction of the appellant under Sections 363 and 366 of the Indian Penal Code could not be sustained.

9. True it is that according to the school certificate Ex. P/6 proved by Mukesh Nagda (PW-6) the Teacher of the Government Girls Middle School, Narayangarh, the date of birth of the prosecutrix is 01.01.1983 and in such premises, she was below 18 years of age, but it is apparent fact on record that in order to prove such certificate, the basic record / the application form of admission on which such date of birth was mentioned in the scholar register or even such scholar register has neither been produced nor proved on the record. Even the concerning person of the school who made such entry in the scholar register has also not been examined. As per the deposition of said examined teacher such original entry was not made by him, he proved only the certificate Ex. P/6 which was issued on basis of some record of the school which was neither produced nor proved by this witness also. So in the lack of aforesaid basic primary documents, the trial Court has not committed any error in not relying on such certificate Ex. P/6. I have found such finding of the trial Court is fully supported by the decision

of the Apex Court in the matter of Sunil Vs. State of Haryana, in which it was held as under:

19. The learned counsel for the appellant placed reliance on the judgment of this court in Birad Mal Singhvi Vs. Anand Purohit, In that case, the court observed that date of birth in the scholar's register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. The court observed as under:

14. ... The date of birth mentioned in the scholar's register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. The entry contained in the admission form or in the scholar register must be shown to be made on the basis of information given by the parents or a person having special knowledge about the date of birth of the person concerned. If the entry in the scholar's register regarding date of birth is made on the basis of information given by parents, the entry would have evidentiary value, but if it is given by a stranger or someone else who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value.

10. The trial Court has assessed and decided the age of the prosecutrix below 18 years by strictly relying on the ossification test report Ex. P/7 and the deposition of Radiologist Dr. Umrao Singh Sisodiya (PW-10).

11. In ossification test report of the prosecutrix (Ex. P/7) her age was ascertained between 16 to 18 years. But while considering such report the trial Court was bound to assess the age of the prosecutrix keeping in view the margin of error and variation of two years either side and it being a criminal case, such margin of error was to be adopted by the trial Court on the upper side as the same is favourable to the appellant.

12. On arising the occasion the principle to take judicial notice about the margin of error in age ascertained by radiological examination is two years on either side has been held by the Apex Court in the matter of Jaya Mala Vs. Home Secretary, Government of Jammu and Kashmir and Others, in following manner: -

9. ... Even on normal calculation, if seven months are deducted from the approximate age opined by the expert in October, 1981 detenu was around 17 years of age, consequently the statement made in the petition turns out to be wholly true. However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side.....

13. In view of the aforesaid in the light of ossification report to assess the age of prosecutrix on applying the principle of margin of error and variation of two years the age of the prosecutrix comes between 15 to 19 years on the date of incident and in view of the settled proposition that whenever and wherever on appreciation two possible views are found on the same issue in a criminal case, then the Court is bound to adopt the view, which is favourable to the accused. So

in such premises, in the available factual matrix, the age of the prosecutrix is hereby held to be more than 18 years and pursuant to it the finding of the trial Court holding the age of the prosecutrix below 18 years is hereby set aside.

14. Apart from the above, there is one more material lacuna in the prosecution case which made the prosecutrix case suspicious itself is sufficient to extend the acquittal to the appellant. It is an apparent fact that initially on lodging missing person report at Police Station, Neemuch nothing was stated against the appellant, but later in the course of it's enquiry, the prosecutrix was recovered and thereafter on her statement in such enquiry, the first information report was registered on 23.01.1997. True it is that the same is based on the roz namcha sanha dated 18.01.1997 Ex. P/5 the missing person report, but the investigation of the crime was started after registration of the first information report as Crime No. 40/1997 on 23.01.1997.

15. In such premises, the first information report being basic foundation of the impugned criminal case, the prosecution was bound to prove by admissible evidence but for the reasons best known to the prosecution, the same has neither been proved nor marked exhibit in the deposition of any of the examined witnesses including the investigating officer. Even the scribe of the same has not been examined. Non-marking the exhibit of the first information report the basic foundation of the case gives circumstance to draw an inference that the prosecution has failed to prove the basic foundation of the crime registered. In the lack of marking exhibit on FIR, the appellant has been deprived from his valuable right to cross-examine the prosecution witnesses including the prosecutrix with respect to the fact stated in the first information report. If the appellant has been deprived from such material right of the defence then he is also entitled for extending acquittal. My aforesaid approach is fortified by the decision of the Apex Court in the matter of Damodarprasad Chandrikaprasad and Others Vs. State of Maharashtra, in which it was observed, as under: -

13. ... The High Court was not wrong in holding that the first information report would be admissible u/s 157 of the Evidence Act. When the maker of the first information report was examined in the court the report was not tendered by the prosecution in accordance with the provisions of the Evidence Act. The appellants were denied the opportunity of cross-examination on the first information report. The first information report was therefore wrongly relied upon in evidence for the purposes suggested by the High Court.

16. Long back on arising the occasion in the matter of Parasram v. State of MP reported in 1970 MPLJ Short Note 115, this Court has also held as under: -

It can reasonably be expected that if the report had been favourable to the prosecution it must have been produced and its non-production is due to the fact that it does not support the prosecution version. It is settled law that the evidence not produced can be presumed to be against the party who should have produced it. It is quite possible that the incident may not have taken place at 6

p.m. but may have taken place during the night and D may not have seen the assailants. Be that as it may, non-production of the report creates a reasonable doubt as to the complicity of the accused in the commission of the crime.

In view of the aforesaid discussion, the impugned judgment holding the conviction and sentence against the appellant being perverse, contrary to the record and existing legal position is not sustainable; hence, by allowing this appeal, the same is set aside. Consequently, the appellant is acquitted from the above mentioned charges. The amount of fine, if deposited, be refunded to the appellant after proper verification. The bail bonds of the appellant are hereby discharged.

The appeal is allowed as indicated above.