
(2012) 09 MP CK 0268
In the Madhya Pradesh High Court
Case No : Criminal Appeal No. 408 of 2009

Gomti Bai

APPELLANT

Vs

State of M.P.

RESPONDENT

Date of Decision : 27-09-2012

Acts Referred:

Penal Code, 1860 (IPC) — Section 120B, 190, 366(A), 376(2)(g)

Citation : (2012) 09 MP CK 0268

Hon'ble Judges : Anil Kumar Sharma, J

Bench : Single Bench

Advocate : R.K. Sharma with Mr. Lokendra Shrivastava, for the Appellant; Prabal Solanki, Public Prosecutor for State, for the Respondent

Final Decision : Allowed

Judgement

Hon. Shri Justice Anil Kumar Sharma

1. By this common judgment, Criminal Appeal No. 408/2009 and Criminal Appeal No. 478/2009 arising out of one judgment dated 19.06.2009 passed in ST. No. 4/08 by learned Fifth Additional Sessions Judge (FTC), Morena, are being disposed of. Appellants have filed two separate appeals against the judgment dated 19.06.2009; whereby appellant Gomtibai (Cri. A. No. 408/09) has been convicted for the offence punishable u/s 366 (A) read with Section 120-B of IPC and sentenced to undergo R.I. for seven years and fine of Rs. 500/- has been imposed upon her, while appellants Jawant and Pratap (Cri. A. No. 478/09) have been convicted for the offence punishable u/s 376 (2)(g) of IPC and each of them has been sentenced to undergo R.I. for ten years and fine of Rs. 1000/- each has been imposed upon them. Appellant Pratap has further been convicted for the offence punishable u/s 366 (A) of IPC and sentenced to undergo R.I. for seven years and fine of Rs. 500/- has been imposed upon him.

2. The brief facts of the case are that on 23.07.2007, prosecutrix, P.W. 1 (the name of the prosecutrix is not being mentioned to hide her identity) went from

her house with accused Gomtibai and when she did not return, her father lodged a missing person report. After about seven days i.e. on 29.7.2007, prosecutrix (PW-1) was produced before the Police by Hukum Singh, Premabai, Rambai and other four persons. Thereafter, she was handed over to her father on 2.8.2007. When brother of prosecutrix came from Rajkot, prosecutrix lodged an F.I.R. alleging that she was abducted by Gomtibai and Pratap and she was taken to Delhi. Gomtibai came back after leaving her in a bus with Pratap and in Delhi she was kept in the house of Jaswant. Jaswant and Pratap subjected the prosecutrix for sexual intercourse several times.

3. After investigation challan has been filed against appellants and Hukum Singh and Premabai, who had brought the prosecutrix from Delhi and it is alleged that they threatened the prosecutrix not to lodge any report with the Police. Learned trial Court after trial of the appellants Pratap Singh for the offence punishable u/s 366 (A), 376 (2)(G) and Section 190 of IPC, against appellant Jaswant charges for the offence punishable u/s 366 (A), 376 (2)(G) and Section 190 of IPC, against Gomtibai, charges for the offence punishable u/s 366(A) read with Section 120-B of IPC, against co-accused Hukum Singh for the offence punishable u/s 366 (A) read with Section 120-B and 190 of IPC and against Premabai, charges for the offence punishable u/s 366 (A) read with Section 120-B of IPC and acquitted the appellants Hukum Singh and Premabai and convicted the appellants Gomtibai, Pratap and Jaswant as mentioned in paragraph 1 of the impugned judgment.

4. Being aggrieved by the judgment, appellants have filed both these appeals that learned trial Court is not justified in convicting them on the basis of non reliable and non corroborated testimony of prosecutrix PW-1. Further learned trial Court is not justified in holding that prosecutrix was minor at the time of incident. The learned trial Court has overlooked the fact that prosecutrix was knowing the appellant Pratap long before the offence and she has gone with her consent with Pratap. A false report has been lodged after consultation against the appellants who are close relatives of prosecutrix.

5. The main question for consideration in this appeal is whether learned trial Court is justified in convicting the appellants by the impugned judgment.

6. Learned counsel for the appellants has drawn attention towards the fact that on being brought to the Police Station from Delhi, prosecutrix (PW-1) has given statement Exhibit D-1 to the appellants in which she has stated that she came to the market with her bhabhi Gomtibai, where she met her brother-in-law Pratap who took her, with whom she went to her sister Rajkumari without informing her family members and she came back from Delhi with her sister and she has gone with her own. Learned counsel for the appellants has further drawn attention towards the statement of prosecutrix (PW-1) who has reported in her examination in chief that in the morning of 23.07.2007, she asked her mother to go to market with Gomtibai and her mother has refused. Thereafter, at about 12.00 in the afternoon, Gomtibai took her for getting medicines. Thereafter,

Gomtibai took her to ghat tiraha where she asked her to sit in a bus and she told the prosecutrix that she wants to meet her sister. Thereafter, she sat in the bus. Pratap joined from Jayaswar road and he was also sitting in the bus.

7. Learned counsel for the appellants has submitted that the prosecutrix in her evidence made a false allegation regarding gang rape by appellants Jaswant and Pratap. Although, the statement of prosecutrix is totally unreliable. Prosecutrix herself, her father Ramdas (PW-5) and brother Devendra (PW-7) have shown ignorance about the fact that they were knowing Pratap before the incident. They have also denied in relationship with Pratap and other appellants. Learned counsel for the appellants has drawn attention towards the statement of Ramnath (PW-8) who has stated that Ramdas is co-brother (Sadu) prosecutrix is daughter of Ramdas and wife of Ramdas, Vaikundibai is his sister-in-law. Surendera is father of Jaswant and brother-in-law of Ramdas (father of prosecutrix). Jaswant has married to Sukram's daughter Rajkumari. Shanti, who is sister of Ramdas and wife of Sukram. Pratap and Jaswant are brother-in-law. At the time of marriage of Rajkumari, Pratap came to Ambah and prosecutrix must be knowing him very well because Pratap is relative of Ramdas and he used to go to the house of Ramdas. In cross examination, he has admitted that Gomtibai is daughter-in-law of Ramdas' brother-in-law.

8. Learned counsel for the appellants has further drawn attention towards the statement of Hubblal (PW-9) who has also confirmed the relations between appellants and family of prosecutrix.

9. Learned counsel for the appellants have further drawn attention towards the fact Hubblal (PW-9) has been witnessed, who has informed the father of prosecutrix that prosecutrix (PW-1) has gone to the market with Gomtibai and when in the evening Gomtibai came back from market and she was narrated the fact that prosecutrix has gone to Delhi with Pratap. Therefore, on 23.07.2007, father of prosecutrix came to know about the fact that she had gone with Pratap to Delhi, he has lodged report of missing persons. Exhibit P-11 in which it has been mentioned in "B" to "B" part that prosecutrix has gone to the market, from where she had suddenly went some where. In Exhibit P-11, it has also mentioned that she had gone with Gomtibai.

10. Learned counsel for the appellants has further submitted that prosecutrix (PW-1) was produced before the Police on 29.7.2007 by relatives who were also living in neighbourhood. But she did not narrate anything about abduction or rape or gang rape in her statement recorded on 29.07.2007.

11. Learned counsel for the appellants have submitted that prosecutrix has lodged F.I.R. on 2.8.2007 against Pratap and Jaswant alleging gang rape with her at Delhi in the house of Jaswant. Reason for delay in lodging report has been mentioned as threat given to her in the report Exhibit P-1 and allegation of threat is against Pratap and Prembai who brought to her from Delhi to Ambah. On the other hand prosecutrix (PW-7) in her statement mentioned different

reason for delay in lodging report with her brother, who came from Rajkot on 29.7.2007. Thereafter, she went to Police to lodge report with her brother, father and mother. Thereafter, she was medically examined.

12. Learned counsel for the appellants has drawn attention towards the statement of brother of prosecutrix Devendra Singh (PW-7) who has stated that he was working in Gujarat for 4-5 months. Before that he was doing labour work at Ambah. Statement of six witnesses has been recorded on 17.04.2008 and offence has been committed on 23.07.2007 which is more than six months which means that on the date of incident, the brother was available at Ambah.

13. Learned counsel for the appellants has submitted that prosecutrix (PW-1) has, therefore, mentioned contradictory reasons for lodging delayed F.I.R. and none of which has been proved by evidence.

14. Learned counsel for the appellants has submitted that prosecutrix and accused Pratap were knowing each other long before the alleged incident. They have drawn attention towards the statement of Ajharali (PW-2) who has taken photographs of prosecutrix and Pratap on 7.1.2006. Negative of which is Exhibit D-3(O) and photograph is Exhibit D-3. Therefore, brother of prosecutrix and prosecutrix have admitted that Exhibit D-3 is photograph of Pratap and prosecutrix. Learned counsel for the appellants has submitted that the photograph of prosecutrix is about one and a half year back before the alleged date of incidents shows that they were having intimate relations.

15. Learned counsel for the appellants has submitted that learned trial Court has convicted the appellants mainly on the ground that prosecutrix has produced mark-sheet Exhibit P-4 in which date of birth of prosecutrix has been shown as 07.03.1990. Exhibit P-4 is certificate of primary examination held in 2000-2001. Learned counsel for the appellants has submitted that the Primary School certificate Exhibit P-4 has not been proved by producing the person who has given the certificate or who has admitted the prosecutrix in his school. Appellants have produced Dilip Kumar Sharma (DW-1) who is Principal of Swami Vivekanand Sanskrit Vidyalay, Ambah, since 2006, who has stated that prosecutrix had appeared in the examination of Xth in the year 2007 from his school. Her mark-sheet was annexed as Exhibit D-7. In cross examination, he has stated that prosecutrix was admitted in Class X after passing Class IX from other school.

16. Learned counsel for the appellant has drawn attention towards the statement of Dr. Ashok Singh (PW-13), who has stated that after taking X -ray of prosecutrix he has given opinion that prosecutrix is above 16 1/2 years and below 18 years. His report is Exhibit P-23. In cross examination, he has admitted that at medical examination definite age cannot be ascertained. He has further stated that age of prosecutrix is below 18 years which is between 17 to 19 years. He has admitted in cross examination that iliac bone is completed between 17 to 19 years. He has further admitted in his report that there is possibility of plus six

or minus six months.

17. Learned counsel for the appellants has submitted that in the absence of any evidence that for confirmation of age as mentioned in the school record by any other reliable evidence and further considering the fact that if the age of prosecutrix as mentioned in mark-sheet is taken reliable then she was about 17 years and four months.

18. Learned counsel for the appellant has cited judgment of Hon"ble Apex Court in the matter of Alamelu and another Vs. State Represented by Inspector of Police, (2011) 1 S.C.C. (Cri) 688 in which it has been held that medical evidence showing age of to be between 17 and 19 years, X-ray report giving approximate age to be between 17 and 18 years. Transfer certificate of a government school showing age not having been duly proved by witnesses who signed it. Therefore, prosecution failed to prove that girl was a minor at relevant date. There is no satisfactory evidence to indicate that she was a minor. Paragraphs 44, 45 and 46 of this judgment is reproduced as under:-

44. In our opinion, the aforesaid burden of proof has not been discharged by the prosecution. The father says nothing about the transfer certificate in his evidence. The Headmaster has not been examined at all. Therefore, the entry in the transfer certificate cannot be relied upon to definitely fix the age of the girl.

45. In fixing the age of the girl as below 18 years, the High Court relied solely on the certificate issued by P.W. 8 Dr. Gunasekaran. However, the High Court failed to notice that in his evidence before the court, PW 8, the x-ray expert had clearly stated in the cross-examination that on the basis of the medical evidence, generally, the age of an individual could be fixed approximately. He had also stated that it is likely that the age may vary from individual to individual. The doctor had also stated that in view of the possible variations in age, the certificate mentioned the possible age between one specific age to another specific age. On the basis of the above, it would not be possible to give a firm opinion that the girl was definitely below 18 years of age.

46. In addition, the High Court failed to consider the expert evidence given by PW 13 Dr. Manimegalaikumar, who had medically examined the victim. In his cross-examination, he had clearly stated that a medical examination would only point out the age approximately with a variation of two years. He had stated that in this case, the age of the girl could be from 17 to 19 years. This margin of error in age has been judicially recognized by this Court in Jaya Mala V. Govt. of J & K. In the aforesaid judgment, it is observed as follows (SCC p. 541, para 9).

9..... 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.

19. Therefore, there is no conclusive evidence on record that prosecutrix was minor on the date of incident, therefore, learned trial Court is not justified by holding that prosecutrix was minor without considering the fact that there is

possibility of plus 2 and minus 2 in the two years of age ascertained by radiologists. Prosecutrix has nowhere tried to escape or complained to anybody. She has admitted that she was travelled in a bus, she lived in the house of Jaswant, where family members of Jaswant were living and in neighbourhood Hukum Singh and Premabai were also living as neighbours at Ambah also but she never tried to tell them that she was brought against her will. Prosecutrix was knowing the appellant Pratap before the incident as it is clear from the photograph Ex. D-3. Photograph with appellant Pratap is Ex.D-3 has also been produced and particularly when she came back from Delhi to Ambah, she has not made any allegation to the Police regarding any incident with her. On the other hand she has lodged that she has gone by her own to Delhi to meet her sister Rajkumar. Her intention to go out is clear from her statement also in which she asked her mother to go with Gomtibai on the morning on 23.07.2007 and her mother refused to go with Gomtibai but even then she went with Gomtibai. Although, she has alleged that katta was shown to her and she was threatened by Jaswant and Pratap but her own statement is not reliable and no katta or arm has been seized from the Police. Therefore, it cannot be denied that prosecutrix had gone with Pratap due to her intimacy with her consent. The reason of delay in lodging F.I.R. has not been explained is not reliable. Report has been lodged after three days when prosecutrix came back from Delhi. Further her medical examination and chemical examination report cannot be taken as ground of conviction looking to the fact that prosecutrix PW-1 was consenting party in going with Pratap and allegation of gang rape after three days from coming back from Delhi may be in the pressure of family members or with some ulterior motive relating to dowry or amount to be paid by the husband in the community of prosecutrix. Therefore, learned trial Court is not justified in convicting the appellants by the impugned judgment. Therefore, both the appeals are allowed setting aside the impugned judgment appellant Gomtibai, is acquitted from the charges for the offence punishable u/s 366 (A) read with Section 120-B of IPC, Pratap is acquitted from the charges for the offence punishable u/s 366 (A) and 376 (2) (g) of IPC. Jawant is acquitted from the charges for the offence punishable u/s 376 (2)(g) of IPC. Appellants are in custody. They be released forthwith.