

(2011) 05 MP CK 0024

In the Madhya Pradesh High Court

Case No : Criminal Appeal No. 216 of 2004

Khemchand @ Taini

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

Date of Decision : 04-05-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 374
Penal Code, 1860 (IPC) — Section 363, 366, 375, 376

Citation : (2011) 2 JLJ 206 : (2011) 3 MPHT 279

Hon'ble Judges : U.C Maheshwari, J

Bench : Single Bench

Final Decision : Allowed

Judgement

U.C. Maheshwari, J.—Appellant/accused has directed this appeal u/s 374 of Code of Criminal Procedure being aggrieved by the judgment dated 25-2-2004 passed by 4th Additional Sessions Judge, Gwalior, in S.T. No. 195/03, convicting him under Sections 366 and 376 of Indian Penal Code, with the sentence for five years" RI with fine of Rs. 2000/-, in default of depositing the fine further three months" RI in the earlier section, while seven years" RI with fine of Rs. 3000/-, in default of depositing such fine further six months" RI in the later section, with a direction to run such sentence concurrently.

2. The facts giving rise to this appeal in short are that on 6-1-2003 one Pushpabai, the mother of Baby, the prosecutrix, lodged a missing person report with Police Inderganj, Gwalior stating that her aforesaid daughter has been missed from her home and in spite making efforts she could not trace her out. In the course of enquiry of such report a Crime No. 40/03 was registered against the Appellant for the offence under Sections 363, 366 and 376 of Indian Penal Code. In the course of enquiry the identity card and mark-sheet of the prosecutrix were seized. The missing daughter of said complainant namely Baby was also recovered by preparing Panchnama (Exh. P-4). She was medically examined. After recording the interrogatory statement of witnesses, making the

arrest of the Appellant, on conclusion of the investigation, prima facie on the basis of collected evidence it was found that the Appellant has committed the abovementioned offences with the prosecutrix Baby, on which he was charge-sheeted before the concerning Court of the Judicial Magistrate having the territorial jurisdiction over the matter.

3. After committing the case to the Sessions Court, on framing the charges of the aforesaid offence against the Appellant, he abjured the guilt, on which the trial was held in which after recording the evidence of prosecution as well as defence witnesses, on appreciation of the same holding the age of prosecutrix Baby more than 18 years, the Appellant was acquitted from the charge u/s 363 of Indian Penal Code while he was convicted for the offences enumerated under Sections 366 and 376 of Indian Penal Code with the punishment as stated above. Being dissatisfied with this conviction and sentence the Appellant has come forward to this Court.

4. Shri B.D. Mishra, Learned Counsel for the Appellant, after taking me through the evidence led by the prosecution as well as by the defence along with the exhibited papers from the record of the Trial Court, said that it was the apparent case of a consent. In continuation, by referring some part of the deposition of the prosecutrix Baby (P.W. 5), he said that on asking her by the Appellant to go with him at some place namely Gol Pahadiya for bringing the wheat, which were led by her mother there, she without verifying such fact from her mother went with the Appellant with her own consent without any hesitation and objection on his Hero Puch auto-bike. He also argued that Gol Pahadiya and Deen Dayal Nagar are situated in different direction from each other and when the prosecutrix was being taken by the Appellant towards Deen Dayal Nagar side instead of Gol Pahadiya, she neither cried nor objected such conduct of the Appellant. Not only this, but after reaching to the place of some relative of the Appellant at Deen Dayal Nagar, with her consent she resided there with the Appellant for two days and during that period she neither cried nor made any complaint to any person of such locality. By referring further deposition of the prosecutrix he stated that subsequent to said two days she also visited various places with the Appellant where she consented to the Appellant to commit the intercourse with her and till the recovery of the prosecutrix by the police in the abovementioned missing person report she did not make any complaint to anyone at any of the places visited by her with the Appellant. In continuation he also said that after holding the age of the prosecutrix more than 18 years taking into consideration the aforesaid her conduct whereby she visited the various places with the Appellant and also consented the Appellant to commit the intercourse with her, the Trial Court ought to have acquitted the Appellant from the abovementioned charges but contrary to the available evidence he has been convicted and sentenced under the wrong premises. According to his submission, whenever the alleged act of intercourse is committed by the accused like Appellant with the major girl like prosecutrix after taking her with her implied consent with him then the person like Appellant could not be held guilty for the offence of kidnapping or

abduction of the prosecutrix with intention to commit intercourse or any other offence stated u/s 366 of Indian Penal Code and, in such premises, it could not also be inferred that he has committed the offence of rape defined u/s 375 and made punishable u/s 376 of Indian Penal Code. With these submissions he prayed for setting aside the impugned judgment of conviction by extending the acquittal to the Appellant by allowing this appeal. He also placed his reliance on a decision of the Apex Court in the matter of Uday Vs. State of Karnataka, and of this Court in the matter of Peeru v. State of M.P. reported in 1996 (I) MPJR SN 4.

5. On the other hand, responding the aforesaid arguments Shri J.M. Sahni, learned Penal Lawyer by justifying the impugned conviction and sentence of the Appellant said that the same being based on proper appreciation of evidence and also in conformity with law does not require any interference for extending the acquittal to the Appellant and prayed for dismissal of this appeal.

6. Having heard the Counsel keeping in view their arguments. I have carefully gone through the record of the Trial Court and also perused the impugned judgment.

7. True it is that at the initial stage one Pushpabai, the mother of the prosecutrix Baby (P.W. 5), lodged a missing person report with respect of the prosecutrix stating her age to be 17 years and on that basis enquiry of such missing person was held and after recovery of the prosecutrix and holding the investigation of the case stating her age to be 17 years the Appellant was charge-sheeted for the offences of Sections 363, 366 and 376 of Indian Penal Code. But, on appreciation of the evidence as per finding of the Trial Court, the age of the prosecutrix was found more than 18 years and in such premises it was categorically held by the Trial Court in Para 25 of its judgment that the prosecution has failed to prove the age of the prosecutrix below 18 years and in such premises the Appellant was acquitted from the charge u/s 363 of Indian Penal Code. So, at this stage, keeping in view the fact that the prosecutrix was more than 18 years of age on the date of incident, this Court has to consider and adjudicate this appeal.

8. In view of the aforesaid age of the prosecutrix more than 18 years, if on re-appreciation of the evidence it is found by this Court that she went with the Appellant with her own consent and with all understanding to know its consequences then the impugned conviction and sentence of the Appellant could not be sustained in this appeal and in such premises the Appellant deserves to be acquitted in the matter.

9. In order to examine the question of aforesaid consent of the prosecutrix, I have gone through the entire deposition of the prosecutrix. In Para 2 of her chief of deposition she categorically stated that she was all alone at her residence when the Appellant came to her home and asked her to accompany with him for bringing the wheat from some Gol Pahadiya as alleged, which were kept at such place by her mother, on which without verifying such position from her mother by leaving home she accompanied with the Appellant went on his Hero Puch auto-

bike. It appears that she was acquainted with geographical position of Gwalior, according to which, Gol Pahadiya and Deen Dayal Nagar were situated in different dimension of the town and when instead Gol Pahadiya she was taken by the Appellant to Deen Dayal Nagar, on the way she did not make any resistance either by crying or otherwise while passing away from the open market before reaching Deen Dayal Nagar and thereafter she remained there for two days, as per the allegation contrary to her wish, where she was also subjected to rape by the Appellant and clothes were also torn by the Appellant but I have not found anything in the chief saying that during that period any resistance was made by the prosecutrix either by crying or otherwise to inform the residents of the locality. In Para 3 of the deposition she stated that subsequent to aforesaid two days she was taken by the Appellant to Village Maharajpura at the residence of his sister and thereafter from such place she was taken to Gudi Guda Ka Naka where she resided with the Appellant in a house of the sister-in-law of the Appellant. Thereafter the Appellant had taken some room on rent at such place. She repeatedly stated that at every place where she was kept by the Appellant, she was subjected to rape by the Appellant. Meanwhile, she also tried to inform her parents through telephone but the same was obstructed by the Appellant. Para 4 of the her deposition appears to be very material in the matter, in which she stated that while they were residing in some house at Gudi Guda Ka Naka, the police came there and brought her to Inderganj Police Station, at that time the Appellant was not at the residence but he went for the work at his working place. It shows that even in the absence of the Appellant the prosecutrix was voluntarily residing in the house of the Appellant and in spite availability of the chance to run away from his house she never left the house of the Appellant but because of the intervention of the police she was brought to the aforesaid Police Station. In such premises and on the basis of the in-chief of the prosecutrix it is established that she voluntarily with her own consent went with the Appellant and resided at various places and also committed the intercourse with him with her own consent.

10. Apart the above, on going through the cross-examination of the prosecutrix Paras 8 and 9 she categorically stated that while going with the Appellant from her residence to Gol Pahadiya she did not cry saying that she is being taken by the Appellant contrary to her wish. She further stated that she was also taken by the Appellant to the Collectorate at Gorkhi, Gwalior where some documentation with her signatures was also carried out. In the premises of the Collectorate she did not tell anything to any other person informing that the Appellant is getting the documentation of the marriage from her forcefully and contrary to her wish. She further stated that after such documentation some photographs of them were taken out by the photographer. Although in the remaining cross-examination she repeatedly stated by saying that she remained with the Appellant under the threat of life and criminal intimidation, but on perusing the entire cross-examination of this witness I have not found the circumstance destroying the abovementioned version of the prosecutrix stated by her in the

chief of her deposition.

11. In the aforesaid premises when on the basis of deposition of the prosecutrix itself the case of consent has been established then the appreciation of the depositions of any other witnesses does not appear to be necessary. Even on perusing the same, I have not found the circumstance in the same establishing any of the material facts proving the alleged offences against the Appellant. Long before considering the identical circumstances with some different factual scenario the aforesaid question of consent was answered by the Apex Court in the matter of Uday (supra), and also by this Court in the matter of Peeru (supra), cited by the Appellant, and ultimately on the basis of the consent of the prosecutrix the concerning accused was acquitted from the charge under Sections 366 and 376 of Indian Penal Code.

12. In view of the aforesaid discussion and the legal position, it is held that the prosecutrix being major girl of more than 18 years went with the Appellant with her own consent and thereafter with her consent the alleged intercourse was committed by the Appellant with her. So in such premises it could not be inferred that she was abducted or kidnapped by the Appellant for any unlawful purpose or with intention to commit intercourse forcefully with her. Therefore, in such premises it is held that the offence of rape, kidnapping or abduction has not been proved against the Appellant and in such premises the approach of the Trial Court holding the guilty to the Appellant for such offences is held to be perverse and contrary to law. The same deserves to be set aside.

13. Therefore, by allowing this appeal the impugned judgment holding conviction and sentence against the Appellant for the abovementioned Offences is hereby set aside, pursuant to it the Appellant is acquitted from the abovementioned alleged charges of Sections 366 and 376 of Indian Penal Code. It appears from the record that the Appellant is on bail, hence his bail bonds are hereby discharged. If the amount of fine imposed by the Trial Court is deposited by the Appellant, then after proper verification the same be refunded to him under intimation to this Court.

14. Appeal is allowed as indicated above.