

(2012) 10 MP CK 0090
In the Madhya Pradesh High Court
Case No : Criminal Appeal No. 2324 of 1996

Lallu @ Latif Ahmad

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

Date of Decision : 08-10-2012

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 363, 366, 376, 376(1)

Citation : (2012) 10 MP CK 0090

Hon'ble Judges : N.K. Gupta, J

Bench : Single Bench

Advocate : A.K. Jain, for the Appellant; Ajay Tamrakar, Panel Lawyer for the State, for the Respondent

Judgement

Hon"ble Shri Justice N.K. Gupta

1. The appellant has preferred this appeal against the judgment dated 26.12.1996 passed by the 2nd Additional Sessions Judge, Katni in S.T. No. 588/93, whereby the appellant was convicted and sentenced for the offences as under:-

All the sentences to run concurrently

The prosecution's case, in short is that, on 22.5.1993 at about 1:00 p.m. in the noon, the prosecutrix (PW-7) aged about 14 years went to submit a form of her supplementary examination to her school at village Tikuri (Police Station Tikuri, District Jabalpur). Thereafter, she did not return to her house. Her father Badri Prasad Jaiswal (PW-2) had submitted a written report Ex. P/2 about her missing. After 4-5 days, the prosecutrix appeared before the police officer of the Police Station, Tikuri and narrated the entire story that she was taken by some persons and the appellant was the person, who took her on his motorcycle and committed rape with her for so many times in the last 4-5 days. The prosecutrix was sent to the Government Hospital, Katni for her medico legal examination. Dr. Rupa Lalwani (PW-3) examined the prosecutrix and gave her report Ex. P/3. No

external or internal injury was found on her person. Similarly, no bleeding was found on the private parts of the prosecutrix. Two slides of her vaginal swab were prepared and handed over to the concerned Constable, after sealing them, for forensic analysis. Thereafter, the appellant was arrested and he was also sent for his medico legal examination. Dr. Arvind Chaudha (PW-8) examined the appellant and gave his report Ex. P/4. Nothing abnormality was found to the appellant. Two slides of his semen were also prepared and handed over to the concerned Constable after their sealing for forensic analysis. The Forensic Science Laboratory found the semen and sperm on the all the slides. After due investigation, a charge sheet was filed before the J.M.F.C. Katni, who committed the case to the Sessions Court, Jabalpur and ultimately, it was transferred to the 2nd Additional Sessions Judge, Katni.

2. The appellant abjured his guilt. He did not take any specific plea, but it was submitted that he was falsely implicated in the matter due to enmity relating to the land. However, no defence evidence was adduced.

3. The learned 2nd Additional Sessions Judge, after considering the prosecution's evidence acquitted all other accused persons, but convicted the appellant for the offences punishable under Sections 363, 366 & 376(1) of I.P.C. and sentenced him as mentioned above.

4. I have heard the learned counsel for both the parties at length.

5. The learned counsel for the appellant has submitted that the story of the prosecutrix appears to be improper and unbelievable. In her case diary statement, she told something else and she turned the story before the trial Court. She remained with the appellant for 4-5 days without any resistance, whereas she had a lot of opportunity to make hue and cry or to inform the police but she did not act in such a manner and therefore, it would be clear that she went with the appellant by herself and hence, she was consented with the appellant to do the intercourse. Though, age of the prosecutrix was shown to be 14 years but looking to her physical appearance as depicted by Dr. Lalwani, she was above 18 years of age. According to the age given for her sisters and brothers, she appears to be above 18 years of age and therefore, the appellant could not be convicted for any offence in the case. In alternate, it is submitted that the appellant remained in the custody for six months and therefore, it is prayed that he may not be sent to jail again. In this respect, the judgment passed by the Hon"ble Apex Court in the case of "Ravinder Singh Gorkhi Vs. State of U.P." [(2006) SCC (Cri) 632] was referred, in which it is laid that if no statement has further been made by the Head Master that either by the parents of the prosecutrix, who accompanied her to the school at the time of her admission therein made any statement or submitted any proof in regard thereto, then such entries cannot be considered as the proof of age of the concerned student. Learned counsel for the appellant has also referred the judgment of the Hon"ble Apex Court in the case of Jackaran Singh Vs. State of Punjab, but after perusal of that judgment, it appears that it is not relevant in the present case,

because it relates to the offence punishable u/s 302 of I.P.C.

6. On the other hand, learned Panel Lawyer has submitted that the conviction and sentence directed by the trial Court appears to be appropriate and therefore, it is prayed that no any change is required in the appeal.

7. After considering the submissions made by the learned counsel for the parties and looking to the facts and circumstances of the case, it is to be considered as to whether the prosecutrix was above 18 years of age at the time of incident? Whether the appeal filed by the appellant can be accepted; and whether the sentence directed against him can be reduced?

8. The prosecutrix (PW-7) told before the Court that her date of birth was 21.9.1979 but she did not give any basis by which she told her date of birth. On the contrary, G.S. Smith (PW-12) Head Mistress of the Primary School Ordinance Factory, Katni has submitted that in the school record, the date of birth of the prosecutrix was mentioned as 15.6.1979. Smt. Smith could not show as to who recorded the date of birth of the prosecutrix at the time of her admission and what was the basis shown by the parents of the prosecutrix at the time of her admission. Badri Prasad (PW-2) and Ganeshi Bai (PW-4) father and mother of the prosecutrix could not tell the exact date of birth of the prosecutrix and therefore, a possibility cannot be ruled out that at the time of her admission, date of birth of the prosecutrix was mentioned according to the memory or without any specific document. Under such circumstances, where there is a contradiction between the date of birth shown by the prosecutrix given at her school, it cannot be said that the entry of the school register is correct and therefore, age of the prosecutrix cannot be assessed on the basis of a such school entry.

9. Badri Prasad (PW-2) and Ganeshi Bai (PW-4) father and mother of the prosecutrix have stated about the age of their various children. Badri Prasad has stated that his marriage took place when he was only 12 years old and Gouna took place after three years. After two years of Gouna, he was blessed with a girl child. He deposed his age to be 51 years at the time of his evidence. It appears that his eldest daughter was 34 years of age at that time. Badri Prasad has further submitted that he got 8 children in all. Out of them, one boy and one girl had expired. The prosecutrix was 4th child of his family. On the other hand, Ganeshi Bai (PW-4) has stated that the prosecutrix was youngest daughter of her family. The prosecutrix has admitted in her cross-examination that she had an eldest sister, who was married to the family of village Badona. Thereafter, Sharada Prasad (PW-5) her brother was born then, her 2nd sister born who was married to the family of village Churhat and 3rd sister was married with the same family at Sidhi. She has two brothers, wherein Sharada Prasad is eldest and another brother is youngest to the prosecutrix. The sister who was married in the family of Churhat was called as Sushila.

10. According to the description given by Badri Prasad, the difference of two and

half years may be considered between the age of their children and his eldest daughter was 34 years of age, whereas Sharda appears to be 31 years of age and then, Sushila could be of 28 years of age at that time. However, Sharda was examined before the Court, who told his age to be 27 years then, the age of Sushila could be of 24 years of age at the time of incident and age of younger sister to the sister Sushila could be of 21 years of age. No description was given that the children of Badri Prasad, who had expired were the elder to the prosecutrix or not and therefore, by such a calculation it cannot be said that the prosecutrix was above 18 years of age.

11. In the circumstances, it is apparent that the age of the prosecutrix cannot be finalized with the help of her educational records as well as the data's given by her parents. Dr. Lalwani (PW-3) did not compute the age of the prosecutrix in her medical report but she referred the prosecutrix for ossification test, but no ossification test was performed and no report has been submitted before the Court. However, Rupa Lalwani (PW-3) found in her report that the breasts of the prosecutrix were well developed and similarly her pubic hairs and axillary hairs were also dense and fully grown. Similarly, she had 28 teeth in her mouth. Looking to the development of her secondary sex character, it appears that the prosecutrix at least 16 years old at the time of incident. Learned counsel for the appellant has submitted that two years may added in computation and it may be presumed that the prosecutrix was above 18 years of age at the time of incident, but it is not a radiologically examination in which error of two years may cause in computation. If educational activities of the prosecutrix is seen then, she was admitted in the school for the first time, when she was six years old and in 5-6 years, she could get the examination of 5th class cleared from school in the year 1990 and thereafter, she could not get clear the examination of class-6th. Under such circumstances, her age cannot be assessed to be more than 17 years of age at the time of incident. Though, the entries of the school records cannot be based for the calculation but a raw information is received from such entry and therefore, looking to the entire educational records and activities of the prosecutrix alongwith her development of secondary sex characters, her age appears to be 16-17 years at the time of incident.

12. Learned counsel for the appellant has placed his reliance upon the judgment passed by the Division Bench of this Court in the case of "Munnalal Vs. State of M.P." [1977 J.L.J. 731], in which it was observed that if the parents of the victim were silent about the time of her date of birth and if the prosecutrix is not proved to be below 18 years of age then, the accused person cannot be held for the guilty of offence punishable u/s 363 of I.P.C. In the present case, the parents have given the assessment relating to the age of the prosecutrix and also looking to her secondary sex characters, she appears to be 16 years of age approximately and therefore, it is established that she was below 17 years of age. Hence, the observations made in the judgment passed by the Division Bench of this Court in case of Munnalal (supra) cannot be applied in the present case.

13. The prosecutrix has stated that the appellant took her to Panna, where they stayed for a night then, they went to Gwalior, where they stayed for a night, then Kanpur where they stayed for one night and thereafter, he took her to Lucknow at the house of his aunt. At such all places, he committed rape upon the prosecutrix, where they stayed in various hotels and similar places. It is strange that the prosecutrix did not make any hue and cry when, the appellant was committing rape with her. No resistance was shown by the prosecutrix. In her medico legal examination, no old injury was found on her person, either external or internal. Under such circumstances, looking to the conduct of the prosecutrix, it appears that she was a consenting party and therefore, the appellant could not be convicted for the offence punishable u/s 376 of I.P.C.

14. The prosecutrix has stated that she was given some intoxication in the Prasad by Datta and Gulab and therefore, she became unconscious and thereafter, the appellant took her on the motorcycle. Such story was not mentioned by the prosecutrix in her case diary statement. She had shifted the entire story from her case diary statement. If she was in intoxication by some Prasad etc. then, she could not sit on the motorcycle independently, whereas she has stated that motorcycle was driven by the appellant and there was no 3rd person to hold the prosecutrix and therefore, the story of intoxication by Prasad appears to be incorrect. In her case diary statement, she had stated that a letter was given through other accused persons to get her dresses ready to elope with the appellant and thereafter, she had 2-3 of her dresses and left with the appellant. It appears that in the statement before the Court, the prosecutrix turned from her previous version to the statement which were contrary and additional to her case diary statement, which cannot be taken as such because they are afterthought. The prosecutrix remained with the appellant for 4-5 days without any resistance and she did not make any hue and cry at that time when they passed from various townships on the motorcycle. She did not say anything to the employees of various hotels etc. She did not try to inform the police. On the contrary, she has accepted in her case diary statement that when the police checked them, she told that the appellant was her brother and she saved the appellant by not telling the actual truth to the police officers. Under such circumstances, it is apparent that the prosecutrix left her house by her own will and joined the appellant. Under such circumstances, it cannot be said that the appellant abducted the prosecutrix for any such purpose that she would be sexually exploited against her will. Under such circumstances, the appellant cannot be convicted for the offence punishable u/s 366 of I.P.C. The learned 2nd Additional Sessions Judge has erred in convicting the appellant for the offence punishable u/s 366 of I.P.C.

15. It is apparent from the testimony given by the prosecutrix that it was the appellant, who accompanied her from the very beginning and he took her on the motorcycle. The appellant took a defence that he had some enmity with the witness Sohanlal (PW-6) and therefore, he had falsely implicated him, but the testimony of the prosecutrix is believable on this count that it was the appellant,

who took her. As discussed above, the prosecutrix was below 18 years of age and therefore, before taking her, the consent of her parents must have been taken by the appellant. It is clear from the statement of Trilok Singh and Sohanlal that they did not know that the appellant took any permission from the parents of the prosecutrix and hence, the appellant has committed the offence punishable u/s 363 of I.P.C. The learned 2nd Additional Sessions Judge has rightly convicted the appellant for the offence punishable u/s 363 of I.P.C.

16. So far as the sentence is concerned, the appellant was a youth of 22 years of age at the time of incident but he has not any ground in his favour by which he could be released on probation. However, he was a youth of 22 years of age at the time of incident and such mistake could be caused in such a tender age. He remained in the custody for six months during the trial and appeal. He faced the trial and appeal for last 19 years. Under such circumstances, it would be proper that he may not be sent to jail again but some heavy fine may be imposed upon him for the offence committed by him.

17. On the basis of aforesaid discussion, the appeal filed by the appellant appears to be partly accepted and therefore, it is hereby partly allowed. The conviction as well as the sentence directed by the trial Court for the offences punishable u/s 376(1) & 366 of I.P.C. are hereby set aside. He is acquitted from the charges of said offences. However, the conviction for the offence punishable u/s 363 of I.P.C. is hereby maintained but the sentence is reduced to the period, which he has already undergone in the custody, whereas the fine amount is enhanced from the sum of Rs. 250/- to the sum of Rs. 7,000/-. In default of payment of fine, the appellant shall undergo for one year's R.I. The appellant is directed to deposit the fine amount within two months" from today.

18. Presence of the appellant is no more required before this Court and therefore, it is directed that his bail bonds shall stand discharged. A copy of the judgment be sent to the trial Court alongwith its record for information and compliance.