

(1989) 08 MP CK 0068
In the Madhya Pradesh High Court
Case No : Criminal A. 244 of 1986

Nattu	Vs	APPELLANT
State of M.P.		RESPONDENT

Date of Decision : 22-08-1989

Acts Referred:

Criminal Law (Amendment) Act, 1983 — Section 376
Penal Code, 1860 (IPC) — Section 366, 376

Citation : (1990) CriLJ 1567

Hon'ble Judges : S.D. Jha, J

Bench : Single Bench

Advocate : Amarsingh, for the Appellant; S.K. Pawanekar, for the Respondent

Final Decision : Dismissed

Judgement

S.D. Jha, J.—The appellant Bhalia was convicted under Sections 366 and 376, I.P.C. by judgment dated 20-5-1986 delivered by the Additional Judge to the Court of Sessions Judge, Jhabua Camp, Alirajpur in Sessions Trial No. 428 of 1985 and sentenced to suffer 2 years" R.I. on the first count and four years R.I. on the second count. By the same judgment the appellant Nattu was convicted u/s 366, I.P.C. and sentenced to suffer 2 years" R.I. and another appellant Sekdiya was also by the same judgment convicted u/s 366, I.P.C. (but he is reported to have died during the pendency of this appeal) and sentenced to two years" R.I. The two appellants through this appeal challenge their conviction and sentence.

2. The prosecution case is that on 5-5-1985 at about 7 a.m. from near village Kosariya the two appellants with deceased appellant Sekdiya kidnapped or abducted Islibai (P.W.1) said to be 14 or 15 years of age, in order that she may be married to the appellant Bhaila and subjected to illicit intercourse by him. First she was taken to the house of deceased appellant Sekdiya and then to the house of the appellant Bhaila. The appellant Bhaila is said to have forcibly sexually assaulted Isli. The incident of taking away was witnessed by Ugarsingh (P.W.3) Chhelbai (P.W.5) who informed Nayakda (P.W.4), father of Islibai. On the

next day Nayakda (P.W.4) lodged F.I.R. (Ex. P/2) which was written down by Bhanwarsingh Chauhan (P.W.6). Bhanwar Singh recovered Islibai from the house of the appellant Bhaila on 6-5-1985 and she was sent for medical examination. Dr. Pratima Mukherji (P.W.2) vide her report (Ex. P/1) found one simple injury on Islibai. She could not, however, express any opinion about sexual intercourse having been committed on Islibai. She found that Islibai was between 19 to 21 years of age. After usual investigation challan was put up against the appellants.

3. The two appellants Bhaila and Nattu pleaded not guilty to charges under Sections 366 and 376, I.P.C. They denied all material allegations and pleaded false implication. They examined Narju (D.W.1) and Barju (D.W.2) to prove that Nayakda was willing to compound the matter on being paid Rs. 2000/- and two goats while accused Bhaila was willing to pay Rs. 1000/- and give one goat. Two appellants and the deceased appellant Sekdiya were convicted and sentenced as stated above.

4. At the hearing to the appeal Shri Amarsingh, learned counsel for the appellant submitted that evidence has been misappreciated and there is no corroboration to story of Isli (P.W.1). She is a grown up healthy woman and no injury was found on her person. Hence offences under Sections 366 and 376, I.P.C. are not made out. It was further submitted that the appellants are tribals being Bhils of Jhabua district and the custom of Bhagoriya marriage by elopment/capture is prevalent amongst them. According to this custom the girl and the man run away and have sexual intercourse; thereafter there is bargaining with the father and other relatives of the girl. Usually boy pays some amount to the father or relatives of the girl and two of them are married. If the bargain is, however, not settled, quarrel takes place and report is lodged in the police leading to prosecution. According to him in the instant case Nayakda (P.W.4) had demanded Rs. 2000/- and two goats from the appellant Bhaila and Bhaila could not pay the same amount and this false report is lodged against him.

5. During the pendency of this appeal before this court an application was filed (I.A. No. 661/89) urging that the appellants, the prosecutrix Isli and her father Nayakda have compounded their differences with the appellants and did not wish to prosecute the appellants. On the day of hearing on 5-7-1989 prosecutrix Islibai and her father Nayakda appeared before this court. On being questioned the two stated that they had compromised the matter with the appellants and they did not want them to be sentenced to imprisonment.

6. Shri Amarsingh submitted that in view of the application for composition the sentence may be suitably reduced to period already undergone. In support of his argument Shri Amarsingh relied on the following decisions: Ram Pujan and Others Vs. State of Uttar Pradesh, and judgment dated 9-10-1986 passed by this court in Cri. Appeal No. 422/83 (Rajaram v. State of M.P.).

7. Shri Pawanekar submitted that on the evidence led by prosecution, offence under Sections 366 and 376, I.P.C. against the two appellants was made out.

About reduction in sentence urged by Shri Amarsingh, he had no comments to make.

8. The appellants were charged u/s 366 for kidnapping and abducting Mst. Islibai (P.W.1). The evidence on the point of age of Mst. Islibai is that of Dr. Pratima Mukherji (P.W.2), who on the basis of her physical examination as per report, (Ex. P/1) opined that Mst. Islibai is between 19 to 21 years of age. Looking to her age the question of her being taken or enticed out of guardianship on the point of kidnapping is not material, for rape; she was above the age of consent.

9. The point now to be examined is whether Mst. Islibai was by force compelled or deceitful means induced by the accused or any of them to go from any place and whether the accused appellant Bhaila had sexual intercourse with her against her will or without her consent or with her consent, when her consent has been obtained by putting her in fear of death or of hurt. The main evidence against the appellants is afforded by prosecutrix Isli (P.W.1) herself, Ugarsingh (P.W.3) and Chhelbai (P.W.5). Mst. Islibai has stated that she was going to market with Ugarsingh, Chhelbai and others. On the way absconding accused Bhangda asked his companions to catch hold of her, accused Bhila caught hold of her; deceased accused Sekdiya, absconding accused Shanker and Natda (Natu) caught hold of her legs and all four accused lifted her, in spite of her protest. She has further stated that all the accused were armed with bows and arrows and on her protesting deceased accused Sekdiya dealt three or four blows on her back with bow. She was taken by the accused Bhaila and Natda (Natu) to accused Bhaila's house. On her crying accused Bhaila threatened her that if she wept he would cut her throat. She has also stated that accused Bhaila told her that she would have to become his wife otherwise he would cut her throat. He fell her down on a cot, removed her clothes and had sexual intercourse with her by thrusting his male organ in her private part. According to her he had sexual intercourse with her twice. She was recovered by police from Bhaila's house next day.

10. Ugarsingh (P.W.3) and Chhelbai (P.W.5) both testify to accused Bhaila, Natu, absconding accused Shanker and deceased accused Sekdiya catching hold of Mst. Islibai and taking her away and beating her. They also say that Mst. Islibai while being taken away was protesting. Nayakda (P.W.4) father of Mst. Islibai, speaks about Ugarsingh informing him about accused Bhaila, deceased accused Sekdiya, accused Natda and absconding accused Shankar forcibly taking her away. The witness lodged F.I.R. (Ex. P/2) at Bhaktagarh Police Station on 6-5-1989 at 9 a.m. next day, which was written down by Bhanwarsingh Chouhan (P.W.6). The F.I.R. recites that Chhelbai and Ugarsingh informed Nayakda about accused Bhaila, accused Natda, absconding accused Shankar and deceased accused Sekdiya catching hold of Mst. Islibai and beating her while taking away and Mst. Islibai protesting while being taken away.

11. Nayakda (P.W.4) also testifies that when Islibai was recovered from the house of accused Bhaila she told him that accused Bhaila had forcibly sexual

intercourse with her.

12. It is true that Dr. Pratima Mukherji found that Mst. Isli had old tear of hymen. She had no injuries on her private part or on her back but she complained of pain in the back. The witness could not express any opinion about recent sexual intercourse with Mst. Islibai but absence of positive opinion of recent sexual intercourse or about finding of injury on person of Islibai is of no importance looking to Mst. Islibai's version that she was threatened with death by accused Bhaila. It appears that she passively submitted to sexual intercourse by accused Bhaila and she did not put resistance due to threat of death put out by accused Bhaila.

13. As for the defence witness Narju (D.W.1) and Barju (D.W.2) deposing that Nayakda, father of Isli, for compounding the offence wanted Rs. 2000/- and two goats and accused Bhaila was willing to pay Rs. 1000/- and one goat to him. It is sufficient to say that offences u/s 366 and 376, I.P.C. are legally not compoundable.

14. From the prosecution evidence discussed above it is amply established that accused appellant Bhaila and Nattu forcibly took away Mst. Isli and accused Bhaila had sexual intercourse with her against will and without her consent.

15. As for the application of composition, offences under Sections 366 and 376, I.P.C. are both non-compoundable. Offence of rape of this nature is punishable with imprisonment for life or with imprisonment for 10 years or fine and the minimum sentence prescribed for the same is seven years. The recent amendments made by Criminal Law (Amendment) Act 1983 in Section 376 show that the present legislative policy is to view offences against women seriously.

16. As for Shri Amarsingh's argument that amongst Bhils there is custom for forcible capture of women reconciling into a marriage; it is difficult to take legal notice of custom opposed to law be it in the tribals or non-tribals. Besides the learned Additional Judge has for the offence of rape u/s 376, I.P.C. awarded the appellant Bhaila less than the prescribed minimum sentence of 7 years R.I. The sentence of two years R.I. awarded to appellants Bhaila and Nattu for offence u/s 366, I.P.C. in view of the application presented in this court, and taking into consideration the two decisions referred to in para 6 of the judgment above, would call for some reduction in the sentence. The sentence of two years R.I. awarded for the offence u/s 366, I.P.C. is reduced to a period of six months R.I.

17. As a result of discussion aforesaid, conviction of the appellant Bhaila under Sections 366 and 376, I.P.C. and that of appellant Nattu u/s 366, I.P.C. are maintained. The sentence of two years R.I. for offence u/s 366, I.P.C. is reduced to a period of six months R.I. Except for this modification in sentence the appeal otherwise fails and is hereby dismissed. The appellants are on bail, they shall surrender and serve out remaining sentence.