
(1996) 10 KAR CK 0028

In the Karnataka High Court

Case No : Criminal Appeals No's. 487 with 540 of 1991

S. Krishna

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 30-10-1996

Acts Referred:

Penal Code, 1860 (IPC) — Section 376, 511

Citation : (1998) CriLJ 785

Hon'ble Judges : M.F. Saldanha, J;H.N. Narayan, J

Bench : Division Bench

Advocate : N. Dwarakanath and Konanuru N. Chandrashekhara, for the Appellant; S.R. Bannurmah, Spl. Public Prosecutor, for the Respondent

Judgement

Saldanha, J.—This pair of appeals arises out of judgment and order dated 26-7-1991 in Sessions Case No. 60/88. The appellant in the first of the appeals is the original accused who stood charged with having committed an offence punishable u/s 376, I.P.C., in so far as on 14-6-1987 at about 9 a.m., he is alleged to have enticed Kum, J. Padmavathy, hereinafter referred to as the victim, to a lonely place where he had taken her on a bicycle on the false pretext that he would procure a certain form for her and it is alleged that he had overpowered the girl at that spot and that he had committed an act of rape. The girl had thereafter come back crying and P.W. 8 Ankamma, who is her grandmother, was informed by her that she had sustained injuries on her genitals. Ankamma waited until P.W. 1 Madaiah, who is the father, and P.W. 11 Mahadevamma, who is the mother, came back to their home and she informed them about what had happened. Since the victim was in considerable pain and discomfort and was also crying, her mother initially told her to wash herself with cold water and thereafter, took her to the local hospital for medical attention. The Doctor Rajarathnam, who is P.W. 3, was the medical officer who ascertained the case history from the girl. The victim disclosed the nature of the incident as also the name of the accused, Krishna, being the person who had sexually assaulted her. The Doctor conducted a physical examination and also took a swab test and

sent the swab for chemical analysis. The Doctor came to the conclusion that there were injuries to the external genitals and the surrounding area and that this was a case of rape and he therefore, directed the parents to take the girl to the police authorities. The complaint of the father was thereafter recorded and the investigation commenced, the accused was arrested and subsequently came to be chargesheeted and put up for trial. The learned Sessions Judge, after a detailed evaluation of the evidence on record, came to the conclusion that the charge had been proved, but for a variety of reasons that have been recorded in the judgment, particularly, the fact that the accused was a young man, the Court imposed a sentence of 15 months R.I. Against this order, the accused has preferred Criminal Appeal No. 487/91 and the State of Karnataka has preferred Criminal Appeal No. 540/91 for enhancement of sentence. Both the appeals have been heard together. The learned S.P.P. has argued the matter in considerable detail and so as the learned counsel who represented the accused.

2. On behalf of the State, the learned S.P.P. has taken us through the entire evidence and he has pointed out that undoubtedly there was some delay in the lodging of the complaint before the police, but that there was a valid reason for it in so far as the parents had complained about the matter to the elders of the village who in turn, decided that the Village Council or the Panchayath must meet on the very next day and evolve a suitable solution. The accused and his parents were present at this meeting and the record indicates that he is alleged to have admitted what had happened between him and the victim and the decision given by the Panchayath was that since the girl was aged about 10 years and at that time, that the accused must undertake through an agreement executed on stamp paper to marry her on her attaining majority after a period of 8 years. The document in question was executed, but it is contended that shortly thereafter, the brother of the accused arrived at the village and created a scene stating that whatever happened, his family would never agree to the terms of the settlement. In view of this development, the father P.W. 1 went to the police and lodged his complaint. The learned S.P.P. submits that in this background, the delay that would otherwise have been perhaps detrimental to the prosecution case, cannot at all be held against the prosecuting authority or the victim. He has also sought to rely strongly on the observations of the Supreme Court in the latest decision on the point reported in *State of Punjab Vs. Gurmit Singh and Others*, . We are in agreement with the submission canvassed by the learned S.P.P. because the Courts are more than conscious of the hesitation which is principally because of sociological consequences and many other pressures that have the effect of deterring the victims in rape cases from approaching the law enforcement authorities at the earliest point of time. Unlike in the case of other serious offences, therefore, the delay alone cannot ipso facto be treated as being fatal to the prosecution if it is validly explained and more importantly because, the Courts have always taken cognizance of the fact that often times, an effort is made to secure corrective action as has happened in the present case during the interim period. We specifically referred to this aspect of the matter because, the

learned counsel who represented the accused, submitted that the accused was economically better-off than the family of the victim and that this was virtually a blackmail attempt to force him to marry the girl at some future point of time and that the Court must discard and discredit the evidence of the victim and her parents the moment it is shown that they were desirous of the decision of the Panchayath being given effect to and were not interested in even approaching the police earlier. We do not accept this submission because it is clear to us from the record that the parents, as any parents would have done, tried to avoid the distasteful consequences to the victim girl by choosing a course of action that would give a garb of respectability to the problem irrespective of the background and if, only on the breakdown of that arrangement, they approached the police authorities, they were perfectly justified in doing so. We do not see any reason why the evidence should be construed as being tainted on this ground.

3. The learned S.P.P. has taken us through the evidence of the victim Padmavathi, who is P.W. 12. She has, irrespective of her young age, very clearly cogently described the incident. She knew the accused from childhood and he was obviously a friend of hers and he had enticed her to come with him on the bicycle on that morning on the pretext that he would secure a form for her. She has indicated how he took her to a lonely place, how he held her mouth and committed a sexual assault on her. Unlike as happens in many such cases, she has described in no uncertain terms as to what precisely happened and the learned trial Judge has accepted her evidence which has been virtually unshaken in cross-examination, and has based the conviction essentially on this. The learned S.P.P. submits that this was an absolutely correct appraisal, whereas his colleague on the other side has seriously attacked the evidence. He states that the victim is a child and that she had been heavily tutored by her parents and his submission is that in all cases of rape, the evidence of the victim can only be relied upon provided there is unimpeachable medical and forensic evidence. The learned counsel points out to us that in cases where force is used against a woman, that there are invariably other injuries on the body which take place because of her resistance, and that strangely enough, no such injuries were found on the person of the victim in this case. As regards this argument, it is well-settled law that in a large number of such instances, the victim is either overruled or traumatized as a result of which, the victim is unable to resist or does not put up a resistance and the mere absence of the injuries would not necessarily mean that the victim has either consented or that the incident has not taken place. We take note of the fact that the accused was much older than the victim who was only about 10 years of age, that obviously he was physically much stronger than her and that when he overpowered her at a lonely place, that there was very little resistance that she could have at all put up. The absence of other injuries on her body therefore, would not avail the accused at all.

4. The more important submission canvassed by the accused learned counsel is that the medical evidence in this case, according to him, does not support the

prosecution. He has failed on the fact that the swab which was taken by the Doctor has resulted in a negative report from the Chemical Analyser in so far as no spermatozoa was detached on it. Learned counsel submits that this conclusively shows two things, firstly, that there was no penetration and secondly, that the victim was not raped at all. Again, we need to take note of the fact that in rape cases, even though, the medical evidence and forensic evidence is of critical importance, that having regard to the manner in which delays occur particularly on the part of the investigating authorities and the worthy persons who are in charge of public hospitals and the careless manner in which exhibits and clinical samples are taken and stored, that merely because the medical evidence is not positive or the forensic evidence is not positive, is no ground on which perfectly good and acceptable oral evidence should be discarded. In the present case, the learned S.P.P. has emphasized the fact that the incident took place at about 9 a.m. and that it was shortly thereafter that the girl was found by her grand-mother. It was only in the evening that her parents returned and the girl herself states that she had washed and wiped herself, but there is positive evidence of the girl's mother that since she was crying and complaining of pain and discomfort, that she once again insisted that she should wash herself. We have also taken note of the age of the girl who was a mere child and the learned S.P.P. has taken considerable pains to bring to our notice the references in Modi's Medical Jurisprudence and other accepted authorities on medical jurisprudence wherein it has been clearly pointed out that where sexual assault is on an infant or a young child that invariably penetration in the normal sense of the term could hardly have taken place. The swab test therefore, in this background and particularly after the victim has repeatedly washed herself, would certainly indicate nothing.

5. On the other hand, the learned S.P.P. has heavily relied on the document Ex. P-4 which has been issued by the Medical Officer at the earliest point of time when the parents took the girl to him for examination. This certificate in no uncertain terms indicates that the Doctor did find injuries on the genitals of the victim as also in the surrounding area. The certificate in no uncertain terms states that the girls had been raped and also indicates the name of the accused which had been disclosed by the girl when the case history was asked for. This certificate has been duly exhibited and the learned S.P.P. submits that it virtually concludes the matter. In our considered view, this document is of crucial importance. It is true that the accused learned counsel has seriously attacked this certificate on two grounds, the first being that the C.A. Report of the swab according to him, destroys the theory of rape and secondly because, the Doctor when he gave evidence, has virtually been treated as a hostile witness because he has gone to the extent of opining that no rape had taken place. We shall deal with the Doctor's evidence separately, but we need to record that Ex. P-4 totally and completely corroborates the evidence of the victim as also that of her parents and her grandmother.

6. Another ground of attack from the defence was in relation to a vital piece of

evidence in rape cases namely, the clothes of the victim. Invariably, in a case of sexual assault which is accompanied by force, the clothes are torn or mutilated and more importantly, there are tell-tale pieces of evidence such as bloodstains and semen stains on the clothes. On behalf of the accused, a strong submission was canvassed that if the incident had at all taken place in a thorny area, that the clothe would have been torn because, the girl states that she was overpowered, and further more that she has herself stated she was bleeding a little bit and also that she had wiped herself with her clothes. The learned counsel submitted that the dress in this case has been found to be intact, that it was not torn and that the police also found, which is confirmed by the C.A. Report, that there was neither blood stains nor semen stains on the dress. It was therefore, contended that the absence of this evidence is the strongest circumstance in favour of the accused. We do not dispute the fact that in certain situations, that would be the position because a Court would invariably look for corroboration from the medical and forensic evidence, but we need to also take cognizance of the intervening circumstances, the delay that occurs and the manner in which these cases are handled both in the police stations and the hospitals all of which could often contribute to a serious damage to this head of evidence. In the present instance, the mother of the girl has stated that since they come from a very poor strata of society, that she had taken the dress of the girl and washed it. It was handed over to the police several days later and in this background, whatever stains that could have normally been found on those clothes have obviously vanished by the time the clothes reached the police.

7. The real question that arises is as to whether in serious offence such as rape, a conviction can be based on the uncorroborated evidence of the victim. If the evidence is 100% reliable and absolutely trustworthy, there is nothing to stop a Court from basing a conviction on that material alone but as a rule of caution, the Courts invariably look to some sort of supportive evidence. In the present case, the evidence of the girl is corroborated by her father, her mother, her grandmother and P.W. 4 Sumithra who is her companion, to a limited extent. More importantly, we find that the document Ex. P-4, namely, the out-patient chit issued by the Doctor at the earliest point of time, totally supports the evidence of the victim. On probabilities, we find it impossible to accept that a 10 year old girl could fabricate an incident of this type or that she could depose about it at the instance of her parents because, the Medical Certificate Ex. P-4 conclusively establishes that the charge of sexual assault is in fact, true.

8. There is one other head of evidence which the learned S.P.P. has relied upon strongly, which is Ex. P-3, namely the agreement entered into on stamp paper after the meeting at the Village Panchayath, P.W. 10 Puttasiddaiah is the scribe of that document and the witnesses have deposed to the fact that the accused admitted the incident in question and that the elders were of the view that if he agreed to marry the girl, the matter could be resolved on that basis. It is this admission which the learned S.P.P. is relying upon and he submits that there is no area of doubt that survives once this evidence is taken into consideration. The

accused's learned advocate has submitted that this material should be totally discarded by the Court. It is his case that an extra judicial confession which has been extorted from a party particularly if it is demonstrated that it was obtained by exercising coercion or through an inducement, would be hit by the provisions of Section 24 of the Evidence Act and is therefore, inadmissible. The position in law is quite clear and the learned counsel drew our attention to the fact that the record indicates that the Panchayath meeting took several hours before it was concluded and that the accused was kept standing during that period. His case is that the accused was pressurised, that he has threatened, that admissions were attributed to him and that the confession in question was anything but voluntary. It would be extremely difficult to uphold this challenge because, the accused in this case was undoubtedly asked to appear before the Village elders, but we see little justification in the plea that his having admitted to the incident was under duress. This is small village, the incident was a serious one and having regard to the fact that everybody had come to know about it, the accused could never have got away with a denial. What is more important is that he was a resident of that village, a youngster and we are inclined to believe that in the absence of legal advice, that he would have normally told the truth in the presence of his parents and elders. In any event, where an admission in writing has been recorded, the onus of establishing that it is hit by certain information shifts to the party pleading the same and we do not find the defence having discharged such a burden. The objection therefore, does not survive.

9. The accused's learned counsel vehemently submitted that the totality of the evidence cannot result in a conviction u/s 376, I.P.C. because even if it is taken at its highest, that the first necessary ingredient of an offence of rape is penetration and he submits that having regard to the medical evidence, that this ingredient has not been established. We need to observe here that the oral evidence of Dr. Rajarathnam - P.W. 3 is more than unsatisfactory and we have no hesitation in holding that he was certainly approached. Despite the fact that he has been treated as a hostile witness and cross-examined, he has tried to side with the accused and we take a serious view of this fact particularly since the man was a Government Doctor. It is unfortunate that a professional while dealing with a serious case of the present type, has attempted to give evidence which is nothing short of perjury, but this fact does not necessarily prove fatal to the prosecution. We do recommend that the concerned authorities take appropriate disciplinary action against the concerned doctor after affording him a reasonable opportunity to show cause because, this Court cannot take a lenient view particularly of situations where heinous offences involving sexual assaults on minors take place, and the very medical authorities which should be instrumental in assisting the administration of justice in bringing such persons to book are found to join hands with the culprits and subvert the due process of law.

10. We have extensively referred to the document Ex. P-4 and to the evidence of the victim and we have no hesitation in holding that this evidence conclusively establishes a sexual assault on the victim Padmavathy. Having regard to her age

and the fact that she was virtually a child of tender years and the fact that there is no conclusive evidence of the fact that the act of rape was completed, it is necessary for us to record the finding that this is a case in which the accused will have to be convicted of the offence of attempted rape punishable u/s 376 r/w. Sec. 511, I.P.C. The law for good reason, prescribes that where such an offence has been committed on a minor, that the sentence shall be not less than 10 years R.I., though a Court has a discretion of awarding a lesser sentence in appropriate cases where extenuating circumstances are present. In the case of an attempt, the law provides for the imposition of half of that sentence. We are not willing to take into consideration any extenuating circumstances in this case though several have been pleaded. Rape is the most heinous form of affront to female dignity. The accused was aged about 17 years at that point of time and we do not accept that a person of that age can be condoned for a sexual assault on a girl of tender years. This is a case in which, there are aggravating circumstances, because it is clear that some of the witnesses have turned hostile. Witnesses do not turn hostile on their own accord and the only test which a Court can apply is the question as to who is the beneficiary when a witness resiles and the inevitable answer is that the accused who is facing the trial is the only direct beneficiary. We do not believe that the witnesses, particularly the Doctor, could have turned hostile at the instance of anybody other than the accused and if these were the tactics that were adopted, no extenuating circumstances can be taken into account on the facts of the present case.

11. The conviction recorded against the accused stands altered to one u/s 376 r/w. Sec. 511, I.P.C. and it is directed that the accused shall undergo R.I. for a period of five years. We also direct that the accused shall pay a fine of Rs. 2,000/- and in default, R.I. for one month. The fine, if recovered, to be paid over by the trial Court to the victim Padmavathy.

12. The order passed by the trial Court is accordingly modified. Criminal Appeal No. 487/91 is dismissed. Criminal Appeal No. 540/91 is allowed. It is directed that the order of this Court be transmitted to the trial Court for further appropriate action according to law.

13. Order accordingly.