
(1999) 1 Crimes 1 : (1998) 76 DLT 324 : (1998) 2 ILR Delhi 864

Delhi High Court

Case No: Criminal Appeal No. 308 of 1977

Mahabir Parsad

APPELLANT

Vs

State

RESPONDENT

Date of Decision: Oct. 6, 1998

Acts Referred:

- Penal Code, 1860 (IPC) - Section 353, 356, 360

Citation: (1999) 1 Crimes 1 : (1998) 76 DLT 324 : (1998) 2 ILR Delhi 864

Hon'ble Judges: Dalveer Bhandari, J

Bench: Single Bench

Advocate: Ms. Venonica Mohan, amices curia, for the Appellant; Ms. Mukta Gupta, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Dalveer Bhandari, J.

This appeal is directed against the Judgment of the Learned Additional Sessions Judge, Delhi, by which the appellant Mahabir Parsad was convicted under Sections 363, 366 and 376, IPC.

Brief facts necessary to dispose of this appeal are recapitulated as under:-

2. In this case, the accused appellant is very closely related to the prosecutrix. The prosecutrix, Vidya Devi, is the sister-in-law (his wife's younger sister) of the accused. The appellant, a hawker, was married to Sushma, the elder sister of the prosecutrix. Sushma was a patient of Tuberculosis and so the accused was keen to marry the prosecutrix Vidya Devi.

3. Shyam Lal, PW-1, maternal uncle of the prosecutrix lodged a report with the Police that his sister's daughter Vidya Devi was living with him for about 1-1/2 years and that the accused was residing in the house adjacent to his house have been missing since

31.7.1975. Shyam Lal further mentioned in the FIR that Sushma was suffering from T.B., so the accused did not keep her with him. Mahabir Parsad, appellant expressed his keen desire to marry Vidya Devi, but did not agree.

4. Shyam Lal further stated that on 31st July, 1975, at about 8.30 P.M. when he returned to his house after attending to his usual business of vending kulfi on a rehri, he found that Vidya Devi was not present at his house. On enquiry, he found that Mahabir Parsad was also not present at his house. So, he suspected that Mahabir Parsad, accused, had abducted Vidya Devi with the intent to marry her. The investigation was started on his lodging the report. On 28.8.1975, about a month after the lodging of the FIR, an informer gave the information to the Sub Inspector Jai Chand that Mahabir Parsad was present with Vidya Devi in a room at Nabi Karim, Pahar-ganj, New Delhi. The Sub Inspector along with some other constables had gone to the aforesaid premises and found Mahabir Parsad accused along with Vidya Devi present inside the room. The Investigating Officer recorded the statement of Vidya Devi u/s 161 Cr. P.C. and produced her before the court and her statement u/s 164 CR. P.C. was recorded on 17.5.1977. In that statement, she stated that about one year and 9 months ago, the accused/appellant came to the house of her maternal uncle Shyam Lala and asked her to accompany him to the Bazaar. The accused took her in a three-wheeler scooter to the Railway Station and from there the accused took her to Etah, UP. She further mentioned in her statement that when she was near the Raja Garden, she asked him as to where he was taking her, the accused instead to reply had shown her a knife and threatened her she got frightened and became silent due to the fear of knife.

5. She further stated in her statement that the accused took her to Dharamshala, and kept her there for 20-22 days, and there he had committed rape on her many a time without her consent. She further stated that the accused had taken her to Katchla for a holy dip in the Ganges. From there, the accused brought her to Delhi and kept her in the house of one Babu Lal at Nabi Karim, Paharganj, New Delhi. In her cross-examination, she stated that she never admitted to any school. She mentioned that because of the threat of knife she did not raise an alarm and stayed with the appellant for all these days. In the cross-examination, she had mentioned that she was about 14 years of age at the time of the incident.

6. The mother of the prosecutrix Mohar Shree, PW. 6 was also examined. According to her, the age of the prosecutrix was about 16 years when her statement was recorded on 17.5.1977. The prosecutrix was examined by Dr. M.C. Bhatia, Radiologist on 1.9.1975. According to his, the age of the prosecutrix was merely 15 years. He had mentioned in his evidence that this is an approximate age with variation of one year. He further submitted that it is correct that age may vary up to 2 years due to climatic, die tic and hereditary differences. The prosecutrix was also examined by Dr. S. Chaudhry, PW-5, on 29.8.1995. The doctor, in his statement had deposed as under:-

"No injury mark on the body. Breasts are developed. Axillary hair present. P.V. examination: There is no injury mark on the vagina and public part. Labia majorae well developed. Vagina orifice admits two fingers easily. Hymen ruptured i.e. recent rupture duration 30 hours. Referred to radiologist for determination of age. My report is Ex. PW5/A which is in my handwriting, bears my signature and is correct. I have tallied her with the mark of identification given her PW5/A. She is the same girl whom I medically examined."

7. The doctor in his statement also stated that according to his report, the prosecutrix Vidya Devi had started sexual life six months back.

8. On examination and scrutinising of the entire evidence on record, the uncontroverted facts which emerge are mentioned in the succeeding paragraphs.

(a) The prosecutrix and accused are close relations.

(b) The prosecutrix for about one year and nine months stayed in the house of her maternal uncle Shyam Lal which is adjoining to the house of the accused.

(c) The sister of the prosecutrix and wife of the accused, Sushama, was suffering from Tuberculosis and the appellant was not keeping her with him, Therefore, the appellant was very keen to marry Vidya Devi and, on a number of occasions he had proposed to Vidya Devi also.

(d) From 31.7.1975 to 28.8.1975, prosecutrix stayed with the accused. She had gone to Etah, U.P. and other places along with the accused. At no place she had raised any alarm and mentioned it to anyone that the accused had forcibly taken her away. Her Explanation is that because of the fear of knife. She did not mention it to anyone. This Explanation is difficult to be believed in the facts and circumstances of this case when for almost 29 days she was away with the accused. The prosecutrix had visited a number of places, but she did not mention it to anyone about her forcible abduction.

9. The conduct of the prosecutrix clearly reveals that she had gone voluntarily with the accused who was her brother-in-law. The age of the prosecutrix was about 16 years. From the facts and circumstances on record, it is clear that the prosecutrix had gone with the accused voluntarily.

10. The other important aspect which needs to be considered is that in case the prosecutrix was a minor, then her consent becomes irrelevant. According to the statement of the prosecutrix, her mother and the radiologist, she was in between 14 and 16 years of age at the time of incident. The radiologist in his evidence had clearly stated that the age which he had given is approximate and the age may vary up to two years due to climatic, dietetic and hereditary differences.

11. In this case, since the accused was not represented by an Advocate, Therefore, this Court appointed Ms. Veronica Mohan, Advocate as amicus curiae on 5.5.1998. Ms. Mohan placed reliance on [Shyam and another Vs. State of Maharashtra](#). In this case, the prosecutrix was abducted but she did not put up a struggle or raised an alarm while being taken away by the accused. The court reached the conclusion that in such a situation, the prosecutrix is to be considered a Willing party to go with the accused on her own.

12. She also placed reliance on State Vs. Musha & Others (1970) 2 Delhi 198. In this case, the Division Bench of this court placed reliance on the judgment of [Kishori Lal Raghbir Dass Vs. The State](#). In the said judgment of Punjab High Court, it is mentioned that "An X-ray ossification test may provide a surer basis for determining the age of an individual than the opinion of a medical expert, but it can be no means be so infallible and accurate a test as to indicate the correct number of years and days he has lived. Hence the opinion of a medical expert based on such test cannot be regarded to be conclusive, particularly, when the difference in the approximate age stated by him and the one fixed by S.363, I.P.C. is not wide."

13. On consideration of the entire evidence on record and the judgment cited at the bar, if there can be difference of two years, even in the ossification tests, in that event, the benefit of doubt has to go to the accused. On application of the said principle the prosecutrix was more than 16 years of age when the alleged offence had taken place. It had already been concluded that she had voluntarily gone with the accused. In that event, the accused cannot be convicted for an offence u/s 376, IPC, and his conviction u/s 376, IPC is accordingly set aside. However, from the evidence on record, it is clearly established that she was below 18 years of age when she was taken away by the accused. Therefore, the appellant's conviction u/s 353, 356 and 360-A, IPC is upheld. Admittedly, the accused had already undergone part of the sentence. Now the question arises whether the accused should be sent to jail for undergoing the remaining part of the sentence after a lapse of 23 years.

14. Their Lordships of the Supreme Court in the case of [B.G. Goswami Vs. Delhi Administration](#), observed as under:

"Now the question of sentence is always a difficult question, requiring as it does, proper adjustment and balancing of various considerations which weigh with a judicial mind in determining its appropriate quantum in a given case. The main purpose of the sentence broadly stated is that the accused must realise that he has committed an act which is not only harmful to the society of which he forms an integral part but is also harmful to his own future, both as an individual and as a member of the society. Punishment is designed to protect society by deterring potential offenders as also by preventing the guilty party from repeating the offence; it is also designed to reform the offender and reclaim him as a law abiding citizen for the good of the society as a whole. Reformatory, deterrent and punitive aspects of punishment thus play their due part in judicial thinking

while determining the question. In modern civilised societies., however, reformatory act is being given somewhat greater importance . Too lenient as well as too harsh sentence both lose their efficaciousness. One does not deter and the other may frustrate thereby making the offender a hardened criminal. In the present case, after weighing the considerations already noticed by us and the fact that to send the appellant back to jail now after seven years of the agony and harassment of these proceedings when he is also going to lose his job and has to earn a living for himself and for his family members and for those dependent on him, we feel that it would need that ends of justice if we reduce the sentence of imprisonment to that already undergone but increase the sentence of fine from Rs. 200/- to Rs 400/- Period of imprisonment in case of default will remain the same.

15. In [Ramesh Kumar Gupta Vs. State of Madhya Pradesh](#) , while referring to the judgment of B.G. Goswami Vs. Delhi Administration (supra), the sentence of imprisonment was reduced to the period already undergone, in a case where the accused was convicted u/s 161 of the Prevention of Corruption Act.

16. While acquitting the accused u/s 376 IPC, his conviction under Sections 353, 366 and 360-A, IPC is upheld and the sentence of the accused is reduced to the period already undergone. The court would like to place on record its deep sense of appreciation for the able assistance provided by learned amices curiae in this matter.

17. The appeal is partly allowed and disposed of accordingly.