State Of Karnataka vs Sureshbabu Puk Raj Porral on 8 October, 1993

Equivalent citations: AIR1994SC966, 1994CRILJ1216, 1993(3)CRIMES600(SC), JT1993(6)SC48, 1993(4)SCALE27, (1994)1SCC468, AIR 1994 SUPREME COURT 966, 1994 CHANDLR(CIV&CRI) 483

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Bench: G.N. Ray

ORDER

K. Jayanchandra Reddy, J.

1. This is an appeal by the State. The respondent, who at the time of the occurrence was aged 20 years, was convicted by the trial court under Sections 366 and 376 I.P.C. and sentenced to five years R.I. under such count. The sentences were directed to run concurrently. He preferred an appeal to the High Court. The High Court set aside the convictions and sentences awarded against him and accordingly allowed the appeal. Hence the present appeal.

2. The prosecutrix Madhubala, P.W. 7, who according to the prosecution was aged about 15 years at the time of occurrence, was residing with her parents P.Ws 1 and 5 Devar Hippargi Village. She is the fifth daughter of P.Ws 1 and 5 and her four elder sisters were already married. Her elder brother was residing at Davangere and her younger sister P.W. 2 was also residing alongwith P.Ws 1 and 5. P.W.I originally belonged to Rajasthan. He came to Davar Hippargi Village about 7 or 8 years ago for the purpose of his grocery business. His shop was opposite to cloth shop of the accused who was the son of cousin brother of P.W. 1. The accused and P.W. 1 were having monetary transactions with each other and the accused used to visit the house of P.W. 1. At the time of a fare in the Village, the accused asked P.W. 7 to accompany him to Bangalore to see the city. ON 30.12.76 P.W. 1 was away and P.W. 2 was sitting in the grocery shop. P.Ws 5 and 7 were at home. At about 11 A.M. the younger sister of the accused went to the house of P.W. 1 and asked P.W. 7 to go to the Bus Stand with a view to go to Bangalore alongwith the accused. PW. 7 and the sister of the accused went to the Bus Stand. The accused and P.W. 7 boarded a has and went to Bijapur and from there they went to Hubli on the same day. They purchased some articles there. Thereafter they went to Ajanta Lodge and stayed there in a double room. According to P.W. 7, on that night the accused did something to her which he ought not to have done by force. However, both of them continued to stay at Hubli for 2 or 3 days and the accused had sexual intercourse with her. From Hubli they came to Bangalore. There again they stayed in a double room for 5 or 6 days and used to see pictures daily. From there they went to

Gulbarga and there they stayed for two days. After two days the accused left Gulbarga taking the necklace, chain ear-rings etc. of P.W. 7, and saying that he would go to Bijapur and come back.

3. Meanwhile P.W. 5, who did not find her daughter, P.W. 7 at home, asked P.W. 2 to search for P.W. 7. In the evening P.W. 1 returned and coming to know that the accused had kidnapped her, gave a complaint. Then ultimately on some information they went to Gulbarga. There P.W. 1 found P.W. 7 in a room of Mohan Lodge but the accused was not there. According to the prosecution P.W. 7 told him that the accused had gone to Bijapur taking her ornaments. P.W. 1 brought P.W. 7 to Bijapur and then took her to Deval Hippargi. The police took some articles from her possession and sent he for medical examination. The Doctor, P.W. 20 did not notice any external injuries nor any injuries on her private parts. The Doctor found that the hymen was ruptured which only showed that P.W. 7 had intercourse and the Doctor also opined that PW.7 was accustomed to intercourse since long. The accused was arrested on 29.1.77 at Bijapur. After completion of the investigation, the charge-sheet was laid. The accused in his statement stated that he was arrested on 15.1.77 at Devar Hippargi itself and the police took his watch, ring, chain and necklace etc. which belonged to him and they did not belong to P.W.7. He also pleaded that P.W.I, who owed him Rs. 6,000/- has falsely implicated him. He produced one birth extract and one transfer certificate pertaining to P.W. 7. The trial court mainly relying on the evidence of P.W. 7 convicted the accused under Section 376 I.P.C. for the offence of rape. In respect of the offence under Section 366 I.P.C. the trial court relying on the evidence of the Doctor who examined P.W. 7 regarding the age and also on a transfer certificate issued by the school, held that she was below 16 years of age and therefore taking or enticing her away attracted the provisions of Section 366 I.P.C. and accordingly convicted the accased. The trial court also held that it the time of commission of offence of rape, she was below 16 years of age and therefore the act committed by the accused accounted to rape irrespective of the fact whether there was consent or not.

4. The High Court somewhat haltingly agreed with the trial court that the age of the victim was below 16 years but held that the evidence of P.W. 7 was shaky and she has not clearly stated that the accused had intercourse with her except stating that he did something which he ought not to have done. The High Court also commented that for some many days she went around with him and though she had an opportunity to make a complaint or tell somebody, she did not do so and in such a situation the conviction can not be based entirely on her sole testimony without any corroboration.

5. Learned counsel appearing for the State of Karnataka submitted that when once the age of the victim was found to be below 16 years, even taking her away from the lawful custody of the parents amounted to an offence punishable under Section 366 I.P.C. and likewise if the accused had intercourse with her even with her consent, the same amounted to an offence punishable under Section 376 I.P.C.

6. Shri S.S. Javali, learned senior counsel appearing for the respondent-accused, however, submitted that the age of the victim has not been satisfactorily proved to be 16 years and that on the other hand there is the doctor's evidence who examined her which shows that her age could be even above 18 or 20 years. We find considerable force in this submission. P.W. 21 was a Doctor and Radiologist working in M.K. Hospital, Hubli, P.W. 7 was referred to him for determination of her

age. He conducted all the necessary tests and then also took X-rays. From the Ossification test, according to him, her age could be under 18 years. But according to Isshial Tuberosity, her age could be below 20 years. Like that, from the tests and examinations of Distal end femur and Tibia etc; the Doctor gave the approximate age suiting that it could be 16 years. But the data given would show that she could be aged 18 years also. In this context, the evidence of P.W. 5, the mother of P.W. 7 throws any amount of doubt about her age. The courts below no doubt have relied on a transfer certificate Ex. P. 1 in which the date of birth of P.W. 7 was given as 5.9.61 and this certificate was obtained after the date of the offence namely on 12.1.77. That apart, the Headmistress simply stated that the entry was made on the basis of the information given by the parents. A lady Doctor, P.W. 20, who also examined P.W. 7 stated that she refused to get herself admitted or even being examined. But, however, she was again brought back and was examined. P.W. 20 did not find any injury on her body including private parts. The doctor deposed that P.W. 7 was used to sexual intercourse and in the cross-examination she stated that her age could extend to 16 to 17 years also. We are only pointing these aspects because regarding the age the evidence is not very convincing.

7. Now coming to the evidence of P.W. 7, she deposed that she went alongwith the sister of the accused to the Bus Stand and got into the bus and went to several places and stayed with the accused in lodges and that the accused had intercourse with her. She, however, added that the accused had intercourse with her. She, however added that the accused was having intercourse against her will. She was cross-examined at length and we find several omissions in her previous statement. In the cross-examination the defence tried to elicit from her as to what exactly the accused did to her in those places during night. She went on saying that the accused did something to her which he ought not to have done. She admitted that her statement was the some before the police also. The learned Single Judge of the High Court especially pointed out this aspect-and observed that it was very difficult to infer that the accused had intercourse with her. Therefore in the absence of some other evidence to support the prosecution case that the accused had intercourse with her, in our view, the High Court was not wrong in holding that the offence under Section 376 I.P.C. is not made out. Now, coming to the offence of kidnapping punishable under Section 366 I.P.C., again her age is doubtful. That apart, P.W.7's evidence shows that she went with the accused voluntarily, When the age is in doubt, then the question of taking her away front lawful guardianship dies not arise. However, the second requirement that taking or enticing away a minor out of the keeping of the lawful guardian is an essential ingredient of the offence of kidnapping. In the instant case, we are not concerned with enticement. But what we have to find out is whether the part played by the accused amounts to taking out of the keeping of the lawful guardian. From the evidence of P.W. 7, it is clear that she was also anxious to go with the accused to see places. In such a case, it is difficult to hold that the accused had taken her away from the keeping of her lawful guardian and something more has to be shown in a case of this nature like inducement.

8. Having given our earnest considerations, we find it difficult to interfere with the judgment of the High Court. For all these reasons, the appeal is dismissed.