
(1992) 01 BOM CK 0021
In the Bombay High Court
Case No : Criminal Appeal No. 916 of 1988

Abdul Wahid Bahadur Ali Shaikh

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 16-01-1992

Acts Referred:

Penal Code, 1860 (IPC) — Section 376

Citation : (1994) 2 BomCR 339 : (1993) CriLJ 977 : (1991) 1 MhLj 1219

Hon'ble Judges : S.M. Daud, J; M.F. Saldanha, J

Bench : Division Bench

Advocate : L.S. Gaikwad, for the Appellant; R.Y. Mirza, Public Prosecutor, for the Respondent

Judgement

Saldanha, J.—The facts of this Criminal Appeal present a rather distressing and unfortunate state of affairs as we shall presently point out. The appellant-father is charged with having committed a sexual assault on his eight year old daughter on the night of 29th December 1985, the incident having taken place in the hut in which the family were residing, which is situated in a slum, at Bandra, Bombay. The appellant stood charged with having committed offences punishable under S. 376 of the I.P.C. as also under S. 57 of the Bombay Children Act. The learned trial Judge has awarded the maximum sentence prescribed under S. 376, which now stands amended, and sentenced him to undergo rigorous imprisonment for life. As far as the conviction under S. 57 of the Bombay Children Act is concerned, no separate sentence has been awarded. It is against this conviction and sentence that the present appeal has been preferred.

2. A few facts that are relevant for the decision of this appeal are set out below :-

The appellant is the father of PW 5 Parvin, who, at the relevant time, was aged about 7 years. From the record it appears that the wife of the appellant had left him about 3 years before the incident and that subsequent to that two of his daughters had also left the hut in which the appellant was residing. On the date incident which took place of the night of 29th December 1985, the appellant was

residing in the hut along with his remaining three children. Apart from Parvin, who was the victim of the assault, there was a younger daughter and an infant son, who also formed part of the family. It appears that on the night of the incident, the appellant and three children had their night meal after which the appellant put the lamp out and told the children to go to sleep. According to the version given by Pravin, at about mid-night the appellant removed her underwear and spread her school uniform under her body. He thereafter had sexual intercourse with the girl who was aged about 7 at the relevant time. The girl states that prior to committing rape on her, the appellant is alleged to have threatened her that if she shouts, he would beat her. The girl thereupon is alleged to have submitted to the act committed by the appellant after which the appellant is alleged to have got up and gone to the bath room. The girl states that as a result of this, she started bleeding and that she went out the hut to ease herself at which time PW1 Nasreen happened to pass by that place. Nasreen is her aunt and appears to be close to her. Parvin complained to Nasreen about what her father had done, because of which she was bleeding and had passed a certain amount of blood when she was trying to ease herself. As was to be expected, PW1 Nasreen was quite taken aback by the complaint from the child whereupon she immediately informed PW2 Jainabi and some other ladies around about the incident that had taken place. A crowd gathered there and two male members who were obviously horrified by the nature of the incident are alleged to have beaten up the appellant after which the ladies took the appellant and Parvin to the Police Station. The Police registered an offence and thereafter sent both of them to the Police Surgeon for necessary medical examination. The Police took charge of the clothes of the victim girl which appeared to have blood stains as also the clothes of the accused/appellant. After investigations were complete, a charge-sheet was put up. The appellant was put on trial and came to be convicted for the offences under S. 376 of the IPC and S. 57 of the Bombay Children Act.

3-4. Mr. Gaikwad, learned counsel appearing on behalf of the appellant has taken us through the evidence in this case which essentially consists of the deposition of PW5 Parvin as also the evidence of the other prosecution witnesses who had appeared on the scene very shortly after the incident. There is also on record the evidence of the Doctor at Exh. 22 and the C.A. report both of which are crucially important in a case of the present type. Mr. Gaikwad has sought to place considerable reliance on one circumstance, viz. the fact that the girl was taken to the Police authorities admittedly by the women who were residing in the vicinity and it is his case that the appellant had pointed out in his statement that these women were extremely hostile to him in so far as they were friends of his wife, who had gone away because of the estrangement between the husband and wife. Mr. Gaikwad had submitted that the accused has wrongly been implicated in this case because of the general hostility against him from the neighbours, as also because of the fact that there was considerable bad blood between the prosecution witnesses and the appellant over the incident concerning his wife.

We do not consider this defence to be of any substance in the face of the overwhelming and conclusive evidence adduced by the prosecution to which we shall presently refer.

5. The essential evidence in this case consists of the deposition of the victim girl Parvin who is examined as PW5. At the relevant time, she was aged about 7 years. Being a child witness, the learned trial Judge has taken the usual precaution of putting certain preliminary questions to the girl for the purpose of ascertaining as to whether she is in a position to understand the implications of the statements being made by her as also whether she is competent to testify in a case of the present type. The learned trial Judge has very clearly stated that he was quite confident of the fact that the girl understands the sanctity of an oath for which reason the oath was administered to her and he has further stated that she was giving rational answers and is thus a competent witness to testify. We would like to record that having gone through her deposition carefully, in spite of the fact that she was cross-examined at considerable length, we are impressed by the fact that the girl, though at the time of deposition was aged only 12 years, has given rational and cogent answers to the questions put to her and that she understands the implications of having given evidence before the Court.

6. Parvin in the course of her deposition described the incident that took place on that night very clearly and precisely as follows :-

"Then my father, after the beddings were spread, put off the lamp and he asked all of us to go to sleep. When we all were sleeping, my father was awake. At about 12 midnight, my father removed my underwear, and he spread my school uniform underneath my body. Then he threatened me that in case I shout, he would beat me. And then he inserted his private part in my private part and he pressed his private part in my private part and on account of that I felt pain and bleeding was caused. Then he told me that he was going to bath-room and he asked me to stay there only. He further told me that in case I started weeping, he would beat me. Thereafter, from my private part, blood clot came out. At that time, Nasreen Khala came from that side. I told her about the incident. She told all these facts to Johra who came by that time there. By that time, my father returned back from the bath room. Babarbhahi, Sabarbhahi and others who had come there by that time, started beating my father."

She has indicated that as a result of the sexual assault committed on her, she was in considerable pain which was inevitable considering the fact that she was aged only 7 at that time and she has further stated that as a result of this act, there was also a good deal of bleeding. She has stated in her deposition that immediately after the incident she complained to PW1 Nasreen who in turn informed Johra about what had happened. She has also explained how, when her father came back from the bath room, two of the persons who had gathered there, namely Babarbhahi and Sabarbhahi had assaulted him which was obviously out of total indignation for the type of incident that had occurred. Parveen has further indicated as to how they were thereafter taken to the Police and that the

Police brought her back to the hut and took charge of the blood stained clothes which were on her person. She has also described the clothes which were worn by the appellant at the relevant time which were in turn taken charge of by the Police. Parvin has been cross-examined at considerable length, the principal thrust of the cross-examination being with regard to the question as to why she did not scream and how she did not raise an alarm when the appellant was in the process of sexually assaulting her. We are more than satisfied with the explanation given by the girl which was to the effect that she had been threatened by the appellant that she should not shout or raise any alarm. This was sufficient to have not only frightened but terrified her and the incident must have taken place in such a situation that she was virtually not in a position to raise any alarm. The fact that the child did not scream at the relevant time, to our mind, is not a circumstance on the basis of which her evidence can be called into question.

7. Mr. Gaikwad also made an attempt to abridge the credibility of the version by seeking to point that the other two children were also sleeping closely. As far as this aspect is concerned, considering the fact that the incident had taken place in total silence and considering the fact that the girl was so terrified and physically also could not have been in a position to offer any resistance, the question of the presence of the other two children in the hut, to our mind, would not assume much of importance. Lastly, it was sought to be suggested that considering the size and area of the hut, it being so small that it was hardly possible for an incident of the present type to have taken place when two other children were sleeping immediately next to where Parvin was. She has stated that she was sleeping last in line near the door which explains how the accused could easily get at her without disturbing the other children. In this view of the matter, the cross-examination along this line also would not be of any avail in assailing the acceptability of Parvin's evidence. As we shall presently point out, from the injuries on her person, and the immediate action that was taken, which was virtually within minutes of the incident, we are left with no doubt whatsoever in concluding that the prosecution has established both charges against the present appellant.

8. As and by way of supportive evidence, the prosecution has also examined PW1 Nasreen Usman Dad who is a neighbour to the hut of Parvin and to whom Parvin had immediately complained about the incident. Nasreen has given evidence in a frank and forthright manner and she has very clearly indicated that Parvin was crying and she was virtually imploring Nasreen to save her. Nasreen has stated that she found the accused in the process of washing the clothes. This lends further credibility to the evidence of Nasreen because one of the items of clothes on which there were blood-stains was found to have been in a wet condition when the Police seized the garment. That the accused was engaged in washing of the clothes which had incriminating evidence on them at dead end of night is another circumstance against him which mitigates against his innocence. Nasreen has been cross-examined very elaborately, the principal attempt being

to allege that she is a friend of the wife of the appellant and that consequently she was responsible for falsely involving him in the incident. She has stood up to this cross-examination admirably and on a scrutiny of the several pages of the evidence, we do not find any infirmities on the basis of which her evidence can be called into question.

9. The medical evidence in this case is of considerable importance. It is unnecessary for us to go into the question of the age of the victim because the learned trial Judge has accepted the evidence as given by the prosecution, viz. evidence produced by the school authorities as also the opinion of the Doctor which was to the effect that the girl was aged only 7 years at the time of the incident. The fact that she is a minor is also not seriously called into question either at the trial or before us for obvious reasons. That the girl was not only a minor but was a child of tender years is an aggravating factor.

10. PW9 Dr. Dilip Waje has stated in his deposition that in December 1985 he was attached to Police Hospital at Nagpada and on 30-12-1985 in the morning at about 11.00 a.m. he had examined one Parvin Abdul Wahid Shaikh, who according to him, was aged between 8 and 9 years. She was brought by the Police from Nirmal Nagar Police Station. The Doctor has stated that on examination of the girl, he noticed the following injuries :-

"On examination of her private part, I noticed that there were no signs of sexually transmitted diseases. Her labia major and minora were swollen, tender and there was inflammation all around vulva. Vaginal mucosa was not visible. Her hymen was torn, fabricated and showed a recent tear at 7 O'clock position 1.5 cm. x 0.5 cm x skin deep extending down from 7 O'clock position (lower end of hymen) going down over perineum. The tear was bleeding on touch and it was tender. Hymen also was tender and there was inflammation all around hymen."

The Doctor has opined that the findings are consistent with those in the case of a girl who is subjected to recent sexual intercourse. The cross-examination of the doctor has proceed on a generalised basis with the usual sort of question being put, namely that the contusion of her genitals could have been caused possibly by circumstances other than a sexual assault. The doctor has denied this suggestion and he has very clearly and unequivocally opined that the evidence undisputedly indicates a case of recent sexual assault. The medical certificate is at Exh. 23 and this fully supports the findings of the doctor. The doctor had also at paragraph 6 of his deposition stated that at about 10.40 a.m. on the same day the accused who was aged about 40 years was brought to him for examination and he has indicated the result of his examination in paragraph 6 of his deposition which reads as follows :-

"On examination of his private part, I found only redness on glans penis. There were no marks of external injury on penis. In my opinion, he was apparently potent. I now produce my notes of medical examination, which is in my handwriting and signed by me. I identify the same. It is marked Exh. 25."

The medical certificate issued at Exh. 25 supports this deposition.

11. We have next on record the forensic evidence viz. C.A. report in respect of the clothes of both the victim and the accused. The C.A. report which is at Exh. 28 conclusively establishes that the underwear and the frock, items 1 and 5 which were sent for analysis were stained with blood and appear to be washed. It is also confirmed that the blood is human blood and is of "A" group which is of Parvin's blood group as per the report Exh. 27. As far as the clothes of the appellant are concerned, namely items 3 and 4, they are a pyjama and a jangya. The C.A. report indicates that these clothes were stained with blood in addition to which semen stains were also detected on these garments. As far as the grouping of the blood is concerned, the C.A. report is inconclusive. But as far as the semen detected on the two items is concerned, the C.A. report shows that it is of blood group "B". This evidence falls into place completely with the rest of the material adduced by the prosecution and establishes the conclusive link between the commission of the offence of rape on Parvin and the accused-appellant.

12. As indicated by us earlier, the incident in this case had taken place around mid-night on 29-12-1985. Parvin had reported the matter to the neighbour within minutes of the commission of the offence and it was very shortly thereafter that the appellant and the victim Parvin were taken to the Police Station. The Police have also on the same night attached the clothes worn by the two of them and the investigation was completed within the next few days when the statements of witnesses were recorded. In our considered opinion the evidence is reliable and conclusive and establishes beyond all doubt the commission of an offence under S. 376 of the I.P.C. on the part of the appellant. As far as the evidence under S. 57 of the Children Act is concerned, the assault on a minor girl having been established, this charge also stands proved. We see no reason to differ from the conclusion recorded by the learned trial Judge.

13. The learned trial Judge has taken a very serious view of this case, and to our mind rightly so, considering the fact that the sexual assault that has been committed was on a minor girl and that too on the minor daughter of the appellant. This factor considerably aggravates the seriousness of the crime and to our mind deserves not only a heavy punishment but a deterrent one.

14. Section 376 came to be amended by the Legislature precisely because it was considered that the offence of rape which is an affront to a woman's dignity requires in this day and age to be dealt with ruthlessly. That a criminal who is proved to have committed such an offence must be punished severely, principally because of the totally shattering effect that an act of rape has on the victim is only one side of the coin; because it was considered equally necessary to incarcerate persons who have displayed such tendencies and segregate them from the mainstream of society for a sufficiently long period of time. The expectation is that this time factor would serve as a reformat and simultaneously society would be saved from a repetition of such atrocities not losing sight of the

fact that where the penalties are extremely harsh, the deterrent aspect is also achieved. In prescribing heavier punishment for the cases where the victim is a minor girl, the legislature has indicated its abhorrence for such acts and a case of the present type where the rapist is the father and the victim is his own minor daughter, it would qualify for the realm of sexual perversion. Undoubtedly this class of cases would have to be categorised among those which invite the heaviest form of punishment. Conscious of these aspects, we have however not allowed ourselves to be over carried by a sense of indignation, however righteous it may be. The learned A.P.P. did exhort us, with great vehemence to come down heavily on the appellant but we have reminded him that this Court needs to take cognisance of certain other aspects at the same time.

15. While evaluating the adequacy of sentence, being conscious of the fact that this is an appeal filed through jail, we have taken special care to consider all relevant factors in relation to this case. The learned counsel for the appellant advanced a strong plea that this Court should not inflict a harsh sentence on the appellant even if prima facie the crime of raping one's own minor daughter stands established. He sought to point out that this case cannot be equated with instances where brute force has been used against a helpless young woman or where a minor girl has been ravished out of a sense of lust but that at the highest it could on facts be treated as a crime of passion. As opposed to this, the learned A.P.P. was quite adamant and insisted that the maximum sentence of life imprisonment should be awarded because according to him, the legislature has stepped up the penalties for rape and has specifically provided for such heavier punishments in the case of such sexual assaults if the victim is a minor girl. He sought to argue that an act of rape committed by a father on his own minor daughter is so reprehensible that it should attract the highest form of punishment since the circumstances attached to a crime should determine the gravity of the penalty and one could possibly not conceive of anything worse than a rape committed by a father on seven year old child who happens to be his own daughter.

16. Whereas we do accept, as rightly pointed out by the learned A.P.P., that this offence is both heinous and atrocious, it is equally essential to take cognisance of the totality of the situation while passing judgment. That the appellant is a hutment dweller and that his poverty has placed him in the difficult position of having to sleep huddled up in a tiny area is something that cannot be lost sight of. The record also indicates that the appellant's wife had left him three years earlier. The appellant comes from virtually the weakest strata of society having been deprived of any form of education and having struggled through life with no opportunity of even acquiring a basic understanding of elementary issues of propriety. The level of existence in which the appellant was placed, his age and the aforesaid factors in combination, resulted in an irresistible impulse. There is nothing on record to indicate that the accused had a background of sexual violence or even any misbehaviour for that matter, but on the other hand we find that even though his wife had left him with the minor children that he used to

work the whole day and send the children to school, arrange for their meals from the hotel, provide them with toys and pocket money and cook the night meal for them. These are mitigating circumstances which would lead us to accept that it was a momentary lapse which again was occasioned due to the pathetic situation of the appellant. While the nature of the act itself calls for a heavy sentence, on the other hand there are factors which impel us to keep it within reasonable limits. After careful consideration, to our mind, a sentence of ten years" R.I. would be fair and just, on the main charge and a sentence of 1 year R.I. for the second one.

17. The appeal partially succeeds. While confirming the conviction of the appellant both under S. 376, IPC and S. 57 of the Bombay Children Act, we modify the sentence awarded by the trial Court from imprisonment for life to R.I. for 10 years and one year R.I. respectively, substantial sentences to run concurrently. Appeal partially allowed.

18. Appeal partly allowed.