

(2015) 02 BOM CK 0091

In the Bombay High Court

Case No : Criminal Appeal No. 415 of 1998

Amol son of Balaji Meshram

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 05-02-2015

Acts Referred:

Penal Code, 1860 (IPC) — Section 34, 376(2)(g)

Citation : (2015) ALLMR(Cri) 2996 : (2015) 2 BomCR(Cri) 80

Hon'ble Judges : S.B. Shukre, J.

Bench : Single Bench

Advocate : Kailash Ravande, for the Appellant; S.M. Bhagde, APP, Advocates for the Respondent

Final Decision : Allowed

Judgement

S.B. Shukre, J.—By this appeal, the appellant has challenged the legality and correctness of the judgment and order dated 28.10.1998 passed by the 7th Assistant Sessions Judge, Nagpur in Sessions Trial No. 208/1998 thereby convicting him for an offence punishable under Section 376(2)(g) of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for seven years together with fine of Rs.500/- and in default to suffer further imprisonment for three months.

2. Briefly stated, the prosecution case is as under:

(i) The prosecutrix, appellant-accused No. 2 and accused No. 1-Suresh Mate were residents of village Sev, Tahsil Umred, District Nagpur and belonged to the same caste. The appellant is nephew of the original accused No. 1.

(ii) The prosecutrix, on the day of incident was below 16 years of age and studying in 9th Standard in a Public High School, Umred. Her village Sev, is about 5 kms. away from the school situated at Umred. The incident took place at about 10.00 or 10.30 p.m. of 9.12.1997. It was alleged by the prosecutrix that at that time when she was on her way to house of her friend, Chhaya Lonare, to

fetch a study book from her, she was accosted by the appellant and accused No. 1 and was taken inside the house of the accused No. 1-Suresh Mate. At that time, it was alleged, the present appellant had caught hold of hands of the prosecutrix. After taking the prosecutrix inside the house of accused No. 1, the present appellant closed the door and then caught hold of both legs of the prosecutrix and, thereafter the accused No. 1 committed forcible sexual intercourse with the prosecutrix. It was alleged that after commission of rape, the present appellant went out of the house and some time after again he came inside the house and asked for sexual intercourse from the prosecutrix. It was also alleged that the appellant threatened the prosecutrix that if she refused to oblige him, he would defame her in the village. Thereafter, the prosecutrix wore her underwear and clothes, abused the appellant and accused No. 1 and left the house of accused No. 1 for returning to her house.

(iii) It appears that the F.I.R. was not lodged on the day when the offence was committed. On the next day, the prosecutrix as usual attended her school and after the school was over, the prosecutrix went to the Police Station Umred and lodged a report against both the accused. It was lodged at 8.10 p.m. of 10.12.1997. Umred Police registered an offence punishable under Section 376(2)(g) of the Indian Penal Code against accused No. 1 and the present appellant. Investigation was made and after completion of the investigation, charge sheet came to be filed against both the accused. It was committed to the Sessions Court where, after framing of the charge for an offence punishable under Section 376(2)(g) of the Indian Penal Code, the Sessions Court tried both the accused for that charge. On merits, it was found by the Assistant Sessions Judge, Nagpur that the prosecution proved beyond reasonable doubt commission of the said offence by both the accused and accordingly by its judgment and order passed on 28.10.1998 convicted and sentenced both the accused for the said offence, directing them to suffer rigorous imprisonment for seven years together with fine of Rs.500/- each and in default of payment of fine, to suffer rigorous imprisonment for further three months.

(iv) While accused No. 1 did not challenge the judgment and order of conviction and sentence passed by the 7th, Assistant Sessions Judge, Nagpur and chose to suffer the sentence, the present appellant challenged the same and this is how the present appellant is before this Court in this appeal.

3. I have heard Mr. Kailash Ravande, learned counsel for the appellant and Mr. S.M. Bhagde, learned Additional Public Prosecutor for the respondent/State. I have carefully gone through the impugned judgment and order and also the record of the case.

4. Learned counsel for the appellant has submitted that the story of the prosecutrix as against the present appellant is discrepant and highly improbable as there are material facts which have been suppressed by the prosecutrix and that her conduct in the entire matter is unnatural. He submits that probably the prosecutrix has been roped in present appellant in this crime for teaching him a

lesson as the present appellant had stated something against the prosecutrix to one Bharat Meshram, the son of landlord of Chhaya Lonare, girlfriend of the prosecutrix, who in turn had related those statements to Chhaya Lonare. He submits that this was a case, wherein corroboration to the testimony of the prosecutrix was required, but there was no corroboration to her testimony and as such, the learned Assistant Sessions Judge has erroneously found that even the present appellant, in furtherance of common intention of both the accused persons committed offence of gang rape in this case. He submits that it is an admitted fact that the present appellant did not commit any sexual intercourse with the prosecutrix and on the allegation that he had assisted and aided the main accused-Suresh Mate in committing sexual intercourse with the prosecutrix, the evidence of the prosecutrix is full of doubts.

5. Learned Additional Public Prosecutor for the respondent/State has submitted that in order to prove the offence of gang rape, as per Explanation (1) to Section 376(2)(g) as it stood then, the present appellant can also be said to have committed offence of gang rape as the prosecution evidence shows that he was not only present at the time when the rape was committed by the accused No. 1, but had also assisted accused No. 1 in committing rape which would only disclose that he had shared the same intention as accused No. 1. He submits that it is well settled law that in cases of rape, conviction can be based upon uncorroborated version of the prosecutrix. He submits that the uncorroborated version of the prosecutrix, when considered in its entirety, would show that there are hardly any doubts emerging from her evidence and, therefore, there is no reason to look for any corroboration in this case. He also submits that even the Medical Officer, PW 6, Dr. Alka Anil Dhole has given an opinion that the prosecutrix was not habituated to sexual intercourse and it only corroborates version of the prosecutrix. He also points out from the evidence of father of the prosecutrix, PW 4 Nawalji, that as his marriage took place about 16 years before the incident and the prosecutrix had been born three years after his marriage, it can be safely inferred that the prosecutrix was at the time of incident, below 16 years of age and this is what has been found by the learned Assistant Sessions Judge. He submits that once it is found that the prosecutrix was well below the age of 16 years of age, her consent would not matter and, therefore, learned Assistant Sessions Judge has rightly found that there was rape committed by the accused No. 1 and accused No. 2 assisted him in commission of the rape.

6. Learned Additional Public Prosecutor submits that the findings so recorded by the learned Assistant Sessions Judge have attained finality, insofar as accused No. 1 is concerned as he did not challenge the same. He submits that so far as the present appellant is concerned, in such a situation what remains to be seen is as to whether or not the version of the prosecutrix that the present appellant had assisted the main accused in commission of rape is creditworthy and he submits that the evidence of the prosecutrix would show that there is no reason to entertain any manner of doubt about truthfulness of the version of the prosecutrix. He also submits that there is no probable reason brought on record

by the present appellant as to why the prosecutrix should make false allegations against this appellant at the cost of her reputation. In support he places his reliance upon the case of Pramod Mahto and Others Vs. State of Bihar, . Thus, learned Additional Public Prosecutor supports the judgment and order impugned in this appeal.

7. In order to appreciate the rival arguments, it would be necessary to consider the prosecution evidence. The evidence of PW 1-Prosecutrix, PW 4-Nawlaji-father of the prosecutrix and PW 6-Dr. Alka Anil Dhole is material and so also the prosecution evidence as regards age of the prosecutrix. Let us consider this evidence now.

8. So far as age of the prosecutrix is concerned, I must point out that her age on the date of incident, being above 16 years, is not a disputed fact. The school certificate vide Exh.-61 disclosing her date of birth as 7.8.1981 has been proved in evidence by the prosecution and never disputed by the appellant. Yet, the trial Court calculated it to be of about 14 years. With undisputed proof of age being there on record, there was no reason for trial Court to determine age of prosecutrix as of 14 years and that too by method of approximation by taking help from answers given by an illiterate witness like her father, PW 4-Nawlaji. His answer that his marriage took place about 16 years before incident and prosecutrix was born about three years thereafter, he being an illiterate person, is only a broad estimation of time span and as such cannot be a substitute for undisputed digits of date of birth in certificate at Exh.-61.

9. Prosecutrix was examined as PW 1. She has stated before the Court that on 9.12.1997 at about 10.00 or 10.30 p.m. the present appellant had caught hold of hands and legs of the prosecutrix on the road when she was on her way from her house to the house of Chhaya Lonare-her friend and that thereafter, had brought her inside the house of the main accused i.e. accused No. 1. She has further stated that after entering the house, the present appellant had closed and shut the door behind him and thereafter caught hold of her hands so that the accused No. 1 could commit rape upon her and which in fact was committed by accused No. 1. She has also stated that after commission of rape by the accused No. 1, the present appellant demanded sex from her and also threatened her that if she refused to oblige him, he would defame her in the village and thereupon, the prosecutrix gave a slap on the face of the present appellant and left the house of accused No. 1. The prosecutrix also says that when the forcible sexual intercourse was being committed with her by the accused No. 1, she had made protest by raising shouts in the name of her mother and that as she was leaving house of accused No. 1, the appellant and accused No. 1 gave threat to her on her life, if she told the incident to anyone else.

10. Such version of the prosecutrix considering her age on the day of incident, which was admittedly above 16 years, on the face of it does not inspire confidence. The reason being that it does not appear probable that when a girl above 16 years of age is going by the road and is accosted by two males at such

hour of the night as 10.00 or 10.30 p.m., the girl would not make any resistance or at least raise shouts. The prosecutrix states that this appellant had caught hold of both of her hands and took her inside the house of accused No. 1. The prosecutrix has admitted in her cross-examination that at that point of time neither of the accused persons which include the present appellant had issued her any threat nor had put her under fear of any injury on the point of any weapon. So, it is difficult to believe that prosecutrix was so scared as not to put up any resistance or alarm.

11. It is further seen that PW 1 says that after entering the house, this appellant had shut the door behind him and then caught hold of both of her hands and thereafter, accused No. 1 forced himself upon her person. Before accused No. 1 forced himself upon the person of prosecutrix, as per her version, the accused No. 1 had removed her clothes and then also his own clothes. Till the time accused No. 1 removed his clothes, it is seen from her evidence, she had continued to lay at the spot of incident without any resistance or protest on her part. One does not understand as to how a girl without any clothes on her person would continue to lay waiting for other person to remove his clothes and do something to her unless she too is a willing party. It is pertinent to note here that it was only after the accused No. 1 forced himself upon the prosecutrix and initiated the alleged forcible sexual intercourse with her, that the prosecutrix says she had raised shouts.

12. The theory of shouts, however, appears to be made up only to make one believe the story of rape. The shouts, however, were not heard by anybody outside the house, although father of the prosecutrix PW 4 Nawlaji, admits that if any sounds are made in the house of accused No. 1 they can be heard in his house as well. If the sound or noise that emanated from the house of accused No. 1, where the incident took place, could be heard outside the house including the house of the prosecutrix, it does not appeal to reason as to why other persons, who might have been present outside the house on the road, would not become curious and would not do something to intervene in the matter. PW 4 Nawlaji has admitted that there was a possibility of some persons being present at the Well situated near the house of accused No. 1 for the purpose of drawing of Well water. It was about 10.00 or 10.30 p.m. of winter night and although it is true that during winter night usually villagers go to sleep a little early than they would in other seasons, the possibility that no other persons were present outside the house and the entire village had gone to sleep has not been brought on record by the prosecution. Had it been brought on record by the prosecution perhaps it could have been said that even if the shouts were raised, there was no way anybody could have heard them so as to come to the rescue of the prosecutrix.

13. Then, in the F.I.R., the prosecutrix does not say anything about giving of slap by her to the present appellant. She also does not say anything in the F.I.R. about catching hold of her legs by the present appellant when she was accosted

by the accused persons on the road and taken inside the house of the accused No. 1. These are improvements made by her to add element of truthfulness in her testimony. But, her overall conduct, discussed earlier, belies it.

14. In the F.I.R., she has stated that she did not take bath etc. before lodging of the report and in her evidence before the Court she admits that she had taken bath. The prosecutrix has not told anything about this incident to her father either in the same night or at least in the next day morning. Even till lodging of the report, the prosecutrix had not stated anything about this incident to her father or her female friends in the school or female teachers in the school and that she had suddenly gone to the Police Station after the school hours were over. Her father admits that he came to know about the incident only after he was called to the Police Station and was told about it by the Police. Prosecutrix has not given any explanation about the same which creates doubt about her trustworthiness. Such evidence of the prosecutrix, would therefore, require corroboration so as to clear the air of doubt surrounding her testimony.

15. There is also one material omission in her F.I.R. and it relates to the incident which took place at about 8.00 p.m. of 8.12.1997, the day preceding the day of the incident. In her testimony before the Court, the prosecutrix has stated that even in the night of 8.12.1997 the accused No. 1 had committed forcible sexual intercourse with her, but she simply chose to return to her house after that incident and keep quite. No report in respect of this incident has been admittedly filed by the prosecutrix. Even in the F.I.R. vide Exhibit-32, the prosecutrix is silent about the incident of commission of rape upon her by accused No. 1 in the night of 8.12.1997. No doubt, F.I.R. is not an encyclopedia so as to contain all details of crime. But, it must encapsulate that information which discloses commission of offence. The incident of night of 8.12.1997 was, according to her, same offence as the incident of night of 9.12.1997 and so it made the offence of 9.12.1997 more serious. Therefore, it was not something which could have been forgotten or ignored while lodging F.I.R. on 10.12.1997. So, for an omission about it in F.I.R. Dated 10.12.1997 prosecutrix owned an explanation. But, no explanation has been given by the prosecutrix about her keeping silent over the incident of 8.12.1997. Her father, PW 4, Nawlaji is absolutely unaware of the incident of 8.12.1997.

16. Such silence, on her part is eerie and makes a prudent man think that here is a person who does not sound to be truthful on her face and who has to be dealt with caution. The cautious approach would result in drawing of some conclusion. It is that if the prosecutrix had already experienced one act of rape upon her by accused No. 1, it does not appeal to reason as to why the prosecutrix should not feel alarmed when in the night of 9.12.1997 both the accused persons including the present appellant accosted her on the road and this appellant allegedly caught hold of hands of the prosecutrix and took her inside the house of accused No. 1. If she had felt his alarm, which she ought to have with just one day old bitter experience, she would have certainly raised shouts. But, she did not. Even

after being taken inside the house of accused No. 1, the prosecutrix did not raise any shouts immediately. The prosecutrix also made no resistance and no protest till the time, her clothes were removed. She raised shouts just when the accused No. 1 allegedly forced himself upon her. This conduct of the prosecutrix is highly unnatural and points towards possibility of her consent.

17. Of course, medical evidence, evidence of PW 6, Dr. Alka, does show that prosecutrix was not habituated to sexual intercourse. It is also true, as held in the cases of *State of Rajasthan Vs. N.K.-The Accused*, , *State of Rajasthan Vs. Om Prakash*, , *Joseph Vs. State of Kerala*, , sole testimony of prosecutrix, if found reliable, can be the basis for conviction. But, in this case even this medical evidence is not sufficient to assure us of her reliability. Her conduct for her age was so unnatural and her testimony so discrepant, as seen from above discussion, that her testimony would require corroboration from other evidence, as held by Hon"ble Apex Court in the case of *Radhu Vs. State of Madhya Pradesh*, . That corroboration, if one peruses the evidence of other witnesses, is not forth coming.

18. If there is no corroboration to the testimony of the prosecutrix, and possibility of her consent has arisen, I am of the view that it would be unsafe to rely upon her sole testimony to find the guilt of the present appellant for the alleged act of his giving assistance to the accused No. 1 in commission of the rape with the aid of Section 34 of the Indian Penal Code. It is possible that something might have happened between her and accused No. 1. But, for that something the appellant cannot and should not be blamed. It is on record that accused No. 1 has been convicted and sentenced for committing gang rape upon the prosecutrix. It is also on record that accused No. 1 has not challenged the verdict that went against him. But that does not mean, complicity of the appellant in that crime has also been proved. It must be proved independently and as there is no corroboration to the testimony of prosecutrix, which is highly unreliable, benefit of doubt needs to be given to the appellant.

19. The question, however, still remains-why the prosecutrix should take name of this appellant and make allegations against him ? It is well settled law, as can be seen from the judgment of the Hon"ble Apex Court in the case of *Promod Mahto (supra)* that normally a girl would not falsely set up a case of rape against an accused as it involves bringing of bad name to her reputation. But, in the instant case, there is some probability brought on record by the present appellant as to what could have been the reason for the prosecutrix in falsely roping in the appellant in the present case. According to the appellant, he had said something against the prosecutrix to Bharat Meshram, the son of landlord of Chhaya Lonare, who in turn had related it to Chhaya Lonare, who then had made some queries with the prosecutrix. According to the appellant, because of questioning of the prosecutrix by Chhaya Lonare, the prosecutrix got annoyed and, therefore, in order to take revenge, the prosecutrix also involved the appellant in this case. This explanation given by the appellant appears to be probable, although all the

suggestions in this regard put to the prosecutrix have been promptly denied by her. But, there seems to be no other reason as to why the prosecutrix should have named the present appellant in this case as perpetrator of the act of rape committed upon her by the accused No. 1 with the aid of Explanation (1) to Section 376(2)(g) of the Indian Penal Code. The version of the prosecutrix has already been found by me, as not creditworthy and it is also found that no corroboration to her testimony is there from other witnesses and, therefore, the explanation given by the appellant about his being falsely implicated in this case seems to be probalised by the facts and circumstances of the case. There is a room to say that corroboration from other witnesses is not coming because what the appellant is saying in his defence may be correct.

20. Thus, this is not a case wherein absolutely there is no probable explanation brought on record by the appellant as constituting the possible reason for the prosecutrix in falsely implicating him in this case. Therefore, the case of Promod Mahto (*supra*) would be of no assistance to the prosecution.

21. In the circumstances, I find that the prosecution has not proved beyond reasonable doubt the charge of commission of gang rape by the present appellant with the aid of Explanation (1) to Section 376(2)(g) of the Indian Penal Code and this is a fit case wherein benefit of doubt deserves to be given to the present appellant. There are several discrepancies in the evidence of the prosecutrix and also her conduct in the whole incident does not appear to be natural. Her version does not receive corroboration from other evidence on record. Therefore, the present appellant deserves to be acquitted of the offence punishable under Section 376(2)(g) by giving benefit of doubt. All these aspects of the matter have not been properly considered by the learned Assistant Sessions Judge and, therefore, the finding of guilt recorded by the learned Assistant Sessions Judge deserves to be quashed and set aside.

22. In the result, the appeal is allowed.

23. The impugned judgment and order dated 28.10.1998 passed in Sessions Trial No. 208/1998, by the 7th Assistant Sessions Judge, Nagpur as against the present appellant are quashed and set aside.

24. The appellant is acquitted of the offence punishable under Section 376(2)(g) of the Indian Penal Code.

25. His bail bonds stands discharged.

26. Fine amount be refunded to him.