
(2008) 01 BOM CK 0169
In the Bombay High Court
Case No : Criminal Appeal No. 390 of 2006

Anil Sharma

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 08-01-2008

Acts Referred:

Penal Code, 1860 (IPC) — Section 34, 342, 354, 363, 366A

Citation : (2008) 4 MhLj 707

Hon'ble Judges : V.R. Kingaonkar, J

Bench : Single Bench

Advocate : A.S. Barlot, for S.K. Barlot, in Criminal Appeal No. 390/2006 and N.N. Chitlange, in Criminal Appeal No. 407/2006, for the Appellant; B.R. Khekale, APP in Criminal Appeal No. 390/2006 and B.J. Sonawane, APP in Criminal Appeal No. 407/2006, for the Respondent

Final Decision : Dismissed

Judgement

V.R. Kingaonkar, J.—Both appeals referred to above are being disposed of together in as much as they arise out of same judgement. By the impugned judgement, both the appellants have been convicted for offence punishable u/s 363 read with Section 34 of the I.P. Code and are sentenced to suffer rigorous imprisonment for five years and to pay fine of Rs. 1000/-, in default to suffer rigorous imprisonment for one (1) month. In addition, appellant Dhanraj @ Dhananjay is further convicted for offence punishable u/s 354 of the I.P. Code and is sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs. 500/-, in default to suffer rigorous imprisonment for 15 days.

2. The appellants were tried before learned Additional Sessions Judge, Aurangabad, in Sessions Case No. 55 of 2006.

3. The prosecution case, in brief, is that prosecutrix is a young girl, who hails from U.S.A. and had come to Aurangabad for her education under International Youth Exchange Programme, run by Rotary Club. She used to stay with her local guardian. In the noon of 4th February, 2006, she was going by road between

Trimurti Chowk to Gajanan Maharaj Temple. While she was walking along side of the road, all of a sudden an auto-rickshaw vehicle came from behind and stopped near her. Appellant Anil (orig. accused No. 1) was driver of the auto-rickshaw. Appellant Dhanraj @ Dhananjay (orig. accused No. 2) was sitting on its rear seat. All of a sudden, appellant Dhanraj @ Dhananjay caught hold of the prosecutrix and pulled her inside the auto-rickshaw which started speeding away. She attempted to wriggle out herself. Appellant Dhanraj @ Dhananjay touched her breasts.

Some passers-by raised hue and cry. A scooterist intercepted the auto-rickshaw by parking his scooter ahead of it. Appellant Dhanraj @ Dhananjay got scared on seeing the passers-by coming to help of the prosecutrix and, therefore, set her free. She went to nearby Jawaharnagar Police Station and lodged a report. The police carried out certain investigation. Both the appellants were arrested in the same night. A panchanama was drawn regarding seizure of the auto-rickshaw from near house of appellant Anil. A test identification parade was conducted at the Central Prison, Harsul, by Naib Tahsildar, Aurangabad. The prosecutrix and eye witnesses of the incident then identified both the appellants as the culprits. On basis of material gathered during course of the investigation, they were charge-sheeted for offences punishable u/s 342, 354, 363 and 366A read with Section 34 of the I.P. Code.

4. At the trial, both the appellants pleaded not guilty to the charge (Exh-5). They adopted defence of total denial.

5. The prosecution examined in all ten (10) witnesses in support of its case. The prosecution also relied on certain documentary evidence. On appreciation of the evidence, the learned Additional Sessions Judge came to the conclusion that the charge for offence u/s 342 and 366A read with Section 34 of the I.P. Code is not proved. He, however, held that the charge for offence punishable u/s 363 read with Sec. 34 of the I.P. Code is duly proved against both the appellants and further charge for offence punishable u/s 354 of the I.P. Code is proved against appellant Dhanraj @ Dhananjay. He awarded the sentences to both the appellants as stated at the outset.

6. Feeling aggrieved, appellant Anil has preferred Criminal Appeal No. 390/2006 whereas appellant Dhanraj @ Dhananjay has preferred Criminal Appeal No. 407/2006.

7. Mr. Barlota and Mr. Chitlange, learned advocates would submit that the prosecution evidence is uncreditworthy and insufficient to prove the charges. They contended that test identification parade held at the Central Prison, Harsul, suffered from various legal infirmities. They contended that identification of the appellants could not be relied upon when the arrest was effected in the same night and that the prosecutrix as well as the eye witnesses had occasion to see the appellants at the Police Station. It is argued that there is no tangible evidence to hold that both appellants shared common intention. It is further

argued that so-called eye witnesses made tall claims only with a view to show some acts of their heroic attempt to foil the bid of kidnapping. It is argued that both the appellants deserve benefit of doubt. It is pointed out that the eye witnesses did not catch hold of the culprits at the spot. The learned advocates urged, therefore, to allow the appeals and acquit both the appellants from the charges. As against this, learned APPs supported the impugned judgement.

8. Before I embark upon scrutiny of the prosecution evidence, it may be mentioned that the alleged incident occurred all of a sudden in the broad daylight and on a public road. The incident took place within a very short span of time. The prosecutrix - PW5 Ambar was then aged about 17 years. She is a foreigner. She has absolutely no reason to make false charge of her forcible kidnapping or abduction in the relevant noon. The witnesses examined by the prosecution, in fact, have no ax to grind against the appellants. The only defence raised by the appellants is that of mistaken identity. There is no denial to the occurrence in which the prosecutrix was tried to be kidnapped by use of force and was molested in the auto-rikshaw.

9. The version of PW Ambar Lane purports to show that she was studying at Aurangabad in the relevant period as a student, in Deogiri College, under the International Youth Exchange Programme run by the Rotary Club. She was residing with PW Mrs. Sunita Kale. Her evidence reveals that on the fateful day while she was going by road near a hospital, an auto-rickshaw came from behind and the passenger sitting on the rear seat grabbed her right arm. Her evidence reveals that then she was listening to a walkman having the earphones plugged in her ears. Her evidence reveals that she screened for help while the passenger sitting on the back seat of the auto-rickshaw was pulling her inside. He pressed his palm on her mouth, pulled her near him and touched her breasts. Her evidence purports to show that some passers-by gathered near the auto-rickshaw and, therefore, the passenger left her free. Thereafter, the auto-rickshaw driver and the passenger left spot. Her evidence reveals that one of the passers-by took her to the Police Station. She corroborated recitals of her report (Exh-20). She also corroborated the fact that during the test identification parade, she identified the appellants on 13-02-2006. She identified both the appellants in the court.

10. There is no doubt about the fact that there took place incident in the relevant noon wherein PW5 Ambar Lane was attempted to be forcibly taken away in the auto-rickshaw. Her cross-examination reveals that she had the occasion to see both the appellants (accused) at the Police Station after their arrest. Obviously, the subsequent identification at the test identification parade is rather farcical. She admits that there were about 100 persons around the place when the incident occurred at the road. The evidence of PW5 Ambar Lane reveals that some of the passers-by gathered to help her. She admits that description of the culprits was not stated in her report (Exh-20). She knew that it was necessary to give description of the culprits while lodging the report.

11. Though identification of the appellants at the test identification parade appears to be doubtful, yet there is no substantial reason to dislodge version of PW Ambar Lane (prosecutrix) in so far as identification of the appellants in the court is concerned. She had no reason to falsely implicate the appellants.

12. Though she was being forcibly taken away in the auto-rickshaw and was probably scared, yet the fact that she struggled for the escape is corroborated by the other evidence. She could not have missed identity of the culprits although she was in the auto-rickshaw for a short period of few minutes.

13. There is evidence of PW1 Manojkumar, PW2 Anjali and PW4 Sachin which lends corroboration to the evidence of the prosecutrix. Out of them, PW2 Anjali is a Wada-Pao vendor. She runs a small hotel in front of Dr. Hedgewar Hospital near the place of incident. Obviously, her presence near the spot is natural. Her evidence shows that she noticed from her Wada-Pao Centre that an auto-rickshaw went from behind the prosecutrix. Her evidence reveals that the passenger sitting on the rear seat of the auto-rickshaw immediately started pulling the foreigner girl inside the auto-rickshaw. She narrated that the foreigner girl was trying to save herself and raised cry. She immediately went to the auto-rickshaw. Her evidence reveals that three youths got rescued the foreigner girl and thereafter the auto-rickshaw immediately went towards Gajanan Maharaj temple. She took down the registration number of the auto-rickshaw. That bore No. MH-20/W-3972. She also identified both the appellants in the court. Nothing of much importance could be gathered from her cross-examination. Her evidence reveals that the prosecutrix being foreigner and beautiful, her attention was attracted towards the latter. There is nothing unnatural about attraction of public members towards foreigners.

14. The testimonies of PW1 Manojkumar and PW Sachin also corroborate the case of prosecution. They identified the appellants in the court as driver of the auto-rickshaw and the passenger. It is pertinent to note that PW Manojkumar also attended the spot panchanama (Exh-11). The topography of the spot reveals that the incident occurred near an electric pole situated opposite to Dr. Hedgewar Hospital on the public road. The evidence on record shows, unmistakably, that the prosecutrix was engrossed in listening music through the earphones of her walkman while going along the road. She being beautiful and young, the passers-by could not have missed her presence on the road. Hence, it is not unnatural that PW Anjali and other witnesses immediately rushed to help her. The evidence of PW Manojkumar and PW Sachin does not suffer from any serious infirmity. Both of them identified the appellants as the same culprits. The fact that the auto-rickshaw vehicle number was noted down by the witnesses is conspicuous from their evidence.

15. The evidence of PW3 Bhagwan reveals that the auto-rickshaw was given to appellant Anil (orig. accused No. 1) at the relevant time on hire at rate of Rs. 80/- per day. He is owner of the auto-rickshaw which was seized from near house of appellant Anil. The evidence of PW6 Mrs. Smita reveals that the prosecutrix was

at Aurangabad for education and used to stay in her house. The evidence of PW Mrs. Smita reveals that she translated the F.I.R. (Exh-23) in Marathi script. It appears that some part of the translation is incorrect. However, it does not impair core of the evidence tendered by the prosecutrix.

16. So far as test identification parade is concerned, the prosecution relied on version of PW8 Rupa. She was working as Naib Tahsildar at Aurangabad during the relevant period. She narrated as to how test identification parade was held on 14-02-2006. She and PW7 Shrimantrao corroborated the identification parade's panchanama (Exh-40). The evidence of PW Rupa would show that both the appellants were mixed up with ten other inmates of the jail. As stated earlier, the prosecutrix had seen both the appellants at the Police Station before holding of the identification parade. The appellants were being taken to the Court for remand during the relevant period. The identification parade is not held as required under the provisions of Para 16 (2) (h) of the Criminal Manual. In *State of Goa Vs. Sanjay Thakran and Another*, , the Apex Court held that the identification parade, which is violative of the instructions contained in para 16 (2) (h) of the Criminal Manual, cannot be relied upon.

17. The learned advocates for the appellants have referred to *Yeshwant and Others Vs. The State of Maharashtra*, and *Budhsen and Another Vs. State of U.P.*, . These authorities deal with evidentiary value of test identification parade. It is held in *Budhsen and another* (supra) that conviction based solely on identification of witnesses by test identification parade would be unsustainable when the test identification parade is not conducted in accordance with requirement of law. In *Yeshwant and others* (supra), there was infirmity in holding the identification parade because the identification related to a bearded man with tape in neck and among five men produced, only one was having the beard. As stated before, the manner of conducting the identification parade was erroneous. The appellants were seen by the witnesses at the Police Station and moreover, they could have an opportunity to see the appellants prior to holding of the identification parade. Secondly, precaution was not taken to mix-up the appellants with persons having similar height and other features.

18. Though the test identification parade held by PW8 Rupa is untrustworthy, yet there is no substantial reason to dislodge the versions of the prosecutrix and eye witnesses regarding the identification of the appellants in the court. The learned Sessions Judge was right in accepting the evidence regarding such identification of the appellants in the court. This is not a case of mistaken identity. True, the prosecutrix could have seen the appellants only for a shortwhile of about five minutes or so, yet, the horrendous attempt to kidnap her and to molest her must have given everlasting impression of the faces of the culprits in her mind. That was harrowing experience for her. Hence, the imprints of the faces of the culprits could be retained in her memory irrespective of the fact that the time-span was short. One can not be oblivious of the fact that the incident occurred in the broad daylight. The culprits walked away from the place after the prosecutrix

was rescued. They were seen by PW Manojkumar, PW Anjali and PW Sachin for some time. Under these circumstances, the identification of the appellants in the Court can be relied upon.

19. Mr. Chitlange, learned advocate points out that copy of the FIR was sent to the Magistrate after delay. He seeks to rely on Mahadeo Kundalik Vaidya and Others Vs. State of Maharashtra, in support of the argument that delay in sending the FIR to concerned Magistrate would weaken the case of prosecution. The prosecution has explained the fact that there was holiday on 5th February, 2006. The version of PW9 P.I. Shri Deshmukh reveals that he registered the crime on basis of translated copy of the FIR (Exh-23). This is not a case wherein there is delay in lodging of the FIR. The version of PW Ambar Lane reveals that immediately the FIR (Exh-20) was lodged at the Police Station. The technical delay in sending of the FIR to the Magistrate would not be fatal to the case of the prosecution, particularly, when there is nothing on record to show that the FIR was lodged much after the period stated by the prosecutrix. There was hardly any scope for manipulation of the report. Hence, mere technical delay in sending of the FIR to the court of Magistrate is of no avail to the defence.

20. Mr. Barlota, would submit that appellant Anil could not have shared common intention with appellant Dhanraj @ Dhananjay. He would submit that there was no meeting of minds between the appellants prior to the incident. For, they could not have seen the prosecutrix much before and there was no design to kidnap her. He would submit that the passenger could have suddenly decided to pull the prosecutrix inside the auto-rickshaw. He relied on Harbans Kaur and Another Vs. State of Haryana, . It is held by the Apex Court that in order to bring home charge of common intention, the prosecution has to establish by evidence that there was plan or meeting of minds of all accused persons to commit the offence. So also, in Israr Vs. State of U.P., , the principle of joint liability underlying Section 34 of the I.P. Code is succinctly illustrated.

21. Coming to the facts of the present case, the conduct of appellant Anil can not be overlooked. For, conduct of an accused plays vital role in such a case. Appellant Anil stopped the auto-rickshaw nearby the prosecutrix. Not only that, but while appellant Dhanraj @ Dhananjay was trying to pull the prosecutrix inside the auto-rickshaw, appellant Anil made no attempt to dissuade appellant Dhanraj @ Dhananjay from doing so. Besides, he immediately speeded away the auto-rickshaw. The auto-rickshaw was stopped only when PW Manojkumar intercepted the same by parking his scooter in front of it. Appellant Anil did not await at the place after the incident was over. He took away appellant Dhanraj @ Dhananjay in the same rickshaw after the prosecutrix proceeded towards the Police Station. Considering this conduct of appellant Anil, it will have to be said that there was meeting of minds between both the appellants. He knew that appellant Dhanraj @ Dhananjay would kidnap the prosecutrix at the relevant time. He aided appellant Dhanraj @ Dhananjay in doing the act of said kidnapping. Their joint liability is rightly inferred by the learned Sessions Judge.

22. The prosecution evidence establishes the fact that appellant Dhanraj @ Dhananjay carressed breasts of the prosecutrix. He did not try to snatch away the walkman or any belonging of the prosecutrix. He immediately had pulled her near him. His overt acts indicate his intention to outrage modesty of the prosecutrix. He used criminal force against her to do so. He was so much excited that he started fondling with her instantaneously. Under these circumstances, the learned Sessions Judge was right in convicting appellant Dhanraj @ Dhananjay for the offence punishable u/s 354 of the I.P. Code. No interference in the impugned judgement on this score is called for.

23. As regards quantum of sentence, I find that the act of alleged kidnapping was not completed as such. The evidence on record reveals that appellant Dhanraj @ Dhananjay was not knowing the prosecutrix. It is explicit that he was infatuated towards the prosecutrix due to her beautiful appearance and youth. It is more probably that he suddenly decided to take the prosecutrix for a short-time pleasure of fondling with her person. The acts of the appellants would amount to attempt of kidnapping. For, in a shortwhile, the bid to kidnap the prosecutrix was foiled. Hence, they should have been convicted for offence punishable u/s 363 read with Section 511 of the I.P. Code. Their conviction for offence punishable u/s 363 of the I.P. Code is improper and incorrect. It would suffice if the sentence is reduced to two years" period in view of the lesser degree of offence proved and the circumstances brought on surface of the record. I am of the opinion that sentence of seven years is too harsh when the incident occurred at spur of moment and probably due to fatal attraction towards the prosecutrix.

24. For the reasons aforesaid, I am inclined to alter the nature of conviction and sentence awarded to the appellants. Both the appeals otherwise fail on merits. Consequently, the order of conviction for offence u/s 363 is altered to that of u/s 363 read with Section 511 of the I.P. Code. The sentence awarded to the appellants for offence u/s 363 of the I.P. Code is reduced from seven years" period to two (2) years. The order as regards amount of fine is, however, maintained and so also the sentence in default of payment of fine for offence u/s 363 of the I.P. Code. The remaining part of the impugned judgement, including conviction of appellant Dhanraj @ Dhananjay for offence u/s 354 of the I.P. Code is maintained. The appeals are accordingly dismissed.