

(1998) 12 BOM CK 0046
In the Bombay High Court
Case No : Criminal Appeal No. 307 of 1996

Anmol Gharde and others

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 03-12-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154
Evidence Act, 1872 — Section 3, 45, 61
Penal Code, 1860 (IPC) — Section 34, 342, 376(2)

Citation : (1999) 5 BomCR 209 : (1999) BomCR(Cri) 209 : (1999) CriLJ 4239 : (1999) 1 MhLj 692 : (2000) 1 RCR(Criminal) 176

Hon'ble Judges : S.D. Gundewar, J;M.B. Ghodeswar, J

Bench : Division Bench

Advocate : Habibuddin Ahmad, for the Appellant; R.G. Agrawal, Assistant Public Prosecutor, for the Respondent

Judgement

S.D. Gundewar, J.—This appeal has been preferred by the convicts-appellants being aggrieved by the judgment and order dated 27-9-1996 passed by the learned Additional Sessions Judge, Bhandara in Sessions Trial No. 66/94, whereby the appellants/accused have been convicted u/s 376(2)(g) of Indian Penal Code and sentenced to suffer rigorous imprisonment for 10 years with a fine of Rs. 1000/- each and in default of payment of fine R.I. for one year.

2. Brief facts of the case are recapitulated as under :-

The prosecutrix Ku. Nilima-P.W. 1 is the daughter of Prahlad Motghare, an employee in Ordnance Factory at Jawahar Nagar. She resides with her parents, sisters and brother in village Sawar (Indira Nagar), Tq. & District Bhandara. In the year 1993 she was studying in XIth Standard in Junior Girls College at Kondi. Some games and cultural programmes were arranged by the authorities of the said college from 21-12-1993 to 24-12-1993 on account of annual social gathering. On 21-12-1993 there was Bhandara dance programme in the college premises. The prosecutrix took part in the said programme. The said programme

was over at about 8.30 P.M. Soon thereafter the prosecutrix along with her friend Archana P.W. 2 went to the room of Smt. Gajbhiye for keeping the articles of make up. After keeping those articles in the said room, she and Archana were going back to the college to see other programmes. At that time, Archana was proceeding ahead and prosecutrix was following her with some distance. On way, when the prosecutrix entered into a lane she saw accused No. 1 Anmol there. He was armed with a knife having shawl on his person. He caught hold of her and when she started shouting he pressed her mouth and threatened her to kill. He then dragged her and took her at the outskirts of the village near a well of one Chimurkar. It was lonely place, where he untied her Salwar and underwear and had a forcible intercourse with her. Thereafter the accused Nos. 2 & 3 who were present there also had a forcible intercourse with her. She then went to the house of Smt. Gajbhiye where she felt giddy. After cultural programme was over, Smt. Gajbhiye, the Principal Khobragade and other staff members came there and on seeing the condition of prosecutrix they removed her to the Ordnance Factory Hospital, where she was examined by the Medical Officer and discharged. On her return to her house, her brother and sisters asked her as to what happened but she did not disclose anything to them. Her parents had gone to Nagpur. Her brother, therefore, went to Nagpur and informed them about the condition of prosecutrix. Her parents, therefore, returned to the house on 24-12-1993 to whom she narrated the entire incident. Thereafter on 25-12-1993 she went to the police station Jawahar Nagar along with her parents and lodged her oral report (Exh. 17) about the occurrence narrating therein the name of accused No. 1 Anmol and two others.

3. On the basis of an oral report (Exh. 17), Police Inspector Namdeorao Tekam (P.W. 10) then attached to the said police station registered an offence as Crime No. 105/93 and sent the prosecutrix to Civil Hospital, Bhandara, where she was examined by a lady Medical Officer Smt. Jaya Charmode and after the completion of the investigation, charge-sheet came to be filed against the appellants/accused in the Court of Judicial Magistrate, First Class, Bhandara and on commitment, the trial Court framed charge Exh. 10 against the appellants/accused under sections 376(2)(g) and 342 read with section 34 of the Indian Penal Code to which they pleaded not guilty and claimed to be tried. Their defence was one of total denial and false implication on account of enmity.

4. The learned trial Judge after hearing both the sides, convicted and sentenced the appellants/accused as stated above.

5. Shri Habibuddin Ahmad, the learned Counsel for the appellants/accused, urged before us that the evidence of the prosecutrix Ku. Nilima does not inspire confidence and she is not corroborated even by medical evidence. According to him, there is an inordinate delay in lodging First Information Report. Not only that, but the story given by the prosecutrix is not consistent with the facts narrated by her in her report-Exh. 17. It is further submitted by him that the appellants have been falsely implicated into this case by the prosecutrix at the

behest of her brother who is a doctor by profession and on inimical terms with the appellants as the appellants had lodged a report against him alleging misappropriation of some sports" articles belonging to Yuwa Manch entrusted to him.

6. Shri R.G. Agrawal, the learned Additional Public Prosecutor for the respondent/ State, however, supported the judgment passed by the learned Additional Sessions Judge and submitted that the learned Additional Sessions Judge was justified in relying upon the evidence of prosecutrix and convicting the appellants/ accused.

7. To appreciate the rival contentions raised at the Bar, we have carefully perused the judgment and scrutinised the evidence in detail. The trial Court has based its findings on the consideration of the evidence of prosecutrix alone. In the present case, it is not disputed that at the time of the alleged incident, the prosecutrix Ku. Nilima was aged about 18 years.

8. We would first consider the contention relating to delay in lodging the oral report Exh. 17. The occurrence had taken place on 21-12-1993 at about 9 P.M. and an oral report was lodged on 25-12-1993 at 5 P.M. Thus, it has been lodged on the 4th day of the incident. Explanation offered by the prosecution for this delay is that the parents of the prosecutrix had gone to Nagpur and only after their return on 24-12-1993 the prosecutrix narrated the entire incident to them and on the next day, i.e. on 25-12-1993 she lodged her oral report Exh. 17 about the occurrence. This explanation offered by the prosecution is not at all satisfactory. It is no doubt true that in a case of rape an atmosphere of emotional anarchy prevails and an attitude of indecisiveness reigns. The victim has to collect and compose herself, get out of shattering experience and go to the police station to lodge the F.I.R. However, in the present case, as the elder brother and the sisters of the prosecutrix were present in the house on the day of occurrence to whom the prosecutrix could have narrated the incident and lodged a report but this was not done. No satisfactory reason has been given by the prosecution as to why the incident was not narrated by the prosecutrix to her brother and sisters. Therefore, in our view, the inordinate delay of about 4 days in lodging the F.I.R. not satisfactorily explained is fatal to the prosecution case.

9. Nextly, it is submitted by the learned Counsel for the appellants that the evidence of prosecutrix is not supported by the medical evidence. On going through the entire evidence on record, we find considerable force in the aforesaid submission made on behalf of the appellants. It is stated by the prosecutrix Ku. Nilima that accused No. 1 caught hold of her hand, pressed her mouth and dragged her towards a well where all the appellants after laying her down committed forcible sexual intercourse with her. If really all the three appellants committed rape on the prosecutrix after she was dragged and taken there by accused No. 1, then some injuries would have been found on her person but no injury was noticed by the lady Medical Officer either on her chest, breast, abdomen or thighs.

10. As regards rape, what the lady Medical Officer Smt. Jaya Charmode P.W. 9 on her P.V. examination found was that hymen torn with slight in duration at forced and tenderness at both furnaces which according to the Medical Officer is possible due to infection. Further, the evidence of the lady Medical Officer shows that no seminal stains were found on vulva and, therefore, she was unable to state as to whether rape was committed on the prosecutrix or not. This clearly indicates that the Medical evidence does not support the version of the prosecutrix regarding the alleged incident of rape. So also, report of Chemical Analyser, Nagpur Exh. 54 shows that no semen or blood is detected either on the clothes of the prosecutrix or appellants. Similarly it shows that neither semen nor spermatozoa are detected on vaginal smear or public hair of prosecutrix and smear and public hair of the appellants. This fact also in our view negatives the theory of rape put up by the prosecutrix.

11. It is then submitted by the learned Counsel for the appellants that the story given by the prosecutrix is not consistent with the facts narrated by her in her oral report Exh. 17. It is true that in the report Exh. 17, the prosecutrix has not mentioned that the accused No. 1 was armed with a knife; so also she did not give the names of accused Nos. 2 & 3 in her report though she admitted that she knows them since long as they reside in the same ward where she resides. No proper explanation for these material inconsistencies in the F.I.R. and the evidence of the prosecutrix has been offered. We, therefore, find much substance in the aforesaid submission made on behalf of the appellants.

12. Now, the evidence of P.W. 2 Archana shows that the prosecutrix Ku. Nilima had a love affair with accused No. 1 Anmol and she had seen her going with accused No. 1 on his motor-cycle on some occasions. The evidence of P.W. 2 Archana on this point remains unchallenged. Her evidence clearly indicates that there was affinity, friendship and love between the prosecutrix and the accused No. 1 Anmol since prior to the incident and, therefore, the possibility that the prosecutrix was a consenting party to any such incident, if occurred cannot be ruled out.

13. Lastly, it is submitted by the learned Counsel for the appellants that the appellants have been falsely implicated into this case at the behest of the brother of the prosecutrix who is a doctor by profession and is on inimical terms with the appellants as the appellants had lodged a report against him for misappropriation of some of sports articles belonging to Yuwa Manch entrusted to him. The fact that the appellants had lodged a report against the brother of the prosecutrix is admitted by the prosecutrix Ku. Nilima during her cross-examination. The appellants have also stated about the same during their statement recorded u/s 313 of Criminal Procedure Code and, therefore, the possibility of the prosecutrix involving the appellants falsely in the present case at the behest of her brother cannot be ruled out. We, therefore, find much force in the aforesaid submission made on behalf of the learned Counsel for the appellants.

14. Now, it is well-settled that the testimony of the prosecutrix in a case of rape

if acceptable, truthful and reliable can be utilised without corroboration. However, it has been held by the Apex Court in a decision in State of Maharashtra Vs. Abdul Hafiz Faroki and Others, that if the testimony of the prosecutrix does not inspire confidence and suffers from infirmities, then conviction cannot be based on her testimony. In the present case, the testimony of prosecutrix Ku. Nilima not only suffers from infirmities as pointed out above but it is not supported even by medical evidence and thus it does not inspire confidence. Therefore, in our view, the learned trial Judge grossly erred in relying upon the testimony of the prosecutrix to base the conviction of the appellants. In this view of the matter, we find that the judgment and order passed by the learned Additional Sessions Judge, convicting the appellants u/s 376(2)(g) of Indian Penal Code needs to be quashed and set aside.

15. In the result, the Criminal Appeal is allowed. The judgment and order of conviction and sentence passed by the trial Judge is quashed and set aside. The appellants/accused are acquitted of the offences charged with. The appellants be released forthwith if not required in any other case.

16. Appeal allowed.