

(2021) 09 BOM CK 0046

In the Bombay High Court

Case No : Criminal Appeal No.147 Of 2014

Balu Kundalik Patil

APPELLANT

Vs

State Of Maharashtra & Another

RESPONDENT

Date of Decision : 22-09-2021

Acts Referred:

Scheduled Caste And Scheduled Tribe (Prevention Of Atrocities) Act, 1989 — Section 3(1)(xii)
Code Of Criminal Procedure, 1973 — Section 313
Indian Penal Code, 1860 — Section 376(2), 376(2)(f)

Citation : (2021) 09 BOM CK 0046

Hon'ble Judges : Sadhana S. Jadhav, J;Sarang V. Kotwal, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Sarang V. Kotwal, J

1 The appellant has preferred this appeal challenging the judgment and order dated 25.7.2013 passed by the learned Special Judge (Atrocities Act), Raigad at Alibag passed in Special Criminal Case No.5/2013. By the impugned judgment and order, the appellant was convicted for commission of the offence punishable under Section 376(2) and was sentenced to suffer life imprisonment and to pay a fine of Rs.5,000/-; and in default of payment of fine he was sentenced to suffer further RI for one year. The appellant was further convicted for commission of the offence punishable under Section 3(1)(xii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short, "Atrocities Act") and was sentenced to suffer RI for five years and to pay a fine of Rs.5,000/-; and in default of payment of fine to suffer further RI for one year. The sentences were directed to run concurrently. On depositing of the fine amount, Rs.9,900/- was directed to be paid to the mother of the victim. The appellant was given set-off for the period which he had undergone since the date of his arrest i.e. from 21.11.2010. The District Special Social Welfare Officer, Raigad-Alibag was directed to pay compensation of Rs.1,20,000/- to the victim's mother as per the

schedule annexed to Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995. He was also directed to pay the travelling allowances and daily wages of the victim and her parents in visiting the office of the investigating officer and he was also directed to make arrangement for rehabilitation of the victim.

2 The prosecution case, in brief, is as follows:

On 19.11.2010 between 4:00 p.m. to 4:45 p.m., the appellant, who was about 33 years of age at that time, took the victim girl, aged about five years, to his room and committed rape on her. After the victim came back home, she narrated the incident to her mother, who is respondent No.2 in this appeal. The mother of the victim found injuries on the victim's private parts and, therefore, along with her husband she approached the police and lodged the FIR. The investigation was conducted. The victim was belonging to Scheduled Caste and, therefore, provisions of Atrocities Act were applied. The investigation was carried out by a competent officer under the Atrocities Act. The appellant was arrested. The victim was sent for medical examination. The spot of incident i.e. the appellant's room was inspected. Spot panchnama was carried out. Some blood was collected on the swab from a chair in that room. A wedding card having blood stains was also seized. The clothes of the appellants and those of the victim were seized. The articles and various swabs collected during medical examination of the victim as well as of the appellant were sent for chemical analysis. The caste certificate of the victim's father was collected. After completion of the investigation, charge-sheet was filed and the trial was conducted before the Special Judge, which resulted in the impugned judgment and order, as mentioned earlier.

3 During trial, the prosecution examined PW-1 Dr. Sachin Ajamera, who had conducted medical examination of the victim. He was working as Medical Officer at Vashi General Hospital. PW-2 Narendra Parulekar was a pancha for two panchnamas under which the clothes of the appellant as well as the victim were seized on 21.11.2010 and 20.11.2010 respectively. Similarly, he was also a pancha for the spot panchnama of the house of the appellant. Those panchnamas are produced on record at Exhibits-24, 25 and 26 respectively. PW-3 Dr. Swati Naik had conducted medical examination of the appellant on 23.11.2010. She was attached to Rural Hospital, Panvel. PW-4 was mother of the victim. She had lodged the FIR vide C.R. No.498/2010 at Panvel City Police Station on 19.11.2010. It was lodged at 9:45 p.m. PW-5 Dinkar Kadam was the Assistant Police Inspector attached to Panvel City Police Station. He had conducted initial part of the investigation when clothes were seized, spot panchnama was carried out and articles from the spot were collected. PW-6 Assistant Commissioner of Police Shri Pralhad Sandansiv was examined as the investigating officer. He had carried out the investigation and had filed charge-sheet. He had arrested the appellant on 21.11.2010. He had collected the caste certificate of the victim's father, which is produced on record at Exhibit-23. The caste certificate of the appellant's brother was produced at Exhibit-53. The

appellant was belonging to 'Agri' caste. PW-7 was the victim girl herself. The C.A. reports were also produced on record vide Exhibits-50, 51 and 52.

4 We have heard Shri Niranjana Mundargi, learned counsel for the appellant, Smt. S.V. Sonavane, learned APP for respondent No.1-State and Ms. Rebecca Gonsalves, learned counsel appointed for respondent No.2.

5 The important evidence in this case is the evidence of the victim, her mother, medical evidence and the C.A. reports. The victim is examined as PW-7. Learned Judge satisfied himself that she was able to give rational answers and, thereafter, her deposition was recorded. She has stated that she was residing at Koli Kopar in a chawl with her parents and brother. Her father was working as a mason. Her mother was a housewife. On the day of the incident, she was playing outside with her friends and brother. She has deposed that a person known as "Balu" came near her house. He offered to give her some snacks and called her to his house. He took her to his house. She was made to sit on a chair. She has deposed that thereafter he removed her undergarments. He forced himself on the victim. She was having pain in her private parts. Thereafter she has described that the appellant touched his private parts with her private parts. She has further deposed that her mother had come to that place and she had taken her back to their house. The victim was in pain. She went to hospital with her parents. The victim identified the appellant before the Court. She also identified her clothes.

6 During cross-examination, the victim stated that she did not know where the appellant was residing. He had not visited her house. She was not knowing him prior to the incident. She admitted that her father told his name as "Balu" and her father had shown the appellant to her in the Court. She has deposed that when the appellant was taking her to his house, her mother had quarreled with him. Some other people also quarreled with him. She has further stated that her father had told her about what evidence she was to give. She stated that her father had told her to state that the appellant had touched the victim with his private parts. She stated that her father told her to say so and that she had stated that she was having pains on the say of her father.

7 PW-4 is the mother of the victim (i.e. respondent No.2 in this appeal). She has described the incident. She has stated that the victim was playing with other children in their court yard. It was about 4:00 p.m. on that day. The appellant took the victim with him by saying that he would give sweets to her. This witness had seen the appellant taking her daughter with him. PW-4 then went to the appellant's house to search for her daughter. Her daughter was found inside the house. There was some bleeding from her daughter's private parts. This witness then took her daughter to her house. She enquired with her daughter. At that time, her daughter told her about the incident. She told her that the appellant removed her clothes as well as his own clothes and then he laid himself on the victim. PW-4 told this fact to her husband. Both of them went to police station. They lodged their FIR. The FIR is produced on record at Exhibit-39. The police

sent the victim to the hospital. The victim's clothes were seized.

8 In the cross-examination, PW-4 stated that, her husband's uncle Manoj had accompanied them to the police station. The appellant's house was at a distance of 100 meters from their house. She could not explain as to why in her complaint to the police, it was not mentioned that when she went to the appellant's house, the victim was there and that she was bleeding. She had also not mentioned that her daughter told her that the appellant removed their clothes and then laid himself on her. She denied the theory that the daughter herself came to their house and then narrated the incident. It was recorded so in the FIR. But, she could not give any reasons why it was so recorded.

9 PW-1 Dr. Sachin Ajamera had conducted the medical examination of the victim. He has stated that the victim's age was calculated on the basis of X-ray report and she was found to be five years of age. On examination, he found that she had abrasion over left labia minora measuring 0.5 cm X 0.5 cm. It was not bleeding. There was presence of hymenal teat at 5'O clock position. The hymenal orifice was hyperaemic but it was not bleeding. Importantly, he stated that the injury was within less than 24 hours. There was no evidence of injury to vagina. He had collected various swabs and had sent them for examination. He further deposed that hymenal orifice admitted tip of finger. There was injury over private part and tear of hymen suggested injury by blunt object. He has deposed that based on this injury he had suggested that the victim was sexually assaulted. In the cross-examination, he admitted that there could be various reasons for tearing of hymen. No semen was detected on the swab collected by him, but, he denied the suggestion that absence of semen meant that sexual assault was ruled out. He reiterated that after examination of the victim, he could state that there was sexual assault. He produced the medical certificate of examination at Exhibit-21, which noted the aforementioned injuries.

10 PW-2 Narendra Parulekar was a pancha for the spot panchnama. The panchnama is produced on record at Exhibit-26. Importantly, blood was collected from the plastic chair with the help of cotton. A wedding card was also seized from that place. It also had blood stains.

11 PW-3 Dr. Naik has produced the medical papers of examination of the appellant. She stated that she found following injuries on his person :

"Swelling of testes. Hydrocele was prsent. No other external injury. Sample of blood, public hairs were obtained. He refused to give sample of semen."

12 The C.A. report showed presence of human blood on the cotton swab taken from the chair, wedding card, shirt and underwear of the appellant. However, the blood grouping was inconclusive.

This, in short, is important evidence of the prosecution case.

13 Shri Niranjan Mundargi, learned counsel for the appellant submitted that the evidence of the victim shows that she was a tutored witness and, therefore, was

unreliable. The mother of the victim has given inconsistent deposition compared to the contents of her own FIR. There is a major contradiction in the versions of her deposition and FIR because in the deposition she has stated that she herself had gone to the appellant and brought the victim back to her house; whereas, in the FIR she has stated that the victim came back to their house on her own and then narrated the incident. He submitted that this is an important contradiction which shows that the witness is not telling the truth.

14 He submitted that the medical officer has admitted that hymenal tear can occur due to various reasons. Lastly, he submitted that in case it is held that the appellant has committed rape, leniency be shown by reducing the sentence.

15 Learned APP submitted that the prosecution has proved its case beyond reasonable doubts. Some latitude will have to be given to the version of the victim who was very young and it was not expected from her to narrate the incident without natural infirmities in her deposition which would occur because of her tender age. She submitted that the mother's evidence is more important. This ocular evidence is supported by the medical evidence.

16 Ms. Rebecca Gonsalves, learned counsel for respondent No.2 submitted that the case was immediately reported to the police. The victim was sent for medical examination without delay. The medical examination supports the prosecution case. There was no scope to concoct and to implicate the appellant falsely. She submitted that considering the tender age of the victim, her deposition will have to be perused from that angle and in any case it does not show that the victim's father had tutored her regarding the actual incident.

17 We have considered these submissions. The medical evidence given by PW-1 is clear enough. He has specifically opined that the victim was subjected to sexual assault. He had mentioned the injuries suffered by the victim. More importantly he had stated that the injury was within less than 24 hours. Therefore, the prosecution has proved beyond reasonable doubt that the victim was sexually assaulted.

18 PW-4, the mother of the victim, has stated that she had seen the appellant taking away her daughter. There is no inconsistency to this aspect between the evidence of PW-4, her FIR and deposition of PW-7. Therefore, whether PW-4 brought the victim back to her house or whether the victim came back home on her own; will not make any real difference to the prosecution case.

19 One of the most incriminating circumstances in this case against the present appellant is finding of blood on the chair as well as on the wedding card found in his house. The prosecution case is that the victim was made to sit on the same chair when the incident had taken place. The medical examination of the applicant himself shows that he did not have any bleeding injuries. There were injuries on the private parts of the victim. The C.A. report shows that there was blood on these articles as well as clothese of the appellant. In the context and facts of this case, this is a strong incriminating piece of evidence against the

present appellant.

20 The appellant in his statement under Section 313 of Cr.P.C. has taken a defence that he was implicated at the behest of his brother who was landlord of the victim's family. However, there is nothing on record to substantiate this suggestion and the defence. As rightly submitted by Ms. Gonsalves the victim's family had immediately approached the police. Medical examination was conducted immediately and there was no scope for concoction of the story falsely implicating the present appellant.

21 In this background, the admissions given by the victim are inconsequential. She was barely five to seven years of age at the time of incident. Even without referring to her deposition and her admissions about her father showing her the appellant, and father instructing her, there are other clinching circumstances as mentioned hereinbefore against the present appellant.

22 In this view of the matter, we are satisfied that the prosecution has proved its case beyond reasonable doubt. The prosecution has also proved the fact that the victim belonged to the Scheduled Caste and the appellant did not belong to a scheduled caste. Therefore, the offence under the Atrocities Act is also proved.

23 We have considered whether leniency can be shown to the appellant. The victim was barely five years of age and the appellant was over 35 years of age at the time of incident. The victim had suffered bleeding injury. She had innocently gone to his house on his inducement. We are not inclined to show any leniency to the appellant. We have considered the injuries and trauma suffered by the victim. Therefore, there is no reason to reduce the quantum of the sentence awarded to the appellant. Hence, we do not find any merit in the matter. The prosecution has proved that the appellant has committed these offences, i.e. the offence under Section 376(2)(f) of IPC (before amendment) as well as under Section 3(1)(xii) of the Atrocities Act. We are not inclined to reduce the sentence.

24 Therefore, the appeal fails and is accordingly dismissed. Ms. Rebecca Gonsalves was appointed by this Court. Therefore, she be paid her fees as per rules.