
(2015) 07 BOM CK 0120

In the Bombay High Court

Case No : Criminal Application Nos. 883 of 2014 and 663 of 2013

Bhagwan Chintaman Thakre

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 24-07-2015

Acts Referred:

Evidence Act, 1872 — Section 32

Penal Code, 1860 (IPC) — Section 306, 323, 34, 342, 376

Citation : (2016) 1 BomCR(Cri) 392

Hon'ble Judges : A.R. Joshi, J

Bench : Single Bench

Advocate : Bhakti Deshpande, for the Appellant; Anamika Malhotra, APP,
Advocates for the Respondent

Final Decision : Allowed

Judgement

A.R. Joshi, J—Heard rival arguments on this application, in this appeal challenging the acquittal of appellant-original accused No. 1. Earlier the appellant had preferred the appeal through jail as through out he was in custody since the day of his arrest i.e. from 13th December 2010. Learned appointed counsel was engaged to represent him in the present appeal. On the earlier date the appointed counsel submitted that she has instructions to withdraw from the matter as the appellant wanted to argue himself before the Court. On this appellant was directed to be brought before the court from concerned jail. On earlier date he was brought before the Court. Today he again changed his mind and stated that the earlier appointed counsel will continue to define his case and as such the matter is taken for final hearing.

2. The appellant accused No. 1 is convicted for the offences punishable under sections 376, 306, 342, 323, 504 and 506 read with section 34 of Indian Penal Code. For the major offences punishable under sections 306 and 376 of Indian Penal Code he is sentenced to suffer RI for 7 years each. Original accused No. 2 was also convicted for the same offences as those proved against accused No. 1.

But curiously accused No. 2 was convicted and was sentenced to suffer RI for three years on the major counts of sections 306 and 376 of Indian Penal Code. Apparently it was the illegality committed by the trial Court while sentencing the accused No. 2 for only 3 years imprisonment without awarding the minimum sentence, once the trial Court came to conclusion that the offence of 376 is established. However, now considering the final outcome of the present appeal for the reasons which are now hereinafter mentioned, in the considered view of this court this aspect has become redundant. Moreover, the original accused No. 2 had already undergone his substantive sentenced as apparently he was also in custody since December 2010 and he had not preferred any appeal. Original accused No. 3 and 4 were acquitted of all the charges. State had not preferred any appeal challenging their acquittal.

3. The case as against the present appellant-original accused No. 1 is concerned, according to the prosecution he was involved in the offence of rape and as such the after math of the said incident of the rape led the victim girl to commit suicide by consuming some insecticide. As such according to the prosecution the appellant was also involved in the offence of abatement to commit suicide.

4. The case of the prosecution in nutshell is that in the evening of 05th December 2010 the victim girl then aged about 17 years or so had been out of her house for fetching water. Her way to fetch water was from the house of accused No. 2. When she reach near house of accused No. 2, accused No. 1 was also sitting there. He called her inside. She inquired as to what was the work. On this accused No. 1, present appellant, caught hold of her hand and dragged her inside. Accused No. 2 closed the door and caught hold of the hands of the victim. Thereafter removing cloths of the victim, appellant accused No. 1 committed forcible sexual intercourse. The victim raised shouts but apparently no body came forward as the area where the house of accused No. 2 was situated was away from the human inhabitation. Appellant-accused No. 1 also gave threats of killing the victim by showing her knife. After the incident some how she managed to come out of the house and thereafter she went to fetch the water and also she met two persons one women by name Vimal Thakre and another male person by name Ganpat Thakare. She narrated entire incident to these persons as to forcible sexual intercourse committed at the house of accused No. 2 by the accused No. 1. Thereafter, said victim girl came back to her home and narrated the incident to her mother i.e. P.W. No. 4. Thereafter, the victim girl lost her balance of mind and decided to end her life by consume some insecticide which was available in the house. She consume the insecticide and become seriously ill and started vomiting. Noticing her condition initially she was taken to primary health center and thereafter to the dispensary at Shahpur and from there on medical advice she was moved to Civil Hospital, Thane in an ambulance.

5. It is also the case of the prosecution that in the ambulance she narrated the incident to her father and her paternal uncle who are P.W.-1 and P.W.-6 respectively. Thereafter, she was treated at the Civil Hospital, Thane and on the

next day evening i.e. on 06th December 2010 at about 7.00 p.m. her statement was recorded by Police Head Constable on receiving the information that the victim girl had been admitted to Civil Hospital, as a case of poisoning. Said police Head Constable is P.W.-5. He initially gave a letter to the attending doctor P.W. No. 9 and after obtaining endorsement on the said letter as to the patient able to give statement and conscious, recorded statement of the victim girl. The said statement is at Exh-35 before the trial Court. It was treated as First Information Report and offence was registered initially only against accused No. 1 and 2. Subsequently during the treatment the victim girl died at early hours of 09th December 2010 and then offence punishable under section 306 was inserted in the chargesheet. Present appellant-accused No. 1 was arrested on 13th December 2010. During the trial the statement of the victim girl was proved by P.W. No. 5 and it was taken on record at Exh-35 being as dying declaration as per section 32 of the Evidence Act.

6. During the trial total 11 witnesses were examined. Out of them the important witnesses are P.W. No. 5 the Police Head Constable who recorded the dying declaration, P.W. No. 9 Dr. Smt. Sanjita Ganpati Patil who gave the endorsement on the dying declaration regarding consciousness and condition of the victim to give statement, P.W. No. 1 and P.W. No. 6 are the father and paternal uncle of the victim. According to P.W. No. 1 and P.W. No. 6 while the victim was being taken to the Thane Civil Hospital in an ambulance she narrated the incident taking the name of accused No. 1 and 2 and also taking the name of other accused person Nos. 3 and 4 who were initially not made accused by the police. Apart from these witnesses the substantive evidence of P.W. No. 7 Dr. Smt. Vaibhavi Prasad Indulkar, Medical Officer, Gynecologist in Civil Hospital Thane is of much importance. It is on the aspect whether there was any finding which may lead to the conclusion of forcible sexual intercourse committed on the said victim girl. The Medical examination report given by P.W. No. 7 Dr. Indulkar is at Exh. 39. Said medical examination was conducted on 07th December 2010 i.e. about 2 days prior to the death of the victim and one day after her admission in the Civil Hospital, Thane.

7. During the arguments following points were emphasized on behalf of the appellant by learned appointed counsel and mainly the evidence of dying declaration was assailed by taking shelter of the findings of Exh. 39 the medical examination report, given by P.W. No. 7 of Dr. Indulkar. It is submitted that the offence punishable under section 376 is ruled out. Firstly it is argued that though there was opportunity to call the Special Executive Officer to record the statement of the victim girl, no such officer was called and the only statement recorded as dying declaration is Exh. 35 and i.e. by Police Head Constable P.W. No. 5. Secondly the admission given by P.W. No. 5 is brought to the notice of this Court on behalf of the appellant that during recording of statement the parents and other relatives of victim girl were present by her side and in that condition her statement was recorded by Head Constable and it was typed by one police writer. It is also brought to the notice that the endorsements given by attending

Dr. Smt. Patil bear the same time. The said time is 7.00 p.m. even at the starting of the recording of the statement and even at the end. Secondly it is argued that the victim was shifted to various hospitals and lastly brought to Civil Hospital, Thane and apparently there was no history as to any sexual assault on her but the history was only of consumption of poison. It is also argued that the signature at the end purported to be that of the victim, on the dying declaration has not been established as that of the victim considering her physical condition and considering her education. By pointing out this it is stated that it is very much doubtful whether Exh. 35 factually contain what was stated by the victim. Lastly it is argued that it is not conclusively established that the death of the victim was by poisoning. On this aspect the CA report of the viscera and the other organs sent for Chemical Analysis indicate that there was no poison detected. The final result of analysis reads thus:--

"General and specific chemical testing does not reveal any poison in exhibit Nos. (1), (2) and (3).

The said three exhibits are:--

- 1) Viscera in a plastic bottle labelled----Stomach with content loop of intestine.
- 2) Viscera in a plastic bottle labelled---Slice of liver, spleen, kidney.
- 3) Blood in a bottle labelled---Blood.

Exhibit Nos. (1) to (3) also labelled--Vidya Balu Thoke.

PM No. 1385/SMJ/10."

8. Now coming to the authenticity or otherwise of dying declaration of Exh. 35, firstly it is admitted position that in the said dying declaration there is nothing mentioned as to the involvement of accused No. 3 and 4. Accused No. 3 is one women by name Nanda Dattu Thakre and accused No. 4 is by name Suresh Thakre. According to the case of prosecution said accused No. 3 Nanda is the wife of accused No. 2 Dattu alias Datta. Though there is no reference to these accused No. 3 and 4 in the dying declaration, substantive evidence of P.W. No. 1 and P.W. No. 6 goes to show that while the victim was being taken to the Civil Hospital in an ambulance she had giving the names of all the 4 accused and also given the role to accused No. 3 Nanda Thakre as she initially called the victim in the house and gave water and thereafter latched the door and went away living the victim in the house in company of other three accused i.e. accused Nos. 1, 2 and 4. According to P.W. No. 1 and P.W. No. 6 victim also stated that accused No. 4 Suresh removed her cloths and accused No. 1 present appellant committed forcible sexual intercourse with her. This substantive evidence of P.W. No. 1 and P.W. No. 6 is rather at variance with the case of the prosecution in as much as contents of the dying declaration are concerned. As such definitely a doubt has been created whether such dying declaration was given by the victim taking the name of only accused No. 1 and 2 and giving them the role as mentioned in the dying declaration.

9. At this juncture the admitted position is also required to be mentioned as admitted by the Investigating Officer and also by the parents of the victim. It was a factual position that after the death of the victim on 09th December 2010 her dead body was brought in front of the local Police Station which had investigated the matter and some social organization also intervened and a huge mob of people gathered and demanded that accused No. 3 and 4 were also to be arrested. It appears that on such tense situation the steps were taken by the Investigating Agency and accused No. 3 and 4 were also roped as an accused persons. Ultimately they were acquitted by the trial Court of all the charges. Even it is apparent that the role of accused No. 3 and 4 is only mentioned in the substantive evidence of P.W. No. 1 and P.W. No. 6 as detailed above. In any event as mentioned earlier the dying declaration is vulnerable and as such cannot be accepted.

10. Now coming to the offence punishable under section 376 of Indian Penal Code the medical examination report of victim girl which is Exh. 39 is of much significance. So also the substantive evidence of P.W. No. 7 is of importance in as much as according to this witness she was asked to examine the patient Vidya Balu Tohake who was admitted as a case of poisoning. Said doctor P.W. No. 7 was asked to undertake Gynec examination of the patient. On clinical examination she found that:

"patient was conscious, disorientated and uncooperative. Her vital parameters were stable. Secondary sex characters were well developed. Her abdomen was soft."

The observations of P.W. No. 7 which are appearing in para No. 2:

"On palvic examination of signs of inflammation. There were no signs of injury or blood or semen on the body or on the private part externally. Her sonography was conducted, it shows normal study. On conclusion, 19g Female undergone recent sexual assault with consumption of unknown poison. Accordingly she issued certificate. It is at Exh. 39."

11. During the cross-examination said P.W. No. 7 has accepted the suggestion given on behalf of the defence that at least some injuries may occur on the private parts of victim girl when it is a case of forcible sexual intercourse and the signs of inflammation can remain for a period of 5 to 6 days. In the present case admittedly there were no injuries on the private parts of the victim girl when she was examined by the Gynecologist i.e. P.W. No. 7. The findings in the medical examination certificate are reproduce hereunder:--

"(i) General Examination :- Conscious, disorientated, uncooperative, Secondary sexual characters well developed,

(ii) Palvic Examination :- No signs of inflammation

(iii) P.V. :- Hymen perforated, Admits one finer, blood stained discharge on examining finger.

(iv) Injuries on body :- No signs of any injury blood/semen anywhere on body.

(v) Injuries on Sexual Parts :- No signs of any injury/blood/semen on Private parts."

12. As such considering the medical examination of the victim girl and considering the case of the prosecution as to forcible sexual intercourse, in the opinion of this court it cannot be said that the offence of rape defined under section 376, much less the offence of sexual assault, has been established.

13. Apart from the above, the C.A. report regarding the cloths of the victim show following results.

"Neither blood nor semen is detected on exhibit No. 1, 2 and 3."

The articles sent to C.A. for these analyses were one knicker, one salwar and one Kurta (Torn). Even the C.A. report regarding the Semen blood sample and Pubic hair sample of the present appellant-accused No. 1 were in conclusive.

14. In the light of the nature of the evidence which was brought before the trial Court, it must be said that the trial Court had committed an error in convicting the appellant and also the other co-accused No. 2. In the result the present appeal succeeds and same is allowed with following order.

ORDER

i. Criminal Appeal No. 663 of 2013 is allowed;

ii. The impugned judgment and order passed by Additional Sessions Judge, Kalyan in Sessions Case No. 136 of 2011 is quashed and set aside. The appellant/accused No. 1 is acquitted for the offences punishable under sections 306, 376, 342, 323, 504 and 506 of Indian Penal Code;

iii. The appellant/accused No. 1 be released from jail custody, if not required in any other case;

iv. The fine amount if already paid, the same shall be returned back to the appellant/accused No. 1;

v. Criminal Appeal is disposed of accordingly.