
(2019) 10 BOM CK 0071
In the Bombay High Court
Case No : Criminal Appeal No. 112 Of 2014

Bhagwan @ Maharu Ragho Koli

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 16-10-2019

Acts Referred:

Indian Penal Code, 1860 — Section 374, 376, 376(2)(f), 506(i)
Evidence Act, 1872 — Section 27
Code Of Criminal Procedure, 1973 — Section 294, 313, 437A

Citation : (2019) 10 BOM CK 0071

Hon'ble Judges : T.V. Nalawade, J;K.K. Sonawane, J

Bench : Division Bench

Advocate : Joydeep Chatterji, V.S. Choudhari

Final Decision : Disposed Of

Judgement

K.K. Sonawane, J

1. The appellant - original accused - Bhagwan @ Maharu Ragho Koli is convicted by the learned Additional Sessions Judge, Dhule, for the offence punishable under Section 376(2)(f) and Section 506 (i) of Indian Penal Code (IPC) in Sessions Case No. 114 of 2012, dated 16-01-2014. The appellant-accused is sentenced to suffer rigorous imprisonment (RI) for life and to pay a fine of Rs.2000/- in default to suffer SI for three months for the offence punishable under Section 376(2)(f) of IPC. He was further sentenced to suffer RI for two years and to pay a fine of Rs.500/- in default to suffer further SI for one month for the offence punishable under Section 506 (i) of IPC. The appellant-accused, taking recourse of remedy under Section 374 of Code of Criminal Procedure, 1974 (Cr.P.C.), knocked the door of this Court and filed present appeal to redress his grievance.

2. It has been alleged on behalf of prosecution that there was pilgrim of Yashwant Maharaj on 04-03-2012 in village Ner, Taluka and District Dhule. The parents of minor prosecutrix, 8 years old, decided to visit fair with children. The

father also gave Rs.30/- each to minor prosecutrix and his elder brother for enjoyment in fair. Thereafter, father had gone to answer nature's call. After returning home, he realized that minor daughter prosecutrix is not available in the home. He made enquiry with wife Sunanda. She disclosed that prosecutrix might have been out-side the house. Meanwhile, at about 7.30 p.m. minor prosecutrix returned to home. She was weeping at that time. After inquiry by parents, she disclosed that one person gave her coconut and took her in the field. He committed sexual assault on the minor prosecutrix. The mother saw bleeding injuries at the private part of minor prosecutrix. Thereafter, parents took her to Government Hospital at Ner for medical treatment. The concerned Doctor advised them to take the prosecutrix to the Civil Hospital at Dhule for further treatment. Later-on, father filed First Information Report (FIR) about incident to the Police of Dhule Taluka Police Station, for further process.

3. Pursuant to FIR of the father of minor prosecutrix, Police registered the Crime No. 55 of 2012 under Section 376 of IPC and swung into action. The Investigation Officer (IO) visited to the minor prosecutrix for recording her statement. But, up-till 08-03-2012, minor prosecutrix was not in a condition to give statement. She was in frighten condition and under duress. However, IO succeeded to record her statement on 08-03-2012. The minor prosecutrix shown inability to disclose the name and identification of culprit. She was not in acquaintance with alleged offender. The minor prosecutrix pointed out scene of occurrence. It was located in the field of PW-2 Devidas Mali. The IO prepared panchnama of spot of incident. He also recorded statement of land owner Shri Devidas Mali. He had disclosed the name of appellant-accused for sexual assault on the minor prosecutrix. Thereafter, appellant-accused was arrested in this crime. The IO recorded statements of witnesses acquainted with facts of the case. IO collected documents of medical examination of prosecutrix. He seized the clothes of prosecutrix under panchnama. The appellant-accused was referred for medical treatment. The IO recovered clothes of accused under Section 27 of the Evidence Act, which were on his person at the time of incident. The seized muddamal was referred to Forensic Laboratory for analysis. After compliance of procedural formalities, IO preferred the charge-sheet against the accused bearing Sessions Case No. 114 of 2012.

4. The learned Additional Sessions Judge, Dhule, framed the charge against the accused, to which, accused pleaded not guilty and claimed for trial. The learned Sessions Judge proceeded further for recording evidence of prosecution witnesses in this case. In addition to the circumstantial evidence in the form of document, prosecution examined in all six witnesses to bring home guilt of the accused. Learned Sessions Judge also recorded statement of appellant-accused under Section 313 of Cr.P.C. After hearing both sides, learned Additional Sessions Judge arrived at the conclusion that appellant-accused is guilty for the offence of sexually assault on the minor prosecutrix.

Therefore, learned Additional Sessions Judge convicted the appellant-accused for

the aforesaid offences and imposed the resultant sentence as indicated above. The impugned Judgment and order of conviction and resultant sentence of the appellant-accused rendered by learned Additional Sessions Judge, is the subject-matter of present appeal.

5. Mr. Joydeep Chattergi, learned counsel appearing for the appellant-accused submitted that the impugned Judgment and order of conviction and resultant sentence is erroneous, illegal and against the prescribed provisions of Law. There is no cogent and satisfactory evidence available on record to prove the complicity of accused for the charges of rape on the minor prosecutrix beyond reasonable doubt. The findings of the guilt expressed by the learned trial Court is perverse and totally based on surmises and conjunctures. The medical evidence and oral testimony of the prosecutrix are inconsistent with each other. According to learned counsel, there were no injuries on the private part of appellant-accused. He gave much more emphasis on the circumstances that if there was penetration of male organs of fully grown up person while physical relation with minor vergin, there would be injuries to his private part. There are material discrepancies in the evidence of prosecution witnesses. The evidence of land owner PW-2 Devidas Mali found suspicious and dubious one. He had seen the appellant-accused on 04-03-2012 while committing rape on minor prosecutrix, but he maintained silence till 10-03-2012. He was interrogated by the police on 08-03-2012. But, he did not disclose about the incident to police. The conduct and demeanor of PW-2 Devidas Mali appears to be suspicious and doubtful. He intentionally and purposefully embroiled the appellant-accused in this case. There were no blood and semen stains detected on the cloths of appellant-accused in Chemical Analyzer's report. There was no any credible evidence available on record to establish nexus and proximity of the appellant-accused with the alleged incident. The prosecution has failed to prove complicity of appellant-accused in this case beyond all reasonable doubt. The prosecutrix also did not identify appellant-accused in the Test Identification Parade. In such circumstances, it would unjust and improper to draw adverse inference against the appellant-accused for the charges pitted against him. In support of arguments, he relied upon the judicial precedent of Honourable Apex Court and Chattisgarh High Court in the cases of - (1) Rahim Beg Versus State of Uttar Pradesh (Criminal Appeal No. 88 of 1971) and Mahadev Versus State of Uttar Pradesh (Criminal Appeal No. 89 of 1971) reported in AIR 1973 SC 343, (2) Dana Yadav alias Dahu and others Versus State of Bihar, reported in 2002 ALL MR (Cri) 2548 (S.C.), (3) Bollavaram Pedda Narsi Reddy and others Versus State of A.P. reported in AIR 1991 SC 1468, (4) Bhoj Kumar and others Versus State of Madhya Pradesh, reported in 2013 Cr.L.J. 4034.

The learned counsel Mr. Chatterji explained the attending circumstances on record in detail and urged to exonerate the appellant-accused from the serious charges of rape on the minor prosecutrix.

6. Learned APP opposed the contentions propounded on behalf of appellant-accused and submitted that victim prosecutrix was minor girl of 7/8 years old at

the time of incident. The evidence of PW-3 minor prosecutrix categorically established the involvement of present appellant-accused in this case. The medical report proved by PW-6 Dr. Chetan Ashok Pawar made it clear that victim girl was subjected to sexual assault during the relevant period. The history of sexual assault was recorded in the medical case papers. The medical expert observed that hymen of the prosecutrix was torn at multiple sites. There was no reason for the parents of minor prosecutrix to implicate appellant-accused falsely in this case.

7. Admittedly, prosecution has examined in all six witnesses in this case to book guilt of the accused. In addition to oral evidence, prosecution also relied upon circumstantial evidence i.e. spot panchnama (Exhibit-8), documents of medical examination of prosecutrix (Exhibits-9 and 10), seizure of cloths of prosecutrix (Exhibit-11), her School Leaving Certificate (Exhibit-12), arrest panchnama of the accused (Exhibit-13), certificate of medical examination of accused (Exhibit-14), etc. The genuineness of all these documents are not put it to controversy on behalf of accused. These documents were tendered by the prosecution under Section 294 of Cr.P.C. Therefore, this sort of documentary evidence came to be admitted for appreciation in this case.

8. PW-1 Police Head Constable (PHC) Akbar Abdul Rahim Patel registered the Crime bearing No. 55 of 2012 on the basis of FIR filed by father of prosecutrix. PW-2 Devidas Mali was the land owner of spot of incident. PW-3 was the minor victim herself and PW-4 Sunanda was the mother of minor prosecutrix. PW-5 Ketan Rathod carried out the investigation of crime and PW-6 Dr. Pawar clinically examined the prosecutrix to ascertain the factual aspect of sexual assault on her.

9. The intense scrutiny of entire oral and circumstantial evidence adduced on record on behalf of prosecution reveals that both the prominent issues about the age of prosecutrix as well as attempt of sexual assault with her, are not seriously put into question on behalf of appellant-accused. As referred above, the panchnama of scene of occurrence, medical certificate of victim, her school leaving certificate, etc. all are admitted and genuineness of these documents were not put into controversy on behalf of accused. In such back drop, the crucial issue remained to be determined in this case only in regard to complicity/ involvement of the appellant-accused in this crime.

10. The prosecution examined PW-3 minor victim in this case. She deposed that on the day of incident there was fair in her village. Therefore, she accompanied with her elder brother-nine years old, had been to fair. She further testified that one person came to her and disclosed that he would give her coconut. He asked her to accompany with him. Thereafter, that person took her in the field. He removed his pant and slept on her person and committed sexual intercourse. She pointed out the accused, who was present in the Court at the time of recording her evidence on 22-04-2014 as a perpetrator of crime. In the cross-examination, she disclosed that at the time of incident, the offender inflicted injuries by blade on her private part and except this he did not commit any act. She conceded in

the cross-examination that she did not disclose to the police in her statement that accused committed sexually intercourse with her. She further explained that she has simply stated to police that accused had committed "kuchu-kuchu" with her. These discrepancies occurred in the version of prosecutrix cause serious doubt in the prosecution case. Be that as it may, the evidence of PW-3 minor prosecutrix is not of impeccable quality to establish complicity of the present appellant-accused in this case.

11. As referred above, the prosecutrix was not knowing or familiar with the appellant-accused prior to incident. Moreover, she could not identify the present appellant-accused during the course of Test Identification Parade arranged by the concerned Executive Magistrate at the behest of PW-5 IO Ketan Rathod. The appellant-accused was not known to the prosecutrix from before the alleged incident nor prosecutrix was aware about his name till recording her evidence. In such circumstances, it would unsafe to fasten guilt on the accused, bare on the basis of his identification by the prosecutrix for the first time in the Court after lag of a year of occurrence of incident. The sole evidence of identification of accused on the part of prosecutrix in the court cannot be accepted for adverse inference against the appellant-accused.

12. PW-2 Devidas Mali was the land owner of the spot of incident and star witness of the prosecution in this case. The police recorded his statement on 10-03-2012. He disclosed the overt-act of the appellant-accused for alleged sexual assault on the minor prosecutrix for the first time on 10-03-2012 in his statement before Police. PW-2 Devidas Mali testified that on the day of incident at the relevant point of time, he was present in the field for watering the crop. He over-heard the cries of girl from the side of Garlic crop. Therefore, he rushed toward minor prosecutrix. He saw that one person was lying on the small girl, doing obscene act. He was committing rape on the minor girl. PW-2 Devidas Mali further added that on seeing him, the person committing rape on the prosecutrix started running from the spot. PW-2 Devidas Mali attempted to give chase to him, but, at some distance, that person stopped and threatened him about dire consequences. PW-2 Devidas Mali recognized the offender as Bhagwan @ Maharu Ragho Koli. According to PW-2 Devidas Mali, accused-appellant gave threat of life to him. Therefore, he did not give chase to him and return back in the field. He saw minor prosecutrix, who was weeping at that time. He made inquiry about names of herself and her father. Thereafter, PW-2 Devidas Mali took victim-girl upto the village road, which was leading towards house of prosecutrix, and thereafter, he returned to home. PW-2 Devidas Mali deposed that due to fear of accused he did not disclose incident to anybody else. However, on 10-03-2012, police recorded his statement and at that time he narrated entire episode of sexual assault by accused-appellant on the minor victim to the police.

13. In the cross-examination, PW-2 Devidas Mali conceded that the minor prosecutrix and his father were known to him as the prosecutrix used to visit him for purchasing milk. He was aware about the name of prosecutrix and her father.

PW-2 Devidas Mali further admitted that before two days of recording his statement on 10-03-2012, police had called and made inquiry about the incident with him. He was interrogated by police for about two hours. But, he did not disclose about the overt-act of accused-appellant to the police. The conduct and demeanour of PW-2 Devidas Mali appears to be suspicious and dubious in nature. We are at a loss to understand that when he was aware about the name of prosecutrix since last 4 to 5 years, as she used to visit him for purchasing milk, then what was the reason for the PW-2 Devidas Mali to make inquiry with prosecutrix about her name at the time of alleged incident.

14. The incident of sexual assault was occurred on 04-03-2012 in presence of PW-2 Devidas Mali. But, he maintained silence about the involvement and participation of accused-appellant in this case up-till 10-03-2012. Moreover, he brought the minor prosecutrix in weeping condition upto road side and left her alone for going to home. He did not show any courtesy to take the hapless minor prosecutrix to her home and handed over the minor girl in the custody of her parents. The behaviour of the PW-2 Devidas Mali found inconsistent with normal human behavioural pattern. Therefore, version of PW-2 Devidas Mali smacks something fishy. His evidence seems to be incredulous and not inspire confidence to prove the involvement and complicity of the accused-appellant in the crime. It also remains a conundrum that when the PW-2 Devidas Mali was interrogated by the Police on 08-03-2012 for about two hours, he did not divulge about the crime committed by appellant-accused then what had happened on 10-03-2012 that made him to disclose to the Police about overt-act and involvement of appellant-accused in this crime.

15. The victim minor prosecutrix also did not identify accused-appellant at the time of Test Identification Parade. The evidence of PW-4 Sunanda, mother of the minor prosecutrix, in regard to overtact of appellant-accused was hearsay in nature. The CA report also silent about blood stains or semen on the cloths of appellant-accused to prove his complicity in this case. Therefore, it is doubtful that really appellant-accused ravished the minor prosecutrix to slack his sexual urges.

16. Learned counsel for appellant gave much more emphasis on the circumstances of absence of injuries on the private of appellant-accused in this case. According to learned counsel, in case of sexual assault on minor girl of 7/8 years old by fully grown-up appellant-accused, there should be some injuries to his male organs. He relied upon the observations of their Lordships of Honourable Apex Court in the case of - *Rahim Beg Versus State of Uttar Pradesh* (Criminal Appeal No. 88 of 1971) and *Mahadev Versus State of Uttar Pradesh* (Criminal Appeal No. 89 of 1971) reported in AIR 1973 SC 343. In paragraph No. 26, their Lordship observed as under -

"26. According to Dr. Katiyar, Medical Officer of District Jail Rae Bareilly, if a girl of 10 or 12 years who is virgin and whose hymen is intact is subjected to rape by a fully developed man, there are likely to be injuries on the male organ of the man.

No injury was, however, detected by the doctor on the male organ of any of the two accused. The absence of such injuries on the male organs of the accused would thus point to their innocence. The examination of the two accused by Dr. Katiyar was on August 5, 1969. The two accused, however, had been arrested, according to the prosecution, on the morning of August 4, 1969. No cogent explanation has been furnished as to why they were not soon thereafter got medically examined by the police."

17. In the matter-in-hand, minor prosecutrix was also 7 to 8 years old virgin girl. At the time of alleged incident the accused was fully grown-up person of 45 years old married and father of three children. The appellant-accused was arrested on 13-03-2012 under arrest panchnama (Exhibit-13). He was referred to Government Hospital for medical examination. The document of medical examination of accused (Exhibit-14) was produced on record. Unfortunately, there were no incriminating material deduced from the papers of medical examination of accused. There were no injuries over the male organs of appellant-accused. Therefore, in the light of aforesaid observations of Their Lordships of Honourable Apex Court as referred supra; the absence of injuries on male organs of appellant-accused would pointer to innocence of appellant-accused in this crime for forceful sexual intercourse with the minor virgin prosecutrix of 7/8 years old.

18. It is also worth to mention that there was no positive evidence available on record to establish involvement of appellant-accused in this crime. The evidence of PW-2 Devidas Mali does not inspire confidence for lack of credence. His conduct and demeanour since beginning appears to be against human behavioural pattern. He disclosed about the incident at belated stage. There was no corroboration to his evidence. The prosecution did not examine the elder brother of victim-prosecutrix, who was accompanied with her in fair. The father of the prosecutrix also did not step into witness box to unfurl material circumstances after reasonable opportunity to accused for cross-examination. The FIR came to be exhibited directly at the behest of accused in this crime. In absence of other incriminating circumstances on record, it would unsafe to fasten guilt on the appellant-accused on the basis of incredulous and dubious evidence of PW-2 Devidas Mali and omnibus and sweeping nature of evidence of minor prosecutrix.

19. In the above premises, we are of the considered opinion that the evidence of prosecution witnesses adduced on record is not sufficient to nail the accused in this case for allegation of committing rape. There are clouds of doubt in the prosecution case. The learned trial Court did not consider the attending circumstances of the case in proper manner and kept implicit reliance on the version of PW-2 Devidas Mali. The circumstances found consistent with the innocence of the accused and inconsistent with his guilt. Therefore, we do not find any impediment to conclude that the impugned findings of conviction and resultant sentence of the appellant-accused expressed by the learned trial Court

are erroneous, imperfect and not within ambit of law. The impugned Judgment and order being perverse in nature deserves to be set-aside and quashed.

20. In sequel, the Criminal Appeal stands allowed. The Judgment and order of conviction and resultant sentence passed by the learned Additional Sessions Judge, Dhule, in Sessions Case No. 114 of 2012 dated 16-01-2014, against present appellant-accused for the offence punishable under Sections 376(2)(f) and 506 (i) of the Indian Penal Code is hereby quashed and set-aside. He is acquitted from the offences pitted against him. The appellant is in jail, he be set at liberty forth-with, if not required in any other crime. The bond of Rs.15,000/- (Rs. Fifteen Thousand Only) with one surety of like amount be obtained from appellant-accused for a period of six months as prescribed under Section 437-A of the Code of Criminal Procedure, 1973. The fine amount, if any, deposited by the appellant be refunded to him. The order about destruction of muddemal property is hereby confirmed. Accordingly, the Criminal Appeal stands disposed of in above terms.