

(2018) 04 BOM CK 0133

In the Bombay High Court

Case No : CRIMINAL APPEAL NO.491 OF 2002 WITH
CRIMINAL APPEAL NO.345 OF 2002

DADA LAXMAN GAIKWAD

APPELLANT

Vs

THE STATE OF MAHARASHTRA

RESPONDENT

Date of Decision : 25-04-2018

Acts Referred:

Indian Penal Code, 1860 — Section 342, 363, 375, 376, 506
Indian Evidence Act, 1872 — Section 35
Criminal Procedure Code, 1973 — Section 313

Citation : (2018) 04 BOM CK 0133

Hon'ble Judges : BHARATI H. DANGRE, J

Bench : Single Bench

Advocate : Abhaykumar Apte, Ajay Patil

Final Decision : Dismissed

Judgement

1. The present Appeals are preferred by the appellant challenging the judgment delivered by the Additional Sessions Judge, Pune on 26/2/2002 thereby

convicting him (the accused) for the offences punishable under Sections 363, 376, 506 and 342 of the Indian Penal Code (Hereinafter referred to as

â??IPCâ?). By the impugned judgment, the appellant has been sentenced to suffer imprisonment of 7 years for the offence punishable under Section

376, sentence of 1 year for the offence punishable under Section 363 and for a period of 6 months each for the offences punishable under Sections

506 and 342 of IPC respectively. All the sentences have been directed to run concurrently.

The present Appeal came to be admitted by this Court on 5/6/2002. The appellant was granted bail and is presently on bail.

The appellant has preferred two Criminal Appeals challenging the very same

judgment. However, at the outset the learned counsel Shri Apte submits that he would not press Criminal Appeal No.491 of 2002 and would prefer to argue Criminal Appeal No.345 of 2002. In such circumstances, Criminal Appeal No.491 of 2002 is sought to be withdrawn and the appellant is permitted to do so. Criminal Appeal No.491 of 2002 disposed of as such. Shri Apte prefers to argue Criminal Appeal No.345 of 2002.

2. Today the matter is taken up for final hearing. Shri Abhaykumar Apte is representing the appellant and learned APP Shri Ajay Patil is representing the State. In order to appreciate the contentions raised in Appeal, it would be necessary to briefly refer to the case of the prosecution and the findings recorded by the Sessions Court about the guilt of the appellant.

A complaint came to be filed by the complainantÂ Smt. Vimal (Prosecution Witness(PW) No.1) on 7/8/2000 with Police Station Shirur alleging that

she was subjected to forcible sexual intercourse after being abducted by the accused. In the complaint, the complainant categorically stated that on

5/8/2000, she was present at home all alone as her parents had left for conducting their daily chores and when she was performing some household

work, the Accused approached her and by putting a piece of cloth in her mouth, he carried her on his shoulder from the adjoining fields and she was

carried to a sugarcane field belonging to one Shri Mohan Rambhau Gaikwad. It is the specific case of the complainant that the accused then asked

her to remove her clothes and committed sexual intercourse with her. It is her specific case in the complaint that this incident was repeated on 3 to 4

occasions and thereafter the accused tied her hands and after committing the act of sexual intercourse, he had taken precaution that she should not

raise voice, by putting piece of cloth in her mouth. In the complaint it is stated that she was raped. Her hands came to be tied by accused and she

was left in the field and the accused fled away. It is stated that she was kept in the field till the next day i.e. on 6/8/2000. She returned home and

reported the incident to her parents and brother. Thereupon the complaint came to be lodged in the Police Station on 7/8/2000. The said complaint

was recorded by the ASI, who has been examined as PW 7. On registration of the complaint, spot panchanama was carried out and the clothes of

the prosecutrix came to be seized. The accused was arrested on 7/8/2000 and his clothes came to be seized under the Seizure Panchanama. On

completion of the investigation, the charge sheet came to be filed and the matter was committed to the Court of Sessions and the trial commenced.

During the course of trial, the prosecution has examined 9 witnesses. The prosecutrix/complainant has been examined as PW 1. PW 3 is the brother

of the complainant and PW 5 is the mother of the complainant. Two doctors have been examined by the prosecution as PW 8 to give an opinion

about the age of the prosecutrix and PW 9 for the purpose of determining as to whether forceful sexual intercourse has been committed on the

complainant. The prosecution has also placed reliance on 2 documents in the form of the School Leaving Certificate and extract of the School

Register for demonstrating that the prosecutrix on the date of incident was below 18 years. Arun Shinde, a Clerk working in the school, who brought

the record of the school reflecting the date of birth, was examined as PW 4. With this material, brought on record, an attempt of the prosecution was

to demonstrate that the prosecutrix, who is below 16 years of age was subjected to forcible sexual intercourse by the accused person and the

occurrence of the said incident is corroborated by the medial evidence from the examination of the PW 9, who had clearly opined that the prosecutrix

was subjected to forcible sexual intercourse. On the basis of the said material being placed, before the Additional Sessions Judge, Pune, the said

Court found that the prosecution has proved its case by tendering cogent and reliable evidence. The learned Additional Sessions Judge appreciated

the entire evidence tendered on record, both oral as well as documentary evidence and also examined the legal position as regards the age of the

prosecutrix and the burden to be discharged as regards the age factor. On conclusion, the learned Trial Court concluded that the accused had forcibly

committed sexual intercourse with the prosecutrix and the statement of the prosecutrix alongwith the corroborative material was found to be

trustworthy and based on this, the learned Sessions Judge passed the impugned judgment convicting the accused for the offences punishable under

Sections 376, 342, 363 r/w 506 of IPC. It is against this judgment, the present Appeals are preferred.

3. The learned counsel Shri Apte would vehemently submit that the Trial Court has felled into gross error in convicting the appellant on the basis of the

material on record. He would submit that the prosecution has failed to prove its case beyond reasonable doubt and he would invite the attention of this

Court on the two important aspects of the matter on which the Trial Court has grossly erred in observing the findings as against the present appellant.

He would submit that prosecution has failed to establish the ingredients of Section 376 and did not adduce any cogent material on record to establish

that the prosecutrix was below 18 years of age. He would submit that the prosecution ought to have discharged the said burden to demonstrate that

the sexual intercourse alleged to be committed would amount to rape within the purview of Section 375 of IPC warranting the penalty under Section

376 of the said Code. He would also submit that in order to establish the crime of sexual intercourse, the doctors have been examined by the

prosecution but the doctor i.e. PW 9 had categorically stated that there are no external injuries found on the body of the prosecutrix and he would also

criticize the testimony of this witness on the ground that at the conclusion derived that there was evidence of "recent forceful penetrating sexual

intercourse" was not based on any material but it was only an observation made by the medical practitioner without any basis. He would thus submit

that the prosecution has failed to bring any evidence on record to rope in the accused person for commission of offences with which he is charged.

He would also submit that when the age of the prosecutrix was in doubt, he could not have been connected with the said offence when his specific

case was that the prosecutrix was not of the age of which has been depicted by the prosecution. He would thus submit that the Court below has

committed gross illegality in convicting the accused.

Per contra, learned APP would submit that the prosecution has proved its case beyond the reasonable doubt and has discharged the burden, which

was required to be discharged in terms of the law which has resulted into a conviction based on the material so produced before the lower Court. The

learned APP would invite the attention of this Court to the ocular evidence of the brother and mother of the prosecutrix and the evidence of the

prosecutrix herself to demonstrate that she was carried by the appellant and was subjected to forcible sexual intercourse on number of occasions on

5/8/2000. He would rely upon the evidence of PW 4, who has proved the documents at Exhibits 19 and 20, by which the prosecution has

demonstrated that the date of birth of the prosecutrix was 6/10/1984 and on the date of incident, she was below 16 years. The learned APP would

also invite the attention of the Court to the evidence of PW 8, medical practitioner, who had applied the ossification test and had arrived at the conclusion that the age of the prosecutrix was between 14 to 16 years. He would also heavily placed reliance on the testimony of PW 9, medical practitioner, who had clearly concluded that her hymen was torn and there was an evidence of recent forceful penetrating sexual intercourse based on which, certificate at Exh.36 was issued by the said doctor. He would submit that this material alongwith the other corroborating evidence in form of the report of the Chemical Analyser as well as the spot panchanma would clinch the guilt of the accused and he would request this Court to upheld the judgment of the Sessions Court convicting the appellant for the offences with which he was charged.

4. With the assistance of the learned counsel for both the parties, this Court has perused the entire paper book consisting the evidence on record as well as the documents, which have been produced and exhibited before the Trial Court. PW 1 i.e. the complainant, who has been examined by the Trial Court gave a detailed narration of the ordeal and she has deposed before the Court that when she was all alone at home, the appellant forcibly carried her to the field on his shoulder and in order to prevent her from seeking any help, he had put the handkerchief/piece of cloth in her mouth. The testimony of PW 1 further reveals that she was taken to a field where sugarcane crop was standing and the accused forcibly committed sexual intercourse with her and threatened her to kill her, in case she make any noise. She then states that inÂspite of she trying to resist, she was unsuccessful and the incident was repeated 2 to 3 times. She also stated that there was white discharge on her nicker. The evidence further states that at the same night, at about 10 p.m., accused again committed the act of intercourse and they were in that field upto 4 p.m. on 6/8/2000. Thereafter the accused left her by tiding her hands and legs with the piece of cloth and putting the cloth ball in her mouth. However, some how she managed to untie herself and she reached home. Then she narrated the incident to her parents, which resulted in filing the First Information Report. The said witness has been subjected to extensive crossÂexamination. Further a suggestion has been given to this witness about her date of birth and she had categorically denied that on the day of incident, her age was between 17 to 17 Â½ years. The version of the prosecutrix is corroborated by

PW 3 is brother and PW 5 mother. PW 3, the brother of the prosecutrix has categorically stated before the Court that he was at the house till 1 p.m. with her sister. However he had to leave house on account of some work and when at about 3 p.m., he returned to home, he was not able to find his sister there and on returning of his father at about 5 p.m., they lodged the missing complaint at Mandavgan out post and undertook a rigorous search for the complainant. His testimony is further corroborated by PW 5 mother, who has been examined by the prosecution and who has given the details of frantic search carried out when the complainant went missing on 5/8/2000. The testimony of the said witness has gone unchallenged and stands corroborated by the testimony of PW 1, who had categorically stated that the missing complaint was lodged after her disappearance by her family members.

5. The prosecution in order to demonstrate that the complainant was below 18 years and so as to attract the offence under Section 376 of IPC, has relied on the two documents in the form of Exhibits 19 and 20. Exhibit 19 is the School Leaving Certificate of 'Wagheshwari Vidyalaya' at Mandavgan-Pharata whereas Exhibit 20 is the extract of the General Register of the said School. The prosecution has examined PW 4 Arun Shinde to prove these documents. PW 4 in his testimony before the Court has stated that he was serving as a Clerk in 'Wagheshwari Vidyalaya' at Mandavgan-Pharata and he was undertaking the work of writing the accounts and other works. He had categorically stated in his deposition before the Court that Vimal Pharate had taken admission at 'Wagheshwari Vidyalaya' on 6/7/1996 in 5th standard and they had obtained the School Leaving Certificate from Zilla Parishad Chakori Shala, Chakori Vasti. He had tendered the said School Leaving Certificate before the Court alongwith the General Register, reflecting the admission and the school leaving dates of the students. The said documents were proved by him by producing the original Register. The perusal of the said documents would reveal that the date of birth of Vimal Pharate is recorded as 6/10/1984 and he stated that the entry was taken in the handwriting of previous Clerk of the school. Thus the prosecution has proved through PW 4 in form of documents i.e.

Exhibits 19 and 20 that the date of birth of the prosecutrix was 6/10/1984.

The age of a person as recorded in the School Register or otherwise may be used

for various purposes namely for obtaining admission, for obtaining appointment, for contesting election and for other purposes. Determination of the date of birth of a person before a Court of Law, whether in civil proceedings or criminal proceedings, will depend upon the facts and circumstances of each case. In absence of any other statute operating in the field, Section 35 of the Evidence Act will have application and the Court while determining such age would rely on the material brought on record by the parties, which would be admissible in evidence in terms of Section 35 of the Evidence Act.

Though the learned Counsel Shri Apte would vehemently submit that this is not a conclusive proof of the age of the victim, it is to be seen that Section 35 of the Indian Evidence Act take cognizance of the entries taken in the public documents and which provides that any entry recorded in public or other official book, register or record or an electronic record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record or electronic record is kept, is itself a relevant fact. PW 4, who was working as Clerk has categorically stated that the said entries were made by the Clerk, who was maintaining the record and maintained the General Register reflecting the general information about the admission and the school leaving dates of the students. Thus these two documents placed on record give rise to a presumption under Section 35 of the Evidence Act and are admissible in evidence unless the contrary is proved. Learned counsel Shri Apte would submit that there is a dispute about these documents.

However, no attempt has been made on behalf of the appellant to dispel the said documents and its contents by tendering any evidence contrary to the one brought on record by the prosecution.

In such circumstances, the prosecution has proved on the basis of said exhibits and through PW 4 that the date of birth of the prosecutrix is 6/10/1984. Further this fact is further corroborated by PW 8, who is a medical practitioner and who has issued a certificate "Exhibit 34. The said witness, who was serving as Assistant Lecturer in Sasoon Hospital has deposed before the Court that he has examined the prosecutrix in order to ascertain her age on 7/8/2000. He has stated that on the basis of the position of

teeth and on examination of Molar, he had issued a certificate

mentioning that her age was between 14 to 16 years. An attempt was made to cross-examine this witness in the backdrop of the medical

jurisprudence and he had admitted that in his opinion, the age of the prosecutrix is between 14 to 16 years including an error of margin. In the cross-examination

he has stated that, margin is plus minus one and it can be added at both the sides. Even if the said examination of the doctor would not

have been brought on record by the prosecution, the evidence in the form of the public documents tendered by the prosecution on record in the form

of Exhibits 19 and 20 through public officer would have been sufficient and a conclusive evidence as regards the age of the prosecutrix. Further the

evidence of PW 8 and document at Exhibit 34 are only corroborative in nature, which also reflect that the age of prosecutrix was between 14 to 16

years. In any case the age of the prosecutrix on the date of incident was below 16 years.

6. As far as the evidence of sexual intercourse is concerned, the prosecution has examined Dr. Likhi, who is a medical practitioner working at Sasoon

Hospital. The said witness had examined the prosecutrix on 7/8/2000 when she was brought along with the policemen and with her consent she was

subjected to physical examination. The said doctor did not notice any injuries on the private part of the victim on the external genitals. However, she

has categorically deposed that her hymen was not intact and it was torn and she also applied the one finger test and arrived at the conclusion that

there was evidence of recent forceful penetrating sexual intercourse. Based on it, she has issued the Certificate at Exh.36. The said witness was

subjected to cross-examination at the hands of the counsel for the appellant to extract the information as to whether the tears were fresh or old and she

stated that she could not give a definite opinion. The said prosecution witness, however, specifically denied a suggestion that the victim was

habituated to the intercourse at the time of examination. She was also further subjected to cross-examination as to what are the reasons for the

hymen being ruptured, to which normally medical practitioner is subjected to while dealing with the opinion about sexual intercourse. The examination

of this witness has to be read with other corroborative material brought on record by the prosecution.

It is a specific case as stated by the complainant in the complaint that she was forcibly kidnapped by the accused person and taken to nearby field and her mouth was covered by a piece of cloth. The spot panchanama which is conducted on 7/8/2000 and which is proved by PW 7 categorically makes a mention about two white cotton handkerchiefs and one chocolate colour handkerchief being found on the spot. The spot panchanama also makes a reference to the place where the rape was committed and earth/ mud was found to be unlevelled. This is also a corroborative material which is produced on record by the prosecution in the form of spot panchanama. Further the report of Chemical Analyser Exhibit 30 refers to the analysis in respect of the nicker of the prosecutrix and it is found to be stained with blood at the middle. By this corroborating material brought on record, the prosecution has proved its case beyond reasonable doubt.

7. The specific case of the prosecution that the prosecutrix, who is below 16 years of age was kidnapped by the appellant and the appellant committed forcible sexual intercourse with her on 5/8/2000 has been proved by the prosecution.

Though the learned counsel for the appellant had specifically argued that there were no signs of external injuries on the body of the prosecutrix and no injury marks were found on external genitals, that itself does not negate the prosecution case. Further it is to be noted that the prosecutrix was subjected to medical examination on 7/8/2000. Whereas it is the case of the prosecution that the incident of sexual intercourse took place on 5/8/2000 and, therefore, two days have elapsed between the time of incident and medical examination and even if there would have been any injuries, they might have healed up in the meantime.

The Hon'ble Apex Court in State of H.P. Vs. Gian Chand 2001(6) SCC 71 has observed to the following effect in paragraph 15 while dealing with some how similar arguments,

15. The observations made and noted by Dr Mudita Gupta during the medico-legal examination of PW 7 clearly make out the prosecutrix having been subjected to rape. The prosecutrix has spoken of 'penetration' in her statement. The discovery of spermatozoa in the private parts of the victim is not a must to establish penetration. There are several factors which may negative the presence of spermatozoa (see Narayanamma v.

State of Karnataka). Slightest penetration of penis into vagina without rupturing the hymen would constitute rape (See Madan Gopal Kakkad v.

Naval Dubey). The suggestion made in the crossexamination of Dr Mudita Gupta that injury of the nature found on hymen of the prosecutrix could

be caused by a fall does not lead us anywhere. Firstly, no such suggestion was given to the prosecutrix or her mother during crossexamination.

Secondly, why would the girl or her mother implicate the accused, charging him with rape, if the injury was caused by a fall? There is nothing to

draw such an inference, not even a suggestion, to be found on record. The answer to the suggestion made to Dr Gupta cannot discredit the

prosecution case in the absence of any other material to support the suggestion. So is the case with the absence of external marks of violence on the

body of the victim. In case of children who are incapable of offering any resistance external marks of violence may not be found. (See Modi's

Medical Jurisprudence, 22nd Edn., p.502.) It is true that marks of eternal injury have not been found on the person of the accused but that by itself

does not negate the prosecution case. Modi has opined (see Modi, ibid, p. 509) that even in the case of a child victim being ravished by a grown-up

person it is not necessary that there should always be marks of injuries on the penis in such cases. Further, it is to be noted that about two days had

elapsed between the time of the incident and medical examination of the accused within which time minor injuries, even if caused, might have

healed.â??

The prosecutrix in her complaint as well as in her deposition before the Court has categorically referred to the act of forcible penetration and it is also

opined by PW 9 that she was subjected to forcible penetration and the report categorically mentions that it was a recent forcible penetration.

Therefore mere absence of injury marks on the other part of the body when there is a specific medical evidence as well as oral evidence brought on

record to show that act of penetration which would attract the provisions of Section 375 would not absolve the appellant of his guilt for committing the

said offence of forcible sexual intercourse on a girl below 16 years of age.

The appellant whose statement came to be recorded under Section 313 of the Criminal Procedure Code, 1973 put up a case of complete denial.

However has stated that there was some dispute about some water course and,

therefore, he has been involved falsely. The prosecutrix, who has barely touched age of 16 years could not have been used as a weapon to settle the score with the appellant. There is no reason why the prosecutrix would implicate only the appellant and it is not believable that the family of the prosecutrix have used the youth of their daughter for such a purpose, at the cost of harm to their reputation. The evidence of the prosecutrix is trustworthy and reliable and inspires confidence. The evidence has to be weighed and not to be counted. It is settled position of law that even the sole testimony of the prosecutrix if it inspires confidence is sufficient to convict an accused. In the present case, the evidence of the prosecutrix is found to be reliable and she has to be looked from the point of view as victim of the offence of rape. Her testimony has to be appreciated on the principle of probability just as the testimony of any other witness; a high degree of probability having to be shown to exist in view of the subject matter being of a criminal charge. If the version of the prosecutrix is specific that she had not consented to the act of sexual intercourse and she was forcibly subjected to sexual intercourse, it will have to be believed and accepted like any other testimony unless there being material available to draw an inference against her testimony. The absence of visible marks of injuries on the person of the prosecutrix on the date of her medical examination would not lead to an inference that she has not suffered any injuries or she has not offered any resistance and would not falsify her allegations of forcible sexual intercourse.

8. The prosecution has established the ingredients of the offence of rape as contemplated under Section 375 of IPC. As per Section 375, a man is said to have committed "rape" if he has sexual intercourse with a woman under circumstances falling under any of the six descriptions namely against her will, without her consent, with her consent when the consent has been obtained by putting her in fear of death or of hurt. After the unfortunate "Nirbhaya incident" took place, which shocked the whole nation, the Parliament raised the age of consent under Clause 6 (3) to 18 years, by virtue of which any act as contemplated under Section 375 with or without the consent of a woman when she is under 18 years of age, would amount to rape. In view of the aforesaid discussion, the Session Court has rightly held the accused guilty of the offences under Sections 363,

376, 342 r/w Section 506 of IPC and was perfectly justified in imposing the sentence of 7 years for the offence punishable under Section 376 of IPC.

The sentence in respect of conviction under Section 376 and Section 363 has been directed to run concurrently. It is informed that the appellant has

undergone the imprisonment for a period of approximately 5 months and thereafter he is on bail. However, it can be seen that a heinous offence like

rape committed on a minor girl cannot be looked with laxity and merely because it was an offence only involving her body, could not be brushed aside

lightly. It is well known that after the celebrated case of Nirbhaya, the Parliament was justified in amending the penal laws and made the offence of

rape punishable with higher penalty and since then the violation of a woman's right has been considered to be a gross violation of individual liberty and

has been dealt with sternly.

The girl child has a right to live with dignity. She has a right to good health, physical as well as mental, has a right to equal opportunity with the male

child to develop into matured independent woman. She has also a right to make choice, which includes a right to deny sexual intercourse to a person

without her consent. The prosecutrix in the present case is a child of 16 years, who enjoyed a right to blossom into a woman and to step into

womanhood in a dignified and graceful way and not being trampled in the manner in which she was ushered in womanhood.

9. In light of the aforesaid discussion, the impugned judgment passed by the Additional Sessions Judge, Pune dated 26/2/2002 do not suffer from any

legal infirmity and is upheld.

Hence, I pass the following order.

1. Criminal Appeal No.345 of 2002 is dismissed.
2. The appellant is directed to surrender before the Court of Additional Sessions Judge, Pune within a period of four weeks from the date of the receipt of the certified copy of this judgment.
3. The certified copy of the judgment be made available to the appellant within a period of seven days from today.