
(2002) 09 BOM CK 0059
In the Bombay High Court
Case No : Criminal Appeal No. 310 of 1998

Dattu Gopalrao Nakhate

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 12-09-2002

Acts Referred:

Evidence Act, 1872 — Section 118

Penal Code, 1860 (IPC) — Section 376, 376(2)

Citation : (2003) 2 ALD(Cri) 31 : (2003) BomCR(Cri) 703 : (2003) 1 MhLj 60

Hon'ble Judges : R.K. Batta, J

Bench : Single Bench

Advocate : R.M. Daga, for the Appellant; K.S. Dhote, APP, for the Respondent

Final Decision : Dismissed

Judgement

R.K. Batta, J.—The appellant was tried for rape of prosecutrix, aged about 8 years, u/s 376 of the Indian Penal Code. In support of the said charge, the prosecution had examined six witnesses. The learned Additional Sessions Judge, Nagpur vide judgment dated 12-8-1998 held the appellant guilty for the offence u/s 376 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for ten years as also to pay fine of Rs. 500/-, in default, to suffer further rigorous imprisonment for four months. The appellant was in custody since 16-10-1997 and he was given benefit of set off from that date, u/s 428 of the Code of Criminal procedure. The appellant has challenged the said conviction and sentence in this appeal.

2. The prosecution case, in brief, is that the appellant called the prosecutrix to his house by offering peppermint. Accordingly, she went to the house of the appellant where he was alone. Appellant removed the under-wear of the prosecutrix and thereafter the appellant entered his penis into her vagina. She started weeping and appellant shut her mouth. There was bleeding from the private part of the prosecutrix. After her mother came in the evening, she narrated the incident to her. The incident had taken place at about 3-4 p.m. The

report was lodged with the police in the early hours of next day. The prosecutrix was medically examined and her under-wear was attached by the police which was sent to Chemical Analyser. The appellant absconded after commission of crime and was arrested on 16-10-1997. The case of the appellant is that of total denial and that he has been falsely implicated on account of dispute between him and father of the prosecutrix.

3. The learned Advocate for the appellant urged before me that the evidence of prosecutrix could not be accepted as she was a child witness and has been tutored to depose against the appellant. The next submission made by learned Advocate for the appellant is that in view of the evidence of Dr. Mangala Ghisal (PW 3), sexual intercourse/sexual assault has not been proved and that no offence u/s 376 of the Indian Penal Code is made out. It is further urged by the learned Advocate that there is no independent corroboration to the testimony of the prosecutrix. Lastly, it is submitted that the charge was not framed u/s 376(2) (f) of the Indian Penal Code and as such, minimum sentence of ten years imposed calls for reduction.

4. On the other hand, learned APP urged before me that the evidence of the prosecutrix is crystal clear and sufficient to make out an offence of rape. After placing reliance on two rulings of Apex Court it has been urged that the offence u/s 376(2)(f) of the Indian Penal Code is clearly established. According to him, though the prosecutrix was eight years old at the time of offence, yet when her deposition was recorded, she was 16-17 years old and as such, she cannot be termed as child witness. According to learned A. P. P. Case of the prosecutrix is supported by the report of the Chemical Analyser and that no case is made out for interference with the judgment of the Trial Court.

5. The prosecutrix has stated that on the date of incident, she had come early to her house at about 3.00 p.m. At that time, the appellant allured her by offering peppermints and asked her to come to his house. Appellant was alone in his house. Appellant removed her under-wear and entered penis in her vagina. She started weeping, but the appellant shut her mouth. According to her, there was bleeding from her private part. Except for bare suggestions, there was no cross-examination on material particulars and the evidence of the prosecutrix on material particulars has not been shaken at all. At the time of evidence, prosecutrix was aged about 16-17 years and as such, there is no merit in the submission of learned Advocate for the appellant that she was a child witness.

6. Dr. Mangala Ghisal (PW 3) who examined prosecutrix on the next day of incident at about 9.15 a.m. found that hymen was torn slightly and there was bleeding from edges. She, however, could not give any definite opinion about sexual assault. However, she confirmed that there was bleeding as hymen was torn. She stated that in case of minor children, the hymen is not usually ruptured, but may become red and congested along with the inflammation and bruising of the labia and if considerable violence is used, there is often laceration of fourchette and perineum.

7. The prosecutrix has stated that the appellant had entered his penis in her vagina and subsequently, there was bleeding from her private part. Medical evidence shows that hymen was torn slightly. This shows that there was penetration.

8. In Madan Gopal Kakkad Vs. Naval Dubey and Another, , the Apex Court has held that even slightest penetration of penis into vagina without rupturing the hymen would constitute rape. The Apex Court found that there was partial penetration within the labia majora or vulva or pudenda which, in the legal sense, is sufficient to constitute rape. In this case, it was held that even in cases where there is lack of oral corroboration to that of a prosecutrix, a conviction can be safely recorded, provided the evidence of the victim does not suffer from any basic infirmity and that as a general rule, corroboration cannot be insisted upon, except from the medical evidence where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming. It is also laid down by the Apex Court that the expert opinion is advisory in character and the Court has to form its own opinion considering the data on the technical aspects rendered by the experts.

9. In State of U.P. Vs. Babul Nath, also it was laid down that to constitute the offence of rape, neither Section 375 of the Indian Penal Code nor the Explanation attached thereto require that there should necessarily be complete penetration of the penis into the private part of the victim/ prosecutrix. In other words, it was held, to constitute the offence of rape, it is not at all necessary that there should be complete penetration of the male organ with emission of semen and rupture of hymen and that even partial or slightest penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim would be quite enough for the purpose of Sections 375 and 376 of the Indian Penal code. Therefore, the Apex Court ruled that it being so, it is quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains.

10. The evidence of the prosecutrix also gets corroboration from the evidence of her mother, P.W. 1 Smt. Nalubai to whom she had narrated the incident after she had came home in the evening, P.W. 1 Nalubai states that under-wear of the prosecutrix, which was stained with blood, was seized. She deposed that at the time of incident, the prosecutrix was in 1st standard. In the light of the evidence of the prosecutrix and the medical evidence on record, I have absolutely no doubt in my mind that the facts make out the case of rape. Report of the Chemical Analyser in respect of the under-wear of prosecutrix shows that the same had blood stains and the blood group was "B" which is the blood group of the prosecutrix. The evidence on record is sufficient to bring home the offence of rape u/s 376(2)(f) of the Indian Penal Code.

11. Learned Advocate for the appellant urged before me that no charge specifically was framed u/s 376(2)(f) of the Indian Penal Code. The charge

mentioned necessary particulars, viz. that the appellant had committed rape on the prosecutrix, aged about 8 years and mere omission of Sub-section (2)(f) does not in any manner cause any prejudice to the appellant who was represented by an Advocate. There is no merit in this submission of learned Advocate for appellant. Lastly, learned Advocate for appellant urged that sentence imposed is excessive in the facts and circumstances of the case. Section 376(2)(f) of the Indian Penal Code provides for minimum punishment of ten years, but it may also extend to life. There are no adequate or special reasons so as to impose a sentence of imprisonment of less than ten years. Accordingly, I do not find that there is any case for reduction of sentence.

12. For the aforesaid reasons. I do not find any merit in this appeal and the appeal is accordingly dismissed.