

(2018) 06 BOM CK 0127
In the Bombay High Court
Case No : Criminal Appeal No.534 of 2005

DEVANAND GOVINDA GAYAKWAD

APPELLANT

Vs

STATE OF MAH.THR.PSO BHISI

RESPONDENT

Date of Decision : 29-06-2018

Acts Referred:

Indian Penal Code, 1860 — Section 354, 448, 511

Citation : (2018) 06 BOM CK 0127

Hon'ble Judges : MANISH PITALE, J

Bench : Single Bench

Advocate : S.D. Malke, Geeta Tiwari

Final Decision : Allowed

Judgement

1] By this appeal, the appellant has challenged the judgment and order dated 05/09/2005, whereby the Court of Ad hoc Additional Sessions Judge,

Chandrapur (trial Court) convicted the appellant for offences under Sections 354 and 448 of the Indian Penal Code (IPC), sentencing him to suffer

simple imprisonment for one year and six months respectively on the two counts and also to pay fine of Rs. 500/ on each count. The trial Court

passed the impugned judgment and order in Sessions Case No.70 of 2004, wherein the appellant had been charged with offences under Sections 376

read with Section 511 and 448 of the IPC.

2] The prosecution case was that on 01/03/2004, when the prosecutrix (PW3), a minor girl aged about 9 years, was alone in her house, the

appellant who was a neighbour entered the house in the afternoon and took the prosecutrix inside a room and closed the door. It was alleged that the

appellant made the prosecutrix to lie on a bed, removed her nicker and after removing the clothes he slept on her. It was alleged that thereafter, he

made her to sit on his thighs and while doing so he threatened her with a knife. It was also alleged that the appellant gave a note of Rs. 10/ to the

prosecutrix. But, when the mother of the prosecutrix i.e (PW2) arrived at the house, the appellant left the house. On the mother of prosecutrix

(PW2) asking the prosecutrix (PW3) about the incident, she narrated the details to her, on the basis of which, the mother of the prosecutrix

(PW2) along with the prosecutrix went to the Police Station for registering the complaint. In the Police Station at Bhis, a preliminary report of

occurrence was recorded, in which it was stated that the appellant had removed the clothes of the prosecutrix with an intention to commit sexual

intercourse and that he had outraged her modesty. On this basis, a First Information Report (FIR) was registered against the appellant under Sections

354, 448 and 509 of the IPC.

3] The prosecutrix was sent for medical examination and she was examined by the Doctor (PW8). The report at Exhibit38 recorded that there

was no injury to the body of prosecutrix or her genitals and that there were no stains of blood or semen on the clothes. It was recorded in the report

that rape might not have taken place but the victim was likely to have been molested. In support of the prosecution case, seven witnesses were

examined and defence examined two witnesses.

4] On the basis of the evidence and material on record, the trial Court found that a case of rape under Section 376 of the IPC was not made out

against the appellant. But, the trial Court found that there was sufficient evidence to show that the appellant was guilty of offence under Section 354

of the IPC i.e. assault or criminal force to woman with intent to outrage her modesty and Section 448 of the IPC i.e. punishment for house trespass.

Aggrieved by the same, the present appeal has been filed.

5] Shri S.D. Malke, learned Counsel appearing on behalf of the appellant submitted in support of the appeal that the findings rendered by the trial

Court were based on erroneous appreciation of evidence and material on record. It was submitted that the evidence of the two main prosecution

witnesses i.e. (PW2) mother of the prosecutrix and prosecutrix (PW3), was full of omissions and contradictions. Moreover, prosecutrix (PW3)

was a minor and her evidence was required to be appreciated with circumspection and caution and that corroboration of the same was necessary. It

was pointed out that while the incident occurred on 01/03/2004, the statement of the prosecutrix was recorded on 09/03/2004 i.e. after a period of

8 days, which was fatal to the prosecution. It was further submitted that the medical record and the evidence of the Doctor (PW-8) did not support

the prosecution case. It was further submitted that defence witnesses have been examined to demonstrate that the appellant had been falsely

implicated because the mother of the prosecutrix (PW-2) had a grudge against the appellant. It was submitted that the trial Court did not properly

appreciate this aspect of the matter while passing the impugned judgment and order. The learned Counsel relied upon the judgments of the Hon'ble

Supreme Court in the case of Yogesh Singh vs Mahabeer Singh and others, reported at (2017) 11 SCC 195, Pandurang Sitaram Bhagwat vs State of

Maharashtra, reported at 2005 ALL MR (Cri) 776 (S.C.) and judgments of this Court in the case of Baban s/o Bakayya Attare vs The State of

Maharashtra, reported at 2002 ALL MR (Cri) 384 and Hemant Tukaram Karande vs State of Maharashtra, reported at 2016 ALL MR (Cri) 522.

6] Per contra, Mrs. Geeta Tiwari, learned APP appearing on behalf of the State submitted that there might have been minor omissions and

contradictions in the evidence of the two material prosecution witnesses, but they were not fatal to the case of the prosecution. It was submitted that

even if the prosecutrix in the present case was a child witness her evidence inspired confidence and that therefore, corroboration of the same was not

mandatory. It was further submitted that even the doctor (PW-8) had opined that the prosecutrix had suffered molestation and on this basis it was

submitted that the appeal deserved to be dismissed. As regards the delay in recording the statement of the prosecutrix (PW-3), it was submitted that

the Investigating Officer had recorded the statement on 09/03/2004, immediately after the investigation was handed over to him on 07/03/2004. It

was also pointed out that the Head Constable (PW-4), who had investigated the matter earlier, had specifically stated that on the date of incident i.e.

on 01/03/2004, he made enquiry with the prosecutrix (PW-3) but she was in a frightened condition and therefore her statement could not be

recorded. On this basis, it was submitted that there was no error committed by the trial Court in passing the impugned judgment and order.

7] Heard learned Counsel for the parties. In the present case, the material witnesses in support of the prosecution case are (PW-2) mother of the

prosecutrix, prosecutrix herself (PW³), (PW⁵) Head Constable, (PW⁷) Investigating Officer and (PW⁸) the doctor. The defence witnesses

DW¹ and DW² were the wife and maternal uncle of the wife of the appellant respectively and they deposed in support of the defence case that

the appellant was not present in the house of the prosecutrix at the time of incident and that he was in fact at his own house.

8] In this case, on the basis of the material on record, particularly the medical evidence on record, the trial Court has held that no case was made out

against the accused under Section 376 of the IPC. But, the trial Court has convicted the appellant under Sections 354 and 448 of the IPC by finding

that the evidence of the prosecution witnesses was reliable. In the present case the only direct evidence is that of the prosecutrix (PW³). As per the

prosecution, the prosecutrix was a child of about 9 years when the incident occurred and she was about 10 years old when her evidence was recorded

before the trial Court. The evidence of the mother of the prosecutrix i.e. (PW²) is indirect because she merely stated that she saw the appellant

leaving her house when she returned home in the afternoon. The details of the alleged incident were told by the prosecutrix to her and therefore, as

regards the manner in which the incident occurred, her evidence is necessarily hearsay in nature.

9] Therefore, it is evident that in the present case the evidence of the prosecutrix (PW³) assumes significance. It is the truthfulness of her evidence

upon which the prosecution case rests. Since the prosecutrix (PW³) is a child witness, her testimony needs to be examined with caution and

circumspection. In the case of Radhey Shyam vs State of Rajasthan, reported at (2014) 5 SCC 389, in the context of appreciation of evidence of child

witness, it has been held as follows :¹²

¹². In Panchhi, (1998 SCC (Cri) 1561) after reiterating the same principles, this Court observed that the evidence of a child witness must be

evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and, thus, a child witness

is an easy prey to tutoring. This Court further observed that the courts have held that the evidence of a child witness must find adequate corroboration

before it is relied upon. But, it is more a rule of practical wisdom than of law. It is not necessary to refer to other judgments cited by learned counsel

because they reiterate the same principles. The conclusion which can be deduced from the relevant pronouncements of this Court is that the evidence

of a child witness must be subjected to close scrutiny to rule out the possibility of tutoring. It can be relied upon if the court finds that the child witness

has sufficient intelligence and understanding of the obligation of an oath. As a matter of caution, the court must find adequate corroboration to the

child witness's evidence. If found, reliable and truthful and corroborated by other evidence on record, it can be accepted without hesitation. We

will scrutinize PW's Banwari's evidence in light of the above principles.

10] In the case of Yogesh Singh (supra), the Hon'ble Supreme Court has held as follows: A

A Testimony of Child Witnesses

22. It is well-settled that the evidence of a child witness must find adequate corroboration, before it is relied upon as the rule of corroboration is of

practical wisdom than of law. (See Prakash Vs. State of M.P., Baby Kandayanathi Vs. State of Kerala, Raja Ram Yadav Vs. State of Bihar, Dattu

Ramrao Sakhare Vs. State of Maharashtra, State of U.P. Vs. Ashok Dixit and Suryanarayana Vs. State Of Karnataka.)

23. However, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child

witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and

thus a child witness is an easy prey to tutoring. (Vide Panchhi v. State of U.P.) A

11] Division Bench of this Court in the case of Baban (supra) has held as follows: A

A 13. A child witness is certainly a competent witness to depose before the Court. The Court would be justified in convicting an accused on the

basis of the evidence of a child witness. If the Court finds that the child witness has the capacity of understanding and gives truthful answers, a

conviction could be based on the evidence of such child witness. The rule of prudence, now ripened into rule of law, is to seek corroboration to the

evidence of child witness before the evidence of child witness is made a foundation for conviction. It is to be always remembered that a child witness

is susceptible to being tutored. Because of tutoring, the child witness is so much impressed that he begins to believe that what is tutored to him is the

truth. The Court has, therefore, to be extremely cautious while accepting the evidence of the child witness.â??

12] The aforesaid position of law regarding the appreciation of evidence of child witness makes it clear that while the evidence of a child witness is

certainly admissible in Court but, the Court has to be extremely cautious in accepting the evidence of the child witness because a child witness is

susceptible to being tutored. In this situation, corroboration of the evidence of a child witness becomes necessary as a matter of caution and

practicality. In this backdrop, when the evidence of the prosecutrix (PWâ3) in the present case is examined, it is found that she has stated in detail

about the manner in which the appellant entered the house and undertook actions referred to above. Her evidence shows that the claim of the

appellant having shown her a knife and that he had given her a note of Rs. 10/â, were material improvements made in her evidence. It has also been

stated in her cross examination that the Police had recorded her statement in the Police Chowki on the date of incident when her mother was also

present.

13] The evidence of the prosecutrix (PWâ3), a child witness, when appreciated in the context of the other evidence brought on record by the

prosecution shows that it is not entirely trustworthy. In fact, the trial Court has discarded the theory of the appellant having threatened the prosecutrix

(PWâ3) at the time of incident with knife and given note of Rs. 10/â to her. Therefore, the evidence of the prosecutrix (PWâ3) cannot be said to be

wholly reliable. In this context, the law laid down by the Hon'ble Supreme Court in the case of Lallu Manjhi and another vs State of Jharkhand,

reported at (2003) 2 SCC 401 becomes relevant, which reads as follows :â?

â??10. The Law of Evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the

testimony of a single witness, the Court may classify the oral testimony into three categories, namely (i) wholly reliable, (ii) wholly unreliable, and (iii)

neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single

witness. The difficulty arises in the third category of cases. The court has to be circumspect and has to look for corroboration in material particulars

by reliable testimony, direct or circumstantial, before acting upon testimony of a

single witness. {See *Vadivelu Thevan etc. v. State of Madras*, AIR 1957 SC 614}.â??

14] Since the trial Court itself has found that parts of the evidence of the prosecutrix (PWâ3) were not reliable, the prosecutrix (PWâ3) clearly falls in the category of a witness who is neither wholly reliable nor wholly unreliable. In this situation, as per the statement of law quoted above, the Court must look for corroboration in material particulars about the evidence of such a witness. Therefore, in the present case, it was necessary that the evidence of the prosecutrix (PWâ3) was corroborated by other evidence placed on record by the prosecution as her sole testimony does not inspire confidence.

15] The other material witness examined on behalf of the prosecution was mother of the prosecutrix i.e. (PWâ2). As noted above, her evidence in respect of the actual manner in which the incident took place was necessarily hear say in nature. It shows that when she reached home she saw the appellant going out of the house. She claimed in her evidence that when she asked the appellant as to what he was doing, the appellant allegedly said that he had gone inside the house for wandering. This particular detail about her exchange with the appellant was not stated by her to the Police.

Thereafter, this witness simply stated what the prosecutrix (PWâ3) allegedly told her. Therefore, other than being a witness to watch the present appellant at the place of incident, the evidence of PWâ2 does not take the case of the prosecution any further.

16] Therefore, the evidence of doctor (PWâ8) and the Medical Examination Report dated 01â03â2004 becomes important. A perusal of Medical Examination Report at Exhibitâ38 shows that there was no injury to the body or genitals of the prosecutrix (PWâ3). There were no stains of blood or semen and no pubic hair were found on the clothes. The gait of the prosecutrix was normal. In fact, it was recorded in the said report that rape might not have taken place but the victim was likely to have been molested. The evidence of doctor (PWâ8) who had examined the prosecutrix shows that he recorded the history of incident as it was told to him. In the cross examination the said witness stated that the prosecutrix was in a position to talk with him when she was brought for examination. The evidence of the investigating Officer (PWâ7) shows that the papers of investigation were

handed over to him on 07/03/2004. He recorded the statement of the prosecutrix (PW-3) on 09/03/2004 which was 8 days after the incident.

This witness states that at the time of recording the statement of prosecutrix (PW-3), her mother (PW-2) was present. In cross examination this

witness concedes that he did not seize the clothes of the appellant and the prosecutrix during investigation. Thus, the evidence on record shows that

while the statement of the mother of prosecutrix (PW-2) was recorded on 02/03/2004 i.e. a day after the incident, the statement of the prosecutrix

(PW-3) was recorded on 09/03/2004, which was 8 days after the incident. The prosecutrix (PW-3) has stated in her cross examination that the

Police had recorded her statement on the date of incident in the Police Chowki but, no such statement of the prosecutrix (PW-3) is on record. The

medical evidence does not show any injury either on the body or the genitals of the prosecutrix (PW-3) and only one statement has been made in the

Medical Examination Report to the effect that the prosecutrix was likely to have been molested.

17] Thus, when the evidence of the prosecutrix (PW-3) does not appear to be wholly reliable, requiring corroboration, absence of reliable evidence of

corroboration on the part of the prosecution witnesses, renders the prosecution case weak and unreliable. In this backdrop, the evidence of the

defence witnesses needs to be appreciated in support of the defence raised on behalf of the appellant. The appellant has claimed that he has been

falsely implicated because there had been strained relations between him and the mother of the prosecutrix (PW-2) as she owed a sum of Rs.

2500/- for grocery items which she had taken from the shop of the appellant. It is the case of the appellant that due to the said strained relations

and the insistence of the appellant that the mother of the prosecutrix (PW-2) should pay the aforesaid amount, a false story had been created to

implicate the appellant in the present case. In support of his claim the appellant examined DW-1, his wife and DW-2, maternal uncle of his wife.

Both these witnesses have claimed that on the date and time of incident the appellant was at his own house. DW-1 has also testified to the fact that

the mother of the prosecutrix i.e. (PW-2) owed the aforesaid amount for grocery articles to her husband. Although the said defence witnesses are

close relations of the appellant, only for that reason their evidence cannot be discarded. If their being close relations of the appellant is the only ground

for disbelieving them, the mother of the prosecutrix (PW²) can equally be said to be an extremely interested witness for the prosecution in the

present case. The Hon'ble Supreme Court in the case of *Munishi Prasad vs State of Bihar*, reported at (2002) 1 SCC 351, while holding that the

defence witnesses ought to be given the same treatment as that of the prosecution witnesses, has held as follows :¹⁸

“3. Before drawing the curtain on this score, however, we wish to clarify that the evidence tendered by the defence witnesses cannot

always be termed to be a tainted one by reason of the factum of the witnesses being examined by the defence. The defence witnesses are entitled to

equal respect and treatment as that of the prosecution. The issue of credibility and trustworthiness ought also to be attributed to the defence witnesses

on a par with that of the prosecution¹⁹ a lapse on the part of the defence witnesses cannot be differentiated and be treated differently than that of

the prosecutors' witnesses.”

18] Thus, if the position of law is that the defence witnesses are to be treated with the same respect as that of the prosecution witnesses, the evidence

of DW¹ and DW² in the present case cannot be ignored. Their evidence becomes relevant particularly when the evidence of the prosecution

witnesses does not appear to be wholly trustworthy and when it does not inspire confidence. The fact that the statement of the prosecutrix (PW³)

was recorded 8 days after the incident, itself creates a serious doubt about the entire prosecution case. The said witness also stated in the cross

examination that her statement was recorded on the very date of the incident in the Police Chowki, but no such statement is on record. This deserves

an adverse inference to be drawn against the prosecution. In fact, all these factors indicate that the prosecutrix (PW³), being a child witness, was

tutored. It lends credence to the contentions raised on behalf of the appellant that he was falsely implicated in the present case due to strained

relations between him and the mother of the prosecutrix (PW²).

19] In any case, the prosecution case must stand on its own legs and it has to prove the case against the appellant (accused) beyond reasonable doubt.

In the present case, the evidence of the child witness/prosecutrix (PW³) does not inspire confidence. It is not at all supported by the medical

evidence on record. The clothes of the prosecutrix were not seized during

investigation. This was significant because analysis of the clothes, particularly the undergarment of the prosecutrix (PW³) could have thrown some light on the case of the prosecution. The evidence of the mother of prosecutrix i.e. (PW²) as regards the details of the incident was of no help and even in respect of the presence of appellant on the date, time and place of the incident, the evidence of the said witness is not clinching. The explanation offered by (PW⁵) Head Constable that he did not record statement of the prosecutrix (PW³) on the date of incident because she was frightened, is not palatable. This statement stands contradicted by the prosecutrix (PW³) herself as she stated in her evidence that her statement was indeed recorded on the date of incident in the Police Chowki. An overall analysis of the evidence and material on record shows that the trial Court erred in holding that the prosecution had been able to prove that the appellant could be held guilty for offences under Sections 354 and 448 of the IPC. The judgments on which reliance has been placed by the learned APP in the present case would not be of much help to sustain the judgment of the trial Court, because, it has been laid down in those judgments that if the evidence of prosecutrix inspires confidence, no corroboration would be required. In the present case, the evidence of the prosecutrix (PW³) does not inspire confidence and therefore, corroboration was necessary, which is missing in the present case. Hence, the contentions raised on behalf of the respondent cannot be accepted.

20] In the light of the above, it is found that the impugned judgment and order passed by the trial Court is unsustainable. Accordingly, this appeal is allowed. The impugned judgment and order of the trial Court is set aside and the appellant is acquitted of the offences under Sections 354 and 448 of the IPC. The bail bond of the appellant stands cancelled.