
(2014) 03 BOM CK 0044
In the Bombay High Court
Case No : Criminal Appeal No. 487 of 2013

Devendra

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 14-03-2014

Acts Referred:

Penal Code, 1860 (IPC) — Section 376

Citation : (2014) ALLMR(Cri) 2450

Hon'ble Judges : M.L. Tahaliyani, J

Bench : Single Bench

Advocate : N.A. Badar, Advocate for the Appellant; A.K. Bangadkar, A.P.P, Advocate for the Respondent

Final Decision : Allowed

Judgement

M.L. Tahaliyani, J.—Heard. The appellant has been convicted for the offence punishable u/s 376 of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for seven years and to pay fine of rupees one thousand, in default to undergo rigorous imprisonment for three months.

2. The victim lady was 32 years old at the time of the incident. It is alleged that she was mentally ill when the incident of rape had occurred. She was staying with her father at Lendezari within the jurisdiction of Gangazari Police Station, District : Gondia. On 15th February, 2010 she was alone at home. It is alleged that the applicant visited the house of the victim and committed rape on her. The incident was witnessed by neighbour Smt. Dhanwantabai Warkade and Smt. Kamlabai Warkade. Dhanwantabai Warkade is daughter in law of Kamlabai. The matter was reported to police by mother of the victim. After completion of investigation chargesheet was filed in the Court of Magistrate. It was committed to the Court of Session.

3. The applicant denied the charge. The prosecution had examined in all seven witnesses. P.W. 1 is complainant Bagirathabai, P.W. 2 is Dhanwantabai, P.W. 3 is

Kamlabai, P.W. 4 is Dr. Shipla Ramesh Patil, P.W. 5 is Munna Hemraj Chavhan who was present at the time of panchnama, P.W. 6 is Police Officer Chandu Ganvir and P.W. 7 is Dr. Bhushan Yadaorao Liaber.

4. P.W. 1 is not an eyewitness. She had lodged report on the basis of information given to her by the eyewitnesses. It is stated by this witness that her husband had seen the accused with the victim on the bed. P.W. 2 Dhanwantabai is neighbour of the victim. She had also seen the victim and the appellant on the bed. She had further seen that the appellant had committed rape on the victim. Similarly, P.W. 3 Kamlabai also seen both of them on one and the same bed.

5. P.W. 4 Dr. Shilpa had examined victim Sunita. According to this witness, the victim was aged about 32 years. She found one external injury over left supra scapular region and one abrasion on back. On local examination of genital area she did not find any evidence of injury. She found bleeding at the time of vaginal examination. Vagina admitted two fingers easily. Hymen was found ruptured. There was no evidence of internal injuries. There was no injury on thighs, legs or breast. She was unable to give any definite opinion. However, she has stated that possibility of sexual intercourse could not be ruled out. She had collected samples of pubic hair, vaginal swab and blood.

6. P.W. 5 Munna, in whose presence spot panchnama was drawn, has stated that police had seized a red coloured saree and a petticoat. The seizure panchnama was drawn at Exh.22. Spot panchnama was drawn at Exh.21. P.W. 6 Chandu Ganvir had visited the spot and had prepared spot panchnama Exh.21 and seizure panchnama Exh.22. He had arrested the accused under the arrest panchnama Exh.24. Clothes of the appellant/accused were seized under panchnama Exh.25. The victim was mentally ill therefore, she was referred to hospital for medial examination. The requisition letter is produced at Exh.27 and medical report is produced at Exh.28. P.W. 7 had examined the appellant and had collected pubic hair and semen.

7. As far as report of Forensic Science Laboratory is concerned, petticoat and saree had innumerable blood stains. No semen was detected on petticoat or saree. No semen or spermatozoa was detected in vaginal swab or pubic hair.

8. As such, the forensic report does not assist in any manner to decide as to whether the sexual intercourse had taken place. The blood stains on the saree or petticoat could be due to menstruation. It is also not the case of prosecution that the victim was injured and had bled during course of the incident. At this stage, it may be mentioned here that the victim was married and she had two children. In view of this, the victim was obviously habituated to sexual intercourse.

9. In view of the negative report of the Forensic Science Laboratory and in view of the report of the Medical Officer that the victim was grown up and her vagina admitted two fingers, the whole case depends on the evidence of the eyewitnesses.

10. The question, which arises for determination is, as to whether the evidence of Dhanwantabai and Kamlabai could be believed in absence of evidence of the victim? If the victim was mentally ill or of unsound mind there was no bar in accepting the evidence of the eyewitness if they are believable. However, in the present case, the prosecution has failed to prove that the victim was mentally ill. The Medical Certificate is produced at Exh.28 by the Police Officer. The Medical Officer who had examined the victim has not been produced before the Court as a witness. As such, there is no evidence to establish that the victim was of unsound mind or mentally ill. There is no explanation on the part of the prosecution as to why the Medical Officer was not examined. The evidence of Kamlabai and Dhanwantabai could have been supporting piece of evidence had the victim herself been examined as a witness. The evidence of Dhanwantabai and Kamlabai could have been the substantive piece of evidence had the prosecution proved beyond reasonable doubt that the victim was mentally ill and was not able to understand the implications of the alleged act of the appellant. Since the respondent-prosecution has failed to establish that the victim was mentally ill, the evidence of Dhanwantabai and Kamlabai, in my opinion, cannot be used as substantive piece of evidence. As already stated, it could have been used as substantive piece of evidence only when unsoundness of mind of the victim had been proved beyond reasonable doubts. P.W. 2 Smt. Dhanwantabai has stated that she had seen that the appellant had committed rape on the victim. She had seen the incident from a distance. Therefore, whether the victim was a consenting party or otherwise could have been decided on the basis of evidence of the victim. The victim has not been examined as a witness. In the circumstances, as already stated, it was necessary to prove that the victim was mentally ill or was of unsound mind and was therefore, incapable of giving consent. Had the prosecution proved mental illness of the victim, the question of consent of the victim would not have arisen. In that event, the evidence of Smt. Dhanwantabai that the appellant had sexual intercourse with the victim also could have been sufficient to prove an offence of rape. Since the prosecution has failed to examine the victim as a witness and has failed to prove that the victim was mentally ill person benefit of this situation must go to the appellant. Hence, I pass the following order.

- i. The appeal is allowed.
- ii. The judgment and order passed by learned Additional Sessions Judge, Gondia in Sessions Trial No. 62 of 2010 is set aside.
- iii. The appellant is acquitted of the offence punishable u/s 376 of the Indian Penal Code.
- iv. He shall be released from the prison immediately, if not required in any case.
- v. Fine, if paid, shall be refunded to him.

The appeal stands disposed of accordingly.

In view of above, Criminal Application (APPA) No. 136 of 2014 does not survive, hence, it is disposed of.