
(2016) 06 BOM CK 0198
In the Bombay High Court
Case No : Criminal Appeal No. 406 of 2014

Dharmuji Mukund Meshram	Vs	APPELLANT
State of Maharashtra		RESPONDENT

Date of Decision : 24-06-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 376

Citation : (2017) 2 AIRBomRCri 134

Hon'ble Judges : S.B. Shukre, J.

Bench : Single Bench

Advocate : Shri N.H. Samundre, Advocate, for the Appellant; A.K. Bangadkar, A.P.P, for the State

Final Decision : Dismissed

Judgement

S.B. Shukre, J.(Oral)—This is an appeal preferred against the judgment and order dated 9/12/2013 rendered in Sessions Trial No. 150 of 2011 thereby convicting the appellant of the offence punishable under Section 376 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for ten years and also to pay fine of Rs. 10,000/- together with default sentence of simple imprisonment for six months.

2. I have heard learned Counsel for the appellant and the learned A.P.P. for the State-respondent I have carefully gone through the record of the case including the impugned judgment and order.

3. It is seen from the evidence of the prosecutrix that the appellant took advantage of absence of the parents and siblings of the prosecutrix at home for a period of 8 to 9 months prior to 12/4/2011 and indulged in sexual intercourse with her. As a result of such carnal contact, it is further seen, the prosecutrix got pregnant and even conceived a daughter. The complaint, however, was lodged on 12/4/2011 after the pregnancy of the prosecutrix was detected. There is nothing in the entire evidence of the prosecutrix to enable me to discard her evidence.

There is no reason why the prosecutrix should make such an allegation against the appellant. In her examination-in-chief, the prosecutrix has deposed about every details about the manner in which the appellant used to commit the acts of sexual intercourse with her.

4. According to the learned Counsel for the appellant, such story of the prosecutrix cannot be believed as she has admitted in her cross-examination that it was her maternal uncle, who had narrated the incident to the police and that she was not aware exactly as to what was written in the complaint. He submits that the maternal uncle of the prosecutrix is Sarpanch of the village and, therefore, he could use his influence in getting a false report filed in this case. He also submits that there is a land dispute going on between the party of the complainant and the party of the appellant. He further submits that the appellant has referred to this background of the case in the answers given by him at the time of recording of his statement under Section 313 of the Criminal Procedure Code.

5. I am not inclined to accept the above argument for the simple reason that no foundation regarding previous enmity has been led in the evidence. No such suggestions as are consistent with said defence have been given to the prosecutrix. Then, the prosecutrix, as seen from the evidence of P.W.3 Dr. Sushma Shendre as well as P.W.6 Dr. Amol Gulhane, is suffering from mild mental retardation. This fact is also noted by the learned Sessions Judge while recording of evidence of the prosecutrix. The learned Sessions Judge has observed the demeanour of the prosecutrix in the words, "whenever question is asked to witness, she used to give laugh and then giving answers". P.W.6 Dr. Amol Gulhane has also issued a certificate vide Exh.51, which has been issued after receipt of the report of the psychologist, and it shows that the prosecutrix is the victim of mild mental retardation. This would explain as to why the incident had to be intimated to police by the maternal uncle. Then, in the examination-in-chief, as stated earlier, the prosecutrix has also specifically stated as to how the appellant used to come to her house in the absence of her parents and siblings, and indulge in sexual intercourse with her from time to time.

6. So far as the facts stated by the prosecutrix in her examination-in-chief are concerned, I have already observed that no such circumstances have appeared in her cross-examination as to enable me to express any doubt about those facts. It is true that she has admitted in her cross-examination that she is not able to read and write. But, that does not mean that testimony of School Headmaster, P.W.-4 Rajendra Thembhre is false. He has categorically stated that the prosecutrix was studying in his School and at the time of her admission to the School a Birth Certificate issued by the Corporation was produced. The prosecutrix, in her cross-examination, has admitted that she was in Badnera Hostel for the purpose of taking education. So, just on one stray admission, the evidence of the prosecutrix or PW 4 cannot be rejected and has been rightly accepted by the learned Additional Sessions Judge as inspiring confidence of the

Court.

7. Now, the question is, whether or not the prosecutrix was below 18 years of age. The evidence of P.W.4 Rajendra Thembhre is relevant in this regard and it establishes beyond any manner of doubt that the prosecutrix was, during the relevant period of time, i.e. about 8 to 9 months prior to 12/4/2011, under 18 years of age. Her date of birth, as seen from the Birth Certificate (Exh.40), proved by the prosecution through the evidence of P.W.4 Rajendra Thembhre, is 11/9/1995. That would mean that at the relevant time the prosecutrix was between the age of 15 and 16 years.

8. Learned Counsel for the appellant has invited my attention to the ossification report at Exh.59, which discloses that radiological age of the prosecutrix on 13/4/2011 was about 17 years with an error of 1 year on either side. The primary evidence regarding the age of the prosecutrix in this case is her Municipal Birth Certificate issued under the provisions of Registration of Births and Deaths Act, 1969, vide Exh.40. It clearly shows that her date of birth is 11/9/1995 and the date of registration of her birth is 19/10/1995. In these circumstances, no doubt can be expressed about the genuineness of the entry made in the said certificate of birth. The cross-examination of P.W.4 Rajendra Thembhre also shows that the appellant has not disputed the correctness of the said birth entry. Therefore, the radiological age in this case would not be material. Even if it is considered as relevant, still, one can say that the prosecutrix was below 18 years of age at the time when the incident occurred. After all, the incident has been spread over the period of 8 to 9 months prior to 12/4/2011 and is not restricted to just one or two days. This entire period would be relevant and when it is considered, one would be convinced that even radiological age, as per the certificate vide Exh.40, of the prosecutrix was below 18 years when the first incident of rape occurred.

9. The above referred evidence would clearly show that this case falls within 6th definition of the term "rape" provided under Section 375 of the Indian Penal Code. It says that a man is said to commit "rape" with or without the consent of the girl when the girl is under 18 years of age and commits various acts as are described in clauses (a) to (d) of Section 375 I.P.C. In the instant case, the particular act committed by the appellant is one of penetration as provided under clause (a). Therefore, the learned Sessions Judge has rightly concluded that the consent of the prosecutrix in this case is immaterial.

10. Even otherwise, the medical evidence, as discussed earlier, shows that the prosecutrix was suffering from disorder of mild mental retardation and if that is the case, then one has to say that the prosecutrix was also incapable of giving any consent, thereby taking the crime committed by the appellant within the ambit of Section 376 (2) (j) of the Indian Penal Code. The learned Additional Sessions Judge has, therefore, rightly rejected the plea of the appellant for leniency and imposed minimum prescribed punishment of 10 years of rigorous imprisonment. As a matter of fact, I would say, by choosing to impose minimum

prescribed punishment upon the appellant, the learned Additional Sessions Judge has already shown the leniency and this is not a fit case for showing further leniency. The appeal deserves to be dismissed.

Appeal is dismissed.