
(2011) 04 BOM CK 0121
In the Bombay High Court
Case No : Criminal Appeal No. 993 of 2006

Girjesh Rajendra Prasad	Vs	APPELLANT
The State of Maharashtra		RESPONDENT

Date of Decision : 10-04-2011

Acts Referred:

Constitution of India, 1950 — Article 7
Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 376, 376(2)

Citation : (2011) 04 BOM CK 0121

Hon'ble Judges : U.D. Salvi, J

Bench : Single Bench

Advocate : Suvarna Vast, Amicus Curiae, for the Appellant; A.A. Mane, for the Respondent

Final Decision : Dismissed

Judgement

U.D. Salvi, J.—The present appeal assails the judgment and order dated 8th September, 2006 passed by the Second Ad-hoc Additional Sessions Judge, Kalyan, in Sessions Case No. 161/2004. The learned Sessions Judge convicted the Appellant-accused for the offence punishable u/s 376(2)(f) of the IPC, 1860 and sentenced him to suffer RI for 10years and to pay fine of Rs. 1000/-, and in default, to suffer RI for 3 more months.

2. A step-daughter of the complainant Smt. Ashadevi Rathod residing at Barrack No. 740, Balkanji Bari, Ulhasnagar-3, District Thane, came weeping back home around noon time on 28th April, 2004. The complainant noticed blood on the legs of her stepdaughter who is hereinafter referred to as the victim. She, therefore, checked private part of her stepdaughter and noticed blood stains on knickers. On inquiries, the victim disclosed that the Appellant-accused had called her to his house and under the pretext of playing had removed her knickers and slept on her. The victim was taken to the Central police station and thereafter, for medical examination to the Central Hospital, Ulhasnagar, where she was medically

examined and treated. Smt. Ashadevi Rathod thereafter lodged the complaint of rape on her step-daughter against the Appellant- accused with the police station. Crime was registered vide C.R. No. I-87/2004 u/s 376 of the IPC against the Appellant-accused around 18.30 on 28th April, 2004 with the Central Police Station, Ulhasnagar.

3. The accused was arrested and the clothes on his person were seized. He was sent for medical examination. Spot panchnama was prepared. Statements of the local witnesses were recorded and clothes of the victim girl were seized. The accused made a statement and at his instance, one cream color Barmoda pant, which was on his person at the time of the commission of the offence and was hidden thereafter by him at his residence, was recovered.

4. For the purposes of forensic investigation, clothes of the accused and the victim along with their blood samples and semen of the accused and vaginal swab collected by the medical officer from the person of the victim were sent to Forensic Science Laboratory with specific queries in relation to the commission of the offence. Report revealed the role of the accused in the crime and the charge sheet came to be filed against the Appellant-accused.

5. The case was duly committed to the Court of Sessions at Kalyan, District Thane. The learned 2nd Ad-hoc Sessions Judge, Kalyan, framed charge u/s 376(2)(f) of the IPC, 1860 as per Exhibit-2 against the Appellant-accused. The accused pleaded not guilty and claimed to be tried.

6. The prosecution examined PW 1 Ashadevi Rathod -the complainant at Exhibit 19, PW 2 -the victim child at Exhibit 21, PW 3 Sunita Rathod at Exhibit 22, PW 4 " Dr. Vinay Raut " Medical Officer, Central Hospital, Ulhasnagar at Exhibit 26, PW 5 "Vikas Sukale " Panch at Exhibit 28, PW 6 "Kamlesh Vispute-Panch at Exhibit 31, PW 7 " Dr. Mrs. Jyoti Pushwani - Medical Officer, Central Hospital, 5 Ulhasnagar at Exhibit 34, PW 8 "Arun Jadhav " Investigating Officer, PI, Central Police Station, Ulhasnagar. To complement the oral testimonies, the prosecution further adduced in evidence the complaint Exhibit 20, entry in the medical register regarding examination of the accused -Exhibit 27, seizure panchnama - Exhibit 29, Memo and discovery panchnama -Exhibit 32, Certificate of Examination -Exhibit 35, Forwarding memo -Exhibit 38, C.A. Reports - Exhibits 42, 43 and 44.

7. The accused simply branded the case as a false one in response to his examination u/s 313 of the Cr.P.C., 1973. However, he admitted that he was staying in the house of one Lady Chandra Chug, neighbors of the complainant Ashadevi and worked as a painter. He further admitted that he was medically examined at about 9.15 p.m. on 28th April, 2004 and the examination revealed abrasion and conjunction of penis-glans with absence of magma collection. According to him, the false case was filed as a result of the complainant's annoyance regarding her defamation as second wife.

8. The learned trial court believed the testimony of the complainant and the

victim " the child witness for two reasons (1) the complaint was lodged without appreciable loss of time and the medical evidence afforded corroboration to the prosecution witnesses.

9. The learned Advocate Mrs. Vast for the accused submitted that the present case suffered from inherent weakness inasmuch as there was no eyewitness and the victim was a child who had given her tutored version of the event of the incident. She further submitted that the forensic investigation failed to establish link between the crime and the criminal. She argued that PW 1 Ashadevi in her evidence had given distance between her residence and the residence of the accused as 3000 paces which rendered the incident improbable. Citing judgment of the Hon"ble Apex Court in the case of State of Assam v. Mafizuddin Ahmed 1983 Law Suit (SC) 23, she submitted that the evidence of such eyewitness is always dangerous. She further argued with reference to the case of Jaharlal Das v. State of Orissa 1991 Law Suit (SC) 208 that abrasions on genital and blood in nail clippings and on under pant of the accused do not necessarily reveal his culpability in the crime of rape.

10. The learned APP Smt. Mane for the State countered the submissions with the simple arguments that occurrence of rape on a child victim was evident from the medical evidence and she had no reason to point out accusing finger at the Appellant-accused. She further urged the court to consider the testimony of the child witness with utmost sensitivity particularly, regarding her age, understanding of words and her innocence. According to her, the consistent version of the complainant and the child victim is supported by the medical evidence. These submissions nailed the Appellant-accused.

11. PW 1 " Ashadevi Rathod in her evidence reveals that she is second wife of the Ashok singh Rathod, a driver who resides at a housewife in a joint family comprising of her husband, her brother-in-laws Sarvajit and Radhe shyam, nephew Vivas, mother-in-law Phulkesaradevi and her step-daughter "the victim. Her cross-examination fails to reveal that she had any reason to quarrel with the Appellant-accused, who was residing as a tenant in the house of her neighbors lady Chandra Chug, and develop enmity to fabricate the false case.

12. PW 1 Ashadevi deposed that sometime between 1 p.m. and 2 p.m. on 28th April, 2004, her daughter Kirti went for urination outside and did not return and there upon she had started searching her in the vicinity and found her returning home weeping. On inquiries made with her, PW 1 Ashadevi added, Kirti had disclosed to her that Brijesh (the accused) called her and under the pretext of play, removed her panty and laid himself on her as a result of which her place of urination was paining.

13. PW 1 Ashadevi further deposed that she had noticed blood on her legs and as such, she approached the police and lodged the complaint Exhibit-20. She revealed the facts about the medical examination of the victim and the investigation that the police had carried out in their locality.

14. In the cross-examination, PW 1 Ashadevi disclosed that the distance between her house and the house of the accused was 3000 paces. Besides this, it could be sensed from the submissions made on behalf of the Appellant-accused that there was nothing which the accused could capitalize. According to the learned Advocate for the Appellant-accused, the distance quoted by PW 1 Ashadevi improbably the prosecution story of the small child going to the residence of the Appellant-accused situated at the distance of 3000 paces from her home and returning there from after getting ravished at that place on foot. To find out whether any improbability arises from the prosecution version or not, one has to not only look at the evidence of PW 1 Ashadevi but to the entire evidence on record.

15. PW 2 " the victim was examined without administering oath for the reasons specifically recorded by the learned trial court. This fact evinces the innocence of PW 2. While saying that she does not know the " accused" , PW 2 " the victim said that she knew Girijesh uncle and pointed out the accused sitting in the court. Her answer only implies that she was not conversant with the term" accused" but knew the accused Girijesh very well. She quickly disclosed that Girijesh uncle had raped her. But when asked how did he rape, she was initially unable to respond. However, she went on to state the facts in her own words: " I went to show the sandal to my friend. I was returning to home. Girijesh uncle caught hold of my hand and taken me inside. My panty was removed and I was threatened. The blood oozed from my urine place. After removing panty, he led upon me. Then I came to home. Informed to my mother." Pertinently, her yielding to the suggestion that she did not come to the house of Brijesh but Brijesh uncle had taken her to his house, shows that not only she was telling at the instance of her mother as revealed in her further cross-examination but was open to answer the questions or respond to the suggestions made to her. Only inference which can be drawn from this fact is that she was child with open mind not led by dictates of any person but by her own will in consonance with the facts registered by her mind. Significantly, she denied the suggestions that the Brijesh had not committed rape on her. In the light of these revelations in her evidence, it would be wrong to come to the conclusion that she was narrating the facts as per the dictates of her mother. She did yield to the suggestion that the mother had told her what to tell in the court and therefore, she was telling. In absence of any further probe it would mean that she was asked total facts. Her response to this suggestion, therefore, only reveals her plain innocence and will only call for corroboration from the circumstances and the medical evidence.

16. Evidence of PW 3 Sunita Rathod, sister-in-law of PW 1 Ashadevi deposed that the incident was revealed to her around 2 p.m. and she had noticed PW1 Ashadevi weeping. Her evidence in substance reveals that the incident was not suppressed and the facts became known to the neighborhood immediately after the incident. Nothing much turns on her cross-examination.

17. Doubts expressed about the testimony of the child witness PW 2 further fade

to insignificance with the corroboration it received through the medical evidence. PW 7 Dr. Jyoti Pushwani, Medical Officer, Central Hospital, Ulhasnagar, who examined the victim sometime around 4.15 p.m. on 28th April, 2004 testified that she had recorded the history of alleged sexual assault sometime between 1 p.m. and 2 p.m. and her medical examination had revealed:

Local examination Perinea tear, second-degree, vaginal tear present, bleeding present, injury fresh.

She opined that there was sexual assault on the victim and accordingly, Certificate Exhibit 35 was issued by her. Her cross-examination brought forward answer to the question raised as a result of the complainant's testimony that the distance between her residence and the residence of the accused was about 3000 paces. PW-7 Dr. Jyoti Pushwani deposed that the rape victim aged 6 years could walk any distances. Though her cross-examination reveals that she could not give opinion as to how much distance the victim could walk-whether 3000 paces-, her opinion does not rule out the possibility of the victim walking between the place of offence and her home. She denied the suggestion that the perinea tear coupled with the vaginal tear cannot be possible by fall while playing and it is not necessary that there should be injury to labiamajora and labia minora. Testimony of PW 7 Dr. JyotiPushwani thus offers the effective corroboration to the testimony of PW 2 the victim.

18. PW 4 Dr. Vinay Raut further offered corroboration to the testimony of PW 2 ? the victim by revealing the fact that the accused showed glens conjunction with minor abrasions and absence of stemma-the signs indicative of sexual intercourse

19. PW 4 Dr. Vinay Raut was Medical Officer at Central Hospital, Ulhasnagar, who had examined the accused at about 9.15 p.m. on 28th June, 2004. According to PW 4 -Dr. Vinay Raut, glens conjunction was possible by otherwise than sexual intercourse. However, his opinion fails to materialize into any reasonable doubt in absence of explanation coming forward from the accused as regards the pertinent revelation regarding glens/penis in his examination u/s 313 of the Cr.P.C., 1973.

20. Evidence of PW 6 Kamlesh Raghunath Vispute, Panch read in conjunction with the evidence of PW 9 Dilip Thote PSI lures one to believe the discovery of one Barmoda pant Article 7 on 1.5.2004 by the accused as that of the one which was on his person at the material time and kept hidden at the place of his residence. Discovery of this pant makes no significant contribution to the Prosecution case except that it carried blood of the accused belonging to " A" Group vide CA Reports Exhibits 42and 44. Though CA reports as pointed out by the learned Advocate for the accused do not reveal any connecting link in form of blood of the victim and semen on the pant Article 7, the convincing evidence of the child witness PW 2. the victim and prompt lodging of the complaint by her mother PW 1 Ashadevi leaves no room for any reasonable doubt. Hence, the appeal must fail.

21. Criminal Application No. 993/2006, therefore, stands dismissed.