
(2012) 06 BOM CK 0098
In the Bombay High Court
Case No : Criminal Appeal No. 228 of 2011

Kakasaheb Haribhau Kamble

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 25-06-2012

Acts Referred:

Penal Code, 1860 (IPC) — Section 376

Citation : (2012) 06 BOM CK 0098

Hon'ble Judges : A.V. Potdar, J

Bench : Single Bench

Advocate : Satej S. Jadhav, for the Appellant; Yogita M. Kshirsagar, APP for the State, for the Respondent

Final Decision : Dismissed

Judgement

A.V. Potdar, J.—The appellant, who stand convicted for the offence punishable u/s 376 of the Indian Penal Code and sentenced to suffer RI for 10 years and to pay a fine of Rs. 1000/- in default to undergo further RI for one month by Sessions Judge, Osmanabad vide judgment and order dated 31.03.2011 rendered in Sessions Case No. 16/2009, by this appeal questions the legality and correctness of his conviction and sentence. Few facts, which are germane to decide the present appeal, may briefly be stated thus -

a) Prosecutorix (Her name is withheld as per the directions of the Supreme Court), had lodged a complaint (Exhibit-26) on 10th November 2008 in Shirdhon police station against the appellant and pursuant to which an offence was registered by PW-9 API Choure at Crime No. 127/2007 u/s 376 of the Indian Penal Code. Investigation of the said crime was entrusted to PW-7 PSI Jadhav.

b) PW-7 PSI Jadhav had visited the spot and had drawn the Spot Panchanama (Exhibit-35). Clothes of the prosecutorix, including her petticoat (Article-3) were seized under Panchanama (Exhibit-34). The appellant was arrested and the clothes on his person were also seized under Panchanama (Exhibit-33).

Thereafter the prosecutrix as well as the appellant were sent for medical examination.

c) PW-1 Dr. Chanchal Bodake, Medical Officer, had examined the prosecutrix and had verified her age as 19 years. Accordingly, certificate (Exhibit-23) was issued. During the examination the pubic hair, vaginal swab and blood sample of the prosecutrix was collected and handed over to police to refer the same for chemical analysis. Sonography of the prosecutrix was also conducted and it was noticed that at the material time the prosecutrix was carrying 7 months' pregnancy. It was opined that the prosecutrix was a married lady and was carrying. No opinion as to whether the prosecutrix was subjected to rape or not, was given till the receipt of the CA report.

d) PW-3 Dr. Anand Kamble examined the appellant and opined that he was capable to perform sexual intercourse. Sample of semen and public hair of the appellant were collected and handed over to the police to refer the same for chemical analysis. Accordingly, medical certificate (Exhibit-29) was issued.

e) During the investigation, statements of certain witnesses were recorded and the articles seized or collected during the investigation were forwarded to the Chemical Analyzer. In due course the CA reports (Exhibit-40, Exhibit-41 and Exhibit-42) were received and thereafter charge sheet was filed against the appellant.

f) On committal of the trial to the Court of Sessions, trial court framed charge (Exhibit-17) against the appellant for the offence punishable u/s 376 and 506 of the Indian Penal Code. The appellant pleaded not guilty to the charge and claimed to be tried. The prosecution, to substantiate its case, examined in all 9 witnesses. The prosecution witnesses include, PW-1 Dr. Chanchal Bodake, who had examined the prosecutrix; PW-2 prosecutrix herself; PW-3 Dr. Anand Kamble, who had examined the appellant; PW-4 Dinkar Kamble-husband of the prosecutrix; PW-5 Latabai Kamble-mother in law of the prosecutrix; PW-6 Uttam Naikwadi-Pancha witness to the seizure of clothes of the appellant and the prosecutrix; PW-7 PSI Jadhav the investigating officer; PW-8 Bansode carrier of the muddamal and PW-9 API Choure. It appears that the defence of the appellant is of false implication. However, the trial court discarded the defence of the appellant and convicted him for the offence punishable u/s 376 of the Indian Penal Code and acquitted him of the offence punishable u/s 506 of the Indian Penal Code. Admittedly, neither the complainant nor the State has questioned the acquittal of the appellant of the offence punishable u/s 506 of the Indian Penal Code. The conviction and sentence of the appellant u/s 376 of the Indian Penal Code is impugned in the present criminal appeal.

2. Heard Mr. Satej Jadhav, learned counsel for the appellant followed by the submissions of Mrs. Kshirsagar, learned APP for the respondent State. Both the learned counsel took me through the entire evidence on record so also through the documents produced by the prosecution during the trial. It is apparent that

the case of the prosecution is based on the direct evidence of the prosecutorix (PW-2), PW-5 Latabai-mother of the prosecutorix and PW-4 Dinkar-husband of the prosecutorix coupled with the circumstantial evidence i.e. CA reports and the medical reports.

3. For better appreciation of the submission advanced before me, it would be appropriate to advert to the evidence of material witnesses.

4. PW-2, prosecutorix has stated in the evidence that at the material time, she was residing at Shirdhon along with her husband PW-4 Dinkar, mother in law PW-5 Latabai and Kesharbai sister of her mother in law. According to her the incident in question took place in the morning of 10th November 2008. At that time she was carrying pregnancy of 7 months. Recently she had come to know that she is the second wife of her husband and her husband and mother in law were planning to bring the first wife of her husband back. Therefore, she had passed on a message to her parents to visit her matrimonial house and give understanding to PW-4 and PW-5. However, her parents could not visit her matrimonial house, but sent the appellant, who was the mediator in settling her marriage, to give understanding to her husband and mother in law. The appellant is the father in law of her real sister. The appellant had come to her house at 5.00 p.m. on 9th November 2008 and stayed there. On the next morning her husband and mother in law had left the house to bring some grocery items. After some time, the appellant asked Kesharbai, sister of her mother in law that as he was in a haste to go back, hence requested to bring PW-4 Dinkar and PW-5 Lata early. Thereafter Kesharbai, had left the house to call her husband and mother in law. Thereafter, she asked the appellant as to why he had not talked with her husband and mother in law when he was specifically sent to give understanding to them. The appellant thereupon told her that he has asked Kesharbai to bring them back. Thereafter he went outside and immediately returned back and pressed her mouth and forced her to lie down on the ground. The appellant told her not to disclose the episode to anybody otherwise he would not settle the dispute. While saying so, he committed rape on her by lifting her sari and petticoat and by unzipping of his pant. At that time her husband and mother in law came there and on seeing them the appellant left her and went outside the room. She narrated the incident to her husband and mother in law and hence her husband caught the appellant and the prosecutorix was brought to police station where her complaint (Exhibit-26) was recorded. Her clothes (petticoat) was seized by the police, she identified the same as Article-3. Thereafter, she was sent for medical examination to Osmanabad.

5. PW-2 prosecutorix was cross examined at length, however even during the marathon cross examination, her testimony as regards rape committed by the appellant was not shaken at all. Only admission could be brought on record that she was angry with the appellant as he had not given her the idea of first marriage of her husband Dinkar. Other than this, no omission, contradiction or discrepancy could be brought on record. In other words, the evidence of the

prosecutorix about her sexual ravishment by the appellant remained unshaken. Though suggestion was given to the prosecutorix during her cross examination that after she produced her petticoat, white liquid discharge from her private part was transferred on the same to explain as to how the semen were found on the petticoat. However, it is necessary to mention here that Dr. Chanchal, PW-1, who had examined the prosecutorix, was cross examined by the appellant, but it was not brought on record that during the medical examination of the prosecutorix there was white discharge from the private part of the prosecutorix which transferred on her petticoat. Therefore, the said suggestion given to the prosecutorix is of no avail to the appellant.

6. The evidence of PW-5 Latabai Kamble about the incident dated 10th November 2008 till she along with her son left the house is at par with the evidence of the prosecutorix. Additionally, she states that on their way back her sister met her and informed that the appellant was making haste to return to his village and hence they reached to the house and when she reached at the house they noticed that the appellant was committing rape on the prosecutorix. When the appellant saw them, he proceeded outside the room. They caught the appellant and brought him to the police station. In her cross examination, suggestion was given to her that the prosecutorix was also assaulted by them. Certain omissions are tried to bring on record, however, according to me, the same are not proved in the evidence of the investigating officer and therefore, the same are not of much significance. Evidence of PW-5 Latabai as regards appellant was found lying on the person of the prosecutorix is neither challenged not shaken in her cross examination.

7. Prosecution has also examined Dinkar, husband of the prosecutorix as PW-4. The evidence of PW-4 Dinkar is similar as that of the prosecutorix and PW-5 Latabai. Additionally, he states that when he reached at the house and entered in the room, he noticed that the appellant was lying on the prosecutorix and got up when the appellant saw them. Thereafter the prosecutorix came weeping near him and disclosed that the appellant had committed rape on her. He thereafter took the prosecutorix to the police station, where complaint of the prosecutorix was recorded. Certain omissions are tried to bring in his cross examination, however, the same are not proved in the evidence of the investigating officer and hence the omissions do not carry any importance. It is specifically brought on record in the cross examination of this witness that on the earlier day the appellant had visited their house as he was sent by the parents of the prosecutorix. Certain suggestions were given to PW-4 that the appellant has been falsely implicated due to previous enmity, however, what was the enmity is not brought in the cross examination.

8. In the light of this evidence, heard learned counsel for the appellant. Learned counsel for the appellant would urge that as the prosecutorix was annoyed with the appellant because though he knew about the first marriage of PW-4 Dinkar, he had not disclosed the said fact to the prosecutorix before her marriage and

hence possibility of false implication of the appellant cannot be ruled out. It is further urged that even the medical officer, PW-1 Dr. Chanchal was not sure as to whether any rape was committed on the prosecutorix and, therefore, according to learned counsel for the appellant, it is highly risky to base the conviction of the appellant on the sole testimony of the prosecutorix. It is also submitted that the CA reports clearly state that no semen were detected in the vaginal swab of the prosecutorix and there was no matting of the pubic hair nor semen was noticed on the pubic hair of the prosecutorix and hence the version of the prosecutorix that the appellant has committed rape on her be discarded. It is therefore urged that the medical evidence and the CA reports render the prosecution case doubtful and hence benefit of doubt be given to the appellant and he be acquitted of the offence with which he was charged and convicted.

9. Per contra, learned APP vehemently supported the judgment of conviction recorded by the trial court and urged to dismiss the appeal by confirming the conviction and sentence of the appellant.

10. Before considering the rival submissions, it has to be noted that the prosecutorix has stated clearly that the appellant had not removed her sari but had lifted the sari and the appellant had also not removed his clothes but only unzipped his pant and had committed rape and this version of the prosecutorix remained unshaken and hence the semen might not have been found on the pubic hair of the appellant. However, admittedly semen of the blood group of the appellant was found on the undergarment of the prosecutorix, which speaks volumes. This is a circumstance, which certainly goes against the appellant. In the premise, now the question arise as to whether the minor discrepancies as regards timings found in the evidence of the prosecution witnesses can take away the evendentiary value of the evidence given by the prosecution witnesses.

11. In this respect, the observations of the Apex Court as regards appreciation of the evidence in the criminal trial when the evidence of the prosecution witnesses, particularly evidence of prosecutorix, is recorded after considerable period, may usefully be referred. The Apex Court in *Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat*, has given 7 golden rules for appreciation of the evidence in criminal trial, which reads thus -

Over much importance cannot be attached to minor discrepancies. The reasons are obvious:

(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

(2) ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

(6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him-Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.

Admittedly, the facts of the case in hand disclose that the incident in question occurred on 10th November 2008 and the evidence of the prosecution witnesses was recorded in January 2011 i.e. after a span of more than 26 months. Therefore, it is quite natural that certain discrepancies may be found in the evidence.

12. Further, it may also be useful to refer the observations of the Apex Court in *Moti Lal Vs. State of M.P.*, . The Apex Court in the said judgment has observed thus

6. In the Indian Setting refusal to act on the testimony of the victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracized by the society and when in the face of these factors the crime is brought to light, there is inbuilt assurance that the charge is genuine rather than fabricated. Just as a witness who has sustained an injury, which is not shown or believed to be self-inflicted, is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of sex offence is entitled to great weight, absence of corroboration notwithstanding. A woman or a girl

who is raped is not an accomplice. Corroboration is not the sine qua non for conviction in a rape case. The observations of Vivian Bose, J. in *Rameshwar Vs. The State of Rajasthan*, were:

The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge...

13. In paragraph No. 10 of the said judgment (*Moti Lal V/s State of MP*) has observed thus -

It needs no emphasis that the physical scar on a rape victim may heal up, but the mental scar will always remain. When a woman is ravished, what is inflicted is not merely physical injury but the deep sense of some deathless shame. An accused cannot cling to a fossil formula and insist on corroborative evidence, even if taken as a whole, the case spoken to by the victim strikes a judicial mind as probable. Judicial response to human rights cannot be blunted by legal jugglery.

14. The facts of the case in hand disclose are that PW2 prosecutrix is a married lady having a daughter and the prosecutrix was carrying 7 months pregnancy at the relevant time. Further it has been established from the evidence that at the relevant time, the prosecutrix and the appellant were alone in the house and secondly the appellant and the prosecutrix are closely related and he was of the age of her father and hence the prosecutrix might not have suspected that the appellant may play any wrong act with her in absence of her relatives. Even the act committed by the appellant was so sudden that the prosecutrix could not react immediately as she was carrying 7 months" pregnancy and hence she could not have given alarm to help her when her mouth was closed by the appellant. In this light of the matter, certainly the wrong committed by the appellant with the prosecutrix caused stigma to her character. As observed by the Apex Court in the case of *Moti Lal V/s State of M.P. (Supra)* in Indian society no woman would falsely implicate any one in rape case at the cost of stigma to her character. Re-appreciation of the evidence from this angle force me to believe the testimony of the prosecutrix that too in the light of the fact that no circumstance is brought on record to indicate that the prosecutrix was in enimical terms with the appellant.

15. Once the charge of the offence punishable u/s 376 of the Indian Penal Code stands proved against the appellant then question arise as to whether the sentence awarded to the appellant can be reduced. As in the present case rape has been committed on a pregnant woman, it may be useful to refer the observations of the Apex Court in *Om Prakash Vs. State of U.P.*, . Wherein the Apex Court has observed thus - 13. It is settled law that the victim of sexual assault is not treated as accomplice and as such, her evidence does not require corroboration from any other evidence including the evidence of a doctor. In a

given case even if the doctor who examined the victim does not find sign of rape, it is no ground to disbelieve the sole testimony of the prosecutrix. In normal course a victim of sexual assault does not like to disclose such offence even before her family members much less before public or before the police. The Indian women has tendency to conceal such offence because it involves her prestige as well as prestige of her family. Only in few cases, the victim girl or the family members has courage to go before the police station and lodge a case. In the instant case the suggestion given on behalf of the defence that the victim has falsely implicated the accused does not appeal to reasoning. There was no apparent reason for a married woman to falsely implicate the accused after scattering her own prestige and honour.

17. One of the categories which attracts more stringent punishment is the rape on a woman who is pregnant. In such cases where commission of rape is established for operation of Section 376(2)(e) the prosecution has to further establish that accused knew the victim to be pregnant. In the instant case there was no such evidence led. The Trial Court came to the conclusion that there was "full possibility" of the accused knowing it. There is a gulf of difference between possibility and certainty. While considering the case covered by Section 376(2)(e) what is needed to be seen is whether evidence establishes knowledge of the accused. Mere possibility of knowledge is not sufficient. When a case relates to one where because of the serious nature of the offence, as statutorily prescribed, more stringent sentence is provided, it must be established and not a possibility is to be inferred. The language of Section 376(2)(e) is clear. It requires prosecution to establish that the accused knew her to be pregnant. This is clear from the use of the expression "knowing her to be pregnant". This is conceptually different that there is a possibility of his knowledge or that probably he knew it. Positive evidence has to be adduced by the prosecution about the knowledge. In the absence of any material brought on record to show that the accused knew the victim to be pregnant Section 376(2)(e) IPC cannot be pressed into service. To that extent the judgment of the Courts below are unsustainable. However, minimum sentence prescribed u/s 376(1) IPC is clearly applicable.

It is observed by the Supreme Court that the offence of rape is a heinous offence and when such an offence is committed on a pregnant woman then it becomes more despicable. Therefore, the Supreme Court has observed that when such an offence is proved, then no leniency to be shown to the accused involved in such offences. Considering the observations of the Apex Court in "Om Prakash V. State of Uttar Pradesh" (Supra) coupled with the facts of the case in hand that a poor helpless lady is subjected to rape by a person who was of the age of her father, that too when she was carrying 7 months" pregnancy, I do not think that the appellant deserves any leniency. In such circumstances, the appeal, which is devoid of any merit, deserves to be dismissed. There being no perversity in the judgment impugned in the present case, no interference is required by this Court. Consequently, the appeal, being sans merits, stands dismissed by confirming the conviction and sentence of the appellant recorded by the trial

court.