(2011) 09 BOM CK 0167

In the Bombay High Court

Case No : Criminal Appeal No. 885 of 2007

Mohammed Gaus Ibrahim Shaikh — APPELLANT

Vs

The State of Maharashtra — RESPONDENT

Date of Decision : 08-09-2011

Acts Referred:
Penal Code, 1860 (IPC) — Section 276(2), 376, 376(2), 511

Citation : (2012) BomCR(Cri) 557 : (2011) 113 BOMLR 3274

Hon'ble Judges : J.H. Bhatia, J

Bench : Single Bench

Advocate : Imtiyaz A.I. Patel, for the Appellant; P.P. Shinde, APP, for the Respondent

Final Decision : Allowed

Judgement

J.H. Bhatia, J.—The Appeal is preferred by the original accused challenging the judgment and order in Sessions Case No. 1034 of 1995 passed by the learned Addl. Sessions Judge, Greater Bombay, whereby the accused was convicted for the offence of rape punishable u/s 376(2)(f) of I.P.C. and was sentenced to undergo R.I. for ten years and to pay fine of Rs. 500/-.

2. Prosecution case, in brief, is that the complainant Suman Jadhav (PW-2) resided in Indira Nagar Zopadpatti, Opposite Kala Mandir Cinema, Bandra (East) along with her husband, two sons and a daughter aged about four years during the year 1995. The said daughter, examined as PW-3, was the victim of the offence and thus prosecutrix. The accused was also residing in the same neighbourhood along with his wife and two-year-old son. He was called as "Mohd. Mama" by the children of the locality. On 23.4.1995, at about 9.30 p.m., the complainant left her house to see off and reach her mother and a nephew at Kala Mandir. Her husband had gone out for fetching water. the children were playing around the house. At about the same time, the wife and son of the accuse were also not at his house and the accused was alone. At about 10.00 p.m., PW-2 Suman came back and the prosecutrix also returned from the house

of accused. About 15 minutes after that the prosecutrix told her mother that she wanted to pass urine. Therefore, her mother took her to a Morie or drainage. However, the prosecutrix could not pass urine and on enquiry by mother she told "see what Mohd. Mama has done". According to PW-2 Suman, on examination, she fond a little blood near her private part. On further enquiry by her, the prosecutrix told that Mohd. Mama had made her sit on his lap and told her that he would do "Bula Bula". Later on, PW-2 Suman disclosed this fact to her husband. They went to the house of the accused to question him about the incident, but he ran away. Thereafter, PW-2 Suman along with her husband and daughter went to the Kherwadi Police Station and lodged a report. The girl, who was feeling pain, was referred to Nagpada Police Hospital where she was examined and then she was referred to Bhabha Hospital and then to J.J. Hospital. The accused was also arrested and was examined by the Medical Officer. The clothes, blood samples, etc. were collected and referred to the Chemical Analyser. After investigation, charge-sheet was filed against the accused for the offence u/s 376 of Indian Penal Code.

3. The accused pleaded not guilty. On behalf of the prosecution, in all five witnesses were examined. Several documents were placed on record.

4. The Learned Counsel for the accused/appellant pressed the Appeal only on one pint. According to him, even if whole incident and evidence of the prosecutrix and her mother as well as the medical officer are believed, the prosecution could not prove that there was penetration and therefore charge of rape was not proved. According to him, at the most, the accused may be held guilty for the offence of an attempt to commit rape.

5. On the other hand, the learned APP took pains to urge that the trial Court has rightly convicted the accused for the offence of rape.

6. PW-2 Suman, who is mother of the prosecutrix, deposed about facts as stated to her by the prosecutrix. According to her, at about 9.30 to 10 p.m. on 23.4.1995, she had left her house to reach her mother to Kala Mandir as her mother had come to her house on that day. According to her, her husband was also not present at the house at relevant time. After reaching her mother to her house, she came back. At about the same time, her daughter/the prosecutrix (PW-3) also came from outside and told that she had been to the house of Mohd. Mama i.e. the accused. After some time, she wanted to go for urination and she was taken to a side by her mother. At that time, the prosecutrix told her mother that she was having some burning sensation in her private part. The mother examined her private part and, according to her, she had seen some blood in the private part. On enquiry by her, the prosecutrix told that Mohd. Mama had taken her inside his house saying that he would give her chocolate. Thereafter having removed his lungi, he had made her sit on his lap and had placed her private part on his private part. Thereafter her husband came and she narrated the incident to him and then PW-2 Suman, her husband and daughter went to the house of the accused to enquire as to what had happened, but he ran away.

Thereafter, they went to the Police Station where she lodged the report Exhibit 14.

7. The prosecutrix PW-3 in her evidence deposed that the accused had taken her into his house and at that time none except the accused was present there. He had removed her under-wear and then he had taken her on his lap and inserted his private part into her private part, which caused burning sensation in her private part and blood oozed. According to her, when she returned to her house, she narrated the incident to her mother and her statement was also recorded. It may be noted that as per the oral evidence of the prosecutrix, her mother as well as the medical evidence on record, she was aged about four years at the time of the incident. The incident had occurred in March 1995. Her evidence was recorded in November 2003 i.e. about 81/2 years after the incident. At that time, girl was aged about 13 years. When she deposed before the Court that the accused had inserted his private part into her private part and had caused burning sensation and oozing of blood, she had come to the age of adolescence when she would begin to understand things. In the cross-examination, it was put to her that she had not stated to her mother or to the parents that the accused had inserted his private part into her private part and she deposed that she did not recollect whether she had stated so. Somehow, this vital omission was not put to the Investigating Officer PW-5 Prakash Agarwal. The statement of the girl was recorded by him on 28.4.1995. i.e. more than one month after the incident. According to I.O., immediately after the incident the girl was under medical treatment and thereafter she had gone to her grandmother''s house at Dharavi and, therefore, her statement could not be recorded earlier. In fact, Dharavi s not far away from the locality where the prosecution and her mother were resding. The explanation for delay in recording her statement s not satisfactory. In the light of this, it is to be borne in mind that in the FIR, which was lodged by her mother immediately after the incident and wherein the words of the prosecutrix are verbatim quoted is important. In the FIR she stated that her daughter had told her "Mohd. Mama had made me sit on his lap and played "Bula, Bula". It does not speak about insertion of the male organ into the private part of the girl. In fact, she was a child aged about four years and for a child of such tender age, it was impossible to understand these things. Whatever she understood and had stated was noted down verbatim in the FIR. In view of this state of oral evidence and the narration of the incident in the FIR immediately, it will be necessary to scrutinize the medical and other evidence to find out whether the prosecution has proved penetration.

8. Admittedly, immediately after the prosecutrix was taken to the Police Station ,she was first referred to the Nagpada Police Hospital where on examination, she was advised to be taken to Bhabha Hospital. The evidence of PW-1 Dr. Shubhada Khandeparkar reveals that as per the medical case papers, on 24.4.1995 at 11.55 p.m. the prosecutrix was brought to Bhabha Hospital for medical examination with a history of sexual assault. At that time, she was examined by Dr. Satish and he noted down the observations on examination of

the girl. The prosecutrix was admitted in the Hospital and was discharged on 28.4.1995. On 26.4.1995 i.e. two days after her admission in the Hospital, she was examined by PW1 Dr. Khandeparkar. According to her, on examination by her, she found as follows:

Hymen intact, Fourchette intact. little erythema around urethra, no c/o of external injury and opening intact.

She explained that ''erythema'' means redness and soreness of skin. As per the Oxford Dictionary, erythema means superficial inflammation of skin and patches. The observations were noted down in the Indoor Case papers of the prosecutrix marked Ex. 9.

9. It is material to note that Dr. Satish, who had first examined the prosectrix on her admission in Bhabha Hosptal, was not examined by the prosecution. However, evidence of Dr. Khandeparkar shows that Dr. Satish had noted his observations on the case papers. On the medical case papers of the prosecutrix, there are following observations recorded on 24.4.1995 immediately after her admission in the hospital:

PA exam - NAD No guarding/tenders/rigidity hymen ring intact. No bleeding PV Urethra normal. No vulval injury No perineal injury.

Thus, on examination, no injury was found on around her private part. Similar notings appear to have been recorded on 25.4.1995 in the medical case papers.

10. The Judgment of the trial Court reveals that in view of the above medical observations, it was urged on behalf of the defence that penetration was not established, but it was contended on behalf of the prosecution that the erythema around Urethra provides corroboration to prosecution case of penetration. The learned trial Court referred to number of judgments and authorities of the Supreme Court and different High Courts in support of the contention that complete penetration is not necessary and even slightest penetration is sufficient to commit the offence of rape. There can be no dispute about this legal proposition and, therefore, I do not find it necessary to refer to all those authorities. However, the question is whether there was even slightest penetration and whether erythema around urethra amounts to penetration into the private part of the girl. The learned trial Court has not addressed this point.

11. In Medical Jurisprudence & Toxicology revised by Prof. T.D. Dogra 11th Edition (2005) page 492, the learned authors have described the "Female external genitalia thus:

Female external genitalia (Syn: Vulva, Pudendum): The female external genitalia include the structures placed about the entrance to the vagina. They are located outside the hymen, which is a membrane that lies across the entrance to the vagina. The external genitalia include the mons pubis (also called the mons veneris), the labia majora and minor ,the clitoris, the vestibule of the vagina and perineum. They are all visible on external examination. The mons pubis is the

rounded eminence, made by fatty tissue beneath the skin, lying in front of the pubic symphysis. A few fine hairs may be present in childhood. Later, at puberty, they become coarser and more numerous. The labia majora are two marked folds of skin that extend from the mons pubis downward and backward to merge with the skin of the perineum. They form the lateral boundaries of the vulva, which receives the openings of the vagina and the urethra. The outer surface of each labium is pigmented and hairy; the inner surface is smooth but possesses sebaceous glands. The labia majora contain fat and loose connective tissue and sweat glands. They correspond to the scrotum in the male. The labia minora are two small folds of skin, lacking fatty tissue, that extend backward on each side of the opening into the vagina. They lie inside the labia majora and are some four centimeters (about 1.6 inches) in length. In front, the upper portion of each labium minus passes over the clitoris, the structure, in the female, corresponding to the penis (excluding the urethra) in the male, to form a fold, the prepuce of the clitoris, and a lower portion passes beneath the clitoris to form its frenulum. The two labia minora are joined at the back across the midline by a fold that becomes stretched at childbirth. It is known as fourchette. Between the fourchette and the vaginal orifice is the fossa navicularis. The labia minora lack hairs but possess sebaceous and sweat glands. The clitoris is a small erectile structure composed of two corpora cavernosa separated by a partition. Partially concealed beneath the forward ends of the labia minora, it possesses a sensitive tip of spongy erectile tissue, the glans clitoridis. The external opening of the urethra is some 2.5 centimeters (about one inch) behind the clitoris and immediately in front of the vaginal opening. The vestibule of the vagina is a triangular space bounded in front by the clitoris, at the back by the fourchette and one either side by labia minora.

12. At page 515 of the Book, it is observed thus:

To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with omission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without omission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable u/s 376 I.P.C.

13. In Bailliere''s Atlas of Female Anatomy revised by Katharine F. Armstrong Seventh Edition (1969) at page 22, it is observed thus:

If the labia minora be separated, two apertures are seen, a small one above, the opening of the urethra, and a large one below, the vagina.

If there would be any internal injury to the urethra, it could be possible only if there was some insertion through the labia majora or labia minora, but in the present case, there was no internal injury to the urethra. A little erythema around urethra, as noted by Dr. Khandeparkar, indicates superficial inflammation of skin around urethra. It clearly shows that the erythema or the inflammation,

which was noted by Dr. Khandeparkar on 26.4.1995, was on the skin covering urethra and not on or inside the private part. In view of the location of urethra, the skin would be slightly away or above the private part of the woman. In view of the inflammation on the skin of urethra, it appears that there was some external injury on the skin covering urethra and not private part. Incidentally, erythema or a superficial inflammation does not appear to have been noted by Dr. Satish, who had examined her first immediately after the girl was brought to the hospital on 24.4.1995. The superficial inflammation was noted on the skin two days after that and it could be because of any reason including itching. It is material to note that when the girl was taken for urination shortly after the incident, she had complained of some difficulty in urination and then she disclosed all the facts. It means her urethra might have been hit, may be from outside, by the private organ of the accused and that might have resulted in some pain and difficulty in urination and this also may be the reason for inflammation, which was noted later on. In any case, that indicates injury on the part which is not covered within the definition of the private part. As noted above, no injury was found on the vulva. There is nothing to show that there was injury on the labia major or labia minora or fourchete and certainly there was no injury to the hymen.

14. It is also material to note that no stains of semen were found either on or around the private part of the girl or on her underwear. As semens stains were found on the underwear and clothes of the accused also. Not only this, even no blood stains were found on the clothes of the girl. A small blood stain was found on the underwear of the accused, but it could not be determined whether it was the blood of the accused or of the prosecutrix. At least, there is no evidence to show that there was any bleeding from the private part of the prosecutrix. It is also material to note that in her examination-in-chief, Dr. Khandeparkar deposed that in her opinion, there might be attempt of penetration of penis. She never deposed that there was any indication of even slightest penetration. She deposed only about an attempt, which appears to be unsuccessful.

15. It appears that the above medical evidence and the admission of Dr. Khandeparkar were not properly scanned and scrutinized by the trial Court before coming to conclusion that offence of rape was committed. Taking into consideration the circumstances, it must be held that the accused had taken the prosecutrix to his house, removed her clothes, made her sit on his lap and attempted to commit rape on her, but it appears from the facts and circumstances that penetration had not actually taken place and, therefore, the case would stop at the level of attempt to commit rape only. Therefore, in my opinion, the accused could not be held guilty for the offence punishable u/s 376(2)(f) of Indian Penal Code, but he could be held guilty for the offence of attempt to commit rape punishable u/s 276(2)(f) read with Section 511 of Indian Penal Code.

16. The accused was in custody for some time before he was granted bail during

trial and from 1.3.2004, when he was convicted and sentenced, he is in jail. He has thus already undergone actual imprisonment of more than seven years. In my opinion, this sentence is sufficient for the offence of attempt to commit rape.

17. For the aforesaid reasons, the Appeal is partly allowed. While the Judgment and Order of conviction and sentence for the offence punishable u/s 376(2)(f) of Indian Penal Code is hereby set aside, the accused is convicted for the offence of attempt to commit rape punishable u/s 376(2)(f) read with Section 511 of Indian Penal Code and is sentenced to undergo rigorous imprisonment as already undergone and he be set at liberty forthwith if not required in any other case.

