
(2013) 11 BOM CK 0094
In the Bombay High Court
Case No : Criminal Appeal No. 69 of 2011

Nandkumar Sitaram Jadhav

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 20-11-2013

Acts Referred:

Citation : (2014) ALLMR(Cri) 697

Hon'ble Judges : V.L. Achliya, J;V.K. Tahilramani, J

Bench : Division Bench

Judgement

V.K. Tahilramani, J.—The appellant (original accused) has preferred this appeal against the judgment and order dated 25/4/2008 passed by the learned 3rd Additional Sessions Judge, Kolhapur, in Sessions Case No. 120 of 2006. By the said judgment and order, the learned Sessions Judge convicted the appellant u/s. 376(2)(f), 324 and 354 of Indian Penal Code ("IPC" for short). For the offence punishable u/s. 376(2)(f) of IPC, the appellant was sentenced to suffer RI for ten years and fine of Rs. 1000/-. In default RI for six months. For the offence punishable u/s. 324 of IPC the appellant was sentenced to suffer RI for three years and fine of Rs. 1000/-. In default RI for six months, no separate sentence was imposed on the appellant for the offence u/s. 354 of IPC. The substantive sentences u/s. 376(2)(f) and 324 of IPC were directed to run concurrently. The prosecution case briefly stated is as under;

PW 3 Maya was residing at Raman Mala, Taluka Karvir, Dist. Kolhapur. The appellant was residing in front of her house. The victim girl, who was aged about 6 years, at the time of incident, was residing in the same area along with her family.

It is the prosecution case that on 9/5/2006 at about 1 p.m., the appellant called the victim girl to his house stating that he would give her "khau" (sweet meats) and then committed rape on the victim girl. As there was pain the victim girl shouted. On hearing her shouts, PW 3 Maya and PW 6 Madhuri rushed into the house of the accused-appellant. They saw the victim girl weeping and she was

frightened. There was bleeding from her mouth. When they entered the house of the appellant, the appellant ran away. PW 3 Maya and PW 6 Madhuri asked the victim girl what had happened. Thereupon she told them that while she was playing in the courtyard the appellant had taken her to his house stating that he would give her "khau" (sweat meats). The appellant then bit her face, leg and chest. The appellant then removed her nicker and slept on her person. As there was pain, she started shouting. After PW 3 and PW 6 came to the spot, the appellant wore his pant and ran away. Then the mother of the victim girl was called. They informed her about the incident. The victim girl's mother lodged FIR. Thereafter investigation commenced. The victim girl was sent for medical examination. PW 9 Dr. Shaha examined the victim girl. A number of injuries were seen on the body of the victim girl and it was found that hymen was ruptured. Injury was fresh injury. After completion of investigation, charge-sheet came to be filed.

2. Charge came to be framed u/s. 376(2)(f) against the appellant for committing rape on a girl below 12 years. Charge was also framed u/s. 354 and 324 of the IPC. The appellant-accused pleaded not guilty to the said charge and claimed to be tried. The defence of the appellant was that of total denial and false implication. After going through the evidence adduced in this case, the learned Sessions Judge convicted and sentenced the appellant, as stated in para 1 above, hence, this appeal.

3. We have heard Mr. Najmi, the learned advocate for the appellant and Mrs. Bhonsale, the learned APP for the State. We have carefully considered their submissions, the judgment and order passed by the learned Sessions Judge and the evidence in this case. After carefully considering the matter, we are of the opinion, that, the appellant did commit rape on a minor girl.

4. Despite diligent efforts to trace them, the victim girl and her mother could not be traced, therefore, they could not be examined. Hence, there is no direct evidence to prove the case. Non-examination of the complainant and the victim girl, since they are not available, is not fatal to the prosecution case and there can be conviction of the accused on the basis of material available on record. In this context, we would like to make useful reference to a few decisions wherein though the victim of sexual assault or material witnesses have not been examined, the conviction has been upheld.

(i) In State of Karnataka Vs. Mahabaleshwar Gourya Naik, , the victim of offence of rape was not available for examination as she was dead. Other evidence proving criminal act of accused was there on record. It was held that non availability of victim is no ground for acquittal of the accused.

(ii) In State of Himichal Pradesh Vs. Gian Chand, the offence was u/s. 376 IPC. In this case the Apex Court held that Non examination of a material witness is again not a mathematical formula for discarding the weight of the testimony available on record, howsoever, natural, trustworthy and convincing it may be.

The charge of withholding a material witness from the court leveled against the prosecution should be examined in the back ground of facts and circumstances of each case so as to find whether the witnesses were available for being examined in the Court and were yet withheld by the prosecution. The court has first to assess the trustworthiness of the evidence adduced and available on record. If the court finds the evidence adduced worthy of being relied on, then the testimony has to be accepted and acted on though there may be other witnesses available who could also have been examined but were not examined.

(iii) In Shilla alias Shilender Vs. State of Haryana, , the accused therein was seen running away, from the scene of occurrence on seeing prosecution witnesses. The victim was found bleeding from her vagina. The evidence of prosecution witnesses was duly corroborated and supported by medical evidence. The court held that the mere fact that prosecutrix was not examined is not fatal to the prosecution case and the conviction of the appellant u/s. 376(2)(f) was proper.

5. The conviction has been based upon circumstantial evidence. In the present case, the circumstances relied upon by the prosecution to connect the appellant with the crime are as under:

1. The victim girl was found in the house of appellant with bleeding from her mouth.
 2. The appellant was seen running outside his house when PW 3 rushed to house of appellant after hearing shouts of victim girl.
 3. Immediate disclosure of incident by the victim girl to P.Ws. 3, 4 and 6.
 4. Injuries over the private part and on the person of the victim girl.
 5. Seizure of Frock and Nicker (underwear) of the victim girl as per panchnama Exh. 14 and seizure of pant of the accused as per panchnama Exh. 16.
 6. Detection of semen on frock and human blood on underwear which were on the person of the victim girl at the time of the incident and human blood and semen on seized pant which was on the person of the accused, at the material time of incident.
 7. Conduct of appellant.
6. To prove circumstances No. 1 & 2, that the victim girl was found at the house of the appellant and the appellant ran away from his house at the material time, the prosecution has relied upon the evidence of PW 3 Maya, and PW 6 Madhuri. PW 3 Maya has deposed that on 9/5/2006 at about 1 p.m., she was preparing papad in her house and Komal Jadhav, Madhuri (PW 6), Champabai Khade and Mangal More were also preparing papad in her house. At about 1.30 p.m., they heard shouts of small child from the house of accused which was in front of house of this witness. After they heard shouts they all went to the house of accused and saw the victim girl weeping and she was frightened. There was bleeding from her mouth. PW 3 Maya had taken the victim girl near her. After

they entered the house of appellant, he ran away. Maya has stated that they asked the victim girl as to what had happened and she told them that, while she was playing in the courtyard the appellant had taken her to his house saying her that he would give her "khau" by holding her hand, that the appellant bit her face, leg and chest and further told her that the appellant had removed her nicker and slept on her person and that as there was pain she raised shouts "Mummy" "Mummy" and that after they came there the appellant ran away after wearing his pant.

7. In the cross examination, PW 3 has stated that the distance between the door of her house and the door of house of the appellant is about 6 ft. The above referred evidence of PW 3 Maya clearly shows that the distance between house of PW 3 and the appellant is about 6 ft. and door of house of PW 3 is in front of door of house of the appellant. Thus, PW 3 Maya is close neighbour of the appellant. Therefore, it is possible for PW 3 to identify the appellant and there is no question of committing mistake by PW 3 in identifying the accused. On the basis of evidence of PW 3, it can be said that after hearing the shouts of victim girl, when she went to the house of the appellant along with five ladies referred to above, she saw the victim girl in the house of the appellant weeping and at the same time, the appellant ran away from his house.

8. The evidence of PW 6 Madhuri is on similar lines as that of PW 3 Maya. This witness also knew the appellant from his childhood, hence, there could not be any mistake on her part in identifying the appellant. As both PW 3 Maya and PW 6 Madhuri were preparing Papad in the house of PW 3 Maya at the material time and the distance of the house of the appellant and PW 3 Maya was only 6 feet, it was quite natural to hear the shouts of the victim girl from the house of the appellant and to rush to the house of the appellant to see what had happened. We find no reason to disbelieve the evidence of PW 3 Maya and PW 6 Madhuri.

9. The other circumstance relied by prosecution is that, there was immediate disclosure of the incident by the victim girl to PW 3 Maya, PW 6 Madhuri and PW 4 Maruti. PW 3 and PW 6 have stated that after hearing the shouts of the victim girl from the house of the appellant, they rushed to the house of the appellant. There they saw the victim girl was weeping with blood coming from her mouth and on inquiry she disclosed about the incident to them. The victim girl disclosed that the appellant caused injuries to her by biting her and thereafter he removed her underwear and slept on her person.

10. PW 4 Maruti is another witness to whom the victim girl had disclosed about the incident. His evidence shows that on 9/5/2006 as usual he went to work along with the father of the victim girl. On that day at about 2.10 p.m. children in the lane came to call them as the victim girl was weeping and there was bleeding from her mouth. Maruti has stated that he and father of the victim girl, both went to the house of the appellant. The victim girl was there. She was weeping and she told them that while she was playing, the appellant took her away to his house saying that he would give her "khau" (sweets). The appellant

thereafter bit her face, leg and chest. He then removed her underwear and slept on her person. Thereupon she shouted, therefore, the ladies in the lane on hearing the shouts, opened the door, the appellant then ran away.

11. The prosecution has further relied upon the circumstance of injuries over the person of victim girl. The victim girl was examined by PW 9 Dr. Shaha. Dr. Shaha has stated that the victim girl was aged about 6 years. On examining the victim girl, the doctor found the following injuries on her person.

1. Scratch marks on rt. Cheek near angle of mouth.
2. Bruise mark on anterolateral aspect of neck 3 c.m. t.d.
3. Bite marks on near rt. nipple and areola.
4. Scratch marks on rt. Wrist dorsum lat. aspect.
5. Scratch marks on medial aspect of rt. Thigh middle 1/3rd 2 c.m. App., horizontally.
6. Bruise on lateral aspect of rt. thigh app. 0.5 cm.
7. Scratch mark on lt. Thigh medial aspect upper 1/3 (2 c.m. Length).
8. Scratch mark on lt. Thigh medial aspect middle 1/3rd (3 c.m.).

On examination of labia majora it was found to be tender. On examination of vagina mucosa it was bright reddish in colour. On examination of hymen it was found to be ruptured. On examination site of ruptured hymen was postero lateral at 8 O'clock and it was found to be tender. The injuries noticed appeared to be fresh and within six hours. In the opinion of the doctor, considering the multiple injuries on the body of the victim girl, rupture of hymen may be due to sexual assault.

12. The clothes of the victim girl were seized under panchnama Exh.-14. Panch witness PW 1 Ananda has deposed on this aspect. PW 1 Ananda has stated that on 9/5/2006, he was called in Shahupuri police station, at about 8.15 p.m. One girl-aged 5 to 6 years and one woman were sitting in the police station. The said woman produced the nicker and skirt on the person of the said girl, in their presence. The appellant was arrested on the day of the incident i.e. on 9/5/2006. His pant was also seized under panchnama, Exh.-16. Panch witness PW 2 Shakil has deposed on this aspect. The clothes were sent to the chemical analyzer. As per chemical analyzer's report, semen was found on the frock of the victim girl and on her underwear blood was found. The pant of the appellant showed blood as well as semen on it. Thus the chemical analyzer's report also corroborates the prosecution case.

13. Another circumstance relied upon by prosecution against the accused is about his conduct of running away after the incident. The conduct of the appellant is also material. On the basis of immediate conduct of accused to run away from his house after girl raised the shouts and PW 3 and other woman

entered the house is sufficient to draw inference that as he has committed rape on victim girl, he ran away from the spot. If the appellant was innocent, there was no reason for him to run away. This conduct on the part of the appellant also speaks volumes about his mens rea. One highly incriminating factor which goes against the appellant is his conduct. The conduct of the appellant in running away from the spot immediately on seeing PW 3 Maya and PW 6 Madhuri strongly underlines his guilt. The conduct of the appellant can certainly be taken into account in view of Section 8 of the Indian Evidence Act.

14. The facts in the present case and the case of Shilla @ Shilender (supra) are quite similar. In the said case also the accused was seen running away from the scene of occurrence and the victim was found bleeding from her vagina. Though the victim girl was not examined the accused was convicted. Same are the facts in the present case. On going through the record, we are of the opinion, that there is sufficient evidence to show that the appellant committed rape on the victim girl and also caused several injuries to her.

15. It is noticed that the appellant has been convicted u/s. 376(2)(f) as well as Section 354 IPC, though no separate sentence has been imposed on the appellant u/s. 354 of the IPC. We are of the opinion that the appellant could not have been convicted u/s. 376(2)(f) as well as 354 of IPC. "An accused person in a single incident of sexual assault on one person cannot be convicted u/s. 376 as well as 354 IPC. In such case an accused can be convicted u/s. 354 of IPC, if the assault is of such a nature that he intended to outrage or knowing it to be likely that it will thereby outrage the modesty of the girl. However, if there is concrete evidence to show that a person has committed rape on the victim then in such case a person can only be convicted u/s. 376. A person cannot be convicted under both sections for a single incident of sexual assault. Section 354 falls short of Section 376 that is 354 is a lesser offence compared to Section 376 IPC and an accused cannot be convicted in a single incident for the bigger offence as well as the lesser offence. For example, if in one single incident of assault an accused causes grievous hurt as well as simple hurt to one person, the accused cannot be convicted u/s 326 as well as Section 323 IPC. Hence, we are inclined to set aside the conviction of the appellant u/s. 354 of IPC. It is seen that the appellant is also convicted u/s. 324 of IPC and sentenced to RI for three years and fine of Rs. 1000/-. The injuries which were simple injuries were caused to the victim girl were part of incident of rape. Hence, we are inclined to reduce the sentence of imprisonment and fine u/s. 324 of IPC to six months RI and fine of Rs. 500/-. In default further SI for one month.

16. In the result, the following order is passed:

The conviction and sentence of the appellant u/s. 376(2)(f) is maintained. The conviction u/s. 324 of the IPC is also maintained. However, the sentence is reduced to six months RI and fine of Rs. 500/-, in default further SI for one month. The conviction and sentence u/s 354 is set aside.

The appeal is partly allowed, in the above terms.

17. Office to communicate this order to the appellant and the Jail Superintendent in which Jail, the appellant is lodged. At this stage, we must record our appreciation for Mr. Najmi, the advocate appointed by this Court to represent the appellant. We found that he had meticulously prepared the matter and he has very ably argued the matter. We quantify legal fees to be paid to him by the High Court Legal Services Committee at Rs. 2,500/-.