

(1998) 11 BOM CK 0041

In the Bombay High Court

Case No : Criminal Appeal No. 258 of 1995 and 372 of 1996

Rahul Pundalik Birahade and another

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 24-11-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 161, 165

Evidence Act, 1872 — Section 3, 45, 49

Penal Code, 1860 (IPC) — Section 34, 375, 376(2), 511

Citation : (2000) 5 BomCR 148 : (2000) 2 RCR(Criminal) 344

Hon'ble Judges : R. G. Deshpande, J; A. D. Mane, J

Bench : Division Bench

Advocate : R. G. Karmarkar and M. B. Sabnis, for the Appellant; K. M. Babhulgaonkar, A.P.P., for the Respondent

Judgement

A. D. Mane, J.—These two appeals arise out of an order of conviction and sentence passed by the III Additional Sessions Judge, Jalgaon on 9th August, 1995, in Sessions Case No. 71/1992, against the appellants for offence punishable u/s 376(2)(f) & (g) of the Indian Penal Code. The appellants were convicted and sentenced to rigorous imprisonment for seven years and to pay a fine of Rs. One thousand on cash count in default to suffer simple imprisonment for one year with a direction that both the sentences to run concurrently.

2. It may be stated that both these appellants are represented through two different advocates and, therefore, these appeals are disposed of by this common judgment.

3. The appellants were tried for the aforesaid offence on an allegation that on April 11, 1991 at about 11.00 p.m., they lifted one Shobha, aged below 12 years and took her in open space surrounded by Besarami shrubs away from the main road and committed sexual intercourse one after the another forcibly.

4. It is alleged that Shobha was asked by her mother to bring a packet of salt. So she alone was proceeding to a shop near the bus stop square. There is a mori

i.e. the drainage in between quarters 79 and 80 in Ordinance Factory Area. When Shobha was passing through the mori, these appellants who were sitting there called her, inasmuch as appellant No. 1 Rahul was known to her.

5. It was prosecution case that the appellants No. 1 first asked Shobha to come with him near Besarami shrubs on back side of mori, but when Shobha refused and proceeded ahead, his companion the appellant No. 2 Sopan caught her hand and both of them lifted Shobha towards Besarami shrubs. It was alleged that they made Shobha to lie, they raised her frock and removed her nicker and then committed sexual intercourse with her one after the another.

6. On return from that place to home, Shobha narrated the incident to her family members and her father then took her to the police station where Shobha's statement was recorded as First Information Report, on the basis of which Crime No. 41/91 was registered, without loss of time, Shobha was referred to the Primary Health Centre for medical examination. The police also recorded statements of her father Raghunath and brother Tulshiram. Clothes on her person, namely frock and nicker were attached under panchanama and immediately spot panchanama was also made. It appears that both the appellants were not present till 13th April, 1991. On 13th April, 1991 they were arrested. Their clothes were also seized. They were also sent to medical examination. After recording certain statements of witnesses and obtaining school Certificates about the age of the prosecutrix, police filed chargesheet. To the charge that was framed at Exh. 10, the appellants denied the same and pleaded not guilty. Their defence was one of total denial. It was stated by the appellants that 3-4 days of the alleged incident, a quarrel between Shobha's brother Tulshiram and the appellants took place on account of demand of money and in which Tulshiram was injured and to wreck the vengeance a false case was lodged.

7. The learned trial judge, on going through the prosecution evidence, particularly the evidence of prosecutrix Shobha and medical evidence, convicted the appellants for the aforesaid offence punishable u/s 376(2)(f) and (g) of the Indian Penal Code.

8. The question, therefore, arose, whether there was a rape or an attempt to rape, in the light of the evidence adduced by the prosecution.

9. Shri Karmarkar as well as Shri Sabnis, learned Counsel appearing for the appellants took us through the relevant record of the case. Indeed both of them argued that the evidence adduced by the prosecution falls short to bring home the guilt to the accused for the offence of rape. It has been urged that the testimony of prosecutrix Shobha is that of a child witness and is not free from suspicion. In this context, it has been submitted that the prosecution has not examined the mother or the father of the prosecutrix. It has also been submitted that the story, as narrated by Shobha and which has been disclosed in the first information report is not from the prosecutrix herself but on the dictation of her

father. It is, therefore urged that the evidence of the prosecutrix was risky to be believed and acted upon. The learned Counsel further urged that though the clothes on the person of the prosecutrix were seized and they were sent for examination to the Chemical Analyser besides the samples of semen from the appellants, that the prosecution for no reasons, best known to them, adduced the evidence in regard to the certificate of the Chemical Analyser to show that any circumstantial corroborating testimony of prosecutrix could be obtained from thereby. It is, therefore submitted that uncorroborated testimony of prosecutrix ought not to have been believed by the trial Court. It is also submitted that the medical evidence, as spoken to by Dr. Udaysingh Patil (P.W.3) shows that no marks of violence could be noticed except abrasion of about 2" in length horizontal on left breast on the other body of the prosecutrix. It has also been submitted that hymen was intact though elastic and internal examination was not possible as small white spots over hymen and part of vulva were present. It is further submitted that the medical evidence shows that there were laceration on posterior commensure of vulva about 1/2 cm. x 1/2 cm. present and bleeding through laceration was also present. But, according to the learned Counsel, this is not the conclusive evidence to come to the conclusion that there has been penetration as required under the ingredients of offence punishable u/s 376 of the Indian Penal Code.

10. On the other hand, Babhulgaonkar, learned APP submits that there was hardly any reason for the prosecutrix to come with the accusation of having sexual intercourse by the appellants forcibly on that day in the night. It is submitted that defence, as suggested, was palpably unbelievable in a given circumstances of the case.

11. The learned Additional Public Prosecutor also urged that the testimony of the prosecutrix, though minor, is a sworn testimony and nothing can be elucidated from her version in the cross-examination as to whether her narration is the outcome of any tutoring either from her mother or father. The conduct of the prosecutrix was natural. There was no loss of time to file the police complaint as soon as matter was disclosed by her to elderly members in the family. It is submitted that even the medical evidence lends assurance to her testimony. It is true that the police have collected circumstantial evidence in the nature of presence of semen and blood stains both on the legs of the prosecutrix or the clothes of the prosecutrix, but as is evident from the report from the Chemical Analyser, the result was inconclusive and, therefore, perhaps the prosecution has not relied upon that piece of evidence, but nevertheless no adverse inference can be drawn about the truthfulness of the prosecution version.

12. We have given our anxious consideration to the rival submissions urged by the learned Counsel for the appellants as well as on behalf of the prosecution. It is clear that the testimony of the prosecutrix is worthy of credence and does not suffer from any legal infirmity so as to discredit it entirely. The evidence of the prosecutrix is fully corroborated by the circumstantial evidence and her conduct

appears to be natural. The medical evidence shows that though the age of the prosecutrix could be ascertained between 10 to 15 years, she had developed secondary sexual characteristic. Except abrasion of two inches on left breast, no other marks of violence could be noticed by the doctor while she was examined. It is, however, to be noted that doctor noticed blood streaks from thigh to legs extending over through on both sides present. Not only that, there was blood trickling through vaginal slit. It is true that, according to the doctor, the hymen was intact, but there were laceration of posterior commisure of vulva about 1/2 cm. x 1/2 cm. showing bleeding through laceration. The medical evidence, therefore, fully corroborates with the fact of sexual assault by the appellants on that day in the night.

13. It is, however, to be considered whether the aforesaid evidence proves the necessary ingredients of the offence of rape. Section 375 of the Indian Penal Code defines the rape. It reads as follows:

"375. A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following description:

First --Against her will.

Secondly--Without her consent.

Thirdly--With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly--With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly--With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly--With or without her consent, when she is under sixteen years of age.

Explanation-- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Explanation--Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."

Therefore, there are two important ingredients of rape, firstly that sexual intercourse by man with woman and secondly sexual intercourse falling under any of the six clauses of the above section. It is to be mentioned that offence u/s 376(2) of the Indian Penal Code is a graver offence as a result of amendment of 1988. Therefore, it is necessary that charge of rape must be clearly proved. We are conscious that where the testimony of prosecutrix was found to be

trustworthy and also corroborated, it was immaterial that there was no injury on the body of the victim or that there was absence of smegma and that it was also immaterial that a completed act of rape on the part of each of the gang members was not provable. Nevertheless, by virtue of explanation to section 375 of the Indian Penal Code, the only thing to be ascertained is whether the private parts of the accused did enter into the person of the woman. It is true that a slight penetration in the vulva is sufficient to complete the offence, and rupture of the hymen is not necessary. In other words, in order to constitute the offence of rape, it is not necessary that there should be complete penetration of the penis, emission of semen and rupture of hymen. Partial penetration into the labia majora of the vulva or pudendum or even an attempt at penetration is sufficient.

14. We are, however, of the opinion that if regard be had to the medical evidence coupled with the evidence of the prosecutrix where she is unable to give sufficient indication of penetration of private parts having been entered into her person, we think, that the prosecution evidence is capable of proving, though no offence of rape but attempt to rape. This is so because if regard be had to the ages of the appellants, who are of 18 years of age, at the time of alleged incident, we are of the opinion that the prosecution evidence does not establish more than what the attempt was to commit the rape.

15. In the circumstances, we find that the nature of evidence, as proved against the appellants, is not the rape as such, but an attempt to rape. The learned trial Judge seems to have not diverted his attention to this aspect of the case while considering the testimony of the prosecutrix in the light of medical evidence besides the ages of the appellants.

16. Accordingly, appeals are partly allowed. The conviction and sentence of the appellant for the offence punishable u/s 376(2)(f) and (g) of the Indian Penal Code is hereby quashed and set aside, and instead the appellants are convicted under sections 375 r/w 511 and 34 of the Indian Penal Code and each of the accused is sentenced to suffer rigorous imprisonment for three years and six months.

Order accordingly.