
(2016) 11 BOM CK 0012
In the Bombay High Court
Case No : Criminal Appeal No. 913 of 2005

Ravi Shankar Bhakre

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 18-11-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 363, Section 376

Citation : (2017) 2 AIRBomRCri 696 : (2016) ALLMRCri 5088 : (2017) 2 MhLJCri 619

Hon'ble Judges : A.M. Badar, J.

Bench : Single Bench

Advocate : Ms. Yogita Deshmukh, Advocate, for the Appellant; Mr. A.R. Kapadnis, APP, for the Respondent/State

Final Decision : Partly Allowed

Judgement

A.M. Badar, J.(Oral) - The appellant/accused by this appeal is taking exception to the judgment and order of his conviction and the sentence recorded by the learned 3rd Ad-Hoc Additional Sessions Judge, Kalyan, recorded on 4th November 2004, in Sessions Case No.164 of 2002, whereby, he was convicted of the offences punishable under Sections 363 and 376 of the IPC. The appellant/accused was sentenced to suffer rigorous imprisonment for a period of 2 years and to pay fine of Rs. 500/-, in default, to suffer rigorous imprisonment for 1 month, and for the offence punishable under Section 376 of the IPC, the appellant/accused was sentenced to suffer rigorous imprisonment for 10 years and to pay fine of Rs. 3,000/-, in default, to suffer rigorous imprisonment for 3 months.

2. According to the prosecution case, PW1 Yeshwant Bhima Sonawane was having two wives. His second wife PW2 Nirmala was residing at Village Soniwali with her two daughters namely, Kumudini, aged about 11 years and the victim girl, aged about 4? years. Her minor son, Siddharth Sonawane, aged about 1 year, was also staying with PW2 Nirmala. Kumudini and minor victim girl are step

daughters of PW1 Yeshwant Sonawane. It is averred by the prosecution that on 27th February 2002, at about 9.15 p.m., the accused came to the house of Nirmala at village Soniwali and slept there on the cot. Angry with this conduct of the accused, PW2 Nirmala then went to the house of her husband PW1 Yeshwant at village Eranjad, Mohpada, which is just adjacent to Village Soniwali. When the duo returned to the house of PW2 Nirmala at Village Soniwali, they found minor daughter of PW2 Nirmala missing. Pointing the finger of accusation against the accused, PW1 Yeshwant lodged report against him, which has resulted in registration of Crime No. I-30/2002 for the offence punishable under Section 363 of the IPC against the accused. Within short time thereafter, missing minor daughter of Nirmala was found nearby her house by PW2 Nirmala. The minor female daughter was bleeding from her private part. She was then taken to the hospital. Section 376 of the IPC was then added to the case diary of crime in question, upon finding that the accused had committed rape on the minor female daughter of Nirmala. The investigation resulted in filing of the charge-sheet against the accused and after due trial, the appellant/accused was convicted and sentenced as indicated in opening paragraph of this judgment.

3. Heard learned counsel Ms. Yogita Deshmukh appearing for the appellant/accused. She vehemently argued that evidence of PW2 Nirmala is coming on record by way of omission. This witness has not stated any material facts to police at the first instance, and therefore, her testimony needs to be ignored, as the same is result of improvement over her previous statement. The learned counsel further argued that PW3, who is alleged minor victim of crime in question has not identified the accused while in dock and she being a child witness, her evidence cannot be accepted to confirm the finding of guilt of the accused. Therefore, according to Ms. Yogita Deshmukh, the learned counsel for the appellant/accused, the appellant/accused cannot be convicted for the offence alleged against him, particularly when the alleged eye witness PW4 Ranjana Hatgade has not supported the prosecution case.

4. The learned APP argued that in cases in respect of sexual offences against woman, and particularly against minor female child, broader probabilities of the prosecution case are required to be kept in mind and the court is not expected to be swayed by minor inconsistencies and contradictions. The learned APP argued that broader probabilities of the prosecution case goes to show that PW3 minor female victim of the crime in question was very much in the house of her mother PW2 Nirmala when the accused came there and within few minutes, the minor female victim went missing from the spot. The medical evidence, according to the prosecution, supports the prosecution case. As per the version of the minor female victim, it was the accused who had committed rape on her.

5. I have carefully considered the rival submissions and I have also gone through the record and proceedings. The case of the prosecution mainly rests on version of PW2 Nirmala and that of PW3 minor female victim of the crime in question. It is seen from the evidence of PW2 Nirmala, that PW3 - minor female victim of the

crime in question was aged about 4? years at the time of the incident in question. Even in Medico-legal Certificate (Exhibit 21) proved by PW5 Dr. Sushruta Sakharkar, age of PW3 is stated as 4? years. Nothing has come in cross-examination of either PW2 Nirmala or PW3 victim minor female child to come to the conclusion that victim of the crime in question was not minor at the time of the incident.

6. Evidence of PW1 Yeshwant and PW2 Nirmala goes to show that PW2 Nirmala is second wife of Yeshwant. PW1 Yeshwant was resident of village Eranjad, whereas, PW2 was resident of village Soniwali. Both these villages, as seem from testimonies of these witnesses, are adjacent to each other. Evidence of PW2 Nirmala goes to show that she was residing in her house at village Soniwali along with her three minor daughters, namely, Kumudini, Rupali and the minor female victim of the crime in question. Version of PW2 Nirmala shows that on 27th February 2002, when she was present at her house, at about 9.15 p.m., the accused came insider her house and slept on the cot. She, therefore, went to report this conduct of the accused to her husband and when she returned to her house along with her husband PW1 Yeshwant, she saw her daughter, aged about 4? years, missing from the house. Therefore, as per version of PW2 Nirmala, her husband PW1 Yeshwant went to the police station to lodge report. Congruous to the version of PW2 Nirmala, PW1 Yeshwant has stated that on 27th February 2002, at about 9.15 p.m., PW2 Nirmala came to his house at village Eranjad and reported him that appellant/accused Ravi Bhakre came to her house. PW1 Yeshwant has also stated in his evidence that when he along with PW2 Nirmala went to the house of Nirmala, they found that minor daughter of PW2 Nirmala was missing from the house. PW1 Yeshwant has duly proved the FIR lodged by him at Exhibit 15.

7. Though PW2 Nirmala has not categorically mentioned that when the accused came to her house at about 9.15 p.m. on 27th February 2002, her minor daughter aged about 4? years, who is victim of the crime in question, was present in her house, going by broader probabilities of the prosecution case, one will have to hold that at that time, the minor female victim of the crime in question must have been at the house of PW2 Nirmala. Evidence of PW2 Nirmala does not show that she carried her minor daughter with her to the house of PW1 Yeshwant. Her evidence shows that she is occupant of the house at village Soniwali, which used to be shared by her daughters, included the victim of the crime in question, and therefore, it cannot be said that the victim of the crime in question was not present in the house of PW2 Nirmala, at the time of the alleged incident.

8. Version of PW1 Yeshwant and PW2 Nirmala is consistent to the extent that when they returned to the house of PW2 Nirmala, victim of crime in question i.e. PW3 - daughter of PW2 Nirmala, aged about 4? years, was found missing, so also the accused was not present at the spot.

9. It is seen from the evidence of PW2 Nirmala that after sometime, she found

her daughter. As evidence of PW2 Nirmala, that she saw the accused leaving her minor daughter near her house, has come by way of omission, this part of her evidence needs to be ignored. However, the fact remains that, the missing minor victim of the crime in question was found soon after lodging of the FIR.

10. Evidence of PW1 Yeshwant and PW2 Nirmala is consistent to the effect that after finding PW3 - minor female victim of the crime in question, she was taken to Dhanwantri Hospital, and thereafter, she was shifted to Central Hospital at Ulhasnagar.

11. Prior to adverting to the evidence of PW3 - minor female victim of the crime in question, one will have to put on record what PW5 Dr. Sushruta Sakharkar, who had immediately attended the minor female victim, says about the condition of the minor female victim. This is necessary because, it is well settled that while examining the evidence of prosecution in cases relating to sexual offences, the court is not expected to sway by minor inconsistencies or contradictions in version of the prosecution. Minor discrepancies and contradictions in such matters are required to be ignored. Evidence of PW5 Dr. Sushruta shows that she attended PW3 - minor female victim of the crime in question, on 28th February 2002 itself. As per version of PW5 Dr. Sushruta, following injuries were found on the person of PW3 - minor female victim of the crime in question :

- i) 2 cm x 2 cm contusion on tip of nose circular by human teeth
- ii) human bite with ecchymosis on left maxillary region in oblique direction with 4 teeth marks on both aspect
- iii) human bite with ecchymosis on chin circular
- iv) 2 cm x ? cm abrasion on left medial side of the back
- v) 2 cm x 1 cm contusion below left shoulder
- vi) ? cm x ? cm abrasion on left lateral side of thigh

It is seen from evidence of PW5 Dr. Sushruta, per vagina examination of the PW3 revealed that there was laceration of size of 1? cm x 1? cm on right side of libia minora. Evidence of PW5 Dr. Sushruta further shows that there was rupture of hymen of the PW3. There is nothing in cross-examination of PW5 Dr. Sushruta to disbelieve her version about finding of these injuries on the person of PW3 soon after the alleged incident. Evidence of PW5 Dr. Sushruta is further corroborated by contemporaneous medical certificate at Exhibit 21. This evidence, establishes that the minor female victim of the crime in question was subjected to sexual violence.

12. Now, let us examine what is stated by the minor female victim. She is examined as PW3. Her statement shows that at the time of recording of her evidence, she was aged about 6 years. In order to test her capacity to testify, it is seen that the learned Additional Sessions Judge has put some preliminary questions to her and as it was found by the learned trial court that the minor

female victim of the crime in question was giving rational answers to the questions so put up to her, oath was then administered to her, and then evidence of this minor female victim of the crime in question was recorded. Section 118 of the Evidence Act envisage that all persons shall be competent to testify unless the court considers that they are prevented from understanding the question put up to them or from giving rational answers to those questions by tender years, extreme old age, etc. Perusal of answers given by the PW3 to preliminary questions put up to her by the learned Additional Sessions Judge, goes to show that PW3 was understanding the questions put to her and was giving rational answers thereto. The PW3, who is minor victim of the crime in question, was a teen aged female at the time of the evidence. The question which falls for consideration is as to whether her testimony can be accepted, she being a child witness. By now, it is well settled that the testimony of child witness needs to be accepted after careful scrutiny thereof. The rational behind this is that a child is susceptible to tutoring. A child can be made to depose anything by tutoring, by offering some inducement or by subjecting him to fear. Moreover, a child lives in the world of make beliefs. In the matter of Panchhi and Others v. State of Uttar Pradesh, reported in (1998) 7 SCC 177 it is held by Supreme Court that evidence of child witness cannot be rejected outright, but such evidence must be evaluated more carefully and with greater circumspection. Applying this test, let us examine what PW3 minor female victim of the crime in question states about this in the evidence. As per her version, on the day of the incident, she was playing in her house and the accused came and took her in the field. PW3, further deposed that the accused then took out her frock, removed her underpant, slept on her chest and then she felt pain in her private part. She started weeping and then the accused left her in the field and went away. PW3 further testified that she was in the hospital for three days. In her cross-examination, she has stated that she is taking name of the accused as Ravi because her mother told her that name of the accused is Ravi. It is also brought on record from her cross-examination that at the time of incident there was darkness and therefore she was frightened. PW3 has further stated in her cross-examination that at the time of the incident, she was sleeping and then she realised that she was having pain in the back. It is apposite to mention that no questions were put to PW3 suggesting her that the alleged act was not done by the accused sitting in the dock or that the said act was done by somebody else. The minor female victim has stated about the incident by referring to the accused and in cross-examination when it was suggested that she was not knowing the accused and that she is deposing a lie against the accused, she flatly denied these suggestions. When the minor female victim has categorically denied the suggestion that she does not know the accused and that she is falsely deposing against the accused, it cannot be said that PW3 minor female victim of the crime in question has not referred to or identified the accused as the perpetrator of the crime in question. Ultimately, standard set out for proving the offence is the standard applicable to a prudent person and in this context, definition of the term "proved" found in Section 3 of the Evidence Act becomes

relevant. Critical analysis of evidence of PW3 - minor female victim of the crime in question, as such, does not allow me to hold that she is not a witness of truth or that her version does not pass the test of credibility and reliance. Therefore, evidence of PW3 - minor female victim of the crime in question needs to be accepted with approval to hold that it was the accused who committed rape on her.

13. The case of the prosecution also gains corroboration from the forensic evidence brought on record. It is seen that shirt of the appellant/accused was stained with blood of "B" group, which is the blood group of the minor female victim of the crime in question. Her seized frock was found to be stained with blood of "B" group. This indicates that the minor female victim of the crime in question was bleeding after the incident in question. The stain of blood of the minor female victim on the shirt of the accused corroborates the version of the PW3 minor female victim about rape on her by the appellant/accused.

14. In the result, by adducing clear and cogent evidence, particularly that of PW3 - minor female victim of the crime in question and PW2 Nirmala - her mother, the prosecution has bring home the guilt for the offence punishable under Section 363 and Section 376 of the IPC to the accused. Similarly, considering the fact that the crime in question was against a teen aged female, imposition of sentence of 10 years for the offence punishable under Section 376 of the IPC is perfectly correct.

15. The appeal is, therefore, devoid of merits, and the same is therefore dismissed.

16. Fees of Ms. Yogita Deshmukh, the learned counsel appointed by this court to espouse the cause of the appellant is quantified at Rs. 10,000/- and the same be paid to her.