

(2012) 09 BOM CK 0081
In the Bombay High Court
Case No : Criminal Appeal No. 208 of 2012

Ravindra Yogiraj Paul

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 25-09-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311, 326(1)
Evidence Act, 1872 — Section 165, 35
Penal Code, 1860 (IPC) — Section 341, 342, 363, 375, 376
Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 —
Section 3(2)(v), 3(i)(xii), 3(i)(xii)

Citation : (2013) 3 ABR 1049

Hon'ble Judges : T.V. Nalawade, J

Bench : Single Bench

Advocate : R.G. Hange, for the Appellant; N.R. Shaikh, APP for State, for the Respondent

Judgement

T.V. Nalawade, J.—The appeal is filed against the judgment and order of Special [Atrocity Case] No. 10/11 which was pending in the Court of Additional Sessions Judge, who was also working as Special Judge in respect of the case filed under Scheduled Castes and Scheduled Tribes [Prevention of Atrocities] Act, 1989. The appellant is convicted and sentenced by the trial Court for offences u/s 376, 363 and 506 of I.P.C. and he is also convicted and sentenced for offence u/s. 3(i) (xii) of Scheduled Castes and Scheduled Tribes [Prevention of Atrocities] Act, 1989. The maximum substantive sentence of 10 years R.I. is given to the appellant. Both sides are heard. Perused the record.

In short, the facts leading to institution of this proceeding can be stated as follows :

The prosecutrix is a resident of Beed. At the relevant time, she was aged about 14 years and she was studying in 9th standard. She was living with her parents and a brother. The accused is a married man and he was living in the vicinity of the house of prosecutrix. The accused used to park tractor on which he was

working as a driver near the house of the prosecutrix. The prosecutrix belongs to "Mahar" caste which is a Scheduled Caste and the accused belongs to "Maratha" Caste, which is not a Scheduled Caste.

2. The accused was acquainted with the prosecutrix as he was parking the vehicle near her house and as he was visiting the house of uncle of the prosecutrix in connection with the work which the accused was doing by using tractor. The accused used to talk with the prosecutrix.

3. On 4/3/11, at about 7 a.m. when the prosecutrix was proceeding to her school by a bicycle, the accused intercepted the bicycle at a square where there is one auditorium. The accused was on motor cycle. The accused said to prosecutrix that prosecutrix should come with him otherwise, he would commit suicide and he would involve the parents of the prosecutrix in a false case. The accused was aged about 23 years at the relevant time. Due to threats given by the accused, the prosecutrix went with the accused on the motor cycle. From Beed, the accused took the prosecutrix to Yermala and from there, he took her to Osmanabad. At Osmanabad, the accused took a room on rent basis and he kept prosecutrix there for 10-12 days. In this room, the accused committed rape on prosecutrix on 2 occasions. On 16/3/11, the accused took the prosecutrix back to Beed. The accused allowed prosecutrix to contact her mother on mobile. Then, the mother of prosecutrix went to the house of accused and from there, she took the prosecutrix to her house. Prosecutrix narrated the incident to her parents and other relatives immediately after returning to home and then, prosecutrix was taken to police station. The report of the prosecutrix came to be recorded by police and the crime came to be registered for aforesaid offence on 17/3/12. Police referred the prosecutrix for medical examination. Doctor found that there was evidence of sexual intercourse.

4. As prosecutrix belongs to Scheduled Caste, her caste certificate was collected and the investigation was taken over by one Dy. S.P. The Dy. S.P. visited various spots including the room where prosecutrix was kept by the accused. From this room, the articles of prosecutrix like her inner wears, school bag etc. were taken over under panchanama in the presence of panch witnesses. Statements of relatives of the prosecutrix and others including the landlord of the aforesaid room came to be recorded. The clothes of the prosecutrix and the clothes of the accused were sent to C.A. office alongwith their blood samples. The Dy. S.P. filed charge sheet for aforesaid offences.

5. In the trial Court, after framing the charge for aforesaid offences, prosecution examined in all 13 witnesses. The trial Court called one Chief Officer of Municipal Council, for proving the birth certificate in respect of prosecutrix by using provision of Section 311 of Cr. P.C. The accused took the defense of total denial. The trial Court has believed the prosecutrix and the aforesaid record. The trial Court has held that the prosecutrix had not crossed 14 years of age.

6. In the appeal, advocate of the appellant submitted alternatively that there is

possibility that the prosecutrix was consenting party. He argued about the delay caused in lodging F.I.R. about the conduct of prosecutrix of not shouting and not offering resistance and some other circumstances. He alternatively argued for taking lenient view on the ground that the accused is a married man and he was also aged about only 23 years at the relevant time. Learned A.P.P. supported decision of the trial Court

7. The definition of Rape given in Section 375 of I.P.C. shows that when a man commits sexual intercourse with a woman with or without her consent, when she is under 16 years of age, then he is said to commit offence of Rape. In view of this definition, the evidence given on the age of the prosecutrix can be considered first. If the evidence is sufficient to prove that the prosecutrix had not crossed the age of 16 years, then most of the evidence in respect of the conduct of the prosecutrix which was pointed out to show that the probability of consent need not be considered.

8. The prosecutrix [P.W. 2] has given her age as 14 years. The mother of prosecutrix [P.W. 4] has given the date of birth of the prosecutrix as 1/4/1997 during her cross examination. [P.W. 10] Pawar the Head Master of the school where prosecutrix was studying at the relevant time has given evidence to prove the entry made in the school registered regarding the date of birth. He has given evidence that the date 1/4/97 is mentioned in the school register as the date of birth. This entry was taken by previous Head Master. Further, the prosecutrix was admitted in the school in 5th standard and so this entry was made on the basis of school leaving certificate issued by previous school. One more document at Exh. 58 shows that it is in respect of entry made by previous school where the prosecutrix was studying in third standard. It appears that as birth certificate was produced during trial, the trial Court took steps to call the Chief Officer of municipal council where entry in respect of date of birth of the prosecutrix was made. The provision of Section 311 of Cr. P.C. was rightly considered by the trial Court as in view of the case of the prosecution that the prosecutrix had not completed 16 years of age, it had become necessary to ascertain the real age of the prosecutrix.

9. The evidence is given by Dr. Yenade [P.W. 9] that clinical examination of the prosecutrix was done and she was examined through Radiologist also. On the basis of clinical examination, he had given opinion that the age of the prosecutrix was 14 to 16 years. The Radiologist is not examined but the opinion of the Radiologist is mentioned by the same witness and he has said that as per Radiological examination, age of the prosecutrix was 14 to 16? years. In view of these circumstances, this Court holds that for just decision of the case, it was necessary for the trial Court to call [P.W. 14] Chief Officer to ascertain date of birth of prosecutrix. Much was argued in respect of this step taken by the trial Court at the flag end of the trial. The second part of Section 311 of Cr. P.C. shows that it is mandatory on the Court to see that such evidence is brought on record. When copy of birth certificate was produced on the record, it became

necessary for the trial Court to take such steps. So this Court holds that the trial Court has not committed any error in calling P.W. 14. Such step cannot be called as a step taken to fill the lacuna in the case of prosecution. It can be said that such evidence would have helped defense also if there was record to show that the prosecutrix had crossed 16 years of age at the relevant time.

10. The evidence of Sham [P.W. 14] and the birth certificate which is proved as Exh. 103 shows that the prosecutrix was born on 1/4/97. The entry in respect of birth date was made in the register of this local body on 13/9/97. It appears that the surname of the parents of prosecutrix was not correctly recorded in the register and so, steps were taken by the parents to correct the entry. In the year 2002, Government medical hospital had sent a letter to the Chief officer for making correction as the surname was wrongly recorded as "Dhokle" instead of "Dhokne". After that, the correction was made in the year 2002 itself. As the Chief Officer has such power, not much can be made out from the circumstance that initially some mistake was committed in recording the surname of the father of the prosecutrix.

11. For the State, reliance was placed on the case reported as 1958 Cri. L.J. 273 Supreme Court in the case of Siddheshwar Ganguly V/s State of West Bengal. In this case, the Apex Court has held that the only conclusive piece of evidence of girl's age may be the birth certificate. In this regard, the provisions of Births and Deaths Act, 1969 are relevant. To such certificate, there is presumptive value u/s 17(2) of this Act. Thus, in the present case, there is evidence of the mother of the prosecutrix on date of birth, the same date was entered in school register and there is also the birth certificate available to prove the date of birth. In view of these circumstances, it can safely be held that the date of birth of prosecutrix is 1/4/1997 and so, at the relevant time, she had not crossed even 14 years of age.

12. The prosecutrix [P.W. 2] has given evidence that at the relevant time, she knew the accused as the accused used to park his tractor near her house. She has given evidence that accused belongs to Maratha caste which is not a Scheduled Caste. She has given evidence that she belongs to Mahar Caste which is a Scheduled Caste. She has given her age as 14 years. She has given evidence that on 4/3/11, at about 7 a.m., when she was proceeding towards her school on a bicycle, the accused who was on his motor cycle, intercepted her bicycle. She has given evidence that the accused gave threat that he would commit suicide and he would falsely implicate her parents in criminal case if she was not ready to come with him. She has given evidence that she was frightened and so on the motor cycle of the accused, she went with him. She has given evidence that the accused took her first to Yermala and then to Osmanabad. She has given evidence that at Osmanabad, the accused took a room on rent basis and there, the accused kept her for 10-12 days. In her evidence, she has given particulars of the places where the accused had taken her which include various hotels and even temple of Tuljabhavani. She has given evidence that in the aforesaid room,

the accused committed rape on her on two occasions in the night time. She has deposed that on 16th of that month, the accused asked her to contact the mother and to inform her that she was returning to Beed. She has given evidence that accused took her to Beed, to his house and from there, she was picked up by her mother. She has given evidence that she narrated the incident to her parents and other relatives and then report dated 17/3/11 came to be given.

13. In the evidence, prosecutrix has identified the articles like her school bag, her inner garments etc. which were recovered by police from the aforesaid room from Osmanabad. She has given evidence that she was referred to Government hospital by police for medical examination.

14. The cross examination of the prosecutrix is made with the object to show that the spot from where she was taken is situated in thickly populated area of Beed. The cross examination is made to show that on many occasions, she had opportunity to resist and she had opportunity to shout for help or to inform to the persons in the vicinity that she was kidnapped. The prosecutrix has given evidence that she was under threats and in Osmanabad also she was locked in the room by the accused. In any case, this cross examination is of no use to the defense. Even if an inference is drawn in this case that the prosecutrix did not offer resistance to the accused, and she went with him, when there was no force used against her, due to the age of the prosecutrix, which was below 14 years, at the relevant time, these circumstances cannot be used in favour of defense. In view of the age of the prosecutrix, it is not open to the accused to say that the prosecutrix was a consenting party.

15. Some suggestions are given to the prosecutrix to the effect that there used to be quarrels between father of the prosecutrix and accused as the accused was parking vehicle near her residential place. Some suggestions are given that family of prosecutrix has relative by name Bhise in police department and at his instance, police concocted false case against the accused. These suggestions are denied by prosecutrix. Suggestion is given by defense that accused was in love with prosecutrix and due to that there used to be quarrels between family of accused and family of prosecutrix. This suggestion can go long way against the accused. This suggestion is however denied. Some cross is made to show that the parents could have given missing report when the prosecutrix was not available from 4/3/11 to 16/3/11. No such report was given. The evidence on the record shows that father of prosecutrix is employed and her mother is also educated person. Considering the age of the prosecutrix and the thinking in our society, it cannot be said that the parents committed wrong in not approaching police immediately on 4/3/11. If report is given, the future of the prosecutrix is ruined and the other members of the family also suffer due to such incident. The evidence on record shows that the prosecutrix was brought back to Osmanabad by accused on 16/3/11 and when the prosecutrix disclosed the incident, her parents decided to give report.

16. Some cross is made to show that the father of the prosecutrix was attending duty between 4/3/11 and 16/3/11 even when the prosecutrix was missing. Certificate of his department is produced by defense. Mother of prosecutrix has tried to say that he was on leave. This suggestion also cannot be of much use to the defense for the reason already given. There was virtually no reason for the family of P.W. 4 to falsely implicate the accused in such a case.

17. Dr. Yende [P.W. 9] has given evidence that he examined the prosecutrix on 17/3/11. The evidence of the doctor shows that he found that the hymen was ruptured at 6 O'clock though it was old rupture. Though medical evidence shows that no marks of violence were found on the person of prosecutrix, in view of the reasons given already, this circumstance cannot help the defense much. Prosecutrix was of tender age and if a married man like accused had induced the prosecutrix to go with him, and if she was attracted towards the accused, the conduct of the prosecutrix of not offering resistance to the accused cannot be of any use to the accused in view of the definition of rape which is already quoted. Doctor has given evidence that in view of the rupture of hymen, it can be said that the prosecutrix had taken sexual intercourse. Though in the cross examination, he has admitted that such rupture can occur due to other things like cycling etc. there is no reason to disbelieve the prosecutrix in respect of the incident. She has given all the minute details of the incident of sexual intercourse and also the incident of kidnapping and her stay for about 10-12 days in a room at Osmanabad. Further, there is circumstantial check like recovery of school bag, her inner wears from the said room and so this Court holds that the medical evidence has given corroboration to the version of prosecutrix.

18. P.W. 11, landlord of the accused from Osmanabad has turned hostile. However, there is evidence of P.W. 1 panch witness in whose presence the articles of prosecutrix like school bag, inner wears were recovered and he has supported the case of prosecution. There is also evidence of Dy. S.P. [P.W. 13] the investigating officer who made the seizure of these articles from the room. There is no reason to disbelieve this evidence also. This evidence is consistent with the version of prosecutrix and it gives necessary corroboration to the case of prosecution. FIR was given on 17/3/11, after return of the prosecutrix to Beed and it is also consistent on material points with the version of prosecutrix.

19. There is evidence of seizure of other clothes of the prosecutrix, seizure of clothes of the accused and sending of these articles to C.A. office. There is also evidence with regard to finding of blood stains on the clothes of the prosecutrix. However, this evidence cannot be considered for corroboration purpose as evidence of the mother shows that prosecutrix had started following menstrual cycle. No semen was detected on the clothes. In view of these circumstances, and the reasons already given, there is no need to discuss the other evidence given by prosecution.

20. The aforesaid evidence is sufficient to prove that the accused had kidnapped the prosecutrix from lawful guardianship of her parents. She was living with her

parents and at the relevant time, she was proceeding towards school. The evidence is sufficient to infer that the accused either compelled or induced by deceitful means to the prosecutrix to go with him. She was taken to other places like Yermala and Osmanabad. She was detained there and she could not return to Beed till the accused brought her to Beed on 16/3/11. This evidence is sufficient to prove the offenses punishable u/s 341, 342 and also 363 of I.P.C. In view of the nature of evidence given by prosecutrix and the fact that the accused was a married man at the relevant time, it cannot be believed that the accused had impression that the prosecutrix was major or she had crossed the age of 16 years. Thus, the evidence is sufficient to prove offense punishable u/s 376 of I.P.C. also.

21. The accused appellant is convicted for the offense punishable u/s 3(1) (xii) of Scheduled Castes and Scheduled Tribes [Prevention of Atrocities] Act, 1989 [for short, Atrocities Act] also. This provision is as under :

3 Punishments for offences of atrocities-(1) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe -

[xii] being in a position to dominate the will of a woman belonging to a Scheduled Caste or a Scheduled Tribe and uses that position to exploit her sexually to which she would not have otherwise agreed;

22. The wording shows that if the woman of Scheduled Caste or Scheduled Tribe agrees for acts, which amount to her exploitation sexually and this is due to the position of the accused who does not belong to Scheduled Caste to dominate will of the woman, then only, the case will fall under this provision. In the present case, the prosecutrix was aged about 14 years and so, there was no question of giving consent or agreeing to do anything. Thus, conviction is not possible under this provision. If there was the evidence that the accused committed such act, only because the prosecutrix was from Scheduled Caste, then he could have been convicted for the offense punishable u/s 3(2) (v) of the same Act. This provision runs as under :

3(2) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe -

[v] commits any offence under the Indian Penal Code [45 of 1860] punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine;

23. This Court has carefully gone through the evidence of both the mother and the prosecutrix. No evidence is given by prosecutrix that the accused did such act only because she belongs to Scheduled Caste. On the contrary, it can be said that the prosecutrix was induced and due to her age, she was probably attracted to the accused and she went with him. It cannot be said that the accused did the act only because the prosecutrix belongs to Scheduled Caste. Evidence is given

by the prosecutrix to show that the accused was probably attracted towards her and therefore, he was giving threat that he would commit suicide if she was not ready to go with him. In view of these circumstances, the accused could not have been convicted for offense punishable u/s 3(2) (v) of the said Act. This Court holds that the conviction given for the offense punishable u/s 3(i)(xii) of the Atrocities Act, needs to be set aside.

24. For the appellant, reliance was placed on some reported cases. In the case cited for the appellant and reported as 1993 (1) Bombay C.R. 599 Bombay High Court [Omprakash Shankarlal Sharma V/s State of Maharashtra [at the instance of CBI, Bombay], this Court has discussed the provision of Section 326 (1) of Cr. P.C., the proviso of Section 311 of Cr. P.C. and the provision of Section 165 of Indian Evidence Act. This Court held that stoppage of judgment by the Court and reintroduction of evidence to bolster of prosecution case is not expected from the Court and the Court has no such power. The facts of this reported case show that there was the point of competency of authority who had accorded sanction under provisions of Prevention of Corruption Act, 1947. The point involved was totally different. This Court has already discussed relevant facts of the present case and this Court has observed that the evidence regarding birth date of the prosecutrix was essential to the just decision of the case and it was mandatory on the Court to take such evidence on record. So the case cited for the appellant is of no use to him. In the case reported as 2005 (1) Bom. C.R. [Cri] 354 Bombay high Court [Sindhu Sukhdeo Waghmare V/s State of Maharashtra], when the prosecution failed to prove that the prosecutrix was a minor below, 16 years of age benefit of this circumstance was given to the accused and the possibility of consent was considered by this Court. The facts were totally different and so this case also cannot help the appellant. In the case reported as 2011 (2) Cri. Court Cases 272 [S.C.] [Alamelu & Anr. V/s State Rep. by Inspector of Police], when the prosecution failed to prove that prosecutrix was minor at the time of abduction and also rape and when there was medical evidence to the effect that the age of the prosecutrix was between 17 and 19 years, benefit of this circumstance was given to the accused. The requirement for the proof of entry made in the school record is also discussed by discussing Section 35 of the Evidence Act by Apex Court. Thus, the facts were different. In another case reported as Rajendra Datta Zarekar Vs. State of Goa, the Apex Court has discussed circumstances like rupture of hymen and in view of the facts of that case, it is observed that only on the basis of such circumstance, inference of rape cannot be drawn. There is no dispute about this proposition. Other relevant evidence is discussed by this Apex Court. In the case reported in 1958 Cri. L.J. 273 S.C. [Sidheswar Ganguly V/s State of West Bengal, the Apex Court has discussed the nature of evidence of victim of rape offense. The Apex Court has observed that she cannot be treated as accomplice though rule of prudence requires that the evidence of prosecutrix should be corroborated before conviction can be based on it. This proposition also cannot be disputed. This Court has considered the relevant circumstances in the present case which corroborate the version of the prosecutrix.

25. Argument was advanced for the appellant on the point of quantum of sentence. It was submitted that at the relevant time, appellant was aged about 23 years and as the possibility of eagerness of the prosecutrix to have contact with the accused cannot be ruled out, sentence can be reduced. The trial Court has given sentence of imprisonment of 10 years for the offence of rape. Other sentences are to run concurrently with this main sentence. Some reported cases were cited on this point. In the case reported as 1994 Cr. L.J. 248 S.C. [Raju V/s State], the sentence of imprisonment of 3 years was given when two young men were involved in rape case. In the case reported as 2006 Crime S.C. page 145 [State of M.P. V/s Sunil], the sentence of imprisonment of 6 years and two months was given for the offence of rape [age of the prosecutrix and other circumstances are not mentioned in this case]. In the case reported as AIR 1998 S.C. 249 [Phulsing V/s State of Haryana] when the prosecutrix was aged about 24 years, the accused was sentenced to suffer imprisonment of 4 years. In the case reported as State of Chhattisgarh Vs. Derha, , when the prosecutrix was minor and Section 376 (2) (f) of I.P.C. was used, the sentence of 7 years was given.

26. It cannot be disputed that the punishment needs to be in proportion to the gravity of crime. There cannot be formula of full proof nature to provide reasonable criteria in determining just and appropriate punishment. There can be variety of circumstances that may affect gravity of crime. Criminal law ordinarily allows some discretion to the Judge in arriving at the sentence in each case but while using discretion, the Court is expected to consider culpability of the accused and other special facts of the case. When the statute provides minimum sentence for particular offence, the Court is expected to be very slow while crossing the limit given by the statute. Thus, even when the discretion is given to the Court, while using the discretion, adequate and special reasons are expected from the Court if the Court prefers to give punishment which is less than the minimum provided by the Section.

27. The provision of Section 376 of I.P.C. shows that in the case like present one, the accused shall be punished with imprisonment of either description for a period which shall not be less than 7 years but which may be for life or for a term which may extend to 10 years and shall also be liable to fine. The proviso to Section 376(1) of I.P.C. shows that for adequate and special reasons to be mentioned in the judgment, the Court may impose sentence of imprisonment for a term of less than 7 years. Thus, for the offense like present one, the minimum sentence provided is 7 years but the discretion given to the Court for imposing less than 7 years imprisonment. For that, adequate and special reasons are required to be given in the judgment.

28. The trial Court has given sentence of imprisonment of 10 years. This Court holds that as the accused was a married man and as he knew that the prosecutrix was minor, he ought not to have misused the circumstance. Though in view of the facts of this case, imprisonment for the period of 10 years need

not be given, the imprisonment which is less than 7 years cannot be given. Imprisonment in such cases should be such that adult persons should think twice before misusing such circumstances. So this Court holds that the imprisonment for the offense of rape can be reduced to 7 years. As the accused needs to be acquitted of the offense punishable u/s 3(i)(xii) of Atrocities Act, Appeal deserves to be partly allowed. So the following order :

29. The Appeal is partly allowed. The judgment and order of the trial Court convicting and sentencing appellant/accused for offence punishable u/s 3(i) (xii) of Scheduled Castes and Scheduled Tribes [Prevention of Atrocities] Act, 1989, is hereby set aside. The fine if any deposited in respect of this offence is to be returned to the appellant. The conviction of the appellant for offences punishable u/s 376, 363 and 506 of I.P.C. is hereby maintained. Substantive sentence given for the offence punishable u/s 376 of I.P.C. is however, reduced to 7 years rigorous imprisonment. The sentence in respect of other offences and the sentence of fine amount is however maintained.