
(1997) 02 BOM CK 0026

In the Bombay High Court

Case No : Criminal Appeal No. 666 of 1984

Sahebrao Nathu Gaikwad

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 12-02-1997

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 375, 376

Citation : (1997) 99 BOMLR 728

Hon'ble Judges : Vishnu Sahai, J; R.P. Desai, J

Bench : Division Bench

Judgement

1. The appellant being aggrieved by the Judgment and order dated 8th August, 1984 passed by the Addl. Session Judge, Pune in Sessions Case No. 77 of 1984 convicting and sentencing him to undergo seven years R.I. and to pay a fine of Rs. 6,000/- and in default to further undergo 3 months R.I. for the offence u/s 376 of I.P.C. has come up in appeal before us.

2. Briefly stated, the prosecution case runs as under:

The prosecutrix Draupadi Sadhu Kamble P.W. 3 was staying with her mother Kondabai Sadhu Kambale P.W. 2 and brother Bharat Kambale P.W. 4 and some others in village Winzar, Tal. Haveli, Dist. Pune, At a distance of 20 to 30 ft. from her house was that of the appellant.

3. On 26.12.1983 she, her mother and 2 brothers were present in the house. At about 8.00 p.m. they took meals. Thereafter, she (the prosecutrix) changed clothes which had become wet while she was washing utensils. She then went to answer call of nature wearing petticoat and zampar. At about 9.00 p.m. While she was returning after answering call of nature, appellant came from behind placed his hand on her mouth, and took her in the bamboo plantation near the stream. He felled her and, after removing her clothes and taking of his own, raped her. While he was raping her, he pressed her mouth tightly. After raping her he made her put on her clothes and thereafter left her near the house of one

Dattu Nathu Gaikawad. She entered into the said house. The appellant went somewhere else.

After some time, the prosecutrix heard her mother calling her. She came to Dattu Gaikawad's house and took her to her own house, where she asked her as to where she had gone and as to what she was doing. The prosecutrix did not reply anything as the brother-in-law of the appellant was sitting in the house. After some time he left. Thereafter, she told her mother that the accused had raped her near the bamboo plantation. As the consequences of the appellant raping her, her petticoat had become stained with semen. Thereafter mother of the prosecutrix called the appellant and reprimanded him for what he had done.

3. The older brother of the prosecutrix Bharat P.W. 4 was not at the house. Next day prosecutrix told this incident to Shantabai, Tarabai, Laxmi and Sanjivani. On the 4th day at night time Bharat came. Next morning, prosecutrix told him about the incident. Thereafter Bharat went and talked to Kondabai.

4. On the next morning that is morning of 31.12.1983, Bharat took the prosecutrix to Sasson Hospital, Pune. There at 5.00 p.m. she was medically examined. Medical report of the prosecutrix is at Exh. 20-A. The doctor did not find any injuries on her breasts, lips, cheeks, thighs etc. and neither any mud, soil or any other foreign material on her body. No injuries were also found on the genitals. Hymen had old healed tear and vagina admitted 2 fingers easily. The doctor directed that samples of pubic hair, vaginal smear, vaginal swab and blood for grouping be taken. It was also directed that x-ray of Wrist joint A.P. view, elbow joint A.P. view, Pelvis with Head of femur A.P. view and lateral view of skull be taken. It appears that radiological examination of the prosecutrix was conducted by Dr. Laxmikant Kashinath Bade, P.W. 7. On it's basis Dr. Bade opined that the prosecutrix had completed 13 years of age but was below the age of 15 years, including margin of error.

5. Going backwards the F.I.R. of the incident was lodged by the prosecutrix at Sassoon Hospital, Pune. The evidence shows that on the next day of her admission in Sassoon Hospital, Police came and took down her F.I.R. The FIR is at Exh. 10.

6. The case was investigated in the usual manner. During the course of investigation, the appellant was arrested. Some injuries were found on his person. Consequently, he was sent to Sassoon Hospital where he was medically examined on 01.08.1984 by Doctor Ashok M. Adhav, P.W. No. 12. The evidence of Dr. Adhav is that he found one healed wound on left elbow posterior medial aspect with scabs of the dimensions of 1/2" x 1/10th". He gave age of the scabs as being caused within three days to 7 days. In the opinion of Dr. Adhav such injury was possible by resting elbow on the ground. Dr. Adhav also stated that the appellant was potent and there was erection of his organ.

7. After completion of the investigation, the appellant was chargesheeted. The case was committed to the Court of Session in due course. In the trial Court,

appellant was charged for the offences u/s 376 of I.P.C. to which he pleaded not guilty and claimed to be tried. During, trial in all the prosecution examined 12 witnesses Prosecutrix Draupadi Sadhu Kambale, P W 3 was the solitary eye witness.

In defence no witness was examined.

The learned Trial Judge believed the evidence adduced by prosecution and convicted and sentenced the appellant in the manner stated above.

8. We have heard Mrs. Anita A. Agarwal for the appellant and Mr. V.T. Tulpule, Public prosecutor for State of Maharashtra (Respondent No. 1). Although respondent No. 2 was served but, she has not engaged any counsel. We have also perused deposition of the prosecution witnesses, exhibits tendered and proved by the prosecution; statement of the appellant recorded u/s 313 of Cr.P.C.; and the impugned Judgment. After giving our anxious consideration to the matter, we are of the view that a technical offence u/s 376 of I.P.C. is made out against appellant and that being so his sentence deserves to be reduced.

9. We have been taken through evidence of the prosecutrix We have no reservations in observing that her statement to the effect that she was raped by the appellant does appear to be correct. After meticulously going through her statement, we are satisfied that sexual intercourse was committed with her per consent. But before we come to this aspect, we would like to refer to the version of the incident as given out by the prosecutrix. She stated that on the day of the incident at about 9.00 p.m. while she was returning after answering call of nature, the appellant came from behind, put his hand on her mouth; took her to the bamboo plantation, thereafter felled her on the ground; took off her clothes and his own and thereafter raped her. Her statement further is that thereafter he asked her to dress and left her at Dattu Gaikwad's place. Her mother came there and took her to her house and after brother-in-law of the appellant had left the house, she told her mother about the incident. She further stated that on 4th day of the incident, her brother Bharat came home and next morning she told him about the incident. Same day he took her to Sassoon Hospital and on the next day she lodged F.I.R. there.

10. We are not impressed with the statement of the prosecutrix. There are a large number of circumstances which suggest that sexual intercourse was common with her of her own volition. They emerge from the following admissions made by the prosecutrix in her cross examination;

(a) The place where she was raped was at a distance of 20ft. to 30ft. from her house,

(b) She knew accused from her childhood;

(c) Neighbouring people were awake at the time of incident;

(d) Appellant was putting one hand on her mouth and by the other hand was

holding her while raping her;

(e) Her clothes was not torn;

(f) She did not suffer any injuries on her back, private parts; in fact on any part of her body; and

(g) When she reached her house, she did not raise any cries.

In our judgment it is extremely improbable that the appellant would have raped her at a distance of about 20ft. to 30ft. from her house. We also feel that it is extremely improbable that with one hand the appellant would have closed the mouth of the prosecutrix preventing her from raising cries and by the other hand could render her from resisting while committing rape on her. In our view had the prosecutrix been raped she would have resisted and in that process her clothes would have been torn and she would have suffered injuries on her body and private parts. We also feel that had she been raped she would have raised cries; at any rate when she came near her house, as her evidence is that people were awake at the said time. The delay in lodging of the F.I.R. also shows that she was a consenting party.

11. We may also mention that the Medical Report of the prosecutrix shows that there were no signs of any resistance. It also shows that she was used to sexual intercourse and her vagina admitted two fingers easily. This is another circumstance which shows that she had consented.

12. At this stage, the learned Public Prosecutor pointed out that technically speaking we cannot look into the Medical Report of the prosecutrix because the same does not appear to have been proved.

13. In our view even if the Medical Report of the prosecutrix is not taken into consideration, still it is established that sexual intercourse with the prosecutrix was committed with her consent.

14. The circumstance that the sexual intercourse took place with the consent of the prosecutrix would not absolve the appellant of the crime for Clause six of Section 375 of the I.P.C. provides that even if sexual intercourse is committed on a woman below 16 years of age with her consent, still the offence of rape is made out.

15. That the prosecutrix was below 16 year of age at the time of the incident as borne out from the statement of Dr. Laxminkant Bade, P.W. 7. Dr. Bade has stated that after conducting radiological examination of the prosecutrix, he was of the opinion that she had completed 13 years of age but was below 15 years of age, including margin of error. That opinion of the doctor which is based on said data we have no reason to doubt. Thereafter, the unescapable position for the appellant is that the prosecutrix was below 16 years of age at the time of the incident and that being so, a technical defence u/s 376 of I.P.C. would be made out against him.

16. Mrs. Anita A. Agarwal, learned Counsel for the appellant strenuously urged that looking to the circumstance that F.I.R. of the incident was lodged 5 days after the incident when Bharat, elder brother of the prosecutrix returned home and the evidence shows that between Bharat and appellant relations were not good, the prosecution case that the appellant raped prosecutrix appears to be conducted. We have given our anxious consideration to the said submission of Mrs. Agarwal and we regret that we do not find any merit in it. It is a common experience that there is general reluctance in our society on the part of rape victims to lodge F.I.R. This is on account of the fact that it takes some time for the victim to get over the trauma of rape and only then, after receiving assurance she musters courage to lodge the F.I.R.

In our view, in the instant case, delay in lodging of the F.I.R. was also probably on account of the fact that sexual intercourse was committed on the prosecutrix with her consent. Hence it is not surprising that initially she was not very keen to lodge a F.I.R.

17. We are not prepared to accede to the submission of the counsel for the appellant that the entire story of rape is a concocted affair. In our view no girl particularly an unmarried girl, as was the case with the prosecutrix, would concoct the factum of her being subjected to rape.

For the said reasons we are not inclined to accept the submission of Mrs. Agarwal.

18. In our view, the prosecution has satisfactorily established that the appellant was guilty of an offence punishable u/s 376 of I.P.C. But in our judgment since the circumstances show that sexual intercourse was committed with the prosecutrix with consent, the offence would only be technical.

19. This leaves us with the vexed question about the quantum of sentence. Mrs. Agarwal vehemently urged that since the prosecutrix was a consenting party and bearing in mind the circumstance that the incident took place nearly 14 years ago, a very nominal sentence should be imposed on the appellant. She even went to the extent of submitting that in the peculiar facts of this case, a sentence of fine alone would meet the ends of justice.

Rape and that too on an unmarried girl, as is the case here, is a serious offence. If the legislature in all its wisdom thought that consent by a woman below 16 years of age was no consent in law and sexual intercourse with her would constitute an offence of rape, we feel that it would be a perverse exercise of discretion on our part to accede to Mrs. Agarwal's submission that a sentence of fine alone would meet the ends of justice. Section 376(1) of I.P.C. provides that a sentence of not less than seven years should be imposed for the offence of rape. It is true that the proviso to Section 376(1) of I.P.C. provides that for adequate and special reasons to be mentioned in the judgment, the court may impose a sentence of less than seven years but that does not mean that the court should be so lenient as to only impose a sentence of fine and that too in a case where the victim happens to be an unmarried girl. It is common knowledge

that the factum of a victim being raped is often a very serious hindrance to her marriage.

But be that as it may, it appears to us that the prosecutrix was a consenting party. In our view considering the overall circumstances, including the fact, that the evidence on record shows that the appellant is married and has children, the ends of justice would meet if the jail sentence of 7 years R.I. awarded to him by the trial court is reduced to 2 years R.I. We however, feel that the sentence of fine and that in its default imposed by the trial court should be maintained.

20. In the result, this appeal is partly allowed and partly dismissed. Although we uphold the conviction of the appellant for the offence u/s 376 of I.P.C., but we reduce the jail sentence from 7 years R.I. to 2 (two) years R.I. We however, maintain the sentence of fine and that in it's default

The appellant is on bail. He shall be taken into custody forthwith to serve out his sentence.

In computing the period of two years R.I. the period served by the appellant as an under trial and convict shall be excluded.

In case a certified copy of this judgment is applied for, it shall be issued on an expedited basis.