
(2009) 09 BOM CK 0165
In the Bombay High Court
Case No : Criminal Appeal No. 688 of 2008

Sajid @ Sadikka Anwarkha Pathan

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 23-09-2009

Acts Referred:

Penal Code, 1860 (IPC) — Section 363, 366, 376

Citation : (2009) 09 BOM CK 0165

Hon'ble Judges : A.P. Bhangale, J

Bench : Single Bench

Advocate : K.S. Deshpande, for the Appellant; Anup Parihar, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

A.P. Bhangale, J.—By means of this Criminal Appeal, the appellant has challenged the judgment and order dated 24.09.2008 in Sessions Trial No.21/2008 passed by learned Adhoc Additional Sessions Judge, Yavatmal, whereby the appellant was found guilty and convicted for offence punishable under Sections 363, 366 & 376 of the Indian Penal Code ("IPC" in short) and sentenced as under:

The substantive sentences of imprisonment were directed to run concurrently.

2. Facts according to the prosecution, are these:

On 5.11.2007, while the prosecutrix Puja was returning to her house from the house of her girlfriend, the appellant who was her neighbour and known to her since prior to the date of the incident, met her and threatened her and took her forcibly to S.T. Stand, Yavatmal and thereafter to village Bechkheda, to the house of his relative Bagya, who resided with his old mother. The appellant falsely told them that prosecutrix is his wife. On that night, Bagya and his mother slept outside their house ; whereas appellant and the prosecutrix slept inside the room. It is the case of the prosecution that the appellant on that night forcibly

committed intercourse with the prosecutrix as also on consecutive night. On 7.11.2007, the prosecutrix insisted to leave her to her house. She came to her house and narrated the incident to her parents. According to the prosecution, the appellant, an already married man with a wife and two children, had falsely assured prosecutrix that he will marry her. First Information Report was lodged on 6.11.2007 by the father of prosecutrix after he came to know while searching for his daughter, that appellant had enticed his minor daughter. Crime was registered being Crime No. 314 of 2007. During the course of investigation, accused/appellant was nabbed and investigating Officer drew spot panchnama; statement of Prosecutrix and other witnesses were recorded; clothes of prosecutrix were seized; Sample of her blood, pubic hair, vaginal swab were collected. While prosecutrix was referred to Medical examination. The accused was also referred for medical examination and sample of his semen and pubic hair were collected. Clothes of the appellant were also seized during investigation. The Investigating Officer collected date of birth certificate of the prosecutrix from her School. Upon completion of investigation, the appellant was chargesheeted before learned Judicial Magistrate, First Class Yavatmal, who committed the case to the Court of Sessions, Yavatmal. The charge was framed against the appellant under Sections 363, 366 & 376 of the IPC on 9.6.2008, to which he pleaded not guilty and claimed trial. His defence is of total denial.

3. The prosecution examined as many as eight witnesses including the prosecutrix to prove the offences alleged. The appellant did not lead any defence evidence. The trial ended in conviction and sentence, as aforesaid.

4. In support of the Appeal, Mr. K.S. Deshpande, learned Advocate for the appellant submitted that the exact age of the prosecutrix is not proved beyond reasonable doubt. He further contended that none of the offences were proved against appellant beyond reasonable doubt and, as such, appellant ought to have been acquitted by the trial Court.

5. Per contra, Mr. Anup Parihar, learned Additional Public Prosecutor, supported the judgment and order passed by the trial Court contending that a minor girl of impressionable age, that is below the age of 16 years, was kidnapped, of course, without consent of her natural guardians parents and was subjected to carnal pleasure and hence all offences have been proved beyond reasonable doubts.

6. Learned Advocate for appellant submitted, with reference to the ruling in State of Chhattisgarh Vs. Lekhram, that prosecutrix was living in village Bechkheda with the appellant, according to the prosecution, in the house of his relative for two days without resisting alleged rape and was a consenting party. Therefore, the quantum of sentence as already undergone by the appellant be considered enough in the facts and circumstances and in the interest of justice. He then referred to ruling in Bibhishan v. State of Maharashtra 2008 ALL MR (Cri) 517 (SC) and submitted that in absence of injury on the person of girl or in absence of signs of semen or such circumstantial evidence to implicate the appellant, he ought to have been given the benefit of doubt. He contended that the School

record as to admission of the student may not be treated as correct as it is a practice prevalent among villagers to understate or overstate age of their wards while admitting them in School and as such, evidence of the Expert ought to have been insisted upon. Under the circumstances, if two views are possible, the trial Court ought to have accepted the view which would support the defence. According to Shri Deshpande, in view of the ruling in Ravinder Singh Gorkhi Vs. State of U.P., school leaving certificate not issued by the person who was in School at the time of admission cannot be relied upon. He submitted that the trial Court fell in error as it did not consider the principles as to proof of age of the prosecutrix.

7. I have considered the submissions in the light of the rulings cited supra, looking to the facts and circumstances brought on record, in the present case. The legal position is well settled by now that conviction u/s 376 IPC can be based upon sole testimony of a rape victim. Any girl subjected to a sexual intercourse or assault is not an accomplice to the crime but is victim of man's lust and, therefore, it is neither desirable nor proper to look upon her evidence with suspects of suspicion, treating the prosecutrix as if she was an accomplice. One may refer to the ruling in State of Rajasthan Vs. Om Prakash, .

8. Learned APP submitted that the trial Court had cogent and reliable evidence of prosecutrix and her father duly corroborated by medical evidence, although conviction could have been based upon uncorroborated testimony of minor prosecutrix. A married man much elder to her with two children had no excuse whatsoever to entice and remove her away from her natural guardianship in such a way to seduce or force her to sexual intercourse. Learned APP submitted that sexual intercourse by appellant with prosecutrix amounted to rape, irrespective of her consent as she was minor girl, below 16years of age on the date of the incident.

9. Let us now turn to evidence as regards age of the victim girl:

PW 1 Puja/(victim) stated her date of birth being 7.7.1992 in her evidence. She specifically denied suggestion in cross-examination put to her by the defence Advocate that she is falsely stating her age. Best evidence came from her father Suresh Motiram Rahile (PW 2), who stated her date of birth as Puja (PW 1) had stated as 7.7.1992. Thus, the suggestion otherwise which are denied would not help the contention of the defence that Puja was major girl. On the date of incident i.e. on 5.11.2007 Puja was of 15years 3 months and 28days old i.e. much below the age of 16 years. Father of the prosecutrix has no reason nor any suggestion to falsely implicate the appellant. PW 5 PSI Vivek Kurwade had collected the School leaving certificate of prosecutrix. PW 7 HS Hore, Headmaster of the Z.P. Girls' High School deposed that birth date of Puja as per School register was 7.7.1992. Original school admission register entry (Exh.32) and true copy (Exh. 34) indicates that she was studying in 9th standard. Further it indicates the same birth date 7.7.1992 which, according to the witness, is true and correct. Medical witness Dr. Vibhuti Panbude (PW 8) also confirmed that Puja

is aged about 15 years. The evidence led as above by the prosecution is sufficient and beyond reasonable doubt enough to conclude that victim girl was below 16 years of age as on the date of the incident.

10. We now turn to the evidence as regards kidnapping and rape as led in the trial Court:

375: Rape :.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 descriptions: Sixthly, with or without her consent when she is under sixteen years of age.

PW 1 Puja contended that while she was going to her School, the accused had followed her and talked deliberately, threatening to kill her if she tells about talking to her. On 5.11.2007 at about 1.45 p.m. while Puja was returning from the house of her girl friend and was near Sharda Chowk, accused met her and asked her to come along with him; but she refused. Then accused took her forcibly to the S.T.Stand Yavatmal and then to village Bechkheda in the house occupied by one Bagya and his mother, telling them that prosecutrix is his wife. While Bagya and his mother slept outside in verandah, accused slept inside with prosecutrix and forcibly committed sexual intercourse with her under threat that if prosecutrix shouts he could kill her. On 6.11.2007 also during evening, accused committed forcibly sexual intercourse with her while prosecutrix had asked him to leave her to her house. The evidence also indicate that accused had during transit promised to marry with prosecutrix though accused was already married having two children out of the wedlock. When accused left the victim girl, she narrated the incident to her parents on 6.11.2007. Father of the victim girl lodged FIR. In crossexamination, it is revealed that victim girl knew the appellant who resided near her house since one or two months prior to the incident. She admitted in the course of crossexamination that she had love affair with accused since 2/3 months prior to the incident. Her father (PW 2) however, denied it. Medical evidence of PW 8 Dr.Vibhuti indicate that prosecutrix Puja was examined and it was found that her hymen was ruptured and vagina admitted two fingers easily. Dr. Vibhuti also deposed that generally hymen ruptures due to sexual intercourse while it can be ruptured by other sources also. The victim girl was found capable of sexual intercourse (Exh.43) Jangya (innerwear) Article 5 of the victim referred to C.A. and Regional Forensic Science Laboratory was found to have stained with human blood in the middle portion and appeared to be washed although group of blood could not be determined. Accused on his medical examination (Exh. 51) was found able to do the sex or intercourse. Thus, there was corroborating evidence consistent with the evidence by prosecutrix. In defence, the appellant denied the prosecution case in toto claiming that false case is filed against him. No defence evidence is led. Even otherwise, consent of prosecutrix is no defence when she was below 16 years of age on the date of the incident.

11. Thus, there appears sufficient and reliable evidence that the accused had

enticed the prosecutrix who was under sixteen years of age a took away at his relatives? house in village Bechkheda, without the consent of the prosecutrix?s lawful guardian (father or mother) and had subjected her twice to forcible sexual intercourse, at the house of his acquaintance. Undoubtedly, the prosecutrix was a minor below 16 years of age, taken away from lawful custody of her parents and had been subjected to rape.

12. Rulings referred to by Shri Deshpande, Adv. for appellant are not attracted in the facts and circumstances of the case so as to rescue the appellant in any manner, including on the point of quantum of sentence. Seven years substantive imprisonment awarded by the trial Court was directed to run concurrently on every count of conviction and I do not find reasons adequate or special enough to award sentence of imprisonment for less than seven years prescribed as minimum for offence of rape u/s 376 IPC which was coupled with the offence of kidnapping punishable u/s 363 and 366 of the IPC. The victim was kidnapped in order that she may be forced or seduced to illicit intercourse. She was taken to a village; the appellant misled his acquaintance to believe that prosecutrix is his wife and ultimately she was ravished by the appellant. False promise was made to her by the appellant that he will marry her. Her ignominy and gravity of the offence do not permit any sympathy or generosity to award lesser sentence.

13. For the reasons aforementioned, the trial Court was right in its conclusion. The Appeal being sans merit, deserve dismissal which I direct. Appeal is dismissed accordingly.