

(2010) 02 BOM CK 0058
In the Bombay High Court
Case No : Criminal Appeal No. 738 of 2008

Sanjay Gondchar

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 10-02-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311
Penal Code, 1860 (IPC) — Section 375, 376, 506

Citation : (2010) 02 BOM CK 0058

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

Bench : Single Bench

Advocate : R.M. Patwardhan, for the Appellant; A.S. Fulzele, APP, for the Respondent

Final Decision : Dismissed

Judgement

A.P. Bhangale, J.—Challenge in this Appeal is to the judgment passed by learned Additional Sessions Judge, Achalpur, Dist. Amravati in Sessions Case No. 119/2006, whereby the appellant came to be convicted for offence punishable under Sections 376 and 506 of the Indian Penal Code (in short IPC). For the offence of rape punishable u/s 376, IPC, he was sentenced to suffer rigorous imprisonment of 5 (five) years and to pay a fine of Rs. 1,000/(Rupees one thousand), in default to suffer rigorous imprisonment of three months. For the offence threatening the prosecutrix to fail in her examination, if she disclose the incident of sex with her, punishable u/s 506, he was sentenced to suffer rigorous imprisonment of six months and to pay a fine of Rs. 200/, in default, to suffer rigorous imprisonment for 15 days.

2. Brief facts giving rise to the appeal are that: Prosecutrix (PW 1), aged about 16 years and was studying in IX standard in Vikas Vidyalaya at Wadner Gangai. She used to reside with her parents, brother and sister. The appellant was her teacher. Some time in the year 2004, he had called the prosecutrix in the Science Laboratory, caught hold of her; kissed her and then threatened her that if she

would resist, she would fail in her examination and then committed forcible sexual intercourse with her. Though she attempted to shout, he warned that she would be defamed by him. On 5.3.2006, the appellant had called the prosecutrix through her friend Shanta Thakre to her house. When prosecutrix went to Shanta's house, the appellant asked Shanta to go out of the house then he closed the door and caught hold of the prosecutrix, who removed her clothes forcibly, kissed her, removed his clothes made her to lie down on the ground, then he introduced his private part on her private part; thereafter, he left the house. By the time Shanta returned to the prosecutrix had worn her clothes, left for her home and narrated the incident to her mother. On 31.3.2006, the incident was reported to the Police as Crime No. 23/2006 of Yeoda Police Station, Dist. Amravati. Investigation was undertaken. The appellant was arrested on 1.2.2006 (Exh. 39). Consequent upon necessary investigation, he was charge sheeted for the offence of rape and criminal intimidation.

3. To the charge (Exh. 14), the appellant pleaded not guilty inasmuch as he denied the accusations and claimed trial.

4. At the trial, the prosecution examined a total of six witnesses consisting of the prosecutrix (PW 1), her mother (PW 2), Manohar, Peon in the School (PW 3) and Police Officers who were part of the investigation (PW 5 and 6) and also produced and relied upon certain documentary evidence (Exhs.31 to 33) in support of its case about the medical examination of the prosecutrix. The documentary evidence was admitted in evidence as it was not disputed to indicate that the prosecutrix had sexual intercourse. On marshalling and appreciating the prosecution evidence, the learned Additional Sessions Judge reached the conclusion that the charge is duly proved against the appellant/accused. Therefore, the impugned judgment of conviction and sentence has been passed.

5. Mr R.M. Patwardhan, learned Advocate for the appellant submitted that the age of the prosecutrix was not proved. She had attained the age of discretion and was practically major in all respects. He contended that conduct of the prosecutrix makes it improbable to infer offence of criminal intimidation or rape as she did not ask for any help during the alleged incident at the School and a considerable period of 25 days" delay is caused in reporting the incident dated 5.3.2006, which is not explained by the prosecution. Thus is case is improbabilized due to the conduct of the prosecutrix. Moreover, Mr. Patwardhan submitted that the material witness Shanta, friend of the prosecutrix, is not examined by the prosecution, for inexplicable reason. The Doctor who had medically examined the prosecutrix too is not examined. Mr. Patwardhan also submitted that village rivalry and petty politics may have prompted the prosecutrix to lodge the false complaint.

6. Per contra, learned APP supports the impugned judgment.

7. Before I proceed to embark upon scrutiny of the prosecution evidence, certain

undisputed facts may be stated. The prosecutrix was taking education in IX standard and the appellant was teacher in Vikas Vidyalaya, Wander Gangai, is uncontroverted. Therefore, the prosecutrix (PW 1) was acquainted with him.

8. The version of PW 1 prosecutrix indicates that she was under the constant threat from the appellant that he would see that she would fail in her examination. After he committed sexual intercourse with her she was threatened that she would be defamed if she shouts. The oral report lodged by the prosecutrix (Exh. 25) indicates that the appellant gave allurements, by saying, you allow me to do this to you, I will pass you with good marks. Further in X standard also,....I will get good marks for you.

9. The prosecutrix (PW 1) narrated the precarious ordeal in the house of Shanta to her mother (PW 2) . Her version purports to show that he committed forcible sexual intercourse with her without her consent. The Peon Manohar Gathe (PW 3) deposed that he had found the accused with the prosecutrix in a Practical Room at between 1.00 p.m. & 1.30 p.m. in the year 2004. The accused came out of the room and threatened him that if he discloses about it to anybody he would be implicated. After 2/3 days the Peon told the incident to the Headmaster. The Headmaster of the School (PW 4) deposed that on 23.6.2006, the father of the prosecutrix had reported the incident of rape by the accused upon his daughter. The said complaint was submitted to the President of the Institute.

10. One cannot be oblivious of the mindset of an adolescent girl. The prosecutrix was not a matured woman to understand the harsh realities of the world outside her parental house. The allurements by the appellant could be enough for her to entertain a dream of passing the examination with flying colours. The appellant exploited prosecutrix's mindset to the hilt and allured her to repeated sexual intercourse. Under these circumstances, her consent for the sexual intercourse with the appellant who was her teacher can not be labeled as a free consent to sexually ravish and rape her.

11. The version of PW 2 mother of the prosecutrix, deposed that the incident of rape was disclosed by the prosecutrix to her.

12. The prosecution examined PW 6 PSI Gavai who deposed that he had recorded the statement of the prosecutrix as FIR (Exh. 25).

13. From the evidence of PW 1, nothing of much importance could be gathered from her cross-examination. Learned Advocate for appellant submitted that the prosecutrix must be held as a consenting party. In Yedla Srinivasa Rao Vs. State of A.P., the Hon'ble Supreme Court considered somewhat similar fact situation .The question of consent of the prosecutrix fell for consideration before Their Lordships in the said case. The accused had committed sexual intercourse with the prosecutrix on assurance that he would marry her and asked her not to cry. The Apex Court held that the consent was obtained by inducement. The relevant observations may be usefully quoted as follows:

What is voluntary consent and what is not a voluntary consent depends on the facts of each case. In order to appreciate the testimony, one has to see the factors like the age of the girl, her education and her status in the society and likewise the social status of the boy. If attending circumstances lead to the conclusion that it was not only the accused but the prosecutrix was also equally been, then in that case, the offence is condoned. But in case a poor girl placed in a peculiar circumstance where her father has died and she does not understand what consequences may result from indulging into such acts and when the accused promised to marry her but he never intended to marry her right from the beginning then the consent of the girl is of no consequence and falls in the second category as enumerated in Section 375 "without her consent". A consent obtained by misconception while playing a fraud is not a consent.

14. Examination of Doctor not a sine qua non to prove rape. In *Dildar Singh v. State of Punjab* (2006) 10 SCC 531 the Apex Court held that where the medical examination was conducted after three months, evidence of corroborative nature to infer forcible intercourse cannot be expected. The Apex Court held that the rape committed by teacher on the minor student ought to be viewed seriously. It is well settled that corroboration to the testimony of the prosecution is not a sine qua non for conviction. The absence of her consent will have to be presumed. In *Dinesh @ Buddha Vs. State of Rajasthan*, the Apex Court held the Courts must hear the loud cry for justice by society in cases of the heinous crime of rape on innocent helpless girls of tender years, as in this case, and respond by imposition of proper sentence. Public abhorrence of the crimes needs reflection through imposition of appropriate sentence by the Court. Needless to say, the question as regards consent of the prosecutrix is dependent upon facts of each case. In the present case, the appellant/teacher, aged about 39 years, induced the prosecutrix aged about 16 years to have sexual relation with him. He allured her that she would pass with good marks and ravished her at a place where she could not have expected any help from anybody. Moreover, she was under his obligation. But for this allurements given by him for her passing examination with good marks and had she resisted the sexual aggression from her teacher she could not have passed examination as she would have been defamed by the appellant as he had threatened. She was also under threat of besmirching her character if she disclose the incident of rape to anybody. Non-examination of Shanta Thakre cannot be considered as fatal to prosecution as the appellant never asked for to summon and examine her u/s 311 of Cr.P.C. in the trial Court or even in this Court.

15. Considering all these aspects of the matter, I am in general agreement with the findings of the learned Additional Sessions Judge as regards guilt of the appellant in respect of offences punishable under Sections 506 and 376 of the IPC. No interference is required with impugned judgment and order which appears well reasoned.

16. For the reasons mentioned supra, the Appeal is dismissed.