
(2014) 07 BOM CK 0279
In the Bombay High Court
Case No : Criminal Appeal No. 200 of 2013

Sayyed Khalil Sayyyed Miskin	Vs	APPELLANT
State of Maharashtra		RESPONDENT

Date of Decision : 07-07-2014

Acts Referred:

Penal Code, 1860 (IPC) — Section 376, 376(1), 376[1], 506

Citation : (2014) 4 BomCR(Cri) 82

Hon'ble Judges : V.M. Deshpande, J

Bench : Single Bench

Advocate : S.G. Ladhha a/w. S.J. Rahate, Advocate for the Appellant; A.S. Shinde, A.P.P, Advocate for the Respondent

Judgement

V.M. Deshpande, J.—The present criminal appeal is directed against the judgment and Order of conviction dated 3rd January, 2013 passed by the learned Additional Sessions Judge - 2, Nanded, in Sessions Case No. 184 of 2011, by which the learned Court below was pleased to convict the appellant/accused for the offence punishable under section 376[1] of the Indian Penal Code, 1860 [In short, the I.P. Code] and sentenced him to suffer Rigorous Imprisonment for ten years and to pay fine of Rs. 25,000/- [Rs. Twenty Five Thousand only] and in default, to suffer Rigorous Imprisonment for one G.A. Ghule [P.A.] year. The appellant was also convicted for the offence punishable under section 506 of the I.P. Code and sentenced him to suffer Rigorous Imprisonment for two years and to pay fine of Rs. 1000/- [Rs. One Thousand only] and in default, to suffer Rigorous Imprisonment for two months. The Court below directed that both the sentences shall run concurrently. The Court below further directed that, if entire fine amount is deposited in the Court, out of it, an amount of Rs. 25,000/- [Rs. Twenty Five Thousand] be given to the prosecutrix for her future. The case of the prosecution which is in narrow compass can be narrated as under:--

FACTUAL MATRIX:--

[i] Sameena Begum W/o. Azhar Hussain Ansari [P.W. No. 1] lodged First

Information Report on 23rd September, 2011 with Police Station, Itwara, Nanded [Exh. No. 18]. It was stated in the F.I.R. that she is having two sons and three daughters, including the prosecutrix. The age of prosecutrix is about 14 years and she used to attend the classes to learn Arabic language at Mohammediya Mosque, situated in the lane, where the first informant resides. The appellant was the teacher there. It is further disclosed in the F.I.R. that prior to seven months, the menses of the prosecutrix were stopped, therefore, she was taken to Dr. Asma, who expressed her opinion that, since the menses of prosecutrix has just commenced, there may be a gap in two menses and it may extend to four months, for some times. The first informant further disclosed in her F.I.R. that, prior to three months, the prosecutrix was having fever and she used to vomit. The prosecutrix was treated however that time, she did not notice that, prosecutrix was pregnant.

[ii] As per the First Information Report, in the night of 21st September, 2011 when the prosecutrix complained severe pains in her abdomen, she was taken to the hospital of Dr. Bhalerao. There she delivered female child. Upon enquiry by the first informant and her husband, the prosecutrix disclosed that, the appellant is the father of that female child. The F.I.R. further reveals that, the prosecutrix disclosed to the first informant that prior to eight months, the appellant put a handkerchief on her mouth, due to which she became unconscious, thereupon the appellant took her in the adjoining room and committed sexual intercourse with her, against her will and wish. The appellant also threatened her with dire consequences; if she disclosed the incident to anybody. The F.I.R. further shows that, on extending the threats, the appellant established sexual relations with the prosecutrix against her will.

[iii] Since the F.I.R. was disclosing cognizable offence, Police authority registered Crime bearing CR No. 115/2011 for the offences punishable under section s. 376(1), 506 of the I.P. Code. After registration of Crime, investigation was handed over to Police-Sub-Inspector Ramchandra Raghoba Rode P.W. No. 7.

[iv] The Investigating Officer visited the spot of incident, panchnama of spot was drawn in presence of the panchas. The same is at Exh. No. 44. Statements of witnesses were recorded. The accused was arrested on 23rd September, 2011 vide arrest panchnama Exh. No. 46.

[v] The Investigating Officer made an application before the Court for taking the sample of the appellant for conducting the D.N.A. test. Requisition letter to the Medical Officer for taking blood sample of the prosecutrix, her baby and the accused was also given. The samples were sent for D.N.A. test to the Director, Forensic Science Laboratory, Kalina, Santacruz, Mumbai - 98. The Investigating Officer also collected the documentary evidence in respect of age of the prosecutrix from Pradnya Niketan Girls' High-School, Holly, Nanded. After receipt of D.N.A. Reports and medical certificate from Dr. Bhalerao regarding the delivery of prosecutrix, the Investigating Officer found that, prosecutrix is a minor girl below 16 years of age and that mere was sufficient evidence against the

appellant, he filed charge-sheet in the Court of the Chief Judicial Magistrate, Nanded.

[vi] Looking to the aspect that the offence punishable under section 376 of the I.P. Code is exclusively triable by the Court of Sessions, committal order was passed by the learned Magistrate and case was committed to the Court of Sessions.

[vii] Charge was framed against the appellant for the offences punishable under sections 376(1), 506 of the I.P. Code. The appellant claimed for his trial.

[viii] After full dressed trial, the Court below convicted the appellant, as observed in the opening paragraph of this judgment.

2. I have heard Mr. S.G. Ladhha, learned Counsel for the appellant and Mr. A.S. Shinde, learned Addl. Public Prosecutor for the State of Maharashtra.

SUBMISSIONS:--

"According to the learned Counsel for the appellant:--

(i) prosecution has utterly failed to establish the guilt of appellant beyond reasonable doubt.

(ii) looking to the quality of evidence that is available on record, it is a fit case, wherein, benefit of doubt should be extended in favour of the appellant.

(iii) no efforts are being made by the prosecution to establish the date of birth of the prosecutrix.

(iv) except Exh. No. 22, there is nothing on record to show what is date of birth of prosecutrix.

In order to substantiate his claim, in that behalf the learned Counsel for the appellant strenuously urged before this Court that, mother of the prosecutrix i.e. PW No. 1 has given date of her marriage and has deposed only that the prosecutrix is her daughter. However, her evidence is silent about the date i.e. 9th December, 1995.

(v) non conduct of ossification test of the prosecutrix is fatal to the prosecution case.

(vi) much reliance cannot be placed on Exh. No. 22 in absence of original admission form.

(vii) though mother of prosecutrix has given date of her marriage in her evidence however, she has not given the date of marriage in the F.I.R.

(viii) Exh. No. 28, a document from the hospital of Dr. Bhalerao showing that, Sameena Begum Azhar Ansari delivered a female child in the year 1995 in the said hospital. Same is a concocted document; same has to be rejected outrightly in view of the fact that, Sameena Begum [PW No. 1] is completely silent in her

evidence before the Court about the place of birth of the prosecutrix.

(ix) Exh. No. 28 of 29 are not coming on record from the custody of PW No. 1 Sameena however, those are brought on record from the custody of P.W. No. 3 - Dr. V.U. Bhalerao.

(x) conduct of witnesses, especially mother is most unnatural, unjustified and not appealable to conscious of ordinary prudent man.

(xi) it is unbelievable that a mother could not notice the fact of pregnancy of her own daughter, till she delivered a child.

(xii) above aspect shows that there is suppression of facts and hence, prosecution case cannot be relied upon. Alternatively, the learned Counsel for the appellant submits that.

(xiii) at the most sexual relations between the appellant and the prosecutrix was outcome of the consent, in view of D.N.A. reports. Lastly, he submitted that, Criminal appeal be allowed.

3. Per contra, the learned A.P.P. submitted that, in the prosecution case, there is clinching evidence of prosecutrix and her mother PW No. 1 Sameena. The documentary record shows the date of birth of prosecutrix and from which it can be gathered that, prosecutrix at the time of incident was minor and below the age of 16 years. According to the learned A.P.P. for the State, D.N.A. test and its report is positive and the Medical officer has also expressed his opinion that, the appellant is the biological father of baby, born to the prosecutrix. He further submitted that, alternative argument of the learned Counsel for the appellant needs no consideration, in view of the fact that, it is established on record that the prosecutrix was below the age of giving valid consent, therefore, assuming that there was so called consent, it has no value in the eye of law.

EVALUATION OF PROSECUTION CASE:--

In order to bring home the guilt of accused, the prosecution has examined in all seven witnesses, they are:--

P.W. No. 1 Sameena Begum W/o. Azhahar Hussain Ansari, (Mother of the prosecutrix.)

PW No. 2 Prosecutrix.

PW No. 3 Dr. Vibha W/o. Umesh Bhalerao

PW No. 4 Dr. Abdul Sami S/o. Abdul Majid. Medical officer of S.G.G.S.M., Hospital, Nanded, who examined the prosecutrix, the appellant and female baby of the prosecutrix

PW No. 5. Dr. Achal Laxminivas Somani.

(who has given final opinion that the appellant is the biological father of female

baby, delivered by the prosecutrix.)

PW No. 6 Mohd. Ayyub S/o. Mohammad Kwaja. Panch witness to the spot panchnama,

PW No. 7 Asstt. Police Inspector Ramchandra Raghoba Rode.

- Investigating Officer.

The prosecution has relied upon various documentary evidence viz.

Exh. No. 18 - First Information Report

Exh. No. 22 - Extract of admission Register of Pradnya Niketan Girls" High School, Nanded, showing the date of birth of prosecutrix as 9th December 1995.

Exh. No. 27 -It shows that, on 22nd September, 2011 the prosecutrix delivered a female child in the hospital of Dr. Bhalerao.

Exh. No. 42 - Final opinion given by Dr. Achal Somani [P.W. No. 5] that the appellant is the biological father of the female child born to the prosecutrix.

Exh. No. 44 - Spot panchnama

Exh. Nos. 50, 51 & 52 - D.N.A. Reports.

4. To reach to the point of date of birth of the prosecutrix, there is evidence of PW No. 1 Sameena Begum, the evidence of prosecutrix herself and documentary evidence Exh. No. 22 - the extract of admission register of Pradnya Niketan Girls" High-School, Holly, Nanded. In Exh. No. 22, the date of birth of the prosecutrix is noted as 9th December, 1995. In the cross-examination of evidence of PW 1 Sameena, she has given date of birth of her daughter i.e. prosecutrix as 7th October, 1996 also the prosecutrix in her evidence before the Court disclose her date of birth as 7th October, 1996.

5. Much argument was advanced as found in the preceding paragraphs by the learned defence Counsel in respect of date of birth. Obviously, it was because, according to the learned Counsel for the appellant, in view of the D.N.A. report, since the appellant is found to be biological father of the female child of the prosecutrix, his much insistence was on propagating consent theory, though it was argued by him, said as alternatively.

6. Though in Exh. No. 22 the date of birth of the prosecutrix is shown as 9th December, 1995 however, in the cross-examination of both PW No. 1 Sameena and the prosecutrix, date of birth of the prosecutrix is brought on the record. Both of them are unanimous in pointing out the date of birth of prosecutrix as 7/10/1996.

7. The learned Counsel further submitted that, in absence of ossification test and in view of the fact that there is discrepancy in the oral evidence about the date of birth of the prosecutrix and documentary evidence Exh. No. 22, it is clear that

the prosecution has failed to prove the date of birth of the prosecutrix. He submitted that if the date of birth of the prosecutrix is taken as 09/12/1995 then it is clear that on the date of her delivery, she has attained the age of giving valid consent.

8. PW No. 1 Sameena has given the date of her marriage as 21st December, 1995. The learned Counsel for the appellant criticised this part of her evidence by pointing that she has not given the date of her marriage in F.I.R. Exh. No. 18. The Criticism has to be ignored because the First Information Report is not encyclopedia of the prosecution case. The purpose of First Information Report is to set the criminal law into motion. If the report discloses commission of cognizable offence, the police officer is under obligation to register the offence, therefore, while registering the offence, the Police Officer has to examine only about the disclosure of commission of cognizable offence. It is not expected from the Police Officer at the time of registration of F.I.R to make detail enquiry.

9. In the entire cross-examination of PW No. 1 Sameena, her statement that her marriage was performed on 21/12/1995 is not at all challenged. In absence of contrary and especially when statement of PW No. 1 Sameena about the date of her marriage is not at all challenged, there is no difficulty to accept her statement that the date of her marriage is 21st December, 1995. In the aforesaid backdrop reproduction of relevant part of cross-examination of the prosecutrix is useful which reads thus:--

"I use to take education in Pradnya Niketan Girls" High-School, Holly, Nanded. My date of birth is 7/10/1996. My name is ***** [Prosecutrix]. I was admitted in the said school in the year 2006 but cannot tell the date. I know the date 9/12/1995. It is not true to say that, my date of birth is 9/12/1995. The extract of school admission register now shown to me is regarding me, but my date of birth i.e. 9/12/1995 mentioned in the said certificate Exh. 22 is not correct. My father has given the wrong date as I was minor."

10. Once it is established on record that the date of marriage of mother of prosecutrix is 21st December, 1995 then obviously, the date of birth of prosecutrix is incorrectly recorded as 9th December, 1995 in Exh. No. 22. The prosecutrix has also given the explanation in her evidence before the Court that his father has made said wrong entry. Some time parents/guardian records incorrect date of birth of their kids, at the time of taking admission in the school, just to comply with the norms of age condition, while admitting their ward in school.

11. In so far as ossification test is concerned, during the course of argument, the learned Counsel for appellant himself has conceded that, by the said test, age cannot be determined, conclusively. Therefore, merely because the ossification test was not carried out; said does not resulted that the entire case of prosecution is vitiated, as claimed by the learned Counsel for the appellant.

12. The First Information Report was lodged on 23rd September, 2011, from

which, it appears that, the prosecutrix disclosed to the first informant that, first act of sexual intercourse with her was against her wish and same occurred eight months prior to filing of the F.I.R. The said fact is also reiterated by PW No. 1 Sameena in her evidence recorded before the Court. Though in the F.I.R. there is no mention about the exact date when the prosecutrix was sexually assaulted firstly, the same is brought on record, by the defence in the cross-examination of the prosecutrix herself, which reads as under:--

"For the first time when the accused forcefully raped me was 20/7/2010. I remember it as it was birthday of my sister."

From the aforesaid piece of evidence, it is clear that firstly she was subjected to sexual assault at the hands of the appellant on 20th July, 2010. The prosecutrix could distinctly remember the said date because 20th July is the birth date of her sister. Birthday of sibling is always a special occasion, therefore, if anything has occurred on such date, it's a human tendency to register the same in the mind and remember it. In the present case, on the said day, the prosecutrix suffered trauma of high degree; both mental and physical therefore, if she has given the exact date of her first sexual assault, it cannot be said to be unnatural one. Even if the date of birth of prosecutrix is taken as 9th December, 1995 as found in Exh. No. 22 and as insisted by the learned Counsel for the appellant, even on the said date i.e. on 20th July, 2000 the prosecutrix was below the age of giving valid consent.

13. Taking me to the evidence of the prosecutrix, the learned Counsel submitted that the conduct of the prosecutrix in not disclosing the sexual contact with her by the appellant to anybody appears to be unnatural one, which suggests, she was consenting party. In the present case, the appellant was the teacher who used to impart education of Arabic language, in Mohammediya Mosque. The prosecutrix was attending said Arabic classes, therefore, it is clear that, there was relation between the appellant and the prosecutrix, as a teacher and student. In view of the said relation, it is obvious that the appellant being a teacher was in commanding position and was in position to influence her. Further the prosecutrix has narrated that the appellant extended threat to her and since her father is of hot tempered, due to fear, she did not disclose the act of committing rape on different occasions to anybody, cannot be termed as exceptional one.

14. The learned Counsel for the appellant strenuously urged that, it will be impossible that the parents did not notice the fact of pregnancy of their daughter. At the first blush the argument appears to be attractive and one would tend to accept the same; however on close scrutiny of the available material on record in the prosecution case, I have no hesitation in my mind to reject the said argument. Admittedly on 22nd September, 2011 the prosecutrix delivered a female baby. Exh. No. 27 is a Birth Record/Certificate issued by Dr. N.C. Bhalerao Maternity Nursing & Family Welfare Hospital, Nanded. Mr. Vibha Balerao [P.W. No. 3] has proved said certificate. Perusal of said certificate shows that, there is

column about the weight at birth. In the said column, weight of said female child at the time of her birth is recorded as 1.5 k.g. only. Therefore, much importance cannot be attached to the submissions of Counsel as one can visualise the physical condition of prosecutrix when she was carrying.

15. In the present case the prosecutrix was attending Arabic classes in the Mohammadiya Mosque and the present appellant was the teacher there, is not a disputed fact. In fact in the cross-examination of the prosecutrix, it is brought on record that the appellant was one of the teacher there. Further in the cross-examination of the prosecutrix, it is brought on record that since October, 2009 the appellant was teaching Arabic language to the prosecutrix. The learned trial Court on appreciation of other corroborative piece of evidence has reached to the conclusion that the appellant is guilty of commission of an offence punishable under section 376 of I.P. Code. I concur with the said findings.

16. Further the evidence of prosecutrix, if it is not read in isolation and read as a whole, then it is clear that her evidence is free from exaggeration. Evidence adduced by the prosecutrix inspires confidence, coupled with the fact that the prosecutrix withstood the searching cross-examination of the learned defence Counsel and nothing has been elicited from her cross-examination to disbelieve her version or to impeach the core aspect about the sexual assault on her, against her will and wish.

17. The learned Counsel for the appellant though has cited various authoritative pronouncements, there is no need to discuss the same in the present Judgment because in the facts of the present case, those are hardly applicable. Since there is no doubt that on the first sexual assault i.e. on 20/7/2010 the prosecutrix was minor, question of her consent loses its importance. Further the prosecution has proved beyond reasonable doubt the ingredients of rape in the present matter, therefore, I find myself in agreement with the recording of findings of guilt and quantum of sentence imposed by the learned trial Court. Resultantly, criminal appeal fails and it is dismissed.