
(2005) 07 BOM CK 0049
In the Bombay High Court
Case No : Criminal Appeal No. 253 of 2004

Shailesh Dharmaji Wahane	Vs	APPELLANT
State of Maharashtra		RESPONDENT

Date of Decision : 15-07-2005

Acts Referred:

Penal Code, 1860 (IPC) — Section 376(2)

Citation : (2005) 4 MhLj 758

Hon'ble Judges : A.H. Joshi, J

Bench : Single Bench

Advocate : Sudhir Malode and D.V. Kukde, for the Appellant; A.R. Taiwade, APP, for the Respondent

Final Decision : Allowed

Judgement

A.H. Joshi, J.—The appellant who is convicted for the offence punishable u/s 376(2)(f) of Indian Penal Code and sentenced to suffer Rigorous Imprisonment for 10 years and fine of Rs. 5000/- and default sentence for 6 months is in appeal before this Court.

2. According to the prosecution, the prosecutrix Ku. Swarna d/o Laxman Chauhan aged 11 years was raped. The First Information Report was lodged. As narrated in the First Information Report, the Prosecutrix has taken she buffaloes for grazing near Taj Mehandi Baba Temple in the village Virli (Khandar). At that time one boy of Katurli village who was wearing black cloths was sitting in the said temple and whose face is said to be known to the prosecutrix was initially accompanied by Atul Ukey. Atul Ukey later on went away, from that place and the prosecutrix was alone there. The accused took the prosecutrix in the temple, gagged the mouth of the prosecutrix with one hand and removed her nicker by his another hand. He then inserted two fingers of his right hand in her vagina and moved the fingers in and out. Thereafter, he made the prosecutrix lie down on the ground, removed his full pant and underwear, slept on the prosecutrix and inserted his pennies in her vagina. He told her not to disclose the incident to

anybody and ran way towards Katurli on bicycle. On an enquiry to Atul Ukey, he told that the person with black cloths was Shailesh Wahane, resident of Katurli.

3. The prosecutrix was referred for medical examination. After the medical examination, the doctor recorded her findings and observations as follows:

"1) She is not fit for intercourse.

2) Hymen is found ruptured.

3) Intestacy (Opening) of vagina is found edematous and radish.

4) Vagina is strained and blood.

5) Radish and edematous Vagina is due to intercourse.

6) There are no other signs on any part.

7) She is not having any problems during walking.

8) Blood samples and vaginal swab is taken."

4. Dr. Anand Sadashiv Ramteke who has examined the prosecutrix was examined as PW-6 in the trial. He deposed in the examination-in-chief as follows:

"2....

On 27-12-2001 at about 12.00 mid night I received requisition from Adhyar P. Stn. As per the requisition I examined Ku. Sawrna Laxman Chavhan, aged about 11 years. On examination I found hymen reptured. She was not fit for intercourse. The opening of vagina i.e. introituses was found edematous and redish, vagina was stained with blood. I collected blood sample, vaginal swab. Sealed the same and handed over the same to P.C. 539 Adyar P. Stn. I issued Medical Certificate. Now I seen the same. It is in my handwriting. It bears my signature.

I have not given my opinion that the symptoms show sexual intercourse with the said girl. I have not given the said opinion as it cannot be definitely given as ruptured of hymen may be due to thrust of hard and blunt object. The symptoms mentioned in Exh. 35 are possible due to rape. The symtium mentioned in Exh. 35 are possible due to rape. The symtium mentioned in Exh. 35 are possible if forced sexual intercourse take place."

He further stated in the cross-examination as follows:

" It is correct to say that I cannot definitely say that the same girl was raped."

5. The Investigating Officer had arranged Test Identification Parade, however, accused is not said to be identified during said parade, nor its record is brought before the Court.

6. The prosecution has examined PW-4 Atul Yeshwant Ukey who identified the person who was seen in the vicinity and whose description according to this

witness matched with the accused to prove that the accused was the same person who must have committed the rape. This witness has stated that when the father of the prosecutrix had gone to him to enquire about the boy who had come near her to drink water when the prosecutrix was grazing the she-buffaloes, and that Atul Ukey had disclosed the identity of the accused. This witness was sought to be falsified by cross-examination on the basis of their dispute and differences on account of payment of tuition fees.

7. The emphasis of the defence is on failure of the prosecution to bring before the Court the record pertaining to test identification parade which according to the defence was conducted, however, the prosecution failed to identify the accused. On the other hand, the prosecution has maintained silence, and did not bring before the Court the record of test identification parade which according to the prosecution had remained incomplete because the prosecutrix did not attend the test identification parade. PW-10 Arjun Pundalikrao Mudgal the Investigating Officer has said about the test identification parade in the cross-examination as follows:

"2...

It is not correct to say that identity of accused was uncertain. It is correct to say that I arranged for identification parade on two dates. It is correct to say that I had issued 2 letters Exhs. 48 and 49 to accused on 14-2-2002 identification parade could not be held as victim girl was not sent as her father was out of station on labour job. It is not correct to say that on 22-2-2002 victim girl was present in the office of N. T. Adyal for identification parade. It is not correct to say that as victim girl could not identify the accused papers of identification parade are not produce letter the Court. I arranged identification parade as the victim girl had mentioned in her report that she knows the accused by face."

8. Insofar as the PW-3 father of the prosecutrix Laxman Chauhan is concerned he was also asked about identification parade, he replied as follows:

"2...

It is correct to say that police sent a letter to remain present in the office of Tahsildar on 14-2-2002 for identification parade along with my daughter. Witness volunteers that when letter came to my house I was not there I had been to Nagpur. I have not received letter of police to remain present for identification parade on 22-2-2002 along with my daughter. It is not correct to say that on 22-2-2002 I had been to Tahsil Office along with my daughter."

9. It would be necessary to deal with the report of the Chemical Analyser. The C. A's report pertaining to the prosecutrix do not in any manner throw light on the case of the prosecution.

10. The learned Advocate had urged the following points in support of the claim for acquittal which are as follows:

(i) The prosecutrix being the same person who was examined cannot be said to have been raped because the cross-examination of Dr. Ramteke discloses that he has clearly stated that he cannot say that the prosecutrix before the Court is the same person who was or may have been raped.

(ii) Though inference available from the medical evidence is that sexual intercourse may have occurred, the testimony of Dr. Ramteke creates a grave doubt since in the examination in chief, he did not say that this was a case of rape.

(iii) The identity of the accused as person having committed the crime is not proved for the reasons namely:

(a) The prosecutrix admitted that she has seen the accused for the first time in the Court.

(b) She did not know the accused any time in the past.

(c) She has not given description of the accused who has committed the rape and only the description given is about the colour of cloths which the accused was wearing.

(iv) The prosecution story was based on a child witness whose oath worthiness was not tested and recorded by the Court.

(v) Test Identification Parade was conducted where the prosecutrix did not identify the accused and this record was admittedly withheld from the Court.

(vi) The prosecution has withheld the evidence of Identification Parade from the Court because it was adverse to it. It is, therefore, suggested that the accused was falsely involved and is not the person who had really committed any offence.

11. Learned Advocate in support of his submissions relied on the following Judgments:

(1) Yogendra Morarji Vs. State of Gujarat, , (2) Baljit Singh and Another Vs. State of Uttar Pradesh, . These Judgments are relied upon in order to demonstrate that:

(i) If the case is such where reasonable doubt is created, benefit should go to the accused.

(ii) When the evidence in possession of Investigating Agency was withheld from the Court, adverse inference should be drawn.

12. In the background of the aforesaid evidence, the argument of the learned Advocate for the appellant need to be tested.

13. The prosecution on the other hand supported the Judgment contending that the medical evidence proves the rape and that the accused has been duly identified.

14. This Court has discreetly examined the oral evidence and scrutinised the submissions of both sides. Thereupon what this Court finds is as herein-below :

(1) It cannot be concluded from the medical evidence that the prosecutrix was raped.

(2) The identity of the accused is not established.

(3) The identity of victim is not established.

(4) Adverse inference is liable to be drawn against the prosecution on account of failure to produce the record relating to test identification parade.

(5) The circumstance namely the prosecutrix failed to give features enabling the identification of the accused should weigh against the prosecution and in favour of the accused.

(6) The version of the Investigating Officer and that of the father of the prosecutrix is different rather contradictory on the point of serving of notice of test identification parade which fact would weigh against the prosecution.

These circumstances result in raising grave suspicion about the evidence of the prosecution and benefit of reasonable doubt which arise therefrom was found tilt in favour of the accused.

15. In the result, the Judgment and order of conviction does not get requisite legal support and the benefit of doubt goes in favour of the accused. The conviction and sentence is, therefore, liable to be set aside and accordingly set aside.

16. Appeal is allowed. Judgment and Order of conviction are set aside. The appellant be set at liberty.

17. Bail bond of the appellant shall stand cancelled.