

(2018) 02 BOM CK 0019
In the Bombay High Court
Case No : 594 of 2004

Shamlal s/o Punaram Achale

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 02-02-2018

Acts Referred:

Code of Criminal Procedure, 1973, Section 428 - Period of detention undergone by the accused to be set off against the sentence of imprisonment
Indian Penal Code, 1860, Section 376, Section 452 - Punishment for rape - House -trespass after preparation for hurt, assault or wrongful restraint
Evidence Act, 1872, Section 154 - Question by party to his own witness

Citation : (2018) 02 BOM CK 0019

Hon'ble Judges : Rohit B. Deo

Bench : Single Bench

Advocate : R.D. Hajare, P.S. Tembhare

Final Decision : Dismissed

Judgement

1. The appellant is assailing the judgment and order dated 17-3-2003 rendered by the learned II Additional Sessions Judge, Bhandara in Sessions Trial 139/2001, by and under which the appellant-accused is convicted for offence punishable under Section 452 of the Indian Penal Code (" IPC " for short) and is sentenced to suffer rigorous imprisonment for two years and to payment of fine of Rs.1,000/-. He is further convicted for offence punishable under Section 376 of the IPC and is sentenced to suffer rigorous imprisonment for seven years and to payment of fine of Rs.2,000/-.

2. The genesis of the prosecution lies in oral report dated 05-11-2001 (Exhibit 17) lodged by the prosecutrix (P.W.1) at Police Station Deori alleging that the accused subjected her to forcible sexual intercourse.

The gist of the report is thus :

The prosecutrix, then aged 12 years is residing with her parents at Toyangundi. The incident occurred on 04-11-2001. The father of the prosecutrix left the village at 6-00 a.m. to go to Deori for work. Her mother Sau. Meerabai went to the agricultural field at 10-00 a.m. and the younger brother, then aged 8 years, was playing with the village boys. The prosecutrix finished household work and was sleeping on the cot in the middle room of the house at 12-30 p.m. The accused, who resided in the neighbourhood, opened the door, approached the prosecutrix who was sleeping on the cot, pressed her mouth, lifted her in his arms and took her near the hearth in the varandah of the house of neighbour Radheshyam Achale. The prosecutrix resisted, but in vain. She was made to lie on the ground, her attempt to get up was thwarted by the accused who pressed both the thighs with his hands. The accused lifted her petticoat upward and removed and kept aside the knicker. The accused was wearing an underwear with a towel wrapped around the waist. He threw the towel aside, removed his underwear, stretched the legs of the prosecutrix, stretched her private part and inserted his penis forcibly into the vagina. The prosecutrix made an attempt to free herself, but could not succeed. The prosecutrix was experiencing pain in private part and blood oozed from the private part. The accused discharged sticky fluid into her private part which the prosecutrix wiped with petticoat. She suffered an abrasion on right elbow. She started weeping, the accused released her and fled. The prosecutrix disclosed to Siyabai Ingole and Asmita Lanjewar that the accused committed bad

act with her. She then narrated the incident to her mother at 5.30 p.m. who disclosed the incident to her father when he returned from work. The father of the prosecutrix decided to lodge the report on the next day since it was late in the evening. The prosecutrix, accompanied by her father, lodged the report on 05-11-2001 at 3-45 p.m.

3. On the basis of the said report, offence punishable under Sections 452, 376 and 506 of the IPC was registered. The prosecutrix was referred to the Hospital at Deori for medical examination and was examined at 7-15 p.m. on 05-11-2001. The accused was also referred for medical examination, he was examined at 11-05 a.m. on 06-11-2001. Investigation ensued, upon completion of which charge-sheet was submitted in the Court of Judicial Magistrate First Class, Sakoli, who committed the proceedings to the Sessions Court. The accused abjured guilt and claimed to be tried in accordance with law, the defence is of total denial and false implication.

4. Before I discussed the ocular evidence, it would be apposite to refer to the medical evidence on record. P.W.6 Dr. Bhimrao Meshram, who examined the prosecutrix, has proved certificate (Exhibit 37). P.W.6 Dr. Bhimrao Meshram has deposed that the prosecutrix had an abrasion over the extensor surface of the right elbow which was oval-shaped of size 1" x 1". The abrasion was black coloured and the age of injury was 18 to 24 hours. P.W.6 has further deposed that on examination of the private parts of the prosecutrix, he noticed :

- 1) No injury to perennial region.
- 2) Pubic hair were well grown.
- 3) Pubic hair were not stained with blood or any sticky material.
- 4) No foreign hair was sticking to her private part.
5. Hymen was ruptured and oedematous.
6. Anterior fornix oedematous and presence of bleeding

spots.

P.W.6 has deposed that in his opinion the prosecutrix was subjected to intercourse before twenty-four hours.

P.W.6, who also examined the accused, deposed that the accused had abrasion on his back, and, in his opinion, the accused had performed sexual intercourse within the last twenty-four hours. He has proved certificate (Exhibit 38) as regards the medical examination of the accused. In response to a suggestion that swelling may occur due to infection, P.W.6 states that although the swelling may occur due to infection, but, as a fact, there was no infection. He asserts that on the basis of the vaginal examination, he has come to the conclusion that there was sexual intercourse.

5. The report of the Chemical Analyzer reveals that the seized knicker of the prosecutrix was stained with blood. However, no semen was detected on the knicker. The analysis of Exhibits 1 to 5 and Exhibits 7 to 12 is of scant assistance to the prosecution.

6. The prosecution witnesses who are material from the perspective of the prosecution are P.W.1, who is the prosecutrix and P.W.7 Meerabai Ingole, who is the mother of the prosecutrix. The learned Counsel for the appellant would submit that the prosecutrix did not support the prosecution and the learned Additional Public Prosecutor was permitted to put questions in the nature of cross-examination, the prosecutrix did support the prosecution in the said cross-examination but then again when she was examined by the accused, she did a volte-face, which vacillating stands renders the testimony extremely unreliable. The submission is that the testimony of the prosecutrix must be kept out of the consideration, and if the testimony is discarded, there is no evidence on record to prove the offence under Section 452 or Section 376 of the IPC, much less to prove the offence beyond reasonable doubt.

7. P.W.1 has deposed in the examination-in-chief that on the day of the incident there was a quarrel between her and the accused when the accused had come to her house at 12-00 in the afternoon. She states that the accused abused her and went away and therefore, she lodged the report. She states that the accused did not do anything with her, nor she was examined by the medical officer. At this stage, permission under Section 154 of the Indian Evidence Act was sought and granted.

In the cross-examination by the learned Additional Public Prosecutor, the prosecutrix has supported the prosecution to the hilt. It would be apposite to reproduce the following portion of the cross-examination on behalf of the learned Additional Public Prosecutor :

It is correct that my jangiya had blood on it. There was a quarrel at the house of Radheshyam. The blood from the private part oozed out at the place which was soaked by Jangiya. Blood had oozed out and fallen on the earth where the quarrel had taken place. In the quarrel, I was frightened and therefore I could not shout. It is correct that on removing my Jangiya the accused performed bad job with me at the place of Radheshyam. It happened near the furnace in the house of Radheshyam. He had caught my hands, pressed my mouth and thigh when he performed bad job with me. Shamlal had removed the clothes on his person before performing bad job with me. That time he was wearing towel and underwear was brought down for performing bad job with me. The flow which had fallen on my private part was cleaned by him by my petticoat. I had injuries on my right elbow, because of the force used by him. After I got up I went to my house weeping. He had inserted penis in my private part and he was pushing me by force. When I was coming to home, I met my elder mother Siyabai and Asmita Lanjewar and I narrated them the

incident. My mother had come in late after noon at about 2 p.m. I narrated her the incident. I, my father and uncle Dudhram went for lodging the report. I have not stated these facts earlier with a fear of defamation.

However, in the cross-examination on behalf of the accused, the prosecutrix again states that the accused abused her and went away and that she is equating the quarrel to "bad act". This answer was in response to a court question. She admits that the accused did not perform any bad act with her. She admits that the blood stains on the knicker were due to menstruation. She admits that her father and the accused were not on talking terms and the contents in the report were narrated by her father to the police. When the prosecutrix admitted that the contents in the report were narrated by her father to the police, she was asked by the learned Judge to answer the question once again by looking at the Judge. The learned Judge has recorded the demeanour of the prosecutrix. The prosecutrix answered in the affirmative with an unhappy expression. She was then questioned by the learned Judge, and it would be apposite to note the question and the response of the prosecutrix as is recorded by the learned Sessions Judge :

Court question-

Q. When such an incident of rape is said to have been met with you, then why you are not speaking it out ?

A. Witness looks at the Court and keeps her neck bowed. No word is uttered by her.

8. P.W.7 Meerabai is the mother of the prosecutrix who has deposed that the prosecutrix narrated to her that the accused has done "bad act with her". The prosecutrix narrated that the bad act was done by force and she was frightened, is the deposition. In the cross-examination, her testimony is not shaken.

The prosecutrix, who was aged 13 years when her evidence was recorded, was indeed declared hostile and cross-examined on behalf of the prosecution. In the cross-examination, on behalf of the prosecution, the prosecutrix has narrated the incident with particularity. The prosecutrix further states that she did not state the correct facts earlier since she was apprehensive of being defamed. The prosecutrix did make a volte-face as is submitted by the learned Counsel for the accused, when she was cross-examined on behalf of the accused. The law on the probative value of the testimony of a witness who is declared hostile, is too well entrenched to warrant a lengthy discussion. The testimony of a hostile witness cannot be brushed under the carpet in its entirety, the testimony must indeed be subjected to close scrutiny and in the present case since the witness is a child, the Court must be extra cautious. The court must be on guard that the testimony of the child is not vitiated due to tutoring and the conscious of the court must be satisfied that the testimony of the child is confidence inspiring. Concededly, the prosecutrix has taken different stands in the examination-in-chief, the cross-examination on behalf of the prosecution and then in the cross-examination on behalf of the accused. However, it would be a travesty of justice if her testimony is brushed aside without endeavouring to separate the grain from the chaff. The learned Sessions Judge, who had the benefit of observing the demeanour of the prosecutrix, has made certain observations, which are referred to and reproduced supra. The prosecutrix, who was aged 10 years or thereabout on the day of the incident and approximately 13 years when the evidence was recorded, has stated at one stage that she did not disclose the facts in the examination-in-chief fearing defamation. The demeanour of the prosecutrix as recorded by the learned Sessions Judge is eloquent. The prosecutrix who was aged 13 years was alive to the unfortunate and condemnable reality of life

that rape, in the non permissive Indian society, is considered to be a stigma, the memories of which haunt the victim forever and the burden of which the girl has to carry throughout her life. The parrot like admissions given in the cross-examination on behalf of the accused, including the admission that the bleeding was due to menstruation, which admission is clearly inconsistent with the medical evidence on record (she had menstruation on 05-11-2001) do not detract from the probative value of her version in the cross-examination on behalf of the prosecution, which, in my opinion, is confidence inspiring.

9. It is true as submitted by the learned Counsel for the accused, that the prosecution did not examine the two ladies to whom the prosecutrix immediately narrated the incident nor was the father of the prosecutrix examined. However, the evidence of the prosecutrix is amply corroborated by the evidence of her mother Meerabai (P.W.7) and the medical evidence is on record. The cry of the victim for justice and the societal interest that the perpetrator of the crime must not go unpunished cannot be held hostage to shoddy or incompetent or unfair investigation.

10. The conscious of this is satisfied, that the prosecution has established offence under Sections 452 and 376 of the IPC against the accused beyond reasonable doubt.

11. The appeal is sans merit and is dismissed.

12. The accused be taken into custody to serve the sentence.

13. The accused is entitled to set off under Section 428 of the Criminal Procedure Code.

14. The fees of the learned Counsel appointed for the appellant are quantified at Rs.5,000/-.