
(2014) 01 BOM CK 0045
In the Bombay High Court
Case No : Criminal Appeal No. 202 of 2010

Sharad Kashiram Rathod

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 08-01-2014

Acts Referred:

Penal Code, 1860 (IPC) — Section 363, 366, 376(2)(f)

Citation : (2014) ALLMR(Cri) 2356

Hon'ble Judges : R.P. Sondurbaldota, J

Bench : Single Bench

Advocate : Aniket Vagal, Advocate for the Appellant; Y.S. Shinde, APP, Advocate for the Respondent

Final Decision : Allowed

Judgement

R.P. Sondurbaldota, J.—By this appeal, the appellant challenges his conviction and sentence for the offences punishable under Sections 363, 366 and 376(2)(f) of Indian Penal Code (IPC). He has been sentenced to suffer Rigorous Imprisonment for 5 (five) years, 5 (five) years and 10 (Ten) years respectively, for the offences. The complainant is the father of the victim girl, then aged 9 years. He carries on business of hawking onions and potatoes. He resides along with his wife and four daughters. It is the prosecution case that on 6th December 2007, at about 2.30 p.m., complainant returned home because of chest pain. At that time, his wife and the victim girl were present in the house. He gave some money to the victim girl and asked her to get some medicine for him. At about 3.30 p.m., she returned home crying and in scared condition. She had not brought any medicines. On questioning, she disclosed that when she was near Alfa Shop at Irla Society Road, the accused came near her and said that he was having some money belonging to her father and that he would hand the same over to her. He took her by S.V. Road to 3rd floor of Udayam building, near Sony Mony shop. There he took out a small bottle of oil, removed the girl's pyjamas and also his own pants. He applied oil on her private part and then had sexual

intercourse with her. When the victim girl shouted, he moved aside. He hastily put on her pyjamas and ran down the staircase.

2. The complainant and his wife then found that the victim girl was bleeding from her vagina. This convinced them that she had been raped. Therefore, they took her to the place of the incident where they saw a plastic bottle of parachute oil costing Rs. 1/-. From there, they came to Police station for lodging the complaint. The victim girl was then initially taken to Cooper hospital and later on to Oshiwara Maternity Home, Jogeshwari (West), where she was admitted for treatment. During the course of investigation, the police drew spot panchnama and seized the oil bottle. They also seized the clothes of the victim girl. During the course of investigation, the appellant was arrested on 14th December 2007. Thereafter, the clothes of the appellant were seized. The clothes were sent to Chemical Analyser. The Test Identification Parade in respect of the appellant was conducted by PW5. After collecting the medical papers and reports of Chemical Analyser, charge-sheet was filed against the appellant.

3. The prosecution examined in all 8 witnesses to establish its case. PW1 is the complainant and father of the victim girl. PW2 is the victim girl. PW3 and PW4 are panchas for spot panchnama and for the clothes of the appellant. PW5 is the Special Executive Officer who conducted the Test Identification Parade. PW6 is the doctor attached to Cooper hospital. PW7 and PW8 are two of the Investigating Officers. On appreciation of the evidence, the Sessions court found that the prosecution had succeeded in establishing that the appellant had kidnapped the victim girl from the guardianship of her parents with the intention of compelling her to sexual intercourse. It also succeeded in establishing that he had committed rape upon her and had criminally intimidated her and sentenced the appellant to the punishment as described above.

4. Amongst several other grounds of challenge to the order of conviction. Mr. Vagal, the learned advocate for the appellant, submits that two are most important. The first is that no offence of rape can be said to have been disclosed by the facts alleged by the prosecution, and secondly, the identification of the appellant by the victim girl in the Test Identification Parade, is highly suspicious. He also submits that the Test Identification Parade was not conducted properly. Therefore, identification of the appellant by the victim girl cannot be believed. He further points out that there are serious contradictions in the evidence of PW1, PW2 and the First Information Report (FIR) registered at the instance of PW2. Also, the medical evidence does not support the prosecution.

5. It has been the evidence of PW1 that on the date of the incident, he returned home because of chest pain. He had sent the victim girl to purchase medicines for him. But the girl returned home weeping at about 3.30 p.m. She disclosed that one person on the pretext of giving money, had taken her to the 3rd floor of one building behind Sony Mony shop. There he had given her a small bottle of coconut oil and asked her to apply oil to his penis. He also asked her to apply oil to her private parts, then he slept on her and committed rape upon her. PW1

then checked her private parts and found that there was bleeding. After that he, accompanied by his wife and the victim girl, went to that building and found a small bottle of coconut oil lying at that place. From there, they went to police station to lodge complaint.

6. PW1 and PW2 are the main witnesses of the prosecution. Apart from the variance in their depositions on some of the material particulars, what can be noticed as unusual and striking is that while the wife of PW1 was at home, he sent his 9 years old daughter to the chemist for getting medicines for him for chest pain. He had not even specified the medicine to be purchased. Secondly, the evidence of both these witnesses does not refer to the place from which the victim girl was picked up by the appellant. This fact would be relevant as the same is the starting point of the incident alleged by the prosecution. PW2, the victim girl, stated in her evidence that she was taken to third floor of one building near a nariyal shop, where the appellant gave her one small bottle of coconut oil to tear. When she was unable to tear it, he abused her and shouted at her. Then the appellant himself tore open the bottle. He removed his pants and salwar of the victim girl. He applied oil to her private parts, made her lie down and committed rape upon her. Thereafter, he asked her whether she knew the way to reach home and offered to reach her home otherwise. The victim girl had replied that she could go home alone. She then returned home and told the incident to her parents.

7. It is the specific case of the prosecution and also the evidence of PW1 that the victim girl was bleeding from her vagina when she came home. The victim herself has not said so. The report of the Chemical Analyser as regards the salwar of victim girl shows that neither blood nor semen was detected on it. In that circumstance, the statement of the complainant that the victim was bleeding from her vagina becomes a suspect. The prosecution has produced the medical case papers from Cooper hospital, and also the Medical Examination Certificate. As per the certificate, on local examination of the private parts of the victim girl, it was noticed that the hymen was intact. There was soreness at 7 O'Clock at fourchette. There is no mention of bleeding therein. The medical case papers of the hospital, however, record the findings of local examination as follows:

L/E: Labia majora

Labia minora | developed

no pubic hair

Hymen not torn with fresh ragged edges, Soreness at 7 O' Clock post at fourchette, no per vaginal bleeding

PR - Patient not allowing examination.

The word "not" is seen to be cancelled indicating that the hymen was torn with fresh ragged edges. But, at the same time, the case papers also record that there was no evidence of any external injury on body parts and private parts.

PW6 is the doctor, who had examined the victim girl. He deposed that the hymen of the victim girl was intact, but there was soreness at 7 O'clock at fourchette. She opined that it was a case of an attempt of rape. Thus, part of the medical record needs to be disbelieved. Mr. Vagal, learned advocate for the appellant, submits that this creates doubt about commission of the offence of rape.

8. Mr. Vagal submits that even the Test Identification Parade in respect of the appellant is not free from doubt. According to him, the Test Identification Parade was not conducted in a proper manner and the identification of the appellant was also not proper. PW5 is the Executive Magistrate who conducted the Test Identification Parade. He deposed that at his request, Jailer Shri Baviskar, produced six dummies who were similar to the appellant with respect to age, complexion, height and looks. He recorded the names of the dummies and made them stand in a row. The appellant stood between dummies Nos. 4 and 5. When the victim girl was brought into the room of Test Identification Parade, she viewed all the persons in the row minutely and saw the appellant present between dummies Nos. 4 and 5. She started shivering and pointed to the appellant by her finger and said that he was the same person who had taken her on third floor of the building and committed rape upon her. In his cross-examination, PW5 said that he did not draw any panchnama of the Test Identification Parade, as according to him it was not necessary. He identified the appellant as the person who had been identified by the victim girl. Mr. Vagal submits that it was necessary for the victim girl to identify the appellant by touching him and assigning the role in the offence. Therefore, according to him, the identification of the appellant was not proper. In my opinion, considering the nature of the offence and the effect upon the victim girl, as described by PW5, it would be too much to expect that the victim girl would identify the appellant by touching him. But, nevertheless, there is no panchanama drawn and there is also no further statement of the girl recorded.

9. PW1 had deposed that the police had taken into custody the clothes of the victim girl. He had identified the clothes produced in the court by the prosecution. He, however, did not say how and where, were the clothes seized. He did not depose about the sealing of the clothes either. Similar is the situation as regards the clothes of the appellant. There is nothing to show that the clothes had been seized. There is also no evidence before the court as to how and from where, was the appellant arrested. PW7, the Investigating Officer, says nothing about the arrest of the appellant. PW8 is the second Investigating Officer, who deposed about the arrest of the appellant on 14th December 2007 and all the steps taken during the investigation of the offence. In his evidence, he merely stated that the appellant was arrested on 14th December 2007 without stating as to how and from where the arrest was effected. There is also no arrest panchnama produced. As per the evidence of PW8, on 17th December 2007 the investigation in the case was transferred to A.P.I. Shri Nikam, who has not been examined. This witness refers to investigation done by one A.P.I. Shri Rane also, who had allegedly arranged for Test Identification Parade and sent the clothes of

the accused for chemical analysis. A.P.I. Rane has also not been examined in the case. Thus, the record shows that not only some of the steps during investigation into the offence alleged were not taken, but the Officer taking some other steps in investigation has also not been examined. There is nothing on the entire record to connect the appellant to the offence alleged against him, except for the Test Identification Parade. The material on record, thus, creates doubt as regards commission of the offence, and the benefit of that doubt must be given to the appellant. The appeal is, therefore, allowed. The order of conviction of the appellant dated 2nd March 2009, passed by the Additional Sessions Judge, Greater Bombay, for the offences punishable under Sections 363, 366 and 376(2)(f) of Indian Penal Code is set aside. The appellant is acquitted of the offences punishable under Sections 363, 366 and 376(2)(f) of Indian Penal Code. Parties to act on an authenticated copy of this order.