
(2014) 03 BOM CK 0244
In the Bombay High Court
Case No : Criminal Appeal No. 350 of 2012

Siddharth	Vs	APPELLANT
State of Maharashtra and Others		RESPONDENT

Date of Decision : 25-03-2014

Acts Referred:

Penal Code, 1860 (IPC) — Section 376, 417, 506, 90

Citation : (2015) ALLMR(Cri) 2275

Hon'ble Judges : M.L. Tahaliyani, J.

Bench : Single Bench

Advocate : R.G. Kavimandan, Advocate, for the Appellant; A.K. Bangadkar, APP, for the Respondent

Final Decision : Allowed

Judgement

M.L. Tahaliyani, J.?Heard. The appellant is convicted for the offences punishable under Sections 376, 417 and 506 of the Indian Penal Code by learned Additional Sessions Judge, Malkapur in Sessions Trial No. 33 of 2012 (Old No. 121 of 2010).

2. The appellant is resident of village Sonbarad within the jurisdiction of Police Station, Dhamangaon Badhe, District: Buldana. Shri Ashok Ahire is maternal uncle of the victim and he was living in the same locality. House of the appellant was adjacent to the house of maternal uncle of the victim Aarti. Aarti was more than 16 years of her age at the time of the alleged incident. She was studying in 10th standard.

3. The incident occurred when parents, brothers and sisters of the victim had gone to Mumbai to earn their livelihood. It is alleged that the appellant had entered the house of the complainant after 56 days of departure of the parents of the complainant. He had sexual intercourse with the complainant on the pretext that the appellant would marry the complainant. This went on for few occasions. The appellant was regularly visiting the house of the complainant and was having sexual intercourse with the complainant. By the time parents of the

complainant came back from Mumbai the complainant was pregnant by 4 1/2 months. She narrated the incident to her father. The matter was reported to police. The first information report was registered vide First Information Report No. 224 of 2010 at Dhamangaon Badhe Police Station. During the course of investigation statements of the witnesses were recorded, spot panchnama was drawn and after completion of investigation chargesheet was submitted in the Court of Magistrate. It was committed to the Court of Session for trial according to law.

4. The prosecution had examined in all seven witnesses. P.W. 1 is complainant. P.W. 2 is panch witness. P.W. 3 is father of the complainant. P.W. 4 was working in Revenue Department and he has prepared sketch map of the spot. P.W. 5 is also panch witness. P.W. 6 is Headmaster of the school where P.W. 1 was studying. P.W. 7 is Police Officer who has investigated the case.

5. In the present judgment, to my mind, the discussion of evidence of P.W. 1 and P.W. 3 father of P.W. 1, P.W. 6 Headmaster and P.W. 7 Investigating Officer would be sufficient to decide the case on merits. Seizure of the clothes of the appellant and the complainant and medical examination, if any, hardly makes any difference, particularly when the sex appears to be by consent.

6. P.W. 3 came to know about the incident only after his arrival from Mumbai. He was told by his daughter P.W. 1 that the appellant had sexual intercourse with P.W. 1. P.W. 3 had visited the house of the appellant but he did not get any positive response from the appellant and therefore, police report was lodged.

7. P.W. 6 has stated that, according to school record, date of birth of P.W. 1 was 10th June, 1993. The matter was reported to police in the month of September, 2010. P.W. 1 was carrying pregnancy of 4 1/2 months at that time. So, let us assume that the first ever sexual intercourse between the appellant and P.W. 1 had taken place some time at the end of April, 2010. P.W. 1 was obviously more than 16 years old at the time of the first ever sexual intercourse between the appellant and P.W. 1. As such, she was of consenting age.

8. The evidence of P.W. 7 is also not required to be discussed in detail. The whole case, in fact, can be decided on the basis of the evidence of P.W. Nos. 1 and 6. I have already discussed the evidence of P.W. 6 and I have come to a conclusion that the complainant was more than 16 years old at the time of the first ever sexual intercourse. P.W. 1 has repeatedly stated in her evidence that the appellant had sex with him on many occasions by force. However, reading of her evidence gives clear impression that it was by consent. The only question which needs determination in the present appeal is whether the consent was a free consent or otherwise.

9. Section 90 of the Indian Penal Code deals with consent known to be given under fear or misconception. Section 90 runs as under:

"90. Consent known to be given under fear or misconception - A consent is not

such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception;"

10. P.W. 1 in her evidence wanted to convey that she has given consent under fear or misconception of fact that the appellant would marry her. The first ever incident had occurred at about 9.00 p.m., 56 days of the departure of the parents of P.W. 1 to Mumbai. The appellant had entered the house of P.W. 1 and he suggested that they should marry. P.W. 1 responded by telling the appellant that he could discuss the subject of marriage with her parents. Thereafter the appellant had allegedly closed doors of the house. He held hand of the appellant and removed her clothes. It is stated by P.W. 1 that the appellant had forcibly committed sexual intercourse with P.W. 1. However, there are no details as to how the force was used and as to whether P.W. 1 had resisted the attempt on the part of the appellant. What is pertinent to note is that the appellant had allegedly threatened P.W. 1 that if she did not permit him to have sexual intercourse she would be killed. P.W. 1 has stated that the appellant had again visited her house during night time after 56 days of the first incident and had forcible sexual intercourse with her. P.W. 1 has repeated same story that the appellant had threatened that she would be killed if she did not permit the sexual intercourse. It is stated by this witness that the appellant had visited her house at least on 5 to 6 occasions and had forcible sexual intercourse with her. As far as misconception of the fact is concerned, P.W. 1 in her evidence has clearly stated that she had not consented for marriage and that she had told the appellant that he could discuss the marriage issue with her parents. Therefore, the question of giving consent under misconception of fact did not arise. When P.W. 1 herself was not ready to negotiate marriage with the appellant, question of she giving consent under expectation that the appellant would marry her did not arise.

11. Therefore, what is required to be examined is, whether P.W. 1 was put under fear and that the consent was given by P.W. 1 under fear of injury. P.W. 1 has stated on more than one occasions that she was threatened that she would be killed if she did not permit sex to the appellant. However, the evidence of P.W. 1 does not appear to be reliable. In the first place P.W. 1 did not inform anybody including her maternal uncle who was staying next door that the appellant had entered her house at 9.00 p.m. and had forcible sexual intercourse with her. What is interesting is that P.W. 1 allowed the appellant at least for 56 times to enter her house and to have sex with her. Had there been threat on the part of the appellant, P.W. 1 would have definitely disclosed this fact to her maternal uncle. It appears that P.W. 1 herself was interested and she wanted to maintain secrecy of her affair with the appellant. It is possible that P.W. 1 would not have disclosed her physical intimacy to her father had she not been pregnant.

12. In view of what has been stated by me herein above it is abundantly clear that the question of misconception of fact did not arise and there is no evidence

that the consent was given by P.W. 1 under fear of injury. On the contrary, the evidence suggests that the sex between the appellant and P.W. 1 was by consent. As far as charges under Sections 417 and 506 of the Indian Penal Code are concerned, the same must fail, as the appellant had not applied any deceitful means to get consent of P.W. 1. I have already given a finding that there was no threat on the part of the appellant. As such the charge under Section 506 of the Indian Penal Code also will not survive. The appeal, to my mind, deserves to be allowed. Hence, I pass the following order.

- i. The appeal is allowed.
- ii. The judgment and order passed by learned Additional Sessions Judge, Malkapur in Sessions Trial No. 33 of 2012 is set aside.
- iii. The appellant is acquitted of the offences punishable under Sections 376, 417 and 506 of the Indian Penal Code.
- iv. Fine, if any, paid by the appellant shall be refunded to him immediately.
- v. The appellant be released from the prison forthwith, if not required in any other case.

The appeal stands disposed of accordingly.