
(2016) 02 BOM CK 0031
In the Bombay High Court
Case No : Criminal Appeal No. 252 of 2015

Sujit Bhurandas Borkar

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 03-02-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 361, Section 363, Section 366, Section 376

Citation : (2016) ALLMRCri 2029 : (2016) 4 BomCR(Cri) 759

Hon'ble Judges : A.B. Chaudhari, J.

Bench : Single Bench

Advocate : A.K. Bhangde, Advocate, for the Appellant; Jawade, Addl. Public Prosecutor, for the Respondent

Final Decision : Partly Allowed

Judgement

A.B. Chaudhari, J.—1. Being aggrieved by the Judgment and Order dated 28th January, 2015 passed by learned Principal District Judge, Gondia, in Sessions Trial No. 76 of 2011, convicting and sentencing the appellant, accused, Sujit Bhurandas Borkar, of offences punishable under Sections:-

[a] 363, Indian Penal Code [Rigorous Imprisonment for five years and to pay a fine of Rs. 2,000/-, in default, further Rigorous Imprisonment for two months],

[b] 366, Indian Penal Code, [Rigorous Imprisonment for five years, and to pay a fine of Rs. 2,000/-, in default, further Rigorous Imprisonment for two months],
and

[c] 376, Indian Penal Code [Rigorous Imprisonment for ten years and to pay a fine of Rs. 20,000/-, in default, further Rigorous Imprisonment for six months],

the present appeal has been filed by the appellant Sujit Borkar.

2. In support of the appeal, learned counsel for the appellant vehemently argued that record of the case shows that the appellant, accused, was not in a normal mental state for reasons more than one. Even the record during trial and

thereafter, and various communications made by him show his abnormal behaviour. According to him, since the mental unfitness of the appellant was clearly visible, in that he was not normal, inasmuch as he filed Exhs.7 and 15 before Trial Judge before commencement of trial on his own, stating that he did not want any legal assistance from the Legal Aid Committee, Govt., and the Court, and would himself defend his side, the Trial Court should not have held trial without giving him legal assistance. The counsel also pointed out that the cross-examination made by appellant himself as per his own choice is certainly not the way in which cross-examination is done by a cross-examiner. This has caused a very serious prejudice to the appellant. He did not get a fair trial. According to Mr. Bhangde, the appellant should have been sent by the learned Trial Judge for finding out his mental fitness and then the Trial Court should have decided whether to allow him to defend himself or for giving help of an Advocate. The fact remains that he was never given the help of an Advocate and the trial went ahead till the culmination of trial ultimately resulting into conviction of the appellant for the serious offence of rape.

3. Learned counsel for the appellant then, without prejudice to the above contentions, submitted on merits of the matter that the story of the prosecution since beginning is contradictory, inconsistent and cannot be reconciled. The contradictions inherently seen in the prosecution case are so material that the prosecution case is required to be rejected and the appellant, accused, is required to be acquitted. The learned counsel relied on the decision of Supreme Court in the case of Hussainara Khatoon & others (V) Vs. Home Secretary, State of Bihar, Patna [, 1980 SCC (Cri) 50] and the learned APP fairly relied on the decision of the Supreme Court in the case of Mohd. Hussain alias Zulfikar Ali Vs. State (Govt. of NCT of Delhi) [(2012) 2 SCC 584].

4. Per contra, learned APP supported the impugned Judgment and Order, and submitted that under the rules, no compulsion can be made on the appellant, accused, or the litigant, to accept the legal aid. In the instant case, according to him, the appellant, accused, himself filed applications [Exhs. 7 and 15], stoutly refusing the help from Legal Aid for defending his case. According to Mr. Jawade, learned APP, there is no procedure for imposing legal aid on somebody who does not want it, nor there is any such legal obligation. He, therefore, prayed for rejection of this plea raised by the appellant, accused.

5. On merits, learned APP contended that there are testimonies of "P" [PW 2], her sister, Madhuri Ramteke [PW 4], and her father, Ashok Ramteke [PW 3], which are corroborated by the First Information Report and there is no reason why this Court should not, as has been done by the Trial Court, believe the testimony of "P" [PW 2] on the incident proper. He, therefore, submitted that there is no merit in the appeal and the same should be dismissed.

6. With the assistance of the learned counsel for the rival parties, I have gone through the entire record, order-sheets, evidence, oral as well as documentary. I have also seen the reasons recorded by the learned Trial Judge.

7. Upon hearing the learned counsel for the rival parties, at the outset, I am inclined to reject the submission made by learned counsel for the appellant about the grievance of the accused, appellant, not being sent for medical examination of his mental health and/or for a legal aid. It appears from the record that the appellant in his admancy made applications etc., during the course of trial. But then, he was not insane or mentally unfit to take a decision regarding offer for legal aid. At any rate, at the inception, he submitted Exh.7 on his own volition that he did not want any legal aid or assistance from the Govt., and on the contrary, would like to defend himself. He then repeated the same by way of Exh.15. I am, therefore, of the opinion that the contention raised by Mr. Bhangde in this connection has no merit.

8. The next question is about the offences for which the appellant was convicted by the Trial Judge. In this connection, the utmost important factor, that was required to be satisfactorily proved by the prosecution, was the age of "P" [PW 2]. In a most casual manner, the prosecution placed on record the certified copy of a Bona fide Certificate from the school showing the date of birth, and was readily accepted by the learned Trial Judge without insisting for the legal proof thereof. By merely tendering or by merely exhibiting a Certificate, the date of birth cannot be said to have been proved according to Evidence Act. It was incumbent on the part of the prosecution to prove the entry from the Register of Date of Birth or in respect of Bona fide Certificate through the concerned Headmaster or the school authorities by summoning the concerned person in the Court. But that was not done. The only inference, therefore, that will have to be drawn, is that the date of birth has not been proved from the documentary evidence.

9. The next question is as to the offences in question. Perusal of the evidence of Ashok Ramteke [PW 3] and the report lodged with the Police Station show that when Ashok Ramteke [PW 3], a rickshaw puller, returned back to his house at about 11.50 p.m., his younger daughter, Madhuri [PW 4], told him that the appellant had taken "P" [PW 2] on his motorcycle by saying that her father was not well and that was done at about 10.45 p.m. The report then shows that a search was taken by him here and there, but could not locate her and, therefore, the appellant had kidnapped his daughter. As against this, the evidence of "P" [PW 2] shows that the incident occurred at about 4.00 pm on 8th February, 2011 when she had gone to shop for bringing a cake and the appellant was in front of the shop and he told her that her father was unconscious and, therefore, from that shop, she went on his motorcycle to his house. After reaching his house, he told her that he would marry her, gave her food and thereafter committed the offence of rape. Her mother came to the house of accused and scolded the accused. He threatened her mother in respect of the incident. He did not allow "P" to go from his house. Her mother came there at the same time. Thus, the time when her mother came to house of the accused appears to be around 5.30 p.m., when the girl is said to have gone at 4.00 p.m., with the accused.

10. Similarly, evidence of Madhuri [PW 4], her younger sister, shows that immediately after PW 2 went on the motor cycle of accused, she told her mother and both of them went to the house of the accused and had broken the door of his house by repeatedly hitting the same by kick blows. When they entered his house and tried to take back PW 2, since the accused resisted their attempt, they could not take back PW 2 with them. Immediately thereafter, they went to the Police Station. PW 4 then says that her sister came back to her house on the next day early in the morning. As against this, Ashok Ramteke [PW 3] stated in his evidence that at about 9.30 p.m., he came to the house. On reaching home, he came to know about the incident and he went towards the house of the accused and thereafter lodged the report [Exh.17] with the Police Station and PW 2 was brought to his house by 5.00 a.m., by the police. Sana entry on his report [Exh.17] seems to have been taken at 1.15 a.m., on the next day.

11. It is true that the substantive evidence of PW 2 as to the actual offence of rape has gone unchallenged. But then, merely on that basis, the Court would not record conviction if the other entire evidence is fully inconsistent, contradictory and without any corroboration, particularly the medical evidence. The medical evidence shows no signs in the examination of injuries to the private part and reading of the medical evidence, to my mind, clearly shows absolute absence of the signs of rape. Not only this, the evidence of Dr. Kalpana [PW 7] also shows no external injury to the accused too. The scientific evidence is also totally absent about the signs of intercourse. In such a situation, it is difficult to believe that the prosecution proved beyond any shred of doubt commission of offence of rape.

12. The incident is of the date 8th February, 2011, i.e., prior to the amendment to the Indian Penal Code and, therefore, the old law would govern the case at hand. Since the prosecution failed to prove its case regarding the age of the prosecutrix, so also the sexual intercourse and it is unbelievable having regard to the major contradictions and inconsistencies in the prosecution evidence that the offence of rape could be said to have been proved, looking to the long stretch of time from 4.00 p.m., to 1.15 a.m., without any evidence of shouting by any of them, or as the case may be, I am of the firm opinion that the appellant deserves to be acquitted of the offence under Section 376, Indian Penal Code.

13. The next question is about the offences under Section 363 and 366, Indian Penal Code, in respect of which, it clearly appears from the record that PW 2 was below 18 years of age and at any rate, being a girl, was taken from the lawful custody of her parents by the appellant and that evidence is supportable and well proved by the prosecution. Section 361 of Indian Penal Code provides that the offence of kidnapping would be constituted or proved in such an event. The appellant, a married person, indulged into kidnapping of PW 2. He then took her away to his house and wrongfully restrained her. That is clearly a foundational evidence for the offence on the strength of the evidence discussed by me above. As earlier stated, on the date of her deposition, PW 2 was married and is living

happily with her husband elsewhere. The appellant has already undergone the sentence of twenty-one months and ten days. He has a family with children to maintain. I think, the sentence which he has already undergone should subserve the interest of justice and, therefore, this is a fit case to reduce the sentence to the one already undergone by the appellant. To sum up, I make the following order:-

ORDER

[a] Criminal Appeal No. 252 of 2015 is partly allowed.

[b] The Judgment and Order of conviction recorded by the learned Trial Judge of offence under Section 376, Indian Penal Code, holding him guilty, is set aside, and the appellant is acquitted of the charge under Section 376, Indian Penal Code.

[c] The Judgment and order of conviction of the appellant of offences under Sections 363 and 366 of Indian Penal Code is confirmed and the Judgment recording sentence awarded to the appellant for these offences under Sections 363 and 366, Indian Penal Code, is modified and the appellant is sentenced to undergo Rigorous Imprisonment which he has already undergone.

[d] The appellant shall be released, if not required in any other crime.

[e] Since the appeal itself is decided today, Criminal Application [APPA] No. 461 of 2015 for suspension of sentence and grant of bail is rendered infructuous.