

(2018) 04 BOM CK 0093

In the Bombay High Court

Case No : CRIMINAL APPEAL NO. 570 OF 2006

THE STATE OF MAH & ORS

APPELLANT

Vs

SHIVAJI SHANKAR GHODEKAR & ANR S.

RESPONDENT

Date of Decision : 12-04-2018

Acts Referred:

Indian Penal Code, 1860 — Section 34, 314, 376

Scheduled Castes and Scheduled Tribes(Prevention of Atrocities)Act, 1989 — Section 3(1)(2)(5, (12), 3(2)(v)

Code of Criminal Procedure Code, 1973 — Section 313

Citation : (2018) 04 BOM CK 0093

Hon'ble Judges : T. V. NALAWADE, K. L. WADANE

Bench : Division Bench

Advocate : M.M. Nerlikar, S.G.Chincholkar

Final Decision : Dismissed

Judgement

K. L. Wadane,J.

1.The appellant has challenged the judgment and order delivered by the learned Adhoc District Judge, Nanded in Sessions Case No.123/2001 dated

27.04.2006, by which the accused persons i.e.respondent Nos.1 and 2 are acquitted from the charges punishable under section 376, 314 r/wÂ 34 of

the Indian Penal Code andÂ under sections 3(1)(2)(5)(12) of the Scheduled Castes and Scheduled Tribes(Prevention of Atrocities)Act, 1989.

2.Brief facts of the case may be stated as follows:

(1)Complainant Atmaram Sonkamble lodged complaint with Police Station Kinwat on 5th May, 2001 alleging that his sister (her name is withheld and

she is referred as ""victim""), aged about 15 years was taking education. Accused No.1 Shivaji developedÂ illicitÂ relations with the victim on false

pretext of marriage and therefore she was under conception from him. As soon as Shivaji came to know about the pregnancy of the victim, he

suggested her for abortion. On 19.04.2001 victim went to private hospital of Dr. Chinnawar at Kinwat i.e. Hospital of accused No.2 with her

sister Varsha for treatment and abortion of her fetus. It is further alleged that at the time of admission in the Hospital, name of the victim

was written as "Asha". she was admitted at about 10 a.m. and was discharged at 6.00 p.m. after abortion of the fetus. Accused No.1 borne all

the medical expenses and fees of the Doctor. It is further alleged that accused No.1 has then instructed the victim not to disclose the fact to

any other person.

(2) On 2nd May, 2001, the victim was suffering from stomach ache. Her urine was blocked and she was admitted in Rural Hospital at Gokunda for

medical treatment. The concerned Doctor advised for shifting her to Civil Hospital, Adilabad, therefore as per the advice, the victim was taken to

Civil Hospital At Adilabad. However, during the medical treatment she died on 05.05.2001 at about 5.30 a.m.

(3) On the basis of report submitted by the complainant, PSO Kinwat registered offence vide Crime No. 46/2001 under section 376, 314 read with

34 I.P.C. and under section 3(1)(5) and (12) of the S.C. and S.T. (Prevention of Atrocities) Act and handed over the investigation to Dy. S. P.

Shri Tamboli.

(4) During investigation, necessary panchanamas were prepared by the investigating officer. Statements of witnesses were recorded. Postmortem of

dead body of the victim was conducted. Viscera was preserved and was sent for chemical analysis. After completion of investigation, it

was transpired that accused No.1. committed rape on the victim and accused Nos. 1 and 2, in furtherance of their common intention, have aborted

fetus of victim by accused No.2 in her Hospital at Kinwat.

(5) The Judicial Magistrate, F.C. Kinwat has committed the case to the Sessions Court for its trial. Learned Additional Sessions Judge framed the

charge vide Exh.17 against Accused Nos. 1 under section 376 IPC and against accused No.1 and 2 under section 314 read with 34 IPC and u/s

3(1)(5) and (12) of the S.C. and S.T. (Prevention of Atrocities) Act and charges were read over to the accused to which they denied and claimed

to be tried.

(6) In support of their case, the prosecution has examined following witnesses:

- i. PW-1 Atmaram Sonkamble at Exh.44, complainant and brother of the deceased/ victim.
- ii. PW-2 Dr. Salma Hirani at Exh.47 to prove contents of the Postmortem report and cause of death.
- iii. PW-3 Maroti Kove at Exh.54, panch witness to spot panchanama.
- iv. PW-4 Varsha Sonkamble at Exh.58, sister of the victim.
- v. PW-5, Datta Kamble at Exh.59 to prove the panchanama of seizure of cloths.
- vi. PW-6 Fasiullah Ubedullah at Exh.62 to prove the panchanama of seizure of register in the Hospital of accused No.2.
- vii. PW-7 Nisar Ahmed Tamboli, Dy. S. P. Vardha as an investigating officer.
- viii. PW-8 Bapurao Nanaji Mamidwar at Exh.69, ASI, to prove seizure of clothe.
- ix. PW-9 Pradip Wamanrao Tribhuvan, P.I. who registered the offence on the report given by PW-1.

(7) Besides oral evidence of aforesaid witnesses, the prosecution has relied on the following documents.

- i. Exh. 45 Complaint/FIR
- ii. Exh.48 Postmortem report
- iii. Exh.50 Histopathology report
- iv. Exh.51 Certificate of cause of death
- v. Exh.55 Spot Panchanama
- vi. Exh.56 Panchanama of specimen handwriting of accused No.1.
- vii. Exh.57 Panchanama of seizure of letter from the house of accused no.1.
- viii. Exh.60 Panchanama of seizure of clothes of deceased.
- ix. Exh.63 Panchanama of seizure of register from the Hospital
- x. Exh.65 and 66, Arrest panchanamas of Accused Nos.1 and 2.
- xi. Exh.67 letter issued by investigating officer to handwriting expert.
- xii. Exh.74 inquest Panchanama.

(8) After completion of evidence of prosecution, accused persons were cross examined under the provisions of section 313 of the Criminal Procedure

Code. They have not lead any defence evidence. After hearing both sides and appreciating evidence on record, the learned Adhoc Additional

Sessions Judge, Nanded has come to the conclusion that the prosecution failed to

establish any of the charges leveled against the accused,
consequently, acquitted both the accused. Hence this Appeal.

3. We have heard arguments Mr. M.M. Nerlikar, learned APP for the appellant State and Mrs. S.G. Chincholkar, learned counsel for respondent

Nos. 1 & 2. We have also perused the evidence on record.

4. At the outset, it is material to mention here that though it is alleged by the prosecution that accused No. 1, under the pretext of marriage, committed

rape on the victim, however, there is absolutely no evidence against accused No. 1 to that effect. Merely witness PW-4 Varsha stated that she had

seen accused No. 1 and victim talking in the field. Further it reveals from the record that field of father of victim is adjacent to the field of accused

No. 1. Therefore, merely accused No. 1 and victim found talking with each other in the adjacent field of the victim is not sufficient to infer that accused

No. 1 was having illicit relation with the victim. On this circumstance, one cannot jump to the conclusion that accused No. 1, under the pretext of

marriage, had committed sexual intercourse or rape on the victim. In the circumstance, the prosecution failed to prove that accused No. 1 has

committed rape on the victim/sister of the complainant.

5. It is claimed by the prosecution that due to relation of the accused No. 1 with victim, the victim was under conception and accused No. 1 came to

know about this fact and thereafter victim, along with PW-4 Varsha went to Hospital of accused No. 2 at Kinwat on 19.04.2001, where she was

admitted during the period from 10 a.m. to 6.00 p.m. According to the prosecution accused No. 2 caused abortion of fetus of the victim.

6. We have gone through the oral evidence of witnesses of Dr. Salma Hirani PW-2 and PW-4 Varsha respectively coupled with relevant medical

report/certificates. On perusal of oral evidence as well as medical certificate, basically it is not established by the prosecution that at the relevant

time, victim was pregnant. Therefore, it is necessary to consider evidence on record for its reappreciation and for that purpose, evidence of witness

PW-2 Dr. Salma Hirani is very material.

7. From the evidence of PW-2 Dr. Salma Hirani it appears that she conducted postmortem of dead body of the victim and opined cause of

death due to Cardio respiratory arrest due to shock secondary to Peritonitis with Vaginitis. Further, it reveals from the oral evidence that this

witness sent uterus of the victim for examination to Histopathology department and Histopathology department has given finding that

Endometrium is unremarkable and product of conception is not seen. Exh.49 is the investigation report of Histopathology department, from

which, it appears that products of conception were not seen. Furthermore, the death certificate issued by Civil surgeon, Adilabad is placed on

record at Exh.51, wherein cause of death is mentioned as Cardio respiratory system failure coupled with Diabetic coma.

8. Cross examination of this witness Dr. Salma Hirani is very material. During the cross examination, she has stated that in many disease, there is

white discharge and she did not notice any perforation in the uterus. The size of perforation of uterus was normal. This witness further stated that

report of Histopathologist is conclusive proof about the conception. Here, in the present case, report of Histopathologist is important, from which, it

is very much clear that there was no product of conception. Therefore, basically, prosecution failed to establish that victim was pregnant. On perusal of

the further cross examination of witness PW2, it appears that this witness has stated that cardio respiratory arrest is the main cause of death. In

further cross examination, this witness has stated that patient/victim was brought in Rural Hospital, Kinwat on 03.05.2001 at 10.30 a.m. She was

complaining about stomach pain and Asthma and general condition of the patient was found poor and therefore her urine was tested and in the urine

test, she was detected diabetes, therefore patient was referred to Nanded but relatives of the patient taken her to Adilabad. Witness

PW2 has further stated that after perusing the treatment papers of Civil Hospital, Adilabad, it appears that blood sugar was 624 and Urine

Sugar is 2%, in such circumstance, the patient may go in Coma and death can be caused.

9. From the aforesaid evidence, it appears that there may be various cause of death of victim i.e. Diabetics, Asthma so also Cardio Respiratory

Arrest due to shock secondary to Peritonitis with Vaginitis. Peritonitis is an inflammation of the peritoneum, the tissue that lines the inner wall of the

abdomen and covers and supports most of the abdominal organs. Peritonitis is usually caused by infection from bacteria or fungi. Vaginitis is an

inflammation of the vagina that can result in discharge, itching and pain. The cause is usually a change in the normal balance of vaginal bacteria or an

infection. Reduced estrogen levels after menopause and some skin disorders can also cause vaginitis. In view of the aforesaid evidence, the

prosecution was not able to establish basically that deceased/ victim remained pregnant and subsequently she was subjected to abortion.

10. On perusal of the oral evidence of PW4 Varsha, it appears that she deposed that on 19.04.2001 she accompanied with her sister/victim to

Kinwat. On that day, she noticed that accused No.1 was standing near bus stand. He came towards them and had talk with the victim.

He took them to private Hospital of Dr. Chinnawar at Kinwat i.e. accused No.2. This witness further deposed that Accused No. 2 Dr.

Chinnawar examined the victim and thereafter victim was taken inside the delivery room. Thereafter, at about 3.00 p.m. this witness

went to the room of his brother and returned to the Hospital at about 4.00 p.m. At that time her sister/victim was shifted to other room from

delivery room. She disclosed her that she was under conception from accused No.1 Shivaji and Dr. Shubhangi Chinnawar has aborted her

fetus.

11. Oral evidence of this witness PW4 is falsified by the evidence of expert witness together with medical certificate. Further more, there was

omission and material contradiction in the oral evidence of PW4 Varsha which has been successfully proved in cross examination of the

investigating officer Nisar Ahmed at PW7. Some of the omissions are that

(1) The witness PW7 has deposed that witness PW4 Varsha has not stated in her statement before him that her sister/victim was under

conception from Accused No.1.

(2) Witness PW4 has stated before him in her statement that she herself and her sister/victim went to private hospital of accused No.2 for

abortion of her sister's fetus.

(3) The witness further stated that witness PW4 also has not stated in her statement that accused No.2 aborted fetus of her sister.

(4) Witness PW4 also not stated before him in her statement that victim died due to abortion conducted by accused No.2.

Therefore, looking to the material omissions, the evidence of the aforesaid witnesses and certain admissions given by them and the opinion as to the

cause of death, we are of the opinion that the prosecution has failed to establish the charge under section 314 read with 34 IPC against accused Nos.1

& 2.

12. In view of the above, offence under the Indian Penal Code punishable with imprisonment for a term of ten years or more has not been

established by the prosecution. Therefore, the offence under section 3(2) (v) of the Scheduled Castes and the Scheduled Tribes

(Prevention of Atrocities) Act, 1989 does not arise.

13. We have gone through the reasons recorded by the learned Adhoc Additional Sessions Judge, Nanded, who has correctly appreciated the

evidence and on reappraisal of the same, we are of the opinion that the finding recorded by the learned Adhoc Additional Sessions

Judge are legal and proper. Therefore it is not necessary to disturb the findings recorded by the learned Adhoc Additional Sessions Judge. There

is no merit in the appeal filed by the State, therefore, it is liable to be dismissed and accordingly it is dismissed.

14. Bail bonds, if any, of respondent Nos. 1 and 2 stand cancelled.