
(2015) 07 BOM CK 0261
In the Bombay High Court
Case No : Criminal Appeal No. 464 of 2014

Umesh

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 30-07-2015

Acts Referred:

Penal Code, 1860 (IPC) — Section 366, 376, 376(1), 428, 506

Citation : (2016) 1 BomCR(Cri) 773

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

Bench : Single Bench

Advocate : N.B. Kalwaghe, for the Appellant; A.K. Bangadkar, APP, Advocates for the Respondent

Final Decision : Partly Allowed

Judgement

A.B. Chaudhari, J—By the present appeal, the appellant has put to challenge judgment and order dated 21.08.2014 in Sessions Trial No. 60/2012 passed by Additional Sessions Judge, Khamgaon thereby convicting him for an offence punishable under Sections 376(1) and 506 of the IPC and sentencing him to undergo R.I. for 7 years and also pay a fine of Rs. 500/- in default to undergo R.I. for 3 months. This appeal was admitted on 11.09.2011 and record and proceedings were called in order to find out whether the applicant was entitled to bail. This Court, by order dated 11.11.2014 rejected bail application of the appellant and fixed the appeal for final hearing on 18.11.2014.

SUBMISSIONS:

2. In support of the appeal, Mr. Kalwaghe, learned counsel for the appellant, vehemently argued that the finding of conviction recorded by the trial court for an offence punishable under Sections 376(1) and 506 of the IPC is clearly illegal and, therefore, accused is entitled to acquittal. In the alternative, he submitted that the alleged offence is said to have taken place in or about July-2011 as is clear from the deposition of prosecutrix Ku. S, who deposed that the incident of

rape had taken place three years before recording of her deposition which was recorded on 05.07.2014. According to Mr. Kalwaghe, therefore, the incident of rape obviously took place before 18.05.2013 i.e. before the amendment to Section 376 IPC came into force. He, therefore, submitted that proviso to sub section (1) of Section 376 as it stood before the amendment has application in the instant case for reducing the sentence of imprisonment less than 7 years. He then invited my attention to the evidence of mother of the appellant so also of PW1-Ku.S and submitted that there are special reasons by way of evidence brought before the Court for reduction of sentence. He then submitted that the appellant is ready to provide an amount of Rs. 1,00,000/- within a period of 8 weeks from his release from jail for being invested into the Fixed Deposit in the name of PW1-Ku.S by way of compensation in that behalf. He submitted that the appellant has two daughters, one of 7 years and other of five years, wife and mother aged about 65 years to be maintained. In fact, the appellant is uncle of the prosecutrix Ku.S.

3. Per contra, learned A.P.P. for the respondent-State vehemently supported the impugned order of conviction. The Learned A.P.P. vehemently opposed the proposal given by the learned counsel for the appellant for reduction of sentence and submitted that such a proposal cannot be accepted since the offence is of serious nature and no such offer can be accepted by this Court. Mr. Kalwaghe referred to the decision of the Supreme court in the case of Ram Kumar Vs. State of Haryana, (2006) 4 SCC 347 .

CONSIDERATION:

4. Heard learned counsel for the parties. I have seen the entire record and the evidence. Insofar as the finding of conviction for the offence of rape is concerned, I have checked up the evidence of PW1 Ku.S. and other evidence on record. I find that the evidence produced by the prosecution clearly proves that the appellant committed offence of rape of his niece who was minor i.e. of the age of 15 years. The evidence of prosecution witnesses on the material point about rape has gone unchallenged and, therefore, I confirm the finding of conviction recorded by the learned trial Judge for an offence punishable under Section 376(1) of IPC so also section 506 of IPC.

5. The next important question raised before me is based on the applicability of amendment brought by the Parliament w.e.f 18.05.2013 by deleting proviso to Section 376(1) of the IPC since the proviso permitted the Court to bring down the sentence below 7 years for adequate and special reasons. Counsel for the parties were heard with reference to the evidence that was tendered before the trial Court at length on this issue. I have consciously considered the submissions made particularly in the light of proviso to Section 376(1). I quote Section 376(1) in entirety as under:

"376. Punishment for rape.--

(1) Whoever, except in the cases provided for by sub-section (2), commits rape

shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the women raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

The above proviso was, however, deleted by parliament w.e.f 18.05.2013 by which the power of court to reduce or inflict the sentence less than 7 years has been taken away and thus minimum sentence of seven years has to be imposed after coming into force of the amendment w.e.f. 18.05.2013.

6. However, in the present case, I find that the incident is said to have taken place well before 18.05.2013 i.e. before coming into force of the the amendment aforesaid and, therefore, power of this Court to inflict sentence lesser than 7 years can be exercised upon recording adequate and special reasons. In the case of Ram Kumar (supra) following are the observations

"3...However, at the time of hearing it is brought to our notice that the girl has now got married and living with her husband. The said statement is also ratified by the evidence of the father of the girl. Having regard to the peculiar facts and circumstances of the case, we are of the view that the sentence imposed by the Sessions Court and as affirmed by the High Court under Sections 366 and 376 of the Penal Code is on the high side. In our opinion, ends of justice would be amply met if we reduce the sentence to three years. We do so accordingly."

7. Similar are the facts in the present case. PW1-Ku.S in her evidence stated that her marriage took place at about 1 1/2 years back. Counting back from the date of recording of her evidence i.e. 05.07.2014, she was married to Mr. P. in February, 2013. The incident of rape took place three years before i.e. in July, 2011. Due to rape on her by her uncle i.e. the appellant, she had delivered a male child and the said male child is kept in Orphanage at Buldana. Thereafter she was married to Mr. P. This Court had asked a specific question to the counsel for the appellant to find out whether the husband of PW1-Ku.S and his family members know about the incident of rape and birth of child therefrom. Learned counsel for the appellant informed this Court that the marriage took place only after all these facts were disclosed to Mr. P. and his family members and still he married with PW1-Ku.S. This Court finds epitomization of the culture and a broad heart and broad perspective, which we are losing slowly and slowly, that PW1-Ku. S. was accepted as the wife.

8. It is, in this background, I proceed further to find out whether there are any adequate and special reasons. It is seen that the girl was thus married and is staying away in a remote village in the District of Aurangabad in her matrimonial

house. The child born due to rape is put in Orphanage. Then there is evidence of mother of accused PW1-Panchafula Kolhe, aged 60 years, that the appellant Umesh has a wife and a daughter and that he also supports her. The daughter is aged about 7 years, as informed by the learned counsel for the appellant. PW1-Panchafulabai stated that Umesh is helpful and supports the family. It is also not in dispute that appellant does not have any criminal record.

9. In the wake of above facts and particularly when PW1-Ku. S. is now settled after her marriage and appellant's support is required by his mother, wife and daughter, I think, these are the adequate and special reasons for reducing the sentence awarded to the appellant. In addition, counsel for the appellant has given an undertaking that the appellant would deposit Rs. 1,00,000/- with the Sessions Judge, Buldana within 8 weeks after his actual date of release from bail, if an order reducing the sentence is passed. He submitted that the appellant is in jail since after his arrest and has completed sentence of 3 years 1 month and 15 days. In the Supreme Court judgment cited supra, the Supreme Court had found that 3 years sentence was sufficient and thus reduced the same, obviously with reference to the proviso to Section 376(1) of the IPC. I think, this is a fit case since there is evidence on record showing the above adequate and special reasons to reduce the sentence.

10. For the above reasons, following order is passed.

ORDER

(i) Criminal Appeal No. 464/2014 is partly allowed.

(ii) Impugned judgment and order dated 21.08.2014 in Sessions Trial No. 60/2012 passed by Additional Sessions Judge, Khamgaon convicting the appellant for an offence punishable under Sections 376(1) and 506 of the IPC is confirmed. However, the sentence awarded by the trial Judge is modified and is reduced to the sentence already undergone by the appellant with the benefit of Section 428 of I.P.C.

(iii) The appellant shall deposit an amount of Rs. 1,00,000/- with the Court of Sessions at Buldana within a period of 10 weeks from the date of his actual release from jail.

(iv) Upon deposit of the amount of Rs. 1,00,000/-, the learned Sessions Judge shall put the same in the name of PW1-Ku.S in her bank account at the place of her choice in Fixed Deposit by making an arrangement for her for receiving interest thereon.

(v) In case of default on the part of the appellant in depositing the amount of Rs. 1,00,000/- within a period of 10 weeks before the Sessions Judge, he shall be arrested and put in jail to serve out the remaining sentence awarded by the learned Sessions Judge vide judgment and order dated 21.08.2014.

No separate sentence of fine is imposed by this judgment.