
(2012) 02 BOM CK 0092
In the Bombay High Court
Case No : Appeal No. 193 of 2011

Vilas Gilbile

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 08-02-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173(2)
Penal Code, 1860 (IPC) — Section 323, 376

Citation : (2012) BomCR(Cri) 24 : (2012) 114 BOMLR 863

Hon'ble Judges : A.M. Thipsay, J

Bench : Single Bench

Advocate : Satej S. Jadhav, for the Appellant; T.S. Lodhe, A.P.P for State, for the Respondent

Final Decision : Allowed

Judgement

A.M. Thipsay, J.—This appeal is directed against the judgment and order of conviction passed by the Additional Sessions Judge, Osmanabad in Sessions Case No. 47/2010 whereby he convicted the appellant, who was the sole accused in the said case, of offences punishable u/s 376 of the Indian Penal Code and section 323 of the Indian Penal Code. The learned Additional Sessions Judge imposed a sentence of rigorous imprisonment for seven years and a fine of Rs.7,000/-with respect to the offence punishable u/s 376 of the Indian Penal Code and a sentence of fine of Rs.500/-with respect to the offence punishable u/s 323 of the Indian Penal Code. The learned Additional Sessions Judge imposed default sentences in the event of failure to pay the amount of fine.

The appellant, being aggrieved by his conviction and sentences imposed by the learned Additional Sessions Judge, has approached this Court by filing the present appeal.

2. The prosecution case as was put-forth before the trial Court, may, in brief, be stated as under.

The prosecutrix (name not mentioned so as to avoid disclosure of identity) is a resident of village Shekapur. She is a widow. Her husband had died about nine years before the incident, which took place on 10/02/2010. The prosecutrix has one son and one daughter. The prosecutrix works in the field of her father-in-law Haridas (P.W.2) for her livelihood. This field is situated about 3 to 4 k.m. away from village where the prosecutrix resides.

3. That, on 10/02/2010, the prosecutrix had, at about 10.00 a.m., gone to the field as usual. There was crop of jawar, cotton etc. in the field. The crop was to be watered. The prosecutrix gave fodder to the cattle. At about 5.30 p.m. when she was still in the field, the appellant (hereinafter referred as "the accused") came near her. The accused is related to the prosecutrix as her cousin father-in-law. The accused asked the prosecutrix as to where was Gul Bhendi Hurda (sic). The prosecutrix told him that it was in the crop of jawar. The accused then went there and from there, he asked the prosecutrix to show where was the Hurda. The prosecutrix went there and while she was searching for Hurda, the accused pulled her sari. When she tried to release the same, the accused fell her down by kicking her. The prosecutrix sensed the motive of the accused and told him that she would report the matter to his brother Sarpanch Balasaheb. The accused then pressed mouth of the prosecutrix by his hand, sat on her person and committed rape on her.

After the act was over and while the accused was leaving, the prosecutrix kicked him on his hand. She then came to the field, where she previously was and stopped the electric motor. She then went to one Dr. Jamkavale at village Bhoom, but was overcome by a feeling of shame and did not disclose what had actually happened. She told the Doctor that she had headache and she was having excessive heart beating.

The prosecutrix then came back to her house at Shekapur and reported the incident to her father-in-law Haridas (P.W.2). Haridas put her in rickshaw and took her to her maternal house at village Mandegaon, where the mother of the prosecutrix joined them, and the prosecutrix was taken to Jagdale Mama Hospital, at Barshi. The prosecutrix was got admitted in the said hospital.

On 11/10/2010 the Police from Paranda Police Station came to the hospital. The prosecutrix narrated the incident to the Police which was reduced into writing (Exhibit 31). On the basis of this report, which was treated as the the F.I.R., a case was registered against the accused and investigation commenced.

In the course of investigation, the clothes of the prosecutrix (Articles No. 4, 5 and 6) were seized under a panchanama (Exhibit 32). The spot panchanama (Exhibit. 46) was drawn. The accused was arrested. The clothes of the accused were also seized under a panchanama (Exhibit 44). The incriminating articles were sent to the chemical analyzer, Aurangabad through Police Naik Shahuraj (P.W. 9) on 21/02/2010.

On completion of investigation, a report u/s 173(2)(i) of the Code of Criminal

Procedure was filed against the accused, pursuant to which he was prosecuted and convicted, as aforesaid.

4. I have heard Mr. Satej Jadhav, learned advocate for the appellant and Mr. T.S. Lodhe learned A.P.P. for the State. With the assistance of the learned counsel, I have gone through the entire evidence - oral and documentary -adduced before the trial Court. I have also been taken through the impugned judgment. I have also gone through other relevant record.

5. The prosecution examined nine witnesses during the course of trial. The first witness is the prosecutrix herself, and as already seen, the second witness is her father-in-law -Haridas. The third witness Sanjay Ingale is a panch, in respect of the seizure of the clothes of the prosecutrix. This witness has identified the articles No.4, 5 and 6 produced before the Court as the same that were seized by the police under a panchanama (Exhibit 32). The fourth witness is Police Head Constable Gorakhnath Shinde, who was on duty as Police Station Officer, at Paranda Police Station, from 14.00 hours to 20 hours on 11/02/2010. He is the one, who had, on the basis of the documents submitted to him, registered an offence in the present case, vide Crime No. 15/2010. The fifth witness Ravikumar Gilbile is also a panch witness. He, however, did not support the prosecution and was declared as hostile. The sixth witness Indrajit Gore is also a panch, but he also did not support the prosecution case and was declared as hostile. The seventh witness Nayim Karim Shaikh, a Head Constable of Police, is the Investigating Officer in the matter. The eighth witness is Dr. Sanjay Deshmukh -a Medical Officer attached to Jagdale Mama Hospital, Barshi, at the material time. He had examined the prosecutrix on 11/02/2010. The last witness Shahuraj is, as already mentioned, the one who carried incriminating articles to the office of the Chemical Analyzer, Aurangabad.

6. It is contended by Mr. Satej Jadhav, learned advocate for the accused that the impugned judgment and order is not in accordance with law. According to him, there was no satisfactory evidence to establish the guilt of the accused. He contended that the story of the prosecutrix was not believable and that, even if the defence of the accused, which was of total denial, is not accepted and even if it is held that sexual intercourse did take place between the prosecutrix and the accused at the material time, still, from the evidence on record, the possibility of the prosecutrix being a consenting party to such intercourse was evident. He emphasized the undisputed position that one hand of the accused was in plaster at that time and by emphasizing it, contended that it would be difficult to believe that such a handicapped person would be able to commit rape on a fully grown up woman; and that too without leaving any marks of injury on her body. He submitted in this context, that there was absolutely no medical evidence to suggest that the prosecutrix had suffered any injuries either on her private parts, or elsewhere on her body. Mr. T.S. Lodhe, learned A.P.P. on the other hand, contended that the evidence of the prosecutrix ought to be believed. According to him, the trial Court has believed the evidence and that the view of the trial

Court is proper and legal. He submitted that the impugned judgment and order therefore, does not need any interference.

7. I have carefully considered the matter. Certain facts which are either undisputed or otherwise sufficiently proved, may be mentioned at the outset itself. The first is that the accused and the prosecutrix are related to each other. The accused is the cousin father-in-law of the prosecutrix. The second fact which needs to be kept in mind is, that the prosecutrix is of 34 years. She is a widow having two children. Admittedly, she earns her livelihood by working in the field. The third aspect of the matter is that, admittedly, the accused was suffering from an injury to his hand at the material time. It is not in dispute that his left hand was in plaster. In his cross examination, the Investigating Officer (P.W.7) has clearly stated that one hand of the accused was plastered and that, that was so was clearly mentioned in the arrest panchanama (Exhibit45). In fact, this witness emphasized the fact that photograph of the accused, showing that his plastered hand was tied around his neck, was already affixed to the arrest panchanama itself, when questioned about having kept the relevant column in the arrest panchanama, which is meant for specifying the injuries and the physical condition of the accused, blank.

It is in the background of these facts that the evidence of the prosecutrix needs to be considered. It needs to be scrutinized thoroughly and carefully, as it is on an assessment of this evidence, that the correctness or otherwise of the impugned judgment can be determined.

8. The prosecutrix stated that she had gone to the field as usual at about 10.00 a.m.. The incident, according to her took place at about 5.30 p.m.. Though in her evidence she has not given any details as to what she had been doing from 10.00 a.m. to 5.30 p.m., that she was working in the field, can be safely accepted. Regarding the actual incident, she stated that the accused came and asked her as to where was Gul - Bhendi Hurda and that she informed him that it was in the crop of jawar -i.e. not in the field where she was present at that time. According to her, the accused then went to that field and from there he asked the prosecutrix to show where the Hurda was. The prosecutrix, thus, leaving the field where she was, went to the field where the accused was, and started searching for Hurda.

9. As to how the incident started, the prosecutrix stated that while she was searching Hurda, the accused pulled the veil of her sari and that when she tried to get her veil released, the accused fell her down by kicking. Regarding the actual act of rape, the prosecutrix stated that after she had fallen down, the accused pressed her mouth by his hand and sat on her person by removing his pant. She also said that the accused then removed his underwear. According to her, the accused had pressed her mouth by his right hand and that by his left hand -which was plastered -he pinned her down by putting the said hand on her chest.

10. There is absolutely no evidence that the prosecutrix sustained any injuries during the incident. The prosecutrix does not state so. Even otherwise, there is absolutely no medical evidence to indicate that the prosecutrix had sustained any injuries. The prosecutrix being a grown up woman and mother of two children, though one would not expect any injuries on her private part, still, in case of a forcible sexual intercourse, there ought to have been injuries on the other parts of her body if any resistance was put up by her. This is particularly so, because her version is that the accused kicked her and she fell on ground as a result of the kicking.

11. It is rather curious that in the present case, no medical examination of the prosecutrix, which is usually undertaken in rape cases, took place. Though Dr. Sanjay Deshmukh (P.W.8) states about having examined prosecutrix on 11/10/2010, he does not say that the examination was with respect to the allegation of rape. What he states is that the prosecutrix was in depression and in "rowdy condition". Undoubtedly, Dr. Sanjay Deshmukh does say that the prosecutrix told him about the incident of rape. But he fails to mention whether he examined the prosecutrix from that point of view and from the point of view of ascertaining, whether there was any medical evidence suggesting correctness of, or support to the claim made by the prosecutrix.

12. Before completing the discussion on the reliability of the evidence of the prosecutrix as regards the actual incident of rape, her own version regarding her post incident conduct may be considered. According to her, after the act was over, she came back to the field where she was before being called by the accused, and then stopped the electric motor. She then went to one Dr. Jamkavale at village Bhoom which is situated at a distance of about 15 k.m. from the place where the incident took place, but as she felt ashamed, did not tell him regarding the incident, but merely complained of "headache" and "excessive heart beating". Dr. Jamkavale has not been examined as a witness. Mr. Satej Jadhav contended that this conduct of the prosecutrix is suspicious and there was no apparent reason for her to have gone to Dr. Jamkavale who was 15 k.m. away instead of going to her own village situated at about a distance of 2 k.m. from the place of the incident. He also emphasized that even after going to Dr. Jamkavale, she did not make any complaint with respect to the incident of rape to him but merely complained of headache and excessive heart beats. There is some substance in the contention advanced by Mr. Satej Jadhav, but the reactions of human beings can not be expected to be fitted in any fixed or standard formula. Merely because a particular reaction is felt unlikely, it would not be proper to reject the evidence of the witness as unreliable. However, when the reactions of a witness, are not thought to be normal, or as would ordinarily be expected of a person placed in that particular situation, the evidence of such witness, would be required to be subjected to a deeper scrutiny.

13. Undoubtedly, the prosecutrix does say that the accused committed rape on her. She has described the actual incident in details, which according to her, went

on for 10 to 15 minutes. She clearly states that it was against her will and without her consent. The question is, however, "is this believable"?

14. Ordinarily, the resistance from a grown up woman can not be overcome by a man so as to be able to commit sexual intercourse with her, without leaving marks of violence. If the woman is not a consenting party, she is expected to resist and if the offender tries to overcome the resistance by force, there will be at least some injuries on the person of the victims as also the offender. Sometimes, there can be passive submission or lack of resistance on the part of the woman, even when she is not a consenting party but such cases generally arise where the offender is armed, or where there is a fear of instant hurt or where the offender is in such a superior position so as to be able to dominate the will of the victim. So far as this case is concerned, even if the aspect of sustaining injuries on account of resistance is kept aside, it was expected that at least some injuries would be caused to prosecutrix as the incident had taken place in a field which could not have been a smooth surface; and as the accused had allegedly kicked the prosecutrix and she had fallen down. If the incident would have happened that way, at least some injuries would have been sustained by the prosecutrix. However, as already observed, not only there is no evidence of any injury, there is not even a claim to that effect.

15. In her evidence, the prosecutrix has elaborately described the acts of the accused leading to the completed act of sexual intercourse. Now, when one hand of the accused was plastered, that he could prevent the prosecutrix from escaping, or moving, and he could also prevent her from raising cries by pressing his hand on her mouth and he could also remove his clothes as well as clothes of the prosecutrix, without giving any opportunity to the prosecutrix to escape or to prevent him from committing sexual intercourse, is difficult to believe. When a Court of law is required to form a belief or disbelief in a particular version, the first consideration of paramount importance will be whether the story put-forth by the prosecution is natural, probable and believable, and in judging so, the Court will go by its experience of worldly matters. The story which is inherently improbable in itself, can not be easily believed and the least that can be said is that in such a case, the Court would certainly expect some corroboration to such a version, which, *prima facie*, is difficult to believe. It can not be ignored that the prosecutrix is a grown up lady and not only there is no evidence that she is weak or feeble, but there is evidence to the effect that she does all the work which a man is supposed to do in field. Thus, the prosecutrix is habituated to serious physical activity and it would be difficult to hold that she could be overtaken by a person whose one hand was fractured, single handedly, so as to be able to have sexual intercourse with her, without her consent.

16. Shri Jadhav drew my attention to the document at Exhibit 35 which is a communication from the Medical Officer, Rural Hospital, Paranda to the Inspector of Police, Police Station, Paranda. It shows that no injuries on the private part, or on the limbs of the accused were observed after his medical examination. This

communication appears to be in reply to a letter dated 14/02/2010, from the Inspector, Rural Hospital, at Paranda. The genuineness of this letter or correctness of the contents thereof, is not in dispute and this document has been tendered in evidence by the prosecution itself. Going by the version of the prosecutrix, there was likelihood of there being some marks on the knees of the accused, as the place where the incident allegedly took place was not a smooth surface. This aspect of the matter is highlighted by learned advocate Mr. Satej Jadhav, to contend that even the fact of sexual intercourse by consent having taken place between the parties, is not established. However, I am not inclined to give much importance to this, as deeper examination of this aspect is unnecessary.

17. The investigation also does not seem to have been carried out in a sincere manner. It has already been seen that the routine and usual medical examination of the prosecutrix as is invariably carried out in rape cases, was not carried out. Apart from this, the manner in which spot panchanama was drawn, also does not indicate that the investigating agency was acting honestly and sincerely. "The spot was said to have pointed out by Haridas (P.W.2), but it is nobody's case that Haridas was aware of the spot where the incident had taken place." Haridas was not a witness to the incident and there is no evidence that he was shown the spot either by prosecutrix or by anybody else and in such a situation, pointing out of the spot of incident by Haridas, is nothing but either gross incompetence of the investigating agency, or its insincerity.

18. The uncorroborated testimony of the prosecutrix was not sufficient to hold that the charge against the accused was satisfactorily proved. If the following aspects of the matter viz: (i) the relationship between the prosecutrix and the accused, (ii) that the prosecutrix is a grown up lady whose husband had died about 9 to 10 years back, (iii) that there were no marks of any injuries on her person or any other signs indicating that she had offered any resistance to the accused in the alleged act of sexual intercourse, and (iv) the unlikelihood of a man whose one hand had been plastered, being able to overpower a fully grown up lady in such a manner so as to be able to perform sexual intercourse with her, without her consent and after removing his own clothes and that of the woman, are taken into consideration, the possibility of the sexual intercourse, if any, between the prosecutrix and the accused, having taken place by the consent of the parties, can not be ruled out.

19. Undoubtedly, the result of the chemical analysis as reflected in the chemical analyzer's reports at Exhibits 48, 49 and 51 shows that stains of semen of group "A" were found on the petticoat of the prosecutrix. However, there is no satisfactory evidence of seizure of the clothes of the prosecutrix. In any case, though the articles when sent to Chemical Analyser, were in a sealed condition, there is no evidence as to when the seals had been put. Certainly, there is no evidence to indicate that the sealing was done at the time of seizure itself. Considering these aspects and when investigation does not appear to be sincere,

not much importance to the alleged finding of stains of semen on clothes of prosecutrix can be given. In any event, the finding of stains of semen on the clothes of the prosecutrix would indicate only that the sexual intercourse had taken place but not that such sexual intercourse had taken place "without the consent or against the will of the prosecutrix".

20. In every criminal trial, the accused is presumed to be innocent and the burden of establishing his guilt is always on the prosecution. It is a cardinal principle of criminal jurisprudence that the accused is entitled to have the benefit of every reasonable doubt, as may arise in the mind of the Court, on consideration of the evidence adduced before it. It is not possible to hold that in this case, the prosecution had succeeded in establishing the guilt of the accused, beyond reasonable doubt.

21. There is one aspect of the matter which needs to be addressed to. It is not clear as to why the prosecutrix would level a false allegations of rape against the appellant. However, in the light of various infirmities in the case of the prosecution and the inherent improbability in the version of the prosecutrix, merely because no motive for false implication is shown, the evidence of the prosecutrix can not be believed as true. It has been brought on record during the cross examination of the prosecutrix that there is a public road, at a distance of only about 50 feet from the place where the incident of rape allegedly took place. It was also brought out in the evidence of the prosecutrix, that the time when the incident allegedly took place, was the time of the agriculturists working in the fields, going back to their respective houses. In these circumstances, the possibility of the prosecutrix having suspected that she and the appellant might have been noticed by some one in a suspicious situation, can not be ruled out. Keeping in mind the relationship between the parties i.e. the appellant being the cousin father-in-law of the prosecutrix, on the fear, or suspicion, that the matter might have been noticed by the villagers or the relatives, the possibility of the prosecutrix, who might have earlier consented for the act, later on claiming that it was against her will or without her consent, can not be altogether ruled out. In any event, merely because no possible reason for false implication is disclosed, the evidence which is inherently improbable, can not be accepted a true and reliable.

22. The appreciation of evidence as done by the learned Additional Sessions Judge was not proper. The learned Additional Sessions Judge did not consider at all, as to whether in the facts and circumstances that were put-forth before him, the prosecutrix could be a consenting party. The judgment indicates that this point was not considered at all by him. The impugned judgment therefore, being not in accordance with law, is required to be set aside.

ORDER

The appeal is allowed.

The impugned Judgment and Order of conviction and sentences imposed by the

learned Additional Sessions Judge, Osmanabad, are set aside.

The appellant is acquitted.

He be set at liberty forthwith, unless required to be detained in connection with some other case.

Fine, if paid, be refunded to the appellant.

Appeal is disposed of accordingly.