

(1994) 09 BOM CK 0062
In the Bombay High Court
Case No : Criminal Appeal No. 68 of 1992

Vishwanath Sawale

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 19-09-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 235, 374
Penal Code, 1860 (IPC) — Section 354, 376, 511

Citation : (1996) 2 BomCR 179

Hon'ble Judges : R.M. Lodha, J

Bench : Single Bench

Advocate : P.A. Deshmukh, for the Appellant; L.K. Khamborkar, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

R.M. Lodha, J.—The accused appellant Vishwanath Badru Sawale, who was tried for offences punishable under sections 376 and 376 read with section 511 of the Indian Penal Code in Sessions Case No. 61 of 1991 by the Additional Sessions Judge, Washim, but convicted by the said Court for the offence u/s 354 of the Indian Penal Code, vide judgment dated 22-1-1992, has preferred this appeal.

2. The accused appellant was charged for the offences under sections 376 and 511 of the Indian Penal Code for having committed rape and/or attempted to commit rape on Amrapali daughter of Baban, a child of 4 years. Prosecution case, in short, is that on 5-1-1991 at about 12.00 noon Amrapali daughter of Baban, and grand-daughter of Haribhau Dagdu Tayade (P.W. 1), who was hardly 4 years old, was playing in the house and the accused-appellant took Amrapali to his house by alluring her that he would give her one banana. The girl child Amrapali without thinking further went along with the accused-appellant, who committed sexual intercourse with her. Stains of semen on the Jangiya (underwear) of the said Amrapali were found and when she came weeping, she told her mother Sunita (P.W. 2) that the accused-appellant discharged some

water inside her Jangiya. A written report (Exh. 13) was lodged to that effect by Haribhau (P.W. 1) at the police station Jaulka. On the basis of the written report, first information report was registered as Crime No. 3 of 1991 at police station, Jaulka, sub-division Washim, district Akola, against the accused-appellant for the offence u/s 376 of the Indian Penal Code. The said first information report dated 5-1-1991 is Exh. 25 on record. The investigation commenced on the said first information report and Uttam Amritrao Chaudhari (P.W. 7) Investigating Officer prepared the spot panchanama on 6-1-1991 and recorded the statements of witnesses u/s 161 of the Code of Criminal Procedure. The nicker of Amrapali and the dhoti of the accused-appellant were seized vide Exhs. 32 and 33 respectively. Amrapali was sent for medical examination and no marks of injury were found over the thighs or around the vagina; no seminal stains were found over the vagina and hymen was intact. In the medical certificate (Exh. 19) it was thus reported that no rape has been committed on Amrapali. The age of Amrapali was found to be between 2 to 5 years. The accused-appellant was also medically examined and vide medical certificate (Exh.33) no injuries were seen on penis or inner side of both the thighs; and no sign of injury over face or anywhere on the body of the accused/appellant was found.

3. On the conclusion of the investigation, the Investigating Officer challenged the accused for the offence under sections 376 and 376 read with 511 of the Indian Penal Code and since the case was exclusively triable by the Sessions Judge, the accused was committed for trial to the Court of the Additional Sessions Judge, Washim, and the said Additional Sessions Judge, charged the accused on 23-10-1991 as stated above. The accused-appellant pleaded not guilty and prayed for trial.

4. In the trial, prosecution examined Haribhau Daghu Tayade - grand father of the girl child Amrapali (P.W. 1), Sunita wife of Baban Tayade - mother of the girl child Amrapali, as P.W. 2, Kusum wife of Jandardhan Khandare (P.W. 3), Amrapali daughter of Baban Tayade - the girl child and prosecutrix as P.W. 4, Dr. Murlidhar Narayan Jaware (P.W. 5), Govinda Anandrao Pawar (P.W. 6) and Uttam Amritrao Chaudhari (P.W. 7). Prosecution also exhibited various documents including the written report given by Haribhau (P.W. 1) as Exh. 13, medical certificate of the girl child Amrapali (Exh. 19), first information report (Exh. 25), panchanama of the spot of occurrence (Exh. 34), seizure memoranda (Exhs. 32 and 33) and the Chemical Analyser's reports at Exhs. 29 and 30 respectively.

5. The learned Additional Sessions Judge, Washim, on consideration of the evidence on record and after hearing the learned Counsel for the parties found that the prosecution has not been able to prove that the accused committed rape or attempted to commit rape on Amrapali and, therefore, acquitted the accused-appellant for the offence u/s 376 and 376 read with section 511 of the Indian Penal Code. However, the trial Court found that the prosecution has been able to prove that the accused-appellant outraged the modesty of girl child Amrapali and therefore, committed an offence punishable u/s 354 of the Indian Penal Code.

Consequently, the trial Court sentenced the accused-appellant to suffer rigorous imprisonment for one year and to pay a fine of Rs. 500/- and in default of payment of fine to suffer simple imprisonment for two months.

6. The learned Counsel appearing for the appellant/accused has not challenged the conviction of the accused appellant u/s 354 of the Indian Penal Code and only prayed for leniency in the matter of sentence awarded by the trial Court.

7. In opposition to the aforesaid submission, Shri Khamborkar, Additional Public Prosecutor, has submitted that the trial Court has already taken too lenient view and, therefore, no further leniency is deserved by the accused-appellant and, therefore, the appeal deserves to be dismissed.

8. On thoughtful consideration of the entire matter and the reasoning given by the trial Court, it may be observed at the outset that the pervert act of the accused-appellant has shocked the conscience of this Court. It is indeed unfortunate that the State has not taken care in filing any appeal against that part of the judgment of acquittal, whereby the accused-appellant has been acquitted of the offence u/s 376 read with section 511 of the Indian Penal Code was concerned. Since no appeal has been filed by the State against the acquittal of the accused u/s 376 read with section 511 of the Indian Penal Code, the matter is not required to be gone into further except observing that the State should have been conscious of this atrocious pervert act by the accused-appellant (who is of the age of the grand-father of the girl) committed on child Amrapali. By having discharged the semen in the nicker of the girl child of 4 years, attempt to commit rape on the girl child of 4 years by the accused-appellant was obvious, but since the trial Court has acquitted the accused for the offence u/s 376 read with section 511 of the Indian Penal Code and the State has not filed any appeal, the matter has to be rest contented with this. That was the reason the learned Counsel for the accused-appellant frankly and candidly did not challenge the conviction of the accused/appellant u/s 354 of the Indian Penal Code. Evidence of Haribhau (P.W. 1) - grand-father of girl child Amrapali, and Sunita (P.W. 2) - mother of girl child Amrapali, and the corroborative evidence that stains of semen were found on the nicker of the girl child Amrapali leads to an irresistible conclusion that the accused-appellant outraged the modesty of the girl child within the meaning of section 354 of the Indian Penal Code. The trial Court has rightly relied on the proposition that in the cases of indecent assault on a female human being of any age, offence u/s 354 of the Indian Penal Code comes into play. Indecent assault by the accused/appellant on the girl child Amrapali and thereby outraging her modesty is well established and does not call for any interference by this Court in appeal.

9. Adverting to the question of sentence, suffice it to say that the trial Court has already taken too lenient view in awarding the sentence of only rigorous imprisonment for one year and a fine of Rs. 500/- and in default of payment of fine, simple imprisonment for two months for such a heinous crime. The dare devil act of the accused-appellant on the little child girl of 4 years speaks

volumes of perversity of the accused-appellant and, therefore, does not deserve any leniency. But for the non-filing of the appeal by the State against the judgment of acquittal of the accused u/s 376 read with section 511 of the Indian Penal Code, the accused deserves severe sentence. Be that as it may, there is no force in the argument of the learned Counsel for the accused-appellant that leniency as regards sentence awarded to the accused-appellant should be shown. In the facts and circumstances of the present case, for the crime committed by the accused-appellant, the sentence awarded by the trial Court does not call for any interference.

10. In the result, this appeal has no force and is liable to be dismissed and is accordingly dismissed. The judgment dated 22-1-1992 passed by the Additional Sessions Judge, Washim, convicting the accused-appellant for the offence punishable u/s 354 of the Indian Penal Code and the sentence awarded to him to suffer rigorous imprisonment for one year and to pay a fine of Rs. 500/- and in default of payment of fine, to suffer further simple imprisonment for two months, is maintained. The bail bonds are cancelled and the accused-appellant is directed to surrender to serve out the remaining sentence. Order accordingly.