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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.563 of 2004

Jaywant Yeshwant Phalke, .. Appellant
(since deceased) Through spouse
Indubai Jaywant Phalke

Versus

The State of Maharashtra (At the instance .. Respondent
of Chembur police station, C.R.No.6/1989)

...

Mr. Ajay H. Lad for the appellant.
Mr. S.R. Agarkar, APP for the State.

CORAM: BHARATI DANGRE, J.
DATED : 8th SEPTEMBER, 2023

P.C:-

1 The appellant who stand convicted under the impugned judgment passed by the Addl. Sessions Judge, Greater Mumbai has passed away on 25/1/2023, which resulted in substitution by Mrs.Indubai Jaywant Phalke, his widow, and by order dated 22/8/2023, the Appeal was permitted to be prosecuted by her by setting aside the abatement of Appeal on his death. .

2 Heard learned counsel Mr. Ajay Lad for the Appellant and learned APP Mr. S.R. Agarkar for the State.

With their able assistance, I have perused the impugned judgment and the material placed before the Special Judge, which resulted in conviction of the appellant u/s.354 of

Tilak

the IPC, though the charge framed against him was for committing an offence of rape u/s.376 of the IPC. Pertinent to note that there was some conundrum about the age of the victim and PW 2, a Medical Practitioner came to be examined as a witness, and the prosecution proceed on the footing that she had attained majority.

3 On 18/11/1988, the victim, aged 18 years, reported to the police station by informing that she was residing at the given address with her family, which comprised of two brothers and one sister and during the time when she was alone at home, she was send to the house of the accused, whom she described as 'caretaker' Jaywant Yeshwant Phalke.

She reported about the incident dated 16/11/1988, when she visited his house and at that time, he is alleged to have instigated her to indulge into sexual intercourse and also told her not to speak of the said incident. She reported that on the next date, she did not visit his house and when she suffered some issue, she disclosed the incident to her father and was immediately taken to Rajawadi Hospital and admitted in Ward no.18.

The victim girl also state that from 15/10/1988 to 16/11/1988, the accused had established physical relationship with her whenever he got an opportunity, but since she enjoyed the act, she did not complain, but since she suspected that she was pregnant, she disclosed the incident to her father.

The victim put her thumb impression on the complaint

which is registered by PW 5 PSI Deshmukh, who attended the Rajawadi Hospital, when message was received that a girl was admitted.

4 The Investigating Officer report that the girl was send to Nagpada Police Hospital for examination and thereafter, she was sent to Children's home.

On completion of investigation, the charge-sheet is filed and the charge came to be framed by the Addl. Sessions Judge and the accused was tried in Sessions Case No. 474/1989. The charge reads thus :-

“FIRSTLY : That you accused abovenamed between the period from 15-10-88 till 16-11-88 at your residence within the precincts of Bhikshekhari Sweekar Gruha Chembur, Mumbai did have sexual intercourse with Kum. Lata Kisan Gaikwad a minor and below 16 years and did thereby commit the offence of rape on each such occasions punishable under section 376 of the IPC and within my cognizance.”

The accused pleaded not guilty and therefore, was subjected to trial.

5 In order to establish the prosecution case, five witnesses were examined, which included the victim girl, as well as her mother, two medical experts as well the Investigating Officer.

The girl who gave her age as 15 years before the Court, was shown to be resident of Begger's Home, Chembur. In the examination-in-chief, she deposed that she went to fill water from the accused, where she deposed as under :-

“2 When I went to fill water the accused slept on the bed with me. When he slept on the bed he came to me. He closed the door. He drank liquor. He had liquor and closed the door and slept. He took out my clothes. He put me down and then he took out my chaddi and did (the witness makes a gesture on the table by putting her hand from one side to another). He made me sleep and then he came over me in the bed. That time his wife and children were not there. (the witness again points to the accused at the back). He was the one. He took out my chaddi and he had intercourse with me.”

After the incident, she deposed, that she went home and told to everyone in Chembur and she told her mother.

6 At this juncture, the trial Judge record that the witness is mentally handicapped and she had repeated the evidence two or three times, when it was recorded in the Chamber.

On being subjected to cross-examination, the mental state of the victim clearly surfaces on record, as she give her age as ‘17 years’, but testify before the Court that as on date, she was 73 years old and she remembered what had happened to her in last month.

Perusal of the cross-examination would reveal that the victim was not mentally stable and if it was so, particularly when the Judge has recorded that she was mentally retarded, it was imperative for him to ascertain her capability of understanding the questions put to her, so as to find out whether she was competent witness before she was administered oath, but without taking any pains to do so, the learned Judge in the impugned Judgment, chose to simply

record, that the respective counsel have conducted the matter with dignity and has specifically record as under :-

“the evidence shows that the witness is not capable of much examination before the Court”

The response of the victim to the question specifically put, is in the affirmative and one of the questoins put to her was question no.14.

“14 “I put it to you that the accused never had sexual intercourse with you” and the response which is recorded in evidence is answered “(The witness smiles, rubs her hand on the table). Yes”.

7 The deposition of the witness will have to be appreciated in the light of the testimony of the other witness i.e. her mother examined as PW 4.

The mother deposed that for filling water, she had to visit the accused's house and when she was at the dispensary, she was informed about the incident and was told that the accused made the victim lie down and did those things. When asked, what things”, the mother's response is “He did all that. He made her lie down. His wife was sitting beside him. He was drunk, took out her clothes. He had sexual intercourse. This is what she told us”.

In the cross-examination, the witness admit that she cannot recollect the day, month and year when the incident occurred. She also state that she had informed the police that the wife of the accused was sitting beside him and he was drunk, but it is not recorded in her statement.

PW 4 admit that her daughter was mentally retarded since childhood and she was under medical treatment and that

she had no mind, hence she talked irrational, but she deny the suggestion that the victim had never mentioned to her and her husband, about the sexual intercourse.

8 Another two relevant witnesses are medical experts. PW 1 examined the victim on 19/11/1988 and he state that she was mentally subnormal. On her examination, he did not find evidence of injuries and hymen was intact and accordingly he made notings in the medical papers.

The medical papers placed on record at Exhibit-12 record that the patient is mentally deranged and there was no evidence of injury on her private part. In the medical report, there is also a reference of the patient being referred to the Psychiatric Department and the opinion about her mental status reported on 26/11/1988, record the following :-

“Patient is showing features of mild mental retardation. Patient’s mother gives history suggestive of sexual intercourse by the patient. Patient’s version of the incidence is unreliable”.

9 PW 2 is the Doctor attached to Nagpada Police Hospital and he depose that he obtained consent of the victim for medical examination in the backdrop that there was history of rape committed on her on 16/11/1988.

He also deposed that she was mentally deranged, considering the IQ was less. In his report dated 22/11/1988, he has made the following notings:-

- “(d) The hymenal orifice admits two fingers*
- (e) Menstrual discharge present.*

- (f) *Vaginal smear was not taken*
- (g) *X rays for ossification test was taken*
- (h) *Age was 15 to 16 years"*

He record a finding that the victim was subjected to sexual assault though in his cross-examination, he agree that there are other reasons apart from sexual assault, for the hymen being torn in case of a patient. He also admit that in respect of his remarks in Column no.6, sub-clause (e), hymen old healed means the sexual assault was a week before medical examination.

With this evidence being placed before the trial Judge, he was called upon to decide on the guilt of the accused who face a charge for committing forcible sexual intercourse with her which is punishable u/s.376 of the IPC.

10 Dealing with the accusations levelled against the Appellant that he had committed rape over the victim for a period of one month, the trial Judge record that specific instances of commision of the offence are not mentioned, but it is the version of the victim that when her parents used to go for work, she used to be in the care of the Appellant and used to fill water from his house. Referring to her demanor when she was sitting at the table of the Judge in chamber, he found her to be mentally retarded, but she pointed out to the accused who was asked to sit behind her and inferring from her conduct, the Judge record as under :-

“11. Her evidence shows but one event, without date. Of course she is incabable of specifying any

date. The specification is not even material but the description of the event, albeit in simple words accompanied by its gesture would suffice, even without technical terms or legal jargon.

12. PW 3 has deposed in para 2 of her evidence that when she went to fill water the accused slept on the bed with her. He came to her. He closed the door. He drank liquor. He took out her clothes. He put her down. He took out her underwear (chaddi) and did..... making a gesture on the table by putting her hand from side to side. She repeated the same words and gestures 2-3 times. In para 3 of her evidence she again deposed that he had put his leg on her and had intercourse with her. However it is not understood whether she understood the concept fully, or felt that the act of the accused in doing the above tantamounted to intercourse.

13. It cannot be understood and it has not been specifically brought out, whether he repetition of the evidence of the act 2-3 times denoted one or more than one events. The prosecution case relates to a period of one month of the accused having had sexual intercourse with the victim girl. Her FIR dated 18.11.88, part of Ex.17 in evidence, describes a specific event.”

Referring to her inconsistent version in para 14, the Judge inferred that in Para 3 of her evidence she has deposed that she went home and told everyone in Chambur and

“everyone” means, whom she knew and hence the following is inferred

“It can therefore be, understood to be one such incident which she immediately narrated upon going home. That was a day thereafter. And she was taken to the police station and hospital, a day after that.”

Since the victim girl answered in gestures, the learned Judge record that she had agreed with each suggestion of the Advocate for the accused and it is totally unclear as to whether she understood any of those suggestions for the answers that she gave, mainly by her gestures and with each of her answer, she had smiled, shooked her head or shut her eyes and when asked about the word ‘intercourse’ and about the date, month and year, all of which she was not able to answer.

It is also inferred that she is incapable of even knowing about any monetary dispute.

In the wake of the aforesaid, when nothing could be inferred from the evidence of the victim and when the case of the prosecution was, she was constantly raped for more than one month, the learned Judge has deduced an inference that her evidence refer to one incident and though the case of prosecution is of rape and it refer to various incidents standing over a period of one month, the trial Judge, derived an inference that there is at least one incident and what is that incident is described by him is that “the accused slept on bed with her, came to her, closed the door, drank liquor, took out her clothes and put his hand on her as shown by her side to

side”, on the table denoting caressing her and her gestures do not show an act of penetration.

11 The impugned Judgment extensively refer to her examination/cross- examination and also record that it cannot be comprehensive on that basis whether she was capable of understanding anything which can be called as ‘dispute’ and was even unaware as to what amounted to ‘intercourse’. The Judge has recorded that it is not understood whether she understood the concept fully or felt that the act of the accused in doing the above, (her response in para-2 of the evidence) tantamounted to intercourse.

However, the trial Judge inferred that the victim referred to one incident and formed an opinion that even by gestures, an incident of rape can be brought before the Court even by deaf and dumb witness, not capable of actually describing how the incident took place. By recording that the victim girl in this case has proved the incident and this is a sensitive case, it must be scrutinized with caution.

12 I see no difficulty in agreeing with the learned Judge on that aspect of the matter. However, in order to ascertain whether she was capable of understanding the gravity of charges which were levelled by her against the accused as well as the seriousness of the act, which is alleged to have been performed with her, which amounted to ‘rape’ without her consent, it was the duty of the learned Judge to adopt the procedure prescribed so as to analyze her potential to depose

as a competent witness. Without doing so, the learned Judge has chosen to draw inference from the deposition of the victim and has construed the evidence by looking it from an angle of a mentally retarded girl and arrived at a conclusion that the case is not made out by the prosecution for commission of offence of rape, but the minor charge u/s.354 of the IPC, outraging modesty is made out.

Here, the learned Judge has fallen into a grave error. Neither the victim girl nor her mother has furnished the details i.e. date, year when the incident is alleged to have taken place. The victim girl, in her complaint, has stated that she did not report the incident to anyone because she enjoyed the act and in her deposition, she admit that she had stated to the police about the pleasure she derived from the act. This itself is indicative of her mental state, coupled with the fact that when she is asked about her age, she tells the Court that she is 73 year old.

13 The trial Judge has committed a gross and precarious flaw when he disbelieved the prosecutrix on the case of offence of rape being committed, although derive an inference that her modesty is outraged and by relying upon Section 222 of Cr.P.C, since the evidence constitute proof of a minor offence, though he was not charged, he convicted the accused u/s.354 of the IPC for causing criminal force upon the mentally retarded girl with an intention to outrage her modesty.

The whole premise on which the conclusion is derived is weak as the prosecution case do not derive credence from the witnesses and particularly the victim girl. If the learned

Judge has disbelieved the case of the prosecution about the incident having taken place on a particular date, since the victim was unable to depose it in a manner which could have inspired confidence, I fail to understand as to how the conviction u/s.354 without any details having been provided could be sustained.

14 The impugned judgment, therefore, suffer from grave illegality and cannot be sustained. For the reasons recorded above, the conviction of an accused u/s.354 cannot be sustained and it deserve to be set aside by allowing the present appeal.

In the wake of above, Criminal Appeal is allowed.

The Judgment and order dated 05.03.2004 passed by the Additional Sessions Judge, Greater Mumbai in Sessions Case No.474/1989 is set aside.

However, considering the facts and circumstances, an amount of Rs.10,000/- which was deposited as a part amount and directed to be invested in the Fixed Deposit, shall be continued to be retained by the victim girl.

(SMT. BHARATI DANGRE, J.)