

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**BENCH AT AURANGABAD.****CRIMINAL APPEAL NO. 8 OF 2015**

RAJASHREE RAJDHAR SURWADE. ..APPELLANT.

VERSUS

THE STATE OF MAHARASHTRA
AND ANOTHER. ..RESPONDENTS.

...
Advocate for Appellant : Mr.T.M. Tandale with Mr. Kale
Ajeet B.
APP for Respondents/State: Mr.S.B. Pulkundwar.
...

CORAM : S.S. SHINDE & A.M. BADAR, JJ.

Dated: August 24, 2015.

COURT ORDER: [Per Badar, J]

1. By this appeal under Section 372 of the Code of Criminal Procedure, 1973, the prosecutrix is challenging the judgment and order dated 18.10.2014 in Sessions Case No.136 of 2014 whereby the learned Additional Sessions Judge, Bhusawal had acquitted respondent No.2 / original accused of the offences under Section 376 and 506 of the Indian Penal Code, 1860.

2. Heard learned Counsel for the appellant / prosecutrix at length and perused the record and proceedings with his assistance as well as assistance of the learned Additional Public Prosecutor appearing for respondent No.1 / State

3. The learned Counsel for the appellant vehemently argued that evidence of prosecutrix (P.W.2) shows that respondent No.2 / accused had committed sexual intercourse with her repeatedly against her will and without her consent. According to him, it is settled law that evidence of the prosecutrix should be appreciated with great care and caution by keeping in mind broader probabilities of the prosecution case. By relying on the ruling in the matter of ***O.M. Baby (Dead) By Lrs. Vs State of Kerala in Criminal Appeal No.133 of 2007***, he contended that evidence of the prosecutrix must be considered keeping in mind social ethos prevailing in rural India inasmuch as, in the rural background of Indian culture, no lady would level false accusation of commission of rape on her. As such, according to the

learned Counsel for the appellant / prosecutrix, the learned trial Court erred in rejecting the truthful and trustworthy testimony of the prosecutrix while acquitting respondent No.2 / accused.

4. The learned Counsel for the appellant further submitted that the learned trial Court erred in not considering the provisions of section 114A of the Indian Evidence Act, 1872, which prescribes rule for presumption and as the prosecutrix had deposed that she had not consented to the sexual intercourse committed by respondent No.2 / accused, learned trial Court ought to have held him guilty of the charges levelled against him.

5. The learned Counsel for the appellant / prosecutrix further argued that the learned trial Court erred in not considering the evidence of Dr. Yogita Fegade (P.W.4), which duly corroborates version of the prosecutrix. According to the learned Counsel, respondent No.2 / accused had represented before Yogita Fegade (P.W.4)

that he is husband of the prosecutrix and then had requested her to medically examine the prosecutrix in order to ascertain whether she was pregnant or not. This conduct of the respondent No.2 / accused, according to the learned Counsel for the appellant / prosecutrix, goes a long way to show that it was respondent No.2 / accused who had indulged in sexual intercourse with the prosecutrix, falling under clauses *firstly* and *secondly* of Section 375 of the Indian Penal Code, 1860.

6. The learned APP appearing for the respondent No.1 State submitted that appropriate orders be passed considering the record and proceedings.

7. After careful perusal of the record and proceedings as well as the evidence of the prosecutrix, coupled with other evidence adduced on record by the prosecution, we are unable to persuade ourselves to arrive at a conclusion that the learned trial Court has not properly appreciated evidence on record while acquitting respondent No.2 / accused. We are unable to come to

the conclusion that plausible view is not taken by the learned trial Court while appreciating evidence of the prosecution while acquitting respondent No.2 / accused of the charges levelled against him.

8. Perusal of record shows that FIR lodged by the prosecutrix on 16.5.2011 has resulted in registration of Crime No.60/2011 against respondent No.2 / accused. After routine investigation, charge-sheet came to be filed against him and learned trial Court had framed charge for the offence punishable under Section 376 and 506 of the Indian Penal Code, 1860 against respondent No.2 / accused. In order to bring home the guilt to respondent No.2 / accused, prosecution has examined in all six witnesses. Nirmala (P.W.1) is mother of the prosecutrix. The prosecutrix has been examined as P.W.2. Dr.Renuka Bhangale, who examined the prosecutrix, has been examined as (P.W.3). P.W.4 is Dr.Yogita Fegade, who had examined prosecutrix at the instance of respondent No.2 / accused. P.W.5 Rajaram Chavan is the Investigating Officer. P.W.6 Durgesh Tiwari is the

Investigating Officer, who filed charge-sheet against respondent No.2 / accused.

9. It is well settled that so far sexual offences are concerned, the Court is expected to show greater sensitivity and evidence of the prosecutrix is required to be appreciated by keeping in mind broader probability of prosecution case. The Court is not supposed to sway on the basis of minor contradictions and omissions in version of the prosecutrix. Rather, the prosecutrix is required to be considered as an injured witness and her evidence requires no corroboration if ultimately it is found to be trustworthy.

10. In the case in hand, respondent No.2 / accused is real cousin of the prosecutrix. It is not in dispute that the prosecutrix, at the time of incident in question, was a girl who had attained majority. The evidence of the prosecutrix goes to show that at the time of her first interaction with respondent No.2, she was 18 years of age. These factors are relevant while appreciating

evidence of the prosecutrix.

11. We would like to reproduce relevant portion from version of prosecutrix for better appreciation of the matter. Paragraph 1 of the deposition of the prosecutrix P.W.2 reads, thus:

“1 I know accused. He is Laxman Pralhad Tayade. I have learnt up to B.A.. I am learning in People's College, Bhusawal. I stay with my parents and my brother Mayur Rajdhar, Surwade. Accused comes from my community and he is my relative. Accused used to meet me on the way to my college. He used to tell me that I should develop friendship with him. He told me that he has got a job in railways. He would marry me. He developed intimate relations with me. He gave promise to marry me and had sexual intercourse with me. When I refused to have relations with him, he gave threat to kill my father and brother through his colleagues. Since 2006 he had sexual intercourse with me from time to time against my will and without my consent. He forced me to have physical relations with him because of the fear of life of my brother and father. He made me to break the

engagement and marriage with others. One Shila gave threat to me at Eagle ground that she was engaged some persons from Kandari and she will kill my brother and father. So, I should discontinue the relation with accused. Accused's mobile is with me. It contains obscene messages to Shila. Accused developed contact with a girl by name Shila. When I asked the accused about it, he said that it is his hobby to develop relation with various girls, have intimate relations with them and to enjoy. He gave threat to me that I should discontinue the relation with him else I will have to suffer the consequences. Accused took me to a temple of goddess in Ichchapur near Burhanpur. He put garland and Mangalsutra to me and made a show that he married me. He himself placed the photos snapped at the time of marriage. When I questioned him about it he said that I should forget him, what he did was a farce. He had a fun with me, if I disclose it to anyone he would involve my family members in a false case.”

12. This evidence of the prosecutrix makes it clear that respondent No.2 / accused and she herself had developed love relations and at that time respondent No.2 / accused had already secured a job in railways.

According to the prosecutrix, respondent No.2 / accused promised to marry her and thereafter, they indulged in sexual relations. The version of the prosecutrix reflected in para 1 of her deposition further goes to show that thereafter, respondent No.2 / accused had even required her to break her engagement with some other person. Her evidence further shows that she and respondent No.2 / accused visited a temple and garlanded each other and respondent No.2 / accused had tied a *Mangalsutra*. It is in this context, one will have to consider whether sexual intercourse by respondent No.2 / accused with the prosecutrix was against her will and without her consent, as envisaged by clause *firstly* and *secondly* in section 375 of the Indian Penal Code, 1860, which defines offence of rape.

13. The prosecutrix attempted to show that sexual intercourse with her by the accused was a forcible sexual intercourse and when she refused, accused threatened her. The prosecutrix further deposed in her evidence that in 2009 respondent No.2 / accused solemnized his

marriage with some another lady. The prosecutrix further deposed that accused gave threat to kill her brother as well as father and again developed sexual relations with her.

14. We are unable to agree with the version of the prosecutrix that her sexual relations with the accused were under threat of life to her relatives. Her evidence clearly shows that love relation was developed between them and the sexual relation, which the prosecutrix was having with respondent No.2 / accused, was as a result of that love relation. She indulged in such relations with the respondent No.2 / accused right from the year 2006 till lodging of her FIR on 16.5.2011. The prosecutrix never complained of any threat or force by the respondent No.2 / accused, compelling her to have sexual relations with him at any point of time during this long period of six years though respondent No.2 / accused is her near relative, being her cousin.

15. Now, let us examine whether alleged sexual relation

by respondent No.2 / accused with the prosecutrix was against her will and without her consent. Section 90 of the Indian Penal Code, 1860 makes it clear that consent is not a consent as is intended by any section of the Code if the consent is given by a person under fear of injury, or under a misconception of fact and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception. We have already held that the evidence on record does not show that alleged sexual intercourse was under threat or force. Now, let us examine whether it was under misconception of fact and therefore, the consent was not a valid consent. One will have to keep in mind the "will", as understood, is one's own voluntary act, a wish or a desire. Will is an inclination to act without any suggestion of others. Similarly, consent as understood by law, is an act by reason accompanied with deliberation, the mind weighing as in balance what is good and what is bad. The consent means an active will in the mind of a person to permit doing an act complained of. In the case in hand, evidence of the

prosecutrix goes to show that she was deeply in love with the accused and accordingly, she allowed him to have sexual intercourse with her for a long period ranging from 2006 to 2011. Evidence shows that the prosecutrix was a fully grown up matured girl and she appears to have indulged in consensual sexual relation with respondent No.2 / accused. Therefore, such act cannot be said to be an act induced by misconception of fact. Section 90 of the Indian Penal Code, 1860, as such, cannot be called in aid for imposing penal liability on respondent No.2 / accused. Ultimately, the prosecutrix was a girl who had attained majority at the time of the incident. She was a graduate, which shows that she was well educated lady with developed mental faculty. Resultantly, she was knowing what was good and what was bad for her. She had reasonable mental capacity to know her own acts. As such, it is not possible to infer that the alleged act complained of by the prosecutrix was against her will and without her consent.

16. We have perused the evidence of Dr.Yogita Fegade

(P.W.4). It only goes to show that respondent No.2 / accused had represented that he is husband of the prosecutrix and thereafter, Dr. Yogita (P.W.4) had medically examined the prosecutrix. As such, evidence of Dr. Yogita (P.W.4) does not show that the alleged sexual intercourse was against the will and without consent of the prosecutrix.

17. Section 114A of the Indian Evidence Act, 1872 deals with the presumption as to absence of consent in certain prosecutions for rape. It provides that when sexual intercourse by the accused is proved in a prosecution for rape under clauses (a), (b), (c), (d), (e) and (g) of subsection (2) of section 376 of the Indian Penal Code, 1860 and question is whether it was without consent of the woman alleged to have been raped and if such woman stated in her evidence before the Court that she did not consent, the Court is bound to presume absence of her consent. Such is not the case in hand.

18. The evidence of Nirmala Surwade (P.W.1) goes to

show that it was in the year, 2011 and precisely, on 29.5.2011 her daughter i.e. prosecutrix disclosed the incident to her. Evidence of mother of the prosecutrix shows that the prosecutrix had informed her that respondent No.2 / accused is going to marry her and, therefore, she did not worry. Nirmala (P.W.1) further deposed that her daughter informed her that because of trust on respondent No.2 / accused, the prosecutrix had developed sexual relations with him. These narrations of the prosecutrix coming on record from mouth of her mother goes a long way to show that alleged sexual intercourse by respondent No.2 / accused was not falling under categories firstly or secondly of section 375 of the Indian Penal Code, 1860.

19. Taking overall view and assessment of evidence on record, we have come to the conclusion that a plausible view is taken by the learned trial Court while recording the finding that the prosecution has failed to establish that respondent No.2 / accused had committed rape on the prosecutrix or that he had criminally intimidated her

by threatening to kill her father or brother.

20. In view of the foregoing reasons, the appeal is devoid of any substance and therefore, the order:

ORDER

Appeal is dismissed.

(A.M. BADAR, J.)

(S.S. SHINDE, J.)

Kadam.