

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AURANGABAD

CRIMINAL REVISION APPLICATION NO. 71 OF 2014

Pravin s/o Dattu Kamble

...Applicant

VERSUS

The State of Maharashtra

...Respondent

.....
Shri V.D.Gunale, advocate for applicant
Shri V.H.Dighe, A.P.P. for respondent/State
.....

CORAM : V.M.DESHPANDE, J.

DATED : 24th February, 2015

ORAL ORDER : -

1] Heard Shri V.D.Gunale, learned counsel for the applicant in extenso.

2] The present Revision is directed against the judgment and order, passed by the learned Sessions Judge, Latur, dated 7.2.2014 in Criminal Appeal No. 41 of 2012, whereby the learned Sessions Judge quashed the order of the learned Magistrate in extending the benefit of the provisions of Section 4 of the Probation of Offenders Act, 1958 of execution of bond

for keeping peace and be of good behaviour for a period of two years. Further, the learned Sessions Judge remitted the Summary Trial Criminal Case No. 101 of 2011 which was tried as regular case for re-trial by giving directions that the prosecutrix has to be examined by the prosecution.

3] The applicant was charge sheeted by police station Murud, District Latur in Crime No. 145 of 2010 for the offence punishable under Section 354 of the Indian Penal Code. The first information report was lodged on 29.12.2010 by the father of the prosecutrix PW 1 Sanjay Kamble.

4] The allegation against the present applicant is that on 28.12.2010 the prosecutrix had been to the house of the present applicant to watch television. Taking the advantage of loneliness in his house, the present applicant removed the nicker of the daughter, who even does not understand the heinous acts of the present applicant and then he has played with her private part with all sorts of perversity. The girl, when tried to raise her voice, her mouth was gagged by the present applicant. The said fact of ravishing her modesty was revealed by prosecutrix to her mother and the matter was reported to the police.

5] The learned Magistrate framed charge against the present applicant, who abjured his guilt and claimed for his trial. In order to bring home the guilt against the present applicant, the prosecution has examined in all four witnesses. They are parents of the prosecutrix, the brother of the first informant and the investigating officer.

6] The learned Magistrate convicted the present applicant by judgment, dated 18.4.2012 for for the offence punishable under Section 354 of the Indian Penal Code, however, instead of sentencing him to suffer jail sentence, the learned Magistrate has extended benefit of Section 4 of the Probation of Offenders Act.

What is more disturbing is that in spite of the fact that in an offence pertaining to the moral turpitude, though the benefit of Section 4 of the Probation of Offenders Act was extended, for the reasons best known to the prosecution, the State did not prefer appeal before the appellate court and it is the applicant who preferred appeal before the Sessions Court questioning his conviction.

7] The submissions were advanced before the learned appellate court by the present applicant that the prosecution has utterly failed to prove his guilt beyond reasonable doubt, in as much as the prosecution did not examine the prosecutrix.

The submission made before the learned Sessions Judge and which is also the submission before this court by the learned counsel for the applicant that in absence of the eye witness the entire case of the prosecution hinges on the evidence and the version of the prosecutrix and in absence of availability of the evidence of the prosecutrix, the learned Magistrate has committed serious mistake in convicting him for the offence punishable under Section 354 of the Indian Penal Code.

8] The learned Sessions Judge has rightly observed and recorded that the offence for which the present applicant was convicted is an offence involving moral turpitude, and therefore, the learned Magistrate has committed a serious mistake at law, and hence, without determining the question as to whether benefit of Section 4 of the Probation of Offenders Act can be extended or not, since he found the accused guilty for the offence punishable under Section 354 of the Indian Penal Code, the learned Magistrate extended the said benefit, and therefore, the learned Sessions Judge set aside the order passed by the learned Magistrate extending the benefit of the Probation of Offenders Act.

While setting aside the benefit, the learned Sessions Judge has rightly recorded that it was obligatory on the part of the prosecution to examine the prosecutrix, since it is the foremost and basic contention of the present applicant that

unless and until the evidence of prosecutrix was available the learned Magistrate was wrong in convicting him for the offence punishable under Section 354 of the Indian Penal Code. Therefore, the learned Sessions Judge has remitted the matter back to the trial court directing the prosecution to examine the prosecutrix.

9] Learned counsel Shri Gunale submitted before this court that the order passed by the learned Sessions Judge cannot stand to the scrutiny of law, in as much as it is the applicant who has preferred the appeal and the prosecution has kept mum in not preferring appeal. It is his contention that the appeal cannot be remitted back to the trial court for re-trial.

Though, at the first blush, the argument advanced by the learned counsel appears attractive, however, on closure scrutiny, it has to be rejected.

The prosecutrix is a child witness. The statement of the learned counsel is that sending matter back to the learned Magistrate will be a futile exercise, because of the age of the prosecutrix, as she does not understand the pervert act on the part of the present applicant.

The submission is totally misconceived. There is no bar in law that child witness cannot be examined, and therefore, cannot have conviction only on the basis of the evidence of the child witness. The court has to keep guard while appreciating

the evidence of the child witness that the evidence of the child witness is not tutored one. If the court is of the opinion that the evidence of the child witness is free from tutoring, then in that event it will be just on the part of the court to keep reliance on such testimony of a child witness and can secure the conviction of the accused person. In fact, it was the duty of the learned Magistrate, before whom the trial was going on, to procure the presence of the prosecutrix. It appears that, the learned Magistrate only pleaded a role of mute spectator.

Time and again this court has observed that while administering the criminal justice, the learned Magistrate has to step in during the course of the trial and pass the necessary orders securing the presence of the related witnesses, who can throw light on the prosecution case. It appears that in the present case, the learned Magistrate has abdicated his duty in not taking proper steps for securing the presence of the prosecutrix.

10] The afore said miscarriage of justice has been corrected by the learned Sessions Judge by setting aside the benefit granted in favour of the present applicant under Section 4 of the Probation of Offenders Act and also in order to give justice to the minor victim girl directed that her examination will be necessary.

11] In that view of the matter, there is no perversity and illegality committed by the learned Sessions Judge, and hence, the Revision is dismissed.

The Registrar (Judicial) is directed to remit the record and proceedings immediately to the learned Magistrate, who shall abide by the directions contained in the judgment of the learned Sessions Judge.

It is made clear that during the trial of remand the learned Magistrate may not get influenced by the observations made in this judgment, since this court has not decided the case of the prosecution on its merits or demerits.

[V.M.DESHPANDE, J.]

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