

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.239 OF 2000

Sinkukumar Tankeshwar Rabha,
Age 19 years, Occu. Education,
R/o. MIRC Family Quarter No.150/3,
Solapur Road, Ahmednagar ..Appellant

Versus

The State of Maharashtra ..Respondent

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Mr.S.S.Jadhavar, advocate for appellant

Mr.R.P.Phatake, APP for respondent – State

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CORAM : M.T. JOSHI, J.
JUDGMENT RESERVED ON : AUGUST 04, 2015
JUDGMENT PRONOUNCED ON : AUGUST 17, 2015

JUDGMENT :

Heard both sides.

2] Aggrieved by recording of conviction for the offence punishable under Section 376 read with 511 of Indian Penal Code and consequential sentence to undergo rigorous imprisonment for two years and to

pay a fine of Rs.1,000/-, present appeal is preferred by the original accused.

3] The prosecution case, in short, is as under :-

. That, the victim in the offence, at the time of occurrence, was about seven years old. The appellant was sixteen and half years old. The incident in question had occurred on 8th October, 1997. On that day, in the morning, the victim had gone to attend tuition class between 8:30 a.m. and 9:30 a.m. The father of victim, being in military, resident of the Cantonment area of Ahmednagar, after his night duty, came to the house at 8:45 a.m. Thereafter, he again went to his duties at 10:00 a.m. and by that time, the victim had not returned. He returned back to the house at 11:45 a.m. At that time, he found that the victim was weeping in the house and the mother of the victim

was making inquiry with her. The father also joined in the same.

. The victim told that at about 8:00 a.m., while she was proceeding to her tuition class, a youth having red colour bicycle, met her on the road. He promised her to escort upto Central School. Thereafter, he took her away from Cantonment area to a secluded place, as described in the F.I.R. He made her to get down from the bicycle. Thereafter, under a tree, he removed her frock and spread it on the floor. He made her to lie on the floor. Thereafter, he removed his trouser and inserted his penis in her private part. She started weeping as there were pains. He gagged her mouth. Thereafter, he tied her both the legs and put a part of footwear in her private part due to which, there was bleeding to her. At that time, the victim questioned him, however, he told her that he was playing a game of lock and key. After

sometime, he untied her and thereafter, brought her in the vicinity of her house. He told her that she should not disclose the said incident to her parents else, they themselves would beat her and thereafter, he went away.

. As the father of the victim was required to join his duty at 2:00 p.m. again, he asked his wife to make inquiry as to who was the youth. In the circumstances, when the mother was making inquiry in the vicinity, it was found that present appellant had a bicycle of red colour. Upon inquiry, the appellant told that he had not done the incident. In the night, the mother of victim told the said fact to the father of victim.

. In the circumstances, on the next day in the morning, the father took the victim to M.I. Room of military. He narrated the incident to the doctor. His senior Officer, however, told the

father of victim to file a complaint. Accordingly, the complaint came to be filed.

4] A.P.I. - Kisan Gawali, PW 9, conducted the investigation. He drew panchnama of the spot of occurrence. He arrested present appellant and seized his clothes. The clothes of the victim were also seized. The victim was sent for medico-legal examination. The appellant was also sent for the medico-legal examination on 10th October, 1997. Statement of the relevant witnesses, including that of the victim and her mother were recorded. The relevant property was sent to the C.A. The C.A. report was collected and charge sheet came to be filed.

5] Before learned Sessions Judge, in all, nine witnesses were examined including, father of the victim as PW 1; the victim herself as PW 3, mother

of the victim as PW 5 and PW 8 - Dr.Suresh Newse, who had examined the victim.

6] Learned Sessions Judge found that the oral testimony of the victim and her parents, is trustworthy. The medical evidence would show that there was redness on the vagina with edges of hymen having fresh tear and hemorrhage as well as bleeding was seen. Therefore, according to the Medical Officer, a passage of object having diameter of more than one centimeter, might have entered in the vagina resulting tear of the hymen and hemorrhage. In the circumstances, learned Sessions Judge came to the conclusion that though it was not a case of sexual intercourse, but attempt to commit forcible sexual intercourse was made, which is punishable under Section 376 read with 511 of Indian Penal Code. In the circumstances, though the appellant was acquitted from the offence punishable under Section 376 of

Indian Penal, for the attempt, he was convicted, as detailed supra.

7] Learned counsel for the appellant made number of submissions. He submitted that the conduct of father of the victim, in not making report of the matter to the police immediately and going away from the house though, according to the victim, she had narrated the incident, would show that the prosecution case is improbable. Further, taking into consideration that the appellant being an Assamese, and as the persons residing in the area of the appellant are having similar appearance as that of the appellant, it might have caused confusion. He expressed doubts regarding seizure of the clothes. He submitted that the C.A. report would show that no blood was found on the clothes of the victim. In the circumstances, he submitted that appeal may be allowed.

8] In the alternative, learned counsel for the appellant submitted that as per the prosecution case, at the time of commission of the alleged incident, the appellant was sixteen years and six months old. Further, Exhibit 18 the certificate issued by the Principal, Kendriya Medical M.I.R.C., Aurangabad, which is admitted in evidence, would show that the appellant was studying in 9th standard and his date of birth is 19th April, 1981. In the circumstances, it was submitted that since at the time of commission of the alleged offence, present appellant was sixteen years and six months old only, in view of the enactment of the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short "Act of 2000") whereby, a male below 18 years of age, is defined as a "juvenile" and the said provision is retrospective, the appellant could not have been tried by learned Sessions Judge.

9] On the other hand, learned A.P.P. supported the the prosecution case and submitted that the appeal may be dismissed.

10] On the basis of this material, following points arise for my determination :-

I] Whether the appellant was a juvenile in conflict with law at the time of commission of the offence ?

II) Whether the prosecution has proved that on 8th October, 1997 at about 8:00 a.m., present appellant had attempted to commit forcible intercourse with the victim ?

. My findings to the above points are in the affirmative. The appeal is, therefore, disposed of in terms of the final order, for the reasons to follow.

R E A S O N S

11] As per the prosecution case itself, the appellant was sixteen years and six months years old at the time of commission of the offence. The certificate at Exhibit 18, regarding the age of the appellant, also fortifies the same. Learned counsel for the appellant has relied on the ratio laid down in the cases of ***Hari Ram Vs. State of Maharashtra, 2009 DGLS (Soft.) 646***; and ***Dharambir Vs. State (NCT of Delhi) and anr., 2010 All M.R. (Cri) 2300***, wherein the provisions under Section 7-A and definition under Section 2(k) of the Act of 2000 were adverted to. Upon considering the provisions, it was declared that the provisions of the Act of 2000 would be applicable even to the male who is below 18 years old at the time of occurrence prior to enactment of the Act of 2000 and any Appeal or Revision, will have to be decided in the light of the said provisions.

12] In the case of ***Dharambir***, cited supra, the appellant was convicted for the offences punishable under Section 302 and 307 read with 34 of Indian Penal Code. The offence in question, was committed on 25th August, 1991, when the appellant was 16 years 9 months 8 days old and when, the Juvenile Justice Act, 1986 (for short, "Act of 1986") was holding the field. However, in view of the provisions of the Act of 2000, it was held that the benefit of the same will have to be extended to the appellant though, on facts, it was found by the Hon'ble Supreme Court that the offence was committed by the appellant therein, who, by the time, was 35 years old and had undergone imprisonment of 2 years and more. In the said matter, the Supreme Court, while sustaining the conviction, quashed the sentences.

13] In the present case, it is found that at the time of commission of the offence, the Act of 1986

was holding the field, which provided that a male below the age of sixteen years, would be a juvenile. However, in view of the provisions of the Act of 2000, the benefit of the same also extends to the appellant.

14] On facts of the case, though number of submissions were made, since the incident has occurred in broad day light, there cannot be a case of mistaken identity, as submitted by learned counsel for the appellant. The parents of the victim as well as the seven years old victim girl, who had entered the witness box, had no axe to grind against the present appellant. The medical evidence has fully supported the prosecution case. The offence is fully proved beyond reasonable doubt. Hence, on the line of the case of **Dharambir** (cited supra), the following order :-

A] The appeal is hereby disposed of by sustaining the conviction for the offence punishable under Section 376 read with 511 of Indian Penal Code. However, the sentence is hereby quashed and set aside.

B] Muddemal property be disposed of as per the directions already issued by learned Sessions Judge.

C] Bail bonds of the appellant shall stand cancelled.

[M.T. JOSHI, J.]