

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 251 OF 2001

Rajendra S/o Trimbak Kalokhe
Age-26 years, Occu.- Labourer,
R/o - Mehunbare, Tq. Chalisgaon,
Dist-Jalgaon

.. Appellant
(Orig. Accused)

VERSUS

The State of Maharashtra

.. Respondent

Mr. P.R. Patil, Advocate for the appellant
Mr. P.N. Kutti, A.P.P. for the respondent/State

CORAM : M.T. JOSHI, J.
RESERVED ON : 30/11/2015
PRONOUNCED ON : 08/12/2015

JUDGMENT :

Heard both sides.

2. The present appellant was convicted by the learned IInd Additional Sessions Judge, Jalgaon vide judgment and order dated 24/05/2001 passed in Sessions Case No. 205 of 1997 for the offences punishable under section 376 r/w. section 34 of the Indian Penal Code. He was sentenced to suffer rigorous imprisonment for a period of three (3) years and also to pay a fine of Rs.500/-. Hence, the present appeal.

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

. That on 12/07/1997, at midnight, near her house at Mehunbare, Taluka – Chalisgaon, Dist. Dhule, PW6 – 14 years old girl was subjected to forcible sexual intercourse by Bhima Balam Mang, the then child in conflict with law, who was also around of the same age. The present appellant is alleged to have helped the said accused Bhila as he caught hold the hands of the victim and dragged her for some distance and forced her to facilitate the rape.

. Bhila faced trial before the then Juvenile Court while the present appellant faced the present trial for the offences punishable under section 376 r/w. section 34 in the alternative under section 376 r/w. Section 109 of the Indian Penal Code in the Sessions Court.

4. According to the prosecution case, in the night between 11/07/1997 and 12/07/1997, the victim went for watching a movie on television set at her maternal grandparent's house, which was just opposite her house. At about 00=15 hours in the night, she went to answer

nature's call near the house of one Ganga Appa as some light was there. At that time, Bhila and the present appellant came there. Both of them caught her hands and dragged her for some distance. Thereafter, both of them forcibly felled the victim on the ground. The present appellant forcibly put both the hands of the victim below her head and also threatened that she should not shout otherwise she would be kidnapped. The victim therefore kept mum in the midnight. Juvenile accused Bhila took out the salwar and nicker of the victim. He took her punjabi kurti upto her neck. Thereafter, he undressed himself and forcibly inserted the penis in her private part by sleeping over her. He gagged her mouth by one of his hands and had the forcible sexual intercourse with her. In the circumstances, the victim started bleeding from the private part.

. During this time as the victim was away from the house for a considerable period, her grandmother – Narmadabai came towards the spot by giving calls to the victim. Therefore, the appellant as well as Bhila fled away.

5. The victim thereafter narrated the incident to all of her relatives including her paternal grandparents etc. and she was taken to Mehunbare Police Station and in the same night at about 01:45 am, her FIR at Exhibit 28 was recorded.

6. PW8 – P.S.I. Pawar conducted the investigation. He referred the victim for the medical examination at General Hospital, Dhule where PW9 – Dr. Pramod Gavit medically examined her. He noticed following injuries on the person of the victim :-

1. Multiple linear abrasions, vertically placed over the back.
2. Two linear abrasions over left buttock in outer quadrant about 7 cm in length
3. Single abrasion about 1 X 1 cm over left breast on lower aspect.

When the Medical Officer examined the private part of the victim, he externally found bleeding stains on both side of libia-majora. Pubic hairs were blood stained. There was small tear about 0.5 cm in length on vestibule

just below the clitoris. Tear over fourchette about 1 cm in length was noticed. Blood stained discharge was present.

. According to the Medical Officer, there was evidence of forceful sexual intercourse with tear over vestibule and on fourchette. He therefore collected the samples of nail clippings, pubic hair, vaginal swab and also of the blood. The juvenile accused was also examined.

7. After seizing the property like clothes and conducting the spot panchanama and recording the statements of the relatives of the victim, the chargesheet came to be filed.

8. The prosecution has examined the relatives of the victim i.e. her mother and father as PW1 and PW2, maternal uncle of the victim as PW4, grandfather as PW5, Dr. Gavit was examined was PW9. PW3 - Madhukar Chavan was the panch witness regarding the spot and attachment of the garments of the victim and juvenile accused - Bhila. PSI - Pawar was examined as PW8.

9. Defence of the appellant was that there was rivalry between him and the family of the victim, as they were in the same business of selling sweeps. He therefore was falsely implicated in the crime.

10. Learned Additional Sessions Judge, Jalgaon had charged the appellant of commission of offence punishable under section 376 r/w. section 34 of the Indian Penal Code and alternatively for the offences punishable under section 376 r/w. Section 109 of the Indian Penal Code as well as under section 506(1) of the Indian Penal Code.

11. The learned Additional Sessions Judge held that the prosecution has proved the incident beyond reasonable doubt except that of criminal intimidation as the prosecutrix did not depose about the same. According to the learned Additional Sessions Judge, the act of the present appellant did not constitute abetment, but it was participation in the offence in furtherance of the common intention with the juvenile

accused - Bhila. Therefore, the appellant was convicted for the offences punishable under section 376 r/w. section 34 of the Indian Penal Code. Hence, the present appeal.

12. Mr. P.R. Patil, learned counsel for the appellant submits that the learned Additional Sessions Judge had wrongly believed the prosecution case. There was no evidence on record to show that the victim was below 16 years of age. Further, the injury found on the person of the victim are possible even during the consensual act of sexual intercourse, as it took place on a rough ground and the injuries on the private part are also possible, if a girl who has recently come to the age of puberty, consents for sexual intercourse for the first time but during such intercourse suffers minor injuries.

13. On the legal issues, he submitted that in a case of rape, a co-accused cannot be convicted simplicitor for the offences punishable under section 376 r/w. section 34 of the Indian Penal Code. In the

circumstances, relying on the ratio in the case of **"State of Rajasthan Vs. Hemraj and another" (2009) 12 Supreme Court Cases 403**, he submits that the appellant be acquitted.

14. On the other hand, learned A.P.P. submits that the prompt filing of the FIR coupled with the medical evidence alongwith the peripheral material on record had established beyond reasonable doubt that, forcible sexual intercourse was committed with the victim by the juvenile accused. The prompt filing of the FIR would also rule out any false implication of the present appellant.

. He further submits that since the appellant has actively participated in facilitating the commission of the offence of rape by the juvenile accused, the learned Additional Sessions Judge has rightly convicted the appellant for the offences punishable under section 376 r/w. section 34 of the Indian Penal Code.

. In the alternative, relying on the ratio in the case of **"Nawabkhan and others Vs. The State" 1990**

CRI.L.J. 1179 Madhya Pradesh High Court (Indore Bench), wherein the ratio of **(1882) 8 QBD 534 "R Vs. Coney"** was cited, he submits that the conviction recorded by the learned Additional Sessions Judge for the offences punishable under section 376 r/w. section 34 of the Indian Penal Code can be altered to one under section 376 r/w. section 109 of the Indian Penal Code. In the circumstances, he submits that the appeal be dismissed.

15. On the basis of this material, following points arise for my determination:-

I) Whether the prosecution has proved that the present appellant has abetted the commission of forcible sexual intercourse by juvenile accused - Bhila with the victim in the night between 11/07/1997 and 12/07/1997 at Mehunbare ?

II) In the alternative, whether the prosecution has proved that the present appellant had, in furtherance of common intention with juvenile accused - Bhila, committed the act of catching and dragging the victim and, thereafter, assisting in

commission of the forcible sexual
intercourse ?

My findings to both the points are in the affirmative.
The appeal is therefore dismissed for the reasons to
follow.

R E A S O N S

16. The prosecution could not prove before the
learned Additional Sessions Judge that the prosecutrix
was below 16 years of age at the time of the incident,
as the birth certificate proved before the learned
Additional Sessions Judge had slightly different name of
the father of the victim.

. There is however ample proof that the juvenile
accused has committed the forcible sexual intercourse
with the victim. The incident has occurred in the
midnight of 11/07/1997 and 12/07/1997 at Mehunbare. The
FIR was filed at 01.45 am i.e. just within 40-45 minutes
of the incident and the victim was also medically
examined in the noon at Dhule, within a reasonable

period of the incident.

17. Not only there is no material to disbelieve the testimony of the victim but also the immediate filing of the FIR coupled with the statement of her relatives and the medical evidence would go to show that the offence of rape was committed against her.

. Further, the very immediate filing of the FIR ruled out any chance for the victim or her relatives to ponder over the incident and implicate the present appellant falsely in the crime.

. The victim, her relatives as well as the appellant were the hawkers, who used to sell sweeps. Business rivalry, if any, suggested by the appellant was denied by the prosecution witnesses.

18. In that view of the matter, no fault can be found with the reasoning forwarded by the learned Additional Sessions Judge that the present appellant has participated in the crime.

19. The only issue is as to whether, the appellant can be convicted with the aid of provisions of section 34 of the Indian Penal Code or under section 109 of the Indian Penal Code.

20. The learned Additional Sessions Judge has held that the appellant has assisted or helped the juvenile accused in furtherance of common intention and it cannot be called as abetment. Therefore, the conviction was recorded for the offences punishable under section 376 r/w. section 34 of the Indian Penal Code.

21. Mr. Patil, learned counsel for the appellant relied on "**State of Rajasthan V. Hemraj**" (cited supra). In that case, however, a woman accused stood trial for commission of the offence of gang-rape punishable under section 376(2)(g) of the Indian Penal Code. In those circumstances, it was held by the Supreme Court that even such prosecution would be impermissible as a woman committing rape is conceptually inconceivable.

22. In the present case what we find is that the

present appellant has actively assisted the juvenile accused by catching the hands of the victim, dragging her for some distance, making her to fall on the ground and, thereafter, in putting her hands below her neck. Therefore, the conviction of the appellant for the offences punishable under section 376 r/w. section 34 of the Indian Penal Code was proper.

23. Even otherwise, the ratio in the case of **"Nawabkhan Vs. The State"** (cited supra), would show that merely because the trial Court convicts the accused under the wrong provision, cannot be a ground for acquittal of the accused and the conviction can be altered for another offence from the offence punishable under section 34 of the Indian Penal Code to the offence punishable under section 109 of the Indian Penal Code to the principal offence. I do concur with the reasons forwarded therein.

24. In that view of the matter, the appeal fails. Hence, the following order:-

25. Criminal Appeal is hereby dismissed.

26. Bail bonds of the appellant shall stand cancelled. The appellant to surrender before the learned Sessions Judge, Jalgaon within a period of six (6) weeks from the date of passing of the present judgment and order.

27. Upon failure to surrender by the appellant, the learned Sessions Judge, Jalgaon to take steps for securing presence of the appellant to serve rest of the period of the sentences.

28. Criminal Appeal stands disposed of accordingly.

[M.T. JOSHI]
JUDGE

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