

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.713 of 1995

Tulshiram Babasaheb Mulik .. Appellant
Versus
The State of Maharashtra .. Respondent

Mrs.S.A.Dhamale, Advocate for the appellant.

Mrs.S.V.Gajare, APP for the Respondent State.

CORAM : ABHAY M. THIPSAY, J.

DATED : 6th JULY, 2015

ORAL JUDGMENT :

1 This Appeal is directed against the judgment and order delivered by the Addl. Sessions Judge, Nashik in Sessions case No.146/95, convicting the appellant who was the accused in the said case of an offence punishable under section 376 of the IPC, and sentencing him to suffer Rigorous Imprisonment for a period of 12 years, and to pay a fine of Rs.5,000/- in default to suffer RI for 9(nine) months.

2 The prosecution case, as put forth before the trial court, may, in brief be stated thus :-

The appellant – an Ex-Military man – was, at the material time, employed as a watchman in Mahendra and Mahendra Co. Nashik. He was residing with his wife Aruna and his two sons Vilas and Jivan. The appellant is the uncle of the wife of one Kondiram, a resident of Satara. Daughter of Kondiram, aged about 15 years (who is the victim of the offence), was sent to the house of the appellant with the consent of Kondiram and his wife for education. The daughter – name not mentioned to avoid disclosure of identity – was admitted in a school. When the daughter of Kondiram (hereinafter referred to as 'the victim') was residing with the appellant, the appellant allegedly had sexual inter-course with her, repeatedly, for a period of about 3 – 4 months. The victim missed her menstrual cycle for two months consecutively, felt vomiting sensation, and therefore, disclosed this fact to the neighbors - Smt.Ahire and Smt.Pawar (PW3). They perhaps suggested that she needed to be taken to hospital, and therefore, the victim asked the appellant to take her to hospital. The appellant took her to Civil Hospital, Nashik. On examination, the Medical Officer found the victim to be pregnant. When the Doctor asked her about her pregnancy, the victim told the doctor that she had been raped by her own grand-father. The appellant left the Civil Hospital without taking the victim with him. The

Medical Officers of Civil Hospital and policemen on duty, sent a wireless message to the parents of the victim in District Satara. In the mean time, while in the Civil Hospital, the victim lodged a report with the police which was treated as the First Information Report and an offence punishable under section 376 of the IPC was registered against the appellant. Necessary investigation was done, and on completion thereof, a charge-sheet came to be filed against the appellant.

3 The prosecution examined seven witnesses during the trial. The appellant did not examine himself on oath, or adduce any evidence in defence.

4 The first witness is the victim herself. Her father Kondiram is the second witness. Ushabai Pawar, neighbour of the appellant is the third witness and Dr.Karuna Bhise who had examined the victim on 9th June 1995 when the victim was brought to her by the police, is the fourth witness. The fifth witness is Babulal Sonawane, Assistant Sub-Inspector of Police who had recorded the First Information Report lodged by the victim. The sixth witness Sou.Mandakini Bakre is a clerk working in the school where the victim was studying and through this

witness, the School Leaving Certificate of the victim, to show the date of her birth, was produced. The seventh witness Devidas Lahare, Assistant Police Inspector is the Investigating Officer who had filed a charge-sheet against the appellant.

5 I have heard Mrs.S.A.Dhamale, learned counsel for the appellant and I have heard Mrs.S.V.Gajare, learned APP for the State. I have gone through the entire evidence adduced during the trial. I have carefully gone through the impugned judgment.

6 In her evidence, the victim has stated that when the incident of rape first time took place, the wife of the appellant and his two sons had gone to Anpatwadi in Satara district and she and the appellant had continued to stay in the house of the appellant. That, the appellant used to return from his duty of second shift at about 11.00 p.m, and usually, the victim used to be sleeping at that time. The appellant would sometimes return home after drinking liquor, and would also bring a bottle of liquor with him to consume the same in the house. That, after returning home, the appellant used to remove the clothes of the victim, wake her up and used to have sexual inter-course with her. According to her, she used to protest, but in spite of the same, the appellant

continued to have sexual inter-course with her during night time. The victim also states that the wife of the appellant knew that the appellant used to rape her, and that, the appellant had kept illicit relations with her. The victim has then stated that accused continued to have sex with the victim for a period of about 3 – 4 months, and that thereafter, for two months, the victim missed her menstrual cycle. That, she then took the neighbors Mrs.Ahire and Mrs.Pawar in confidence and they, after making enquiries with the victim told her that she had contracted pregnancy. The victim then requested the appellant that she should be taken to hospital as she was pregnant, and the appellant then took her to Civil Hospital. The doctor on examining her, told her that she was two months pregnant. When asked, the victim told the doctor that the appellant had abused her sexually, and that he was the uncle of her mother. The appellant then left the Civil Hospital and went back alone to his house. He did not return to Civil hospital to take the victim back. The policemen in the civil hospital and the doctor on duty told the victim that they would call her parents. The victim then made a report to the police while in the Civil Hospital itself which was treated as the First Information Report (FIR). It was produced before the Court and tendered in evidence (Exhibit-18). The victim has given the date of her going to the Civil

Hospital as '8/06/1996', and has stated that on 14th or 15th June 1995, she was discharged from the hospital. She has also given her date of birth as '1/09/1980'. The identity of the appellant was not in dispute, but even otherwise, on being asked, the victim has identified the appellant as the same person who had sexually abused her.

7 In the cross-examination of the victim, it was asked to her that there were two sons of the appellant who were staying with him in the same house, and that, the school of the victim was about 1 km away from the house. In the cross-examination, it was brought on record that the victim, the appellant, the appellant's wife, and the appellant's two sons, all slept in one room only. The victim said in the cross-examination, that even when his wife and two children used to be in the house, the appellant used to have sexual inter-course with her. She categorically stated that the appellant used to have sex with her against her will and desire. She claims to have told Aruna – wife of the appellant – that she was being raped by the appellant against her will, after about a month, and that, as the appellant had threatened her, she had not disclosed the same earlier to anyone. She was also asked in the cross-examination as to why she did not shout when the appellant

used to have sexual inter-course with her, and that she replied that it was due to the threats given by the appellant. She was questioned in the cross-examination as to why she had not sent any letter to her parents to which she replied that she did not know their postal address. She also said that she did not disclose this fact to her school mates and school teachers. She also said that she did not ask Aruna why she did not do anything to stop the acts of appellant. She said that she did feel that she should go back to her parents, but was not having money. She also said that she did not know how to go to her parents village.

8 The evidence of Kondiram shows that the victim was born on 1st September 1980, and that, on receiving a message from the Satara Control room, he came to the Civil Hospital, Nashik on 13th June 1995 in the morning. That, he asked the victim what had happened when she told him about the appellant having committed rape on her, and that, she was pregnant of two months.

9 The evidence of Ushabai (PW 3) says that the victim came to her and told that she had vomiting sensation, and that she had missed her menstrual cycle. That, Ushabai then felt

something was wrong with her 'in the house of the appellant' and that, at that time, the wife of the appellant had gone out of station. Ushabai asked the victim to go and tell the appellant about it.

10 Dr. Karuna Bhise (PW 4) has stated about her having examined the victim on 13th June 1995. According to her, the victim was of about 13 years. On examination, Dr.Karuna found the hymen of the victim to be torn and that, she was habituated to inter-course. Dr.Karuna observed that the victim was having pregnancy of about seven weeks.

11 The evidence of Babulal Patel (PW 5) only shows the fact of recording of First Information Report, and is not of much significance. It was suggested to him that the victim was not inclined to disclose the name of the person who had committed rape on her, but that he pressurized her and then she took the name of the appellant. It was suggested to him in the cross-examination that the victim was telling that she had contracted pregnancy because of rape by school mates. These suggestions were denied, as not true by this witness.

12 Mandakini Bakre (PW 6) produced the School Leaving Certificate issued by the previous school of the victim i.e. Municipal School Boards School at Satpur. That, as per the school record, the date of birth of the victim was '1st September 1980'. In the cross-examination, she admitted that she had not got verified the date of birth of the victim from the previous school, and that she did not know on what basis the date of birth had been mentioned in the records of the previous school.

13 Devidas Lahare – the Investigating Officer has given the details of investigation in his evidence. In the cross-examination, he was asked as to whether he had recorded the statements of the sons of the appellant, and he answered the same in negative. He also stated that he did not feel it necessary to record the statements of school mates of the victim.

14 Mrs.S.A.Dhamale, the learned counsel for the appellant, submitted that the story of the victim was unbelievable. She contended that when the victim, the appellant, the appellant's family consisting of his wife and two children, all were staying in a single room, it was not possible for the appellant to commit rape on the victim. She also submitted that the victim's evidence that

though she was being raped, she kept quiet, and did not disclose this to anybody else, is not believable. It was contended that the excuses given by victim for not reporting the matter to the school authorities or to her parents, or for not attempting to go away from the appellant's house, are not believable.

15 I am unable to accept this. The appellant was an ex-military man, and was gainfully employed in a Company. The victim had been sent to his house, and apparently, was to stay there and have her education, because he was financially more affluent than the parents of the victim. He was the uncle of the victim's mother, and thus, the grandfather of the victim. The relationship between the appellant and the victim was such that the appellant was certainly in a position to dominate her will. When the victim – a fifteen year old girl – had been specially sent by her parents to stay in the appellant's house and take education by being there, it was very difficult for her to resist the acts of the appellant.

16 The matter has to be viewed in this context. That the victim was pregnant, cannot, and is not disputed. Therefore, there must be somebody who had inter-course with the victim. The

victim says that he was the appellant. When such is the case, there ought to be some reason for disbelieving the victim and holding that she was falsely implicating the appellant though actually she had inter-course with someone else.

17 I do not think that the victim should be disbelieved, inasmuch as it would mean accepting a theory that though somebody else committed inter-course with her, the victim falsely named the appellant. This does not appear to be possible for a number of reasons, including the relationship between the victim and the appellant.

18 The victim was the uncle of her mother, and thus, her grand-father. He was trusted by her parents, as is obvious from the fact that they sent the victim to stay at his house. Infact, he is supposed to be obliging the parents of the victim by agreeing to look after her. In such a situation, the victim was not likely to make such a false allegation against him. Secondly, the victim appeared to be used to sexual inter-course. In other words, she was subjected to several acts of sexual inter-course. It is difficult to accept that this would be possible outside the house, without being detected. The suggestions given in the cross-examination

that she was raped by her school mates, cannot be accepted at all. There would hardly be any opportunity to the school mates to commit repeated acts of sexual inter-course with the victim.

19 What exactly is suggested, by putting the ages of the sons of the appellant to the victim in her cross-examination, and by pointing out that they were young, is difficult to understand. Perhaps, it was intended to be suggested that one of the sons of the appellant could have had inter-course with the victim. This does not appear to be possible as the sons would not dare to take such a step in the presence of their mother and father. Such a step could be taken by a person who would be completely confident, and would be in the control of the affairs. The appellant did hold such a position.

20 The learned counsel for the appellant contended that it was not possible for the appellant to have committed rape on the victim when his wife was in the room. She thereby submitted that the statement of the victim that the wife of the appellant was aware of the acts of the appellant, could not be accepted and consequently, the victim cannot be relied upon. I am not able to accept this. It is quite possible that the appellant who was the

bread earner of the family had all the say in the matter, and his wife was probably a helpless spectator in the whole episode. Thus, the version of the victim cannot be disbelieved because she said that the wife of the appellant was aware of what the appellant was doing to the victim. On the contrary, there appears to be no reason for the victim to make such a false claim i.e. about the wife of the appellant being aware of the appellant's acts.

21 As aforesaid, once the fact that the victim had, had repeated sexual inter-course with *someone* is not disputed, there ought to be some sound and logical reason for holding that, that *somebody* is not likely to be the appellant, though the victim implicates him. There was absolutely no motive for the victim to have falsely implicated the appellant. The appellant's explanation in that regard, as given by him, during his examination under section 313 of the Code, is that on one occasion, the victim came late, and that thereafter, he did scold her, and that therefore, the victim made a false allegation of rape against him. It is impossible to accept such a possibility as reasonable.

22 Since it is also suggested that the acts of the appellant could be with the consent of the victim, the age of the victim

assumes importance. The prosecution case is that the victim was at the material time, less than 16 years of age. Her date of birth has been given by Kondiram as '1st September 1980'. There is absolutely no challenge to the evidence of Kondiram in that regard in the cross-examination. The birth certificate produced by Smt.Mandakini (PW 6) is attacked on the ground that it does not establish the date of birth of the victim with certainty, inasmuch as it was based on the record maintained in the previous school, and that who had given the information in that school, was not clear. There is some substance in this contention, and perhaps better evidence about the age of the victim could have been adduced. However, how much evidence should be given in a particular case for the proof of any fact, and how much evidence is required for holding a fact as 'proved', depends on several aspects. In the instant case, as already observed, there was absolutely no cross-examination of Kondiram with respect to the date of birth of the victim as given by him. There was every opportunity to challenge Kondiram in that regard which was not availed of. The entry in the record of the school where the victim was studying was made in the ordinary course of the business, and though better evidence perhaps could have been produced, since the evidence of Kondiram has gone unchallenged, it is not possible to doubt the

correctness of the date of birth of the victim as given by him. Moreover, the evidence of Dr.Karuna also shows that the victim was thought of about 13 years by her. Certainly, that is not conclusive, but as aforesaid, when no challenge to the date of birth of the victim as given by Kondiram, was given and when the school records lend corroboration to what Kondiram stated, one must proceed on the basis that the date of birth of the victim as stated before the trial court, was the correct date. Once this is so, that the victim was less than 16 years on the given date, cannot be doubted at all. Going by the date of birth of the victim as 1st September 1980, the victim was less than 15 years at the material time. Therefore, the appellant who had sexual inter-course with the victim, was undoubtedly guilty of an offence punishable under section 376 of the IPC, irrespective of whether the victim was a consenting party to the repeated sexual inter-course.

23 Even otherwise, there is absolutely no reason to believe the victim to be a consenting party. Considering the age of the victim and the age of the appellant, as also his position as the grand-father of the victim, to whose house she was sent by her parents, and was to stay there for years, lack of resistance by the victim, cannot be construed as her consent for the act. The

appellant, apparently, was in a commanding position vis-a-vis the victim, and able to dominate the will of the victim. It was not possible for the victim to have resisted the appellant, but that would not mean that the victim was a consenting party to the sexual inter-course, particularly when she categorically and repeatedly says that she was not.

24 In my opinion, the charge levelled against the appellant had been satisfactorily proved. The appreciation of evidence as done by the learned trial Judge does not suffer from any error or infirmity, and the conclusion arrived at by him, appears to be proper and legal.

25 The sentence of Rigorous Imprisonment for a period of 12 years, as imposed by the Addl. Sessions Judge, however, does not seem to be in accordance with law. Section 376 of the IPC as it stood, at the material time, provided for a punishment of Rigorous Imprisonment 'which should not be less than 7 years, but might extend to Imprisonment for life', or 'for a term which may extend to 10 years.' Thus, it was permissible for the trial Judge to impose a sentence of imprisonment for a term of 10 years, or even to impose a sentence of Imprisonment for Life, but, he could not

have, when he did not award the sentence of Imprisonment for Life, imposed a sentence of Rigorous Imprisonment for a period of 12 years upon the appellant. If he wanted to impose a sentence of Imprisonment for a term and not for life, he could have imposed only a maximum sentence of Rigorous Imprisonment for a period of 10 years. The sentence imposed upon the appellant by the trial court, therefore, needs to be modified in accordance with law.

26 Considering the heinous nature of the crime, I am of the view that the appellant should be punished with Rigorous Imprisonment for a period of 10 years which is the maximum punishment awardable for the offence punishable under section 376 of the IPC, when Imprisonment for Life is not awarded.

27 In the result, the substantive sentence imposed upon the appellant by the trial court, is modified to a sentence of Rigorous Imprisonment for a period of 10 years.

28 Subject to this modification, the Appeal is dismissed.

(ABHAY M.THIPSAY, J)