

vks

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.756 OF 2014

Jaikumar Kailas Gedam	]	 Appellant
age: 35 years, Occn. Service	]	(Original
resident at Bharat Chicken Market,	]	Appellant)
Karvenagar, Pune -5	]	

V/s.

The State of Maharashtra	]	
at the instance of Warje Malwadi	]	.. Respondent
Police Station,Pune	]	

Ms. Sarojini Upadhaya, appointed advocate for the Appellant.
Mr. H. J. Dedia, APP for the Respondent/State.

CORAM : SMT. V. K. TAHILRAMANI, ACTING C.J. &
DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 11TH FEBRUARY 2016.

ORAL JUDGMENT :[Per: Dr. Shalini Phansalkar-Joshi, J.]

1. This appeal is preferred by original accused challenging his conviction and sentence, as recorded by the judgment and order dated 13.1.2014, in Sessions Case No.179 of 2012, by the Sessions Judge, Pune, for the offences punishable

under Sections 376(2)(f) and 377 of Indian Penal Code for committing rape on his own daughter and further having unnatural carnal intercourse with her. He has been sentenced to suffer imprisonment for life and to pay fine of Rs.1,000/- in default to undergo rigorous imprisonment for six months on the first count; and to suffer rigorous imprisonment for five years and to pay fine of Rs.1,000/- in default to undergo rigorous imprisonment for six month on the second count. By the impugned judgment the appellant is further convicted for the offence punishable under Section 377 of Indian Penal Code, for committing carnal intercourse with his own son and sentenced to suffer rigorous imprisonment for five years and to pay fine of Rs.1,000/- in default to undergo rigorous imprisonment for six months.

2. The facts of this case are pretty disturbing and most unfortunate. The prosecutrix in this case is a minor daughter of appellant, who was 10 years of age and studying in fifth standard at the time of incident. As her mother has expired, since about 6 months prior to incident, she was residing with her cousin aunt Bharti Tai, the sister of P.W.2 Shailaja. Her brother

P.W. 5 Kishor aged 12 years was also staying with Bharti Tai. On Sunday, their father the appellant herein, used to come there to meet them. On the day of incident, the appellant came to meet prosecutrix and then took prosecutrix with him on the pretext of purchasing footwear for her. He took her near Mrutyunjay temple. From there he took her to one bridge of the culvert. There, he committed forcible sexual intercourse with her, after removing her underwear and his clothes. Then he also had carnal intercourse with her by inserting his penis in her anus. When she shouted, her father pressed her mouth. After the incident, she was again dropped in the house of Bharati Tai.

3. On the next day, at the time of giving bath to her, Bharati Tai noticed some injuries on the person of prosecutrix. P.W.2 Shailaja, then made enquiry with prosecutrix about said injuries. Prosecutrix disclosed the incident to her. Therefore, P.W.2 Shailaja took the prosecutrix to Kothrud police Station. There, her complaint came to be recorded vide Exh.24. On the said complaint C.R.No.547 of 2011 was registered. The statement of prosecutrix was then recorded in question and answer form by Lady Police Inspector Mr. Deepali Jadhav. The

statement of P.W.5 Kishor, the brother of prosecutrix also came to be recorded by PI Deepali Jadhav. From his statement, it was transpired that the appellant had subjected him also to carnal intercourse. Hence appellant was arrested on the same day on both these charges and investigation was set in motion.

4. P.W.1 ASI Deshmukh conducted spot panchnama Exh.11 and referred both the prosecutrix and her brother P.W. 5 Kishor for medical examination. He then seized the clothes of appellant, prosecutrix and her brother P.W.5 Kishor under panchnama Exh.16. The seized Muddemal articles were sent to Chemical Analyzer. The Chemical Analyzers reports are produced at Exh.19 to 21. Meanwhile both prosecutrix and her brother P.W. 5 Kishor, were referred for medical examination to Sassoon Hospital. On receipt of the medical reports and further to completion of investigation, chargesheet was filed in the Court against the appellant.

5. On committal of the case to the Sessions Court, trial Court framed charge against the appellant vide Exh.4. Appellant pleaded not guilty and claimed trial, raising defence of denial and false implication at the instance of P.W.2 Shailaja and her

sister Bharati Tai.

6. In support of its case, prosecution examined in all five witnesses and on appreciation of their evidence, trial Court was pleased to hold the guilt of appellant to be proved beyond reasonable doubt, on all the counts and convicted and sentenced him, as aforesaid.

7. This judgment of the trial Court is challenged in this appeal by learned counsel for appellant; whereas supported by learned APP. In our considered opinion, before adverting to rival submissions advanced by them, it would be useful to refer to the evidence on record.

8. The entire prosecution case hinges on the evidence of P.W.4 prosecutrix, who is a minor daughter of appellant. In view of settled position of law in respect of sexual offence, the evidence of prosecutrix is of particular significance and conviction can safely be recorded on her sole testimony if her evidence is found to be worthy of credence and it does not suffer from any basic infirmity. The law is also well settled that corroboration to her testimony is neither a rule of law, nor of prudence. Conversely to insist on such corroboration is adding

insult to her injury. It is further well settled that prosecutrix complaining of having been a victim of sexual offence stands at higher pedestal than an injured witness and therefore, her evidence is of crucial consequence, which is required to be assessed with requisite sensitivity and taking a realistic approach, keeping in mind social ethos that rarely will a girl or a woman in Indian society can make false allegations of sexual assault. It is held that a girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit occurrence of any such incident and would feel extremely embarrassed in relating the incident to others; hence her natural inclination would be to avoid publicity to the incident. Apex Court has further held in the landmark decision of Bharwada Bhoginbhai Hirjibhai -vs- State of Gujarath AIR 1983 SCC 753(1) that,

“reluctance to face interrogation by the investigating agency, to face court, to face the cross examination by defence counsel for the culprit and risk of being disbelieved, act as a deterrent”

All these factors which deter even an adult woman to lodge

complaint of sexual offence become more accentuated in case of a minor girl, especially when such complaint is against her own father, as in the present case.

9. In the instant case P.W.4, prosecutrix was a minor girl of 10 years old at the time of incident; whereas while giving evidence in the Court she was approximately of the age of 11 to 12 years. Her mother was no more and therefore, naturally her attachment and dependence was only on her father- the appellant.

10. According to her evidence, after death of her mother, she started residing with her cousin aunt Bharati Tai. P.W. 5 her brother, Kishor was also a minor child, residing with Bharati Tai, since his childhood. P.W.2 Shaila, is real sister of Bharati Tai. As per evidence of prosecutrix, her father was working at Chicken Centre. He used to come to meet her at the house of Bharati Tai on Sunday. On the day of incident also, her father came to meet her at the house of Bharti Tai and then on the pretext of purchasing footwear for her, he took her under the bridge of culvert near Mrutyunjay temple. There he removed her underwear and his own underwear and committed sexual

intercourse with her from behind as well as from front. Specific questions were put to her to know her understanding of the incident. Those questions and answers are as follows :-

“Q.1 : What is meant by from behind?

Ans : The witness put her hand on her buttock and states that her father had inserted his penis in her anus.

Q.2 : What is meant by doing from the front?

Ans: My father inserted his penis in my vagina”

11. She has further deposed that when she shouted, her father pressed her mouth. Thereafter she was brought to the house of Bharati Tai. On the next day, when she was given bath, the injuries on her person were noticed. She then disclosed about the incident to P.W.2 Shailja, who then took her to the Kothrud Police Station.

12. This evidence of prosecutrix is supported with the evidence of P.W. 2 Shailja, who has deposed about prosecutrix disclosing to her about the incident and after confirming with her again and again as to what has actually happened, she took prosecutrix to the police station. As per her evidence, prosecutrix told her that on the pretext of purchasing footwear, her father took her at Culvert behind temple of Mrutyunjay.

There he removed her clothes and his clothes. Then her father made her to lie on her stomach on the ground and inserted his penis in her anus.

13. Both these witnesses are cross examined at length by learned counsel for the appellant, but nothing worthwhile is elicited in their cross examination, except for some minor omissions which are bound to occur in testimony of any truthful witness. Instead of demolishing their credibility, they give an inbuilt guarantee of their truthfulness. The prosecutrix has outrightly denied that she has made false allegations against appellant at the instance of P.W.2 Shailja and her sister Bharati Tai.

14. This evidence of prosecutrix also gets complete support and corroboration from the medical evidence. P.W.3 Dr. Mrs.Matri, has examined the prosecutrix in Sassoon hospital and noted history given by her which was to the effect that prosecutrix was sexually abused by her father. Prosecutrix has also given history of penetration and sexual intercourse through anus as well as vagina. Prosecutrix has further told about this particular incident dated 21.12.2011 when her father had taken

her on the pretext of purchasing footwear for her and then under the bridge forced her to have penetrative sexual intercourse through both anus and vagina.

15. As per evidence of P.W.3 Dr. Matri, on anal examination of prosecutrix, she found that peri-anal cracks were present in the skin. Raw surface was present. There was also presence of blood on the surface. Further she found that anal opening was two finger wide. On genital examination she found genital ward of size 2 mm.

16. From these injuries on the person of prosecutrix Dr. Matri has categorically opined that those injuries were caused by forcible anal intercourse with her. In cross examination Dr. Matri has denied suggestion that these injuries can be caused by yeast infection. Her evidence is challenged only on the ground that on genital examination of prosecutrix she did not find any injuries on her vagina. As per her evidence, hymen and fourchette were intact. There were also no marks of injuries on breast, lips, chicks, thighs etc. Hence according to learned counsel for appellant, the absence of these external injuries on person of prosecutrix especially her hymen being intact,

possibility of rape needs to be totally ruled out. However, in our opinion, as per explanation of Section 376 of Indian Penal Code, to constitute an offence of rape, even slight penetration is sufficient. Hymen need not be torn nor injuries to the vaginal or other parts of the body of the victim are essential.

17. The real issue before the Court in such cases of sexual offences is whether the evidence of prosecutrix deserves to be believed upon or not. Once her evidence is found to be reliable, no other impediment can come in upholding conviction of the accused. Here in the case as stated above, the evidence of prosecutrix is straightforward, consistent and reliable. It has a ring of truthfulness which inspires confidence in the judicial mind. Hence the evidence of her hymen remaining intact or absence of injuries on her person has no relevance.

18. Though submission is also advanced by learned counsel for appellant to the effect that Chemical Analyzer's report of vaginal smear and swab does not disclose presence of blood, in our considered opinion it cannot become fatal in the instant case as evidence on record shows that the medical examination of prosecutrix was done on the next day of the

incident and prior to that she had already taken bath.

19. The evidence of P.W.5 Kishor, the brother of prosecutrix, who at the time of incident was again a minor child and residing with Bharati Tai, reveals that appellant used to take him at various places, remove his half pant and was committing rape on him from behind. He has disclosed this fact to Bharati Tai and P.W.2 Shailja. He has denied suggestion that he was deposing at the instance of Bharati Tai and Shailaja tai. There is also no possibility of his giving false evidence against his own father, considering the fact that these two children were minor and orphan, as their mother was no more. It was their father who was subjecting them to sexual abuse, it cannot be expected that they will disclose about such incident to any one. In case of prosecutrix, as injuries on her person were noticed by Bharati Tai, the incident came to light. Otherwise it would not have been.

20. In our considered opinion, therefore, there is absolutely no reason to disbelieve the evidence of these two children. The offence committed by the appellant is of most heinous nature. He has betrayed the trust reposed in him by his children with total disregard to sacred relationship. Therefore,

the punishment of life imprisonment imposed by the trial Court on the appellant is also most justified in the facts of the present case. The appeal, therefore, holds no merit. Hence stands dismissed.

21. The fees payable to the advocate appointed to represent the appellant in this appeal are quantified at Rs.5,000/-.

[ACTING CHIEF JUSTICE.]

[DR. SHALINI PHANSALKAR-JOSHI, J.]