

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL APPEAL NO.444/2015

Sakharam Subhash Zolande,
aged about 25 years, Occ. Labour,
r/o Ghonsara, Tq. Mahagaon,
Dist. Yavatmal.

.....APPELLANT

...V E R S U S...

State of Maharashtra, through
Police Station Officer, Police Station,
Pusad Rural, Tah. Pusad,
Dist.Yavatmal

...RESPONDENT

Mr. D. A. Sonwane, Advocate appointed for the appellant.
Mr. S. S. Doifode, A.P.P. for respondent.

CORAM:- A. B. CHAUDHARI, J.
DATED :- 29.01.2016

J U D G M E N T

1. Being aggrieved by judgment and order dated 25.02.2014 in Sessions Trial No.22/2012 passed by Additional Sessions Judge, Pusad, by which the appellant was convicted and sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs.5000/- for an offence under Section 366 IPC, rigorous imprisonment for three years and fine of Rs.3,000/- for an offence under Section 452 IPC and rigorous imprisonment for seven years and fine of Rs.7000/- for an offence under Section 376 of the IPC, the present appeal was filed.

2. In brief, case of the prosecution is that on 26.11.2012, the prosecutrix was at home and there was a marriage in the house of one Thakare in the village. Her parents and sister had gone to that marriage. The prosecutrix stayed back since she was feeling ill. At about 1.00 p.m. when she was sitting in the courtyard, her cousin i.e. the appellant came to her house and asked her to come behind the house. But she refused and he then took her to the fodder room and committed rape on her and went away. Her parents came back along with her uncle and aunt. She informed the incident to them. She was taken to Police Station, to the hospital and thereafter complaint was lodged on 26.04.2012 itself when the offence was registered. The investigation was carried out by the Investigating Officer. Seizures were made and finally charge-sheet was filed in the Court. The prosecution examined as many as 10 witnesses before the learned Sessions Judge who finally convicted the appellant. Hence, this appeal.

3. In support of the appeal, learned counsel appointed for the appellant, vehemently argued that because of dispute of the accused with the family members of the prosecutrix, he was being

roped for the offence of rape. He then contended that one Maroti was examined as defence witness to substantiate his case. He then submitted that the prosecution case does not at all appear to be probable since in the broad daylight, the incident is said to have taken place. He then submitted that the story that she was lifted by the accused and forcibly taken to the fodder room and thereafter committed rape is nothing but an impossibility since she did not shout as is apparent from the case. He then submitted that it is important that there will be no other witness when in broad daylight, the incident is said to have taken place. Therefore, the prosecution case was totally faulty and without any substance. He then contended that the distance between the place of marriage and house of the prosecutrix was such that it is impossible to believe that anybody would see the accused taking away the girl by lifting. The learned counsel then contended that the medical evidence is not suggestive of any evidence of rape and, therefore, the appellant deserves to be acquitted.

4. Per contra, the learned A.P.P. supported the impugned order and submitted that the prosecutrix-S (PW5) is a physically challenged girl with both hands and legs and in addition, is

mentally retarded girl, apart from being minor. The accused is a close relative of the prosecutrix and ultimately took advantage of her physical as well as mental unfitness and committed heinous offence of rape. Her evidence clearly inspires confidence and has not been shaken on material points. Her evidence is also corroborated by Shivaji (PW6) who also stated in her evidence that she is physically challenged. Learned A.P.P., therefore, prayed for dismissal of the appeal.

5. I have heard learned counsel for the rival parties at length. I have perused the entire evidence with the assistance of learned counsel for the rival parties. I have perused the reasons recorded by the learned trial Judge for making an order of conviction. At the outset, in my opinion, from the evidence of the prosecutrix-S (PW5) and Shivaji (PW6), it is clear that the prosecutrix is physically challenged girl, who was minor at the relevant time. Her father is also physically challenged. The evidence of Shivaji (PW6) shows that he is also physically challenged. The appellant by relation is her uncle and was clearly holding the position of trust. Be that as it may.

6. The Prosecutrix-S (PW5) was examined, who clearly stated in her evidence that after the learned trial Judge asked her some preliminary questions to understand her capacity and it is thereafter, he proceeded to administer oath to her. But she stated that she was 16 years of age on the date of recording of her evidence. The appellant is her uncle. She is physically challenged with both hands and legs. On the date of incident, the accused-appellant took her in the fodder room by lifting her. When she tried to shout, he closed her mouth and thereafter committed rape on her. Her parents came to her house after some time. She informed them that the appellant committed rape on her. Thereafter, they went to Police Station, report was lodged and thereafter investigation was undertaken. In the cross-examination, it was brought that she was told twice before her evidence as to what evidence she should give and she did not understand time and date. It is not possible to accept the said alleged admission that she was told twice as to what evidence she should give unless it is brought on record as to who told her to do so and what actually was told to her about the evidence to be given. It is noteworthy that her evidence that she was 16 years old on the date of deposition, has gone unchallenged in the cross-

examination, which means that she was a minor girl. She described the incident of rape with material particulars. In her examination-in-chief of the said evidence as to the commission of offence of rape has not been shattered at all in the cross-examination. She denied about the dispute about property suggested to her. Shivaji (PW6) is her father who stated that he himself was physically challenged apart from the prosecutrix. He stated that on the date of incident, he and his children went for the marriage since the prosecutrix was not well she stayed at home. They came back at 1.30 p.m. when the prosecutrix was crying in the house. When she was asked, she told that the appellant-accused took her away behind the house and committed rape on her and thereafter she came back home. She was taken to Police Station and report was lodged.

7. Dr. Sonali (PW9) is the Medical Officer who examined the prosecutrix and gave her opinion that rape was committed on the girl.

8. The learned trial Judge, after examining the entire evidence as discussed by me above, found that the evidence

tendered by the prosecution was trustworthy. In order to find out the correct position, I have gone through the evidence of the witnesses carefully. The statement made by learned counsel for the appellant that the people would have gathered, does not appeal to me and the reasons recorded by the trial Judge in paragraph 17 of the judgment are legal, correct and proper. I quote paragraph 17, which reads thus:

“17. From the evidence of P.W.4, 5, 6 & 7 and also of the defence witness Maruti it is established that there was marriage in the house of Maruti Dhakre on the alleged date of incidence. The witness P.W.4 i.e. mother of victim has admitted that about 2000 to 3000 persons attended the marriage at the house of Maruti and house of Maruti is about 10 to 12 houses from the house of victim. P.w.5 the victim also in fact support this contention. P.W.6 i.e. father of the victim has admitted that there is distance of about 100 to 150 ft between the house of victim and Maruti. P.W.7 states that it take about 10 to 15 minutes to reach the house of Maruti. It is an admitted position that the road off the house of victim led to the place of marriage and was used by the guests to access the place of marriage. Even the defence witness has admitted that the distance between the two houses is about 125 ft. thus, marriage in the house of Maruti was performed on the date of incidence in near vicinity of about 100 ft.”

The trial Judge also discussed the evidence of the defence witnesses in paragraph 18, which reads thus:

“18. The alleged incidence is said to have occurred at about one p.m. the marriage invitation card at exh.63 shows that the marriage was fixed at 10-15 a.m. Defence witness states that it was performed at 10-45 a.m. Thus, there is some delay in performing of the marriage from its scheduled time. Defence witness has admitted that the lunch went on till 1-30 p.m. and his guest were present till 4 p.m. In rural area it is practice of all the members attending the marriage and staying back for lunch. It is not suggested to the witnesses attending marriage namely P.W.4, 6, 7 that they did not attend the marriage or had lunch. The defence witness was not asked about the absence of these witnesses for the marriage. Considering this aspect the presence of the witness, P.W.4, 6 & 7 for marriage appears to be natural and probable. Admittedly after the marriage was performed, some time could be used for other rituals and other customary program. As has been admitted by the defence witness, the person from other villages had their lunch before and thereafter the local villagers had lunch. Thus, absence of these witnesses from home at about 1 pm can be said to be possible and natural. Only because marriage was performed at 10-45 a.m. will not imply that these witnesses had left the place of marriage and went home immediately. One another aspect which

is to be considered that the witnesses state the time to be approximate timing and not on observing nay watch or clock to record the timing. Thus, these are approximate timing and hence there could be bit of variance in the same. The witnesses are rustic villagers and hence, there could also be some variance in the timing. Thus the prosecution has established that the family members attend the marriage. The period of return at 1 pm appears to be reasonable time period with that of the Defence witness also.”

The trial Judge then discussed about the medical evidence in paragraphs 22, 23, and 24 as under:

“22. The aspect of alleged rape is to be seen if corroborated by any medical evidence. It is well known principle that similar symptoms could be found for number of causes. It is the medical officer who observes the patient who opines by considering all the symptoms together. The medical certificate is at exh.45. The medical certificate shows that there are two bruises on the left lower stapula and two nail marks on the right lower back. There is also blunt trauma to the lower abdomen with positive tenderness. On examining the vagina it was found that the hymen was ruptured and finger can be inserted easily with increased tenderness. The medial officer further observed that labia majora and minora were dark in colour and gaping. In her evidence P.W.9 Medical Officer has reiterated this

finding. She has stated that the above symptoms suggest vaginal penetration. In her cross examination it was tried to suggest that there could be number of reasons for rupture of hymen and dark colour of the organs because of victim not maintaining good hygiene. The medical officer clearly stated that there was no other symptom of bad hygiene or otherwise to indicate other causes of dark colouring of organs. Thus, the only positive aspect could be seen or the admission that could be seen from the evidence of blood discharge could be menstrual discharge. The CA report indicates that there were blood stains on the clothes of the accused. It is alleged that the accused had injuries. There is no injury seen. Details of injury not given. Although the blood group could not be ascertained, it creates sufficient reason with other circumstances to infer about the blood of the Victim.

23. *The witnesses P.W. 4 i.e. mother saw that she had straw in victims hair. Moreover the spot panchanama shows that there was some kind of disturbance on the floor in the fodder room. In the spot panchanama exh.21 the panchas and the investigating officer observed that the fodder and floor is disturbed. This shows some kind of resistance which one can consider to corroborate the victim.*

24. *As regards the victim P.W.5 there is no contradiction between her complaint and statement. She stated that she did not know why she had been to*

police station. That could be apparent considering the fact of her less IQ and being kept in the house. Thus, the evidence of P.W.4 coupled with medical evidence, spot panchanama, CA report, appearance of PW5 establishes that the accused had sexual intercourse with P.W.5.”

The above reasoning given by the trial Judge is in accordance with the evidence, legal correct and proper and I find no fault therein.

9. The trial Judge has recorded findings in paragraph 26 about the insufficient evidence tendered by the prosecution as to the age of the prosecutrix and also her mental and physical fitness. But then I find that the sworn testimony of the witnesses and the evidence of the witnesses that the prosecutrix was physically as well as mentally challenged has not been shattered in the cross-examination. Not only the prosecutrix but even her father stated on oath that the prosecutrix as well as he himself were disabled or physically challenged. I think, there was no reason to discard their testimony on this aspect. Insofar as the aspect of age is concerned, the evidence of the prosecutrix is as clear as it could be that she had resisted the appellant from being taken out of her house but then he had forcibly lifted her and taken her to the fodder room

and thereafter committed rape on her which clearly indicate that the rape was committed with force and without any consent as contended. At any rate, I find that the trial Judge committed no error in convicting the appellant for the offence in question.

10. In that view of the matter, following order is passed.

ORDER

- (i) Criminal Appeal No.444/2015 is rejected.
- (ii) Professional charges of Mr. D. A. Sonwane, learned appointed Advocate is quantified at Rs.5000/-.

JUDGE

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