

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPEAL NO.48 OF 2015**

Tiofilo Evangelio Moraes @ Mories,
s/o. Mr. Salvador Morais @ Moraes,
presently in Central Jail, Aguada, Goa.

.... Appellant

V/s

STATE
(through Quepem Police Station),
Quepem-Goa.

.... Respondent

Shri Anthony D'Silva, Advocate under Legal Aid Scheme for the
Appellant.

Shri S.R. Rivankar, Public Prosecutor for the Respondent.

Coram:- PRITHVIRAJ K. CHAVAN, J.

Reserved on :- 19th August, 2019

Pronounced on :- 26th August, 2019

JUDGMENT :

Feeling aggrieved with a judgment and order dated 13/05/2014 passed by the Additional Sessions Judge, Margao in Sessions Case No.20/2013 by which the appellant has been convicted of an offence punishable under Section 376(2)(1) of IPC and sentenced to undergo rigorous imprisonment for ten years, the present appeal is filed.

2. Facts of the case are as follows:

The prosecutrix, who was then aged about 43 years, is a mentally retarded woman. Appellant, who is said to be her Godfather was aged about 75 years at the time of the incident. The incident occurred on 23/06/2013. The prosecutrix resides with her sister Magdeline Moura, who is a widow. The prosecutrix admittedly is under medication at Institute of Psychiatry and Human Behaviour (IPHB), Bambolim.

3. On 23/06/2013, at around 11.30 hrs., the prosecutrix went to collect coconut in a nearby coconut plantation. The appellant noticing the prosecutrix alone intercepted her at the coconut plantation and committed forcible sexual intercourse with her. After committing rape, he left the spot by extending threats of dire consequences if she discloses anyone about the incident. It is an admitted fact that the incident was witnessed by cousin of the prosecutrix namely PW3 Jose Moura, who also happens to be a close friend of the appellant.

4. Since the prosecutrix was in a sad mood for a week or so, the complainant PW1 Magdeline Moura, out of curiosity inquired with her. She was shocked to learn about the incident which had occurred

on 23/06/2013. After having discussed the matter with relatives and well wishers, the complainant PW1 Magdeline Moura reported the matter to the police.

5. A crime bearing no.39/2013 under Section 376, 506 IPC came to be registered against the appellant.

6. PW9 Vinayak Patil, attached to Quepem Police Station as a Police Sub-Inspector held investigation into the crime. The prosecutrix was referred for medical examination at GMC, Bambolim and so also the appellant. The Investigating Officer recorded statements of the prosecutrix and the other witnesses. He referred the prosecutrix for testing her Intelligence Quotient (IQ) as he found her abnormal. He also drew a scene of offence panchanama in the presence of two panch witnesses on 05/07/2013. This is proved at Exhibit 29. A photographer was pressed into service to take the photographs of the scene of occurrence. The photographs are proved at Exhibit 25 colly. The prosecutrix and the eyewitnesses were produced before the JMFC. Their statements under Section 164 of Cr.P.C. came to be recorded by JMFC, Quepem. The samples of

blood, swabs, etc. were referred for chemical analysis to the CFSL, Hyderabad.

7. After the investigation, the Investigating Officer filed a charge sheet in the Court of JMFC, Quepem against the appellant under Section 376(2)(1) and 506(ii) of IPC.

8. The learned Magistrate by her order dated 03/09/2013 committed the case to the Sessions Court since the offence under Section 376(2)(1) of IPC is exclusively triable by the Court of Sessions.

9. The appellant appeared before the learned Additional Sessions Judge, Margao. The learned Additional Sessions Judge framed a charge under Section 376(2)(1) and 506 (ii) of IPC against the appellant on 08/10/2013. It was read over and explained to the appellant in vernacular to which he pleaded not guilty and claimed to be tried. The statement of the appellant under Section 313 Cr.P.C. is that of denial of the commission of offences alleged. It is the stand of the appellant that a false charge sheet has been filed against him. No

defence evidence has been adduced on his behalf.

10. After having recorded the evidence of the prosecution witnesses and hearing the respective parties, the learned Additional Sessions Judge by the impugned judgment and order convicted the appellant of the offence punishable under Section 376(2)(1) IPC. However, she acquitted him of the offence punishable under Section 506 (ii) of the IPC. The appellant is sentenced to undergo rigorous imprisonment for ten years. He was given a set off as per Section 428 of Cr.P.C.

11. I heard Shri Anthony D'Silva, the learned Counsel appearing for the appellant. At the outset, it is contended that there was a delay of about nine days in reporting the matter to the police, which has gone unexplained and, therefore, a doubt creeps in as to the veracity of the complaint. The learned Counsel also drew my attention to the evidence of the complainant as well as the other witnesses indicating that the prosecutrix is capable of doing her day-to-day routine work and, therefore, it is difficult to infer that she is of unsound mind. The learned Counsel further contends that if the

prosecutrix is mentally retarded then how she could withstand the cross-examination and answered all the questions during the course of her evidence. It is also contended by the learned Counsel that there was no resistance or any cry for help by the prosecutrix at the time of the alleged incident from which it can be inferred that she was a consenting party. The learned Counsel while concluding his arguments submits that if this Court is of the view that there is no substance in the appeal then looking to the advanced age of the appellant it is prayed that he be sentenced for the period already undergone by him.

12. Per contra, Shri Rivankar, the learned Public Prosecutor supported the impugned judgment and order of conviction and sentence by contending that the testimony of the prosecutrix and the eyewitness remain unshattered. Rather, the cross-examination substantiates the story of the prosecution as regards the sexual exploitation of the prosecutrix by the appellant. He points out to the fact that the prosecutrix being a mentally retarded woman was not expected to resist or to make hue and cry at the time of the incident especially in the light of the fact that she was threatened by the

appellant by means of a koyta. It is submitted by Shri Rivankar that though the appellant was of 75 years age at the time of incident, medical evidence shows that he was capable of performing sexual intercourse. The appellant, according to the learned Public Prosecutor, took disadvantage of the mental disability of the prosecutrix and molested her for which there is no question of acquitting him by reversing the findings given by the Trial Court. The learned Public Prosecutor concedes that there is no sufficient evidence to hold the appellant guilty of an offence punishable under Section 506 (ii) of IPC.

13. The prosecutrix has testified as PW5 in the Trial Court. Her evidence indicates that the appellant is her Godfather. Around three months back, the prosecutrix had gone to the coconut plantation during morning hours to collect coconuts. At that time, the appellant came and held her from behind. He removed her panty and kissed her. The appellant was not wearing pant. The prosecutrix had a pain in her private part due to the act of the appellant. She further testified that PW3 Jose came to the spot at that time and scolded them. The appellant went away after threatening the prosecutrix by saying that if

she tells about the incident to her sister he will assault her. He showed her a koyta. After coming home she was required to go to the bathroom again and again and was crying. When her sister inquired with her, she informed about the incident. By the time the complainant informed the police about the incident it was about a week or so. Obviously, in such cases, a delay of a few days is justified because normally in such cases no one will immediately approach the police as the reputation of the family is at stake.

14. The evidence of the prosecutrix further reveals that her sister had confirmed the said fact from PW3 Jose and, thereafter, approached the police. She further testified that she was referred to the GMC, Bambolim for medical examination. She had also shown the spot of incident to the police. The prosecutrix has testified that her statement was recorded by JMFC, Quepem under Section 164 Cr.P.C.

15. Interestingly, during her cross-examination the defence has literally substantiated the prosecution case qua the incident. It has been elicited in cross that at the relevant time when she had been to the coconut plantation to collect coconuts, coconut husk and palm

leaves, PW3 Jose was present when the appellant had shown her a koyta. Her cross-examination further reveals that she had a pain in the back as she was pushed against the coconut tree by the appellant. She also had pain in the stomach which she had mentioned to the Doctor. She also had pain in the other parts of the body besides pain in the back and stomach after the incident. Thus, there is nothing in her cross-examination by which it can be inferred that no incident as alleged had occurred at the relevant time. Her statement recorded by the JMFC under Section 164 Cr.P.C. materially corroborates her evidence adduced before the learned Additional Sessions Judge.

16. The evidence of prosecutrix is materially corroborated by PW3 Jose. As already stated, he has no axe to grind against the appellant as the appellant is his close friend. Merely because he happens to be a relative of the prosecutrix will not render his testimony unworthy of credit for the simple reason that he is a natural witness as well as a chance witness.

17. It has come in his evidence that on 23/06/2013 at about 11.00 a.m. when he was passing through the coconut plantation while

going for fishing at Kushavati river, he noticed the appellant having sexual intercourse with the prosecutrix by standing under the coconut tree. He saw them from a distance of about 5 to 6 metres. On seeing the witness the appellant became nervous. He left the prosecutrix, pulled up his pant and went away. This witness had questioned the appellant as to what he was doing. He noticed the prosecutrix weeping under the coconut tree by bending down. This witness had also questioned the prosecutrix as to what she was doing.

18. During cross-examination of this witness the defence has substantiated the prosecution case. He admits that he did not scold either the appellant or the prosecutrix but just questioned them. The defence has not disputed the presence of the appellant and the prosecutrix on the spot at the time of incident. The cross-examination further reveals that the appellant was standing behind the prosecutrix. Both were in standing position and facing in one direction. It has again been substantiated that he had seen the appellant having actual sexual intercourse with the prosecutrix. After noticing this witness, the prosecutrix had said "Jusinbab". It is clear from his cross-examination also that the appellant was committing sexual intercourse

with the prosecutrix at the coconut plantation and that after noticing this witness he left the prosecutrix and went away. The cross-examination also reveals that on that day the appellant and this witness were supposed to go together for fishing. The cross further reveals that the prosecutrix used to go alone to the coconut plantation to collect the dry palm leaves, etc. There is no suggestion that no incident as alleged occurred. The statement of this witness recorded under Section 164 of Cr.P.C. corroborates in material particular about the facts deposed by him in the Court. There is no reason to disbelieve the evidence of this independent witness.

19. Turning to the medical evidence, PW2 Dr. Sunil Chimbolkar, who is an Assistant Lecturer in Forensic Medicine and Toxicology, Department of GMC, Bambolim had examined both the prosecutrix and the appellant. Pursuant to a letter received from Quepem Police Station dated 02/07/2013, he examined the prosecutrix after obtaining her consent in the presence of one Dr. Pallavi Pereira.

20. On genital examination, Doctor noticed that the development was normal for the age. Pubic hair were present but not

matted with blood or semen. There were no injuries on inner aspect of thighs. Labia majora opposed partly. Labia minora hyper pigmented. No injuries for labia majora, labia minora, anterior and posterior commissure. Hymen was thick fleshy with bruising at 9 O'clock to 6 O'clock region. Bluish black colour with mild tenderness. Vaginal mucosa shows menstrual blood stains. No evidence of any injuries. Two vaginal swabs and two vaginal smear slides were preserved for serological examination.

21. It is opined by the Doctor that there is evidence of bruise like that of vaginal penetration of more than 7 days and less than 15 days. This corroborates the version of the prosecutrix and PW3 Jose that the appellant had committed sexual intercourse with the prosecutrix. She being a grown up lady and since she was examined by PW2 Dr. Sunil Chimbolkar on 02/07/2013, obviously, there would be no detection of any blood or semen or fresh injuries to her private part. The medical Certificate as regards examination of the prosecutrix is proved at Exhibit 14.

22. In his cross-examination, the defence has put a strange

question as to whether the bruise found at 6 O'clock to 9 O'clock position could be caused by any blunt penetration, which the expert had answered in the affirmative. It is elicited in cross that for causing such type of bruises it is not necessary that the man and the woman are in sleeping position. One more unusual question came to be asked by the defence to PW2 Dr. Sunil Chimbolkar as to whether such bruises are possible when a man and woman are in standing position with the knees of the woman tied together upon which the expert answered, if the thighs are separated penetration is possible. The manner in which the questions were put to the medical expert rather corroborates the fact that the appellant had committed sexual intercourse in a standing position. It is significant to note that there is no such suggestion given to the prosecutrix as regards the bruises at 6 O'Clock and 9 O'Clock position being caused due to any blunt penetration. The defence has, thus failed to rebut the testimony of the medical expert which has fully corroborated the unimpeached testimony of the prosecutrix as well as PW3 Jose.

23. So far as the examination of the appellant is concerned, PW2 Dr. Sunil Chimbolkar testified that he had also examined the

appellant on 02/07/2013, who was aged about 77 years. No fresh injuries were evident. Genital development was normal for his age. No injuries were present over genitals. Flaccid penial length is 8 cms, mid shaft circumference is 9 cms. On retraction of prepusal skin there was thick smegma present around corona glandis. There was no evidence of laceration, abrasion or bruise for glance. There was no abnormality, no deformity, no abnormal curvature on penis. Two urethral swabs and two urethral smear slides preserved for serological examination.

24. It is opined by the expert that on physical and genital examination he noticed nothing to suggest that the appellant is incapable of performing sexual intercourse. There is no effective cross-examination in so far as the capability of the appellant to perform sexual intercourse is concerned. It is not the suggestion in cross that the appellant was incapable of performing sexual intercourse due to old age.

25. It is crystal clear from the testimony of PW2 Dr. Sunil Chimbolkar that the prosecutrix had sexual intercourse or there was a

vaginal penetration within a period of 7 to 15 days which covers the date of incident. It is coupled with the fact that the appellant was also capable of performing the said act. There is no reason to reject the expert's opinion.

26. PW1 Magdeline Moura, the complainant and the sister of the prosecutrix testified as per her complaint. The sum and substance of her evidence is that when she noticed the prosecutrix crying and sitting on the bed for around eight days, she inquired with her as to what had happened. The prosecutrix used to go to the toilet frequently. The prosecutrix appraised her sister about the act of the appellant. Thereafter, this witness approached the police and lodged a complaint. There is no effective cross-examination of this witness on behalf of the appellant.

27. PW8 Dr. Shilpa Waikar is an Associate Professor, IPHB since July 2003. The prosecutrix was referred to IPHB on 03/07/2013 for conducting her IQ test. The prosecutrix was referred by PW2 Dr. Sunil Chimbolkar. It has come in the evidence of PW8 Dr. Shilpa Waikar that earlier on 19/04/2002 IQ test of the prosecutrix was

conducted at IPHB for the purpose of financial assistance. Her IQ test was conducted on 22/04/2002. There was no follow up. On 03/07/2013, she was referred along with police by the Department of Forensic Medicine. Her IQ test was done on 15/07/2013. It is opined by PW8 Dr. Shilpa Waikar that prosecutrix is suffering from moderate mental retardation. Her IQ is 46 which amounts to approximately 75% of intellectual impairment. PW8 Dr. Shilpa Waikar had, therefore, submitted her report to the Quepem Police Station which is proved at Exhibit 31 colly.

28. During cross, it is elicited that there are four categories of mental retardation depending on the severity which are as follows:

- (i) Profound wherein the IQ level is less than 20 and intellectual impairment is approximately 100%,*
- (ii) Severe wherein the IQ level is between 20 to 34 and intellectual impairment is approximately 90%,*
- (iii) Moderate wherein the IQ level is between 35 to 49 and intellectual impairment is approximately 75% and*
- (iv) Mild wherein the IQ level is between 50 to 69 and intellectual impairment is approximately 50%.*

29. It is testified that there is no effect on physical growth. Sexual physical characteristic remain the same but the sexual urge

would differ from person to person as in case of any normal person. The defence has tried to bring out about the different kinds of mental retardation and the characteristic features which are irrelevant in the given set of facts. The cross-examination reveals that on 13/07/2013, the witness had spent around 10 minutes with the prosecutrix. However, no questions were asked about her sexual activeness. According to me it was irrelevant. The prosecutrix was less communicative. It is pertinent to note that the prosecutrix tried to communicate by gestures by pointing to her genitals and by using few words such as Godfather, she did not like, etc. A specific question was asked whether mentally retarded persons are susceptible for tutoring, upon which the witness answered since the prosecutrix has 75% intellectual impairment and that she had not gone to school, she may not remember any details of tutoring. The expert has thus ruled out the possibility of tutoring. Likewise, it has been shown that due to 75% of intellectual impairment she was an easy prey or a gullible woman whose disadvantage had been taken by the appellant by molesting her sexually. Despite being a Godfather of the prosecutrix the appellant had betrayed the prosecutrix and committed rape upon her in a broad day light.

30. PW7 Mariano D'Souza acted as a panch witness of the spot panchanama which is at Exhibit 29. His evidence is formal in nature.

31. PW6 Auda Viegas is a social activist and being a NGO was present at the police station. She deals in the cases of atrocities against woman and offences against children. She was present at the time of recording the statement of the prosecutrix by the police. Her evidence is also not of much importance to the prosecution in order to substantiate the charge. What had been stated by the prosecutrix to this witness would tantamount to hearsay evidence.

32. PW9 Vinayak Patil is the Investigating Officer, whose evidence is restricted to the extent of and the manner in which he conducted investigation into the crime. There are no material omissions and contradictions on record.

33. Section 376(2)(1) provides that whoever commits rape, on a woman suffering from mental and physical disability shall be punished with rigorous imprisonment for a term which shall not be

less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's life. Before the amendment to Section 376(1) of Criminal Procedure Code, the punishment for rape was provided thus:

(1) Whoever, except in the cases provided for by subsection (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both.

34. However, in view of amendment to the said Section with effect from 21/04/2018, it is prescribed that the punishment shall not be less than ten years..... However, even prior to the amendment the punishment provided for rape was for a term not less than seven years but which was extended up to life term or even up to ten years with fine. After the amendment, it is specifically provided that the punishment for rape especially for the offences in respect of a woman suffering from mental or physical disability it shall not be less than ten years and it may extend to imprisonment for life. In view of the legal position and keeping in mind the manner in which the appellant

committed a rape in a broad day light upon the prosecutrix of whom he was a Godfather, no question of taking lenient view arises. Merely because the appellant is an old man, who crossed the age of 80 years, would not itself can be a ground to take any lenient view especially in the light of the fact that he committed the rape upon the prosecutrix when he was around 75 years of age. Advanced age cannot be a licence to commit such offences. The Trial Court has awarded appropriate sentence provided under the law.

35. Having considered the entire facts, circumstances and the manner in which the offence has been committed by the appellant, I do not find any reason to interfere with the impugned judgment and conviction passed by the learned Trial Court. The learned Trial Court has correctly and properly appreciated the evidence of all the witnesses on record. No fault can be found with the impugned judgment and order. Consequently, there is no merit in the appeal which deserves to be dismissed and, accordingly, stands dismissed.

PRITHVIRAJ K. CHAVAN, J.

NH/