

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.2 OF 2014

SHARIF SHAHA SAMSHER SHAHA)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Chetan Damre, Advocate for the Appellant.

Mr.Amit Palkar, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 28th AUGUST 2019

JUDGMENT :

1 By this appeal, appellant/accused no.2 Sharif Shaha Samsheer Shaha is challenging the judgment and order dated 10th December 2013 passed by the learned Additional Sessions Judge, Malegaon in Special (Atrocity) Case No.10 of 2010 thereby convicting him of the offence punishable under Section 376 of the Indian Penal Code and under Section 3(1)(xi) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

On the first count, the appellant/accused no.2 is sentenced to suffer rigorous imprisonment for 7 years apart from direction to pay fine of Rs.5,000/- and in default to undergo rigorous imprisonment for 5 months. On the second count, he is sentenced to suffer rigorous imprisonment for 2 years apart from direction to pay fine of Rs.2,000/- and in default, to undergo fine of Rs.2 months.

2 Facts, in brief, leading to the prosecution and resultant conviction of the appellant/accused no.2, can be summarised thus :

- (a) The victim, at the relevant time, was a minor female child about 14 years belonging to Scheduled Castes (Mahar). She was residing along with her parents in the tenanted house belonging to accused no.1 Mangala Godage, located at Hanuman Nagar area of Manmad in Nashik district. The appellant/accused no.2 used to visit house of appellant/accused no.1 Mangala Godage, and therefore, the PW1/victim minor female child was acquainted with him.

- (b) The incident in question took place on 20th July 2010. At about 8.30 p.m. of that day, appellant/accused no.1 Mangala Godage insisted the PW1/victim minor female child to go to the dilapidated public latrine located at Hanuman Nagar area and to meet the appellant/accused no.2. Accordingly, the PW1/victim minor female child went to that place. The appellant/accused no.2 was present there. He committed forcible sexual intercourse with the PW1/victim minor female child at that place and went away by telling her that she should take further instructions from appellant/accused no.1 Mangala Godage.
- (c) The PW1/victim minor female child started returning to her house and on the way met her father, who slapped her. On the next day i.e. on 21st July 2010, appellant/accused no.1 Mangala Godage asked her to go to Nashik with one lady with a promise that she would meet her at Nashik. Accordingly, the PW1/victim minor female child went to Nashik with that unknown lady. However,

appellant/accused no.1 Mangala Godage did not go to Nashik.

- (d) The PW1/victim minor female child then met a boy by name Rais, who was acquainted with her. She disclosed cell phone number of the appellant/accused no.2 to Rais. Rais then made a telephone call to the appellant/accused no.2. Then, at about 11.00 p.m. of that day, parents of the PW1/victim minor female child accompanied by appellant/accused no.1 Mangala Godage and appellant/accused no.2 came to Nashik Railway Station and brought back the PW1/victim minor female child.
- (e) Ultimately, on 23rd July 2010, the PW1/victim minor female child disclosed to her parents the incident of commission of rape on her by the appellant/accused no.2, which resulted in registration of Crime No.146 of 2010 against the accused persons with Police Station Manmad City.

- (f) The PW1/victim minor female child was then sent for medical examination and she was medically examined by PW10 Dr.Varsha Lahade, Medical Superintendent working with Civil Hospital, Nashik. PW11 Dr.Yogita Patil of that hospital conducted ossification test on the PW1/victim minor female child and found her to be aged between 14 to 15 years. On completion of routine investigation, the appellant/accused no.2 along with co-accused came to be charge-sheeted.
- (g) In order to bring home the guilt to the appellant/accused no.2 and the co-accused, the prosecution has examined in all fourteen witnesses. The defence of the appellant/accused no.2 was that of total denial. However, he did not enter in defence.
- (h) After hearing the parties, the learned trial court was pleased to convict the appellant/accused no.2 as indicated in the opening paragraph of this judgment. However, he was

acquitted of the offence punishable under Sections 363 and 366 of the Indian Penal Code.

3 I have heard the learned advocate appearing for the appellant/accused no.2 at sufficient length of time. He argued that evidence of the PW1/victim minor female child is suffering from several infirmities. Her conduct is not a natural conduct of the victim of sexual offence. She has not raised any hue and cry at the time of the incident of commission of rape on her. She claimed to have accompanied an unknown lady at the instance of appellant/accused no.1 Mangala Godage and went to Nashik. Evidence regarding age of the PW1/victim minor female child is not sufficient and ossification test indicates that the PW1/victim minor female child may be more than 16 years of age, at the time of the incident. Even if case of the prosecution is accepted, then also, evidence on record suggests consensual sex. The learned advocate further argued that even caste certificate was not produced with the charge-sheet. Therefore, the appellant/accused no.2 is entitled to acquittal.

4 As against this, the learned APP supported the impugned judgment and order of conviction and the resultant sentence.

5 I have considered the submissions so advanced and also perused the record and proceedings including oral as well as documentary evidence. Due to acquittal of the appellant/accused no.2 of offences punishable under Sections 363 and 366 of the Indian Penal Code, now we will have to consider whether the prosecution has established the fact that the appellant/accused no.2 had committed forcible sexual intercourse on the PW1/victim minor female child, who according to the case of prosecution, was below 16 years of age at the time of the incident, which allegedly took place on 20th July 2010. Similarly, it will have to be seen whether the appellant/accused no.2 had assaulted or used force on the PW1/victim minor female child belonging to Scheduled Castes with intent to dishonour or outrage her modesty.

6 Considering the offence held to be proved against the appellant/accused no.2, evidence of the PW1/victim minor female child assumes importance. At the outset, let us examine whether she is proved to be below 16 years of age, at the time of the incident. The PW1/victim minor female child candidly deposed that her date of birth is 4th August 1996. This oral evidence regarding her date of birth is not shattered in the cross-examination. It was suggested to her that her menstrual period started at the age of 15 years. She accepted this fact. The PW1/victim minor female child in her cross-examination has stated that she attained menarche after about five to six months of the incident. She denied the suggestion that at the time of the incident her menstrual cycle had already started. Thus, this material found in cross-examination of the PW1/victim minor female child cements the case of the prosecution that the PW1/victim minor female child, at the relevant time, was below 16 years of age.

7 Evidence of PW3 Sushila Pawar, Head Mistress of the Municipal School No.13 at Manmad shows that the PW1/victim minor female child was taking education in the said school. This witness had brought original Birth Certificate of the PW1/victim minor female child and deposed that recorded date of birth of the PW1/victim minor female child in the school record is 4th August 1996 and the same is as per the date mentioned in the Birth Certificate of the PW1/victim minor female child. There is no challenge to this evidence regarding original Birth Certificate brought before the court by PW3 Sushila Pawar, Head Mistress and recorded date of birth of the PW1/victim minor female child in the school record on the basis of the Birth certificate of the PW1/victim minor female child. Thus, oral evidence of the PW1/victim minor female child regarding her date of birth is corroborated by documentary evidence placed on record by the prosecution.

8 The PW1/victim minor female child was subjected to ossification test conducted by PW11 Dr.Yogita Patil and as per

version of this Radiologist, upon examination of X-Rays taken for age determination of the PW1/victim minor female child, she came to the conclusion that the PW1/victim minor female child was between 14 to 15 years of age. The certificate of ossification test is at Exhibit 58. True it is that there is margin of error of two years on either side in the ossification test, but the medical report regarding determination of bony age is supporting the case of the prosecution that the PW1/victim minor female child was about 14 years of age at the time of the incident. The same is not divergent to the documentary evidence regarding age of the PW1/victim minor female child. Thus, with this evidence, the prosecution has established the fact that the PW1/victim minor female child was below 16 years of age, at the time of the incident in question, thereby rendering her consent, if any, to the act, irrelevant.

9 So far as the incident of commission of rape on her is concerned, the PW1/victim minor female child has candidly deposed that she was tenant of appellant/accused no.1 Mangala Godage and on the date of the incident, at about 8.00 p.m., said

appellant/accused no.1 Mangala Godage told her to go to the dilapidated public latrine in the locality, where the appellant/accused no.2 had gone. She stated that as appellant/accused no.2 Sharif Shaha used to come to the house of appellant/accused no.1 Mangala Godage, she was knowing appellant/accused no.2 Sharif Shaha. Her evidence shows that she followed the directions of appellant/accused no.1 Mangala Godage and went to the public latrine. The PW1/victim minor female child deposed that, at that place, the appellant/accused no.2 pressed her breast, took out her clothes and committed forcible sexual intercourse with her. He, then, told her that they would be going to Nashik on the next day. The PW1/victim minor female child stated that during return journey, her father met her, as her parents were searching her. She was questioned as to where she had gone and as she did not disclose anything, her father slapped her. This is what the PW1/victim minor female child has stated about the incident of commission of rape on her.

10 In cross-examination, it was suggested to the PW1/victim minor female child that she was not given any direction by appellant/accused no.1 Mangala Godage nor had she gone towards the dilapidated public latrine in the locality. However, the PW1/victim minor female child candidly denied this suggestion. It is elicited from her cross-examination that at the time of the incident, she raised shouts for protecting herself and had suffered abrasions on her hand. There was slight bleeding from those abrasions. She further stated in the cross-examination that she did not show those abrasions to the doctor or her parents as well as the police. As per her version, there were no stains of blood on her clothes as well as private part. It is further elicited from her cross-examination that as she was late in returning to the house, her father as well as her mother had beaten her up, on the day of the incident.

11 The incident took place on 20th July 2010. The PW1/victim minor female child disclosed the incident of commission of rape on her to her parents on 23rd July 2010. Then

the First Information Report (FIR) came to be lodged by her on 23rd July 2010, when her parents took her to the Police station. Thus, there is delay of two days in lodging the FIR. However, that delay gets explained from evidence of the PW1/victim minor female child herself. Her cross-examination shows that as she was late in returning to her house after the incident of rape on her, her mother as well as her father slapped her. Her evidence further shows that on the very next day, she had been to Nashik on instructions of appellant/accused no.1 Mangala Godage. She left her house on that day without disclosing this fact to her parents. She was, ultimately, found at Nashik, when her parents started searching her. She was then again brought back to her house on 21st July 2010. Thus, it is apparent that because of fear of her parents, the PW1/victim minor female child, who was beaten up by her own parents, soon after commission of rape on her, must have been frightened to disclose such incident to her parents. Age of the PW1/victim minor female child, at the relevant time, is also material. Feeling of guilt as well as shame might have prevented her from disclosing the incident of commission of rape on her, to

her parents, particularly in the wake of beating to her, by her parents. Therefore, the so called delay does not cast any shadow of doubt on the case of the prosecution.

12 Evidence of the PW1/victim minor female child regarding commission of rape on her is gaining corroboration from evidence of PW10 Dr.Varsha Lahade, Medical Officer of Civil Hospital, Nashik, who examined the PW1/victim minor female child on 24th July 2010. The PW1/victim minor female child lodged report on 23rd July 2010 at Manmad City Police Station and she was required to be sent to Nashik for medical examination. As such, it cannot be said that there is inordinate delay in getting the PW1/victim minor female child examined. Even otherwise, there is no iota of evidence on record to infer that in the intervening period, the PW1/victim minor female child was subjected to penetrative sexual assault by some other person than the appellant/accused no.2. Evidence of PW10 Dr.Varsha Lahade shows that the hymen of the PW1/victim minor female child was freshly torn. There was tenderness in vagina of the PW1/victim

minor female child, as stated by PW10 Dr.Varsha Lahade. Thus, this medical evidence corroborates the version of the PW1/victim minor female child regarding commission of rape on her by the appellant/accused no.2. PW10 Dr.Varsha Lahade has opined that there is evidence of recent sexual intercourse with the PW1/victim minor female child. This evidence is sufficient to hold that the appellant/accused no.2 had committed rape on the PW1/victim minor female child, at about 8.00 p.m. of 20th July 2010.

13 The PW1/victim minor female child is belonging to Scheduled Caste Mahar as seen from the Caste Certificate at Exhibit 19. Delayed submission of this Caste Certificate is not a factor which creates doubt on caste of the PW1/victim minor female child. Evidence of the PW1/victim minor female child shows that the appellant/accused no.2 was on visiting terms to the house of her landlady and as such, he was knowing her. This indicates that the appellant/accused no.2 was knowing caste of the PW1/victim minor female child. The PW1/victim minor female child has candidly deposed that she was subjected to

forcible sexual intercourse by the appellant/accused no.2 and as such, it is proved that the appellant/accused no.2 had used force on the PW1/victim minor female child with an intent to dishonour or outrage her modesty.

14 Resultantly, no case for interference is made out. Therefore, the order :

ORDER

The appeal is dismissed.

(A. M. BADAR, J.)