



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 300 OF 2005

Laxman Jaywantrao Gurhale,
Age : 23 Years, Occu Agriculture,
R/o. Jajnur, Tq. Nillanga,
District Latur.

... Appellant
[Orig. Accused]

Versus

The State of Maharashtra

... Respondent

.....
Mr. Mayur V. Salunke h/f Mr. V. D. Salunke, Advocate for the
Appellant.

Mr. S. K. Shirse, APP for the Respondent-State.

.....

CORAM : ABHAY S. WAGHWASE, J.

Reserved on : 03.10.2024

Pronounced on : 08.10.2024

JUDGMENT :

1. In the instant appeal, there is challenge to judgment and order dated 21.04.2005 passed by learned Adhoc Additional Sessions Judge, Nilanga, District Latur in Sessions Case No. 23 of 2004, recording guilt of the appellant for offence under Sections 376 and 341 of the Indian Penal Code [IPC].

PROSECUTION CASE IN BRIEF

2. Victim, a 19 years old girl, gave statement that while she was going to the field to collect fodder at around 2.00 p.m., present appellant Laxman intercepted her way, took her in the crops, undressed her, got himself undressed and had sexual intercourse and thereafter left. Out of fear, victim did not report the incident to her parents. After 4 to 5 months, she started experiencing pain in abdomen and even missed her menses. Mother took her to doctor and during such examination, it was revealed that she was pregnant. When mother questioned about it, she reported act of accused. On her above statement, Gandhi Chowk Police Station, Latur registered crime which was investigated by PW8, and on gathering sufficient evidence, accused was chargesheeted.

3. At trial before learned Adhoc Additional Sessions Judge, Nilanga, vide Sessions Case No. 23 of 2004, on appreciation of prosecution evidence, learned trial Judge accepted the prosecution story as proved and sentenced appellant to suffer seven years rigorous imprisonment for offence under Section 376 IPC and simple imprisonment for one month for offence under Section 341 of IPC.

The instant appeal is the offshoot of above judgment.

EVIDENCE BEFORE TRIAL COURT

4. The role and status of the witnesses examined by prosecution in support of its case, and the sum and substance of their evidence can be summarized as under :

PW1 Mother of victim, who is examined at Exhibit 18, deposed that she took daughter for medical examination due to bleeding from urine and swelling to extremities. That time at Latur, doctor disclosed that her daughter was pregnant, and on being questioned, her daughter reported that appellant obstructed her and committed forceful sexual intercourse in a field.

PW2 Father deposed that daughter was taken to the hospital on account of bleeding. There, doctor disclosed that his daughter was pregnant and therefore she was taken to Ambajogai for operation.

PW3 Victim gave evidence as under :
“one month of after last Diwali, I had gone to the field for fetching fodder and it was 2 p.m. At that time accused Laxman obstructed me and pressed my mouth. Accused then took me in a hybrid crop. The accused removed my all clothes. He has also removed his all clothes. Accused laid down me and thereafter he inserted his penis into my vagina. Some white sticky substance fall on my vagina. Thereafter the accused left the spot.”

- PW4** Pancha to spot panchanama Exhibit 25.
- PW5** Dr. Datar, Medical Officer at Civil Hospital Latur, deposed that sonography report of victim revealed vesicular mole and she reported it to Gandhi Chowk Police Station vide communication Exhibit 27.
- PW6** Dr. Watre, another medical expert at Woman's Hospital Latur, testified bout admission of victim, she being examined and even this medical expert reached to an opinion that there was vesicular mole with peri-metastasis right lung with huge cardiomegaly with severe anemia, and patient referred to Ambajogai. She identified certificate Exhibit 31.
- PW7** Dr. Vaidya, Medical Officer at SRT Medical Hospital Ambajogai, also conducted sonography and diagnosed vesicular mole. He performed operation, collected sample of mole for CA and samples were forwarded to police.
- PW8** PSI Rathod was the Investigating Officer [IO].

SUBMISSIONS

On behalf of the appellant:

5. Pointing to the above evidence, learned counsel for the appellant took exception to the findings and conclusion by putting forth a case that at the first count, there is inordinate delay in

reporting the occurrence, i.e. of almost five months. That, testimony of victim is full of material omissions, variances and improvements. He submitted that, there is nothing to show that there was any forceful act. He emphatically pointed out that scientific evidence and medical evidence i.e. DNA report rules out involvement of appellant. That, here, very spot of scene of occurrence was not established. Consequently, prosecution version was weak and palpably feeble on all counts. He also questioned the entire trial for not offering opportunity to answer the questions put under Section 313 of Cr.P.C. on material count. He also puts forth case of false implication due to political rivalry. In the alternative, he submitted that even otherwise, the act was explicitly consensual one as there was no resistance, raising alarm or prompt reporting.

On behalf of the State:

6. Supporting the judgment, learned APP would submit that victim was forcibly raped while she was going alone to the field. Victim has narrated the sequence of events. Learned APP submitted that out of fear of parents and further getting defamed, victim did not report. Only when on complaint of abdominal pain she was taken to hospital, at such time her pregnancy was revealed but she

immediately disclosed act of accused to her mother. That, victim was required to undergo medical procedure and only after recovery, she gave statement. Thus, according to learned APP, there is reason for delay. He also further submitted that in cases of such nature, delay cannot be given undue importance, as there are several reasons for victims of such crime to not to report immediately.

7. Learned APP further submitted that three doctors had examined victim. Her pregnancy was confirmed by conducting tests like sonography. Victim has named appellant for committing forcible sexual intercourse after which her menses had stopped. That, he was thus solely responsible for the conception. Act amounts to rape and therefore, according to learned APP, learned trial court's findings and conclusion cannot be faulted at.

8. Here, though as many as 8 witnesses are examined, evidence of victim, her parents and medical experts is of relevance. Admitted position is that reporting is after five to six months of alleged occurrence. Only upon medical examination as a result of abdominal pain, pregnancy was revealed, and thereafter victim reported alleged incidence at the hands of appellant.

9. Now the question which needs to be ascertained and addressed is whether offence under Sections 376 and 341, for which guilt is recorded, is proved beyond reasonable doubt. Testimony of victim as regards to occurrence is reproduced in aforesaid para. On carefully scrutinizing and appreciating the same, the victim is shown to be 19 years of age. She has alleged that one month prior to Diwali, which generally falls at the end of October or beginning of November, while she was going to the field to collect fodder, appellant allegedly obstructed her way and took her in the hybrid crop. She claims that he removed her all clothes, then he removed his own clothes, made her lie down and then had sexual intercourse by inserting his organ in her private part. Then she deposed that he left. She too wore her clothes and then went to collect the fodder.

10. Her such testimony categorically shows that there was no resistance or oppose by her while being taken to the crop. She had not resisted or attempted to run while he disrobed her. She does not seem to have attempted to escape from the spot while he himself was getting undressed. She has not uttered in her substantive evidence that the act was against her wish, forceful and without her consent. The manner of testimony clearly shows that there was no resistance put up by her.

11. It is true that it is also settled law that mere passive submission also cannot be held as consent. But here, as discussed above, after the act, she went to collect the fodder, for which she claims to have proceeded that day, and had not reported her parents till a period of four to five months was over. Only on experiencing pain, she complained to that extent and when being treated, her pregnancy was diagnosed and only thereafter, when being questioned by mother, she reported alleged act of accused. As pointed out, delay is admittedly immense. Report is only upon pregnancy being revealed and not earlier to it.

12. Therefore, with such quality of evidence, it is difficult to accept version of prosecution that there was act of forceful coitus or against her wish. Had it been so, she would have at least reported the incident immediately to her parents. But that has not happened. Her version that due to fear, she did not report, also suggests something else. As discussed above, the manner of testimony shows that in spite of being a young girl, she had not raised alarm, put up resistance, nor attempted to escape while accused was undressing himself. She has not uttered a word about any sort of threat by accused before committing the act. For said reasons, it would be unjust to draw inference that she was forcibly ravished.

13. Three doctors had occasion to examine the victim. They all are consistent about she being diagnosed of vesicular mole. PW5 Dr. Datar, while under cross, has defined the said medical term by stating that, it is a type of fertilization and a kind of pregnancy which is possible in case of sexual intercourse. Neither of the medical experts i.e. PW5, PW6 and PW7 deposed about history of forceful sexual intercourse.

14. PW7 Dr. Vaidya, an expert in gynecology, conducted operation on the victim on 17.05.2004 and claims to have taken sample of mole, tissue and fluid for CA and he deposed in para 2 that, it was handed over to police constable B.No. 1102 of Nilanga police station at 10.00 p.m. i.e. on 17.05.2004. Exhibit 36 shows that samples were referred to Forensic Science Lab, Kalina, Mumbai for establishing paternity.

15. Exhibit 11 seems to be result of analysis of blood vial of victim. Exhibit 12 seems to be blood of accused. Both the samples were collected for DNA. At Exhibit 14 is the result of DNA analysis and its interpretation and opinion, which is as under :

Interpretation -

- 1) For all the 15 different genetic systems and gender specific Amelogenin locus analyzed with the PCR, the victim girl Ms. XYZ matched both the sets of parental alleles, which are present in the tissue sample.
- 2) As the tissue sample shows exactly similar pattern of alleles with victim girl XYZ, there is no possibility of contribution of paternal alleles in the tissue sample from accused Mr. Laxman.

Opinion -

The tissue sample forwarded for DNA analysis (Exh.1) has originated from Victim girl XYZ herself and it is not a part of fetal tissue.

Therefore, as pointed out, DNA analysis apparently rules out and eliminates involvement of Laxman.

16. Another ground of attack launched by learned counsel for appellant here is that, incriminating material pertaining to DNA and its report was not brought to the notice of accused while answering under Section 313 Cr.P.C., and it amounts to severe infraction and thereby entire trial gets vitiated.

17. In the line of above defence, if statement of accused under Section 313 of Cr.P.C. is visited, it is noticed that as many as 26 questions are posed. There is pointed question by virtue of question no.18 that, on 17.05.2004, after operation, PW7 Dr. Vaidya, a medical expert, did collect vesicular mole and blood of victim for DNA examination and dispatched it to Kalina, Mumbai. Therefore, her, though point is raised by virtue of ground (M), in the light of above discussion, question regarding DNA was apparently put to the accused to which he has answered it in negative.

18. However, to sum up, here, prosecution version comes under shadow of doubt primarily for immense delay for over 5 to 6 months caused in reporting the incidence. Only on detection of pregnancy, PW3 victim disclosed involvement of accused. Her testimony discussed and analyzed above creates doubt as to whether the act itself was forceful and against her wish. In spite of being taken to Dr. Shinde of Nilanga, who is apparently not examined, and pregnancy was noticed, at that point of time also there is no disclosure of involvement of accused. Rather it is emerging from victim's evidence that more than one month thereafter, she was taken to Latur and Doctor at Latur summoned police, and thereafter she has disclosed before police vide statement dated 12.05.2004. Her

evidence is that after said act of accused, her menses had stopped, and she claims to have conceived from the said act, but DNA analysis does not support her version, as appellant is ruled out to have contributed to the conception.

19. Therefore, on complete re-appreciation, for above reasons, in the considered opinion of this Court, with such quality of evidence, case of prosecution comes under shadow of doubt and therefore, case not being proved beyond reasonable doubt, and more particularly when victim's testimony about she being forcibly raped not inspiring confidence, benefit of doubt is required to be extended to the accused.

20. Perused the judgment under challenge. In para 17 of the judgment, learned trial court has accepted prosecution version by observing that, victim and parents being illiterate labourers and residing in rural area, and due to fear, as victim did not disclose, the delay in reporting is *bonafide*. This court has already noted that there is no element of fear as victim's testimony is silent about any threats issued by appellant. Above aspect has not been correctly appreciated while condoning delay.

21. Similarly, as regards findings of trial court on the point of DNA, it is noticed that PW5, PW6 and PW7 are all in unequivocal terms reporting about diagnosis of vesicular mole. Vesicular mole in medical terms is said to be a non cancerous tumor that develops in the uterus as a result of “non-viable pregnancy”. This term “non-viable pregnancy” means a pregnancy where the fetus has no chance of survival. Again, if we carefully examine evidence of PW7 who operated victim, in examination-in-chief para 2 he deposed about taking sample of mole of tissues and vesicular fluid for CA and the same was forwarded to Forensic Science Lab at Kalina for the purpose of establishing paternity, and this is revealed from Exhibit 36. Therefore, DNA analysis was particularly got done to ascertain paternity.

Under such circumstances, when DNA report does not support prosecution, learned trial court in its judgment para 20 and 21 erred in accepting the DNA analysis holding that there were mere tissues forwarded for DNA and no fetal tissue. In fact, sample of vesicular mole itself was drawn for paternity.

Consequently, learned trial court's findings are apparently erroneous. In view of the above discussion, the appellant succeeds. Accordingly, I proceed to pass the following order :

ORDER

- I. The appeal is allowed.
- II. The conviction awarded to the appellant Laxman Jaywantrao Gurhale, by learned Adhoc Additional Sessions Judge, Nilanga, District Latur in Sessions Case No. 23 of 2004 under Sections 376 and 341 of IPC on 21.04.2005 stands quashed and set aside.
- III. The appellant stands acquitted of the offence punishable under Sections 376 and 341 of IPC.
- IV. The bail bonds of the appellant stand cancelled.
- V. Fine amount deposited, if any, be refunded to the appellant after the statutory period.

[ABHAY S. WAGHWASE, J.]