



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 616 OF 2005

Arun S/o. Shamrao Nichal,
Age : 32 years, Occu. : Service,
R/o. Venegaon, Tq. Madha,
Dist. Solapur, At Present Ketur No.2,
(Parewadi Railway Station), Tq. Karmala,
Dist. Solapur.

... Appellant

Versus

The State of Maharashtra

... Respondent

.....
Mr. Ambar Barlota h/f. Mr. S. K. Barlota, Advocate for Appellant.
Mr. S. M. Ganachari, APP for Respondent - State.
.....

CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 28 NOVEMBER 2024

PRONOUNCED ON : 16 DECEMBER 2024

JUDGMENT :

1. In this appeal, there is challenge to the judgment and order dated 18.08.2005 passed by learned 1st Ad-hoc Additional Sessions Judge, Osmanabad in Sessions Case No. 23 of 2005 recording guilt and sentencing appellant for offence punishable under section 376 of Indian Penal Code (IPC).

2. In nutshell, case of prosecution is that, Osmanabad Police Station charge-sheeted appellant for commission of offence under section 376 of IPC, on the premise that, victim, who was a student of

11th Standard and taking tuition from accused for Hindi subject, was sexually ravished against her wish couple of times by issuing threats to defame her or kill her. On receiving report to that extent, PW4 P.I. Shinde carried out investigating and charge-sheeted accused for above offences.

At trial, case of prosecution is rested on in all 4 witnesses and also on documentary evidence.

3. Defence denied to lead any evidence. After hearing both sides and on appreciating the evidence vide above impugned judgment and order, case of prosecution has been accepted as proved.

Aggrieved by the above, instant appeal has been preferred.

SUBMISSIONS

On behalf of Appellant :-

4. Advancing the case of false implication, learned counsel for appellant, at the outset pointed out that, at the time of alleged incidence, victim had already attained the age of consent as she was above 16 years. Learned counsel took this court through the entire length and breadth of the testimony of the victim and would submit that, it is clear that, it is she, who had repeatedly visited accused appellant. He submitted that, admittedly, there was previous

acquaintance between family of victim and appellant. That, whatever physical intimacy developed was purely consensual. That, there was no element of force or developing intimacy against her wish. That, allegations to that extent are levelled for the first time at the time of report filed against prosecutrix for committing offence under section 317 of IPC. Learned counsel submitted that there was no reporting at any point of time till delivery of child. That, prosecutrix abandoned the new born and was therefore booked for offence punishable under section 317 of IPC, and thereafter, to save herself, concocted and afterthought theory has been advanced. That, such reporting is while prosecutrix was on bail for above offence. He would submit that whatever instances took place were all consensual and moreover prosecutrix herself use to visit appellant repeatedly to his house where sexual intercourse took place. Thus, according to him, there being no element of force, both implication as well as guilt for offence punishable under section 376 of IPC is not made out. Learned counsel took this court through the observations of the learned trial court and he submitted that crucial aspect of repeated consensual relations has not been taken into account. That, erroneous approach has been adopted by learned trial court while accepting the case of prosecution as proved. For all above reasons, he prays to set aside the impugned judgment and order by allowing the appeal.

On behalf of Respondent – State :

5. Strongly objecting to the above submissions, learned APP would submit that, at that time, age of consent was 16 years, but it is his submission that victim has deposed that under threats to defame and to kill her, repeatedly physical relations were maintained against her wish. Only because of threats, victim did not report. He refutes the allegations of consensual relations. He also invites attention of the court to the scientific evidence holding appellant biological father. Learned APP also invited attention of this court through the evidence of PW3 Ajit, a sarpanch and would submit that, from the evidence of this witness, prosecution has brought on record conduct and behaviour of accused towards other ladies. Thus, according to him, once prosecutrix herself reports and deposed about acts against her wish and her consent, offence of rape is automatically attracted. That, learned trial court has rightly considered the settled legal position and according to him, committed no error in returning the guilt and hence learned APP prays to dismiss the appeal for want of merits.

SUM AND SUBSTANCE OF PROSECUTION EVIDENCE

6. Prosecution has adduced evidence of four witnesses in support of its case. Role, status and sum and substance of prosecution witnesses is as under :

PW1 victim is the informant. Her relevant testimony at Exh.15 is as under :

2. That time my uncle Pratap was ill due to accident, therefore, I resided with him. When I was studying at Parewadi in 9th and 10th standard, that time accused was teaching me a Hindi subject. Accused is present in the court hall. Accused was residing at Parewadi near to the house of my uncle Pratap. Accused was holding stationary shop in his house. I was visiting to the shop of accused to purchase the articles.

3.

4. For 11th std., I took the admission in Janta Vidhyalaya at Art side at Yedshi. When I was residing at Yedshi, I was visiting to the house of my uncle at Parewadi. Accused was knowing my uncle Pratap, so he was visiting to the house of my uncle and he was talking with all family members of my uncle.

5. That time my family members told to accused that accused to telephone to our house at Yedshi, when he has to go to Ramling. Then I returned to my village Yedshi.

6. In the month of November on Saturday accused telephoned to my house. I received that phone. Accused told me on phone that he is visiting to Ramling on Sunday for Darshan. I told accused on phone to bring his wife and children. I intimated the phone message to my family members.

7. On next day my mother after completing the work in the house went to field. While going to field, she told we all sister to go to Ramling. Then I and my sister Anita went to Ramling. Accused was sitting at the stair of Ramling temple. I asked accused why his wife had not come. Accused told me that his wife had gone to her parents house for vacation. Then we took Darshan of Ramling temple then we drink the water after coming out from the temple. That time accused told us to go to Durgadevi rest house. My sister Anita refused to go to Durgadevi rest house as she became tired. Anita told us that we should go and she will wait there. Then I and accused proceeded towards Durgadevi rest house. When we were proceeding on road. That time accused caught hold my hand. I objected to accused. I told accused to leave my hand. Accused gave threat saying that he will kill me. Accused took me in the bush near to rest house. Accused pressed my mouth. He pressed my breast. Accused removed clothes on my person and also removed clothes on his person. Accused inserted his penis in my

vagina and discharged the semen. I and accused wared our clothes. I started weeping. Accused gave me threat and asked me not to weep. We came near to Railway track, Anita was standing there. Anita asked why we took this much time, that time accused told her that we have seen the Rest House. I, accused and Anita came to Yedshi. That time accused went to Parewadi and we returned to the house. I have not disclosed this incident to anybody in the house under the fear of loss of my reputation.

8. In last week of November-2003, we received phone message that my uncle is serious, so we all members of our family went to Parewadi. On next day I was standing in front of door of my uncle's house at Parewadi. Accused asked me when I came. On next day I had gone to the shop of accused to bring Bindi Packet. The shop was closed and accused was in the house. I asked accused from the door to provide Bindi packet, but accused had not provided me. Accused took me in his house. After entering in the house of accused, I asked where is his wife. Without replying me question, accused took me on his bed. Accused removed clothes on my person and committed sexual intercourse. Accused asked me to come on next day and gave threat that if I will not go, he will defame me. Due to threat of accused, I went to the house of accused on next day. Again accused committed sexual intercourse with me. On that day I had gone to the house of accused at morning, accused asked me to come at evening also. Again, I went to the house of accused at evening, that time accused committed rape on me by committing sexual intercourse to me.

9. I became pregnant from accused. Due to threat of accused and due to fear I had not disclosed this fact to anybody in my family. I telephone to accused and intimated him about my pregnancy. That time accused told me to consume tablets. I was not aware of tablets and so I have not consumed it. After six months I disclosed the fact to my family, but nothing was in our hand. On 22/8/2004, I started delivery pain. I went near to the latrine of my house. At that place I delivered a child. My mother came there. My mother brought me to my house.

10. On 3/9/2004, police came to my house for inquiry. Police made inquiry with me about newly born child. I narrated the police that accused committed rape on me from time to time, due to which I became pregnant and delivered a child."

While under cross, PW1 victim answered that, On Ramling road, there is always crowd of people. They spend half an hour inside

the temple to have darshan and then came out of temple. She answered that when accused asked them to go towards rest house, she did not inform him that she was tired. She answered that it take 15 minutes to reach guest house from the temple and she answered that incident occurred 15 to 20 feet from the rest house road. She was unable to give description of clothes on her own person as well as clothes on the person of accused. She answered that incident took place at 2:00 p.m.

Further she admitted that, there is a stationary shop prior to the house of accused and stationary shop of one Kathare situated just near the house of her uncle. She answered that she delivered child on 22.08.2004 and that police did not come to her up to 03.09.2004. She admitted that, police had filed complaint against her mother for throwing the child and also admitted that complaint against her for throwing the child and case is going on. Rest is all denial.

PW2 sister, at Exh.19, deposed as under :-

1. "Complainant is my sister....

..... Accused was residing at Parewadi near to the house of my uncle. As accused was residing near to the house of my uncle, we were visiting to the house of accused and accused was visiting the house of our uncle. I and complainant are twin sisters. In the year 2003 I and Sunita passed in 10th std. examination I and Sunita took the admission for 11th std. at Yedshi in Janta Vidhyalaya. As my uncle met with accident, I, Sunita and all family members have gone to Parewadi. When we had gone to the house of our

uncle, accused came there. Accused told us that he will visit to Ramling. I told him that do the telephone to our house while coming to Ramling. Then we all returned to Yedshi.

2. In the month of November-2003 on second Saturday at night, accused did telephone to our house. That phone was received by complainant Sunita. Sunita talked with accused. Sunita told us that accused is visiting to Ramling on Sunday.

3. On next day, i.e. on Sunday, I and Sunita proceeded towards Ramlang. Accused was found sitting on stair of Ramling temple. We asked accused whether he came alone and where are his wife and children. That time accused told us that his wife had gone to her parents house. Then I, Sunita and accused went in Ramling temple and took Darshan of God, and we went out of the temple. Then wen drink the water. Then we started proceeding towards Yedshi.

4. Then accused told us that we should see Durgadevi Rest house. I told them that they should go as I am tired by climbing stairs. I went near to Railway line and waited there. Then Sunita and accused went towards Rest house. I was waiting for them at Railway line. Much more time was required for Sunita and accused to come there. Then accused and Sunita came there. I asked them why much more time was required to them. Accused told me that time was required to see rest house and temple. Then I and Sunita returned to Yedshi with accused. At Yedshi, accused went to Parewadi. I and Sunita returned to our house. Then we came to know that Sunita was pregnant. So Sunita was facing the problem. I asked Sunita about it, that time Sunita told me that when we went to Ramling, that time accused committed rape on her.”

PW2 sister in cross claimed that she informed police about her sister telling her that, accused told on telephone that he is coming to Yedshi for Ramling Darshan next day. She answered that she herself and her sister reached Ramling temple at 10:30 a.m. and after taking darshan, they proceeded to return. She answered that, accused and her sister went towards rest house and they returned after 10 to 15 minutes.

PW3 Ajit is the Sarpanch of village Ketur.

PW4 P.I. Mahadeo Shinde is the Investigating Officer.

ANALYSIS

7. In short, case set up by prosecution is that, PW1 victim was 16 years of age. Though there was acquaintance between victim and accused, who was neighbour of victim's uncle, it is specific allegation that victim was ravished by issuing threats and he impregnated her. On her such versions, report was entertained and accused was booked for offence punishable under section 376 of IPC.

8. On complete re-appreciation of evidence of victim PW1, more particularly paragraph nos. 2 to 8, it transpires that, victim was put up with her uncle at Parewadi on account of his illness. Her version in paragraph no. 2 shows that, victim claims that accused ran a stationary shop and she also claims that he taught her Hindi. She has deposed that, it is she who was visiting the shop of accused to purchase articles. Deposition in paragraph no.4 shows that, accused used to visit to the house of uncle and talk with all family members of her uncle. Testimony in paragraph no.5 shows that during such one visit to her uncle's place, accused expressed his intention to visit Ramling temple for darshan and at that time victim's family

themselves told him to make telephone call to them whenever he visits Ramling. Testimony in paragraph no. 6 shows that in the month of November, accused initially telephoned about his proposed visit to Ramling on Sunday and victim responded the phone call and even informed her family members about proposed visit of accused. Victim's testimony in paragraph no.7 goes to show that, on said Sunday, mother of victim left the house for work instructing all sisters also to go to Ramling and so victim and her sister PW2 appears to have gone to the Ramling temple. After taking darshan, victim claims that, accused told her as well as her sister that they should go to Durgadevi rest house. Evidence of victim to this extent in paragraph no.7 shows that she has used the word "us", meaning thereby, accused had asked both, victim as well as her sister that, they should go to Durgadevi rest house. PW2 refused on the count that she was tired and therefore accused proceeded towards rest house and on the way she claims he caught her hand. She claims to have objected, but then according to her, he threatened her that he would kill her and then he took her to the bush, initially pressed her mouth, pressed her breast, removed her clothes, removed his own clothes and had sexually intercourse with her. She deposed that she and accused wore clothes. Then she claims that she started weeping and accused gave her threat. But of which kind of threat is not stated by her. Then they returned and met PW2 sister and all three came to

Yedshi. She herself deposed that she did not disclose the incident due to fear of loss of reputation.

9. Her testimony in paragraph no. 8 reproduced above shows that in November, 2003 on account of serious condition of her uncle, she along with her family went to Parewadi i.e. village of accused. She further deposed that, on next day, while she was standing in front of the door of her uncle's house, accused merely asked her, when she came. Her further testimony shows that, she herself went to the shop of accused on the next day to purchase Bindi packet and then she claims that shop was closed. If such was the condition, she ought to have returned because the shop itself was closed, but that does not seem to have happened. Instead her further version shows that, she herself went inside the house of the accused and then demanded accused to provide Bindi packet, but then she claims he took her inside the house and then she questioned the whereabouts of her wife. She claims that, without replying, he took her to the bed and committed sexual intercourse and asked her to come on next day issuing threat that if she will not come, he will defame her and due to the threat, she claims that, she went to the house of accused on next day also and on such day accused also had sexually intercourse with her. She claims that on that day she had been to the accused in the morning and he asked her to come even in

the evening and so she went in the evening also. That time, she claims he committed rape on her by committing sexual intercourse. In further depositions she stated that, she became pregnant. On 22.08.2004, she delivered a child in the house itself and on 03.09.2004 police came to make enquiries about the new born child, and thereafter, she narrated the incident of rape and she to be impregnated.

10. Fundamental ground raised by learned counsel for appellant is that, victim was more than 16 years of age at relevant time, age of consent was 16 years and as such victim was above age of consent. That, whatever sexual encounters took place were consensual. Victim repeatedly visited accused himself at his place. She never resisted nor raised hue and cry. Disclosure is made for the first time when her offence of commission of abandoning new born came to light. During her entire pregnancy or even delivery, there was no reporting by family members nor they questioned her at any point of time. That, story of threat and fear of defamation are false, afterthought and concocted and only raised after lodgment of complaint against victim and her mother i.e. for committing offence under section 317 of IPC. Victim has admitted in cross that, after delivery, complaints were filed against her mother and herself for abandoning new born.

11. There is force in the above submission. From the record, it is emerging that at the time of her evidence before court victim has given her age as 16 years and occurrence is much prior to it. The several instances of sexually intercourse are prior to enactment brought into force raising the age of consent and even much prior to enactment of the Protection of Children from Sexual Offences Act, 2012.

Learned counsel for appellant has placed on record ruling of the Hon'ble Apex Court in *Manak Chand @ Mani v. The State of Haryana* reported in *(2023) 4 S.C.R. 74*. In said ruling the Hon'ble Apex Court had made observations and noted that in that case at relevant time of rape age of consent was 16 years and above and as such appellant therein was acquitted from charge of section 376 of IPC. Here also, victim was above 16 years of age and had thereby attained age of consent. As stated above, she herself seems to have paid visits to shop and house of accused on several occasions and at no point of time she raised any hue or cry nor reported it to her family members about being forcibly raped. As pointed out, for the first time, she alleges threat to kill and defame, when she is herself indicted for commission of offence under section 317 of IPC. Therefore, there is every possibility that to escape from punishment, and while on bail, report of rape is lodged. Be it so. But, her own evidence suggests that she was consenting party. Prosecution does

not deny or dispute that she was 16 years of age and above. Prosecution has not demonstrated that she was below 16 years.

12. For all above reasons, as offence of 376 is not made out, appellant succeeds. On going thorough the judgment passed by learned trial court, the above aspects are not correctly appreciated and hence interference is called for by allowing the appeal. Hence, the following order is passed :-

ORDER

- (I) Criminal Appeal stands allowed.
- (II) The conviction awarded to Arun S/o. Shamrao Nichal in Sessions Case No. 23 of 2005 by the learned 1st Ad-hoc Additional Sessions Judge, Osmanabad on 18.08.2005 for the offence punishable under Section 376 of Indian Penal Code, stands quashed and set aside.
- (III) The appellant stands acquitted of the offence punishable under Section 376 of Indian Penal Code.
- (IV) The bail bonds of the appellant stand cancelled.
- (V) The fine amount deposited, if any, be refunded to the appellant after the statutory period.

(ABHAY S. WAGHWASE, J.)