



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 143 OF 2004

Sandip Eknath Ithape,
Age : 28 years, Occupation Service,
R/o Pimpalgaon-Pisa, Taluka Shrigonda,
District Ahmednagar.

... Appellant
[Orig. Accused]

Versus

The State of Maharashtra

... Respondent

.....
Mr. Vikram R. Dhorde a/w Mr. S. P. Nimbalkar and
Mr. S. P. Dudhane, Advocate for the Appellant.
Mrs. Chaitali Choudhari Kutti, APP for the Respondent-State.
.....

CORAM : ABHAY S. WAGHWASE, J.

Reserved on : 23.04.2024

Pronounced on : 30.04.2024

JUDGMENT :

1. Conviction recorded by learned Sessions Judge, Ahmednagar in Sessions Case No. 171 of 2001 by order dated 25.02.2004 for commission of offence punishable under Sections 376(G) and 506(1) of the Indian Penal Code [IPC] is taken exception to, by filing instant appeal.

FACTS IN BRIEF

2. Victim PW3 stayed with her parents at Kotalwadi in Pimpalgaon Pisa Shivar. On 10.08.2001, around 4.00 p.m., when her parents had been to Rasaiwadgaon, taluka Shirur and her uncles had been to agricultural work, she left the house to fetch water from a hand pump. While she was proceeding in front of the house of one Dada Kotal, juvenile accused Bharat caught hold of her, whereas accused Sandip (appellant) pressed her mouth and she was pulled in the house of said Dada Kotal. When she tried to raise alarm, she was gagged. She was taken to the rear side room and there, first accused Sandip raped her and then juvenile Bharat took turn to rape her. They threatened to kill her if she informs anyone.

3. Victim's uncle Babu, who happened to reach there while he was searching for her, found her unconscious and she was taken to hospital. There, at hospital, her complaint Exhibit 27 was noted and this was followed by registration of crime.

4. PW9 PSI Raskar, who was entrusted with the investigation, carried out the same and after gathering sufficient evidence, accused came to be chargesheeted and accused Bharat, being minor, was

referred to the Juvenile Court. Accused Sandip was made to face trial before learned Sessions Judge, who, on appreciating oral and documentary evidence adduced by prosecution, accepted the case of prosecution as proved and convicted accused Sandip for commission of offence punishable under Sections 376(G) and 506(1) of IPC.

Such judgment and order of conviction is now challenged by way of instant appeal.

SUBMISSIONS

On behalf of the appellant :

5. Pleading innocence and false implication, learned counsel for the appellant would submit that, at the outset, here, prosecution has miserably failed to establish the charges beyond reasonable doubt. He pointed out that except testimony of prosecutrix, there is no independent evidence to hold charge proved. At the outset, he took exception to the prosecution version about prosecutrix being a minor. He pointed out that there is no legally acceptable evidence in support of age of the victim. According to him, solitary document relied by prosecution is a school extract, which is apparently not of the first school where victim undertook education. According to him, there is

no distinct evidence like date of birth to hold victim a minor and therefore, it is his submission that prosecution has utterly failed to show that victim was minor, as is claimed by prosecution.

6. He next submitted that it is impossible to accept the version of victim being dragged in the house which is surrounded by other residential houses and that too, in broad day light. He pointed out that victim has not resisted or raised alarm. He further pointed out that victim claims that she was gagged, but the piece of cloth is also not seized by the investigating machinery. According to him, there is no evidence whatsoever regarding victim being forcibly taken inside the house by accused.

7. He further pointed out that here, there are allegations of forceful sexual assault by two persons, but there is no external injury and medical evidence falsifies such claim. On this count, he invited attention of the Court to the medical evidence and pointed out that cross of the medical expert belies the story of prosecution. His further submission is that, though prosecutrix put up a case that she went out of the house to fetch water, according to learned counsel, said steel water pot was not found on the way or in the vicinity of the spot. Rather it was found in the very house of victim and as such, he

submitted that such circumstance itself belies the version of prosecution. He further pointed out that even apart from no supporting medical evidence, scientific evidence is also not connecting accused with the said offence.

8. Lastly he submitted that the tenor of the cross and answers given by prosecution witnesses as well as answers given by accused while answering under Section 313 of Cr.P.C., clearly show that it was proposed to perform marriage of victim and accused. Therefore, there was close acquaintance. Resultantly, occurrence was not forcible rape and hence he questions the legality, maintainability and sustainability of the impugned judgment and order of conviction and finally prays to set aside the same.

On behalf of the State :

9. In answer to above, learned APP pointed out that apparently, victim was minor. PW7 Clerk of the school, who maintained record, has been examined by prosecution. Resultantly, it is her submission that prosecution has cogently established age of the victim. Pointing out to the cross of victim, learned APP submitted that case set up by accused about love affair is flatly denied by victim. She pointed out

that here, uncle Babu is the eye witness. He had been in search of victim who was found unconscious in the house of Dada Kutal. She was unconscious and while undergoing treatment, when she regained consciousness, she reported the occurrence and named accused and therefore, immediately crime was registered. She pointed out that clothes of victim, which were found to be in torn condition, fortifies the case of forceful rape. According to her, medical evidence is also clear and cogent. Thus, according to learned APP, considering the testimony of victim coupled with medical evidence, charge of rape is proved. Victim categorically deposed that there were threats to kill and therefore, required ingredients for attracting Section 506 IPC were also available. For all above reasons, learned APP submits that learned trial Judge has correctly appreciated the available evidence and has correctly applied the settled law. That, guilt is proved beyond reasonable doubt and therefore, having accepted the prosecution version as proved, learned trial court committed no error and so learned APP prays to dismiss the appeal for want of merits.

GIST OF THE PROSECUTION EVIDENCE IN TRIAL COURT

10. Prosecution has examined following 12 witnesses to establish its case:

- PW1** Rangnath is the pancha to seizure of clothes of victim and in his evidence at Exhibit 22, he stated that father produced clothes and the same were seized by drawing panchanama Exhibit 23.
- PW2** Machhindra has acted as pancha to spot panchanama which is the house of Dada Kutal, and he identified panchanama drawn in his presence to be at Exhibit 25.
- PW3** victim gave evidence at Exhibit 26 and sum and substance of her evidence is that on 10.08.2001, when she went to fetch water, accused Bharat and Sandip pulled her in the house of Dada Kudal. She was taken to the rear room and accused Sandip raped her, followed by accused Bharat. She stated that she was threatened if she discloses the incident to anyone. She claims that she became unconscious and when she regained consciousness, she found herself in hospital. She stated that, that time police had also come there and she gave complaint Exhibit 27, contents of which were identified by her.
- PW4** Babu is the uncle of victim. It is his version that on 10.08.2001, he learnt that his niece victim, who had left to fill water from the hand pump, had not returned and therefore he set out for search. He saw door of the house of Dada Kutal moving in spite of no one residing there. Therefore, on suspicion, he went towards the house. According to him, accused Sandip opened the door and ran out. Thereafter, he

entered the house and found Bharat hiding and he too ran away without saying anything. After he entered second room, he saw a water pot lying there and victim lying on the ground in unconscious condition. Her clothes were in torn condition and her undergarment was lying near her. He called one Kalawati and thereafter one doctor Santosh was called and victim was taken in a jeep initially to Shrigonda police station, who directed to take her to Rural Hospital, Shrigonda and from there she was further directed to be shifted to Civil Hospital where, after gaining consciousness, she gave statement.

PW5 Baburao Jape, ASI, who recorded complaint Exhibit 27 by visiting Civil Hospital.

PW6 Medical Officer, who examined accused.

PW7 Shinde is Clerk in the school where victim was admitted. He gave date of birth of victim as per register to be 01.06.1986 and entry of her name in register to be at serial no. 1161. He identified this document at Exhibit 33.

PW8 is the Medical Officer who examined victim on 11.08.2001 and issued certificate Exhibit 36.

PW9 Police Sub Inspector Gopinath Raskar is the Investigating Officer who narrated all the steps taken by him during investigation.

PW10 Police Constable Gaikwad is the carrier of muddemal to C.A.

PW11 is the forensic expert.

PW12 Police Constable More is another carrier of muddemal.

ANALYSIS

11. On going through the prosecution evidence, it seems that the evidence of PW3 victim, PW4 her uncle and PW8 Medical Officer who examined victim is of significance.

12. The testimony of victim **PW3** at Exhibit 26 is put to scrutiny. Regarding occurrence, she has deposed that on 10.08.2001 around 4.00 p.m., she went to fetch water from hand pump and while she was proceeding in front of house of Dada Kutal, accused Bharat (juvenile) caught hold her left hand and thereafter present appellant pressed her mouth. Present appellant pulled her in the house of said Dada Kutal. She claims that she tried to shout but accused put cloth in her mouth. She was taken to the backside room. Appellant pushed her on the ground, lifted her gown and removed her undergarment while juvenile accused Bharat held her hands, appellant then undressed himself, inserted his penis in her vagina. Victim stated that appellant

had twice forcible sexual intercourse with her and thereafter he held her hands and juvenile accused Bharat undressed himself and he too raped her. She further deposed in para 3 that both accused threatened her that if she disclosed the incident to anybody, they will kill her. They gagged her after which she became unconscious. When she regained consciousness in the Civil Hospital, her uncle and parents were near her. They inquired with her as to what happened and she narrated the incident.

On visiting her cross, it is found that initially questions are put about place of education, about her brothers and sisters, as to whether father of accused is dead or alive. She answered that parents of accused are from Kutal family. Relevant cross is at para 7 and 8. She answered that there is only one water hand pump in the Kutalwadi. She denied that there are houses around the water pump. She answered that her house is adjacent to the house of Dada Kutal in the same lane. In para 8 she answered that she failed in 10th standard and thereafter she did not attend school. In para 9, she stated that her mouth was pressed by use of palm and that she tried to raise shouts after removal of palm. She again volunteered that immediately cloth was inserted in her mouth. She answered that the cloth was handkerchief. She is asked what was the distance between two spots.

She is asked whether she tried to take out the cloth from her mouth. She answered that she was dragged for 15 feet. She denied that there were scratches on her knees, thighs, chin. She answered that she was frightened because her hands were held and pressed. She answered that incident lasted for 15 to 20 minutes and therefore she lost consciousness. She flatly denied that her marriage was settled with accused and an amount of Rs.31,000/- was given by way of dowry. She also denied that there was any love affair with accused or about meeting him at lonely places. Rest all suggestions are denied by her.

13. **PW4** uncle of victim is also a crucial witness, because he claims to have gone in search of victim and when he reached the house of Dada Kudal, there, he claims to have seen accused Sandip running out of the house, whereas juvenile accused Bharat hiding himself and later he also running out of the house. He claims that when he entered second room, he found victim lying unconscious. He described the condition of clothes to be torn and her undergarments lying beside her. Therefore, he gave call to one Kalavati and victim was shifted to two hospitals and at Civil Hospital, she regained consciousness and narrated the incident. He also reiterated that she told that while she was proceeding towards water hand pump for fetching water, in front of house of Kutal, accused pressed her mouth

and dragged her inside the house, pushed her on the ground and both accused raped her.

He also, in cross, denied that marriage of victim was settled with accused. He denied about lodging complaint at Shrigonda Police Station. He admitted about having talks with PSO on duty. He denied about he disclosing the incident to the Medical Officer or to police at Civil Hospital, Ahmednagar. He denied false implication.

14. After these two witnesses, another star witness for prosecution is **PW8** Doctor who is examined at Exhibit 34. Doctor stated that patient was admitted on 11.08.2001 on the history of sexual assault between 4.30 p.m. to 5.00 p.m. on 10.08.2001. It is contention of Doctor that there were signs suggestive of recent sexual intercourse, but no signs of force. Doctor identified certificate issued Exhibit 36. Again after going through the C.A. report, she deposed that after perusal of the same, in her opinion, there are signs of recent sexual intercourse but no signs of force. In recent sexual intercourse, redness of vaginal wall is often noticed.

In cross, she admitted that two fingers test suggested habituated to sexual intercourse. She admitted that hymen of the

patient was old torn. Hypothetical questions are posed which need not be taken into account.

15. Therefore, what is emerging on meticulous examination of victim's testimony is that on 10.08.2001, while she was going for fetching water, she has specifically stated that when she reached the house of Kutal, at that time, juvenile accused and present appellant took her in the house of Kutal and she has specifically stated that juvenile accused first held her by her hands and her mouth was pressed preventing raising alarm. First, present appellant seems to have raped her and thereafter juvenile allegedly raped her. She has categorically stated that they both threatened to kill her if she reports to anyone. Because of being raped one after the other, she fell unconscious. She gave statement in the hospital. In spite of being subjected to cross, her above evidence has not been disturbed nor rendered doubtful.

16. Much stress is laid that there is no alarm, there are no marks of injury and medical evidence is about old hymnal tear. There is no force in such submission. Victim was handled and taken forcibly to the house by two persons. Therefore, obviously there may not be dragging marks. When she was incapacitated by one accused holding

her, while other raped her, there may not be injuries. Therefore absence of external injuries is insignificant. Likewise, even if medical evidence suggests old hymnal tear or opinion is about habituated to sexual intercourse, still it is not open for accused persons to take defence or cover to say that there was consent. Victim has reiterated the deeds of accused immediately after she regained consciousness. She has specifically named them for raping her. Therefore, the act is apparently forceful. PW4 uncle, who took her to the hospital, is lending support to the testimony of prosecutrix. Victim has categorically denied about marriage being fixed or she to be having love affair with accused. This itself shows that whatever act has happened, was against her wish. If at all there was love affair with accused Sandip, then why juvenile accused forced himself upon her is the crucial question. Even a person who is keen in marrying a girl may not permit other person to indulge in such act in his presence. Therefore, the defence so raised here is improbable and hence having no substance. In the light of above material, offence claimed is proved to have been committed. Appellant is the first person to rape victim. Evidence of prosecutrix does inspire confidence and therefore both offences i.e. under Sections 376(G) and 506(1) of IPC are apparently made out and all ingredients necessary to attract the offence are patently available.

17. Learned trial Judge has correctly appreciated the evidence available on record keeping in view the settled law. No perversity or illegality is brought to notice in appeal so as to interfere. Hence, I proceed to pass the following order:

ORDER

The appeal is hereby dismissed.

[ABHAY S. WAGHWASE, J.]

18. On pronouncement of this judgment, learned counsel for the appellant prays for six weeks time to surrender so as to enable him to approach the Hon'ble Apex Court.

19. Learned APP strongly opposes the same.

20. Considering the above request made by learned counsel for the appellant, six weeks time is granted for the appellant to surrender.

[ABHAY S. WAGHWASE, J.]