



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 151 OF 2004

Mukundrao S/o Deorao Pachpute
Age 30 years, Occu. Agri.,
R/o Jaldhara, Tq. Kinwat,
District Nanded.

... Appellant
[Orig. Accused No.1]

versus

1. The State of Maharashtra
2. Shobha d/o Digambar Dukre,
Age 49 yrs, Occu. Homemaker,
R/o Jaldhara, Tq. Kinwat,
District Nanded

... Respondents

.....
Mr. S. J. Salunke, Advocate for the Appellant.
Mr. S. K. Shirse, APP for Respondent No.1-State
Respondent No.2 is served.
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CORAM : ABHAY S. WAGHWASE, J.

DATED : 12 SEPTEMBER 2024

JUDGMENT :-

1. The judgment and order of conviction dated 16.02.2004 passed by learned 2nd Adhoc Additional Sessions Judge, Nanded in Sessions Case No. 64 of 2002 recording guilt of the appellant for offence under Section 313 of the Indian Penal Code [IPC] is hereby assailed in the instant appeal.

FACTS IN BRIEF, GIVING RISE TO THE INSTANT APPEAL

2. In all five accused were charge-sheeted on receipt of complaint of PW1, who reported that she was married to Ramrao, but later on she had obtained divorce. She had love affair with appellant Mukund. Out of their such relation, there was physical intimacy due to which she conceived. After she was five months' pregnant, appellant accused took her to the hospital and got her pregnancy terminated. That, he also did not keep his promise of performing marriage. That, she was not willing to get her pregnancy terminated but was forced and therefore, on her report Exhibit 22, police registered crime for offence under Sections 313, 323, 504 r/w 34 of IPC.

3. After completion of investigation and on gathering sufficient evidence, accused were chargesheeted and tried by learned 2nd Adhoc Additional Sessions Judge, Nanded vide Sessions Case No. 64 of 2002. Trial culminated into conviction of appellant Mukundrao alone, whereas, rest of the accused were acquitted. Such judgment and order of conviction is now the subject matter of appeal before this Court.

SUM AND SUBSTANCE OF THE EVIDENCE IN TRIAL COURT

4. In support of its case, prosecution examined in all 8 witnesses. Their role and status and the sum and substance of their evidence can be summarized as under :

PW1 Informant stated that one year prior to the incident, she was married. Her husband came to know her love affair with appellant Mukund and therefore he divorced her. That, out of physical relations with appellant, she conceived. When she was 5 months pregnant, accused had promised to marry her. He did not marry her and more over, against her will and wish, he got her pregnancy terminated.

PW2 Maternal aunt of informant stated that informant was married to Ramrao, however, because of her illicit relations with Mukunda, he gave her divorce. Informant was visiting appellant and she had conceived. That, later on accused threatened and forced her to terminate pregnancy.

PW3 Babusha did not support prosecution as he denied visits of informant to the field of accused.

PW4 Ramrao is husband of Informant and he stated that after marriage, informant did not cohabit with him and she used to say that she disliked him, therefore he divorced her. He identified "*farkatnama*" Exhibit 31.

PW5 Prakash acted as pancha to panchanama of the hospital Exhibit 33.

PW6 Dr. Savita is the medical practitioner and gynaecologist, who terminated the pregnancy. While giving evidence, she stated that she is unable to identify complainant and therefore, was declared hostile and subjected to cross-examination.

PW7 Dr. Supriya, also a doctor who examined victim on 29.09.1997 and issued certificate Exhibit 47.

PW8 API Mali is the Investigating officer, who carried out investigation and chargesheeted accused.

SUBMISSIONS

On behalf of the appellant :

5. Learned counsel for the appellant pointed out that there is false implication. According to him, here, prosecution has failed to establish beyond reasonable doubt that there was any forceful termination of pregnancy so as to attract Section 313 of IPC. He pointed out that there was even no iota of evidence in support of conception of informant only due to physical intimacy with appellant. He took this court through the testimony of victim and other witnesses and pointed out that FIR is after one month. He also

pointed out that, from the evidence of informant, it is clearly emerging that contents of the FIR were not narrated by her but were rather at the behest of one Tukaram Shirde, who was from rival political group, and therefore implication is at his instance. According to him, FIR is afterthought and with sole intention to implicate. He strenuously submitted that in report Exhibit 22, on the strength of which crime is registered, name of appellant is not appearing as accompanying victim to the hospital of Dr. Bhalerao, where there was said to be alleged medical termination of pregnancy. That, learned trial court has not appreciated and analyzed the evidence as required by law and has not considered that essential ingredients for attracting Section 313 of IPC are not available in prosecution evidence. Therefore, according to him, such findings and judgment cannot be allowed to be sustained.

On behalf of the respondent-State :

6. While resisting the appeal, learned APP pointed out that victim has categorically stated that there was promise of marriage and therefore there was physical intimacy. That, victim had reported that she had conceived from appellant. In spite of she to be five months' pregnant, without her consent, medical termination of pregnancy was performed and therefore, clearly offence of 313 IPC is made out.

Thus, according to learned APP, learned trial court has correctly appreciated the evidence and by assigning sound reasons, conviction has been rendered. That, judgment is infallible and hence he prays to dismiss the appeal.

7. Here conviction is for offence under Section 313 of IPC. The said provision reads as under :

“313. Causing miscarriage without woman’s consent.-
*Whoever commits the offence defined in the last preceding section **without the consent** of the woman, whether the woman is quick with child or not, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extent to ten years, and shall also be liable to fine.”*

8. Evidence of PW1 informant is crucial in this case, because precise story of prosecution is that without her consent, her pregnancy was terminated. Therefore, it would be desirable to deal with her testimony in the court which is at Exhibit 21. PW1 informant, after deposing about her love relations with appellant Mukunda, prior to and post marriage with Ramrao, stated as under ;

“After the divorce, I had continued to stay at the house of my parents in village Jaldhara. I had love affairs with

*appellant Mukunda since prior to my marriage with Ramrao Dhakre. Since my divorce with Ramrao Dhakre, accused Mukunda went on visiting me at my parents house as well as at land of the accused Mukunda. Accused Mukunda had sexual intercourse with me during one year prior to my marriage with Ramrao and also **subsequent to my marriage with Ramrao**. Due to the said sexual relations, I conceived. When I was pregnant of more than 5 months, deceased Nilabai, wife of brother of accused Mukunda, took me to the hospital of Dr. Bhalerao at Nanded. Nilabai brought me to the hospital of Dr. Bhalerao for abortion as I had told her that I had conceived due to sexual relations with accused Mukunda. At that time Nilabai and myself were accompanied by accused Mahadu Zalke and Pramod Ramji Davare. At the hospital of Dr. Bhalerao, accused Mukunda gave my fake name Renuka Satwa Wanole. Accused Mukunda, Mahadu, Pramod, deceased Nilabai and Dr. Bhalerao terminated my pregnancy. Then I was taken to Jaldhara. My parents did not allow me to stay with them and asked me to accompany accused Mukunda at his house. Thereafter accused Mukunda allowed me to stay at his house for two days and thereafter kept me at gotha (cattle shed). After the said one month, accused Mukunda, Devrao, Panchafulabai abused and beat me and drove me out of their house. The parents of accused Mukunda also drove me out of their house. After incident of beating to me, I lodged complaint at Islapur police station. The complaint bears my signature. I am now read over the complaint. The contents are true and correct. It is at Exh. 22...."*

She further deposed that :

“I was admitted in the hospital of Dr. Bhalerao for seven days. Dr. Bhalerao gave me medicines and injections and terminated my pregnancy. Mahadu Zalke, Pramod Davre and Nilabai gave their signatures at Dr. Bhalerao but they did not allow me to know what papers they have signed. At the hospital of Dr. Bhalerao, my signatures were not obtained on any papers. At the hospital of Dr. Bhalerao accused Mukund told me that he will marry with me if I gave consent for termination of pregnancy. He also told me that he will not marry with me unless I consent for termination of pregnancy. I was not willing for termination of my pregnancy. Accused Mukund forced me for termination of my pregnancy.”

9. She is subjected to extensive cross and in the relevant cross, she answered that she is not married with accused Mukund and that, he was already married in 1996 and he has two children. She admitted that when she gave police complaint, Tukaram Shirde and Punjabai had accompanied her. Her complaint is written by Tukaram Shirde. Punjabai is sister of her mother. She answered that she does not know why it is not mentioned in her complaint that appellant Mukund was also accompanying her in the hospital of Dr. Bhalerao.

10. Next crucial witness is PW2 Punjabai, maternal aunt of informant, and she too stated that, after Ramrao gave divorce to informant on learning about her illicit relations with Mukunda, accused Mukunda visited house of informant even after her marriage and after her divorce. Informant used to visit land of accused for agricultural work. She conceived from accused Mukunda. Thereafter, accused took informant to hospital of Dr. Bhalerao and got her pregnancy terminated. Later on she was allowed to stay in their house for two to three days, and then kept in cattle shed for one month and then beaten by Mukunda, Devrao and Panchfulabai. Thereafter informant went to the house of her parents. Since then she was residing with her mother. This witness stated that when informant returned from Nanded, she informed this witness that accused and his family members threatened her and forced her to undergo termination of pregnancy.

11. PW3 Babusha did not support.

12. PW4 husband of victim merely stated that he gave divorce to victim on 30.05.1996.

13. PW6 Dr. Bhalerao is the medical practitioner, in whose hospital victim allegedly underwent medical termination of pregnancy. In her evidence at Exhibit 34, initially after going through papers article A, B and C, she stated that pregnancy of one Renuka Satwaji Wanole was terminated in her hospital on 05.08.1997. As a routine oral consent of the lady was obtained and pregnancy was terminated . The lady was pregnant for 14 to 16 weeks. She is unable to state whether lady was accompanied by any woman but she identified articles A, B and C to be of her hospital. She also deposed that she does not remember whether she had personally terminated pregnancy. Exhibit 34 shows that learned trial Judge took note in the evidence itself as under :

“Note: In the light of statement made by witness on oath, it is necessary to call the complainant in the Court so that the witness recollects her memory and deposes truly in the interest of justice. Complainant be called. Witness shall appear for her further evidence on 14.11.2003.”

When examination-in-chief was resumed, PW6 deposed that she is unable to identify complainant and whether she is the same lady whose abortion was performed by her on 06.08.1997. Therefore, not finding her supporting, learned APP sought permission of the court to cross examine her, during which she identified

articles/Exhibits 36, 37 and 38. She answered that she does not remember whether she verified the name of the patient and her husband. She admitted that she did not obtain signature of the lady for her consent, but further stated that she might have obtained oral consent of the lady. In further cross, she denied that she terminated pregnancy of the lady though lady had no consent for termination of pregnancy.

14. Another important witness is PW7 Dr. Supriya who is also a private practitioner. In her evidence she stated that on 29.09.1997, she examined informant who was referred by police, and she noticed “presence of mongeripuberplus on breast, presence of lentor nigra on abdomen and her perspecula examination show parous cervix”, and she identified document Exhibit 47. In cross she answered that according to her, pregnancy of informant must have been aborted or it must be pre-term delivery before about 6 months.

15. PW8 is the investigating officer.

ANALYSIS

16. On complete re-appreciation of evidence of PW1 informant, it is emerging and she has categorically stated in her substantive evidence that she had love affair with Mukunda and said relation continued in

spite of her marriage with Ramrao (PW4). It is pertinent to note that in chief itself she had stated that, accused Mukunda used to have sexual intercourse with her during one year prior to her marriage with Ramrao and also subsequent to the marriage with Ramrao, as a result of which she had conceived. Her such testimony explicitly shows that there used to be physical relations between appellant Mukunda and informant even prior to marriage of informant with Ramrao and even subsequent to marriage. How many days there was cohabitation with Ramrao has not come on record. But considering her evidence that there was physical intimacy with Mukunda even after her marriage with Ramrao, there is reason to hold that she was having physical relations simultaneously with both, Mukunda as well as Ramrao. She claims to have conceived through physical relation with appellant Mukunda, but except her such bare words, that she conceived only through Mukunda is not established. Apparently, no DNA test has been done to ascertain as to from whom or with whose intimacy she had gained pregnancy. Moreover, as pointed out by learned counsel, she has accompanied deceased Nilabai to the hospital, as according to her, Mukunda had promised to perform marriage with her. But there is nothing to show that at that point of time she was already separated or divorced by Ramrao. Her evidence that, because of promise of marriage and condition that he would

marry her only if she terminates her pregnancy, clearly shows that she herself proceeded to the hospital to get her pregnancy terminated. Had she been not willing, she would not have visited the hospital and got medical termination of pregnancy performed. Even as pointed out by learned counsel, presence of appellant at the hospital is not stated by her in her report Exhibit 22, and regarding which omission is also brought in her cross para 2.

17. What Section 313 contemplates is, medical termination of pregnancy without consent. Here, this necessary ingredient is not established by prosecution and is also evident from her above discussed testimony. Therefore, there is weak evidence on the point of commission of offence under Section 313 of IPC.

18. It is also pertinent to note that the doctor in whose hospital the pregnancy was terminated i.e. PW6, has stated that the lady's oral consent was obtained. It has also come in the evidence that appellant is not signatory to the necessary consent papers at the hospital. Taking such material into consideration, defence of appellant that he was not present at the time of abortion and as such, at first count ought not to have been chargesheeted and tried of offence under Section 313 of IPC, has force.

19. Apparently, FIR is not prompt, rather it is after almost a period of one month of alleged medical termination of pregnancy and only when she was allegedly driven out not only by appellant but even by her parents. Thereafter she seems to have reported her maternal aunt PW2 Punjabai, and then steps seem to have been taken. Further, even she has admitted that Tukaram Shirde is the author of complaint and she herself had not written or narrated contents of Exhibit 22, which was the basis of registration of crime. This aspect also weakens prosecution version.

20. Therefore, on complete re-appreciation of evidence, here, it is noticed that victim has admitted that at the time of her marriage with Ramrao, she was having love affair with appellant Mukunda. She clearly stated that even after marriage, she continued her affair and had developed physical intimacy with appellant i.e. during cohabitation with Ramrao. Though she claims to have conceived, except her bare allegation that said conception was only and only from Mukund, it cannot be said that the pregnancy is attributable to him. There is no scientific evidence that the conception was out of her intimacy only and only with Mukunda. Secondly, in the report, she has not named him for taking her to the hospital. His presence at hospital is patently missing when alleged medical termination of

pregnancy was performed. Her evidence also shows that she has undergone the procedure of termination believing offer of marriage. Therefore, it cannot be said that the pregnancy was terminated against her wish. Even there is nothing in black and white to show that appellant had consented for medical termination of pregnancy before the procedure was conducted at hospital. On the contrary, PW6 deposed about obtaining oral consent of PW1.

21. Under such circumstances, required ingredients that termination of pregnancy was without her consent, does not stand established. Apart from FIR to be after inordinate delay, there is no evidence of any injury so as to attract Section 323 of IPC. For such reasons, case of prosecution does not stand.

22. Perused the judgment. Above aspects are not taken into account by learned trial Judge while appreciating the evidence. Therefore, interference is called for. Hence, the following order is passed :

ORDER

- I. The appeal is allowed.
- II. The conviction awarded to the appellant Mukundrao, by learned 2nd Adhoc Additional Sessions Judge, Nanded in Sessions Case

No. 64 of 2002 under Section 313 of IPC on 16.02.2004 stands quashed and set aside.

- III. The appellant stand acquitted of the offence punishable under Section 313 of IPC.
- IV. The bail bond of the appellant stands cancelled.
- V. Fine amount deposited, if any, be refunded to the appellant after the statutory period.

[ABHAY S. WAGHWASE, J.]

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