



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 1250 OF 2019

Munja s/o Jijabhau Bhange,
Age 28 years, occu. Labour,
R/o. Niwali (BK),
Tq. Jintoor, Dist. Parbhani.

... Appellant.

Versus

The State of Maharashtra

... Respondent

.....
Mr. Rahul O. Awasarmol, Advocate for the Appellant.
Mr. N. D. Batule, APP for the Respondent-State
.....

CORAM : ABHAY S. WAGHWASE, J.

Reserved on : 10.01.2024

Pronounced on : 16.01.2024

JUDGMENT :

1. Convict for offence punishable under Section 376 of the Indian Penal Code [IPC] is hereby assailing the judgment and order passed by learned Additional Sessions Judge dated 13.11.2019 in Session Trial No. 161 of 2011 wherein appellant is sentenced to suffer seven years rigorous imprisonment and to pay fine.

2. Bori police station filed challan against the present appellant for offence punishable under Sections 363, 366-A, 376, 506 of IPC alleging that, when victim PW2 was proceeding towards village at around 6.00 a.m. on 09.08.2011, accused appellant approached her,

offered to marry her and further suggested that they should run away and perform marriage. Around 10.00 a.m., her parents went to work in the field and her other siblings went to Jintur and school respectively and around 7.00 p.m. that day, when she was alone in the house, she left the house and accompanied accused, who took her towards a *mal* near water tank and on promise of marriage, he had forcible intercourse with her and thereafter he threatened to finish her if she reports the incident to anyone. Accused then took her to Sailu and then to Nashik and kept her in the house of his relative for two days. Subsequently, he also refused to marry her. Therefore she came back to Parbhani on 12.08.2011, narrated the incident to her family members and approached Bori Police Station on 13.08.2011 and on her report, crime no. 96/2011 was registered which was investigated and after gathering sufficient evidence, chargesheet against the appellant was submitted before learned Sessions Court.

On assignment of case to the learned Additional Sessions Judge-3, Parbhani, trial was conducted, during which prosecution examined in all six witnesses and on appreciating the evidence, learned trial Judge reached to a finding that prosecution has established the charges but only for offence punishable under Section 376 of IPC and there being no cogent, reliable evidence for

commission of offence under Sections 363, 366-A and 560 of IPC, accused stood acquitted for the same. Said judgment is now taken exception to by filing instant appeal.

3. Learned counsel would submit that apparently implication is false. That, there is delay of almost 5 days in reporting the occurrence. That victim is above 18 years of age. That, her own evidence suggested that she left the house on her own. There is no cogent, reliable evidence regarding accused calling her or taking her towards any water tank. He would point out that in fact she had stayed with accused at Nashik for three days and there was no resistance or complaint to anyone. Medical evidence is also not supporting prosecution but learned trial court, though acquitted accused from charge under Sections 363, 366-A and 506 of IPC, has unfortunately held him guilty for offence under Section 376 of IPC. He submits that, there is improper appreciation to that extent and therefore, he seeks indulgence of this court for setting aside the impugned judgment. He also pointed out that very Investigating Officer has not been examined. He seeks reliance on the rulings of the Hon'ble Apex Court in *State of H.P. v. Suresh Kumar @ Chhotu* AIR 2009 SC 1109 and *State of Maharashtra v. Lingabai Maroti Sahane* 2018 (2) ABR (Cri) 187.

4. In answer to above, learned APP would submit that though there is no conclusive evidence regarding age of prosecutrix, there is cogent, reliable evidence suggesting offence of rape. Medical evidence confirms rape. There is promise of marriage and there is sexual intercourse at *mal* near water tank. Victim herself has deposed to that extent. Therefore, learned trial court has correctly appreciated the evidence of victim and medical expert and guilt so recorded cannot be faulted at and hence he seeks to dismiss the appeal. Learned APP is relying on the ruling of *Anurag Soni v. State of Chhattisgarh* 2019 DGLS (SC) 568/(2019) 13 SCC 1.

5. Being first appellate court, while exercising powers under Section 374 of the Code of Criminal Procedure [Cr.P.C.], this court has re-examined, re-analyzed and re-appreciated the entire evidence adduced by prosecution in the trial court. Record shows that following are the witnesses whose testimonies are relied by prosecution in the trial court:

PW1 is PSO Manik Kadam, who noted the FIR; **PW2** is the victim; **PW3** Dr. Pawar is the medical officer who examined accused; **PW4** Sanjay is the pancha to spot panchanama but he has not supported prosecution; **PW5** Shaikh Yunus is pancha to seizure

panchanama Exhibit 67 however he too has turned hostile and was crossed examined by the APP; **PW6** Dr. Bharati Patod is the Medical Officer who examined the victim.

6. On hearing the submissions of both sides and on appreciating the evidence, taking into consideration the nature of charge, evidence of victim and the doctor who examined her assumes importance. Even otherwise PW1 is the PSO who merely registered crime, PW3 is the doctor who examined accused and PW4 and PW5 are pancha witnesses who have not supported. Therefore only evidence which remains for re-appreciation and re-analysis is of victim PW2 and doctor PW6.

7. On carefully going through the evidence of PW2 victim, she is found to be deposing that she knew accused who was residing in the same village. According to her, accused used to ask her to run away and perform marriage. She deposed that once when she went to bring flour, finding her alone accused took her to *mal* near a water tank, threatened her, made her fall down, disrobed her, undressed himself and performed intercourse with her and thereafter threatened to kill her. She further deposed that he took her to Nashik from Jalna. In chief again she rectified herself and stated that she cannot tell the

place from where she went to Nashik. Further, according to her she stayed at Nashik for two days. There also accused told her to perform marriage and then informed her that they have to return back to the village. Then, according to her, they came to Parbhani. Accused did not perform marriage with her and therefore she reported the occurrence to her parents and thereafter they all approached the police.

In her cross, she has answered that her marriage was performed 10 years back and she had four issues. She admitted that two days after the incident which took place near the water tank, she had lodged report. She admitted that surrounding the scene of occurrence, there are fields and *aakhadas* where people render agricultural work. She answered that the incident at *mal* lasted for five to six hours. She stated that she shouted but no one was present there. She candidly admitted that she did not tell anyone about the incident but her mother told the incident to the Sarpanch. She stated that she only suffered abrasions and no injuries. Omission is brought that while she was returning from the flour mill, accused pressed her mouth and took her to the *mal*. She admitted that she did not inform police about knowing accused for the last two years. She is also unable to state how portion marked "A", i.e. regarding her acquaintance with

accused since two years, is appearing in her statement. She admitted that while she was at Nashik, her parents did not lodge report and she also did not lodge report at Nashik. Omission is again brought to the extent of informing police about she being taken to Janla. Rest is all denial.

8. On visiting testimony of PW6 Dr. Patod at Exhibit 68, she is found to be deposing that she examined victim on 14.08.2011 and she found hymen to be ruptured, but there were no injuries on other parts of her body. According to her, she sought radiologist's and Dentist's opinion regarding age of prosecutrix and as per their opinion, her age was 16 to 17 years and 15 years respectively. Her personal opinion was that age of prosecutrix was 14 to 15 years. She identified the medical report Exhibit 72 issued by her.

While under cross, doctor denied issuing wrong opinion but **further admitted that actual age of the victim was more than 19 years.**

9. Here, it is pertinent to note that parents of victim are not examined so as to establish the exact age of victim. Though victim herself claims to be married 10 years back, exactly at what age she came in contact with appellant is not getting clear from the evidence

of prosecution. However, medical expert speaks about radiological age to be around 16 to 17 years and in cross, doctor has admitted that age of victim could be 19 years. Therefore, in absence of conclusive evidence about age and taking into consideration the above age narrated by doctor, it is unsafe to hold that victim was a minor or below 18 years of age at the time of incident.

10. Admittedly appellant is only held guilty for commission of offence punishable under Section 376 of IPC. Therefore it is to be seen whether such offence is at all made out.

11. On carefully going through the evidence of victim, it is revealed from her testimony that, she has quoted one incident of she being taken towards *mal* near a water tank, he undressing her, getting himself undressed and having sexual intercourse with her. Thereafter, she claims that she was taken to Nashik for a couple of days and then brought back to Parbhani and when he refused to perform marriage, she seems to have reported the occurrence to the parents.

12. On carefully analyzing the above evidence of victim, it is found that she reported about sexual intercourse while she was returning with flour from a four mill. There are no details of day, date and time,

where she met accused exactly and by what mode he took her towards the water tank and at what distance was it located. She speaks about he initially insisting to perform marriage. Therefore, such material clearly suggests previous acquaintance of victim and accused. In fact the alleged episode which took place while she was returning from flour mill, is apparently an improvement and omission as such material is not finding place in her statement. Her answer in cross about she being picked up and carried up to railway station, is unworthy of reliance. Resultantly, her evidence does not inspire confidence.

13. As discussed above, already prosecution seems to have utterly failed to show that victim is a minor. Admittedly report is lodged only on returning from Parbhani after spending couple of days at Nashik. Details of stay at Nashik are also not coming in her evidence. Though victim is medically examined and though doctor has reached to a finding about hymen ruptured, doctor's opinion is not categorical as to since when the hymen could be torn. There is no clear opinion about forceful sexual intercourse as alleged. Evidence of doctor is also silent about any history of forceful sexual assault or on promise of marriage. As stated above, details of alleged episode which took place at water tank are not stated by her. She is directly examined on

14.08.2011 by doctor PW6 and this doctor has stated that there were no injuries on the parts of body. Therefore, medical evidence is also ambiguous and not conclusive.

In the totality of such circumstances and when prosecution could not establish very age of the victim and moreover, she herself having left the house and had accompanied accused to a couple of districts and reported the occurrence late i.e. almost after five days, her version about forceful sexual intercourse or intercourse on promise of marriage cannot be readily accepted.

14. On going through the judgments relied by learned counsel for the appellant, in the case of ***State of Maharashtra v. Lingabai Maroti Sahane and Another*** (supra), the facts seem to be identical. There also victim was acquainted with accused and on his mere asking to perform marriage, she had accompanied him. Even in that case, radiological age was reported to be around 17 years. Hear, in this case also, considering the conduct of victim of accompanying accused towards water tank without raising alarm and further accompanying him to another district and staying there for a few days without resisting or raising alarm or attempting to make her escape good, inference that can be drawn is that she was a consenting party.

Likewise, the case in ***State of H.P. v. Suresh Kumar @ Chhotu*** (supra) is also on identical circumstances. The prosecutrix therein having found to be a consenting party to the sexual acts, acquittal of accused was upheld. Thus, both above citations come to the rescue of the appellant.

Whereas, on going through the judgment relied by learned APP i.e. ***Anurag Soni v. State of Chhattisgarh*** (supra), it is emerging that on analysis, the Hon'ble Apex Court observed that on promise of marriage, accused therein developed physical contact with prosecutrix three times on 29.04.2013 and 30.04.2013. On each of the occasion it seems that he would assure to perform marriage but finally resiled and therefore Apex Court held that she consented for sexual intercourse under misconception of fact and hence conviction of accused therein for offence under Section 376 of IPC was upheld. Here it is not so. For above discussed reasons, when alleged forceful sexual act was committed on her, has not come on record. As stated above, she has accompanied accused to another district without resisting or raising alarm. Her testimony about she being lifted and taken is unbelievable. There is material omission about alleged occurrence taking place at *mal*. Therefore, it is unsafe to rely on her sole testimony. In the light of her evidence, this court is of the opinion

that there ought to have been further corroboration to her testimony but there is none. Even facts in the case in hand being distinct to the citation relied by learned APP, the same cannot be taken aid of.

15. Learned trial court in para 22 of the judgment has straightway accepted the version of prosecutrix without assigning proper reasons. Therefore, apparently, as pointed out by learned counsel for the appellant, there is no proper appreciation of the evidence of victim. Medical evidence is also not full proof regarding commission of offence under Section 376 of IPC. Hence, in the considered opinion of this court, as like charges under Sections 363, 366-A and 506 of IPC, even there is no reliable, firm and conclusion evidence about commission of offence under Section 376 of IPC on the pretext of marriage. Hence, interference is called for and I proceed to pass the following order:

ORDER

- I. The Criminal Appeal stands allowed.
- II. The conviction awarded to the appellant Munja s/o Jijabhau Bhanghe by learned Additional Sessions Judge-3, Parbhani in Sessions Trial No. 161 of 2011 under Section 376 of IPC on 13.11.2019 stands quashed and set aside.

III. The appellant stands acquitted of the offence punishable under Section 376 of IPC.

IV. The appellant be set at liberty, if not required in any other case.

V. Fine amount deposited, if any, be refunded to the appellant after the statutory period.

VI. It is clarified that there is no change as regards the order regarding disposal of muddemal.

[ABHAY S. WAGHWASE, J.]

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