

(2013) 04 BOM CK 0187

Bombay High Court (Aurangabad Bench)

Case No: Criminal Appeal No. 406 of 2012

Shaikh Sheru

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision: April 2, 2013

Citation: (2013) 4 ABR 59 : (2013) ALLMR(Cri) 2555 : (2013) 2 BomCR(Cri) 510

Hon'ble Judges: K.U. Chandiwal, J

Bench: Single Bench

Judgement

K.U. Chandiwal, J.

Appeal was admitted on 27th June, 2012. Appellant is in jail from 20th January, 2010, consequently, preference is given.

FACTS:-

The appellant has, allegedly, two months prior to the FIR dated 20th January, 2010 (Crime No. I-27 of 2010), has committed rape on his 12 years" daughter (prosecutrix). He again desired such sex on 19th January, 2010, which was rebuked and disliked by the prosecutrix. She ran away and informed her mother, giving rise to FIR for offence under Sections 376, 506 and also 376 read with 511 of Indian Penal Code.

2. After FIR, spot panchnama was drawn. The prosecutrix and the accused - appellant were medically examined including radiology test to determine her age. The seized samples were forwarded to regional forensic lab and since it revealed that the accused has committed offence, he was charge sheeted before learned Chief Judicial Magistrate, Aurangabad on 14th June, 2010 and it was committed to the Court of Sessions at Aurangabad for trial. Charge below Exhibit 3 was explained to the accused - appellant. He did not plead guilty and claimed to be tried. His defence was, there was matrimonial discord and disharmony between him and his wife; the daughter is stooge of his wife. His wife instigated the prosecutrix to accompany her to police station and lodged a false FIR.

3. Six witnesses were put in by the prosecution. PW 1 is prosecutrix. PW 2 - Sk. Anwar Sk. Sheru was the panch for panchnama Exhibit 22. PW 3 is Shamim Begam Shaikh Ayub, mother-in-law of accused and mother of Ruksanabi. Prosecutrix is her grand daughter. PW 4 - Shriniwas Hanumant Khandekar had carried investigation in the matter, had arrested the accused - appellant, had sent seized articles to the office of Chemical Analyser under forwarding letter Exhibit 31. PW 5 is Dr. Vikram Samadhan Lokhande. He had examined the prosecutrix and tendered his report Exhibit 35 dated 21st January, 2010. He had collected venous blood, pubic hair, nails and vaginal smear of the prosecutrix and had also addressed letter to the Chemical Analyser for analyzing samples. PW 6 is Dr. Pankaj Ramrao Ahire, Radiologist, who had examined the prosecutrix on 22nd January, 2010 and according to him, her radiological age was 14 years (Exhibit 43).

4. On analytical assessment of evidence, following points appear not in dispute:

- a) The prosecutrix is daughter of appellant and Ruksanabi, aged 12-14 years.
- b) PW 3 Shamim Begum is real mother of Ruksanabi and grand mother of the prosecutrix.
- c) There was discord between the couple ensuing in heated arguments on the point of Ruksanabi engaged as scrap picker or the appellant consuming liquor.
- d) The couple is also blessed with two sons, Salman and Arbaz, who were present in the hut on the day of incident.
- e) The hut/room is small, hardly able to occupy 4-5 persons, rented.
- f) Medical Officer did not notice any injuries on private part of the victim or any sense or sign of ravishing her sexually.
- g) PW 3 Shamim Begum accepted in the evidence that false FIR was lodged against the appellant at the instance of her daughter.

5. It is a shocking event, that a teen, the prosecutrix, has been used as a lever against her father. The defence witness Sk. Rafique (DW 1) and Shaikh Afsar (DW 2) are acquainted to the couple as Sk. Rafique was landlord of Shamim begum and house of Ruksanabi was at some distance from his house. He explained about regular quarrels between the accused and Ruksanabi on account of later collecting scrap. After such quarrels, Ruksanabi used to come to her mother Shamimbi and extend threats of criminal prosecution to the appellant. DW 2 Shaikh Afsar is cousin of Ruksanabi. He used to reside in nearby area in the house of Sk. Rafique. DW 2 Shaikh Afsar referred to discord between the couple. Ruksanabi extended threats of criminal prosecution. Ruksanabi even conveyed him of filing a criminal case of accusation of rape on prosecutrix against her husband. DW 2 Shaikh Afsar says, Ruksanabi has filed false criminal case against the accused.

6. It is settled legal position that "if evidence of prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reasons the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony".

7. Hon"ble Supreme Court has observed in the matter of [State of Punjab Vs. Gurmit Singh and Others](#), "The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case."

8. In cross-examination, the prosecutrix candidly accepts, at the time of sexual abuse in the hut, her two younger brothers were sleeping, however, in spite of her yelling, they did not awake. The room is in cluster, consequently, commotion was audible, but nobody turned forward. There is no explanation from the prosecution as to why Salman and Arbaz, the two children in the room present at the time of alleged rape, are not examined. If they were in slumber, still there was no harm for the prosecution to put in before the Court. If the prosecutrix, at her tender age of 12-14 years, not used to sex, is sexually abused by grown up person like her father (appellant), the unfortunate implications are, to suffer profuse bleeding to her private part or to witness injuries nearby area including, swelling and rupture. Nothing of this sort has taken place. The prosecutrix is unable to explain, what made her not to retort against her father to her mother who, knowingly, was on cross terms. Her keeping silence for two months, after so called rape, is suggestive of falsehood, rather than screening the evidence. She did not demonstrate her annoyance to her peers or grandmother (PW 3). No plausible answers are forthcoming. It may be that the prosecutrix was experiencing symptoms of acute trauma soon after ravishing, but such trauma cannot be expected to extend for over two months. The couple locked horns and had tantrums. The intrigue memories of sexual assault are normally difficult to control which disrupts daily life of victim. Nightmare flashbacks after such event, are not indicated. Her evidence coupled with evidence of PW 3 and defence witnesses appears to be a catalogue of events in chronological form to a hypothesis of false implication of appellant for no event of sexual abuse. The prosecutrix had put her esteem at stakes, but it was instrumentality of her mother which, indeed, proved fatal for the smooth family life. The evidence of prosecutrix does not inspire confidence to bank upon. The medical evidence does not support that she had suffered sexual abuse or that she was a sex victim, even delayed examination by two months, showed she was not used to sex.

9. The learned Addl. Sessions Judge recorded affirmative findings for sexual abuse, inviting infraction of Sections 376 and 506 of Indian Penal Code, however, he did not believe later event dated 19th January, 2010 of appellant insisting prosecutrix for sex for second time to invite Section 376 read with 511 of Indian Penal Code or attempt to commit rape inviting Section 376 read with 511 of Indian Penal Code. The evidence, as a whole, does not demonstrate that the victim was sexually abused, least by her father/appellant. Criminal Appeal allowed. Conviction recorded in Sessions Case No. 169 of 2010 by learned Addl. Sessions Judge-3, Aurangabad, dated 29th February, 2012, is set aside. Accused/appellant be released forthwith, if not required in any other case.