(2009) 04 BOM CK 0165

Bombay High Court (Aurangabad Bench)

Case No: Criminal Appeal No. 396 of 2007

Dhondiba Langade		APPELLANT
	Vs	
The State of Maharashtra		RESPONDENT

Date of Decision: April 4, 2009

Acts Referred:

- Evidence Act, 1872 - Section 53A(5), 6
- Penal Code, 1860 (IPC) - Section 376(2)

Hon'ble Judges: V.R. Kingaonkar, J

Bench: Single Bench

Advocate: M.V. Ghatge, for the Appellant; Dilip Bankar Patil, Assistant Public Prosecutor, for the Respondent

Final Decision: Dismissed

Judgement

V.R. Kingaonkar, J.

Challenge in this appeal is to judgement rendered by learned Additional Sessions Judge, Nanded, in Sessions Case No. 95 of 2005 whereby the appellant has been convicted for offence punishable u/s 376(2)(f) of the I.P. Code and is sentenced to suffer rigorous imprisonment for ten (10) years and to pay fine of Rs. 10,000/-, in default to suffer simple imprisonment for one (1) year.

2. Background facts leading to the prosecution case are as follows:

Complainant Madhukar (PW1) was employed as an agricultural servant by one Deelip Savakar on annual contract basis. He used to reside in the open space (Akhada) situated in the agricultural field of his master. His cousin Devidas (PW2) was also employed as agricultural servant by the same field owner i.e. Deelip Savkar. There was banana orchard in a part of the agricultural field. On October 11th, 2002, Madhukar was engaged in work on a huller machine at some distance from the open space (-------). His minor daughter Sarika, then aged about six (6) years, was in the open space in front of the residential hut. His wife as well as wife of Devidas had

gone to attend weekly bazaar. At about 4 p.m., the appellant went to the said open space (------). He noticed that Sarika was alone and unattended. He immediately lifted her and took her amidst plants of banana. After a shortwhile, she returned near the residential house. She was found weeping when Devidas noticed her. He also noticed that her private part was bleeding. He inquired with her as to what had happened. She narrated to him that the appellant had done something to her by taking her to a place amidst the banana plants. He himself went with her towards the place of incident. The appellant was not there but the place was found upheaveled and some banana plants were inflated. So, Devidas (PW2) called for father of the minor girl. She narrated the same incident to her father i.e. Madhukar (PW1). He was shocked to see that the private part of Sarika was torn and there was profused bleeding. He took her to the Government hospital at Ardhapur. The Medical Officer examined Sarika and gave opinion to the effect that there was forceful vaginal penetration and, therefore, there were extensive injuries found on the vaginal wall extended upto posterior fornix. She was thereafter referred to the Government Medical College Hospital at Nanded. The medical examination at the Government Medical College Hospital, Nanded further confirmed the fact that Sarika was subjected to violent sexual intercourse. She was treated. She had to undergo an operation. On basis of the report lodged by Madhukar (PW1), the police carried out certain investigation. The appellant was arrested on next day i.e. 12-10-2002. The undergarments of the minor girl - Sarika were seized under a memorandum panchanama. So also, the undergarments of the appellant were seized. He was clinically examined. On the basis of material collected during course of investigation, he came to be charge sheeted for offence punishable u/s 376(2)(f) of the I.P. Code.

3. To the charge (Exh-16), the appellant pleaded not guilty. He denied truth into the accusations. It was suggested that due to strained relations with master of the complainant - Madhukar, he has been falsely framed. No positive defence as such was put forth.

4. At the trial, the prosecution examined in all six (6) witnesses in support of its case. The learned Sessions Judge came to the conclusion that immediate conduct of Sarika indicated complicity of the appellant. The learned Sessions Judge held that version of the prosecutrix (Sarika) and the other circumstances sufficiently established guilt of the appellant. The learned Sessions Judge held that the crime is of heinous nature and, therefore, called for deterrent punishment. In keeping with such findings, the appellant came to be convicted and has been sentenced as described hereinbefore.

5. Heard learned advocate Mr. Ghatge for the appellant and learned A.P.P. Mr. D.B. Patil for the State. With their assistance, I have gone through the record and proceedings.

6. Mr. Ghatge would submit that the prosecution case could not be accepted without proper and legal proof about the charge of rape. He would submit that the prosecutrix - Sarika (PW3) did not spell out the act of the appellant to Devidas (PW2) but later on ,she gave improvised version with all the details, which may be result of her tutoring. He would submit that the omission of the prosecution to place on record report about medical examination of the appellant is also material lacuna in as much as the report could be exculpatory. He contended that conduct of Devidas is unnatural because instead of taking her to the father, he took Sarika towards the banana plants in order to verify the place of incident. He would submit further that the version of the minor girl - Sarika may be outcome of tutoring and is not free from doubt. The learned advocate, therefore, urged to give benefit of reasonable doubt to the appellant and to set aside the conviction and sentence by allowing the appeal. The learned A.P.P. Mr. D.B. Patil, however, supports the impugned judgement.

7. At the threshold, it may be stated that the FIR (Exh-27) was lodged by complainant Madhukar (PW1) in the same evening. The recitals of the FIR purport to show that the appellant was named as the person who had lifted the minor girl and reportedly committed forcible sexual intercourse with her. The FIR further shows that the private part of the minor girl was found torn. The promptitude with which the FIR was lodged is indicative of absence of fabrication. The appellant had no serious dispute or enmity with Madhukar (PW1). What is suggested to him is that the appellant had some dispute with the master of Madhukar. It does not stand to reason that any father would cause injuries to private part of his minor daughter in order to frame another person in such a serious case.

8. In the present case, versions of Devidas (PW2) and Sarika (PW3) are most important. Their versions would reveal that Sarika immediately named the appellant as the culprit. It is explicit from their versions that Devidas returned to the open space around 4.30 p.m. for drinking a glass of water and then saw that Sarika was weeping. His inquiry with her revealed that she was subjected to sexual assault by the appellant. She was found having bleeding injury on her private part. She showed her private part to him and narrated that the appellant had done "something" to her. He noticed that the private part of Sarika was torn. He took Sarika to the place amidst the banana plants. He thereafter returned with her because the appellant was not found in the banana orchard. He thereafter called Madhukar (PW1).

9. A question was raised as to why should Sarika take Devidas towards the place of incident and instead of calling her father, he should have gone with her to that place. It was argued that such conduct of Devidas reveals lack of truthfulness in his version. I do not agree. It has come on the record that Madhukar (PW1) is the maternal cousin of Devidas. Both of them were working under the same master. It is but natural that Devidas was treated as a close relative and well-wisher of the family of the prosecutrix. In her evidence, Sarika (PW3) referred to Devidas as her uncle

and naturally so. The relation of Devidas with the prosecutrix was the reason as to why immediately he wanted to verify whether the appellant was still in the orchard. There is nothing un-natural in his conduct. He cannot be disbelieved because he did not immediately call for the complainant. His version purports to show that the place of incident is situated at a distance of about one (1) furlong away from the open space (---------). He noticed that the place was upheaveled and there were stains of blood on the mud. He also attended the spot panchanama (Exh-29) drawn by the police. It is significant to note that the spot panchanama (Exh-29) was prepared in the same evening between 18.45 Hrs. to 19.15 Hrs. Needless to say, the investigation was geared up immediately. The panchas found that the place was soft and muddy. The blood stains were found in the mud and were mixed with the wet earth. Therefore, the sample could not be collected.

10. Conduct of Sarika (PW3) appears to be quite natural. Her immediate disclosure to Devidas (PW2) about complicity of the appellant is "res geaste" within the meaning of Section 6 of the Evidence Act. The facts which form part of the same transaction may be considered as relevant. The fact that Sarika was found weeping is also indicative of her being subjected to horrendous and harrowing experience of sexual assault. It is true that she did not mention the word "rape" when she narrated the incident to Devidas (PW2). It is also true that Madhukar referred in the FIR (Exh-27) that she was subjected to incident of brutal rape committed on her. These discrepancies, however, will not enure to benefit of the defence. It is more probable that the poor, rustic and minor girl was unaware of the expression to be used in order to describe the ghastly incident of the sexual assault. In cases of sexual abuse of children, mere technical defects or the defects caused due to improper understanding of the act of fornication, by itself cannot be the ground to dislodge the otherwise credible evidence of the victim. The very fact that her private part was found torn, blood was oozing therefrom and she was weeping could be taken as the inferential facts. The only deducible inference could be that she was subjected to forcible intercourse and when she named the appellant immediately, it is difficult to infer that it was the instructed version.

11. Coming to the version of Madhukar (PW1), it may be gathered that he did not waste time after he gathered the information about the brutal act of sexual intercourse committed with his minor daughter. His version reveals that he immediately approached the Police Station at Ardhapur and narrated the incident. His report (Exh-27) corroborates his version. He states that the minor daughter was required to undergo operation in the Government Medical College Hospital at Nanded. Nothing of much importance could be gathered from his cross-examination. His version reveals that the agricultural field of his master and that of the appellant are bisected by a brook. There were other 3/4 persons working with him on the huller machine. It was suggested to him that a day before the incident, his wife and wife of Devidas had gone to cut grass from the field of the appellant and were abused by him. It is highly improbable that Devidas (PW1) could

have falsely implicated the appellant at the stake of the social stigma as well as by causing such serious injuries to the private part of his own minor daughter or only because she had received the injuries to the private part.

12. This takes me to the version of PW6 Dr. Sandhya. She was attached to the Government Medical College Hospital, Nanded on 11-10-2002. Her version purports to show that she clinically examined Sarika (PW3) at about 11.55 p.m. in the same night. She noticed that the girl was aged about 6/7 years and was subjected to sexual intercourse per force. She noticed abrasion on the private part of the prosecutrix. The clinical examination resulted into the following findings.

(i) There was evidence of forceful vaginal penetration;

(ii) As genital organs were not developed, there was extensive, ragged, tear of vaginal wall extending upto posterior fornix.

(iii) Posterior fornix was open (pouch of douglas) protruding through it. Dowel (sigmoidcllon) was seen. It ruled out bowel injury.

Thereafter, the senior surgeon was called to operate the private part of the minor girl. The complete bowel was inspected. It was noticed that the vagina was badly torn. With great difficulties, the post fornix was closed and vaginal mucus was repaired. The hymen was found torn recently and was bleeding. These medical findings speak out the brutal and lascivious compulsive sexual intercourse committed on the child. The version of Dr. Sandhya (PW6) is corroborated by the recitals of the medical certificate (Exh-45). She collected the vaginal swab because it was suspected that some hair were on the external genitals. The opinion of Dr. Sandhya reveals that the injuries sustained by the minor girl may cause trouble in her future married life. This is but natural. For, the tearing of the vaginal walls was found extensive upto the posterior fornix and the uterus was seen protruding through it. This is a worst case of inhuman sexual assault mounted on the minor girl. The cross-examination of Dr. Sandhya (PW6) only comprises of a few suggestions and nothing more. Nowhere, it was suggested that the injuries could be caused due to any accident nor it is the case of the defence.

13. The version of API Ramrao (PW5) relates to the steps taken during course of investigation after receiving FIR (Exh-27). He corroborated the spot panchanama (Exh-29). He states that the undergarments of the minor girl were seized vide memorandum panchanama (Exh-35). He further deposed that the appellant was subjected to clinical examination after the arrest. It is true, no doubt, that the medical examination report of the appellant is not placed on record. The deficiency in the conduct of the investigation is not serious one. It would not create any serious doubt about otherwise acceptable evidence tendered by the prosecution. It has come on the record that the appellant is a married person and has a son. He is aged about 48 years. It was never the case of the appellant that he is unable to commit sexual intercourse.

14. The learned advocate for the appellant invited my attention to certain observations in Rameshwar Vs. The State of Rajasthan, . It has been observed that an omission to certify understanding of the minor witness may go to the credibility of the witness. In the present case, however, the learned Sessions Judge did verify that the child was able to understand the import and sanctity of the oath administered to her. It appears that some preliminary questions were put to her in order to verify that she could understand significance of the oath and was in a position to testify in the Court of law.

15. Mr. Ghatge argued that version of Devidas is not reliable because he claims to have met the appellant at the open space (------) which is contrary to what he has deposed. It is also pointed out that the panchanama did not disclose stains of the mud on the frock of Sarika though she claims that it was stained with mud. This is a minor discrepancy. He also submitted that Section 53A(5) requires filing of the medical report of the accused in the Court and failure of the prosecution in this context is fatal to the credibility of the prosecution. I do not agree.

16. Mr. Ghatge referred to certain observations in Rahim Beg and Another Vs. State of U.P., . The Apex Court observed that stains of semen on the "langot" (loin cloth) of a young man could exist because of variety of reasons. The Apex Court considered the circumstance that absence of injuries on the male organ of the accused would point out to his innocence when it was a case of rape allegedly committed by fully developed man on a girl of 10 years who was virgin. That was a case, however, wherein the two (2) accused allegedly committed rape upon a prosecutrix (Kesh Kali) and thereafter, strangulated her to death and removed her ornaments. There were other number of circumstances which created considerable doubt regarding guilt of the accused. This aspect is considered in paragraph 15 of the said judgement. The absence of injury on the male organ of the man may be relevant fact alongwith other circumstances. But that cannot be the sole reason to discard the otherwise credible eye witness account of the witness.

17. The cumulative effect of the evidence on record is that the appellant is proved to be the rapist. He committed the heinous act in the relevant noon by forcibly taking away the minor girl at the secluded place. There is nothing redeeming about the appellant. The crime is heinous and deplorable. The sentence awarded is, therefore, proportionate to the nature of offence. In a similar case of rape on a minor girl, aged about six (6) years, the Apex Court rejected request for reduction of the sentence awarded to the accused. The Apex Court in Rajendra Datta Zarekar Vs. State of Goa, , held that where the victim is less than 12 years of age, the sentence awarded shall not be less than 10 years, but it may be for life and the accused shall also be liable to fine in view of Section 376(2)(f) of the I.P. Code. It is observed:

The rape leaves a permanent scar and has a serious psychological impact on the victim and also her family members and, therefore, no one would normally concoct a story of rape just to falsely implicate a person. In the present case there was not

even an iota of evidence to show that P.W. 1 Pushpa or her husband Satyam Ahire had any reason whatsoever to falsely implicate the accused - Rajendra.

In my opinion, the appellant virtually behaved like a beast. He did not show any mercy to the hapless minor child in the course of satisfying his depraved lust. In this view of the matter, the appeal deserves to be dismissed.

18. In the result, the appeal is dismissed. The impugned judgement of conviction and sentence, rendered in Sessions Case No. 95/2005, is confirmed.