Rajesh BIn Vs. State, Through Public Prosecutor.

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Court : Mumbai Goa

Decided On : Jan-21-2014

Judge : The Honourable Mrs. Justice R.S. Dalvi &Amp; F.M. Reis

Appeal No. : Criminal Appeal No. 38 of 2012

Appellant : Rajesh Bin

Respondent : State, Through Public Prosecutor.

Judgement :

Smt. R.S. Dalvi, J.

1. This appeal is filed against the conviction of the appellant for the offence punishable under Section 376 of IPC, read with Section 8 of the Goa Children's Act, 2003. The accused-appellant was known to the victim He was her neighbour. He lived close by. The victim is stated to be partially mentally deficient. The victim girl was a minor. The appellant is stated to have taken the victim to his house, which was close to the house of the victim, for committing the aforesaid offence. The victim was not found in the house, upon which her mother caused search to be made. Her brother went to search for the victim. He banged on the door of the appellant and found the victim. The victim was injured. The victim was crying. The mother was shocked to see that her daughter was injured. She was enraged and shouted for help. She reported the incident to the police.

2. The mother has been examined as Complainant. Her brother is also examined to corroborate what transpired when he saw the accused and the victim girl. An independent neighbour has been examined to depose about what transpired soon after the appellant was apprehended. The victim girl has been medically examined. The medical report has been produced on record. The Doctor who examined the victim girl has deposed about her injuries. The deposition of another Doctor who conducted the ossification test to determine the age of the victim girl, as also the accused has been recorded. A doctor who conducted the psychological test of the victim girl is also examined. A panch witness of the scene of offence, has been examined who has produced the panchanama which shows the layout of the room of the appellant.

3. Upon such evidence, the prosecution has sought conviction of the appellant. The victim herself has not deposed since apart from being minor, she was also partially mentally retarded.

4. The conviction of the appellant will have to be considered upon the aforesaid circumstantial evidence alone.

5. The evidence of the mother, who was the complainant examined as PW.1 shows that she lived with her husband and four minor children, including the victim girl who was 12 years old. All other children were younger. Her husband was a tile fitter. On the date of the incident i.e. 2nd April, 2006, the husband of the complainant left home for his work. She left home for domestic work. She returned and prepared food. After having lunch, she realised that the victim child, her elder daughter, was not around. She searched for her, but could not find her near her house. She was worried because the victim girl was abnormal and not growing as per her age. She asked her son to search for her in the neighbouring rented room of the appellant as sometimes her daughter and son used to go to the room of the appellant to listen to music. On banging the door, he heard the appellant's voice stating that the victim girl was coming. Her son reported to her that the victim girl was in the room of the appellant. She rushed to the appellant's room which was behind her room. She saw her child crying and her hands were full of blood. She inquired from her as to who hurt her and she was told that the appellant forced her

to sleep on the floor and sexually assaulted her by sleeping over her. The victim child explained this to her mother by signals, but she understood it as she was her mother. The victim girl complained of pains and difficulties in walking. The mother went to the room of the appellant and saw blood on the floor mat and also on the bed sheet, on the shirt of the appellant and on his handkerchief, which was near his pillow. She shouted and called the neighbours. The neighbours came and caught-hold of the appellant. She lodged her complaint. She identified the clothes of the victim child and the appellant, as also the mat in the room of the appellant. She also identified the appellant in the Court.

6. She has been cross examined on the layout of the rented room. She explained that after lunch, when she was about to wash utensils, she realised that the victim girl was not to be found. She has reiterated the condition of the victim girl in her cross examination relating to her blood, as also her pains.

7. Her evidence, as that of the complainant, shows what transpired in the room of the appellant.

8. This evidence has been corroborated by her son, who has been examined as PW.2, who went to search for the victim girl. He is a child witness, 7 years' of age. He has been asked preliminary questions to determine his eligibility as witness, which has been seen by the Court. He has deposed about the work of his parents and about the fact that his elder sister who is the victim girl, was not going to school, though her younger sister was going to school. He has deposed that he came home for lunch from play. When the mother washed the utensils, she inquired as to where her sister was. He went to search her, but could not find her. His mother told him to go to appellant's room, because he lived close to their room and he used to call them to listen to music. He has also deposed that earlier to that day, his sister as well as his brother, had been to the room of the appellant. His deposition shows that he knocked the door. The appellant answered from inside the room and stated that his sister was coming. He told his mother that she was in the appellant's room and the door was closed. His mother started shouting. She went to his room and at that time he saw his sister was coming out of the appellant's room. He has deposed about her condition at that time, as also about

the blood on her clothes and hands. He has also deposed about what the appellant was wearing and the condition of his clothes.

9. In his cross examination, he has reiterated what the victim girl did when she was coming out of the appellant's room and the fact about the closure of the door when he went to search her.

10. It has been pointed out on behalf of the appellant that there is a major contraction in the evidence of the aforesaid two witnesses. The contradiction which is shown to the Court is that while the mother deposed that when she was about to wash the utensils she realised that her child was not present near about, the son has deposed that he was told after her mother went to wash utensils. The mother would have told the son to search for his sister, by which time the washing of the utensils would have begun. Hence, the deposition of two witnesses is not only not contradictory, but is natural. The son has corroborated the evidence of the mother. There is no other contradiction.

11. The Doctor PW.2 who examined the victim girl, as also the appellant for determination of age, has produced ossification test result. He has identified his signature on the reports. His reports show that the victim was 12 and half years old and the accused was 20 years old, given a difference of about six months. The victim was, therefore, a child who was sexually assaulted.

12. This evidence has to be corroborated. The corroboration is found in the evidence of the Doctor PW.7 who examined the victim child, as also the appellant-accused with regard to their injuries. The Doctor who is examined as PW.7 has deposed about condition the appellant at the time of examination. His deposition shows that he had found reddened effect on the private part of the appellant. He deposed that the evidence showed sexual intercourse within six hours of the examination which was recorded by him. The report made by this Doctor is most material circumstantial evidence. The condition of the appellant showed creamish smegma present and his skin reddened of his private part. The report itself shows evidence of sexual intercourse within six hours of the examination. He has also noticed several injury marks on various parts of the body of the appellant which were bruises as well as abrasions. He has stated in his report that those injuries

were simple, which took place within six hours prior to the examination. This report would show sexual assault made by the appellant.

13. The medical report, with regard to the condition of the victim child shows dried blood stains on the internal part of labia majora. It also shows reddish fresh bruise on right labia minora in mid. It specifies that it is on the hymen. It records specific test on the hymen. The report further shows that it was bleeding on touch. There were no old healed wounds present. The Doctor has detected bloody mucoid mix with few clots, of which swab was taken. He has opined that there was evidence of partial vaginal penetration which he made in the report which he has identified. He had collected relevant material for serological examination which was sent for forensic test. He identified the victim girl from identification marks .

14. The injuries upon the minor child, who had no sexual intercourse prior to the incident are, therefore, conclusively established.

15. The neighbour, who is an independent witness to what transpired immediately after the appellant was apprehended, has been examined as PW.5. She has deposed that she heard shouts of one lady and saw her hitting one boy outside the rented room. She knew all those persons whom she had described and identified. She also stated about where they lived. Her deposition shows that the victim girl was frightened and her hands and clothes were having blood stains on the towel which he had tied around his waist. Her deposition shows that œWe all neighbours apprehended the accused and handed him over to the police.?.

16. Her cross examination shows that the appellant was residing in room No.8. She has also reiterated the condition of the victim girl, as also how the appellant was seen when he emerged from his room. Her evidence is that of independent witness, which is unblemished.

17. Another doctor who has conducted psychological test of the victim child has been examined as PW.4. He has identified the medical report and deposed about the medical condition. The evidence of the Doctor shows that the victim girl was non-cooperative during the examination. She was evaluated by a psychologist. Based upon the psychological test, he was of the opinion that she had mild mental

retardation. She was not communicating.

18. The panch of the scene of offence has been examined as PW.6. He has deposed about the various rooms in the house of the landlord around which was a compound wall. He has deposed that each room was having independent door with lock. He has deposed about the passage of the entrance of two rooms, 7 and 8 and that room no.7 was seen locked and room no.8 was open and there was no door to this room. It is contended on behalf of the appellant that the story of banging of the door cannot be believed since the room of the appellant had no door. However, the sketch/plan produced along with the panchanama shows the door at the end of the passage. It would be that door which was banged. Beyond the passage were two rooms, 7 and 8. It does not matter that room no.8 had no door. It would be the door to the passage which would have been locked by the appellant whilst the incident took place.

19. Such material is enough for the conviction of the appellant. It is, however, argued that the victim child herself has not been examined and hence, there is no direct evidence and the circumstantial evidence is not enough. The child is seen to be partially medically retarded as per the evidence and report of the Doctor who conducted the psychological test. This aspect finds support of other intrinsic evidence. The mother's evidence shows that the victim child was abnormal and was not growing as per her age. Her evidence further shows that the victim child explained to her what transpired in the room of the appellant when she came out of the room crying, by signals which she understood as mother. This would show her medical condition. The brother's evidence shows that though his younger sister was going to school, the victim girl was not going to school. The victim girl would, therefore, not be an eligible witness.

20. The other circumstantial evidence will be required to be seen. The most important corroborating evidence is the medical evidence, as also the evidence of the independent neighbour.

21. Upon such evidence, the conviction which is recorded would be in order. The learned Judge has considered, at length, the aforesaid evidence. He has also considered the special provision under the Children's Act and has determined the

issue with the required sensitivity. The marshaling of the evidence, as also consideration of law, is correct. The conviction for the offence of grave sexual assault on the abnormal victim child of 12 and half years under Section 2(y)(i), and punishable under Section 8(2) of the Goa Children's Act, 2003, therefore, is correct and maintained. The sentence of 10 years R.I. along with payment of fine of Rs.2,00,000/- or in default, further six months R.I. is also appropriate, given the case of Dineshalias Buddha vs. State of Rajasthan, (2006) 3 SCC 771, correctly considered for the sentensing policy that has been propounded therein. The direction with regard to payment of compensation to the victim from the fine recovered from the appellant in terms of Section 357(1)(a) of the Cr. P.C. 1973 is also correct and accordingly maintained.

22. The appeal is without merit and, therefore, dismissed.