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Court : Mumbai Nagpur

Decided On : Oct-27-2015

Judge : V.M. Deshpande

Appeal No. : Criminal Appeal No. 29 of 2015

Appellant : Sanjay

Respondent : The State of Maharashtra

Advocate for Pet/Ap. : Shri. Vyas

Judgement :

1. The present appeal is directed against the judgment and order passed by the learned Special Judge, Chandrapur, in Special (Child) Case No. 5 of 2014 on 02.01.2015, thereby convicting the present appellant for the offence punishable under Sections 376(2)(i) of Indian Penal Code read with Sections 3 and 4 of Prevention of Children from Sexual Offences Act, 2012 and sentencing him to suffer rigorous imprisonment for seven years and to pay a fine of Rs.500/-, in default to suffer rigorous imprisonment for one month.

2. The prosecution case, in nut shell, is as under:

Factual Matrix :

Prosecutrix is the first informant. She lodged a complaint (Ex.15) with police station Pathari on 22.12.2013. Since the said complaint was disclosing commission of a cognizable offence, a crime was registered vide Crime No. 18/13. Superintendent of Police ordered for investigation by higher police official and accordingly the investigation was handed over to P.W.9 Baburao Bhausa Mahamuni, the S.D.P.O. As per the first information report, on 21.12.2013 at about 5-30 p.m. when the prosecutrix was proceeding towards the agricultural field of Tukaram Nawghare for answering nature's call, that time she noticed the appellant and one Prabhakar Nagpure standing on the road. As per first information report, the appellant rushed towards the prosecutrix, gagged her mouth with the help of her Odhani and dragged her in the adjoining bandhi against her will, removed her clothes and also of his, and committed forcible sexual intercourse with her. At the time of sexual intercourse, on five-six occasions, the cell-phone of the appellant rang, however he did not receive the same and in a hurry put on his clothes and left the place and in that his cell-phone was left at that place. The F.I.R. further proceeds that thereafter the prosecutrix put her clothes and narrated the incident to her parents. They informed the incident to Vijay, elder brother of her father and to Deoraohar maternal uncle. Both of them reached to the village and also enquired from the prosecutrix. Thereafter, the prosecutrix along with her parents and other relatives went to police station and lodged her report (Ex.15). Printed F.I.R. is at Ex.16.

3. After getting charge of Crime No. 18/13 for investigation, P.W.9 Baburao Mahamuni, SDPO, visited the spot of incident and prepared spot panchanama (Ex.31). He referred the prosecutrix for her medical examination to the General Hospital, Chandrapur, under requisition (Ex.32). The appellant was arrested under arrest panchanama (Ex.33) and was also sent for medical examination under requisition (Ex.34). The Investigating Officer received the medical report of the victim. He also seized the pubic hair, vaginal swab and blood sample of the prosecutrix under seizure memo Ex.35. The clothes of the prosecutrix were seized under seizure panchanama (Ex.13). School leaving certificate of the prosecutrix was also obtained. Muddemal articles were sent to chemical analyser for examination and analysis. After completion of investigation charge-sheet was filed in the Court of law.

4. Since the offence was exclusively triable by the Court of Sessions, the case was committed to the Court of Sessions, which was registered as Special Case No. 5 of 2014. Charge was framed against the appellant. He denied the same and claimed for trial.

5. After full dress trial, the appellant was convicted and sentenced, as stated in the opening paragraph of this judgment.

SUBMISSIONS:

6. I have heard Shri Vyas, learned counsel for the appellant and Shri Bangadkar, learned APP for the State. Both the learned counsel extensively took me through record and proceedings. According to learned counsel for the appellant, the conviction is erroneous. He submitted that the cumulative evaluation of the prosecution case would show that the evidence of prosecutrix is not reliable and does not inspire confidence and, therefore, the appellant is entitled for acquittal. Per contra, learned APP would submit that the evidence in the prosecution case is over whelming. He submitted that the court below has not committed any wrong in convicting the appellant. He, therefore, prayed for dismissal of the appeal.

Age:

7. According to prosecution, the prosecutrix is minor. To prove the said aspect, prosecution has examined Prashant Kaware (P.W.7). This witness is Head Master of the school in which prosecutrix is taking education. He brought original Admission Register of the school and proved the relevant extract of the same which is at Ex.24. As per the said extract, date of birth of prosecutrix is 30.12.1998. According to the charge which the appellant has faced, he has committed sexual intercourse with prosecutrix on 21.12.2013. Thus, the prosecutrix was minor on the date of commission of offence.

8. Evaluation of prosecution evidence:

The prosecution case revolves around the evidence of the prosecutrix and the chemical analyser report (Ex.53), which shows presence of blood stains on the clothes of the prosecutrix as well as the appellant.

It is well settled that F.I.R. is not a substantive piece of evidence. It can be used for corroboration or for contradiction.

The following portion from the oral report (Ex.15) lodged by the prosecutrix is relevant -

HINDI?

The spot panchanama (Ex.31), which is duly proved, makes a mention of finding of a China-made cell-phone on the spot.

However, in her substantive evidence, prosecutrix is completely silent about falling down of cell-phone at the place of incident. Her evidence only shows that the cell-phone of the appellant rang for 5-6 times. Thus, the fact asserted in the F.I.R. that the cell-phone of the appellant fell at the time of incident has remained to be proved. Further, there is nothing in the entire prosecution case that the cell-phone, which was seized from the place of incident was belonging to the appellant. There is no connecting evidence available in that behalf.

9. The appellant is a married person and is having one son. Near the house of appellant, there exists a well. The prosecutrix has denied that she used to go to the well for fetching water. The prosecutrix also deposed that she was not visiting the house of her friend Chabu, which is near the house of the appellant. However, the Investigating Officer Mahamuni (P.W.9), who is a senior police officer of the rank of S.D.P.O., during his investigation, found that the prosecutrix used to fetch water from the well situated near the house of the appellant. It is also noticed during the course of investigation that the prosecutrix used to visit the house of her friend Chabu, which is near the house of the appellant.

The prosecutrix has denied the suggestion given to her in her cross-examination that she used to send messages and phone calls to the appellant. However, the investigating officer in his evidence has specifically stated that during investigation he found that the prosecutrix used to send messages to the appellant. In the aforesaid background, the admission of prosecutrix, which is reproduced hereinbelow, assumes importance :

HINDI?

10. Thus, the claim of the prosecutrix about fetching of water and sending of messages to the appellant were found to be incorrect by the Investigating Officer. Therefore, in my view, the prosecutrix is having little respect to the truth and if such is the affair in the prosecution case, it would be very difficult for the court to rely upon the evidence of the prosecutrix.

11. The prosecutrix in her oral report has stated that when she was proceeding towards agricultural field for answering nature's call, on the road she noticed presence of appellant and Prabhakar Nagapure. This version is also deposed by her in her evidence. As per the first information report and evidence of the prosecutrix, the incident had occurred immediately thereafter. Thus, Prabhakar Nagapur would have been the best witness to fix the presence of appellant near the spot incident. During the course of investigation, Prabhakar Nagapure was interrogated by the investigating officer. He was also cited as a witness, but for the reasons best known to the prosecution, the prosecution did not examine him and gave up him as a witness by filing a pursis (Ex.19). The prosecutrix has deposed about Prabhakar Nagapure as under:

I know Prabhakar Nagapure. We have no cross terms with him.?

In my view, Prabhakar Nagapure would have been an independent witness in respect of prelude to the incident.

Consideration of C.A. report :

12. The clothes of the appellant and the clothes of prosecutrix which were seized during the course of investigation were sent to chemical analyser for scientific examination. The clothes of the prosecutrix were at Exhs. 4 to 8 while that of the appellant were at Ex.1 to to 3. The report of chemical analyser (Ex.53) shows that no semen stains were detected on the clothes of the prosecutrix as well as that of the appellant. However, blood stains were found on the jeans full pant and full shirt of the appellant as well as on the kurta, Chust and nicker of the prosecutrix. The blood stains were found to be of blood group A?, which is the blood group of the

appellant as per the report of chemical analyser (Ex.52).

13. What is important to note from the two seizure memos (Exs.11 and 13) by which the clothes of the appellant and prosecutrix were seized and from the evidence of P.W.4 Kaushik Sahare, that the articles after their seizure were not sealed. Even the evidence of Investigating Officer Mahamuni is also silent about the sealing.

14. The evidence of Vinayak Shende (P.W.10), who was attached to police station Pathari, shows that on 09.1.2015 he deposited the muddemal to chemical analyser, Nagpur. He has proved the invoice challan (Ex.45) and his return duty (Ex.46). It would be useful to refer to his cross-examination, which is as under:

There is a property room in police station. Entry of property receiver used to mention in the said register. I have not received the property from Malkhana.?

This witness has stated that he received the property on 08.1.2014. He is candid enough to say that he has not received the property from Malkhana. Then the question arises, as to where from he received the property? There is no evidence in that behalf. Further, the seizure memos [Exs. 11 and 13] would show that the clothes of the appellant and the prosecutrix were seized on 23.12.2013. If the muddemal property was not received from the Malkhana then where the property was lying from 23.12.2013 to 08.1.2014. The prosecution was under obligation to explain the same, which it failed to do so.

15. That reminds me an authoritative pronouncement of Division Bench of this Court reported in **Lalchand Cheddilal Yadav v. State of Maharashtra** reported in **2000(3) Mh.L.J. 438**. In the said judgment, the Division Bench of this Court has reproduced para 8 of a decision of Division Bench of Rajasthan High Court reported in AIR 1955 Rajasthan 82- The State vs. Motia and ors., wherein Wanchoo, C.J. (as he then was) observed thus:

It is, therefore, necessary for the prosecution to produce evidence that steps were taken at once to seal the articles, and that from the time the articles came into possession of the police to the time they were sent for identification before a

Magistrate or for examination to the Chemical Examiner the seals remained intact. This evidence is missing in this case. It is, of course not difficult to sprinkle a few human blood stains on articles recovered if somebody wants to do so. We do not say that this was done in the present case; but as precautions were not taken the arguments raised on behalf of the accused that this might have been done remains unrefuted.....?

16. Once there is no reliable evidence in respect of sealing of the muddemal articles and when the evidence of prosecution is totally silent that the property was sealed and further when the evidence is doubtful about the placement of muddemal articles from 22.12.2013 to 08.1.2014 in such unsealed condition, much importance cannot be attached to the report of chemical analyser. It is pertinent to note that scientific evidence is always in the nature of corroborative piece of evidence. On the basis of such evidence alone, conviction cannot be secured. In the present case, as discussed above, there is a serious doubt about the existence of appearance of blood on the muddemal articles.

17. The appellant has faced charge that he has committed sexual intercourse with the prosecutrix on 21.12.2013. Even according to the charge, the appellant has committed sexual intercourse not prior to 21.12.2013. Thus, he was not liable for the same. Further, neither in the F.I.R. nor in her evidence the prosecutrix claims that prior to 21.12.2013 the appellant committed sexual intercourse with her. In the above backdrop, let us scrutinize the medical evidence.

Medical Evidence :

18. P.W.11 Dr.Sapna Tallarwar, who was discharging her duties as Medical officer at General Hospital, Chandrapur, has deposed that on 22.12.2013 the prosecutrix was brought to her for medical examination. Dr.Sapna in her evidence deposed as under:

I examined her. On examination I found that there was no penetrative sexual intercourse, but old healed tear and 03 and 08 O' clock. No fresh injury was seen over external genital organ.?

This witness further deposed that initially she reserved her opinion till the opinion of forensic expert. In her re-examination, after receipt of report of chemical analyser, she has stated as under :

Now I have gone through C.A. report Exh. 51, 52, 53. From the C.A. report I cannot give any opinion. Old healed hymen tear at 3.00 and 8.00 O' clock may occur in case of sexual intercourse.?

19. As per the first information report and evidence of prosecutrix, it has come on record that she was forcibly dragged by the appellant and her mouth was gagged by Odhani. The medical evidence shows that the medical officer who examined the prosecutrix did not notice any external injuries on the person of the prosecutrix. Further, as per the evidence of the prosecutrix, she was in her menses at that time and the doctor had asked the last date of her menstruation. Dr.Sapna (P.W11) in her cross-examination has stated as under :

victim had stated the date of her M.C. If intercourse is happened during the said course, blood ought to be found on the private part of both as well as victim. No such blood was found on private part of Vaishali.?

This clearly belies the claim of the prosecutrix.

CONCLUSION

20. From the aforesaid evaluation of prosecution evidence the Court has to depart from the position that on the solitary evidence of prosecutrix, the conviction can be secured. For securing conviction on the solitary testimony of the prosecutrix it is absolutely essential and necessary that the evidence of the prosecutrix is trustworthy. It must inspire confidence in the mind of the Court. In the present case, I have no hesitation in my mind to record a finding that the prosecutrix has no regard for the truth. The evidence discloses that the appellant was insisting that the prosecutrix should not talk with him. The evidence also shows that the prosecutrix used to send messages to the appellant, who is a married person. Therefore, false implication of the appellant is not completely ruled out. When there is an element of doubt in the prosecution case, benefit of doubt has to be

extended in favour of the appellant. Accordingly, I extend benefit of doubt in favour of the appellant. Resultantly, I pass following order.

ORDER

(i) Criminal appeal is allowed.

(ii) Impugned judgment and order of conviction dated 02.1.2015 passed by Special Judge, Chandrapur, in Special Case (Child) No. 5 of 2014 is hereby quashed and set aside.

(iii) Appellant/accused Sanjay Vijay Nawghade is acquitted of the offence punishable under Section 376(2)(i) of Indian Penal Code read with Section 3 and 4 of Prevention of Children from Sexual Offences Act. He is in jail. He be set at liberty forthwith, if not required in any other case.

(iv) Fine amount, if paid, be refunded to the appellant.

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