Peter Fernandes Vs. the State

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Court : Mumbai

Decided On : Apr-26-1996

Reported in : 1997(1)ALT(Cri)23; 1997CriLJ954

Judge : F.I. Rebello and ; R.K. Batta, JJ.

Acts : Indian Penal Code (IPC), 1860 - Sections 376 and 506; Evidence Act - Sections 114 and 118

Appeal No. : Criminal Appeal No. 20 of 1995

Appellant : Peter Fernandes

Respondent : The State

Advocate for Def. : G.U. Bhobe, Public Prosecutor

Advocate for Pet/Ap. : Menino Teles and ;D.V. Kalangutkar, Advs.

Judgement :

Batta, J.

1. The appellant was tried for rape on a minor girl aged 15 years and criminal intimidation under Ss. 376 and 506(I) IPC. He was sentenced to suffer 7 years Rigorous Imprisonment and fine of Rs. 5,000/-, in default R.I. for six months under S. 376, IPC and Rigorous Imprisonment for one year and fine of Rs. 500/- in

default R.I. for one month under S. 506(I) IPC. The sentences were ordered to run concurrently. A sum of Rs. 4,000/- was awarded as compensation to be paid to the prosecutrix in case of realisation of the fine. The appellant challenges the said conviction and sentences in this appeal.

2. We have heard Advocate Shri Menino Teles for the appellant and P.P. Shri G. U. Bhobe for the State.

3. The contentions advanced by Advocate Shri Teles are :- that there has been inordinate delay in filing the FIR; that except for the version of the prosecutrix, there is nothing to connect the accused with the crime and that even the belated version of the prosecutrix was totally discredited in the course of her cross-examination. He, therefore, contends that the conviction is ill-founded and is liable to be set aside.

4. The accused was charged for the offences of rape and criminal intimidation committed by him on 10-1-1991 at 3 p.m. The parents and brother of the prosecutrix were working in the lime stone quarry of the appellant and the appellant used to call the prosecutrix for domestic work at his house. The FIR in this case was lodged by the brother of the prosecutrix on 30-7-1991, that is to say, after more than 6 months of the incident. The prosecutrix is reported to have become pregnant as a result of the incident in question.

5. There is no doubt that there is delay in filing the FIR, but in such matters, delay in reporting the matters is on account of various reasons, including reluctance of the prosecutrix and her parents to further aggravate the agony by making the incident public and to suffer in silence. Moreover, in the case under consideration, the prosecutrix was not only illiterate and minor, but she even refused to reveal the name of the culprit, even after she became pregnant. PW. 1, the brother of the prosecutrix has stated that he came to know of the pregnancy of the prosecutrix in May, 1991, when she was 5 months pregnant and upon making inquiries as to who had spoiled her, she did not reveal the name of the person concerned. P.W. 4 has also stated that they had even beaten the prosecutrix to find out the name of the culprit, but she did not disclose the same. According to P.W. 1, it was only on 25-7-1991 that the prosecutrix had told him upon being repeatedly questioned that

it was the accused who was responsible for her pregnancy. The FIR was filed on 30-7-1991. Therefore, in the facts and circumstances of the case, the prosecution case cannot be just thrown out on the ground of delay in lodging the FIR.

6. The prosecution case mainly rests upon the testimony of the prosecutrix, P.W. 2 as there is no corroborative evidence in support of the testimony of the prosecutrix.

7. On the question of corroboration of the evidence of the prosecutrix, the Apex Court in Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, : 1983 CriLJ1096 has made observations which have material bearing in the matter :-

'Corroboration is not the sine qua non for a conviction in a rape case. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion To do so is to justify the charge of male chauvinism in a mala dominated society. : 1952 CriLJ547 .

A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracized by the society or being looked down by the society, including by her own family members, relatives, friends and neighbours. She would face the risk of losing the love and respect of her own husband and near relatives and of her matrimonial home and happiness being shattered. If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. In view of these and similar factors the victims and their relatives are not too keen to bring the culprit to books. And when in the face of these factors the crime is brought to light there is a built-in assurance that the charge is genuine rather than fabricated (paras 9, 10, 11).

On principle the evidence of a victim of sexual assault stands on par with evidence of an injured witness. Just as a witness who has sustained an injury (which is not

shown or believed to be self inflicted) is the best witness in the sense that he is least likely to exculpate the real offender the evidence of a victim of a sex-offence is entitled to great weight absence of corroboration notwithstanding. And while corroboration in the form of eye-witness account of an independent witness may often he forth-coming in physical assault cases, such evidence cannot be expected in sex offences, having regard to the very nature of the offence. It would therefore be adding insult to injury to insist on corroboration drawing inspiration from the rules devised by the Courts in the Western World. If the evidence of the victim does not suffer from any basic infirmity, and the 'probabilities-factor' does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from the medical evidence where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming subject to the following qualification : Corroboration may be insisted upon when a woman having attained majority is found in a compromising position and there is likelihood of her having levelled such an accusation on account of the instinct of self-preservation. Or when the 'probabilities-factor' is found to be out of tune.'

8. The Apex Court in State of Maharashtra v. Chandraprakash Kewalchand Jain, : 1990 CriLJ889 has reiterated the principles laid down by the Apex Court earlier and it is necessary to quote the following observations of the Apex Court (para 16) :

'A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under S. 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to S. 114 which requires it to look for

corroboration. If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction of her evidence unless the same is shown to be infirm and not trust-worthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence.'

The said principles have been once again reaffirmed by the Apex Court in State of Punjab v. Gurmit Singh : 1996 CriLJ1728 .

9. The law laid down by the Apex Court is that there is no rule of law or practice that the evidence of the prosecutrix cannot be relied upon without corroboration and as such, it has been laid down that corroboration is not a sine qua non for a conviction in a rape case. If the evidence of the victim does not suffer from any basic infirmity and the 'probabilities factor' does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming.

10. The prosecution had, in all, examined 8 witnesses, including the brother of the prosecutrix, P.W. 1 and the prosecutrix herself who was examined as PW. 2. The other witnesses examined are :- Sister Maria Machado, P.W. 3, who stated that the prosecutrix was brought to their Institution by one lady Concessao Fernandes in May, 1991; P.W. 4, father of the prosecutrix, who also states that the prosecutrix told him, after she became pregnant, that she was spoiled by the accused; P.W. 5, Dr. Madhukar Usgaonkar, who examined the prosecutrix on 30-7-1991; PW. 6, Dr. Anand Haldankar, who states that he had examined the prosecutrix in the year 1991 and the Investigating Officers, PW. 7 and PW. 8. The appellant had examined two witnesses in his defence. The evidence of Dr. Madhukar

Usgaonkar, P.W. 5, as well as of Dr. Anand Haldankar, PW. 6 does not help the prosecution case, except for the blood grouping of the prosecutrix, the child born as a result of the incident and that of the appellant. According to Dr. Usgaonkar, the blood group of the prosecutrix was B positive; that of the appellant A Positive and of the child AB positive. The Investigating Officers should have got detailed paternity tests carried out in order to establish the paternity of the child to connect the appellant, but unfortunately the Investigating Officers failed to do so. This vital piece of evidence could have connected the appellant with the crime and could lend assurance to the version of the prosecutrix, which was considerably weakened during her cross-examination.

11. The prosecutrix, in her examination-in-chief had stated :

'While I was working in the house of the accused on 2 occasion the accused caught my band and took me inside the room. He was trying to throw me down. He also told me to remove my underwear and in case I did not remove he will beat me. Then I shouted and came out running. On the next day the accused again called me. I refused to come to his house because he has earlier asked me to remove my underwear. Thereafter the accused brought me into his house and removed my underwear. The accused removed his underwear also. The accused slept over me and he had sexual intercourse. Then I shouted. As I was shouting the accused closed my mouth by putting clothes on my face. Then I came out crying. The accused threatened to beat me if I cried. I told the accused that I will inform my mother that you slept with me. The accused threatened to beat me if I tell my mother. The accused had sexual intercourse with me on 3 occasions. As a result I became pregnant and delivered a child. At that time the accused told me that I will become pregnant thereafter the accused wife and another lady by name Shanta took me to a doctor. The doctor after having examined me opined that I am pregnant.'

However, the prosecutrix was confronted during the course of cross-examination with her police statement, in relation to the version given by her in her examination-in-chief and we must say that the prosecutrix was thoroughly discredited in the said process.

12. In her cross-examination, the prosecutrix stated that the accused had sexual intercourse with her on three occasions, but in her police statement, she had stated that the accused had sexual intercourse twice and the accused has, in fact, been charged with only one act of sexual intercourse on 10-1-1991. The prosecutrix had stated in her examination-in-chief that the accused had thrown her down twice and she was confronted with her police statement, wherein it was not so recorded. She had also stated in her deposition that the accused threatened to beat her in case she did not remove her underwear. On being confronted with her police statement, this fact was not found recorded therein. She had also stated in her deposition that the accused told her to remove her under-wear and that in case, she did not remove, he would beat her and as such, she shouted and came out running. The witness was confronted with her police statement, but the version found in the police statement was completely different wherein it is recorded that she shouted when he forcibly removed her under-wear, took her to bed and when she tried to shout, the accused put some clothes in her mouth. She had further stated in her deposition in the Court that on the next day, the accused again called her, but she refused to go to his house, because he had earlier asked her to remove her underwear and when she was confronted with her police statement, the said fact was not found recorded therein. The prosecutrix had further stated in her deposition that the accused removed her under-wear and made her to lie down and he slept over her, but when she was confronted with her police statement, the said fact was not found recorded therein. She had also stated in the course of her deposition that the accused had also removed his underwear, but when she was confronted with her police statement, the said fact was not found recorded therein. She had also stated that in response to her shouts, three people came there, but when she was confronted with her police statement, the said fact was not found recorded therein. She had also stated that while running, she was seen by one Shanta, but this fact was also not found recorded in her statement before the police. Said Shanta was not examined in the Court on the ground that her where about were not known. The prosecutrix had also stated that she shouted, came out crying and the accused threatened to beat her, but when confronted with her police statement, the said facts were not found recorded therein. She further stated that she had told the police about the timing of the

incident on all the three occasions and was confronted with her police statement on this aspect. Of course, she had stated in the Court that she did not know the date on which the accused had sexual intercourse with her on three occasions.

13. After having discussed the evidence of the prosecutrix in detail, we are of the opinion that the evidence of the prosecutrix has been totally discredited in the cross-examination and, as such we hold that her evidence does not inspire confidence. We are further of the opinion that her evidence is unworthy of credit and it is not possible to sustain the conviction on such evidence.

14. For the reasons mentioned above, we are of the opinion that the prosecution had failed to establish the charges against the appellant beyond reasonable doubt and, as such, the conviction of the appellant cannot be sustained. Accordingly, the appeal as allowed. The conviction and the sentence of the appellant under Ss. 376 and 506(I) IPC is, hereby, set aside and the appellant is ordered to be acquitted of the charges. The Bail Bonds of the appellant are cancelled.

15. Appeal allowed.