

Joseph Alfonso Vs. State

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Court : Mumbai

Decided On : Nov-12-1997

Reported in : 1998(5)BomCR577

Judge : N.J. Pandya, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 342 and 376; [Evidence Act, 1872](#)
- Sections 3, 8, 45 and 59

Appeal No. : Criminal Appeal No. 28 of 1996

Appellant : Joseph Alfonso

Respondent : State

Judgement :

ORDER

N.J. Pandya, J.

1. The appellant/accused in Sessions Case No. 26/91, is facing charge of rape as also unlawful confinement respectively punishable under sections 376 and 342 of the Indian Penal Code. The incident happened at about 8 a.m. on 10th July, 1990. The appellant/accused staying nearby the house of the prosecutrix, Sarojani, came there brushing his teeth, asking for some water apparently to gargle. The girl was sitting outside the house and in response to the request for water, asked the

appellant to go inside the house and help himself. The appellant went inside and came back taking her forcibly inside the house closed the front door and committed the offence of rape.

2. About the age no doubt, so far as the appellant is concerned, before the trial Court the evidence as expected was not led. The material sought to be relied upon by the prosecution should have been collected and presented before the Court with notice thereof being given to the appellant well in time. What happened was that after the matter was virtually over, before the judgment however, the prosecution chose to examine the Headmaster of the School where the girl had studied. Relying upon the details gathered from the School Leaving Certificate of another school, whatever details were entered in the school register were deposed to by the Headmaster and accordingly, the prosecution finally was able to establish that the girl was aged between 13 to 14 years and therefore below the consenting age. Otherwise also there was the oral testimony of the mother that the girl is aged 13 years and so also of the girl. The learned Sessions Judge working out the age on the basis of her claim of being 17 years of age on the date of recording her evidence, has also come to the conclusion that at the time of the incident she would be below 14 years of age.

3. In this background the approach of the learned Sessions Judge of not considering the question of consent at all cannot be said to be totally, wrong. Whatever material that was produced before him indicated that the deed was definitely done. Medical evidence is there to support it and by that I mean the physical examination of the prosecutrix as well as the clothes that she was wearing, were subjected to examination of the forensic science laboratory as well.

4. The order of conviction therefore, in my opinion, is well merited. The learned Sessions Judge has awarded three years of rigorous imprisonment with a fine of Rs. 1,000, in default to undergo six months of rigorous imprisonment.

5. The element of consent is indicated in the form of the fact that there were two neighbours who were examined and both of them were women residing in the vicinity. According to the claim of these witnesses, they had become curious when they saw a young boy and girl entering the house and shutting the door. One of

them actually claimed to have knocked on the door, but the prosecutrix did hear the shout of a woman raising her name and yet the fact remains that she did not respond by seeking help of the intruders, who were just waiting outside ready to help.

6. This indication coupled with the other material on record would probably lead to the case of the appellant that there was no force employed by him and that it was an act done with the willing co-operation of the other side.

7. However, this will not help the appellant much, save and except for being used as a circumstance which would mitigate his crime. Accordingly, I accept the alternative submission of reducing the sentence.

8. The appellant/accused so far has remained in jail for thirteen months. The fine is not paid. The period that the appellant has undergone so far is held to be sufficient. However, he is ordered to pay the fine within a period of four weeks.

The fine shall be paid before the learned Sessions Judge and shall be dealt with as per the Orders of the Sessions Court.

9. While confirming the order of the learned Sessions Judge as to conviction, the order of sentence by the learned Sessions Judge is modified to the aforesaid extent. The appeal stands disposed of accordingly. The bail bond shall stand cancelled on payment of fine.

10. Appeal allowed partly.