

Arun Vs. State of Maharashtra

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Court : Mumbai

Decided On : Aug-05-2004

Reported in : 2003(2)ALD(Cri)73; 2005CriLJ1044

Judge : P.S. Brahme, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 376 and 376(2); Criminal Law (Amendment) Act, 1983

Appeal No. : Criminal Appeal No. 73 of 1990

Appellant : Arun

Respondent : State of Maharashtra

Advocate for Def. : Lanjewar, A.P.P.

Advocate for Pet/Ap. : A.K. Khare, Adv.

Judgement :

P.S. Brahme, J.

1. Heard Mr. Khare, learned advocate for the appellant and Mr. Lanjewar, learned A. P. P, for the respondent.

This criminal appeal is against the Judgment and Order passed by the Additional Sessions Judge, Wardha in Sessions Trial No. 93/1987, dated 28-2-1990

convicting the appellant for offence under Section 376 of Indian Penal Code and sentencing him to suffer R.I. For 7 years and fine of Rs. 5000/-, in default to undergo further R.I. for 9 months.

2. The incident which gave rise to this prosecution against the appellant took place on 26-7-1987 at about 4.00 p.m. in noon in the vicinity of Paunar near Water Works of M. I. D. C. The appellant -- Arun Nimbalkar resident of Paunar was serving in M.I.D.C. at Paunar. The complainant-Anandrao Sawai (P.W. 4) is the father of prosecutor Vaishali (P.W. 1). On the date of occurrence Vaishali along with her friend Savitri (P.W. 2) went to M.I.D.C. area near Water Works for bringing plants of flowers. They plucked some plants from the garden of M.I.D.C. Water Works, it was noticed by the appellant-Arun who was on duty. When Arun started coming towards them they started running away from the garden. The appellant followed them. The prosecutor- Vaishali got herself hidden in the bushes of Beshram Plants while Savitri ran away ahead. Vaishali came out of the plants and that time her friend Savitri also came near her. Arun took both of them to the stairs of Water Works and made them to sit on the steps for some time. Thereafter, he told Savitri to go away from there to her house. That time Vaishali told him that she also wanted to go back to her house to which the applicant told her that she should not go. After Savitri went away the appellant kept Vaishali sitting on the stairs and then after some time he took her to a field of Banana near the Water Works and after releasing her underwear committed intercourse on her. Due to that Vaishali had pains and she started bleeding from her Vagina. After completing intercourse the appellant went away. Vaishali came home weeping to which her father asked her as to what happened to her, she narrated the whole incident to him. Her father then immediately took her to Police Station, Sevagram where he lodged report about the occurrence vide Exhibit 33. On that report the offence was registered vide Crime No. 127/1987 under Section 376 of I.P.C. against the appellant by P.S. I. Gopal Yadao (P.W. 9) who then carried out investigation. He sent the prosecutor-Vaishali for medical examination. She was examined by Doctor Suman Bodile (P.W. 6) who was then Medical Officer, Mayo Hospital, Nagpur. On examination she found :

1) Laceration present on (sic) around the vaginal orifice and labia minora.

2) Slight bleeding present.

3) Hymen was ruptured recently.

4) The examination of the patient was painful.

5) Vaginal orifice admits one finger. Examination was painful.

Accordingly -- Doctor Suman Bodile issued certificate -- Exhibit 41. She opined that rape was committed on the said girl. In her opinion age of the girl was below 12 years.

3. The Investigating Officer -- Gopal Yadao arrested accused and sent him for medical examination. On the next day P.S.I. Yadao along with prosecutor and panchas visited the place of occurrence and drew spot panchnama -- Exhibit

52. Then he seized the clothes of the prosecutor consisting of Skirt (Exhibit 6), Jangya (Exhibit

7) under seizure memo Exhibit

35. The articles seized were sent to the Chemical Analyser, Nagpur for examination as per requisition -- Exhibit

59. After the report of C. A. Exhibit 60 was received and on completion of investigation he filed charge-sheet against the accused in the Court of J.M.F.C., Wardha who in turn committed the case to the Court of Session. Before the Sessions Court when the appellant appeared and charge was framed vide Exhibit 17, he pleaded not guilty to the charge and claimed to be tried. His defence is of total denial and of false implication by the father of the prosecutor. At the trial the prosecution examined in all 9 witnesses including Vaishali, her friend -- Savitri, her father -- Anandrao Sawai, one Mahadeorao Bakade (P.W.

4) serving in M.I.D.C., Champat Hadake (P.W.

5) who was Headmaster of the School where prosecutor was taking education and he produced her birth certificate -- Exhibit 39 showing her date of birth as 24-9-

1976, Dr. Suman Bodile, Dr. Kailash Singhaniya (P.W.

7) who examined the accused and P. S. 1 Yadav. After the prosecution evidence was over the appellant examined three witnesses in defence, they were :

1) Nanaji Pagade (D.W. 1),

2) Chandrashekhar Ugemuge (D.W. 2),

3) Sau. Asha Kunjekar (D. W. 3). From the tenor of the cross-examination of the prosecution witnesses by defence, it is revealed that the presence of the appellant at the time and place as also the factum of injuries suffered by the prosecutor on her private part is not disputed. That is how the very suggestions to the prosecutor by defence in her cross-examination that when she was plucking the branch of Roze Tree, having a width of one finger the said branch hit her private part causing injury thereby to it. It was further suggested that when she was trying to hide herself behind the Beshram Plants while running she fell over the branch of Beshram Branch which also hit to her private part causing injury thereby to her. It was also suggested to her that when she tried herself to hide in a branch of Beshram Tree hit on her private part when she was sitting behind the Beshram Plant and suffered the injury to her private part. It was also suggested that appellant had been to the house of the prosecutor immediately after the occurrence to settle the matter. The prosecutor and her father did admit the fact that the appellant had been to their house. The appellant, however, in his defence denied the allegation that he committed rape on the prosecutor. It is probably to support his theory as to how prosecutor suffered injuries to her private part, defence witnesses have been examined. The trial Court accepting the evidence of prosecutor, her friend Savitri and that of her father Anandrao coupled with the medical evidence came to the conclusion that the prosecutor was sexually assaulted by the appellant by committing rape on her. The trial Court found that as suggested by the defence the possibility of prosecutor having suffered injuries to her private part as a result of fall on thorny bushes, either while running away or when appellant chased behind her or while plucking flowers, was totally ruled out having regard to the medical evidence. The trial Court, therefore, convicted and sentenced the appellant for offence under Section 376, I.P.C. as stated earlier.

Hence this appeal.

4. I have gone through the judgment as also the evidence on record with the assistance of learned counsel for the parties. I have heard Mr. Khare, the learned counsel for the appellant. He submitted that having regard to the nature of injuries, the prosecutor suffered, it stands probable that the said injuries might have been caused, as suggested by defence. The appellant was examined by Doctor, however, there was no injury on his private part. His clothes have been seized and sent for analysis to Chemical Analyser. However, nothing incriminating was found on his clothes. No semen was detected on the clothes of the prosecutor. Neither blood nor semen was detected on the clothes of the appellant. The learned counsel referring to the Book on the medical jurisprudence by learned Author Parikh pointed out that in young children, as the vagina is very small and hymen deeply situated, adult penis cannot completely penetrate it. In rare cases of great violence, the organ may be forcibly introduced, causing great tearing of the tissues, often through the perineum into the anus. The learned counsel submitted that no such injuries were noticed on the private part of the prosecutor. No semen was detected either on the clothes of prosecutor or that of the appellant. Therefore, medical opinion that rape was committed on the prosecutor cannot be accepted with authenticity. The learned counsel submitted that in this background as per the theory suggested, story of the defence, the possibility of injuries being caused to the private part of the prosecutor cannot be ruled out. He also submitted that as stated by the defence witnesses, in all probability this was certainly a case of false implication of the appellant as the prosecutor was apprehended by the appellant while she was plucking flowering plants from the garden. He, therefore, urged that the trial Court erred in convicting the appellant for offence. In the alternate he also submitted that incident has taken place way back in the year 1987. The appellant is in service. Though the appellant was on bail at the trial as also during the pendency of this appeal, the sword of prosecution, trial and appeal is hanging on his head, since over 18 years. He, therefore, urged that having regard to these circumstances, lenient view be taken in award of sentence.

5. The learned A.P.P. Mr. Lanjewar, submitted that the trial Court has accepted the evidence of prosecutor supported by her friend Savitri and her father. That

medical evidence also lends assurance to the claim of the prosecutor that rape was committed on her by the appellant. The report was lodged immediately showing thereby that there was no opportunity or reason also to falsely implicate the appellant. Admittedly the prosecutor was 11 years old at the time of occurrence. He therefore, urged that in the facts and circumstances of the case, the trial Court has rightly awarded the sentence of 7 years which does not call for any interference when under Section 376(2)(f), I.P.C. minimum sentence of R. I. for a term of 10 years is prescribed.

6. I have scrutinized the evidence of prosecutor, her friend Savitri and her father -- Anandrao. It is not disputed by the defence that the witness- Savitri was with the prosecutor Vaishali at the time and place when the occurrence took place. It has come in the evidence of witness-Savitri that the appellant after having apprehended both of them and after having made them sit for few minutes, asked her to go to her house and at the same time told the prosecutor to remain there though she expressed her desire to go with Savitri to her house. Therefore, Savitri as she left the place leaving the prosecutor and appellant at that place, she did not know what happened behind her back and she gave her evidence before the Court to the extent she was present. It is in this context her evidence is to be appreciated and what is pertinent to take note of is that the appellant managed to send this witness- Savitri to her house. It is obvious that the purpose of sending Savitri alone to her house, so that the appellant wanted to have prosecutor alone, at that place to accomplish his desire of seducing or committing sexual assault on her.

7. The prosecutor-Vaishali in her evidence stated in clear words as to what happened and what was done to her by the appellant. In her evidence she has stated in clear words that the appellant on releasing her underwear, had sexual intercourse with her. She stated that at that time she was weeping as she had pains. The accused has removed his pant and underwear and then he had sexual intercourse with the prosecutor. She stated that at that time she cried and started weeping but the accused threatened to beat her. It is matter of record that the prosecutor suffered bleeding injuries to her private part as noticed by Suman Bodile. Dr. Suman Bodile -- Medical Officer in her evidence has given details of

the injuries she noticed on the person of the prosecutor and she has given candid opinion that rape was committed on her. Dr. Suman Bodile was cross-examined by defence. It is pertinent to note that the factum of injuries which she noted on the person of prosecutor and as stated by her in her evidence, is not controverted by the defence. Dr. Bodile was subjected to cross-examination by the defence. However, her evidence remained undisturbed. It was suggested to her by defence that the injuries as per her certificate are possible if a girl falls over the bushes of Beshram Plants and there is possibility of rupture of hymen more running through barbed wire fencing or by falling over the Beshram Plants. The Medical Officer has stoutly denied these suggestions. It was suggested to the Doctor that the bleeding which was found was because of menses. Dr. has denied the suggestion and at the same time voluntarily stated that the said bleeding was not due to menses as the said girl had not attained puberty and secondary sexual characters were not well developed. Therefore, medical evidence lends assurance to the evidence of the prosecutor and her claim that rape was committed on her. There is absolutely no reason to discard the evidence of prosecutor merely because no injuries were found on the private part of the accused. It is needless to say that it is only in case of excessive violence used by the rapist that a minor girl could get severe injuries on her private part as stated by learned Author Parikh in his treatise on medical jurisprudence. It will also depend upon the force used by the rapist whether there would be any injury on his private (sic). In the case before hand as medical evidence shows there was recent rupture of hymen. There was laceration present on (sic) around vaginal orifice and labia minora. There was slight bleeding. The examination of the prosecutor was painful. The vaginal orifice admitted one finger only, but then as stated by Doctor the examination was painful. This finding recorded by the Medical Officer on examination of private part of the prosecutor as also per-vaginal examination, certainly shows that there was penetration when the act of sexual intercourse was committed by the appellant. But at the same time, having regard to the extent of injuries, as also the bleeding was slight, it goes to show that the intercourse by the appellant was not with that force and vigor. The fact that the prosecutor had bleeding through her private part is corroborated by the finding of blood-stains on her Skirt and Jangya as detected by the Chemical Analyser vide Exhibit 60. It is to be borne in mind that Medical Officer has stoutly

denied the suggestion of defence that the prosecutor had bleeding because she was in menses. The Medical Officer has stated that the prosecutor did not have menses as she had not then attained puberty.

8. The evidence of prosecutor is further corroborated by the evidence of father, Anandrao who immediately took the prosecutor to the police station at Sevagram and lodged report -- Exhibit 33, In his evidence he has stated that when his daughter -- Vaishali came home weeping he asked as to why she was weeping and at that time she told that she had gone to M.I.D. C. Garden along with her friend -- Savitri for bringing plants and at that time accused committed intercourse in the field of Banana. The immediate disclosure by prosecutor to her father -- Anandrao that the appellant committed rape on her on the place, where she had gone with her friend -- Savitri exhibits very natural conduct on the part of the prosecutor. This shows that there was no play for fabrication of false case against the appellant. That is further fortified by the fact that Anandrao immediately took his daughter to police station and lodged report Exhibit 33. It is significant to note that on that day itself the appellant had gone to the house of the prosecutor and told Anandrao that his daughter had gone to the Garden and had plucked some branches and plants. The witness Anandrao stoutly denied the suggestion that his daughter Vaishali told him that she received injury to her private part because of barbed wire fencing. The evidence of witness-Anandrao was subjected to cross-examination by defence, to accept suggestions, which were also stoutly denied by him, nothing has been elicited in his evidence by the defence. It is pertinent to note that when the defence has taken a defence for false implication, nothing has been suggested even to witness-Anandrao as to why false complaint was lodged against him levelling very serious charges against him. There is nothing to show that there was any enmity between the appellant and witness -Anandrao. In such circumstances the claim of defence of false implication as has been put through the defence of defence witnesses does not stand to be probable. Therefore, I do not find any merit in the submission of the learned counsel for the appellant that there was possibility of manipulation in prosecution against the appellant. There was absolutely no tangible reason for false implication of the accused. Therefore, on assessment of prosecution evidence, I have no hesitation in coming to the conclusion that the prosecutor was sexually assaulted by the appellant as the

prosecutor was minor girl of 11 years' age, at the time when she was sexually assaulted by the appellant, the appellant has committed offence under Section 376(2)(f) of I.P.C. The trial Court has rightly convicted the appellant for the said offence. No interference is called for, so far as the conviction is concerned.

9. This takes me to consider the contention of learned counsel for the defence made in alternate on the point of sentence. Section 376 has been extensively amended by the Criminal Law (Amendment) Act, 1983, whereby for offence under Section 376(2)(f) for commission of rape on a minor girl a punishment with R. I. for a term which shall not be less than 10 years, but which may be for life, and also shall be liable to fine, is prescribed. But at the same time by the proviso discretion is given to the Court to impose sentence of imprisonment of either description for a term of less than 10 years, for adequate and special reasons to be mentioned in the judgment. The trial Court awarded substantive sentence of seven years. This itself shows that the trial Court has taken recourse to the proviso to Section 376(2) to award lesser sentence than the minimum prescribed. The learned A. P. P. vehemently contended that the trial Court having shown leniency by awarding sentence less than minimum prescribed, no further interference in award of sentence is called for. But then the learned counsel for the appellant Mr. Khare, has rightly pointed out the circumstances to support his claim for further leniency in award of sentence. The incident in question has taken place in the year 1987. The appellant has faced trial in the trial Court for a period of almost 2-1/2 years, with the result that there was hanging sword of conviction on his head. Then he preferred appeal in the High Court and though the appellant was released on bail by this Court for a period of 13 years by now the sword of conviction is still hanging on his head. Having regard to the fact that the incident has taken place, way back in the year 1987 and as such a period of 17 years has lapsed I feel that substantive sentence awarded by the trial Court has to be reduced to 5 years' R.I. To meet the ends of justice, I must make it clear that having regard to the serious nature of offence committed by the appellant, he does not deserve any leniency. But then in view of the circumstances, more particularly that the matter is lingering in the Court for over 17 years, substantive sentence has to be reduced. As such with this modification in substantive sentence, the appeal has to be disposed of. Hence the order :

ORDER

10. The appeal is disposed of maintaining the conviction and sentence of payment of fine and in default sentence, with modification in the substantive sentence making it to R. I. for five years. The order passed by the Trial Court in respect of disposal of property is maintained. The appellant to surrender before the Trial Court to serve out the sentence within 10 days. In case the appellant surrenders in time, his bail bonds shall stand cancelled. It is further made clear that in case the appellant fails to surrender, the Trial Court shall take steps to secure the presence of the appellant to serve out the sentence, in that contingency the bail bonds of the appellant shall stand cancelled on his surrender to serve out the sentence.

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