Raju Pandurang Mahale vs State Of Maharashtra And Anr on 11 February, 2004

Equivalent citations: AIR 2004 SUPREME COURT 1677, 2004 (4) SCC 371, 2004 AIR SCW 1071, 2004 AIR - JHAR. H. C. R. 1041, (2004) 2 JT 425 (SC), 2004 (2) UJ (SC) 876, 2004 (2) ACE 341, 2004 (2) SCALE 408, 2004 CALCRILR 364, 2004 (2) SLT 295, 2004 UJ(SC) 2 876, 2004 SCC(CRI) 1259, (2004) 2 SUPREME 234, (2004) 3 BLJ 328, (2004) 28 OCR 796, (2004) 2 RECCRIR 936, (2004) 1 UC 723, (2004) 2 JLJR 304, (2004) 3 GCD 1759 (SC), (2004) 20 INDLD 203, (2004) 2 BOMCR(CRI) 22, (2004) 1 EASTCRIC 211, (2004) 2 MADLW(CRI) 851, (2004) 2 ALLCRIR 1638, (2004) 3 BLJ 298, (2004) 3 ALLCRILR 76, (2004) 2 SCALE 408, (2004) 1 CURCRIR 349, (2006) SC CR R 718, 2004 CHANDLR(CIV&CRI) 219, (2004) 2 CHANDCRIC 23, (2004) 3 PAT LJR 72, 2004 (2) BOM LR 898, 2004 BOM LR 2 898

Author: Arij1T Pasayat

Bench: Doraiswamy Raju, Arijit Pasayat

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           CASE NO.:
Appeal (crl.)  616 of 2003

PETITIONER:
RAJU PANDURANG MAHALE

RESPONDENT:
STATE OF MAHARASHTRA AND ANR.

DATE OF JUDGMENT: 11/02/2004

BENCH:
DORAISWAMY RAJU & ARIJIT PASAYAT

JUDGMENT:
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JUDGMENT 2004(2) SCR 287 The Judgment of the Court was delivered by ARIJ1T PASAYAT, J. Appellant calls in question legality of the conviction recorded in terms of Sections 342 and 354 read with Section 34 of the Indian Penal Code, 1860 (in short 'the IPC') by the Trial Court, and affirmed in appeal by the impugned judgment by learned Single Judge of the Bombay High Court, Aurangabad Bench. Two appeals were disposed of by a common judgment. Criminal Appeal no. 3 of 98 was filed by the present appellant along with one Pankaj, while the connected Criminal Appeal no. 50/98 was filed by Raju @ Rajesh S. Kopekar.

Four accused persons faced trial. The appellants before the High Court were present appellant Raju Pandurang Mahale (A-1), Gautam (A-2), Pankaj (A-3) and Rajesh S. Kopekar (A-4). A-1 to A-4 were convicted for offences punishable under Sections 376 (2) (g) IPC and each of A-1, A-3 and A-4 was sentenced to suffer Rl for 10 years and to pay fine of Rs.500 with default stipulation; but Gautam (A-2) was awarded 2 years RI. Additionally, A-l, A-2 and A-4 were found guilty for offences punishable under Section 342 read with Section 34 IPC. Gautam (A-2) did not prefer any appeal questioning his conviction. A-3 alone was convicted for offence punishable under Section 292 IPC. While A-4 was convicted for offence punishable under Section 323 IPC. A-l, A-3 and A-4 were convicted for offences punishable under Section 354 read with Section 34 IPC. For offences relatable to Section 342 read with Section 34-IPC, six months RI and for the offence punishable under Section 354 IPC one year custodial sentence was imposed.

The High Court by the impugned judgment set aside the conviction and sentences of A-l and A-3 for the offences punishable under Section 376(2)

(g). So far as the appeal filed by A-4 is concerned, he was convicted for the offence punishable under Section 376 IPC, though his conviction in terms of Section 376 (2)(g) was set aside. The conviction of A-1 and A-2 and A-4 for the offences punishable under Section 342 read with Section 34 IPC, and the conviction of A-l, A-3 and A-4 for the offences punishable under Section 354 read with Section 34 IPC was also maintained with the sentence imposed. Conviction of A-4 in terms of Section 323 IPC was maintained. In essence so far as the appellant is concerned, his conviction for the offence punishable under Section 342 read with Section 34 IPC and Section 354 read with Section 34 IPC was maintained as noted above.

Prosecution version as unfolded during trial is as follows:

> The alleged occurrence took place on 12th and 13th January, 1996. Husband of the prosecutrix (PW-5), at the relevant time, was undergoing imprisonment for life after his conviction in a murder case. The prosecutrix, along with a daughter of two years age, was residing with her sister (PW-6). Accused no.4-Raju @ Rajesh s/o Sudakar Kopekar and accused no.l- Raju s/o Pandurang Mahale were friends of the husband of prosecutrix. It was for this reason that the prosecutrix was known to them. Both these accused persons were on visiting terms with the prosecutrix and her husband used to go to their bruise. Raju @ Rajesh S. Kopekar (accused no. 4) was working in Railways and was required to go out of station sometimes. The prosecutrix, on request, by him, used to stay with his wife during his absence in connection with his duties.
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> The incident occurred during the midnight of 12.1.1996 and 13.1.1996. At about 9.30 p.m. of 12.1.1996, appellant Raju Pandurang Mahale came to the house of the prosecutrix and told her that Raju @ Rajesh S. Kopekar (accused no. 4) had gone for night duty, and that his wife was alone at home. She was also told that wife of Raju (A-4) had called her to stay with her. The prosecutrix was reluctant to go to the house of Raju (A-4). She, however, relented on persistence of appellant Raju (A-l). She

agreed to go, also for the reason that earlier, appellant Raju had taken her daughter and she had been left at the house of Raju @ Rajesh S. Kopekar (A-4) by Appellant Raju.

On reaching the house of Raju @ Rajesh S. Kopekar (A-4), the prosecutrix found her daughter sleeping on a cot in the house. She, however, did not find the wife of Raju @ Rajesh S. Kopekar (A-4) at home. On the contrary, Raju @ Rajesh S. Kopekar (A-4), who was reported to have gone on duty, was very much present there. On questioning by prosecutrix, as to why she had been called by sending misleading information, Raju @ Rajesh S. Kopekar (A-4) stated that he had wanted her to come to his house for company. Gautam Suresh Shejwal (A-2), a friend of Raju @ Rajesh S. Kopekar (A-4) was also sitting in the house. He went outside the house and closed the door from outside, forcing the prosecutrix to remain in the house with Raju @ Rajesh S. Kopekar (A-4) along with appellant Raju s/o Pandurang Mahale and her two years old daughter who was sleeping on the cot. Appellant Raju s/o Pandurang Mahale brought liquor bottle and liquor was consumed by him and Raju @ Rajesh S. Kopekar (A-4). Thereafter, both these accused persons assaulted the prosecutrix and forced her to consume liquor. Soon she experienced giddiness and lost her balance. She was raped, thereafter, by Raju @ Rajesh S. Kopekar (A-4), when the prosecutrix regained consciousness, she found Raju @ Rajesh S. Kopekar (A-4) was lying on her person and Pankaj Ganpat Avhad (A-3) was in the room. She alleged that Pankaj Ganpat Avhad had taken her nude photographs. In the morning, the prosecutrix was threatened not to disclose the incident to anybody and was asked to go home. The prosecutrix went to her sister's house and narrated incident to her sister (PW-6). Thereafter, they went to the police station and lodged the report. Investigation was undertaken and charge sheet filed.

The Trial Court and the High Court accepted the evidence of the victim prosecutrix to be cogent and taking note of the additional factors brought on record made the conviction and awarded the sentence as aforenoted.

In support of the appeal, learned counsel for the appellant submitted that the offences under Section 342 and Section 354 IPC were not made out. So far as he is concerned. It was submitted that the role attributed to the appellant does not in any manner establish existence of ingredients necessary to constitute offence punishable under Sections 342 and 354 IPC. He pointed out that the locking of the door from outside according to prosecution was done by A-2 in the house of A-4. The appellant had not poured liquor to the mouth of the prosecutrix as victim herself said that she was forcibly made to drink liquor by A-4. The High Court proceeded on the basis, as if, the appellant and A-4 forced her to take liquor.

In response, learned counsel for the State submitted that evidence has been analysed by both the Trial Court and the High Court in great detail. The role attributed to the appellant by the victim is very clear and in any event Section 34 was pressed into

service to show that he shared the common intention regarding commission of the alleged offences. That being so, the conviction and the sentence as awarded do not need any interference.

The evidence on record clearly establishes that the appellant brought the victim to the house of A-4 on false pretext and made it compulsory for her to go by earlier taking away her daughter to the house of A-4. She was confined with A-4 and the appellant, when room was locked from outside by A-2. It was the appellant who brought the liquor which the victim was made to drink. She was forcibly disrobed by A-4 in the presence of the appellant. Thereafter A-4 raped her and A-2 took her nude photographs while she was -being sexually ravished by A-4. Section 342 provides the punishment for wrongful confinement. It is established by the evidence on record that the victim was taken to A-4's place by the appellant in the night of date of occurrence and she was able to come out of the confinement on the next day. Wrongful confinement is defined in Section 340. As observed by this Court Shyam Lal Sharma and Anr v. The State of Madhya Pradesh, AIR (1972) SC 886. Where a person is wrongfully restrained in such a manner as to prevent that person from proceeding beyond certain circumscribed limits, he is wrongfully confined within the meaning-of this Section. The essential ingredients of the offence "wrongful confinement"

are that the accused should have wrongfully confined the complainant and such restraint was to prevent the complainant from proceeding beyond certain circumscribed limits beyond which he/she has a right to proceed. The factual scenario clearly establishes commission by the appellant as well of the offence punishable under Section 342 IPC.

Coming, to the question as to whether Section 354 of the Act has any application, it is to be noted that the provision makes penal the assault or use of criminal force to a woman to outrage her modesty. The essential ingredients of offence under Section 354 IPC are:

(a) That the assault must be on a woman.

(b) That the accused must have used criminal force on her.

(c) That the criminal force must have been used on the woman intending thereby to outrage her modesty.

What constitutes an outrage to female modesty is nowhere defined. The essence of a woman's modesty is her sex. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. Modesty in this Section is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex. The act of pulling

> a women, removing her saree, coupled with a request for sexual intercourse, is such as would be an outrage to the modesty of a woman; and knowledge, that modesty is likely to be outraged, is sufficient to constitute the offence without any deliberate intention having such ourtrage alone for its object. As indicated above, the word 'modesty' is not defined in IPC. The shorter Oxford Dictionary (Third Edn.) defines the word 'modesty' in relation to woman as follows:
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> "Decorous in manner and conduct; not forward or lowe; Shame-fast: Scrupulously chast."

Modesty is defined as the quality of being modest; and in relation to woman, "womanly propriety of behaviour; scrupluous chastity of thought, speech and conduct." It is the reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions. As observed by Justice Patterson in Rex v. James Llyod, (1876) 7 C & P 817. In order to find the accused guilty of an assault with intent to commit a rape, court must be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person but that he intended to do so at all events, and notwithstanding any resistance on her part. The point of distinction between an offence of attempt to commit rape and to commit indecent assault is that there should be some action on the part of the accused which would show that he was just going to have sexual connection with her.

Webster's Third New International Dictionary of the English Language defines modesty as "freedom from coarseness, indelicacy or indecency, a regard for propriety in dress, speech or conduct". In the Oxford English Dictionary (1933 Edn.), the meaning of the word 'modesty' is given as "womanly propriety of behaviour: scrupulous chastity of thought, speech and conduct (in man or woman); reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions."

In State of Punjab v. Major Singh, AIR (1967) SC 63 a question arose whether a female child of seven and a half months could be said to be possessed of 'modesty' which could be outraged. In answering the above question the majority view was that when any act done to or in the presence of a woman is clearly suggestive of sex according to the common notions of mankind that must fall within the mischief of Section 354 IPC. Needless to say, the "common notions of mankind" referred to have to be gauged by contemporary societal standards. It was further observed in the said case that the essence of a woman's modesty is her sex and from her very birth she possess the modesty which is the attribute of her sex. From the above dictionary meaning of 'modesty' and the interpretation given to that word by this Court in Major Singh's case (supra) the ultimate test for ascertaining whether modesty has been outraged is whether the action of the offender is such as could be perceived as one which is capable of shocking the sense of decency of a woman. The above position was noted in Rupan Deal Bajaj (Mrs.) and Anr. v. Kanwar Pal Singh Gill and Anr., [1995] 6 SCC 194. When the above test is applied in the present case, keeping in view the total fact situation, the inevitable conclusion is that the acts of accused appellant and the concrete role be consistently played from the beginning proved combination of persons and minds as well and as such amounted to "outraging of her modesty" for it was an affront to the normal sense of feminist decency. It is further to be noted that Section 34 has been rightly pressed into service in the case to fasten guilt on

the accused- appellant, for the active assistance he rendered and the role played by him, at all times sharing the common intention with A-4 and A-2 as well, till they completed effectively the crime of which the others were also found guilty.

Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The Section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the Section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of moment; but it must necessarily be before the commission of the crime. The true concept of Section is that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. As observed in Ashok Kumar v. State of Punjab, AIR (1977) SC 109, the existence of a common intention amongst the participants in a crime is the essential element for application of this Section. It is not necesssary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision.

The Section does not say "the common intention of all", nor does it say "and intention common to all". Under the provisions of section 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in Section 34, when an accused is convicted under Section 302 read with Section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in Ch. Pulla Reddy and Ors. v. State of Andhra Pradesh, AIR (1993) SC 1899. Section 34 is applicable even if no injury has been caused by the particular accused himself.

For applying Section 34 it is not necessary to show some overt act on the part of the accused.

Looked at from any angle the conclusions of the Trial Court and the High Court in convicting the appellant do not suffer from any infirmity to warrant interference in exercise of the powers under Article 136 of the Constitution of India, 1950. The sentences imposed by no stretch of imagination can be said to be on the higher side. On the contrary, backgrounds facts of the case show that lenient sentences were imposed. The appeal fails being without merit.