

Bombay High Court

Amol @ Samir S/O Mangal Dongre (In ... vs State Of Maharashtra Through ... on 9 August, 2017

Bench: R. B. Deo

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apeal179.16

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,

NAGPUR BENCH, NAGPUR.

CRIMINAL APPEAL NO.179 OF 2016

Amol @ Samir s/o Mangal Dongre,
Aged 24 years, Occupation - Private Work,
R/o Chuna Bhatti, Jail Road, Nagpur.

.... APPELLANT

VERSUS

State of Maharashtra,
through P.S.O. Dhantoli, Nagpur.

.... RESPONDENT

Shri D.A. Sonwane, Advocate appointed for the appellant,
Shri V.A. Palshikar, Addl.P.P. for the respondent.

CORAM : ROHIT B. DEO, J.

DATED : 9 AUGUST, 2017.

th ORAL JUDGMENT :

This appeal takes exception to the judgment and order dated 21-3-2016 delivered by the learned Additional Sessions Judge-1, Nagpur in Special Child Protection Case 75/2014 by and under which the appellant (hereinafter referred to as the "accused") stands convicted for the offence punishable under Section 376(2) of the Indian Penal Code read with Sections 3 and 4 of the Protection of 2
apeal179.16 Children from Sexual Offences Act, 2012 and offence punishable under Section 354-D (1) of the Indian Penal Code read with Sections 11(iv) and 12 of the Protection of Children from Sexual Offences Act, 2012. The accused is, however, acquitted of the offences punishable under Sections 341 and 506 Part-II of the Indian Penal Code. The accused is sentenced to suffer rigorous imprisonment for ten years for the offence punishable under Section 376(2) of the Indian Penal Code read with Sections 3 and 4 of the Protection of Children from Sexual Offences Act, 2012 and to

suffer rigorous imprisonment of one year for the offence punishable under Section 354-D (1) read with Sections 11(iv) and 12 of the Protection of Children from Sexual Offences Act.

2. It is the case of the prosecution that the complainant victim was aged 13 years old at the relevant time and was residing with her parents and brother at Chunabhatti, Nagpur. The accused also resided in the same locality. The victim was then in 9 th Standard in Tilak Vidyalaya, which is situated near Dhantoli Garden, Nagpur. The victim and the accused knew each other since childhood as house of the accused was situated near the parental house of the victim.

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3. The first incident in the prosecution story occurred in July 2013 when the victim was on her way to school. The accused, around 7.00 a.m. accosted the victim and said "I love you". The victim ignored the accused, attended the school and did not inform any person about the incident. The next morning, the accused again confronted her and asked her "yes or no" and the victim replied "I don't know". It is alleged that the accused then parked his motorcycle, brandished a knife and pointed the knife at the neck of the victim. The victim tried to raise alarm, the accused pressed her mouth, the victim managed to free herself and went to her school. On the same day at 11-30 a.m. when the victim was returned from the school, she was again accosted by the accused and threatened with a knife. The accused is alleged to have threatened the victim that should she disclose the incident to anyone, she and her brother shall be killed. The victim did not report the incident to anyone.

4. The case of the prosecution further is that in August 2013 when the victim was on her way to attend tuition class at about 4-00 p.m., the accused stopped her and forcibly took her on his motorcycle to Marigold Photo Studio and took her photographs with him. This is allegedly done at the point of knife. The victim did not narrate the 4 apeal179.16 incident to any person because of the threats issued by the accused. The victim was on her way to her school on 03-12-2013 to attend cultural programme and at about 11-30 a.m. near Chitale Marg the accused again accosted her, brandished a knife and forcibly took her on his motorcycle to Shivangaon forest which was a secluded area. The accused parked his vehicle, tried to kiss the victim who attempted to ran away and in the process fell down. The accused caught her, inflicted four to five slaps on her face, forcibly removed her school uniform, gagged her mouth with handkerchief, undressed her and forcibly committed sexual intercourse. The accused allegedly took photographs of the victim on his mobile, when the victim was nude. The accused then dropped the victim in Dhantoli area. The victim attended the cultural programme in the school and on her way back to her house at 5-00 p.m. accused accosted her and issued threat that if the victim informs any person about the incident, her family members shall be killed. The victim again did not inform the incident to her family members.

5. The prosecution version is that on 28-2-2014 when the victim was attending the school, the accused sent one mobile and chocolate through one Ritik Upadhyay. The victim threw away 5 apeal179.16 chocolate while retaining the mobile due to fear. On 09-3-2014 parents of the victim noticed the mobile, made enquiries with the victim, the victim narrated the various incidences including the forcible sexual intercourse and on 11-3-2014 the victim and her parents lodged a report with the Dhantoli police station. The statements of the victim is recorded at Exhibit 21 and an

offence vide Crime 66/2014 was registered at Dhantoli police station.

6. The accused was arrested on 16-3-2014. The clothes of the victim were seized from her mother vide seizure memo Exhibit 36. The investigating officer prepared a spot panchanama Exhibit 40. A second spot panchanama Exhibit 41 was prepared since during the investigation it transpired that the accused committed similar act in a room at Chunabhatti. The victim was sent for medical examination and the medical examination report is Exhibit 48. The pleasure motorcycle and the clothes of the accused were seized vide panchanama Exhibits 54 and 57 respectively. The mobile was seized vide seizure panchanama Exhibit 58. According to the prosecution, the accused gave a memorandum statement Exhibit 60 while in police custody pursuant to which the knife allegedly used in the offence was recovered and seizure panchanama Exhibit 61 was prepared. The 6th accused was medically examined and the medical examination report is Exhibit 67. The birth certificate of the victim is Exhibit 24. The investigation culminated into charge-sheet, the learned Sessions Judge framed charge at Exhibit 4, the accused pleaded not guilty and claimed to be tried. The defence of the accused as is evident from the tenor of the cross-examination and statement under Section 313 of the Criminal Procedure Code, 1973 is of false implication.

7. Shri D.A. Sonwane, learned Counsel for the accused would urge that the prosecution story is inherently incredible. He would submit that the evidence on record is grossly insufficient to prove that the accused threatened or pressurized the victim. He would further submit that false implication of the accused is a real possibility and in the absence of corroborative evidence the accused could not have been convicted on the basis of the testimony of the victim/prosecutrix. The judgment impugned is also attacked on the ground that the delay in lodging the first information report is inordinate and unexplained. The learned Counsel further submits that the fact that the victim did not make a hue and cry or an attempt to shout or raise alarm when the accused allegedly took her on his motorcycle to Shivangaon forest area would suggest that the allegation that the victim was forced to 7th accused accompany the accused to Shivangaon forest area is not worthy of acceptance. The learned Counsel further submits that the alleged spot of forcible sexual intercourse at Shivangaon forest area is rough terrain would surely have caused some injuries to the victim. That the medical evidence does not so suggest is, according to the learned Counsel, totally inconsistent with the prosecution version. The learned Counsel for the accused invites my attention to the medical examination report and in particular to the absence of external injury on the private part of the victim. The learned Counsel would urge that the conviction is manifestly erroneous and militates against the oral and documentary evidence on record. Per contra, the learned Additional Public Prosecutor Shri V.A. Palshikar would urge that it is not in dispute that the victim was only thirteen years old at the relevant time and there is no material brought on record to suggest false implication. He would urge that the testimony of the minor victim is consistent with the first information report and is confidence inspiring. The learned Additional Public Prosecutor submits that the minor victim has stood her ground in the extensive cross-examination and nothing is brought on record in the cross-examination to shake the credibility of the testimony of the victim. He would urge that this Court should ordinarily accept the testimony of the minor prosecutrix/victim in the absence of any 8th evidence to suggest that the accused was falsely implicated and that since the victim/prosecutrix is not an accomplice, her evidence did not call for any corroboration. The learned Additional Public Prosecutor would urge that there is no straight-jacket formula to judge or assess

the implication of delay in lodging the first information report, assuming that there is a delay. The learned Additional Public Prosecutor submits that the first information report is lodged with promptitude upon the parents of the minor prosecutrix discovering the mobile and coming to know of the sexual exploitation of their daughter at the hands of the accused. He would further submit that in view of the age of the prosecutrix, which was indisputably thirteen years, even if it is assumed that the sexual intercourse was with the consent of the victim, such consent is immaterial and the accused would be guilty of offence punishable under Section 376(2) of the Indian Penal Code read with Sections 3 and 4 of the Protection of Children from Sexual Offences Act, 2012 and offence punishable under Section 354-D (1) of the Indian Penal Code read with Sections 11(iv) and 12 of the Protection of Children from Sexual Offences Act, 2012.

8. I have closely scrutinized the record and have given my anxious consideration to the appreciation of evidence by the learned 9 appeal179.16 Sessions Judge. For reasons recorded infra, I have no hesitation in confirming the judgment and order impugned and dismissing the appeal.

9. The minor prosecutrix is examined as P.W.1. Her testimony is by and large consistent with the first information report. She has been extensively cross-examined. It is suggested to P.W.1 that due to strained relationship between her maternal uncle and the accused, she has falsely implicated the accused. The effort in the cross-examination is also to bring on record that considering the distance between the school of the prosecutrix and Shivangaon forest area where she is allegedly raped by the accused and the presence of traffic signals, traffic police and the pedestrian and vehicular traffic during the journey of twenty-two to twenty-five minutes, the version of the prosecutrix that she was forced to accompanying the accused at knife point is inherently unbelievable. It is suggested to P.W.1, by referring to every material fact deposed to in the examination-in-chief, that the version of the victim is untrue and that she was falsely implicating the accused. I am of the opinion that although the cross-examination of the witness creates doubt about the version that the prosecutrix was forced to have sexual intercourse at knife point, as is rightly contended 10 appeal179.16 by the learned Additional Public Prosecutor, even if it is assumed arguendo that the prosecutrix was a consenting party, she being only thirteen years old at the relevant time, consent, if any, is immaterial and does not take case of the defence any further.

10. The testimony of the minor prosecutrix is consistent and confidence inspiring. I am not persuaded to accept the submission of the learned Counsel for the accused that false implication of the accused is a real possibility. A vague and omnibus suggestion in the cross-examination that due to strained relationship between the maternal uncle of the prosecutrix and the accused and a blissfully similar vague plea in statement under Section 313 of the Criminal Procedure Code, 1973 is not sufficient to uphold the defence of false implication particularly as the testimony of the prosecutrix is generally reliable and confidence inspiring. In the factual scenario of this appeal, I am not in a position to record a finding of false implication which would suggest that maternal uncle of the prosecutrix would use her as a tool to wreck vengeance at the pain of social stigma and humiliation. It is equally difficult to believe that the thirteen years old prosecutrix would be a willing party to such a sinister and diabolic design to falsely implicate the accused. I would safely rule out the possibility of false 11 appeal179.16 implication.

11. The mother of the prosecutrix is examined as P.W.2. She has deposed that it was only on 09-3-2014 that she and her husband noticed the mobile and upon enquiries with her daughter, she came to know of the sexual exploitation. Nothing material is brought on record in her cross-examination. P.W.3 Dhanraj Sayre is examined to prove the spot panchanama Exhibit 40, he did not support the prosecution and was declared hostile and cross-examined. During the cross-examination by the prosecution, he supported the prosecution version and was, therefore, cross-examined by the defence. P.W.4 Dr. Madhuri Deotale is examined to prove the medical examination report Exhibit 48. She states that she did not notice any external injury in the general examination of the prosecutrix. However, in genital examination, she found that the hymen of the prosecutrix was ruptured. She opined that overall findings are consistent with the sexual intercourse. In the cross-examination, P.W.4 denies the suggestion that her deposition is at the instance of the police. P.W.5 Baban Solanke is examined to prove the oral report Exhibit 21 and P.W.6 Chitra Mesre who then was attached with the Dhantoli police station is examined since she conducted the investigation. She has 12 appeal179.16 proved the seizure panchanama of the clothes of the accused Exhibit 57, the spot panchanama Exhibit 40, the seizure panchanama of the mobile Exhibit 58, the memorandum under Section 27 of the Indian Evidence Act Exhibits 60 and 61 and deposes that upon completion of the investigation, presented the charge-sheet. Nothing material is brought on record in her cross-examination. The accused has taken a defence of total denial in the statement under Section 313 of the Criminal Procedure Code, 1973. Pertinently nothing is stated in the statement under Section 313 of the Criminal Procedure Code, 1973 about the strained relationship between maternal uncle of the prosecutrix and the accused nor has the accused stated that he was being falsely implicated. Such a suggestion is given to the prosecutrix in her cross-examination, however, in the statement under Section 313 of the Criminal Procedure Code, there is absolutely no whisper of false implication due to allegedly strained relationship between the maternal uncle of the prosecutrix and the accused.

12. The implication of delay in lodging first information report, assuming there is delay, would depend entirely on the facts of the case. The first information report is lodged on 11-3-2014 with reasonable promptitude since the parents of the minor prosecutrix 13 appeal179.16 came to know of the sexual exploitation on 09-3-2014. They discovered the mobile given to the prosecutrix by the accused and made enquiries leading to the prosecutrix narrating the incidence of sexual exploitation. It is true that the minor did not inform her parents about the incident till the mobile was discovered on 09-3-2014. But then, while the silence of the minor may possibly suggest a consensual relationship, the same is immaterial in view of the fact that the prosecutrix was a minor aged thirteen years. What is important and material is that her parents took the prosecutrix to the police station and ensured the lodging of first information report.

13. The judgment and order impugned does not suffer from any legal infirmity and no interference is called for in exercise of appellate jurisdiction. The appeal is sans substance and is dismissed. The fees of the learned Advocate appointed for the appellant is quantified at Rs.5,000/-.

JUDGE adgokar