

Bombay High Court

Ranjit S/O Duryodhan Ghutke (In ... vs The State Of Maharashtra, Through ... on 4 September, 2017

Bench: Swapna Joshi

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT NAGPUR, NAGPUR.

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CRIMINAL APPEAL NO. 455/2015

Ranjit s/o Duryodhan Ghutke  
Aged about 23 years, occu: Labour  
R/o New Jamsala, Tah.Sindewahi  
Dist. Chandrapur.

v e r s u s

State of Maharashtra  
Through Police Station Sindewahi  
Tq.Sindewahi, Dist. Chandrapur.

.....  
Mr. C.R. Thakur, Advocate for appellant  
Mr. S.B. Bissa, Additional Public Prosecutor for respondent-State  
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CORAM: MRS. SWAPNA JOSHI, J.

DATED: 4th September, 2017 ORAL JUDGMENT:

This Appeal has been directed against the judgment and order dated 25th November, 2015 in Special (Child) Case No.15/2015 delivered by learned Additional Sessions Judge, Chandrapur, by which the learned Judge has convicted the appellant/accused for offence punishable under Section 376(2)(i) of the Indian Penal Code and sentenced him to suffer RI for a period of ten years and to pay a fine of Rs. 2000/-, in default, to suffer R.I. for 30 days. The appellant was also convicted u/s. 3 read with Section 4 of the Prevention of Children from Sexual Offences Act, 2012; however no separate sentence is imposed against him.

CRI.APPEAL.455.15

2. The prosecution case in brief is that, prosecutrix (PW1) was residing at village Jamsala, Tq. Sindewahi, Dist. Chandrapur, along with other family members. The prosecutrix, at the relevant time, was aged about 13- years, and was studying in VIIth standard. The appellant too is the resident of the same village. On the date of the alleged incident, i.e. 22.12.2013 at about 8.00 pm, the prosecutrix and her mother were near the chulha in the verandah of their house. The father of the prosecutrix had gone out for his work. The prosecutrix went to back side of her house for answering

nature's call, at that time, the appellant arrived. He called the prosecutrix, however she refused to go with him. On this, the appellant forcibly caught hold of the hands of the prosecutrix and took her in an open space. The appellant removed the clothes of the prosecutrix and he too also removed his clothes and committed sexual intercourse with her. The prosecutrix started shouting. On hearing the cry, the mother of the prosecutrix rushed to that place. She abused the appellant and assaulted him by means of a stick. The appellant then fled away. As it was a night time, on the next day, the prosecutrix along with her mother proceeded to Sindewahi Police Station and lodged the complaint against the appellant. At the relevant time, WPC Lata Shende (PW

4) was attached to Sindewahi Police Station. She scribed the report of the prosecutrix(Exh.16) and referred her to the Government Hospital, Chandrapur for the purpose of medical examination. Thereafter API-Devanand Alone (PW

13) registered the offence on the basis of the said complaint. API Alone CRI.APPEAL.455.15 (PW13) recorded the spot panchnama. He collected the birth certificate of the prosecutrix and took charge of the clothes of the prosecutrix as well as the appellant. He took their blood samples. He arrested the appellant. He sent the blood samples and other samples to the Chemical Analyser for analysis and recorded the statements of the witnesses. On completion of the investigation, PW13 submitted the charge-sheet against the appellant in the competent Court. The learned Additional Sessions Judge framed the charge against the appellant. The trial was conducted and on analysis of the evidence and after hearing both sides, the learned trial Judge convicted the appellant, as aforesaid. Hence, this Appeal.

3. Heard Shri C.R.Thakur, the learned counsel for the appellant and Mr S.B.Bissa, the learned APP for the respondent-State. The learned counsel for the appellant vehemently argued that the judgment and order passed by the learned trial Judge is illegal and perverse inasmuch as the learned Judge has not considered the discrepancies in the testimony of the witnesses and has also failed to consider that there were no fresh injuries on the private part of the prosecutrix-PW1. The learned Judge has failed to consider the CA report which did not support the prosecution case in any manner. Au contraire, the learned APP has contended that the learned trial Judge has rightly convicted the appellant, after considering the entire evidence on record in its right perspective.

4. In order to consider the rival contentions of the both the sides, I CRI.APPEAL.455.15 have meticulously gone through the record of the case. As far as the testimony of prosecutrix (PW1) is concerned, she has deposed before the Court that on 22.12.2013 at about 8.00 p.m. when she had been for answering nature's call in the bath room, the appellant came to that place and forcibly took her at the open place behind her house. The appellant removed her clothes. At that time she shouted. Her mother arrived at the place of the incident. The prosecutrix deposed that the appellant had committed sexual intercourse with her. After hearing shout, her mother came and she assaulted the appellant by means of stick. The appellant then fled away from that place. PW1 further deposed that on the next day, she along with her mother proceeded to the Police Station and lodged the report (Exh.16) against the appellant. The report (Exh.16) is in consonance with the testimony of PW1.

5. The testimony of PW1 is well-supported by the testimony of PW 2-Ujwala Nagdevte, who is the mother the prosecutrix. According to PW2- Ujwala, on the date of the incident at about 8.00 pm, her daughter went to the bath room. She heard the shouts of her daughter as "Aai". On this she rushed to the bath room and saw the appellant lying on the body of her daughter. She assaulted the appellant by means of stick. The appellant stood up and fled away. PW2-Ujwala stated that as there was no means to come to Sindewahi at that time, on the next day, she along with her daughter proceeded to the Police Station, Sindewahi, to lodge the complaint.

6. Careful scrutiny of testimony of PW1-prosecutrix as well as CRI.APPEAL.455.15 PW2-Ujwala, reveals that there are no material discrepancies in their testimony. The testimony of PW1-prosecutrix as well as PW2-Ujwala has not been shattered in the cross-examination. The testimony of PW2 corroborates the testimony of PW1 on all material aspects. It is well-settled that the sole testimony of the victim of rape can be relied upon, if it is found to be cogent, trustworthy and consistent. The testimony of PW2 has not been shattered on the factum of rape. PW1-prosecutrix, no doubt, has stated in her cross- examination that her parents used to abuse and beat her if she was found talking with the appellant and during the night of the incident her parents had beaten her. PW1-prosecutrix admitted that the appellant is her cousin brother and he used to talk with him. However her parents used to tell her that appellant is not a good person and she should not talk with him. The said version of PW1-prosecutrix makes it crystal clear that PW1 was well- acquainted with the appellant and she was in talking terms with him. Her testimony also indicates that her parents did not like the intimacy of the prosecutrix with the appellant. The testimony of PW1 as well as PW2 is found to be cogent, reliable and trustworthy. No doubt, the victim was well- acquainted with the appellant. It appears that the appellant took undue advantage of the said intimacy and therefore called her behind the house of prosecutrix and committed rape on her. If at all the prosecutrix would have indulged in consensual sex with the appellant, she would have not shouted for help by calling her mother, who immediately rushed to the place of incident CRI.APPEAL.455.15 and assaulted the appellant, who then fled away.

7. As far as the medical evidence of prosecutrix is concerned, the Medical officer-Dr. Jaya Bhongle (PW6) examined the prosecutrix on 24.12.2013 i.e. two days after the incident. She noticed that hymen of the prosecutrix was torned circumferentially with healed marks, slightly white discharge, laxity of vaginal orifice and elongation of posterior vaginal fornix, cervix vaginal appeared healthy. The evidence of PW6 does not show as to what was the exact age of injury as such. The medical evidence is of less assistance to the prosecution case to corroborate the version of the prosecutrix on the point of incident which occurred on 22.12.2013.

8. In this regard, the law is well-settled that even if the prosecutrix is habituated to have sexual intercourse, she can refuse to have sex with any one. This Court cannot loose sight of the fact that at the relevant time, the age of the prosecutrix was 13-years. The prosecutrix has stated her date of birth to be 1.8.2000. As far as the age of the prosecutrix is concerned, the prosecution has relied upon the testimony of Dinkar Pawaran (PW 11) who was working as a Secretary of Gram Panchayat of village Jamsala. He produced the birth register pertaining to the year 2000. As per the note in the register, the birth of the prosecutrix is shown at Sr.No.13 and as per the said entry, her date of birth is recorded as 1.9.2000 which means on the date of the incident which took place on 22.12.2013 the

prosecutrix was aged about 13 years 4 months and 8 days. In any case, the prosecutrix was below the age of 16-years at the CRI.APPEAL.455.15 time of the alleged incident. In view thereof, her consent to have sexual intercourse with the appellant is not material one.

9. Apparently, the prosecutrix was below the age of 16 years of her age at the time of the alleged incident. In these circumstances, the consent theory offered by the defence is rather indefensible and cannot be sustained. In the case of *State of Punjab vs. Gurmit Singh and others*, reported in (1996) 2 SCC 384, it is held that casting stigma on the character of a victim of rape was deprecated. The trial Judge was not justified in characterising a rape victim as a girl of loose character. The Court must use self-restraint recording such finding even if the girl is found to be habituated to sexual intercourse. The Hon'ble supreme Court further held that, "even in cases, unlike the present case, where there is some acceptable material on the record to show that the victim was habituated to sexual intercourse, no such inference like the victim being a girl of "loose moral character" is permissible to be drawn from that circumstance alone. Even if the prosecutrix, in a given case, has been promiscuous in her sexual behaviour earlier, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone."

10. On the point of delay in lodging the complaint, an useful reference can be made in the case of *Tulsidas Kanolkar vs. State of Goa*, reported in (2003) 8 SCC 590, it is held by the Hon'ble Apex Court that the CRI.APPEAL.455.15 delay in lodging of the first information report cannot be used as a ritualistic formula for discarding the prosecution case and doubting its authenticity.

11. In the case of *State of Punjab vs. Gurmit Singh & others* (supra) it was observed by the Hon'ble Apex Court that, the Courts cannot overlook the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police station and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged.

12. In the case of *Aman Kumar and another vs. State of Haryana*, reported in (2004) 4 SCC 379, the Hon'ble Apex Court has held as under :-

"5. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands on a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the Court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice, would suffice."

13. Thus, in the instant case, taking undue advantage of the fact that the victim was a cousin sister of the appellant of tender age of 13 years, CRI.APPEAL.455.15 the appellant who is a matured young boy, aged about 23 years, has committed rape on her. The testimony of the mother of the victim as well as the FIR (Exh.17) supports the case of victim.

14. In conclusion, I am of the opinion that the appellant has committed rape on the prosecutrix who was below the age of 16 years of age at the time of the incident and the learned trial Judge has rightly convicted the appellant for offence punishable u/s section 376 (2)(i) of the IPC and no interference at the hands of this Court, is called for. Hence the following order :-

#### ORDER

i) Criminal Appeal No.455/2015 is dismissed.

ii) The judgment and order dated 25th November, 2015 in Special (Child) Case No.15/2015 delivered by the learned Additional Sessions Judge, Chandrapur, convicting the appellant for offence punishable u/s. 376(2)(i) of the IPC and sentencing him to suffer RI for a period of ten years and to pay a fine of Rs.2,000/- in default to suffer R.I. for 30 days, is maintained.

iii) Muddemal property, if any, be destroyed after the appeal period is over.

JUDGE Sahare