

Bombay High Court

Ravindra Bhiwaji Choudhary vs State Of ... on 24 July, 2017

Bench: Swapna Joshi

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

Criminal Appeal No.229 of 2002

Ravindra Bhiwaji Choudhary,  
Aged about Major, Oc.Agri. Labour,  
R/o.-Hiwra (Hiwri), Taluqa Ramtek, Distt. Nagpur.  
(at present in Jail).

-Versus-

The State of Maharashtra,  
through its P.S. Officer Police Station Ramtek,  
Distt. Nagpur.

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Mrs. Geeta Tiwari, Additional Public Prosecutor for respondent/State.  
None for appellant.  
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Coram : Mrs. Swapna Joshi, J.

th Dated : 24 July, 2017.

ORAL JUDGMENT This appeal has been preferred by the respondent-State against the judgment and order dated 28-03-2002 delivered in Sessions Trial No. 17 of 1996 by the 2nd Extra Joint Additional Sessions Judge, Nagpur, thereby convicting the appellant of the offence punishable under Section 376 of the Indian Penal Code (for short, 'the I.P.C.") and sentencing him to suffer rigorous imprisonment for seven years and to pay a fine of Rs. 500/- in default to undergo simple imprisonment of three months.

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2] Heard the learned Additional Public Prosecutor for the respondent-

State. The accused as well as his Counsel remained absent. With the assistance of the learned Additional Public Prosecutor for the respondent- State, I have carefully gone through the record of the case and the impugned judgment and order.

3] The brief facts of the case which can be unfolded from the prosecution are as under :-

The prosecutrix and the accused are residents of village Hiwra (Hiwri). The prosecutrix (PW-2) was residing with her parents in the said village. According to the prosecution, the prosecutrix was 10 years old at the time of incident and as per the version of accused she was aged about 16 years old. While the prosecutrix was studying in 2nd standard, she had left the school. On the day of incident i.e. on 06-04-1995, in the afternoon, the prosecutrix along with her cousin brother (PW-6) Deepak was going near the Nullah for collecting the fuel wood. At that time, the accused came there. He cut the grass, gave it to Deepak and asked him to go home. The prosecutrix and the accused remained at that place. The accused then caught hold the prosecutrix and committed forcible sexual intercourse on her. The prosecutrix informed about the said incident to her parents in the evening. It is the case of the prosecution that the brother of the prosecutrix saw the incident. The prosecutrix proceeded to the Police Station on the next day and lodged her complaint (Exhibit-21). The offence was registered under Section 376 of the I.P.C. and the investigation was conducted by the investigating agency. The 3 Judg. 240707 appeal 229.02.odt charge-sheet came to be filed. The prosecution examined in all 11 witnesses. The learned Judge convicted the accused under Section 376 of the I.P.C. and sentenced him as aforesaid.

4] The learned Additional Public Prosecutor for the respondent-State contended that the prosecutrix was aged about 10 years at the time of the incident and taking disadvantage of the fact that she was found alone near the Nullah, he committed rape on her. The learned APP for the respondent-State further contended that the prosecution has proved its case beyond reasonable doubt.

5] As seen from the record of the case, the defence of the accused is of total denial and the case is put up to that there was rivalry between two families i.e. the family of the accused and the family of the prosecutrix, therefore, the accused has been falsely implicated in the offence of rape. It is noticed that, the age of the prosecutrix has not been proved by the prosecution beyond reasonable doubt. According to the accused, the prosecutrix was aged about 16 years old at the time of incident. In this backdrop, it is necessary to see, whether the prosecution has proved the age of the prosecutrix. Admittedly, the prosecutrix was removed from the school in 2nd standard. The parents of the prosecutrix as well as the prosecutrix are villagers and illiterate persons. They all remained silent on the point of date of birth of prosecutrix. According to the father of the prosecutrix, the date of birth of his daughter was recorded in Gram Panchayat at the time of her birth. However, the prosecution has failed to produce on record the Gram Panchayat record. The father of prosecutrix 4 Judg. 240707 appeal 229.02.odt did not state that he informed the date of birth of prosecutrix to the school authority. Even, the Medical Officer has admitted that she has not conducted the clinical examination of the prosecutrix. She however stated that the prosecutrix has not attended menarche. The ossification test of the prosecutrix was also not conducted. The prosecution relied upon the testimony of Headmaster (PW-10) Bala Gajbe who deposed on the basis of the school record. According to him, the entry regarding the date of birth of the prosecutrix was 01-07-1984. PW-10, however, failed to state as to on the basis of which document the entry in the school register with regard to the date of birth of the prosecutrix was taken. In view of above, it is not clear as to on what basis the said entry is taken in school register. The entry in the school record ought to have been taken on the basis of the Gram Panchayat record, which was maintained by the Gram Panchayat. According to the father of the prosecutrix, he had recorded the date of birth of his daughter in the register maintained by Gram Panchayat Office. It is unclear as to why the said record is not

produced before the trial Court in order to prove the age of the prosecutrix which would have been the best evidence to prove the age of the prosecutrix. 6] In case of State of Madhya Pradesh v. Munna Alias Shambhoo Nath, reported in (2016) 1 SCC 696 the question before the Hon'ble apex Court was whether the age of the prosecutrix has been proved. 7] In that case the prosecution produced school certificate of the prosecutrix and examined the Principal of the school. He deposed that the age of prosecutrix was noted at the time of admission but he had no 5 Judg. 240707 apeal 229.02.odt knowledge about the fact as to what date of birth would have been mentioned in her letter of declaration. The Hon'ble Apex Court did not rely upon the said school certificate.

8] In the said case reference was made of the judgment in case of Birad Mal Singhavi v. Anand Purohit reported in 1988 Supp SCC 604, wherein it is held-

"17. ... the entries regarding date of birth contained in the scholar's register and the secondary school examination have no probative value, as no person on whose information the dates of birth of the aforesaid candidates were mentioned in the school record was examined".

Thus, the prosecution has utterly failed to prove the exact age of the prosecutrix. However, in any case since the prosecutrix had not attended menarche, she appears to be below the age of 16 years. 9] According to the testimony of (PW-2) prosecutrix, on the day of incident, at about 12.00 noon, she had gone to the field (Shivar) to collect wood. Her brother Deepak was also with her. At that time, the accused came there and he gave fodder to Deepak and asked him to go to home. Accordingly, he went away. Thereafter, the accused committed sexual intercourse (Sambhog) with her. Significantly, the prosecutrix who according to her, was aged about 17 years old at the time of recording her evidence, did not state in her examination in chief that the accused committed forcible sexual intercourse with her. The prosecutrix, thereafter, stated that she narrated the said incident to her parents. Her brother was present at the time of incident. He also saw the incident. The 6 Judg. 240707 apeal 229.02.odt prosecutrix then lodged the complaint against the accused. In the instant case also there is no iota of evidence to show that the date of birth was stated by the father of the prosecutrix to the school authorities while admitting his daughter in the school. In fact the father of prosecutrix failed to state the date of birth of the prosecutrix before the Court. 10] On careful scrutiny of the testimony of prosecutrix it does not inspire confidence at all. It is not the case of the prosecutrix that at the time of incident she raised an alarm or made a hue and cry. If at all according to Deepak, he was present at the place of incident, then why he did not come to rescue his sister or raise an alarm to rescue his sister. According to PW-6 Deepak, on hearing the cries of his sister, he reached to the spot. Whereas the prosecutrix did not state about screaming or crying. It is the case of the prosecution that the prosecutrix was aged about 10 years old at the time of incident. If a girl of such a tender age is ravished there has to be a bleeding injury on her private part. Medical Officer did not notice any bleeding injury to the private part of the prosecutrix. Even the prosecutrix did not state that it started bleeding from her private part immediately after the incident and her clothes were stained with blood. Although the prosecutrix stated that she narrated the incident to her parents, the mother of prosecutrix (PW-4) did not state that her daughter narrated to her the said incident. PW-4 stated that her daughter informed her that accused pulled her. There is no corroboration to the version of prosecutrix with regard to the incident of rape, insofar as the

testimony of her mother is concerned. Until normal circumstances a girl would inform 7 Judg. 240707 appeal 229.02.odt the incident of rape to her mother, without any hesitation. However, the prosecutrix did not do so. Thus the prosecutrix did not narrate the incident of rape to her mother. The testimony of prosecutrix does not inspire confidence at all. It appears that as at the time of recording her evidence the prosecutrix was already married having one child, therefore she has half-heartedly adduced the evidence. Such casual approach of the prosecutrix while deposing before the Court in respect of such a serious offence of rape makes her testimony untrustworthy. It is worthy to note that the FIR (Exhibit-21) which is a contemporary document does not reveal that the accused inserted his private part in the private part of the prosecutrix. It simply reveals that the accused touched his male organ to the private part of the prosecutrix.

11] As regards the testimony of PW-3 father of prosecutrix, he stated that when he returned from the market at 5.00 pm, his daughter told him that when she had gone to collect fuel in the field, accused sent his nephew Deepak at home with the fodder and then committed rape (Sambhog) on her. On scrutiny of the testimony of father of prosecutrix, it is surprising that a girl aged about 10 years old would inform her father that the accused committed rape (Sambhog) on her. Even PW-3 did not state as to whether prosecutrix told him about the actual act committed by the accused. In the examination in chief, PW-3 has uttered the exact word as 'Sambhog' for the act committed by the accused with the prosecutrix. The testimony of PW-3 is not worthy of trust and does not inspire confidence at all.

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12] So far as the medical evidence is concerned, as per the evidence

of PW-8, the hymen was ruptured, admitted one finger easily. There was no bleeding per vagina. The doctor opined that the vagina of prosecutrix was not virgin and she was capable to commit intercourse. The doctor stated that in normal circumstances, the vagina orifice does not admit one finger easily. The testimony of medical officer does not depict that the injuries on the private part of the prosecutrix were within 24 hours. Under normal circumstances, if the injury occurs within 24 hours there would be bleeding on touching to the private part. Admittedly, the doctor had examined the prosecutrix on the very next day. However, no injury within 24 hours was seen on the private part of the prosecutrix. The Medical Officer failed to state the age of injury. Thus, the medical evidence does not corroborate the testimony of the prosecutrix and does not support the case of the prosecution.

13] On perusal of the testimony of PW-6 the brother of the prosecutrix, it is noticed that he claims to be an eye witness. According to him, the incident had taken place about one or two years back. He had gone to collect fuel in Shivar along with his sister. At that time, accused came there. The accused gave the bundle of grass to him and asked him to go home. After reaching home, he heard the cries of his sister. Therefore, he came to that place. He saw the accused sitting on the body of his sister. Thereafter, he along with his sister went to their house and narrated the incident to one Kisan Varkhede. On perusal of the testimony of the brother of the prosecutrix, it is noticed that when he saw the 9 Judg. 240707 appeal 229.02.odt accused sitting on the body of his sister, he did not make

any effort to rescue his sister or raise any hue and cry or call the villagers or his neighbours for help. Though PW-6 stated that he heard the shouts of his sister, however, the prosecutrix did not say that she raised an alarm at the time of incident. It is, therefore, not clear as to how the brother of the prosecutrix came to the place of the incident. The presence of PW-6 on the spot becomes doubtful. The testimony of the brother of the prosecutrix also does not inspire any confidence as such. 14] Interestingly, the panchanama of place of incident, does not reveal any blood stains or semen stains on the spot. There is absolutely no evidence on record regarding the finding of any blood stains on the clothes of prosecutrix, in order to support the case of the prosecution. Even the C.A. report has not been placed on record by the prosecution which would have depicted whether any blood stains or semen stains were found on the clothes of the prosecutrix and the accused. 15] Thus, the learned trial Judge has not considered all the aforesaid aspects while holding the accused guilty of an offence of rape. It is very easy to make an allegation of rape and very difficult to refute the said allegation. The judgment of the trial Court appears to be perverse and illegal. It is well settled that, the sole testimony of the prosecutrix can be relied upon, provided it is found to be credible and trustworthy. As discussed above, the testimony of the prosecutrix is not at all trustworthy and does not inspire confidence at all. In these circumstances, the benefit of doubt is given to the accused. Hence, the following order:-

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# O r d e r

- (a) Criminal Appeal No.229 of 2002 is allowed.
- (b) The judgment and order dated 28-03-2002 delivered  
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by 2 Extra Joint Additional Sessions Judge, Nagpur in Sessions Trial No.17 of 1996 is set aside.

(c) The appellant is acquitted of the offence under Section 376 of I.P.C.

(d) The bail bond furnished by the appellant stands cancelled.

(e) Muddemal property be dealt with as directed by Trial Court after the appeal period is over.

JUDGE Deshmukh