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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 600 OF 2008

Ramkisan Surajmal Harijan ..Appellant
(Through Jail)

Vs.

The State of Maharashtra ...Respondent

Mr. Irfan Sait, Advocate appointed for the Appellant.

Ms. R.S. Gadhvi, APP for the State.

CORAM : M.L. TAHALIYANI, J.

DATED : DECEMBER 23, 2011

JUDGMENT:-

1. The appellant impugns the judgment and order dated 17.1.2008 passed by the Additional Sessions Judge,

Greater Mumbai in Sessions Case No.330 of 2006. The appellant was tried for the offences punishable u/ss 363, 376(2)(f) and 377 of the Indian Penal Code. He has been acquitted of the offences punishable u/ss 363 and 376(2)(f) of I.P.C. However, he has been convicted for the offence punishable u/s 377 of I.P.C. and is sentenced to suffer R.I. for 10 years and to pay a fine of Rs.5000/- and in default to undergo R.I. for six months.

2. The appellant feels aggrieved by his conviction and sentence imposed upon him. Hence, this appeal.

3. Before I advert to the evidence on the basis of which the appellant has been convicted, let me briefly state the case of prosecution and the evidence adduced during the course of trial.

4. The complainant Mrs. Manisha Virednra Gupta with her husband and three children was staying at Markhurd-Ghatkopar Link Road, near sub-terminal, Mumbai-400 043.

Duty hours of her husband were from 12.00 to 8.00 p.m. He was selling kulfi and ice cream. The youngest child of the complainant was Miss. Rani aged about 10 months who is victim of the offence in question. It appears that the appellant was staying alone and was working as labourer with brick traders. He was engaged in loading and unloading of the bricks. He was known to the complainant and her family members. He used to visit her house and used to play with her child.

5. The incident had occurred on 10.1.2006. The husband of complainant had returned from his duty at about 7.00 p.m. and had again gone to sell bhel-puri at about 8.00 p.m. After the departure of the husband of complainant, the appellant had visited complainant's house and started playing with victim Rani. He took away the victim on the pretext that he would play with her. It is alleged that taking advantage of the lonely place near the truck parked by the side of the road, the appellant had inserted his penis in anus of the victim which resulted into severe injuries to the victim. The victim started

crying. The complainant, therefore, rushed to the direction of the cries of her daughter. She had seen the appellant running away from the place by the side of the truck. When the complainant picked up her daughter from the floor, it was noticed by her that there was bleeding from her vagina and anus due to injuries. She, therefore, immediately rushed to her neighbour Tulsadevi Gupta. Both of them took the child to the Shatabdi Hospital. The victim was referred to Lokmanya Tilak Hospital, Sion for treatment as injuries were of serious nature. The matter was referred to the Police on the intervening night of 10th and 11th January 2006, and the offence was registered on 11th January, 2006 at about 5.45 p.m. In the meantime, the Police had also visited the hospital. The victim was examined by the doctor. The doctor found multiple cuts on both lateral walls of anal canal. Two cuts were very prominent. One was 2.5 cm length and other was 1.5 cm. Both cuts were muscle deep involving superficial layer of sphincter. However, there were no injuries to vagina, urethra, and labia majora and they were found intact. Injury was found only in anus. The victim was

treated by the doctor. The doctor had opined that injuries were fresh and were caused within 24 hours of the examination. The statements of the witnesses were recorded and after completion of the investigation, a chargesheet was filed and he case was committed to the court of Sessions by the Magistrate.

6. During the course of trial, the Addl. Sessions Judge had framed charge against the appellant for the offences punishable u/ss 363, 376(2)(f) and 377 of the I.P.C. The appellant had pleaded not guilty and claimed to be tried.

7. The prosecution has examined 7 witnesses in support of its case. PW-1 is mother of the victim, PW-2 Dnyandeo Sathe is the witness who had seen the appellant carrying the child, PW-3 Pappu Gupta is also on the same point, PW-4 Annabhau Panjge is a panch witness, PW-5 Dr. Prashant Adivarekar, the Medical Officer who had examined the victim, and PW-6 and 7 are the Police Officers who had investigated the case.

8. As already stated that the appellant has been acquitted of the offences punishable u/ss 363 and 376(2)(f) of the I.P.C. on the basis of the opinion given by the Medical Officer. The learned Sessions Judge had believed the evidence of PW-1 and other witnesses to the effect that the victim was seen with the appellant. The evidence of PW-1 to the effect that she had seen the appellant running away from the place of offence was also believed. The learned Trial Court, after considering the evidence of the witnesses and the Medical Officer, had come to the conclusion that the accused had committed unnatural carnal intercourse against the order of nature.

9. During the course of hearing, it was submitted before me that none of the witnesses had seen the appellant indulging into unnatural carnal intercourse with the victim. It was submitted by Mr. Sait, learned counsel appearing for the appellant that the nature of injuries found by the Medical

Officer could be caused by the fall on the ground or by some other incident of the same nature. It was submitted that even if the injuries were caused by the appellant, there is no evidence to show that the appellant had indulged into the carnal intercourse against the order of nature.

10. I have gone through the evidence of PW-1 Manisha, PW-2 Dnandeo Sathe, and PW-3 Pappu Panchma Gupta. I do not find anything in the cross examination of PW-1 to show that she had given false statement that the victim was taken by the appellant and that she had seen the appellant rerunning away from the place where her daughter was found in an injured condition. The appellant was known to PW-1. It is admitted by PW-1 that the appellant had been visiting their place. There is nothing on record to indicate that PW-1 had any reason to implicate the appellant in a case of this nature by making false allegations. It was suggested that PW-1 had taken loan of Rs.500/- from the appellant and she had not returned the same and she had no intention to do so. Considering the nature

of injuries reported by the Medical Officer, it does not appeal to reason that the complainant would cause such serious injuries to her own daughter to create a false case against the person from whom a small amount of Rs.500/- was taken as loan. In my considered opinion, the evidence of PW-1 is rightly believed by the Trial Court.

1**1.** The evidence of PW-2 was also rightly believed. PW-2 is an independent witness. He knew the appellant and PW-1. He also knew the victim and he had seen the appellant carrying the victim with him at about the same time when the said incident had occurred. PW-2 is a shopkeeper having grocery shop in the said area. He also knew the appellant and PW-1 and children of PW-1. He had also seen the appellant carrying the victim with him. There is very short cross examination of these two witnesses which had not in any manner shattered the evidence of any of these two witnesses. PW-6 was working as Station House Officer. While he was on duty at Dewnar Police Station, husband of PW-1 visited the

Police Station and informed the Police regarding the incident. PW-6, therefore, visited Shatabdi Hospital. He was informed that the victim was taken to Sion Hospital. When he visited the Sion Hospital, he was informed that a surgery was being performed on the victim. He, therefore, returned to the Police Station. At about 2.15, he received a wireless message from the Sion Hospital that the victim Rani aged about 10 months old was allegedly raped by the appellant. He had recorded statement of PW-1 at about 5.00 a.m. on 11.1.2006. It was treated as an F.I.R.

12. PW-7 had conducted further investigation and had recorded statements of the witnesses. After collecting evidence, he had filed a chargesheet in the court of Magistrate.

13. As already stated, Mr. Sait, learned counsel for the appellant had submitted that in fact the evidence of PW Nos.1,2 and 3 should have been rejected by the Trial Court. It was further submitted that even if the appellant was found

responsible for the injuries sustained by the victim, there is no evidence to show that he had indulged into the carnal intercourse against the order of nature.

14. I have already rejected the defence put up by the appellant before the Trial Court. There is ample evidence that the victim was with the appellant. P.W. 1 in her evidence has stated that she had heard cries of her child and she had rushed to the sport. At the same time, P.W.1 had seen bleeding from vagina and anus of her child..

15. The only question which needs to be examined is whether it was the appellant or somebody else who had caused the injuries to the victim. If one examines the evidence narrated by the witness, the only conclusion which can be drawn is that it was the appellant who had caused the injuries to the victim. In the present situation, the appellant was under obligation, in view of the provision of Section 106 of the Evidence Act, to explain has to how the victim has suffered the injuries. There is

no explanation on the part of the appellant in his statement under Section 313 of the Cr. P.C. Since the victim was in the custody of the appellant, the cause of injuries can be said to be especially within the knowledge of the appellant. He was, therefore, under obligation to explain the same. If he has not given any explanation, the court can drawn only one conclusion that he himself is responsible for the said injuries. The other question which needs to be examined is whether the injuries were caused due to some assault of other nature or by carnal intercourse. The Medical Officer has stated that injuries could be caused by force. This evidence has come in the cross examination of the witness. Considering the nature of the injuries, it can be safely said that the injuries were caused by penetration of some object of the size bigger than the size of the anus of the victim child. Since the appellant has not given any explanation of the injuries and since there does not appear to be possibility of any other penetration, the only conclusion Court can draw is that perverse mind of the appellant was responsible for the alleged sexual assault on child of 10 months. I do not

think that in the present circumstances it possible to draw the conclusion that the penis was not penetrated but any other object was penetrated. As such in my considered opinion, the Trial Court has rightly come to the conclusion that the appellant had committed an offence punishable u/s 377 of the I.P.C.

16. I have heard learned counsel for the appellant and learned A.P.P. on the point of sentence. Learned A.P.P. has submitted that considering the age of the victim, it can be said that the appellant had exhibited the height of perversity and that the punishment of 10 years imprisonment imposed by the Trial Court was not out of proportion to the offence committed by the appellant.

17. Mr. Sait, learned counsel for the appellant has submitted that the appellant is from the poor strata of the society and he was leaving alone much away from his native place and therefore probably he lost control over himself and indulged into act alleged against him. It is submitted Mr. Sait

that the severe punishment imposed by the Trial Court may not serve the purpose, and may proved to be counter productive. He has relied upon the judgment of the Orissa High Court in the case of ***Mihir alias Bhikari Charan Sahu Vs. State reported in 1992 CRI L.J. 488*** and submitted that the Orissa High Court had come to the conclusion that since the appellant has a broken family life and belongs to the lower strata of the society and since the offence definitely was one relating to perversity and deprivation of mind, the sentence was reduced to two years from three years. It is submitted the appellant has already undergone sentence from 16.1.2006 till today which is more than sufficient for the offence committed by him. It is submitted that it is not the case of the prosecution that the appellant had been indulging into such activities in past also. The present incident is solitary incident and in the circumstances court may consider reducing of sentence imposed by the Trial Court.

18. I have gone through the judgment of the learned Trial Judge. It is seen from the said judgment that the learned

Trial Judge was aware of the fact that the appellant was married and having two children and his family was staying in Uttar Pradesh. This particular fact does not appear to be considered by the learned Trial Court. No doubt, this by itself may not be a reason for lenient sentence. However, had it been considered in the proper perspective, the learned Trial Court probably would have imposed lesser sentence that ten years. In my considered opinion, the view expressed by the Orissa High Court in the case of ***Mihir alias Bhikari Charan Sahu(Supra)*** can be made applicable to the present set of circumstances, and benefit of that judgment can be given to the appellant.

19. I subscribe the view expressed by the Orissa High Court in the aforementioned judgment and I pass the following order:

(i) The criminal appeal is partly allowed.

(ii) The conviction of the appellant for the offence punishable u/s. 377 of IPC is maintained. However, the substantive sentence is reduced to seven years

from ten years. The substantive sentence, in default of payment of fine of Rs.5000/-, is also reduced from six months to two months.

(iii) As such, the appellant stands convicted for the offence punishable u/s. 377 of IPC and is sentenced to suffer RI for seven years and to pay a fine of Rs. 5000/-, in default, to suffer R.I. for two months.

(iv) The appellant is in custody from 11th January, 2006 till today. Set off be given for the custody period.

(v) The property be destroyed in accordance with the order passed by the trial court.

20. Criminal Appeal No.600 of 2008 is accordingly disposed of.

(M.L. TAHALIYANI, J.)