1997 ALL MR (Cri) 1422

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

V.P. TIPNIS AND A.B. PALKAR, JJ.

Suresh Balkrishna Nakhava Vs. State Of Maharashtra And Anr.

Criminal Appeal No.230 of 1997,Criminal Application No.1847 of 1997

6th August, 1997

Petitioner Counsel: Shri A. P. MUNDARGI with Mr. S. V. MARWADI
Respondent Counsel: Mr. D. S. MHAISPURKAR
Other Counsel: Mr. NITIN PRADHAN with Ms. BHAVANA JADHAV

(A) Penal Code (1860), S.342 - Wrongful confinement for purpose of sexual intercourse - Evidence showing that act of sexual inter course was with her consent - Held, question of upholding the conviction did not arise at all.

(B) Penal Code (1860), S.375 - Prosecutrix under the age of 16 - Act of sexual intercourse with her would amount to rape even if the act was with her consent. (Para 14)

(C) Penal Code (1860), S.376 - Sentence - Act of sexual intercourse with consent of prosecutrix who was 15 years old - Act repeated at least 12 to 15 times and at times even inside her own house - Prosecutrix giving birth to a female child who was subsequently given in adoption in good family - Accused depositing rupees four lakhs for the prosecutrix's future maintenance - Held taking into consideration all these facts sentence shall stand reduced to six months R.I. and fine of Rs.1000/- i.d. R.I. for one month. (Paras 14, 15)

Cases Cited:
1996 Cri LJ 1882 [Para 13]

JUDGMENT

PALKAR, J. :- Admit.

By consent of parties heard forthwith.

1. This is an appeal challenging the judgment and order of conviction and sentence passed against the accused by the Ld.3rd Addl. Sessions Judge, Raigad, on 3.4.1997 for offences punishable under Sections 376 and 342 of IPC. The appellant has been sentenced for offence punishable under Section 376 of IPC. to suffer RI for 7 years and to pay a fine of Rs.500/- and in default to suffer RI for 3 months and for offence punishable under Section 342 of IPC he is sentenced to suffer RI for 6 months and to pay a fine of Rs.500 and in default to suffer RI for 3 months. After

directing that the substantive sentences to run concurrently, the Ld. Addl. Sessions Judge, acquitted the accused for offence punishable under Section 506 of IPC. It is reported that the fine has been deposited by the accused.

2. This appeal came up for admission. There is also a prayer for bail. The matter was placed for admission on 7.7.1997 and 14.7.1997. The father of the prosecutrix Ramchandra Masan filed an application as intervenor which is registered as criminal application no.1847 of 1997 and there was some talk of settlement between the advocate for the intervenor and the advocate for the accused, during the course of which the father of the victim was also present. The wife of the accused also appeared in court. Although the trauma that the victim has suffered cannot be totally made good by any amount of monetary compensation, such a settlement would atleast help the victim to resettle in her life. Affidavits have been filed by the intervenor as also by the wife of the accused. Both affidavits are taken on record.

3. The complaint in this case was lodged on 29.11.1994 by Kum. Punam Ramchandra Masan resident of Navpada Karanja, Tal. Uran, Dist. Raigad contending inter alia therein that she was aged about 14 years. Her mother died long back when she had not even reached the age of understanding. Thereafter her father Ramchandra entered into the second marriage and presently the prosecutrix is living with her father and step mother.

4. About 7 to 8 months prior to the filing of the complaint the appellant accused who was residing in close vicinity of the house of the prosecutrix and her father and was also a distant relative of the victim and as such well known to her, called her towards a shack on the pretext of supplying her fire wood. The shack is near the sea shore. The appellant called her inside the shack and thereafter committed rape on her and threatened her not to disclose this incident to anybody. On the 2nd occasion the appellant came to her house in the absence of other family members and there again he had sexual intercourse against her will and by force and this act was repeated atleast 10 to 12 times sometime in the shack and some time in the house of the victim. After about 6 months of the first incident, Punam the victim became pregnant and she had pain in her abdomen. Thereupon she complained this to her grand mother and through her the matter was informed to her father. After this a complaint came to be filed and after due investigation into the allegations the appellant accused was chargesheeted for offence punishable under Sections 376 and 342 as also 506 of IPC and in the course of time the case was committed to the court of Sessions presided over by the 3rd Addl. Sessions Judge, Raigad.

5. The learned counsel for the accused Shri Mundargi stated before us that he is not challenging the conviction of the appellant accused for offence under Section 376 because although it appears to be clear case of the prosecutrix being a consenting party to the act to sexual inter course, since very beginning, the evidence on record also clearly established that she was born on 1.3.1980 and as such her consent is immaterial and in the eye of law it amounts to offence under Section 376 of IPC. He further contended that if the very first act was as a result of the consent of the prosecutrix, then the accused cannot be held to be guilty of offence under Section 342 of IPC.

6. We have heard the learned counsel for the accused on the point of sentence for offence u/s 376 IPC and we have also heard the learned counsel for the intervenor Shri Nitin Pradhan and the Ld. Addl. Public Prosecutor Shri Mhaispurkar on the point. We have also gone through the affidavits which are filed today and the copies of depositions produced on record and after considering the arguments and material on record the following facts are very clear and appear to be beyond dispute.

7. The evidence of prosecutrix Punam was that at the time of incident she was aged about 15 years; that on the very first occasion when she went in the company of accused after her father left the house at about 8 a.m. She was sitting outside the door of her house and accused asked her what she was doing and finding that she was idle asked her to accompany him to the shack to collect fire wood. She also went with him to the shack near the sea shore with the intention of collecting the fire wood. It is her specific case that after entering the shack she found that none else was there and thereafter she has stated that the accused forced and compelled her to lie down and thereafter lifted her petti-coat, removed her under garments and committed the act of sexual intercourse with her. After completing this act both of them got up and she left the shack for collecting fire wood. She has further stated that this act was repeated 10 to 12 times when and for the first time she complained to her grand mother she was taken to the doctor for examination and she was found to be carrying in the 6 month of pregnancy. In the complaint it is stated that this act was repeated for 20 to 25 times and considering that period of six months had passed that does not appear to be improbable. She has further stated that after her first menstruation period she was told by elderly ladies in the family not to live in the company of male persons and not to do any undesirable act. She had also left the school before she attained the age of puberty.

8. It is in her cross examination that although she has stated in the complaint that Suresh (accused) locked the door of the shack it did not appear there and she could not explain this omission. In the complaint she also stated that she was compelled to lie down on the ground with force by Suresh and it is her specific admission that she was aware of the bad intention of Suresh when he was bolting the door from inside. She was forced on the ground by holding her shoulders although it is obvious that at that time she must have become aware of the intention of the accused, she had the audacity of stating that she was not aware of any intention on the part of the accused. After narrating the incident of first sexual inter course she also admitted that having watched the T.V. and Video at Navpada, she had seen scenes of rapes. Taking into consideration that she had reached the age of understanding and had attained puberty much before the incident coupled with the fact that the act of sexual inter course was repeated at least 12 to 15 times and at times even inside her own house, we are fully convinced that even the first act was with the consent of the victim and at no time there was an element of force used by the accused for committing the sexual inter course. Even the Ld. trial Judge after relying upon the evidence of the prosecutrix has also observed regarding this aspect of the matter.

9. Even though it is the case of the prosecutrix being a consenting party, evidence regarding her age is clinching and was not even challenged on behalf of the accused. There is evidence of her school leaving certificate, coupled with the entry in the register of the hospital where her mother delivered and medical evidence in which doctor found the age to be the same as is claimed by the victim and as is clear from the date of birth mentioned above.

10. In fact the prosecutrix also delivered a female child as a result of this pregnancy and it is admitted fact at this stage that the said female child has been given in adoption in a good family by the institute where the prosecutrix was living as per the order of the court alongwith the child.

11. It is on the background of these facts that the wife of the accused has filed an affidavit today stating therein that the facts clearly show that there was no force used by the accused against the prosecutrix and as she was aged about 15 years despite such consent, the offence of rape is committed. She has stated that she was married to Suresh some 10 years back and is having three children all of whom are minor and her husband is a fisherman and their only source of livelihood is the earning of her husband by fishing. The relationship between her husband and her brother in law are strained and they are living and messing separately in a part of the same house.

Her father in law who is an old man is not keeping good health and is dependent upon them and in addition the sister of her husband Manjula is physically handicapped as she is affected by polio. She is unmarried and is entirely dependent on her husband's income. They own a fishing vessel for which they have raised a loan of Rs.3 lacs and sending her husband to jail for a long period would literally ruin their family. Being a woman she is also aware of the precarious condition in which Punam is placed. As a genuine well wisher she has allowed the matter to be settled and for that purpose she has also sold her ornaments in order to adequately compensate Punam and therefore in the end she has prayed that the sentence of jail of her husband be reduced to the period already undergone by the accused.

12. In the affidavit filed by the father of the prosecutrix it has been clearly stated that when he first approached the accused for giving legitimacy to the child and for some sympathy, the accused did not pay any heed and refused to help them to come out of the trauma. He has further stated that the accused has now agreed to pay Rs. four lacs which have been deposited with their counsel by the counsel for the accused and the said amount shall be deposited in the name of Punam-(victim) in fixed deposits in Bank of India Uran Branch, Raigad which would fetch her reasonable amount of interest.

13. We have also heard the Ld. Addl. Public Prosecutor. He has cited an authority reported in 1996 Cri.L.J. 1882 (Supreme Court) State of Rajasthan Vs. Ram Naraian & ors. The case before the Apex Court was entirely different on facts and it is clear from the judgment of Apex Court that in that case the Prosecutrix was made to believe that all the women folk had assembled on the outskirts of the village to go to a circus and accused induced her to accompany them. Believing their statement she accompanied them to the outskirts but did not find women folk there. She was taken at knife point to another village by name Siroha and from there to Jaipur in a truck. In Jaipur, she was wrongfully confined in a house. From Jaipur, she was taken to Murtipura where first accused respondent had sexual intercourse with her. She was wrongfully confined in that house. From there she was brought back to her village and was confined in the house of the first accused. Then on coming to know of this her father i.e. the father of the victim made a complaint to the police and the police recovered her from the house of the first accused. These facts clearly show that she was deceived by telling that women had assembled at the outskirts and after she went there she was kidnapped at knife point and thereafter she was raped. The Apex court did not accept the contention on behalf of the accused that the prosecutrix was a consenting party and therefore came to the conclusion that the High Court was not justified in reducing the sentence. The ratio laid down by this judgment does not apply to the facts of this case which we have already discussed above.

14. After giving our anxious consideration to the aforesaid facts and circumstances and arguments advanced on behalf of the accused by the learned counsel Shri Mundargi and the arguments advanced by Shri Nitin Pradhan for intervenor as well as the learned Addl. Public Prosecutor Shri Mhaispurkar, we are also convinced that this is a matter in which settlement in terms referred to above is all the more in the interest of the prosecutrix who comes from a poor family and would have something to fall back upon even if as a result of earlier happenings in her life she is not in a position to get married. The fact that the female child born to her has been given in adoption in a good family the name of which family has been kept secret as per the rules by the said institution has also weighed with us to some extent. The evidence on record also clearly establishes that Punam had attained the age of puberty about a year before the first act of sexual inter course and even the said act was with her consent and therefore the question of upholding the conviction under Section 342 of IPC does not arise at all. However the facts clearly establish that Punam was under the age of 16 years at the relevant time and inspite of her consent the act would amount to

an offence of rape as defined under Section 375 of the IPC and punishable under Section 376 of IPC. A reference to Section 376 of IPC shows that although the minimum sentence is prescribed, the court is empowered to award lesser punishment for adequate and special reasons to be recorded in the judgment. The reasons mentioned above, specially the fact that even the first act of sexual inter course was with consent and that the female child born out of these acts has been given in adoption in good family and is settled and also taking into account that substantial amount is deposited by the accused which may be utilized for Punam's future maintenance even if she is not married, we are inclined to accept that this and other reasons stated in detail in earlier part of this judgment are sufficient and can be said to be adequate and special reasons for awarding lesser sentence for the offence punishable under Section 376 of IPC. The conviction for offence punishable under Section 342 of IPC will have to be set aside in view of the above stated facts and circumstances.

15. We are therefore inclined to allow the appeal partly by setting aside the conviction for offence under Section 342 of IPC and sentence passed on that count. At the same time we confirm the conviction of appellant accused for the offence punishable under Section 376 of IPC but reduce the sentence to R.I. for six months and to pay a fine of Rs.1000 and in default to suffer R.I. for one month. We may specifically mention that the amount of Rs. four lacs which has been deposited with the learned counsel appearing for the intervenor by the learned counsel for the accused shall be deposited in fixed deposit in the Bank of India Uran Branch in the name of Punam in such a way that it would fetch maximum amount of interest on a monthly or quarterly basis. Zerox copies of the Fixed Deposit receipts shall be shown to the counsel for the accused.

In view of the disposal of appeal, criminal application no.1847 of 1997 also stands disposed of accordingly.

Writ to go down forthwith.

Order accordingly.