

CASE NO.:
Appeal (crl.) 32 of 2007

PETITIONER:
Rajendra Datta Zarekar

RESPONDENT:
State of Goa

DATE OF JUDGMENT: 04/12/2007

BENCH:
G.P. Mathur & G.S. Singhvi

JUDGMENT:
J U D G M E N T

CRIMINAL APPEAL NO. 32 OF 2007

G. P. MATHUR, J.

This appeal has been preferred under Section 2(A) of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 against the judgment and order dated 16.8.2006 of Goa Bench of Bombay High Court by which the appeal filed by the State was allowed and judgment and order dated 28.7.2004 of First Ad hoc Assistant Sessions Judge, Panaji in Sessions Case No. 1 of 2004 acquitting the accused was set aside. The High Court convicted the appellant Rajendra under Sections 376(2)(f) and 342 IPC and sentenced him to ten years R.I. and a fine of Rs.10,000/- under the first count and one month\022s R.I. and a fine of Rs.1,000/- under the second count.

2. The case of the prosecution, in brief, is that PW-2 Satyam Ahire along with his wife PW-1 Pushpa and three children was residing in Usgao in Ponda. He was working as a security officer in Bethora Industrial Estate. In the evening of 14.10.2003 his eldest daughter Supriya was studying at her home while the second daughter PW-8 Sonia, aged about six years, was playing in the courtyard of his house. PW-4 Mohandas Gaonkar, uncle of Pushpa, owned some rooms close by which were given on rent to some boys who were working in the Nestle factory. The accused Rajendra was living on rent in one of these rooms. At about 5.00 P.M. on 14.10.2003 PW-1 Pushpa heard cries of her daughter Sonia from inside the room, which was in occupation of the accused Rajendra. She went to the room and found it closed from inside and, therefore, she knocked at the door. After some time the accused Rajendra opened the door of the room. She enquired from the accused as to what he was doing inside the room along with her daughter but he kept quiet. On enquiry Sonia told her mother that the accused Rajendra took her inside his room while she was playing in the courtyard. He closed the door, switched off the light and forced her to lie down on the mat. Thereafter the accused removed her panty and also removed his own pant and lied down over her. He inserted his private part in the private part of Sonia and did some movement. Pushpa then brought Sonia to her own house and called her sister and other family members. After Satyam Ahire (father of Sonia) had come back, they went to the Police Station, Ponda where they reached at about 9.00 P.M. The PSI of Ponda Police Station sent them to Medical College where Sonia was medically examined and the doctor confirmed that she had been subjected to rape. Thereafter a formal FIR was registered at 11.45

P.M. on 14.10.2003 at P.S. Ponda.

3. After the case had been registered at the police station the same was investigated by PW-11 Shivram Vaigankar, PSI. He recorded statements of witnesses under Section 161 Cr.P.C. The accused Rajendra was arrested at 5.00 A.M. on 15.10.2003 and the clothes which he was wearing were taken into custody. He also took in custody the clothes of the girl Sonia. He prepared a site plan and panchnama of the scene of occurrence in presence of two witnesses and also seized a bed sheet and nylon mat. A photograph of the room was also taken. After completing investigation he submitted charge-sheet under Sections 342 and 376 IPC against the accused Rajendra.

4. The prosecution in support of its case examined 11 witnesses before the trial court and filed some documentary evidence. The learned Assistant Sessions Judge, after appraisal of the evidence, came to the conclusion that the case of the prosecution was not established beyond doubt against the accused Rajendra and he accordingly acquitted him by the judgment and order dated 28.7.2004. Feeling aggrieved by the judgment and order of the learned Assistant Sessions Judge the State preferred an appeal before the High Court. The High Court, after a detailed consideration of the evidence, allowed the appeal and reversed the judgment of acquittal recorded by the Assistant Sessions Judge. The High Court convicted the accused under Section 376(2)(f) IPC and sentenced him to ten years R.I. and a fine of Rs.10,000/- and in default to undergo six month\022s S.I.. He was further convicted under Section 342 IPC and was sentenced to undergo one month\022s R.I. and a fine of Rs.1,000/- and in default to undergo 15 days\022 S.I.

5. We have heard Mr. Vinay Navare, learned counsel for the appellant Rajendra and Ms. A. Subhashini, learned counsel for the State of Goa, and have perused the record.

6. PW-4 Mohandas Gaonkar has deposed that he owns three houses and has four rooms in one of his houses out of which one room had been given on rent to some boys who were working in Nestle factory. The accused Rajendra, who was employed in Nestle factory, had been given one room on rent and his duty hours were from 8.00 A.M. to 4.30 P.M. On 14.10.2003 he returned from the market at about 6.30 P.M. when PW-1 Pushpa, her sister and some others were present there in the house. Pushpa told him about the incident regarding commission of rape by the accused Rajendra on Sonia inside the room.

7. PW-2 Satyam Ahire deposed that Mohandas Gaonkar is his wife\022s uncle and is a close neighbour. He had given one room in his house to boys working in Nestle factory and the accused Rajendra was a tenant in one such room. On 14.10.2003 he had gone to the market and returned from there after 5.00 P.M. When he returned home he found his daughter Sonia sweating and was in a very bad condition. She was lying in bed. His wife PW-1 Pushpa informed him that the accused Rajendra had pulled Sonia inside his room and had committed rape upon her. He has further deposed that he then went to police station by rikshaw and from there he was sent to medical college for medical examination of Sonia.

8. PW-1 Pushpa has given a detailed version of the incident. She has deposed that she has three children and Sonia, who is aged about six years, is her second daughter. Her uncle Mohandas Gaonkar lives nearby and he had let out one of the rooms in his house to the accused Rajendra. In the evening of 14.10.2003 her elder daughter was studying at home while Sonia was playing in the courtyard near the house. While she was preparing some eatables she heard the cries of Sonia coming from the side of the house of her uncle Mohandas Gaonkar. She immediately rushed there and found that the room which was under the tenancy of the accused Rajendra was closed from inside. She also heard the cries of Sonia coming from inside the room. She then knocked at the door which was opened by the accused after about five minutes. She enquired from the accused as to what had happened but he kept quiet. Sonia, who had rushed to her mother,

informed her that she was taken inside the room by the accused and thereafter he closed the room from inside and switched off the light. The accused forced her to lie down on the mat and after removing her panty also removed his pant and lied down over her. He inserted his private part inside her private part and did some movement. Pushpa then came to her own house and called her family members. After her husband had come back from the market she went to the police station to lodge the report. The FIR was lodged by her which is Exhibit 8. The police referred her daughter Sonia to Goa Medical College for her medical examination. She went there where Sonia was medically examined. She was cross-examined at length but nothing material has come out in the same which may throw any doubt regarding the prosecution version of the incident. In cross-examination she has said that her husband was not present and had gone to market and he returned from the market at about 5.30 P.M. Sonia was crying loudly and was having great difficulty in passing urine. She has further deposed that one day before her statement in court Sandesh, brother of the accused Rajendra, and his mother had come to her house pleading for mercy. She denied the defence suggestion that she had some kind of relations with the accused and used to borrow money from him and had falsely implicated him as she wanted some more money from him.

9. The prosecutrix Sonia was examined as PW-8. The learned Assistant Sessions Judge put questions to her in order to ascertain whether she was in a position to give statement in court. After being satisfied about her mental capacity, her statement was recorded. The learned Assistant Sessions Judge has noted that she wanted to be near her mother at the time of recording her statement and that the accused had been sent little away with the consent of his advocate so that the witness may be comfortable. Sonia stated that the accused Rajendra was residing in the room near her house. When she was near the house of her aunty the accused came near her and pulled her inside his room and closed it from inside. He removed her panty and his own pant and made her lie down on the mat. He lied over her, inserted his private part in her private part and did some movement. She cried out of pain. After few minutes her mother came and knocked at the door. After couple of minutes the accused opened the door. She then narrated the entire incident to her mother. She identified the panty and frock, which she was wearing at the time of the incident and were seized by police, during the course of her statement in court. She further said that she was taken to the hospital for her medical examination.

10. PW-10 Dr. E.J. Rodrigues, Associated Professor in Forensic Medicine, Medical College, Goa, examined Sonia at about 11.45 P.M. on 14.10.2003 in the presence of Dr. Mrinalini, lecturer in the Medical College. He has deposed that the girl Sonia was of thin built having a height of 97 cms. and weighing 26 kgs. The gait of Sonia was slightly painful. Her genital development was of infant type nature. Pubic hairs were not erupted and there were no injuries on inner aspects of thighs. There was a bruise reddish 2 x 1.5 cms. area on right labia majora and right labia minora, which was tender to touch. There was a laceration of 5 mm x 2 mm on right labia minora near the clitoris which was tender to touch. The hymen was intact. There were no fresh or old tears to hymen. Hymenal opening admits tip of little finger. Hymenal border was bruised, edematous and tender to touch. The vaginal contents and vaginal walls were normal. He opined as under: -

\023I certify that on physical genetical examination there is evidence of recent penetration. Vaginal swabs and smear slides were retained for serological examination.\024

11. The same doctor also examined the accused Rajendra at 12.15 P.M. on 15.10.2003 at the request of police of Ponda Police Station in the presence of Dr. Girish Kamat. There were no injuries on his body. His genital development was good. His pubic hairs were black and

not matted with blood or semen (preserved). On physical and genital examination there was nothing to suggest that Rajendra was incapable of sexual intercourse.

12. PW-3 Raju Sunktankar is the photographer who took photographs of the room and he has proved the same. PW-5 Tarun Kumar is a panch witness of seizure of clothes of PW-8 Sonia and of accused Rajendra. PW-6 Narayan is the panch witness of seizure of mattress and bed sheet. PW-9 Sanjay had examined the blood group of Sonia and of accused Rajendra. PW-11 Shivram Vaigankar, PSI of Ponda Police Station has deposed about the lodging of FIR by Pushpa and registration of the case after he had received the medical examination report of Sonia. He has deposed about the various steps taken by him during the course of investigation of the case.

13. We have given above the gist of the evidence adduced by the prosecution. The evidence shows that the accused Rajendra was living as tenant in a room in the house of PW-4 Mohandas Gaonkar, who is uncle of PW-1 Pushpa. The room in which the accused was living is close to the house of the victim. In the evening of 14.10.2003 when Sonia was playing outside the courtyard of her house the accused pulled her and took her to his own room, bolted it from inside and after removing the clothes of Sonia and his own pant committed rape upon her. The cries of Sonia attracted her mother Pushpa who came there, knocked at the door and after some time the accused opened the same. Sonia was crying loudly and she narrated the incident to her mother. Pushpa went to the police station after her husband PW-2 Satyam Ahire and some other relations had come there. The police sent Sonia to Medical College where she was medically examined by PW-10 Dr. Rodrigues who certified that she had been subjected to rape. Thereafter the FIR of the incident was registered at the police station at 11.45 p.m. the same night. In spite of fairly lengthy cross-examination nothing has come out in the statements of Pushpa and Sonia which may throw even a slightest doubt on the prosecution version of the incident. There is no enmity of any kind between Pushpa and the accused Rajendra which may impel her to falsely implicate the accused. Though a suggestion regarding taking of some money by Pushpa from the accused has been made and a further suggestion has been made that she wanted to have some kind of relationship with the accused but the same has not at all been made probable much established by any evidence. The rape leaves a permanent scar and has a serious psychological impact on the victim and also her family members and, therefore, no one would normally concoct a story of rape just to falsely implicate a person. In the present case there was not even an iota of evidence to show that PW-1 Pushpa or her husband Satyam Ahire had any reason whatsoever to falsely implicate the accused Rajendra. We have carefully gone through the evidence and in our opinion the evidence lead by the prosecution fully establishes the case against the accused Rajendra beyond any shadow of doubt.

14. Learned counsel for the appellant has next submitted that the doctor had found that the hymen of Sonia was intact and, therefore, the charge for rape under Section 376 IPC as defined in Section 375 IPC has not been made out. An identical question was considered by a Bench of this Court in Santosh Kumar vs. State of M.P. JT 2006 (8) SC 171, and para 10 of the report is reproduced below: -

\02310. The question, which arises for consideration, is whether the proved facts establish the offence of rape. It is not necessary for us to refer to various authorities as the said question has been examined in considerable detail in Madan Gopal Kakkad v. Naval Dubey JT 1992 (3) SC 270 and paras 37 to 39 of the said judgment are being reproduced below:

\02337. We feel that it would be quite appropriate, in this context, to reproduce the opinion expressed by Modi in Medical Jurisprudence and Toxicology (Twenty First Edition) at page 369 which reads

thus:

\023Thus to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one.\024

38. In Parikh\022s Textbook of Medical Jurisprudence and Toxicology, the following passage is found:

\023Sexual intercourse. \027 In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains.\024

39. In Encyclopedia of Crime and Justice (Vol. 4) at page 1356, it is stated:

\023... even slight penetration is sufficient and emission is unnecessary.\024

Therefore, the absence of injuries on the private parts of a victim specially a married lady cannot, ipso facto, lead to an inference that no rape has been committed.\024

Here the victim was a very young girl of six years of age and it is quite likely that full penetration did not take place as the accused is a grown up person of over 20 years of age. The injuries clearly indicate that rape, as defined in Section 375 IPC, did take place.

15. Learned counsel for the appellant further submitted that the sentence of ten years R.I. awarded by the High Court is very severe and the same may be reduced. It may be mentioned here that Section 376(2)(f) IPC specifically provides that where the victim is less than 12 years of age the sentence awarded shall not be less than 10 years but it may be for life and the accused shall also be liable to fine. The proviso, no doubt, says that the court may for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than ten years. Here the victim PW-8 Sonia was aged about six years and, therefore, the case is fully covered by clause (f) of sub-section (2) of Section 376 IPC and the sentence awarded cannot be less than ten years unless there are adequate and special reasons for doing so. We do not find any adequate or special reasons for imposing a sentence of less than ten years. Learned counsel for the appellant placed reliance on State of Chhattisgarh vs. Derha (2004) 9 SCC 699, for reducing the sentence. In the authority cited what weighed with the court was that the accused was hardly eighteen years of age and had already served about six and half years\022 imprisonment. He was married and had a

family. In these circumstances the court considered it proper to reduce the sentence to seven years. Such is not the case here and, therefore, we are legally bound to award a sentence of ten years R.I. However, we feel that the fine of Rs.10,000/- awarded under Section 376(2)(f) IPC is excessive and the same is reduced to Rs.1,000/- and the fine of Rs.1,000/- awarded under Section 342 IPC is set aside.

16. In the result the appeal is dismissed with the modification that the fine of Rs.10,000/- imposed under Section 376(2)(f) IPC is reduced to Rs.1,000/- and the fine of Rs.1,000/- imposed under Section 342 IPC is set aside. The substantive sentence of ten years R.I. awarded under Section 376(2)(f) IPC and one month R.I. under Section 342 IPC are maintained.

JUDIS