DATTA

v.

STATE OF MAHARASHTRA

(Criminal Appeal No. 295 of 2005)

NOVEMBER 24, 2010

[HARJIT SINGH BEDI AND CHANDRAMAULI KR. PRASAD, JJ.]

Penal Code, 1860:

s.376 – Rape of a child of 10-12 years – Acquittal by trial court – Conviction by High Court with 7 years RI – Held: The High Court has given a positive finding that the statement of the prosecutrix and her mother, clearly spelt out a case of rape and that as she was merely a child of 10-12 years of age, there was no reason whatsoever as to why she would tell a lie – The High Court has also observed that the trial court appeared to have misread the evidence of the doctor inasmuch as the evidence read as a whole clearly revealed that there had been partial penetration of the vagina of the prosecutrix – The evidence of the doctor, P.W. 1 corroborates the fact that rape had indeed been committed – In the light of the facts, there is no reason to discard the evidence of the victim and her mother – As regards sentence, s.376 provides a minimum sentence of 10 years, for rape of a child below 12 years of age, though in exceptional cases a lesser sentence can be awarded – The High Court has already awarded that lesser sentence – The Court is thus disinclined to interfere in the matter – Sentence/Sentencing.

Prithi Chand v. State of Himachal Pradesh ***1989 (1) SCR 123*** *=AIR 1989 SC 702 – relied on.*

Case Law Reference:

1989 (1) SCR 123	**relied on**	**para 3**

A CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 295 of 2005.

From the Judgment and Order dated 27.07.2004 of the High Court of Judicature of Bombay Bench at Aurangabad in
B Criminal Appeal No. 59 of 1986.

Shivajit M. Jadhav for the Appellant.

Sushil Karanjkar, Sanjay V. Kharde and Asha Gopalan Nair for the Respondent.

C The following order of the Court was delivered

ORDER

1. The appellant was prosecuted for an offence punishable
D under Section 376 of the Indian Penal Code for having committed rape on P.W. 2 on the 24th of January, 1984, at about 5:00p.m. A report was lodged at the Parbhani Police Station (Rural) at 11:30p.m. the same night by the prosecutrix. In this Report, she stated that she had been raped by the
E appellant while she was collecting cow dung cakes from the cattle shed in her family's property and immediately after the rape had been committed, she had informed her mother, P.W.3, about what had transpired. The prosecutrix was also subjected to a medical examination by P.W. 1 who found no injuries on
F labia majora but the hymen was torn and lacerated but as there was no sperm detected in her it was not possible to give any categoric opinion about rape. In cross examination, however, the doctor admitted that the injuries that had been found on the prosecutrix could have been possible if there had been partial penetration of the vagina. The trial court in its judgment dated
G 24th September, 1985, held that as there was no medical evidence of rape the prosecution story could not be proved, beyond doubt. It, accordingly, made an order of acquittal. An appeal was thereafter taken to the High Court which cognizant of the fact that it was dealing with an appeal against acquittal,
H

has set aside the judgment of the trial court and has convicted the appellant herein under Section 376 of the IPC and sentenced him to seven years rigorous imprisonment. In arriving at this conclusion, the High Court has given a positive finding that the statement of P.W.2, the prosecutrix and her mother, P.W.3, clearly spelt out a case of rape and that as she was merely a child of 10 to 12 years of age as per the medical evidence, there was no reason whatsoever as to why she would tell a lie. The High Court has also observed that the trial court appeared to have misread the evidence of the doctor inasmuch that the evidence read as a whole clearly revealed that there had been partial penetration of the vagina of the prosecutrix.

2. Mr. Shivaji M. Jadhav, the learned counsel for the appellant has, however, submitted that in the light of the fact that from the medical examination of the prosecutrix on the 30th January, 1994, it was not clear as to the commission of rape and that the statement of doctor, P.W.1, was equally ambivalent, no case was made out. We, are, however, not inclined to accept this submission for the reason that medical report speaks of the fact that the hymen had been torn and there was a laceration on the posterior vaginal wall. Likewise, the doctor appearing as P.W. 1 stated that the possibility that the injuries had been caused to the hymen and the vaginal wall though partial penetration could not be ruled out. We find that the evidence of the doctor, P.W. 1 corroborates the fact that rape had indeed been committed. As a matter of fact, P.W. 2 who was barely a child herself stated that there had been only partial penetration of the vagina. In the light of the facts, we see no reason to discard the evidence of P.W.2 and P.W.3.

3. Furthermore, in a similar matter in *Prithi Chand v. State of Himachal Pradesh* AIR 1989 SC 702, this Court has opined that merely because the doctor has found that the vagina admitted one finger with difficulty, it could not be inferred that there was no penetration as the vaginal muscles could have contracted by then. This Court (in the same judgment) also held

A that mere absence of spermatozoa could not cast a doubt on the correctness of the prosecution case.

4. Faced with this situation, Mr. Jadhav, has submitted that the incident had happened way back in 1984 when the B accused was a young man and as of now he was a married family person and some mitigation in the sentence was thus called for. We find no merit in this submission as well. Section 376 of the IPC provides that the minimum sentence for rape of child below 12 years of age is 10 years though in exceptional C cases a lesser sentence can be awarded. The High Court has already awarded that lesser sentence. We are thus disinclined to interfere in the matter.

5. The appeal is dismissed.

R.P. Appeal dismissed.