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TULSHIDAS KANOLKAR

v.

THE STATE OF GOA

OCTOBER 27, 2003

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[DORAISWAMY RAJU AND ARIJIT PASAYAT, JJ.]

*Penal Code, 1860—Sections 376 and 506(2)—Rape—Mentally challenged victim—Delay in lodging FIR—Consent—Plea of Held, on facts, victim is totally unaware of dreadful consequences—Hence, there is no delay in lodging FIR—Mentally challenged victim cannot legally give consent to sexual intercourse Legislature advised to prescribe higher minimum sentence for rape of mentally challenged victim.*

D Appellant accused committed rape of a mentally challenged victim several times. The parents of the victim came to know of it on seeing the legs of the victim being swollen and signs of advanced stage of pregnancy. The victim pointed out accusing fingers at the appellant. The mother of the appellant offered a part of the amount necessary for termination of the pregnancy of the victim. There was no termination of pregnancy and the victim delivered a stillborn child. The father of the victim lodged a complaint with the police. The appellant was charged for the offences punishable under section 376 and 506(2) IPC. The appellant contended before the trial court that there was a delay in lodging of first information report: that certain persons were not examined by the prosecution; and that since the appellant had sexual intercourse with the victim on several occasions, there was a clear consent by the victim.

G The trial court held the appellant guilty under sections 376 and 506(2) IPC and sentenced him to imprisonment for 10 years and one year along with a fine of Rs.10,000 and Rs. 2,000 respectively with default stipulation. The High Court, in appeal, upheld the conviction but reduced the sentence to 7 years in relation to offence under section 376 IPC. Hence the appeal.

H The respondent State contended that considering the nature of evidence and gravity of offence, the High Court has acted liberally in

reducing the sentence while upholding the conviction. A

Dismissing the appeal, the Court

**HELD : 1.** The unusual circumstances satisfactorily explained the delay in lodging of the first information report. In any event, delay *per se* is not a mitigating circumstance for the accused when accusations of rape are involved. Delay in lodging first information report cannot be used as ritualistic formula for discarding prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered, the Court is to only see whether it is satisfactory or not. In a case if the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is a relevant factor. On the other hand satisfactory explanation of the delay is weighty enough to reject the plea of false implication or vulnerability or prosecution case. As the factual scenario shows, the victim was totally unaware of the catastrophe which had befallen to her. That being so, the mere delay in lodging of first information report does not in any way render prosecution version brittle. [982-D-G] B C D

**2.** Non-examination of some persons *per se* does not corrode vitality of prosecution version, particularly when the prosecutrix has notwithstanding her mental deficiencies, withstood incisive cross-examination pointed to the appellant as the perpetrator of the crime. [982-H] E

**3.** A mentally challenged girl cannot legally give a consent which would necessarily involve understanding of the effect of such consent. It has to be a conscious and voluntary act. There is gulf of difference between consent and submission. Every consent involves a submission but the converse does not follow, and mere act of submission does not involve consent. An act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance or passive giving in when the faculty is either clouded by fear or vitiated by duress or impaired due to mental retardation or deficiency cannot be considered to be consent as understood in law. For constituting consent, there must be exercise of intelligence based on the knowledge of the significance and the moral effect of the act. A girl whose mental faculties are undeveloped, cannot F G H

A be said in law, to have suffered sexual intercourses with consent.

[1983-A-C]

4.1. While the murderer destroys the physical frame of his victim, a rapist, degrades and defiles the soul of a helpless female. When the victim is a mentally challenged person, there is not only physical violence and degradation and defilement of the soul, but also exploitation of her helplessness. This is a classic example when the baser instincts of the appellant overtook his moral values and human insensitivity and he ravished the unsuspecting victim incapable of comprehending the vicissitudes of the dastardly act, not once but several times. So innocent was the victim that she was even not aware of the dreadful consequences. The mental faculties of the victim were undeveloped and her intelligence quotient was not even 1/3rd of what the normal person has.

[1980-H, 1981-A-C]

4.2. In subsection (2) of section 376, clause (f) relates to a physical age of a woman under 12 years of age. In such a case sentence higher than that prescribed for one under sub-section (1) is provided for. But when the mental age of victim is not even 12 years of age, she is definitely at more vulnerable situation. A rapist in such a case in addition to physical ravishment exploits her mental non-development and helplessness. The legislature would do well in prescribing higher minimum sentence in a case of this nature. The gravity of offence in such case is more serious than the enumerated categories indicated in sub-section (2) of section 376. [1983-E-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 298 of 2003.

From the Judgment and Order dated 31.10.2001 of the Bombay High Court at Goa in CrI. A. No. 78 of 2000.

Surya Kant (AC) for the Appellant.

Ms. A. Subhashini for the Respondent.

The Judgment of the Court was delivered by

ARIJIT PASAYAT, J. : While the murderer destroys the physical frame of his victim, a rapist degrades and defiles the soul of a helpless

female. When the victim is a mentally challenged person, there is not only physically violence and degradation and defilement of the soul, but also exploitation of her helplessness. The case in hand is a classic example when the baser instincts of the appellatant overtook his moral values and human sensitivity and he ravished the unsuspecting victim incapable of comprehending the vicissitudes of the dastardly act, not once but several times. So innocent was the victim that she was even not aware of the dreadful consequences. The mental faculties of the victim were undeveloped and her Intelligence Quotient (in short 'I.Q.') was not even 1/3rd of what a normal person has. Tragedy struck on the victim, sometimes in 1999, when parents of the victim noticed that her legs were swollen and there were signs of advanced stage of pregnancy. They were shocked beyond limits. They asked the victim as to who was responsible for her pregnancy. She in her own way pointed out accusing fingers at the appellatant and said that on some pretext or the other, ravished her. When this shattering news was conveyed to the parents of the victims, they questioned the appellatant. It is on record that some money was offered to them by mother of the appellatant to have termination of pregnancy. When asked about the possibility of termination of pregnancy, the doctor indicated a sum of Rs.6,000 as the amount required. Since the appellatant's family were willing to part with only Rs.2,000, there was no termination of pregnancy and evidence shows that a stillborn child was delivered by the victim. Information was lodged with the police on 10th August, 1999 by PW1 (father of the victim). Investigation was undertaken for the commission of the offence of rape and threat given to the victim by the appellatant. The accused was charge sheeted for offences punishable under Section 376 and 506(2) of the Indian Penal Code, 1860 (for short the 'IPC'). During trial, accused pleaded false implication. From the tenure of cross-examination and statement made under Section 313 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.'), it appears that indirectly a case of consent was pleaded. It was highlighted that there was delay in lodging of first information report which rendered the prosecution version unacceptable. Many persons who could have thrown light as allegedly victim made disclosure about the involvement of appellatant before them were not examined. As there was alleged intercourse on several occasions, it is otherwise clearly a case of consent.

Learned Additional Sessions Judge, Panaji, considered all these pleas H

A and held the accused guilty, imposed sentences of 10 years and one year respectively for the two charged offences along with a fine of Rs.10,000 and Rs.2,000 respectively with default stipulation.

B In appeal, the stand taken before the Trial Court was reiterated before the High Court of Bombay at Goa, which upheld the conviction, but reduced the sentence to 7 years in relation to the offence punishable under Section 376 IPC. The stands taken before the trial Court and the High Court were pressed into service by learned counsel appearing for the accused appellant.

C Learned counsel for the State on the other hand submitted that considering the nature of evidence and the gravity of offence, the High Court has rather acted liberally in reducing the sentence while upholding the conviction.

D We shall first deal with the question of delay. The unusual circumstances satisfactorily explained the delay in lodging of the first information report. In any event, delay *per se* is not a mitigating circumstance for the accused when accusations of rape are involved. Delay in lodging first information report cannot be used as a ritualistic formula for discarding prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered, the Court is to only see whether it is satisfactory or not. In a case if the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is a relevant factor.

F On the other hand satisfactory explanation of the delay is weighty enough to reject the plea of false implication or vulnerability of prosecution case. As the factual scenario shows, the victim was totally unaware of the catastrophe which had befallen to her. That being so, the mere delay in lodging of first information report does not in any way render prosecution version brittle.

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Non-examination of some persons *per se* does not corrode vitality of prosecution version, particularly when the prosecutrix has, notwithstanding her mental deficiencies, withstood incisive cross-examination pointed to the appellant as the perpetrator of the crime. The plea of consent is too

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shallow to even need detailed analysis or consideration. A mentally challenged girl cannot legally give a consent which would necessarily involve understanding of the effect of such consent. It has to be a conscious and voluntary act. There is gulf of difference between consent and submission. Every consent involves a submission but the converse does not follow, and mere act of submission does not involve consent. An act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance or passive giving in when the faculty is either clouded by fear or vitiated by duress or impaired due to mental retardation or deficiency cannot be considered to be consent as understood in law. For constituting consent, there must be exercise of intelligence based on the knowledge of the significance and the moral effect of the act. A girl whose mental faculties are undeveloped, cannot be said in law, to have suffered sexual intercourses with consent.

We find no infirmity in the conclusions arrived at by the Trial Court and the High Court to warrant interference. The appeal fails.

The omega is said, but a few words are necessary to be said about prescription of sentence in a case where a mentally challenged or deficient woman is the victim. In sub-section (2) of Section 376, clause (f) relates to physical age of a woman under 12 years of age. In such a case sentence higher than that prescribed for one under sub-section (1) is provided for. But what happens in a case when the mental age of victim is not even 12 years of age? Such a woman is definitely at more vulnerable situation. A rapist in such a case in addition to physical ravishment exploits her mental non-development and helplessness. The legislature would do well in prescribing higher minimum sentence in a case of this nature. The gravity of offence in such case is more serious than the enumerated categories indicated in sub-section (2) of Section 376.

We record our appreciation for the fair manner in which Mr. Surya Kant, learned amicus curiae and Ms. A. Subhashini for the respondent-State placed all relevant materials for disposal of the appeal.

The appeal as indicated above, is sans merit and is dismissed. The appellant shall undergo the remaining period of sentence imposed.

B.S.

Appeal dismissed. H