Supreme Court of India
Jameel vs State Of Maharashtra on 16 January, 2007
Author: S.B. Sinha
Bench: S.B. Sinha, Markandey Katju

CASE NO.:
Appeal (crl.) 173 of 2006

PETITIONER:
Jameel

RESPONDENT:
State of Maharashtra

DATE OF JUDGMENT: 16/01/2007

BENCH:
S.B. Sinha & Markandey Katju

JUDGMENT:

J U D G M E N T S.B. Sinha, J :

This appeal is directed against a judgment and order dated 27.01.2005 passed by a learned Single Judge of the Aurangabad Bench of the Bombay High Court in Criminal Appeal No. 23 of 1991 whereby and whereunder the appeal preferred by the appellant herein against a judgment of conviction and sentence dated 16.01.1991 was dismissed.

Appellant herein is a resident of Ambedkarnagar, Nanded. He was a mechanic of two-wheelers. One Shivrani Dhondiba Kshirsagar, aged about 6 years at that time, was also residing at House No. 14, Ambedkarnagar, Nanded. He allured the said child to ride with him on his Luna. She was taken towards Aerodrome. A search was made for her, but she could not be traced. She came back to her house weeping and crying. It has been noticed by the High Court :

" When her mother made query, she told that the person who used to repair Luna had taken her towards aerodrome on Luna and thee, after removing her nicker, he urinated on his private part. She also told that as a result of the same, she was having pains at her private part. After arrival of the father of the prosecutrix, Vandana, the mother of the prosecutrix narrated the incident to him. The prosecutrix also narrated the said incident to her father. Thereafter, father tried to search the person who had committed the above acts, but he was not traced "

A First Information Report could not be lodged immediately as night had set in. On the next day, the girl was taken to the 'Noor Garage' where the appellant was identified as the person who had committed the 'mischievous act' against her on the previous day. The First Information Report thereafter was lodged. The prosecutrix was medically examined by one Dr. Sheela Kadam. The medical report reads as under :

"(i) Hymen intact

(ii) No evidence of injury over valva

(iii) External anal spinctor abrasion anteriorly and laterally about < cm x < cm. Redness of spinctor PR powerful.

(iv) For vaginal examination not possible.

(v) No semen deposit and hymen intact. So wet smear for spearm taken from rectum. Negative.

There is evidence of intercourse through rectum."

Although a chargesheet was filed against the appellant under Sections 363 and 376 of the Indian Penal Code, but the same was altered to one under Sections 363, 376 read with Section 511 and Section 377 thereof.

Before the learned Sessions Judge, not only the prosecutrix but also her mother Vandana Dhondiba Kshirsagar and father Dhondiba Kishan Kshirsagar were examined.

Believing the testimonies of the said witnesses, the learned Sessions Judge found the charges to have been proved as against the appellant. He was convicted under Sections 363, 376 read with Section 511 and Section 377 IPC. He was sentenced to suffer rigorous imprisonments for three years, five years and seven years under Sections 363, 376/511 and 377 IPC respectively and to pay a fine of Rs.2,000/- under Section 363 and Rs. 3,000/- each under Section 376/511 and 377 IPC respectively.

The appeal preferred by the appellant herein was dismissed by the High Court by reason of the impugned judgment. Hence, the appellant is before us.

The learned counsel appearing on behalf of the appellant would submit that the appellant having not been put to test identification parade, which was imperative having regard to the fact that the prosecutrix did not know him, the impugned judgment cannot be sustained.

It was furthermore submitted that although the age of the appellant on the date of the occurrence was more than sixteen years but below eighteen years, having regard to the provision of the Juvenile Justice (Care and Protection of Children) Act, 2000, (for short, 'the 2000 Act), it was imperative on the part of the court to follow the procedures laid down therein.

The fact that the appellant as also the prosecutrix are of the same town is not in dispute. It is also not in dispute that the appellant was a mechanic of two- wheelers. He was working in the 'Noor Garage'. At about 2.00 p.m. on 16.12.1989, the appellant allured the prosecutrix stating that he would take her on his Luna for a ride. She was tempted to go along with him. The medical report is also not in dispute. The identification of the accused by the prosecutrix on the next day also stands proved.

Having regard to the depositions of the prosecutrix and her parents, the learned Sessions Judge as also the High Court cannot be held to have committed any error in arriving at the finding as noticed hereinbefore. The High Court, in our opinion, has rightly opined :

"Merely because there was no evidence of stains over perineum or clothes and no semen was detected, it cannot be concluded that sexual intercourse through rectum had not taken place. Suggestion in this behalf has been categorically denied by Dr. Sheela Kadam. So, the medical evidence, in fact, supports the version of prosecutrix. Merely because prosecutrix has stated that the accused put his penis on her private part and urinated there and has not specifically stated that he had inserted his penis in her vagina on her private part, we cannot jump to the conclusion that there was no attempt on the part of the accused to commit rape on prosecutrix. We must take into consideration the fact that the prosecutrix is hardly of six years age and whatever act was committed by the accused, she might have thought that the accused urinated there, but in fact, the evidence indicates that he must have tried to commit rape on Prosecutrix. However, finding that it is difficult to insert his penis in her vagina, intercourse through rectum was committed. The doctor has stated that there is evidence of intercourse through rectum "

The deposition of the prosecutrix, in our opinion, clearly shows that she was absolutely an innocent girl. So far as the submission of the learned counsel in regard to non-holding of the test identification parade of the appellant is concerned, we are of the opinion that having regard to the fact that the appellant was known to the prosecutrix and her family members and she having identified him before lodging of the F.I.R., it would have been futile to hold a test identification parade. Even otherwise the substantive evidence is the evidence of identification in court. [See Amitsingh Bhikamsing Thakur v. State of Maharashtra 2007 (1) SCALE 62]. We, therefore, cannot accept the contention that the prosecution has not proved its case.

So far as the submission of the learned counsel in regard to the applicability of the 2000 Act, is concerned, it is not in dispute that the appellant on the date of occurrence had completed sixteen years of age. The offence having been committed on 16.12.1989, the 2000 Act has no application. In terms of the Juvenile Justice Act, 1986, 'juvenile' was defined to mean "a boy who had not attained the age of sixteen years or a girl who had attained the age of eighteen years".

The applicability of the provisions of Section 20 of the 2000 Act was considered by a Constitution Bench of this Court in Pratap Singh v. State of Jharkhand and Another [(2005) 3 SCC 551], wherein, inter alia, it was held : "31. Section 20 of the Act as quoted above deals with the special provision in respect of pending cases and begins with non-obstante clause. The sentence "notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any court in any area on date of which this Act came into force" has great significance. The proceedings in respect of a juvenile pending in any court referred to in Section 20 of the Act are relatable to proceedings initiated before the 2000 Act came into force and which are pending when the 2000 Act came into force. The term "any court" would include even ordinary criminal courts. If the person was a "juvenile" under the 1986 Act the proceedings would not be pending in criminal courts. They would be pending in criminal courts only if the boy had crossed 16 years or girl had crossed 18 years. This shows that Section 20 refers to cases where a person had ceased to be a juvenile under the 1986 Act

but had not yet crossed the age of 18 years then the pending case shall continue in that Court as if the 2000 Act has not been passed and if the Court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, shall forward the juvenile to the Board which shall pass orders in respect of that juvenile.

xxx xxx xxx

34. This Rule also indicates that the intention of the Legislature was that the provisions of the 2000 Act were to apply to pending cases provided, on 1.4.2001 i.e. the date on which the 2000 Act came into force, the person was a "juvenile" within the meaning of the term as defined in the 2000 Act i.e. he/she had not crossed 18 years of age.

xxx xxx xxx

(b) The 2000 Act would be applicable in a pending proceeding in any court/authority initiated under the 1986 Act and is pending when the 2000 Act came into force and the person had not completed 18 years of age as on 1.4.2001."

The appellant was above eighteen years of age on 01.04.2001. The 2000, therefore, cannot have any application whatsoever in the instant case. For the reasons aforementioned, there is no merit in this appeal which is dismissed accordingly.