

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 358 OF 2015

Janabai W/o Machindra Misal
Age : 50 years, Occ : Household,
R/o Bangarwadi, Tq. Kallamb,
Dist. Osmanabad.

..APPELLANT

-VERSUS-

1. The State of Maharashtra
Through Police Station, Yermala,
Tq. Kallamb, Dist. Osmanabad.
2. Kalidas S/o Eknath Gawali
Age : 55 years, Occ : Labour,
R/o Bangarwadi, Tq. Kallamb,
Dist. Osmanabad.

..RESPONDENTS

**WITH
CRIMINAL APPLICATION NO. 2762 OF 2015**

The State of Maharashtra
Through Police Station,
Yermala, Through
Sau. Janabai Machindra Misal
Age : 50 years, Occ : Household,
R/o Bangarwadi, Tq. Kallam,
Dist. Osmanabad.

..APPLICANT

VERSUS

Kalidas S/o Eknath Gawali
Age : 55 years, Occ : Labour,
R/o Bangarwadi, Tq. Kallamb,
Dist. Osmanabad.

..RESPONDENT

....

APP for Applicant : Mr. B.L. Dhas
Advocate for appellant : Mr. Humbe V.M.

CORAM : S.S. SHINDE & A.M. BADAR, JJ.

Dated: August 26, 2015

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ORAL ORDER (PER A.M. BADAR, J)

Criminal Appeal No. 358 of 2015 is filed under Section 372 of the Code of Criminal Procedure, 1973 by the prosecutrix, whereas Criminal Application No. 2762 of 2015 is filed by the State under Section 378(1)(3) of the Code of Criminal Procedure, seeking leave to appeal. The prosecutrix and the State are seeking to challenge the judgment and order dated 20.02.2015 passed by the learned Additional Sessions Judge, Bhoom in Sessions Case No. 116/2014, thereby acquitting the respondent/accused of the offences punishable under Sections 376 and 506 of the I.P. Code.

2. Heard Mr. Humbe the learned counsel appearing for the prosecutrix as well as the learned Additional Public Prosecutor appearing for the State. Mr. Humbe the learned counsel appearing for the appellant has strenuously argued that, it is settled law that, in case of sexual assault, the courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature,

to throw out an otherwise reliable prosecution case. He relied upon the judgment of the Apex Court in the case of **State of Uttar Pradesh V/s Chhotelyal**, reported in (2011) 2 SCC 550, wherein after relying on the judgment in the matter of **State of Maharashtra Vs. Chandraprakash Kewalchand Jain** reported in 1990 (1) SCC 550, the Hon'ble Apex Court has summarized the law relating to appreciation of evidence in sexual offences by holding that the evidence of prosecutrix needs to be analyzed and examined carefully. The Hon'ble Apex Court has reiterated its earlier view by stating that, if the testimony of the prosecutrix is found to be reliable and trust worthy then conviction can be based solely on her version. The learned counsel appearing for the appellant further submits that, the prosecutrix in sexual offences is infact injured victim of the offence and her evidence is required to be given same respect, as is given to the evidence of an injured witness. The learned counsel appearing for the appellant relied on the observations of the Hon'ble Apex Court in the case of **Chhotelyal** (supra), recorded in paras 22, 23 and 25, which needs reproduction and which read thus :-

"22. In the backdrop of the above legal position, with which we are in respectful agreement, the evidence of the prosecutrix needs to be analysed and examined carefully. But, before we do that, we state, as has been repeatedly stated by this Court, that a woman who is victim of sexual assault is not an accomplice to the crime. Her evidence cannot be tested with suspicion as that of an accomplice. As a matter of fact, the evidence of the prosecutrix is similar to the evidence of an injured complainant or witness. The testimony of prosecutrix, if found to be reliable, by itself, may be sufficient to convict the culprit and no corroboration of her evidence is necessary. In prosecutions of rape, the law does not require corroboration. The evidence of the prosecutrix may sustain a conviction. It is only by way of abundant caution that court may look for some corroboration so as to satisfy its conscience and rule out any false accusations.

23. In State of Maharashtra V/s Chandraprakash Kewalchand Jain reported in (1990) 1 SCC 550, this Court at page 559 of the Report said:

"16. A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on

the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence."

25. In Vijay V/s State of M.P. reported in (2010) 8 SCC 191, decided recently, this Court referred to the above two decisions of this Court in Chandraprakash Kewalchand Jain and Gurmit Singh and also few other decisions and observed as follows :

"14. Thus, the law that emerges on the issue is to the effect that the statement of the prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix."

3. He relied upon the judgment in the case of **State of Haryana V/s Vastiram** reported in **(2013)4 SCC 200**, wherein the Hon'ble Apex Court has held that, evidence of the prosecutrix, if found trustworthy, needs to be accepted without requiring any further corroboration. With the aid of this, crystallized legal position, submission of the learned counsel for the appellant is that the evidence of prosecutrix PW-2 is totally trustworthy and reliable. After reading the entire evidence of PW-2 - prosecutrix, the learned counsel appearing for the appellant submitted that

the prosecutrix was alone all the while in hilly area, where she had taken her she-goats for grazing. At that time, the accused came and on the pretext of demand of water, he had committed forcible sexual intercourse with her. By pointing out her cross-examination, the learned counsel appearing for the appellant argued that, there is material in the cross-examination, which would cast a shadow of doubt on her version. The learned counsel appearing for the appellant/prosecutrix, as such, contended that, the impugned judgment and order of acquittal recorded by the learned trial Court is totally perverse and ignoring the relevant evidence on record. As such, in his submission appeal deserves admission.

4. The learned Additional Public Prosecutor appearing for the State in Criminal Application No. 2762/2015 reiterated the arguments advanced by the learned counsel appearing for the appellant/prosecutrix.

5. With the assistance of the learned counsel for the appellant/prosecutrix as well as the learned Additional Public Prosecutor, we have gone through the entire record

and proceedings including the statement of the prosecutrix as well as the other evidence on record.

6. At this juncture, we are noting that, we are dealing with the appeal against acquittal recorded by the learned Additional Sessions Judge. In this regard, it needs to be noted that, reversal of the acquittal can be made only if the conclusion recorded by the trial Court did not reflect the possible view. We emphasize that, what is required is to examine whether the trial Court has taken possible or plausible view while acquitting the accused and not an erroneous or wrong view. There is fundamental distinction between the possible/plausible view and erroneous or wrong view. When the conclusion is reached on the basis of evidence on record, which in the circumstances is possible then the view can be said to be a possible view. The appellate Court while dealing with such matter, even if is in position to take some contrary view then also such possible view recorded by the learned Trial Court cannot be upset while dealing with appeal against the acquittal. Keeping in mind this position of law, while dealing with the appeal against acquittal let us examine, whether view taken by the

trial Court is possible view or not.

7. At the outset, we may put on record certain undisputed facts. The prosecutrix is sister-in-law of the accused. The accused is husband of her real sister. The prosecutrix has three sisters and four brothers. She is resident of Bangarwadi, Tq. Kallam, whereas the incident in question was happened at Mhasobachiwadi- an adjacent locality. It is not in dispute that, Mohan Kamble is her brother and that her mother had entered the names of the prosecutrix, her three remaining sisters and four brothers in the revenue record in respect of the agricultural land owned by her. The incident in question is alleged to have happened in this agricultural land which is used for grazing. The cross-examination of the prosecutrix shows that, her brother Mohan had leased out this hilly track of land to the prosecutrix after obtaining some rent/monetary consideration from her. Undisputedly, the accused- brother-in-law of the prosecutrix used to graze his she-goats at the adjoining track of land.

8. With these undisputed position emerging on record particularly from cross examination of the

prosecutrix, let us see what the prosecutrix has stated in her evidence. As per her version, in the morning hours, she had been to the hilly area for grazing the she-goats and sat under the Neem tree. Thereafter the accused came there and demanded water for drinking from her. She replied him that, she is not having water. Upon that, as per her version, the accused demanded sexual favour from her. He caught hold of the prosecutrix and cause her to lie on ground. The prosecutrix further stated that, then accused committed forcible sexual intercourse with her. Thereafter as per version of the prosecutrix, the accused extended the treats of life to her entire family in the event of disclosure of incident by her. This is what the prosecutrix states about the actual incident of alleged commission of rape on her.

9. We may note that, the prosecutrix is a fully grown up adult lady of about 49 to 50 years at the time of incident in question. At this juncture, we may also note that, the prosecutrix was having three sisters and four brothers, out of which Mohan had leased out the hilly track of land to her on receiving rent/monetary consideration. This specifically implies that, the prosecutrix was in a

position to narrate her woes to her sibling soon after the incident. We do not accept the evidence of the prosecutrix that, under fear of threats to the life of her family, she kept mum. The accused was not stranger to her. He is her brother-in-law. It is not her case that, he was on enimical terms with her. Even the conduct of the prosecutrix after the incident is unnatural. Though the incident had allegedly happened in the morning, the prosecutrix has chosen to remain in the field till 6.00 p.m. Thereafter the incident in question was not disclosed by her to anybody else though she is having brothers and sisters. As per her version, her husband had gone to meet his son at Pune and after four days, her husband returned back to home. Thereafter, as per her version, she lodged a report of incident. Evidence of the prosecutrix is conspicuously silent about the whereabouts of her siblings and why she did not disclose the incident to her sisters or brothers. Suffice it to mention that, though the incident is alleged to have taken place on 13.12.2013, the prosecutrix has lodged the report of the same on 18.12.2013. This delay in lodging First Information Report is not at all explained satisfactorily by this adult prosecutrix.

10. True it is that the prosecutrix has denied that there used to be dispute between her family and accused but her cross examination reveals that hilly track of land owned by her mother was mutated in the name of all her sisters and brothers including herself. This goes a long way to show that mother of the prosecutrix intended that, the benefit of this hilly track of land should go to all her sons and daughters. In this context, the material elucidated from the cross-examination of the prosecutrix indicate that this entire hilly track land owned by her mother was used to be utilized by the prosecutrix alone by paying some monetary consideration to her brother Mohan. The accused, who is husband of one of the sister of the prosecutrix, as such was required to graze his she-goats at the adjoining track of land. The prosecutrix has denied the suggestion that, the accused used to take his cattle through her land giving a cause of dispute amongst them. In the backdrop of this evidence, the trial Court found the evidence of prosecutrix unreliable and not worthy of reliance. We do not find this appreciation of evidence to be erroneous or faulty.

11. The alleged sexual intercourse by the accused

with the prosecutrix was forcible. In para 12 of her deposition, the prosecutrix has categorically stated that, during the incident, she resisted the accused and the scuffle ensued. As per her statement, because of this forcible sexual intercourse by Respondent/accused, she suffered multiple scratches on back side of her fore arms and on her back. Her version reveals that, hilly track of land where the incident had happened was having hard and rough surface. If really the incident had happened as alleged, then multiple scratches on her back side of fore arms and on her back, could have been revealed while the prosecutrix was medically examined. In the case in hand, PW-1 Dr. Ashwini Mukund Chaudhary had examined prosecutrix on 18.12.2013. The medical report of the examination of prosecutrix is at Exhibit-18. The evidence of PW-1 Dr. Ashwini as well as the medical report are not showing any scratches or injuries on the person of the prosecutrix. On this count, the version of the prosecutrix become doubtful. As such, the learned Trial Court, in our considered view had taken a plausible view of the matter by not placing implicit reliance on the version of the prosecutrix as a gospel truth. Other evidence adduced by

the prosecutrix is not at all supporting the version of the prosecutrix.

12. True it is that conviction in sexual offence can be rested only on the sole testimony of prosecutrix but for that the evidence of prosecutrix needs to be trustworthy. Way back in the year 1983 in the case of **Sheikh Zakir V/s State of Bihar** reported in **AIR 1983 SC 911**, the Hon'ble Apex Court has given a word of caution in such matters. When the prosecutrix is fully grown up lady, the corroboration should ordinarily be required and in a case, where prosecutrix is habitual to sexual intercourse, there is likelihood of false implication on various counts. The Hon'ble Apex Court in the matter of **Sheikh Zakir (supra)** observed that, even though a victim of rape cannot be treated as an accomplice, on account of a long line of judicial decision rendered in our country over a number of years, the evidence of the victim in a rape case is treated almost like the evidence of an accomplice requiring corroboration.

13. Considering the reasons stated by us in the

foregoing paragraphs, we endorse the findings recorded by the trial Court as reflecting the possible view by holding that the evidence of the prosecutrix which remained to be uncorroborated by other evidence on record, cannot be held to be trustworthy in order to record conviction relying on the same. As the learned Trial Court has taken possible and reasonable view, we proceed to pass following order :-

ORDER

Criminal Appeal filed by the complainant is dismissed. Consequently, Criminal Application seeking leave to file appeal filed by the State is also rejected.

Sd/-
(**A.M. BADAR, J.**)

Sd/-
(**S.S. SHINDE, J.**)