

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

Criminal Revision Application No. 182 of 2003

Sk. Imam s/o. Sk. Azamoddin,
Age : 34 years,
Occupation : Agriculture,
R/o. Solnapur, Taluka : Paithan,
District : Aurangabad.

.. Revision Applicant
(Original accused no.1)

versus

The State of Maharashtra.

.. Respondent.

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*Mr. H.F. Pawar, Advocate, holding for
Mr. A.H. Kapadia and Mr. V.N. Damle, Advocates,
for the revision applicant.*

*Mr. U.S. Mote, Additional Public Prosecutor, for
the respondent - State.*

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CORAM : SMT. SADHANA S. JADHAV, J.

DATE : 21ST APRIL 2015

ORAL JUDGMENT :

1. Heard Adv. Mr. H.F. Pawar h/f. Adv. Mr. A.H. Kapadia and Mr. V.N. Damle for the revision applicant, and learned APP Mr. U.S. Mote for the respondent - State.

2. The applicant herein is convicted by the Vth Assistant Sessions Judge, Aurangabad, in Sessions Case No. 74/1993, vide judgment and order dated 18th March 1998, for offence punishable under Sections 376 and 342 read with Section 34 of the Indian Penal Code, and is sentenced to suffer rigorous imprisonment for a period of five years, and to pay fine of Rs. 1,000/-, in default of payment of fine, to suffer rigorous imprisonment for six months, for offence punishable under Section 376 of IPC. He was sentenced to suffer rigorous imprisonment for six months, for offence punishable under Section 342, read with Section 34 of IPC. The substantive sentences were to run concurrently.

3. Being aggrieved by the said judgment and order, the applicant herein filed Criminal Appeal No. 26/1998. The learned IInd Additional Sessions Judge, Aurangabad, vide judgment and order dated 22-5-2003, has been pleased to dismiss the appeal and hence, this revision.

4. Such of the facts necessary for the decision of this revision are as follows :-

(a) Ms. "X" was the original resident of village Solnapur in Paithan Tahsil. Her father was engaged in labour work and he was residing in the field of one Galande at Pimpalwadi Shivar. The prosecutrix and her mother were also residing at Pimpalwadi. They used to occasionally visit village Solnapur for cultivating their field. In the last week of August 1992, the prosecutrix and her mother had been to village Solnapur for harvesting the crops in their field. The prosecutrix and her mother worked in the field for two days and on 31st August 1992, mother of the

prosecutrix left for village Pimpalwadi, leaving the prosecutrix alone in village Solnapur. On 1-9-1992, the friend of the prosecutrix, namely, Sangita had been to her house and asked her to accompany to collect cow dung cakes. The prosecutrix and her friend Sangita were wandering in the village. When they went near the slum area, where the house of accused Sangita was situated, accused Sangita requested her to visit her house. The prosecutrix had been to the house of accused Sangita to collect the cow dung cakes. It is alleged, that suddenly the present applicant, who was present in the house of accused Sangita, appeared on the scene and dragged the prosecutrix inside the house, whereas accused Sangita locked the door from outside. He threatened her of dire consequences and thereafter ravished her against her wish. It is alleged that, upon hearing cries of the prosecutrix, persons in the village gathered near the house of accused Sangita. The cousins of the prosecutrix rushed to the spot. They broke open the lock which was put on the door from outside by accused Sangita. They rescued the prosecutrix. They had made attempt to accost the accused / applicant. However, the said attempt had failed and the accused had fled from the scene of offence. Late in the night, at about 10.00 p.m., cousins of the prosecutrix had taken her to the Police Station and lodged a report, on the basis of which Crime No. I-97/1992 was registered at Paithan Rural Police Station, against the applicant and accused Sangita, for offences punishable under Sections 342, 376, read with Section 34 of IPC.

(b) After completion of investigation, charge sheet was filed. The case was committed to the Court of Sessions and was registered as Sessions Case No. 74/1993. The trial was conducted before the Assistant Sessions

Judge. The prosecution examined ten witnesses to bring home the guilt of the accused. The learned Assistant Sessions Judge convicted the applicant (original accused no.1) for offences punishable under Section 376 and Section 342 read with Section 34 of IPC and sentenced him as aforesaid. Being aggrieved by the said judgment and order, the applicant herein had filed Criminal Appeal No. 26/1998 which came to be dismissed as aforesaid. The learned Sessions Court had not issued any notice of enhancement although the sentence was less than the minimum as contemplated in the statute.

5. At the outset, learned Counsel for the applicant has submitted that both the Courts have not appreciated the fact, that the medical evidence is at variance with the deposition of the prosecutrix who is examined as PW 1. The medical report is at Exhibit 14. The Doctor who examined the prosecutrix on 1-9-1992, has recorded approximate age of the prosecutrix to be 15 years. That, the Doctor has specifically opined that, prima facie it cannot be said positively that the victim has been raped. It is pertinent to note that, there was absolutely no injury. The medical certificate further indicates that the hymen was intact. It was clear that there was no medical evidence on record, to indicate even remotely that the prosecutrix had been ravished. PW 3 Dr. Urmila Bodhankar happens to be the Doctor who had examined the victim. The substantive evidence of the Doctor appears to be omnibus.

6. In these circumstances, the prosecution is left with the substantive evidence of the prosecutrix and the eye witness account of the brother of the prosecutrix. The substantive evidence of the prosecutrix is

full of inherent omissions and contradictions. The most important aspect is that, she has specifically stated that there were no windows to the house of accused Sangita i.e. the scene of offence. She has further stated that she does not remember her physical characteristics at the time of incident. According to her, her brother Krishna is a Home Guard. She has evaded to answer as to whether Krishna had gone to Paithan on the day of the incident. Her brother Baban happens to be head of Shevsena branch of Solnapur. She could not recollect as to whether he was working as contractor or that, he had been to the Sugar Factory on that day, to collect the contract. It is pertinent to note that, according to the prosecutrix, at the time of incident, she had tried to raise shouts and tried to reach towards the door of the house. However, it is not specifically stated that she had raised the shouts.

7. As against this, PW 5 Asaram Ghone has stated that on the day of the incident, he had heard shouts of the girl. He went near the house of accused Sangita and was standing near the door of the house. At that time, he saw Baban and Krishna had reached the house. He saw accused Sangita running towards the house of Gangubai Kaikadi. According to him, Krishna peeped through the windows and informed him that, his sister and accused were present in the house. The door of the house was locked from outside. Krishna broke open the lock by means of an axe. Thereafter, the accused came out of the house. There was scuffle between the accused and Krishna. However, the accused managed to flee from the spot. According to him, the prosecutrix came out of the house. She was weeping at that time, and upon enquiry, she had informed that the accused had raped her. That, Krishna and Baban had taken the prosecutrix

to their house. Police had come in the evening in the village and had recorded his statement. It is elicited in the cross examination, that the scene of offence i.e. house of Shankar Muley consists of two rooms. There is a common wall and there is a house of another person. One Mohammedan lady resides in the neighbourhood. The house of Suresh Choutmal is also located in the vicinity. He has further stated in the cross examination, that the house of Shankar Muley where the incident occurred, has two windows and two doors, one door is inside and another is outside the house. The door of the house faces towards north. There are windows on the east and northern side. It appears from his description, that the house is situated in thick populated area. The Court cannot be oblivious of the fact that the said hut was situated in slum area. According to him, he was passing by the road when he heard shouts of the young girl. He had seen Krishna and Baban running towards the house and, therefore, he had not rushed to the spot on hearing the first shouts. According to him, the accused came out of the house first and was then followed by the prosecutrix. The witness has asserted that, he has good relations with the brothers of the prosecutrix.

8. The next relevant witness is the brother of the prosecutrix i.e. PW 9 Krishna Ghone. He has deposed before the Court, that on that day in the afternoon at about 1.00 to 1.30 p.m., he had seen his sister in the company of accused Sangita. That, they had heard the cries of their sister from the house of Shankar Muley and, therefore, they rushed to the spot. According to him, Sakharam and Asaram i.e. PW 5 had also rushed towards the spot. They had seen accused Sangita running towards house of Gangubai. The door of the house was locked from outside. According

to him, he peeped through the window and found the accused and his sister present in the house. He had then broke open the lock by means of axe and had rescued their sister. There was a scuffle between the accused and PW 9. It is elicited in the cross examination, that he was working along with his brother Baban in the western side of his field. He had heard the shouts twice. On hearing second shouts, he had started running towards the spot. He claims to have reached the spot first in point of time and then followed by Baban, Sakharam and Asaram. The hearing of shouts of the prosecutrix is elicited as a material omission in the cross examination. According to him, there is only one window to the house which is on the eastern side. He has denied the existence of a window on the northern side of the house. According to him, there are two rooms to the said house and the rooms are one after another. That, there is no door to the inner side. Hence, he has falsified the version of PW 5 Asaram to a large extent. Hence, it is clear from the substantive evidence of the witnesses, that there is variance in the description of the scene of offence since the prosecutrix has categorically asserted that there were no windows to the said house.

9. It is pertinent to note that, the witnesses have not stated that they had actually seen the accused / applicant committing sexual intercourse with the prosecutrix. All that is stated is that, they were present in the house. The learned Counsel for the applicant submits that, in the short span of time, the fact that the witnesses had not seen the accused ravishing the victim or that, they were in objectionable position, it cannot be said that the evidence of the victim is a sterling testimony and hence, does not deserve to be relied upon, more so, when the medical evidence does not corroborate the version of the prosecutrix.

10. The learned Counsel for the applicant has placed reliance upon judgment of the Hon'ble Apex Court, in the case of ***Sadashiv Ramrao Hadbe Vs. State of Maharashtra & another***, reported in ***(2006) 10 Supreme Court Cases 92***. In the said case, there were no injuries on the person of the prosecutrix. There were injuries on the private part and the Doctor who examined her was unable to give any opinion about sexual intercourse allegedly taken place. In the present case also, the Doctor who examined the victim has asserted that there is no prima facie evidence that the victim was ravished or that, there was sexual intercourse with her. The Hon'ble Apex Court had, therefore, observed as follows :

“ It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen. ”

In the present case also, the *obiter dictum* of the Hon'ble Apex Court needs to be taken into consideration since besides the sole testimony of the prosecutrix, rest of the evidence is shrouded with omissions and

contradictions. The evidence of the alleged eye witnesses is at variance with each other. That, the extenuated circumstances in the present case are doubtful and hence, the revision application deserves to be allowed. The applicant herein deserves to be acquitted.

11. In the result, the Revision Application is allowed.

[A] The judgment and order dated 18th March 1998, passed by the Vth Assistant Sessions Judge, Aurangabad, in Sessions Case No. 74/1993, and the judgment and order dated 22nd May 2003, passed by the IInd Additional Sessions Judge, Aurangabad, in Criminal Appeal No. 26/1998, are quashed and set aside.

[B] The applicant (original accused no.1) is acquitted of the offence punishable under Sections 376 and 342 read with Section 34 of the Indian Penal Code. Bail bonds of the applicant stand cancelled. The amount of fine, if paid, be refunded to the applicant.

12. Rule is made absolute in the above terms.

(SMT. SADHANA S. JADHAV)
JUDGE

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