

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.34 OF 2014

Jitu @ Jitendra Ramchandra Salunkhe,	]	
Age : 20 Years,	]	
R/at Santnagar, Kurhadewadi,	]	
Tal. Bhusawal, Dist. Jalgaon.	]	
Presently r/at Dhawade Vasati,	]	
Bhosari, Pune.	]	 Appellant

Versus

The State of Maharashtra,	]	
Through Pimpri Police Station, Pune	]	 Respondent

Mr. Satyavrat Joshi for the Appellant.

Mrs. Sangeeta D. Shinde, A.P.P., for the Respondent/State.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 9TH APRIL, 2015.

ORAL JUDGMENT :

1. The Appellant, who stands convicted by the Additional Sessions Judge, Pune in Special Atrocity Case No.43 of 2009, by the Judgment dated 23rd September, 2013 for the offences punishable under Sections 376(1) and 506(2) of the IPC and sentenced to suffer R.I. for a period of seven years and to pay fine of Rs.1,000/-, in default to suffer S.I. for one year, on the first count, and R.I. for a period of two years and to pay fine of Rs.1,00/-, in default to suffer S.I. for a period of one month, on second

count, with a direction that both the substantive sentences of imprisonment to run concurrently, by this Appeal challenges his conviction and sentence.

2. Facts, as are necessary, for deciding this Appeal can briefly be stated thus :-

PW-2 the Prosecutrix, (the name is deliberately withheld), is the daughter of PW-1 Kausalya Shirsat. At the time of incident, the Prosecutrix was running the age of 14 years and studying in 6th Standard. On 23rd January, 2009, as usual, Prosecutrix had gone to the school. However, she did not return. From her friend, PW-1 Kausalya came to know that Dnyaneshwar Tandale, the juvenile-in-conflict with law, has kidnapped the Prosecutrix on his vehicle. PW-1 Kausalya, therefore, went to the Pimpri Police Station and lodged a missing report (Exhibit-22A).

3. While the enquiry of the said missing report was in progress, on 10th February, 2009, at about 7:30 pm, PW-1 Kausalya received a telephone call from the Prosecutrix requesting her to rescue her, as she was confined at Village Markal. Hence, PW-1 Kausalya informed the Police about the same and, with the help of the Police, she went to Village Markal and rescued the Prosecutrix. On the way, Prosecutrix disclosed to

her mother PW-1 Kausalya the entire incident. She was brought to the Pimpri Police Station, where her complaint came to be recorded. On her complaint, C.R. No.73 of 2009 was registered for the offences punishable under Sections 363, 366(A), 342, 420, 376(g), 323, 506(1) r/w. 34 of the IPC. As the offence was also registered under Section 3(1), (11), (12) of Prevention of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, PW-5 ACP Prabhakar Patil took over investigation of the said offence. He visited the place of occurrence situate at Village Markal, Taluka Khed and in the presence of two Panchas, made the Spot Panchanama (Exhibit-25) of the room, which was occupied by the Prosecutrix and the Accused. He seized the clothes of the Prosecutrix, one carpet and one blank note book from the said room. Under the said Panchanama, he also seized two pants of the Accused. He recorded the statements of six witnesses from the said village and then returned.

4. On 12th February, 2009, he sent the Prosecutrix to YCM Hospital, Pimpri, Pune for her medical examination, where she was examined by PW-4 Dr. Meera Badve, who opined about the evidence of repeated penetrative intercourse. The opinion was also elicited from the Doctor of the Dental Department about the age of the Prosecutrix, who opined that the age of the Prosecutrix was between 14 to 15 years. The Prosecutrix

was admitted there for about five days.

5. During the course of investigation, on 13th February, 2009, PW-5 ACP Patil recorded the statements of two witnesses and on 14th February, 2009, he arrested juvenile-in-conflict with law Shrikant Jadhav. During the course of further investigation, he collected the School Leaving Certificate of the Prosecutrix from Pandit Jawaharlal Nehru Vidya Mandir, Pimpri, where she was studying. It was transpired from the said Certificate that she was belonging to 'Hindu Mahar' caste. On 20th February, 2009, he also received medical certificate of the Prosecutrix from YCM Hospital, Pimpri. On 3rd March, 2009, he sent the clothes of the Prosecutrix and the articles collected from the spot to Chemical Analyzer vide his requisition letter (Exhibit-34). On 26th March, 2009, he arrested juvenile-in-conflict with law Dnyaneshwar Tandale. Further to completion of investigation, he filed Charge-Sheet against juvenile-in-conflict with law Dnyaneshwar Tandale on 11th May, 2009 before the Juvenile Justice Board.

6. The present Appellant was produced before him on 8th September, 2009 by PSI Pawar. PW-5 ACP Patil arrested him on the same day at about 18:45 pm. On the next day, he recorded the statement of three witnesses. On 10th September, 2009, he sent the Appellant to YCM Hospital, Pimpri for his medical examination. On the same day, the

Appellant produced the clothes, which he was wearing at the time of committing the offence. They came to be seized under Panchanama (Exhibit-35). On 1st October, 2009, PW-5 ACP Patil sent the clothes of the Appellant and other articles, like, medical samples received from YCM Hospital to Chemical Analyzer, vide his requisition letter (Exhibit-36). Further to completion of investigation against the present Appellant, he filed Charge-Sheet in the Court against him. The C.A. Reports are produced on record at Exhibits "37" and "38".

7. On case being committed to the Sessions Court, the Trial Court framed charge against the Appellant vide Exhibit-2. The Appellant denied the guilt and claimed trial.

8. In support of its case, Prosecution examined 6 witnesses, whereas, the Appellant also examined one Defence Witness. On appreciation of their evidence, the Trial Court acquitted the Appellant of all other charges, but convicted him for the offences punishable under Sections 376(1) and 506(2) of the IPC and sentenced him, as aforesaid.

9. In this Appeal, I have heard learned Counsel for the Appellant Mr. Satyavrat Joshi and learned A.P.P. for the Respondent-State Mrs. Sangeeta Shinde. In order to effectively deal with the rival submissions

advanced by them, in my opinion, it would be useful to refer to the evidence of the Prosecution Witnesses.

10. This being a case of forcible sexual intercourse, punishable under Section 376 of the IPC, the relevant and the most vital evidence is naturally that of the Prosecutrix herself. If her evidence is cogent, consistent and reliable, inspiring confidence in the judicial mind, then, as per the well crystallized principles of law, the conviction can rest on her solitary testimony alone. Therefore, in this case, it would be useful first to refer to the evidence of PW-2 the Prosecutrix herself.

11. As per her evidence, on the date of incident, when she was in the school as usual, juveniles Shrikant and Nitin came to the class and informed her teacher Smt. Patil Madam that her sister was not feeling well and, therefore, she should be sent to her house. Prosecutrix told to Patil Madam that she does not want to go to the house. However, Patil Madam gave her phone number of Shrikant and Nitin. Thereafter, juvenile Dnyaneshwar Tandale telephoned to her teacher and informed that her sister is very serious and requested her to sent the Prosecutrix to home. However, Patil Madam did not sent her to her house. It is her evidence that after the school was over, when she was proceeding to her house, juveniles Nitin, Shrikant and Dnyaneshwar were present outside. They

took her in the Sumo Jeep towards Alandi Markal, Pune and subsequently to the house of one Jitu Pujari, whom she has identified in the Court as the Appellant in the case. As per her evidence, juvenile Dnyaneshwar Tandale and the present Appellant confined her in the house of the Appellant. Then, on 24th January, 2009, the Appellant loaded his household articles in one tempo and then she was taken by the Appellant and juvenile Dnyaneshwar to another village. There, they stayed in one house upto 5th February, 2009. During that stay, juvenile Dnyaneshwar asked her to marry him, with threatening that otherwise he will kill her parents. He also beat her by means of hands and wooden logs. On 5th February, 2009, Juvenile Dnyaneshwar gave her new saree for wearing and thereafter she was taken, along with the Appellant, to Village Alandi and then again to the house of the Appellant at Village Markal.

12. As per further evidence of Prosecutrix, on 7th February, 2009, at about 4 pm, when juvenile Dnyaneshwar went out of the house for some work, the Appellant beat her, forcibly removed her clothes and then had sexual intercourse with her against her will. At that time, she bit on his hand. The Appellant also threatened her not to disclose about this incident to anyone, otherwise he will kill her. It is her further evidence that on the next day, when Appellant went out of the house, the Juvenile Delinquent

Dnyaneshwar also committed forcible sexual intercourse with her. Again on 9th February, 2009, present Appellant committed sexual intercourse with her against her will. Thus, as per her evidence, both, the Appellant and juvenile Dnyaneshwar committed repeated sexual intercourse with her against her will.

13. It is her evidence that on 11th February, 2009, at about 7 pm, when the Appellant and juvenile Dnyaneshwar had gone out of the house, confining her in the room, Nitin came there. She took him in confidence; telephoned her mother and informed her about the entire incident. Her mother came and she was brought to her house to Pune and then taken to the Pimpri Police Station, where her complaint came to be recorded. Thereafter she was referred for medical examination.

14. The cross-examination of the Prosecutrix is quite cursory. Absolutely nothing worthwhile is elicited in her cross-examination to disbelieve her evidence as regards the actual incident of sexual intercourse committed by the present Appellant and Juvenile Dnyaneshwar, which was against her will. It is also brought on record that she has made every attempt to resist such sexual intercourse. She has even bited Juvenile Dnyaneshwar. A suggestion was put up to her that she was having love affair with Juvenile Dnyaneshwar, which suggestion

is denied by her. It is brought out in her cross-examination that she was resisting the act of Appellant, when he was committing sexual intercourse with her, but he pressed her mouth. It is also brought on record that the Appellant had committed rape on her by laying down her on the mat (carpet). Thus, her cross-examination has not made any dent to challenge her credibility or to disbelieve her in any way.

15. If at all any corroboration is required to her testimony, then it is also coming from the evidence of her mother PW-1 Kausalya, to whom she has disclosed about the entire incident, immediately after she was rescued and was being brought to Pune. All the details of the incident, as given by the Prosecutrix in her evidence, are also appearing in the evidence of PW-1 Kausalya as being told to her by the Prosecutrix. It is significant to note that immediately after coming to Pune, the Prosecutrix was taken to the Pimpri Police Station, where her complaint came to be recorded. Again in her cross-examination, nothing worthwhile is brought on record.

16. Further corroboration to the evidence of Prosecutrix is coming from the medical evidence on record. PW-4 Dr. Meera Badve has examined Prosecutrix in YCM Hospital on 13th February, 2009. According to her, the history was given by the Prosecutrix of forcible sexual intercourse with her

on three consecutive dates, i.e. on 7th, 8th and 9th February, 2009, by Juvenile Dnyaneshwar and the present Appellant. She has noted the said history in the MLC case papers produced on record at Exhibit-29.

17. On examination of Prosecutrix by PW-4 Dr. Meera Badve, she found two injuries; one that of nail scratch marks on both sides of chest laterally and tenderness of rib case on both sides. On vaginal examination, she found that the vagina was patulous and easily admitted cuscus speculum. She also noted that the hymen was torn, irregular and easily admitted two fingers.

18. In view of these clinical findings, PW-4 Dr. Meera Badve has arrived at the opinion that the Prosecutrix was subjected to repeated penetrative intercourse. The only admission brought out in her cross-examination is that there were no injuries noticed on the private parts, like, libia majora, libia minora and the hymen of vagina was torn one. A suggestion put to her that Prosecutrix has informed her that injury caused to her, are due to beating of her mother, is denied by her. Her Medical Certificate (Exhibit-30) is accordingly produced and proved on record by her, which thus fortifies the evidence of the Prosecutrix of being subjected to repetitive sexual intercourse.

19. As regards the age of the Prosecutrix, there is clinching evidence on record. Prosecutrix herself and her mother PW-1 Kausalya have stated that her birth date is 29th January, 1995 and she was born at YCM Hospital, Pimpri. There is absolutely no cross-examination of both these witnesses on the aspect of the age and her birth date. Then, there is evidence of PW-4 Dr. Meera Badve that during her stay in the hospital, the Prosecutrix was also referred for determination of her age. According to dental examination, her age was 14 to 15 years, whereas, as per Radiologist's opinion, the age of the Prosecutrix was 14 to 18 years. Accordingly, it was mentioned in the certificate (Exhibit-30). Again there is no cross-examination of PW-4 Dr. Meera Badve on the aspect of the age of the Prosecutrix.

20. The most clinching piece of evidence is the evidence of PW-6 Sunil John, who is working as Medical Officer in Administrative Department of YCM Hospital. He is in-charge of maintaining Birth and Death Certificates. He has issued Birth Certificate to the Prosecutrix on the request of her mother. He has also brought with him the original Birth Register maintained in the hospital and he has deposed that as per the said Birth Register, the birth date of the Prosecutrix is 29th January, 1995 and her birth place is YCM Hospital, Pimpri. Thus, the Birth Certificate of the

Prosecutrix (Exhibit-18) proved from the evidence of PW-6 Sunil John puts seal as regards the age of the Prosecutrix, which categorically goes to prove that at the time of incident, the Prosecutrix was hardly running the age of 14 years and, therefore, below 16 years and hence a minor.

21. The evidence of the Prosecutrix of being subjected to sexual intercourse at the hands of the Appellant against her will and the evidence that at the time of incident, she was minor, thus taken together, go to prove the offences under Section 376(1) IPC. As her evidence that at the time of incident, she was threatened with the dire consequences has also remained unchallenged on record, the charge under Section 506(2) IPC also stands proved.

22. This case of Prosecution is challenged by the learned Counsel for the Appellant, firstly, on the ground that in her evidence, the Prosecutrix stated that the name of the offender is Jitu Pujari, whereas, the name of the Appellant is Jitendra Salunkhe. It is urged that the identity of the Appellant in such situation, as the culprit is not established beyond reasonable doubt. To substantiate his submission, learned Counsel for the Appellant has relied upon ***Gajraj Ramswarup Kharare Vs. State of Maharashtra in Criminal Appeal No.698 of 2013, Judgment dated 31st January, 2014***, to urge that if the identity of the offender is not established

beyond reasonable doubt and if he is referred by different names by different witnesses, then the benefit of doubt should go to the Accused. However, the facts of this authority are totally different. It pertains to the Dying Declaration of the deceased, in which she has referred the Accused by different names, including Dalya, Dadu etc. Hence, in the absence of any evidence, which would connect the identity of the Appellant as the same person who is referred in the Dying Declaration, it was held that conviction of the Accused was only unsustainable. As against it, in the present case, the Prosecutrix has, in her evidence before the Court, categorically identified the Appellant as the same person whom she has referred as Jitu Pujari. Again there is no cross-examination of the Prosecutrix on this point. Not even a single suggestion is put to her that the Appellant is not the same person whom she was referring as Jitu Pujari or Appellant has not committed sexual intercourse, but it was committed by someone else known as Jitu Pujari. Thus, when the Prosecutrix has categorically identified the Appellant as the person who has committed rape on her, no question arises as to the doubt of his identity even assuming that she has referred him by different name.

23. The second submission advanced by learned Counsel for the Appellant is that except for her evidence, there is no other evidence on

record to prove the Prosecution case, which aspect need not detain me at all any longer in view of the fact that in case of offence of rape or sexual intercourse, there can hardly be the evidence of any other eye witnesses because such offences are committed in privacy and, therefore, the evidence of Prosecutrix herself is of vital importance. If her testimony inspires confidence, then it is not necessary at all to look for corroboration from any other source. Conversely, to insist on corroboration to her evidence in such cases is adding insult to her injury.

24. Moreover, in the instant case, sufficient corroboration is coming to her testimony from the evidence of her mother PW-1 Kausalya, to whom she has disclosed the incident immediately after her rescue. The corroboration is also coming from the medical certificate and the evidence of PW-4 Dr. Meera Badve, to whom she has given the history of sexual intercourse at the hands of the Appellant. Therefore, this is not a case where there is no corroboration at all. After all, the Prosecutrix is not accomplice to the offence, but she is victim of the incident. Her evidence is like that of an injured witness. Just as the evidence of the injured witness is accepted and relied upon, without insisting for corroboration from other sources, in the same way, the evidence of Prosecutrix also stands on the same pedestal. Only in exceptional circumstances, where

her evidence lacks credibility, corroboration can be insisted upon. In the present case, the evidence of the Prosecutrix is found to be more than sufficient and reliable to prove the guilt of the Appellant.

25. As regards submission that no corroboration is coming from the C.A. Certificate, as it does not prove the presence of blood and semen, it can be explained from the fact that the medical examination of Prosecutrix and collection of the vaginal smear or the blood sample was not done immediately, but 5 to 6 days after the incident. Therefore, the presence of blood and semen either on her clothes or vaginal smear cannot be expected. It is but natural that C.A. Reports in such circumstances will be negative.

26. To sum up, therefore, it has to be held that the Prosecution has succeeded in establishing the guilt of the Appellant for both the offences, punishable under Section 376(1) and 506(2) of the IPC, beyond reasonable doubt. Though the learned Counsel for the Appellant has also advanced the submission as regards the sentence imposed on the Appellant, in considered opinion of this Court, the Trial Court has imposed the minimum sentence, as provided for the offence under Section 376 of the IPC.

27. As per Proviso to Section 376 IPC, if the sentence is to be imposed less than the minimum, then special and adequate reasons are required to be made out. No such reasons are advanced either before the Trial Court or this Court. Therefore, as regards the sentence also, the Judgment of the Trial Court is required to be maintained and confirmed.

28. Consequently, this Criminal Appeal holds no merit and hence stands dismissed, confirming the conviction and sentence of the Appellant.

[DR. SHALINI PHANSALKAR-JOSHI, J.]