

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO.691 OF 1991

1. Shri.Balu Haribhau Balkawade,
Age – about 24 years,
Occu. Agriculturist
R/at Village Darawali, Tal.Mulshi,
Dist. Pune.
2. Shri.Vitthal Dhondiba Dhanave,
Age – about 22 years,
Occu.Agriculturist,
R/at Village Darawali, Tal.Mulshi,
Dist. Pune.
3. Shri.Vilas Bhaguji Kandhare,
Age – about 24 years,
Occu. Agriculturist,
R/at Village Kondhavale,
Tal.Mulshi, Dist.Pune. ... **Appellants**

V/s.

The State of Maharashtra ... **Respondent**

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Mr.Hitesh P.Vyas, Advocate for the Appellant No.1.
Mr.Pravartak Pathak, Advocate for the Appellant No.2.
None for the appellant No.3 (Since deceased).
Mr.Deepak Thakre, APP for the Respondent/State.

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CORAM : ABHAY M. THIPSAY J.

DATED : 30TH JULY 2015

ORAL JUDGMENT :

1. This appeal is directed against the Judgment and Order dated 04/12/1991 delivered by the Additional Sessions Judge, Pune, whereby he convicted the appellants of offences punishable under Section 366 of the Indian Penal Code (For short, “the IPC”) and Section 324 of the IPC read with Section 34 of the IPC. He additionally convicted the appellant No.1 of an offence punishable under Section 376 of the IPC. The learned Additional Sessions Judge imposed a sentence of Rigorous Imprisonment for five years and a fine of Rs.1,000/- with respect to the offence punishable under Section 366 of the IPC read with Section 34 of the IPC, a sentence of Rigorous Imprisonment for two years with respect to the offence punishable under Section 324 of the IPC and a sentence of Rigorous Imprisonment for four years and a fine of Rs.1,000/- with respect to the offence punishable under Section 376 of the IPC.

Being aggrieved thereby, the appellants have filed the present appeal challenging their conviction and sentences imposed upon them, praying that they be acquitted.

2. The appellants were the accused Nos.1,2 and 3, respectively, before the trial Court. There were three others, who were also prosecuted along with the appellants, but the learned Additional Sessions Judge held them not guilty and acquitted them.

3. The prosecution case, as put forth before the trial Court, briefly, be stated thus :

Hirabai Dattu Balkawade – the First Informant (PW1) is the cousin of one Ganpat Surve – father of the prosecutrix. Ganpat had five daughters and one son including the prosecutrix (Name not mentioned to prevent disclosure of identity). All the daughters including the prosecutrix were unmarried. The appellant No.1 had asked the prosecutrix to be given to him in marriage, which proposal was rejected by the said Ganpat. On 19/04/1990, the prosecutrix and her younger sister – Asha, had, along with Hirabai and some other women from their village, gone to Paud, as there was a fair. After the fair, they also went to see a *Tamasha* show. At about 3.30 a.m., they were returning. On the way, the appellant No.1 asked them to stop and then levelled a false accusation against the prosecutrix suggesting that she has stolen his watch. The appellant No.1 then, with the help of appellant Nos.2 and 3, abducted the prosecutrix. He had taken out a knife and had threatened Hirabai (PW1) and others by showing the same. In the process of abduction, the appellant had caused injury to Hirabai (PW1) and to Asha (PW5). After the prosecutrix was taken to some distance, the appellant No.1, with the help of appellant Nos.2 and 3, who held the prosecutrix, committed rape on her. The appellant No.1 then took the prosecutrix to the house of one Alka Yerankar (PW4). On the next

day, the prosecutrix was forced to accompany the appellant No.1 to Talegaon, where she was forced to undergo a marriage like ceremony. Photographs of the said ceremony were also taken.

4. Hirabai (PW1) had reported the matter to the police within a few hours from the incident i.e. in the early morning on 20/04/1990. A case in respect of offences punishable under Sections 366 of the IPC, 376 of the IPC and Section 324 of the IPC read with Section 34 of the IPC had been registered, and investigation was in progress.

On 02/05/1990, the appellant No.1 and the prosecutrix went to Paud Police Station and the appellant No.1 surrendered himself. The prosecutrix initially stated before the police that she had voluntarily left her father's place as she wanted to marry with the appellant No.1; and that, she had already married him and had no complaint of any nature. However, subsequently, the prosecutrix changed the version and claimed that she had been abducted, confined, forced to undergo a ceremony resembling marriage, and had been repeatedly raped by the appellant No.1.

5. On completion of investigation, a chargesheet came to be filed against the appellant Nos.1 to 3 and 3 others. The prosecution, as aforesaid, resulted in the conviction of the appellants and the acquittal of the other three.

6. During the trial, prosecution examined twelve witnesses. The first witness, it may be recalled, is Hirabai - the First Informant. The second witness is the prosecutrix herself. The third witness Dr.Nandkishore Deshmukh is the one who had examined Hirabai (PW1) and Asha (PW4), and noticed injuries on their persons. The fourth witness Alka is the one in whose house the appellant No.1 and the prosecutrix had taken shelter. The fifth witness, as aforesaid, is Asha – sister of the prosecutrix, who is supposed to have witnessed the abduction of the prosecutrix by the appellants. The sixth witness Dr.Laxmikant Bade is the one, who had examined the prosecutrix on 10/05/1990 for determination of her age. As a result of the Ossification Test, he estimated the age of the prosecutrix to be above 17 years, but below 19 years. The seventh witness Eknath Pingale is a panch in respect of a disclosure statement allegedly made by the appellant, pursuant to which a knife came to be recovered. This witness, however, did not support the prosecution and was declared hostile. The eighth witness Ganpat Satpute – a teacher working in Jivan Shikshan Vidya Mandir was examined for the production of the school record showing the date of birth of the prosecutrix. The ninth witness Dr.Priya Pardeshi is the one who had examined the prosecutrix on 03/05/1990 in the context of the allegation that she had been subjected to repeated acts of forcible sexual intercourse. The tenth witness Balaji Shete, Inspector of Police, is

the Investigating Officer who had filed the chargesheet against the appellants and the other accused. The eleventh witness Madhukar Patukle is a Head Constable, attached to Paud Police Station, at the material time. He had recorded the First Information Report (Exh.29). The twelfth witness Dinkar Pawar is a Sub-Inspector of Police, attached to Paud Police Station at the material time, who had carried out the initial investigation in this case. It is quite interesting to note that he was declared as hostile by the learned APP and questions in the nature of cross-examination were permitted to be put to him.

7. I have heard Mr.H.P.Vyas, the learned counsel for the Appellant No.1. I have heard Mr.Pravartak Pathak, the learned counsel for the Appellant No.2. I have heard Mr.Deepak Thakre, the learned Additional Public Prosecutor for the Respondent/State.

8. The appellant No.3 has passed away during the pendency of the appeal, and this Court, by an Order dated 30/11/2010 (Coram : Mr.R.C.Chavan J.) observed that the appeal, so far as it related to appellant No.3, stood abated. Apparently, it was not pointed out to the Court at that time, that since the sentence imposed upon the appellant No.3 is also of fine, the appeal, even in so far as it relates to the appellant No.3, would not abate and would need to be decided on merits.

9. Mr.Vyas, the learned counsel for the appellant No.1 contended that the prosecution had failed to prove its case against the appellants. He submitted that the prosecutrix had given contradictory versions and, therefore, her testimony ought not to have been relied upon. It is submitted that the evidence clearly indicated that the prosecutrix had voluntarily eloped with the appellant No.1 and that, she had stayed with the appellant No.1, travelled with him, had undergone ceremony of marriage, which factors were totally inconsistent with the prosecution case. It is also submitted that there were a number of discrepancies in the evidence of Hirabai and Asha, who were supposed to be the eye witnesses to the incident of abduction. It is also submitted that as per the prosecution case, the prosecutrix was abducted in the presence of about 10 to 12 women from the village, but none of them were examined, and that even their statements were not recorded in the course of investigation.

10. I have carefully considered the evidence of Hirabai (PW1) and Asha (PW5). In her evidence, Hirabai (PW1) stated about the incident, by and large, consistently with the version in the FIR. She said that between night of 19th and 20th April 1990, there was one *yatra* at Paud and that, Hirabai, the prosecutrix, Asha and 10 to 12 other ladies from Hirabai's *vasti* had gone there. That, at about 3.00 a.m. they were coming back by a tar road. When they had reached at some distance from Omble Vasti

somebody shouted as, “stop”, but Hirabai and other ladies kept walking. At that time, the appellant No.1 obstructed them and said that his watch was missing. The appellant No.1 then put his hand on the chest of the prosecutrix. The appellant No.1 told Hirabai that she should leave the prosecutrix. The appellant No.1 took out a knife, raised it and gave a blow thereof to Hirabai, who put her hand in between, and thus, sustained injury to her left hand thumb and palm. The appellant No.1 then called out the other appellants Vitthal (accused No.2) and Vilas (accused No.3) asking them to, 'take the prosecutrix'. The prosecutrix raised cries and caught the saree of Hirabai. The ladies, who were with Hirabai, prosecutrix and Asha ran away on seeing the knife and stood at some distance. The appellants were pulling the prosecutrix. Asha was pulling the prosecutrix in opposite direction. The prosecutrix was holding the saree of Hirabai. The appellant No.1 cut that part of the saree with the knife and took the prosecutrix away. During the incident, the middle finger of Asha also got a cut. When the prosecutrix was taken away by the appellant, she was shouting, calling out to her mother and father. After sometime, the shouts of the prosecutrix could not be heard and then Hirabai and others left. The incident was told to Ganpat – father of the prosecutrix. Then, Ganpat, Hirabai and others went to Paud and searched for the prosecutrix in nearby areas, but since the prosecutrix was not found, the matter was reported to the Paud Police Station. The statement of Hirabai was recorded and

treated as First Information Report (Exh.29). Enquiries were made with Asha also.

11. In the cross-examination of Hirabai (PW1), certain variations between her version in her evidence and the version in the First Information Report were brought on record. In the view that I am taking, I do not find it necessary to discuss the same.

12. The crucial evidence is of the prosecutrix (PW2) herself. She did state about the incident of the appellant No.1 obstructing her and Hirabai, and pulling her. She also stated that the other appellants also pulled her, on being asked to do so by the appellant No.1; and that, when the prosecutrix was holding Hirabai (PW1), the appellant No.1 hit Hirabai (PW1) with a knife. According to her, though she, Hirabai (PW1) and Asha (PW5) resisted, the appellants could successfully take her away. That, she was shouting, but the appellant No.1 gagged her mouth. She was then taken towards the river. Vitthal (appellant No.2) held her hands and Vilas (appellant No.3) gagged her mouth. The appellant No.1 then removed her clothes and had forcible sexual intercourse with her. That, all the appellants took her to the hillock at Amlewadi, where she was kept for one day i.e. from morning till evening. There again, the appellant No.1 committed forcible sexual intercourse with her. The appellant Nos.2 and 3 were with appellant No.1, at that time. At about 10.00 p.m., the appellants brought her down from the hillock. There were two

motorcycles, that had been brought by the other accused - Shivaji Bhagat and Chaban (Accused Nos.4 and 5 respectively, who have been acquitted). Prosecutrix was made to sit on the motorcycle of accused Shivaji Bhagat behind him and the appellant No.2 Vitthal. Sat behind the prosecutrix. A bed-sheet had been put on the person of the prosecutrix. The appellant No.1 had committed sexual intercourse with her, about five to seven times. The prosecutrix did not know the names of the other appellants except appellant No.1 – Balu and appellant No.5 Chaban. She, however, learnt the names of other appellants and the other accused from their addressing each other.

The prosecutrix was then taken to Vadgaon. She was taken to a house at Talegaon at about 9.00 a.m. There was a lady (Alka – PW4) in that house. Her husband was also there. In the night, the prosecutrix slept near that lady and told her that she had been abducted. That lady forced the prosecutrix to wear bangles. The prosecutrix was then taken to a temple and appellant No.1 then put garland around her neck. The prosecutrix was forced to garland the appellant No.1. That, from there, except the appellant No.1 and accused Chaban, the other appellants and the other accused went away. The others came back to the house of Alka (PW4). The prosecutrix was crying. Alka bolted the room, in which the appellant and the prosecutrix were there, from outside. The appellant No.1 again committed sexual intercourse with the prosecutrix.

From Vadgaon, the appellant No.1 took the prosecutrix to another village, where they stayed for two-three days. From there, the appellant No.1 took her to two-three other villages. In every village, the prosecutrix and the appellant No.1 stayed for about two-three days. All the time, accused No.5 Chaban was with the appellant No.1 and the prosecutrix.

13. The appellant No.1 and the prosecutrix then went to Kasarsavi village, where she met Police Patil of UMBERBET - one Bal Kisan Nangare, who she knew well. Seeing him, the prosecutrix hugged him and started crying. She asked him to save her from the situation. Nangare, however, gave a false message to the prosecutrix - stating it to be the message of her father - to the effect that she should speak in favour of the appellant No.1 as, otherwise, the appellant No.1 was going to beat her father and brother. Then, on his say, the appellant No.1 and Chabhan brought the prosecutrix to PAUD Police Station. On the way, the appellant No.1 threatened the prosecutrix that she should speak in his favour, otherwise her brother would be 'finished off'. The police recorded the prosecutrix's statement, but actually it was the appellant No.1, who was speaking. The prosecutrix was then sent to the SASOON Hospital on the next day, where she was kept for nine days.

14. In the cross-examination, it is revealed that the prosecutrix had given a completely different version of the happenings in her statement recorded by the police on 03/05/1990, which version has been brought on record. As per this version, the prosecutrix knew the appellant No.1 and that, she had told the appellant No.1 that she would love him, but 'its end must be important'. That, sexual intercourse had taken place between her and the appellant No.1 on a number of occasions during a period of one year before the incident. As per this version, she had insisted that the appellant No.1 – Balu should come to Paud when she was to come there, and take her away. As per this version, she only made a drama that she had been taken away by Balu, but actually she had voluntarily left with him.

15. The evidence of Asha (PW5) supports the prosecution case that the prosecutrix was abducted by the appellants. In the cross-examination, it was suggested to her that the prosecutrix had voluntarily gone with the appellant No.1, but that suggestion was denied by Asha (PW5).

16. Thus, though there are some minor discrepancies between the version of the prosecutrix, Hirabai (PW1) and Asha (PW5) about the incident of the abduction, all of them are consistent in the sense that, according to them, *while they were returning from Paud, the appellant No.1 obstructed them and with the help of appellant Nos.2 and 3 forcibly took away the prosecutrix.*

17. The question is about the reliability of the evidence of Hirabai (PW1), Asha (PW5) and the prosecutrix.

18. It has already been observed that the prosecutrix and the appellant No.1 went to the police station voluntarily, where the appellant No.1 appears to have surrendered himself. At that time, admittedly, the prosecutrix gave a different version about the incident and said that she had voluntarily gone with the appellant No.1. The evidence also indicates that the appellant No.1 and the prosecutrix had undergone a marriage-like ceremony by garlanding each other and that, photographs of the ceremony were also taken. These photographs were produced before the Court and tendered in evidence.

19. The evidence of Alka (PW4) in whose house the appellant No.1 and the prosecutrix had stayed for 2-3 days may now be examined. According to her, she knew appellant No.1 as he used to come her house to meet her son-Jitendra. That, the appellant No.1 along with some others and a girl, had been to her house. She has identified that girl as the prosecutrix. Alka's evidence shows that the appellant No.1 had told her that he had made the prosecutrix run away with him. Alka had then taken the prosecutrix at one side in the house and asked her whether she was a consenting party. That, the prosecutrix had not told her

anything and had kept quiet. In the next day morning, Alka again asked the prosecutrix that if she was not a consenting party, Alka would reach her to her parents. At that time, the prosecutrix told that the appellant No.1 made her run away and that, her honour had been lost and that she would marry the appellant No.1. Then, the appellant, the other boys, prosecutrix and Alka went to Talegaon, bangles were purchased and put on the prosecutrix, a Brahmin was called at a temple, religious rites were performed and marriage between appellant No.1 and the prosecutrix was performed. This witness was declared hostile and the public prosecutor was permitted to put questions in the nature of cross-examination to her. Pursuant to such questioning, it was suggested to her that she never told the prosecutrix that she would reach her to her parents, if she is not a consenting party, etc., but the witness denied these suggestions. She also denied, categorically, that after the marriage, appellant No.1 and the prosecutrix had slept in one room. According to her, the prosecutrix slept in kitchen and the appellant No.1, in another room. In the cross-examination, she said that the marriage took place in a cordial atmosphere and the prosecutrix was not forced to do anything.

20. In view of the inconsistent version of the prosecutrix (PW2) and the evidence of Alka (PW4), it would be appropriate to straightaway discuss the evidence of Dr.Priya Pardeshi (PW9). This Doctor, it may be recalled, had examined the prosecutrix

medically on 03/05/1990. Interestingly, on the examination of the prosecutrix she found only one small abrasion at six O'clock position to the hymen of the prosecutrix and except this, there was no other injury on the body of the prosecutrix. The prosecutrix was also not found accustomed to sexual intercourse. Interestingly, this witness was made to speak much about the history of the incident, as given by the prosecutrix to her, but very little was asked to her about the medical examination of the prosecutrix, which was the purpose behind her examination. In the cross-examination, she admitted that if resistance would be offered to sexual intercourse, there would be surface injuries on the person. She also said that in case of repeated sexual intercourse, the hymen will tear. She agreed that in case of the prosecutrix, the hymen had not been torn, but there was merely a small abrasion.

21. This medical evidence is absolutely inconsistent with the story of the prosecutrix. In fact, the medical evidence does not show even a case of complete act of sexual intercourse - not even a consensual one.

22. The vaginal smear of the prosecutrix was collected and sent to the Chemical Analyzer for examination, but nothing to show that the prosecutrix was subjected to intercourse was revealed from the said examination.

23. In the light of the fact that the prosecutrix had given two different versions in the course of investigation, her evidence needs to be subjected to meticulous scrutiny. The statement of the prosecutrix was also recorded under the provisions of Section 164 of the Code of Criminal Procedure, and though that version is also against the appellants, it is not the same as the version of the prosecutrix in the Court during her testimony. However, that is not the crucial aspect of the matter, and instead of judging the reliability of the evidence of the prosecutrix, by making a hairsplitting analysis of the minor discrepancies or inconsistencies in her version, the matter may be decided by keeping the broad probabilities in mind. The prosecutrix had stayed with the appellant No.1 for more than 12 days. During this period, she and the appellant No.1 stayed at various places. She had even met the Police Patil - Bal Kisan Nangare. Of course, she says that he did not help her, but the prosecution has not examined the said Nangare as a witness. Alka's evidence shows that the prosecutrix never complained that she had been forcibly brought to Alka's place and was being detained against her wishes. She went through the ceremony – supposed to be marriage ceremony – without any protest. It is difficult to hold that she could be forced to do all this against her wishes. The appellant No.1 and she had travelled by public transport at various places and it is not acceptable or believable that the appellant No.1 could create such

fear in her mind that she would, without being the willing party, do whatever the appellant No.1 would tell her to do.

24. This improbability is to be judged in the context of the evidence of Dr.Priya Pardeshi (PW9), which, as aforesaid, does not support the theory of repeated acts of sexual intercourse between the appellant No.1 and the prosecutrix. As a matter of fact, as already observed, this does not support even the theory of a voluntary intercourse between these two. The evidence of Dr.Priya Pardeshi shows that she was not in a position at all to give any final opinion to the effect that the prosecutrix had been subjected to any sexual intercourse - and this despite the report from the Chemical Analyzer.

25. When the improbabilities in the version of the prosecutrix are considered in the light of the medical examination, it, at once, becomes doubtful whether the prosecutrix case, as put forth, can be safely accepted.

26. Undoubtedly, Hirabai (PW1) and Asha (PW5) had said about the incident and have claimed that they sustained injuries during the incident. However, the injuries sustained by them are of extremely minor nature. Simply because such minor injuries were sustained, the whole theory - namely that these injuries were caused to them by the appellant No.1 while he forcibly took away the prosecutrix, cannot be accepted.

27. During the hearing of the appeal a rather unusual incident has taken place. Hirabai (PW1) appeared before this Court and stated that she wanted to make a certain statement. She produced 'Adhar Card' to establish her identity. On being permitted, she stated before the Court that the appellant No.1 actually wanted to marry the prosecutrix and had requested her father that she should be given to him in marriage. The father of the prosecutrix – Ganpat, however, had rejected the proposal. The prosecutrix had thereafter voluntarily gone with the appellant No.1. However, since Ganpat was not ready for the marriage of the prosecutrix, at his instance, a false report against the appellant No.1 and the others, was lodged by her. Hirabai has filed an affidavit to that effect, which has been taken on record.

28. Though I am not inclined to give much importance to what Hirabai now states, the fact remains that there was a reasonable doubt about the guilt of the appellants. This doubt arises, obviously, because of the fact that the version of the prosecutrix had been inconsistent. On a careful consideration, I think that the contradictory version of the prosecutrix – i.e. the version absolving the appellant No.1, might have been given by her, under the influence of the appellant No1. Therefore, not much importance to the same may be given. However, the inherent improbabilities in her version before the Court, and the medical evidence with respect to her examination as given by

Dr.Priya Pardeshi cannot be lightly overlooked and when considered together make it difficult to accept the prosecution case, as put forth.

29. The appellants had examined one witness in defence. That witness is a member of the staff of the District Court, Pune. At the material time, he was working as a *nazar*. According to him, an affidavit was sworn by the prosecutrix before him. The contents of which were to the effect that she had voluntarily eloped with the appellant No.1 and had married him in accordance with Hindu rites.

30. I have gone through the impugned Judgment. The learned Judge has noted the inconsistencies in the version of the prosecutrix, but has concluded that her version given before the Court was the true one and earlier version given by her before the police was false. According to him, this version of the prosecutrix was due to the fact that she was afraid of the appellant No.1. The learned Judge did not consider the possibility as to whether the prosecutrix, if she was unwilling, could not call anybody for her rescue during the period of about 12 days when she was with the appellant No.1. What is further important is that the learned Judge simply ignored the medical evidence of Dr.Priya Pardeshi and just emphasized the facts of the case as allegedly told to her by the prosecutrix. How there was no tear of hymen and how

there could be only a minor and small abrasion on the hymen in spite of the history of repeated sexual intercourse was not taken into consideration by the learned trial Judge.

31. In the context of the affidavit filed by Hirabai before this Court, (which by itself cannot be given much importance) that no independent witnesses, who were available as per the prosecution case, were examined to prove the abduction, is significant. That, not only none out of ten or twelve ladies, who have been supposed to witnessed the abduction of the prosecutrix were not examined, but even their statements were not recorded in the course of investigation was significant, but the significance was not realized by the learned Additional Sessions Judge.

32. This was a case whether the prosecution had failed to establish the charges against the appellants beyond reasonable doubt. The appellants, therefore, should have been given the benefit of doubt and should have been acquitted.

33. The appeal is allowed.

34. The impugned Judgment and Order of conviction is set aside.

35. The appellants are acquitted.

36. Their bail bonds are discharged.
37. Fine, if paid, by the appellant Nos.1 and 2, be refunded to them.
38. Fine, if paid, by the appellant No.3, be refunded to his heirs and legal representatives.

(ABHAY M. THIPSAY J.)