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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 488 OF 2007

1. Vinod Gopal Dalvi
Aged about 26 years,
R/o Room No. 201, Shankar Apts.
2nd Floor, Vakola Pipe Line
Santacruz East, Mumbai 400 055
2. Dhanraj @ Nandu Bhikaji Dalvi
Aged about ____ years,
R/o Parab Chawl No.4, Shrikrishna
Near Vakola Pipe Line
Santacruz East, Mumbai 400 055
3. Ravindra Gopal Dalvi
Age about ____ years,
R/o Room No. 201, Shankar Apts.
2nd Floor, Vakola Pipe Line,
Santacruz East, Mumbai 400 055
4. Anesh Jagannath Divkar
Aged ____ years,
R/o Room No. 7, Rama Patil Chawl,
Near Vakola Pipe Line,
Santacruz East, Mumbai 400 055

.. Appellants
(Org. Accd.Nos.1 to 4)

Vs.

The State of Maharashtra

.. Respondent

Mrs. Pooja Bhojne-Sejpal for appellants.
Mr. H. J. Dedhia, APP for State.

CORAM: P. V. HARDAS , J.

DATED : FEBRUARY 16, 2015.

ORAL JUDGMENT:

1. The appellants/Original Accused Nos.1 to 4 who stand convicted for offence punishable under Sections 457 and 324 read with Section 34 of the Indian Penal Code and sentenced to RI for three years and each accused to pay fine of Rs.3000/-, in default of which to undergo RI for six months and RI for three years and each accused to pay fine of Rs.3000/-, in default of which to undergo RI for six months, with the direction that an amount of Rs.7000/- be paid by each of the accused as compensation to PW 1 – Christaline Fernandes and that the substantive sentences shall run concurrently, by the Additional Sessions Judge, Greater Bombay, by judgment dated 24/04/2007, in Sessions Case No. 849 of 2004, by this appeal challenge their conviction and sentence.

2. Facts, as are necessary for the decision of this appeal, may be stated thus:-

PW 15 – PSI Nandkumar Savant, who, on 17/7/2004 was attached to the Vakola Police Station and was on duty, received specific call from a constable on duty at the V.N. Desai Hospital at about 1.30 p.m.

about admission of PW 1 – Christaline Fernandes in the hospital. An entry was accordingly taken in the station diary and PW 15 – PSI Savant proceeded to the V.N. Desai Hospital along with police staff. On reaching the hospital, he recorded the complaint of PW 1 – Christaline at Exh. 12. On the basis of the said complaint at Exh. 12, he registered an offence vide Crime No. 343 of 2004 under Sections 452, 324, 342, 367, 376 read with Section 34 of the IPC. On 18/7/2004 all the accused were arrested. On 19/7/2004 during custodial interrogation, accused no. 2 – Dhanraj expressed his willingness to point out the place of the incident and accordingly the memorandum was recorded at Exh. 36. On 19/7/2004, the clothes of PW 1 – Christaline were seized under panchanama at Exh. 21. Further investigation was handed over to PW 16 - PI Vithal Latpate.

PW 16 -PI Latpate, who was also attached to the Vakola Police Station was entrusted with the investigation of the said crime. On 21/7/2004 he referred the accused for medical examination. Their certificates are at Exhs. 38 to 41. On 22/7/2004, accused no. 4 – Anesh expressed his willingness to point out the place where his clothes had been concealed. Accordingly, a memorandum was recorded in the presences of panchas at Exh. X-2. The accused no.4 led the police and the panchas and

produced his clothes, which were seized under seizure memo at Exh. X-3. On 22/7/2004, accused no.2 – Dhanraj also expressed his willingness to point out the place where his clothes had been concealed. A memorandum of accused no.2 – Dhanraj was recorded in the presence of panchas at Exh. 60. Accused No.2 led the police and the panchas and produced his clothes, which were seized under panchanama at Exh. 60A. On 23/7/2004, accused no.1 – Vinod also expressed his willingness to point out the place where his clothes and clothes of accused no.3 – Ravindra had been concealed. A memorandum was accordingly recorded at Exh. 61. The accused no.1 led the police and the panchas and produced the clothes which were seized under panchanama at Exh. 61A. On 22/7/2004 statement of PW 5 – Alex was recorded. Statements of other witnesses were recorded and on 27/7/2004 the seizure property was referred to the Chemical Analyzer along with forwarding letter at Exh. 63. Exh. 64 Colly. is the report of the C.A.

PW 2 -Dr. Ritesh Nazareth has produced the record of the Holly Family Hospital, Bandra, where PW 2 – Dr. Nazareth was working with Dr. Munna Kazi. According to PW 2 – Dr. Nazareth, PW 1 – Christaline was found to have a swelling on the mandible, back of the head

and right shoulder and a bite mark on the right hand. According to Dr. Nazareth, the injuries were not self inflicted. Exh. 17A Colly. are the medical case papers.

PW 1 – Christaline was examined by PW 8 - Dr. Anisa Sayed on 17/7/2004 at 8.35 a.m. PW 8 -Dr. Sayed was attached to the V.N. Desai Hospital as a CMO. PW 8 – Dr. Sayed noticed the following injuries on external examination :-

- (i) Contused lacerated wound on the frontal region admeasuring 2 cm x 1 cm. No fracture clinically was noticed.
- (ii) Contused lacerated wound of the left tempero parietal region.
- (iii) Abrasion with haematoma of the right shoulder.
- (iv) Haematoma of the left thigh.
- (v) Blunt trauma to the right and left wrist with swelling and painful movements.

The injuries were noted in the Casualty Register at Exh. 30.

The photocopy is at Exh. 30A. PW 11 – Dr. Madhuri Attal, a Gynecologist, who was attached to the V.N. Desai Hospital had examined PW 1 – Christaline. She did not notice any bruises or laceration on the Vulva. She took vaginal swab, nail clippings and sample of the cubic hair and had drawn blood for grouping and sent it to the C.A.

3. Further to the completion of investigation, a charge-sheet against the appellants was filed. Trial court vide Exh. 3 framed charge against the appellants for offence punishable under Sections 451, 324, 342, 367, 376(2)(g) read with Section 34 of the IPC. The accused denied their guilt and claimed to be tried. Prosecution in support of its case examined 16 witnesses. The entire prosecution case revolves around the testimony of PW 1 – Christaline Fernandes, who is injured witness.

4. PW 1 – Christaline Fernandes deposes that she along with her husband PW 5 – Alex and her son PW 6 – Domnic as well as another son was residing in the house. On 16/7/2004, at about 10.30 p.m. her son Domnic returned home and informed her about a fight between Domnic and others and in that fight Domnic had been assaulted. PW 1 – Christaline came out of the house and saw four accused coming towards

them. She has identified the appellants to be the same accused. On making query with the accused, accused no.1 – Vinod slapped her. At about 11.30 p.m. the appellants came to her house. At that time, Christaline, her husband PW 5 – Alex and her two sons were present in the house. The appellants started assaulting PW 6 -Domnic after entering the house. Christaline and her husband Alex attempted to intervene, but the appellants assaulted them also. She caught the legs of accused no.1 – Vinod and Nandu and asked her son Domnic to flee from the spot. At that time, accused – Vinod lifted a bamboo and assaulted Christaline on her shoulder, face and head. Christaline sustained bleeding injuries. Accused No.1 – Vinod had enquired from her as to where Domnic had gone, but Christaline did not disclose. According to Christaline, the appellants dragged her at some distance, tore her clothes and denuded her and committed rape on her. The appellants have been acquitted in respect of the charge under Section 376(2)(g) of the IPC. The State has also not filed any appeal against acquittal and, therefore, I refrain from making any reference to the evidence in respect of the charge of rape. According to Christaline, she returned home on the next day at about 6 a.m. She thereafter changed her clothes and took her younger son Baptist to the school. After returning from the school, she woke her husband and

informed him about the incident. PW 4 – Alex took her to the Municipal Hospital at Golibar where first aid was administered to her. On arrival of the police in the hospital, her statement at Exh. 12 was recorded. She has identified the appellants to be the same persons.

5. In cross-examination, she has admitted that she knew the accused as they were coming to the area. She has admitted that the accused had never visited her house. She has further admitted that the appellants used to come to their lane and, therefore, she knew them. She has admitted that her son Domnic was studying in the 10th standard. She has admitted that Vinod had assaulted Domnic in her presence. Initial quarrel between Domnic and John was outside the house and she had not gone out of the house. She could not state whether she had seen the accused outside the house at that time. She was confronted with portion marked “A” from her statement that she had gone out and had seen accused no.1 – Vinod assaulting Domnic. She has admitted that she had been assaulted outside the house as well as inside the house. This witness refers to the slap which was given by accused no.1 – Vinod during the initial quarrel and in the subsequent quarrel about her being assaulted inside the house. She has admitted that her husband had not attempted to intervene and help her

when she was dragged out of the house as he had been confined in the house. She has admitted that when she reached home after the incident, she did not inform her husband about the incident. She has said that she does not know Dhanraj and Anesh. She has identified accused – Nandu and when asked to identify accused no.4 – Anesh, she has identified him by stating that his name was Uday.

6. The trial Judge has disbelieved this witness so far as the charge under Section 376(2)(g) is concerned. As pointed out by us above, prosecution has not filed any appeal challenging the acquittal.

7. Prosecution has examined PW 5 – Alex, husband of PW 1 – Christaline, who deposes that on 16/7/2004 at about 11.30 p.m. the appellants had entered the house and had assaulted his son Domnic. He claims that he too had been assaulted. According to him, his wife PW 1 -Christaline was assaulted by the appellants with a bamboo stick. According to Alex, he was rendered unconscious and regained his consciousness at about 5 to 6 a.m. He has admitted that his wife was not in the house. According to him, he noticed that the clothes of his wife were dis-arrayed and were torn. He admits that Christaline had informed

him that the accused had committed rape on her. He deposes about admitting his wife in the hospital and about police recording her statement.

8. In cross-examination, he was confronted with portion marked “A” from his statement that accused – Vinod had come with a bamboo stick with him. He has denied to have stated portion marked “A”. He was confronted with portion marked “B” from his statement that after the assault, due to apprehension, he was sitting in the house. He has denied to have stated portion marked “B” in his statement. Omission has been elicited that he had not stated in his previous statement that he was unconscious and that he had regained his consciousness at about 5 to 6 a.m. Omission is also elicited that he had not stated that all the accused were armed with bamboo stick. He has admitted that he had seen the accused for the first time in his house. He has admitted that he was not knowing them by their individual names.

9. Prosecution has examined PW 6 – Domnic, who deposes about the earlier incident of one John teasing him. He deposes that thereafter he was assaulted by accused no.1 – Vinod. On reaching the home, he had informed his mother about the incident. PW 1 – Christaline

had gone out of the house and had enquired with accused no.1 – Vinod due to which Vinod had slapped her. According to Domnic at about 11 p.m. the appellants came to his house, they broke open the door and entered inside the house and were assaulting him. Domnic deposes that his parents rushed to rescue him and accused no.1 – Vinod picked up a bamboo stick and assaulted his parents. Christaline asked him to flee from the place and, therefore, he fled and hide himself beneath the Santacruz bridge. On the next day at about 5.30 a.m. he went to the house of his grandmother and in the evening returned and learnt that the accused had committed rape on his mother.

10. In cross-examination, he has admitted that he does not know as to where accused were residing. He has also admitted that he did not know their occupation. He has, however, admitted that after returning from work, he used to see the accused. He has also admitted that since the accused were calling each other by their names during the incident, he had learnt their names. He has admitted that prior to the incident, he was not knowing the accused by their names.

11. Learned counsel for the appellants has urged before us that no

reliance can be placed on the testimony of PW 1 – Christaline, PW 5 -Alex and PW 6 – Domnic in respect of the trespass as well as assault on Christaline. The learned counsel for the appellants has urged that in the light of the variations in the testimony as well as a false accusation having been made by PW 1 – Christaline, the accused deserves to be acquitted. The learned APP has supported the findings arrived at by the trial court.

12. It is true that there are inter se variations in the testimony of PW 1 – Christaline and PW 5 – Alex. Even PW 1 – Christaline has been disbelieved by the trial court in respect of the offence under Section 376 (2) (g). Despite the variations in the evidence of the eye witnesses, we find that the evidence of PW 1 – Christaline in so far as the accused forcibly entering her house and assaulting her and her husband is reliable. The identity of the appellants has also been established. It is true that implicit reliance cannot be placed on the testimony of PW 1 – Christaline and, therefore, the trial court has performed the exercise of separating the truth from the falsehood. After performing that exercise, the trial court found the residue to be sufficient for convicting the appellants.

13. With the assistance of the learned counsel for the parties, I

have perused the depositions of the witnesses. In my opinion also the offence against the appellants has been established beyond reasonable doubt. Learned counsel for the appellants states before me that the appellants have already undergone the sentence passed by the trial court.

14. Thus, after giving my thoughtful consideration to the submissions advanced before me, in my opinion, there is no merit in the appeal and the appeal filed by the appellants, therefore, deserves to be dismissed.

15. Accordingly, Criminal Appeal No. 488 of 2007 is dismissed, confirming the conviction and sentence of the appellants.

(P. V. HARDAS,J.)