

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO.525 OF 2010

Gopal @ Gopi Ramdas Shetye

Age : 35 Years, Occupation : Service,

R/o.Hut No.123, Nityanand Nagar

Hutment, Viatangwadi, Ghatkopar,

Mumbai.

... **Appellant**

V/s.

The State of Maharashtra

Through - Kurla Railway Police Station

in C.R.No.168/2009

... **Respondent**

.....

Mr.R.L.Majgaonkar, Advocate for the Appellant.

Mrs.S.V.Gajare, APP for the Respondent/State.

....

CORAM : ABHAY M. THIPSAY J.

DATED : 10TH JUNE 2015

ORAL JUDGMENT :

1. The appellant was prosecuted on the allegation of having committed an offence punishable under Section 376 of the Indian Penal Code. The Ad-hoc Additional Session Judge at Sewree, Mumbai, after holding a trial, found him guilty of the said offence and sentenced him to suffer Rigorous Imprisonment for seven years and a fine of Rs.400/-, in default to suffer Rigorous Imprisonment for one month. Being aggrieved by the Judgment

and Order convicting him, the appellant has approached this Court by filing the present appeal.

2. The prosecution case, as can be seen from the 'brief facts of the case' reflected in Column No.16 of the printed prescribed proforma of the charge sheet, may be stated as follows :

That the victim (name not mentioned to prevent disclosure of identity), who was a resident of Aurangabad had come to Ghatkopar Railway Station on 19/07/2009 and had been sleeping in the night on the overbridge of the Railway Station. That, at that time i.e. between 2.40 a.m. to 3.00 a.m. the appellant went to her, woke her up, stated that he loves her and then against the wishes of the victim took her to a open space on the railway overbridge and committed forcible sexual intercourse with her.

3. In order to establish its case against the appellant, the prosecution examined five witnesses during the trial. The first witness is the victim herself. The second witness is one Dr.Ranjit Kale, who was, at the material time, attached to Rajawadi Hospital and who had, on 19/07/2009 at about 5.00 a.m., examined the victim medically. The third witness Narayan Pujari is a panch who was supposed to have acted as such in the spot panchanama drawn on 24/07/2009, but he did not support the case of the prosecution. The fourth witness Sainath Mangaonkar is the person, who had held a Test Identification Parade on 07/08/2009.

The fifth witness is Smt.Lata Sutar, a Sub-Inspector of Police, who was attached to Kurla Railway Police Station at the material time. She is the one who had recorded the First Information Report and had carried out certain investigation including the arrest of the accused, which was effected on 29/07/2009. The police officer who completed the investigation and filed the charge sheet was not examined.

4. The appellant, who was denied bail during the pendency of the appeal, has been released from the prison after having undergone the full sentence imposed upon him. He is present before the Court and has insisted on a decision of the appeal on merits.

5. I have heard Mr.R.L.Majgaonkar learned counsel for the appellant and Mrs.S.V.Gajare learned Additional Public Prosecutor for the respondent/State. With their assistance, I have gone through the entire evidence adduced during the trial. I have also carefully gone through the impugned Judgment.

6. It is clear that the victim and the appellant were not known to each other since previously. According to victim, she met the appellant only on that day when the incident took place. In the investigation that was carried out chemical analysis in respect of the clothes seized/recovered from/at the instance of the

appellant was got done, but admittedly, nothing incriminating was found on examination of the clothes of the appellant. *Thus, the whole case rests on the testimony of the victim and her identification of the appellant as the one, who committed rape on her.*

7. The evidence of the victim reveals that she used to reside at Aurangabad and that, about a year and half before the incident, she had come to Kalyan and had been residing there. The victim was working as a maid servant initially, but had left the job and was surviving by begging at Kalyan railway station. On 19/07/2009 she boarded one train from Kalyan for coming to Mumbai and got down at one railway station. She was hungry and she was weeping on the railway station. One person came to her and on learning that she was hungry, offered food to her. That person took the victim to one shop, gave her meals, put her in the shop, locked it from outside and disappeared. In the morning, the said person came, opened the shutter of the shop, gave tea to the victim and asked her to go. The victim came back to the railway station in order to search work. She spent the day in begging. In the night, she was sleeping on the platform and at that time a person came to her and told her that he was in love with her. When the victim did not reply, the said person pulled her in corner and raped her. According to the victim, after committing rape that person called one rickshaw and took the victim to one hospital. That person had also told the doctor that the victim had fallen

down. While the doctor was examining the victim, police came there and as soon as that person saw the police, he ran away.

8. It is not necessary to examine whether that the incident of rape had actually taken place as alleged by the victim was satisfactorily established. *It is because the real question that needs determination is whether the identity of the appellant as the person who committed rape on the victim was satisfactorily proved during the trial.*

9. The incident had taken place on 19/07/2009. The appellant was arrested on 29/07/2009 and was placed on Test Identification Parade on 07/08/2009. However, admittedly, the appellant was shown to the victim at the police station itself before the Test Identification Parade was held.

10. The evidence of the victim has been recorded in a peculiar manner. Her examination-in-chief was partly done on 05/01/2010 and then the matter was adjourned for further examination-in-chief. No attempt to establish the identity of the appellant as the culprit was made on that date, and the victim was not at all questioned by the Assistant Public Prosecutor in that regard. The further examination-in-chief took place on 12/03/2010 in which the identity of the appellant was got established. The relevant part of the notes of evidence in that regard reads as under ;

“Witness identifies accused present before the court.”

11. Thus, the identification has been brought on record as and by way of a note made by the learned Judge, and not on a statement made by the victim. Such a procedure was uncalled for, and if the victim had identified the appellant, it was the assertion made by her before the Court that ought to have been recorded. In the further examination-in-chief of the victim, more emphasis has been placed on the alleged fact of the identification of the appellant done by the victim in the jail, during the Test Identification Parade.

12. In my opinion, considering that the appellant was shown to the victim at the police station after his arrest and before holding the Test Identification Parade, *which fact was attempted to be suppressed by the Investigation Agency* as also the fact that the social status of victim and her position was such so as to render her susceptible to the suggestions, it would be unsafe to hold that it must be the appellant, who had committed rape on the victim.

13. The incident had taken place on 19/07/2009 and the appellant came to be arrested on 29/07/2009. It appears that the victim had learnt the name of the culprit to be 'Gopi' and had given that name to the police. The name of the appellant is 'Gopal Ramdas Shetye' and that *his name is 'Gopal alias Gopi' appears to have been a theory introduced by the Investigation Agency itself.* There is absolutely no material to indicate that the appellant was known also as 'Gopi' and there is no evidence to this effect.

14. It is clear that the C.C.T.V. footage covering the place of incidence and/or related areas was available to the Investigation Agency and had been collected in the course of investigation. This is stated by Smt.Lata Sutar (PW5) herself in her evidence. It appears that efforts were being made to find out the culprit on the basis of the images that would be found in the C.C.T.V. footage and that, actually on the basis that the description of the appellant matched with that of the culprit as revealed from the images, the appellant seems to have been arrested. If this was so, production of the C.C.T.V. footage before the Court would have lend assurance to the identification of the culprit. The Court in that case would have been in a better position to decide the question of identity of the appellant as the culprit in a more satisfactory manner. Since that such C.C.T.V. footage was available and was collected - as stated by the Investigating Officer herself - it may be safely assumed that it was held back because the images contained therein were not visible or clear. This factor creates a further doubt about the correctness of the identification of the appellant as the culprit.

15. The investigation had not been satisfactory. No serious efforts to find out the truth or to collect evidence were undertaken. The prosecution case is that the culprit had taken the victim to the hospital in rickshaw. No attempts to trace the rickshaw and to get the identity of the appellant as the same

person, who had taken the victim to the hospital in the rickshaw, were taken. The prosecution case is also that the culprit was present with the victim for some time in the hospital when she was being medically examined and treated, and had run away only after the arrival of the police. Whether the person who had brought the victim to the hospital was seen by the doctors or staff of the hospital, and whether that person was indeed the appellant, was not attempted to be investigated into.

16. Since the whole accusation against the appellant was based on a solitary piece of evidence- viz:- his identification as the culprit - not previously known to her - by an illiterate victim, who also came from a lower strata of the society and who could, therefore, be susceptible to the suggestions from the Investigating Agency, it was not safe to base the conviction of the appellant on such a piece of evidence. This is more so because, as aforesaid, even such identification is not satisfactorily reflected from the notes of evidence and finds a place by way of an observation or note made by the learned trial Judge, rather than being reflected as a statement made by the victim before the Court.

17. In my opinion, this was a case where the identity of the appellant as the culprit had not been satisfactorily established. In my opinion, there was indeed a real and substantial doubt about the identity of the appellant as the culprit. The trial Court ought

to have been given the benefit of that doubt to the appellant and should have acquitted him.

18. The appeal is allowed.

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

20. The appellant is acquitted.

21. Fine, if paid, be refunded to him.

(ABHAY M. THIPSAY J.)