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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL 767 NO.2013.**

Rajashekhar Bansode @ Babu @	]
Mohd Dilawar Hussain Mulla	] <u>... Appellant</u>
Jay Bhim Nagar, Near Buddha Vihar	] Ori. Accused No.1
Filter Pada, Aarey Nagar	]
Powai, Mumbai 87	]

-VS-

The State of Maharashtra	]
Through Powai Police Station	].... Respondent
Mumbai	]

Mr. Anand S. Patil, appointed advocate for the Appellant.

Ms. R. M. Gadhvi, A.P.P., for the Respondent-State.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 1st JULY, 2015.

ORAL JUDGMENT. :

1. This appeal is preferred by the original accused No. 1 against the judgment and order dated 26th April, 2012 in Sessions Case No.469 of 2011, passed by Ad-hoc Additional

Sessions Judge, Mumbai, thereby convicting appellant-accused No.1 for the offence punishable under Section 376 of IPC and sentencing him to suffer rigorous imprisonment for 7 years and to pay fine of Rs.20,000/- in default to suffer rigorous imprisonment for six months. By the said judgment the accused No. 1 alongwith accused No.2 Vikas is further convicted for offence punishable under Section 67 read with 34 of the Information Technology Act, and sentenced to suffer them rigorous imprisonment 3 years and to pay fine of Rs.5,000/-, each in default to suffer simple imprisonment for six months. They are also convicted for the offence punishable under Section 292 r/w 34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for 6 months. The substantive sentences of imprisonment were to run concurrently.

2. The facts, as are necessary, for deciding this appeal, may be stated as follows :-

The prosecutrix in this case is a married lady residing alongwith her husband, having one son and four daughters at

Jaybhim Nagar, Filter Pada, Powai, Mumbai. She was working as maid servant in the Customs Colony. She was knowing the appellant as he has done electric wiring in her house. Three months prior to the incident, there was repairing of electric work in her house. Hence she called appellant to her house for work. At that time appellant locked front door of the house and tried to use criminal force against her to violate her modesty. Hence she shouted loudly. When nearby persons gathered in front of her house, appellant fled through window.

3. The incident giving rise to this case took place on 18th March, 2011. On that day, when she was proceeding for her work in the Customs Colony at about 10.30 a.m. appellant suddenly caught hold of her and covered her face. He took her to the room situated on the third floor of the Customs building and there he committed forcible sexual intercourse with her. He also recorded video shooting of the entire incident on his mobile phone and threatened her that if she discloses about the incident to anyone, he will show and circulate it to others.

4. After the incident, prosecutrix returned to her house crying. Her husband was out of station. When he returned after two days, she narrated the entire incident to him. Meanwhile appellant has started showing video recording of the said incident to accused No.2. Accused No.2 and the appellant both were circulating the said video shooting and displaying the same to other persons in the locality. Hence the prosecutrix went to police station and lodged complaint against accused vide exh.15.

5. On the complaint of prosecutrix, P. W.10 P.S.O. Rane, who was on duty at Powai Police Station registered C.R.No.131 of 2011, against appellant and accused No.2, for the various offences punishable under Sections like section 376, 420, 506 (2), 292 r/w 34 of the IPC, and also under Section 67 of the Information Technology Act.

6. On the same day P.W.10 PSI Rane, took search and arrested appellant on that night. From possession of appellant Mobile Phone of "Samsung Company" with SIM card of Idea Company came to be seized under panchanama Exh.20.

Thereafter P.W. 10 PSI Rane, prepared spot panchanama in the presence of P.W.7 panch Dinesh Mehta. From the spot, he seized the bed-sheet which was used in the commission of the sexual intercourse under panchanama Exh.37. On the next day, he also seized the clothes of the prosecutrix under panchanama Exh.28. Further investigation of the case was taken over by P.W.11 PI Girap. He arrested accused No.2 on 28.3.2011 and then seized two mobile phones which were produced by witnesses Abdul Shaikh and Ashok Kalyani vide Panchanama Exh.41 in the presence of P.W.8 panch Aruna Katare. He sent the seized muddemal articles like mobiles phones and clothes of the prosecutrix to Chemical Analyzer, recorded statements of relevant witnesses and further to completion of investigation, he filed chargesheet in the Court against accused.

7. On committal of the case, to the Sessions Court, trial Court framed charge against accused vide exh.2. Both the accused pleaded not guilty and claimed trial, raising the defence of false implication.

8. In support of its case, the prosecution examined 11 witnesses and on appreciation of their evidence , trial Court was pleased to hold guilt of both the accused to be proved and convicted and sentenced them as aforesaid.

9. This judgment of the trial Court is challenged in this appeal by learned counsel for the appellant and supported by learned APP. In my considered view, before adverting to the rival submissions advanced by them, it would be useful to refer to the evidence on record.

10. The vital evidence in the case is naturally that of prosecutrix. It being sexual offence which is normally committed in secrecy and privacy, therefore, evidence of other witnesses may not be available. Hence as per settled position of law, if the evidence of prosecutrix inspires confidence in judicial mind, the conviction can rest on her sole testimony. It is not necessary to seek corroboration to her testimony. As a matter of fact, doing so is tantamount to adding insult to her injury.

11. In the instant case, the evidence of P.W.1 prosecutrix

reveals that she was knowing appellant as he used to come to her house for carrying out work of electric wiring and repairs. About 3 months prior to the incident, when he had come to her house for repairing of electric wiring, he has tried to violate her modesty. When she shouted, the persons nearby gathered, and the appellant run away from the window.

12. In this backdrop, the present incident took place on 18.03.2011 at about 10.30 a.m., when she was proceeding for her work in the Custom Colony. As per her evidence, appellant suddenly caught hold of her hand, covered her face with clothe and took her to the room situated on the third floor of the Customs building. At that time she was half conscious. The appellant made her to lie on the floor, switched on his mobile phone and kept the same nearby. Appellant was holding her both hands with his one hand. He then undressed her and raped her. Appellant further threatened her that if she discloses the incident to anyone, then he would make public the video shooting of the rape committed by him. Appellant then drove her out of the house. She returned to her house crying. As her

husband was out of station, she did not lodge complaint immediately. In the meanwhile she came to know that the appellant has started showing and circulating the video shooting of the said incident to accused No.2 and other boys in the locality. Hence she went to police station and lodged complaint (Exh.15).

13. In her cross-examination certain contradictions and omissions are brought on record to the effect that she had not disclosed earlier incident of violating her modesty to anyone. She has denied the portion marked "A" in her statement to the effect that she went with appellant in the room at Customs Colony of her own accord, as appellant wanted to express sorry for the earlier incident. Further, it is brought on record that she has not sustained any injuries in the said incident. Her clothes were also not torn. She had personally not seen the video shooting of the alleged incident.

14. On the basis of these contradictions and the admissions given by her in the cross-examination, coupled with

the fact that there is delay of 7 days in lodging complaint, it is urged by learned counsel for the appellant that implicit reliance cannot be placed on her testimony.

15. As regards the delay in lodging complaint, it is needless to say that in respect of sexual offences, especially in case of married woman, having children, the delay is natural as she herself will not take decision of approaching the police without discussing about it with her husband. Prosecutrix has deposed that as her husband was away, after his return, they discussed the matter and then lodged her complaint. In view thereof, it has to be held that the delay is explained satisfactorily in the present case.

16. About the omissions and contradictions, those are bound to occur in the evidence of any truthful witness, they do not go to the root of the matter, to vitiate or discredit her testimony, especially when her testimony gets complete support and corroboration from the testimony of other material witnesses, who had actually seen the video shooting of the said

incident, as displayed to them by appellant and accused No.2.

17. In this respect, there is evidence of P.W.2 Madhuri Sharma who is residing in the same locality and knowing prosecutrix and accused. As per her evidence, on 26th March, 2011, when she was returning to her house at about 2.00 p.m., near Buddha temple, she saw some boys were gathered. Accused No.2 was showing them video shooting of the incident on his mobile. She has also seen the said shooting and found that the prosecutrix was lying on the floor and appellant was lying on her body. She has further stated that P.W.6 Vikas Gole and one Ashok Kalyani were also present in the gathering. As per her cross-examination, she had seen faces of appellant and the prosecutrix.

18. Then there is evidence of P.W. 3 Lalita Gole and P.W.6 Vikas Gole to the effect that they had actually seen the entire video recording of the incident. As per evidence of P.W.3 Lalita, accused No.2 was showing video shooting on the mobile phone and it was containing body parts above waist of the prosecutrix

and appellant and appellant was lying over the prosecutrix. The video shooting was regarding sexual intercourse between the prosecutrix and the appellant. P.W.3 Lalita has intimated about the said fact to the husband of prosecutrix. In her cross-examination, it is further brought on record that she has seen video shooting for about 2 to 3 minutes. In the said video shooting, there was scene in which appellant was removing clothes of prosecutrix.

19. The evidence of P.W.6 Vikas Gole is also similar. He is having Pan Shop and accused No.2 had come to his Pan Shop and shown him nude photographs of the prosecutrix and appellant which were on his mobile. In the said vide shooting appellant was lying on the body of the prosecutrix and it was video shooting of sexual intercourse between appellant and the prosecutrix. His evidence further reveals that accused No.2 has forwarded the said video shooting via bluetooth to his mobile. However, after watching the video shooting, he has deleted the same due to fear.

20. In his cross-examination, he is confronted as to why he did not refuse to see the video shooting and he has answered that as he was not believing the fact of video shooting, he saw the same to test its veracity. Further he has admitted that he saw video shooting for about 2 to 3 seconds.

21. Though these two witnesses are cross-examined at length by learned defence counsel, nothing worthwhile is elicited in their cross-examination to disbelieve them or to discredit them. Hence even if Forensic Report reveals that no pornographic material was found in the SIM Cards of mobile phones which were seized during the course of investigation, there is no reason to disbelieve these witnesses. They are independent witnesses. Nothing is brought on record to show that they are having any inimical relations with either of the accused. The possibility of these witnesses or the accused deleting the video shooting on the said mobile phones before they were seized by the police cannot be ruled out as it is quite easy to do the same with a click of single button.

22. The absence of the medical evidence in the case can be easily explained as the prosecutrix is a married lady having given birth to four children. Moreover, her medical examination was conducted 7 days after the incident, therefore, there was no possibility of any external injuries being noticed on her body. Similarly the absence of forensic evidence on the clothes of prosecutrix also can be explained on account of delay in lodging complaint.

23. The prosecution has also examined other witnesses like P.W.9 Jogdand, who was working as watchman in the Customs Building and has deposed about appellant coming with one lady to the room of P.W.4 Raghunath Singh. The prosecution has also led the evidence of P.W.4 Raghunath Singh to prove that appellant was working as cook and the key of his room used to be with the appellant. Even if the evidence of these witnesses is left aside, the evidence of prosecutrix herself, coupled with the evidence of P.W.3 Lalita and P. W.6 Vikas Gole, in my considered opinion, is sufficient to prove the guilt of the appellant for the offences held to be proved against him. The appeal, therefore, is

devoid of merit, hence stands dismissed.

24. The fees payable to appointed advocate Mr. Anand S.Patil, by Legal Services Authority, are quantified at Rs.5,000/-.

[DR.SHALINI PHANSALKAR-JOSHI, J.]