

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1557 OF 2004

Mehboob Abbas Ali Jamadar
Age 45, Adult, Occ.Service
R/o Fisherman Police Colony,
Building No.7, Room No.83,
Mahim, MUMBAI – 400016.

.. Appellant

Versus

The State of Maharashtra

.. Respondent

Mr. Niteen Pradhan i/b Mr.Kuldeep Patil, Advocate for the appellant.

Mr.D.P. Adsule, APP for the Respondent State.

CORAM : ABHAY M. THIPSAY, J.

DATED : 24th AUGUST, 2015

ORAL JUDGMENT :

1 This Appeal is directed against the judgment and order dated 18th December 2014 passed by the Addl. Sessions Judge, Greater Mumbai in Sessions Case No.742 of 1995, convicting the appellant who was an accused in the said case of a number of offences. The details of the offences in respect of which the appellant was convicted and the sentences imposed upon him by the learned Addl. Sessions Judge for the said offences are as given below :-

Sr.No	Offence Under Section	Sentences
1)	420 IPC	Three years R.I and fine of Rs.500/- in default to undergo S.I for three months.
2)	366 IPC	Three years R.I and fine of Rs.500/- in default to undergo S.I for three months.
3)	347 IPC	Three years R.I and fine of Rs.500/- in default to undergo S.I for three months.
4)	354 IPC	Two years R.I.
5)	376 IPC	Seven years R.I and fine of Rs.1,000/- in default of payment he shall undergo one year R.I. If the amount is realized Rs.5,000/- of the same shall be paid to the prosecutrix as compensation.
6)	506(II) IPC	Three years R.I.

2 The appellant is aggrieved by the judgment and order of his conviction and the sentences imposed upon him, and as such, has approached this Court by filing the present Appeal.

3 The appellant, who is a Police Constable, was at the material time, attached to Borivali Police Station. The victim and her husband, because of some complaints that had been made against them, came in contact with the police, and that is how the victim and the appellant got acquainted with each other. The appellant taking advantage of his position threatened and beat the husband of the victim by calling him at the police station, and

thus, was able to create his fear in the mind of the victim and her husband. The appellant then started behaving in a friendly manner with the victim and her husband and sometime in September 1991, came to the house of the victim, took her out, managed to take her to a lodge, and had forcible sexual intercourse with her in the presence of her daughter, aged about seven years. This is in short, the case of the prosecution.

4 The victim went to Borivali Police Station to report the matter, but had considerable difficulty in getting her report to be written. One Gidde who was the Inspector in-charge of Borivali Police Station, at the material time, was made aware of the incident by the victim, but Gidde gave evasive replies and was soon transferred from the said police station. Victim then informed the successor of PI Gidde, but no report was registered by the police and the information given by the victim was not even taken out. The victim then approached some social workers who helped her and ultimately succeeded in having her statement recorded by the police on 15th October 1994. However, no crime was registered on the basis of this statement. Ultimately, it is only on 20th April 1995, the said statement was treated as the First Information Report and a crime was registered on that basis. After investigation, a charge-sheet alleging commission of the aforesaid offences by the appellant came to be filed, and as aforesaid, the appellant came to be convicted and sentenced.

5 Only three witnesses were examined during the trial. The first is the victim herself. The second witness Manohar Shirodkar and the third witness Maruti Sakpal are both Police

Officers. Shirodkar had made preliminary inquiry into the matter, and had registered a case on that basis. Maruti Sakpal carried out further investigation, and on completing the same, filed the charge-sheet against the appellant.

6 I have heard Mr.Niteen Pradhan, learned counsel for the appellant. I have heard Mr.D.P. Adsule, learned APP for the State. With their assistance, I have gone through the evidence adduced during the trial and the impugned judgment.

7 Mr.Pradhan contended that the impugned judgment of conviction, as recorded by the learned Addl. Sessions Judge is not in accordance with law. According to him, there were a number of discrepancies in the evidence of the victim which was uncorroborated. According to him, the evidence of the victim was not of a quality so as to base a conviction only on her uncorroborated testimony. He also submitted that the material witnesses such as the daughter and husband of the victim were not examined. He also submitted that there was a delay in reporting the matter to the police. He submitted that since the claim of the victim was that the matter was immediately reported by her to PI Gidde who did not make any record of the same, it was necessary for the prosecution to have examined PI Gidde to corroborate this version of the victim, but since that was not done, the victim's explanation about the delay fails to get any support.

8 Indeed, the case rests solely on the uncorroborated testimony of the victim. It is also true that some evidence to corroborate the victim which *could have been* made available was

either not collected, or was not produced before the Court, during the trial.

9 There are some disturbing features of this case. The first is that admittedly, the police did not record a 'First Information Report' even after the complaint made by the victim was taken down on 15th October 1994. The evidence of Shirodkar (PW 2) shows that it was only after holding a preliminary inquiry that the FIR came to be registered on 20-4-1995. Surprisingly, even thereafter, the appellant was not put under arrest. He was arrested on 26th April 1995, only after he had procured an order of Anticipatory Bail. The appellant was aided and abetted by a person, whose name was not known to the victim, but his mention had been made in the FIR. That person was not found in the course of investigation. Thus, it is evident that the investigation was not carried out properly. The learned APP submitted that this could be due to the fact that the appellant was attached to the same police station where the First Information Report had been registered.

10 It was highly improper for the police to have carried out 'preliminary inquiry' into the matter inspite of the categorical allegation levelled against the appellant by the victim. Such a preliminary inquiry is not contemplated by law, and evidently was a method adopted by the police to delay the outcome of the report lodged by the victim which itself had been recorded belatedly, and only after the intervention of superior police officers.

11 Under these circumstances, distrust cannot be placed in the testimony of the victim, just because her evidence is not corroborated, and the investigation has been inefficient, – and perhaps positively dishonest, with the object of helping the appellant. It is, however, necessary to subject the evidence of the victim to a careful scrutiny and to see whether it is acceptable, believable, and whether the same is sufficient to base the conviction of the appellant.

12 The victim, in her evidence has narrated as to how she became acquainted with the appellant. It is seen that the appellant had initially come to the house of the victim in connection with a complaint lodged against the victim and her husband by some lady. He had, thereafter, taken the husband of the appellant to the police station on a number of occasions. Apparently, because of this, the appellant successfully created his fear in the mind of the victim and her husband. The appellant, thereafter, became friendly with the husband of the victim. He then demanded an amount of Rs.10,000/- for passing his rickshaw and an amount of Rs.6,000/- was actually given by the husband of the victim to him. This amount was not returned by the appellant.

13 I have carefully considered the evidence of the victim in respect of the actual incident relating to the offences. Sometime in September 1994, the appellant came to her house in the absence of her husband and told her that one Sambhaji Saheb was calling him. When the victim told him that her husband was not at home, and that the appellant should come after 3.00 p.m.

The appellant said that Sambhaji Saheb had no time to wait. The victim therefore, took her 7 year old daughter with her and went with the appellant, who was accompanied by a man, in an auto-rickshaw. The appellant took the victim to some place in Kandivali area with which the victim was not familiar, but the appellant had told her that they had to go to a Beat office. Since the victim suspected as to where she was being taken (because of the look of the area), she questioned the appellant as to how Sambhaji Saheb would be in such a place, when, the appellant started talking vulgar things. The victim and her daughter were made to sit in a room. The appellant and the said other person were waiting outside. The appellant, after sometime came inside the room and had forcible sexual inter-course with the victim. The victim's daughter was kept outside the room by the other person at that time. The appellant had forcible sexual inter-course with the victim twice. He told her that he wanted to have sex with her right since the time he had first seen her. The appellant then threatened the victim that he could do anything since he was a police person and then took her to a guest house. The daughter of the victim was forcibly gagged and the appellant got several photographs of the victim, clicked by a photographer.

14 When the victim went to the police station, she noticed that the appellant had already reached there, and was with two police officers. The victim got scared and went home. She told her husband about all that had transpired. As her daughter who had been kicked by the appellant was injured, she was got admitted in Hazare hospital. The husband of the victim told her that if their relatives would come to know about the

incident, they would discard the appellant and her husband and that, therefore, they should keep the incident, secret.

15 The appellant then started coming to the house of the victim. He used to whistle at the victim and used to call out for her.

16 It appears from the evidence of the victim that thereafter, the appellant started coming to the house of the victim frequently. The appellant told the husband of the victim as to what he had done to the victim, and even gave an exaggerated account of the acts. The husband of the victim, thereafter, started assaulting the victim. The appellant used to make her husband drink liquor, and was successful in creating an impression in the mind of the husband of the victim that the victim was co-operating with the appellant in his sexual acts.

17 In the course of investigation, the victim had taken the police to a guest house i.e. Nandan Lodge and had told them that the incident had taken place in the same guest house. The victim and her husband had also gone to the photo studio where the appellant had taken his photograph with the victim. The victim and her husband had managed to get back the negative from the said photographer.

18 It has already been observed that there is substance in the contention advanced by the learned counsel for the appellant that witnesses who could have corroborated the version of the victim, were not examined, and there is no satisfactory

explanation for their non-examination. Even the photographer from the photo studio, has not been examined.

19 However, it is clear that the investigation was not properly carried out at all. There is absolutely no justification for not recording the First Information Report. The way the things were handled at the stage of investigation, leaves no manner of doubt that the Investigating Agency was reluctant to take action on the report lodged by the victim and had made an obvious attempt to help the appellant. Some of the persons whose statements were recorded in the course of investigation, were not called to depose before the trial Court. An examination of the record of the trial Court shows that some of the important witnesses were said to be not available. It is doubtful whether sufficient efforts were made to procure the presence of the said witnesses. Under these circumstances, the prosecution case cannot be thrown out only because corroborative evidence which could have been available, was not produced before the Court. Therefore, the success of the prosecution case depends on whether the testimony of the victim can be safely accepted and believed. Ofcourse, it is required to be subjected to the usual para-meters applied in appreciating the evidence of a witness and cannot be blindly accepted.

20 After carefully going through the testimony of the victim, I do not find that the account of the happenings, as given by her, suffers from any inherent improbabilities. Deciding the reliability of evidence cannot be governed by any set rules or formula. It depends on common sense, logic and experience. It is

not that in this case, the story of the victim is entirely consistent with her version, as has been reflected in the FIR. However, there are no basic weaknesses, variations or contradictions in her version, as given before the Court and the one found in the FIR. What is particularly significant is that the victim was not cross-examined at all by the applicant on any of the material facts. In fact, the appellant had not engaged any Advocate, and when he was asked by the Court to cross-examine the victim, he declined to do so. The victim was then discharged by the Court, and the Court note shows that repeated opportunities had been given to the appellant to engage an Advocate and defend himself, but such opportunities were not availed of by the appellant. Later, after the other two witnesses were examined and cross-examined, on an application of the appellant, the victim was recalled for cross-examination. I have carefully gone through the cross-examination of the victim. I find that there has been no challenge to the version of the victim in the cross-examination. Some discrepancies between the version of the victim as found in her evidence and the version in the First Information Report were attempted to be brought on record, *but curiously, these discrepancies or contradictions or omissions were not proved by putting the same to Manohar Shirodkar (PW 2) who had recorded the First Information Report.* Not much importance, therefore, can be given to the minor variations which do appear in the version in the FIR, and the evidence of the victim.

21 I have also gone through the record of the examination of the appellant. The explanation of the appellant is that he had been falsely implicated in the case. The appellant did

examine two witnesses in defence, but these witnesses are relevant only in so far as they attempt to show the victim to be not a truthful or reliable person.

22 While appreciating the evidence of the victim, two things ought to be kept in mind. The first is that no motive on her part for falsely implicating the appellant, has been suggested before the trial Court. No motive could be suggested before this Court either. The second is that there has been only a half hearted cross-examination of the victim. Initially, it was not taken at all, and as aforesaid, the cross-examination was taken only after the recall. In this background, if the version of the victim is examined, it does not appear that she was deliberately lying or saying things which were not true. It also does not appear that she was making a deliberate attempt to implicate the appellant. In fact, a reading of her evidence indicates a systematic pattern of behaviour on the part of the appellant, who apparently, had an evil eye on her right since the time he came in contact with her. He first created his feat in the mind of the victim and the appellant, then tried to be good to them, and after he had ravished the victim, developed friendship with her husband – obviously, so as to make it easier for him to keep contacts with the victim. He also told the husband of the victim about his having had sex with the victim, and by giving an exaggerated account of the happenings and saying that a victim was a consenting party, made the position of the victim totally vulnerable.

23 In her evidence, the victim has given several details such as her having gone to *Mahila manch*, and then, with their

support, reporting the matter to the Dy. Commissioner of Police etc. This version of the victim is corroborated by the fact that Shirodkar (PW 2) was asked to inquire into the matter by an order of the Addl. Commissioner of Police, North Region. The victim also said about the accused having sent one person for mediation to her house after the incident, and that, the person who had come, forgot his cap behind. It is difficult to hold that such details could be given by the prosecutrix from her imagination, or that the prosecutrix being a cunning woman, is deliberately making an attempt to make her story seem reliable. There are some variations in the version of the victim as found in her testimony and that found in the FIR, particularly with respect to the sequence of certain events relating to the initial incident of Rape, but as aforesaid, there has been no cross-examination to confront the victim with regard to the same. The variations could be due to the huge time gap between the incident and the date on which victim gave evidence, which was of about ten years. Since the victim was not confronted with the variations, etc. in the cross-examination, she did not get any opportunity to state what was the correct position; and as such no importance to such variations, which are not basic, can be given. It is true that mere failure of cross-examination will not render the story of a witness acceptable, if the same is against the probabilities, logic and experience, but such is not the case here. The only suggestion that was given to the victim in the cross-examination that the husband of the victim had suspected that the victim had illicit relationship with the appellant, and that, in order to put an end to the domestic quarrels, she had lodged a false report against the appellant. This suggestion was denied by the victim. What were the facts which

could provide ground to the victim's husband for suspecting, has not been suggested, and as such, I find no substance in this suggestion. On the contrary, it appears that the victim had to make a number of efforts to see that some action was initiated on the report made by her.

24 The victim was believed by the learned Addl. Sessions Judge. The trial Court has an advantage of being able to see the demeanor of witnesses and also the reactions of an accused person. When the story of the victim does not suffer from any inherent infirmities, is not against the probabilities, and when the cross-examination of the victim appears to have been taken half-heartedly without touching the basic and material aspects of the case, it is not possible to hold her testimony as unreliable, inspite of the fact that the trial Court which had the advantage of observing her in the witness box, has found her reliable.

25 Upon considering the entire evidence adduced before the Court during the trial, I am of the opinion that the evidence of the victim is reliable and the appreciation of her evidence, as done by the learned Addl. Sessions Judge, suffers from no infirmities. It is now well settled that the prosecutrix, in an offence of rape, cannot be treated on par with an accomplice, and she is to be treated on par with any other injured or interested witnesses. Also, the broad probabilities of the case based on experience of human affairs are needed to be kept in mind while appreciating the evidence of a victim of rape. The story of the victim does not suffer from any improbabilities so as to have distrust in her version.

26 If the evidence of the victim is accepted as reliable and truthful, the conclusion of the appellant being guilty of rape and other offences, as arrived at by the trial Court, cannot be said to be suffering from any illegality or error.

27 However, the offence punishable under section 420 of the IPC is not made out even if the version of the victim is accepted. The learned Addl. Public Prosecutor concedes that the conviction, so far as it relates to the said offence be set aside.

28 In the result, the conviction of the appellant with respect to the offence punishable under section 420 of the IPC and the sentence imposed therefor, is set aside.

29 The conviction of the appellant with respect to the other offences is maintained.

30 Since the substantive sentences have been made to run concurrently, and only the minimum sentence as has been prescribed, has been imposed for the offence punishable under section 376 of the IPC, there is no case for interfering with the sentences imposed.

31 Subject to the acquittal of the appellant with respect to the offence punishable under section 420 of the IPC, the Appeal is dismissed.

32 The appellant shall surrender to his bail bonds within a period of four weeks from today.

(ABHAY M.THIPSAY, J)