

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1129 OF 2013

APPA S/o.RAMRAO GAVATE

)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA

)...RESPONDENT

Mr.Amit Munde, Advocate for the Appellant.

Ms.R.M.Gadhvi, APP for the Respondent - State.

CORAM : ABHAY M. THIPSAY, J.

DATE : 30th NOVEMBER 2015.

JUDGMENT :

1 This appeal is directed against the judgment and order dated 24th May 2013, delivered by the Ad-Hoc Additional Sessions Judge, Pune, in Sessions Case No.299 of 2012, convicting the appellant who was the sole accused in the said case of offences punishable under Sections 376 of the IPC and 506 of the IPC. The

learned Ad-Hoc Additional Sessions Judge sentenced the appellant to suffer Rigorous Imprisonment for 7 years and to pay a fine of Rs.5,000/- with respect to the offence punishable under Section 376 of the IPC, and to suffer Rigorous Imprisonment for 5 years and to pay a fine of Rs.500/- with respect to the offence punishable under Section 506 of the IPC. The learned Ad-Hoc Additional Sessions Judge directed that the substantive sentences would run concurrently. Being aggrieved by his conviction and the sentence imposed upon him, the appellant has approached this court by filing the present appeal.

2 I have heard Shri Amit Munde, the learned counsel for the appellant. I have heard Ms.R.M.Gadhvi, the learned APP for the State. With their assistance, I have gone through the record of the trial court. I have carefully gone through the entire evidence adduced during the trial, as also the impugned judgment.

3 The prosecution case, as put forth before the trial court, may, in brief, be stated thus :

The victim / prosecutrix (name not mentioned to avoid disclosure of identity) is a married woman, aged about 33 years. She is mother of two children. The prosecutrix (PW1) and her husband Shivaji Kapure (PW2), at the material time, were doing labour work on the site of Kumar Builders, Sus Road, Pashan, Pune. The appellant – a labour contractor, had provided the work to the prosecutrix and her husband.

The prosecutrix used to work between 9 am to 6 pm. A tin shed, adjacent to the site where the work was going on, had been provided to the prosecutrix and her husband for their residence.

On 23rd December 2011, the appellant sent the husband of the prosecutrix to some other site at Baner and the prosecutrix was asked to work at Sus Road, Pashan, Pune. At about 12 noon, the prosecutrix had gone inside the tin shed, which was provided to her and her husband, for having water. When she was drinking water, she felt that somebody had come from behind. She turned around and noticed that, that the appellant was there. The appellant gagged her mouth, fell her down and told her that he would mark her 'double presence' and that, she should keep mum.

The appellant also said that if the prosecutrix would shout, he would kill her and throw her. The appellant, then, lifted the leg of the prosecutrix, removed her undergarments and had intercourse with her against her will. After he had completed the act, the appellant left the place after threatening the prosecutrix that if she would disclose the incident to anybody, he would kill her and her husband.

The prosecutrix was suffering from pain and kept sitting there itself. The prosecutrix thought that if her husband would come to know about the incident, he would leave her, and she, therefore, decided, not to disclose the incident to anybody. When her husband came back, she did not tell him anything, but the husband noticed a change in her behaviour, and took her in confidence. It is, thereafter, that the prosecutrix, disclosed the incident to her husband. The husband then said that they should go and lodge a report with the police, and that, a report was lodged against the appellant on 27th December 2011.

The appellant was arrested in the course of investigation. On completion of investigation, a charge-sheet was filed alleging the

commission of the aforesaid offences by the appellant, pursuant to which, the appellant came to be prosecuted, convicted and sentenced as aforesaid.

4 The prosecution examined six witnesses during the trial. The first two witnesses are the prosecutrix (PW1) herself and her husband Shivaji Kapure (PW2) respectively. The third witness Dr.Gautami Pawar is a doctor, who at the material time, was attached to Aundh Hospital, and had, on 29th December 2011, carried out medical examination of the appellant. The fourth witness Dr.Vijaylaxmi D. is also a Medical Officer, who at the material time, was attached to Sassoon Hospital, Pune. She had examined the prosecutrix medically on 28th December 2011. The fifth witness Babu Koli is a panch in respect of the seizure of the clothes of the appellant on 28th December 2011. The sixth witness Pratapsing Bahure, Sub-Inspector of Police, who was attached to Chaturshungi Police Station at the material time, is the one who had carried out investigation in the matter and had filed a charge-sheet against the appellant.

5 In her evidence, the prosecutrix narrated the incident. It is revealed from her evidence that she and her husband were working with the appellant about a month prior to the incident. Her evidence also shows that she knew the appellant as he was the labour contractor and used to call him *Appa*. She also states that adjacent to the site where she and her husband used to work, a tin shed for their residence had been provided. She also states that on 23rd December 2011, she had been working at Sus Road, Pashan, while her husband was provided work at Baner. She has then described how the incident took place in the tin shed when she had gone there for drinking water, at about 12 noon. She also states about the threats given to her by the appellant to the effect that if she would shout, he would kill her and throw her away. She also states that when the appellant gave threats of killing to her, she told him that her husband would also kill her, and that, her '*izzat*' would be lost. According to her, inspite of such protest, the accused performed the act of sexual intercourse without her consent.

6 According to the prosecutrix, she did not disclose the incident to her husband, as she was frightened. She disclosed the incident to her husband only after 2-3 days. During this period, she had not gone for work. According to her, it is only when her husband had noticed that she was crying and had asked her whether medical treatment was required to be given to her, that she had disclosed the incident to her husband.

7 The evidence of Shivaji (PW2) shows that on 23rd December 2011, when he returned home from Baner, he noticed that the behaviour of the prosecutrix was not normal. According to him, the prosecutrix did not cook the dinner in the night and was complaining of body pain. Shivaji did ask her as to what had happened, but she did not disclose anything to him. It is only on 27th December 2011, that she disclosed the incident that had taken place on 23rd December 2011 to Shivaji. Through Shivaji, a copy of the attendance card issued in the name of the prosecutrix and showing her attendance on 23rd December 2011 was produced. In the cross-examination, it was suggested to him that

on the day of incident, he and his wife i.e. the prosecutrix were working at the same site, but this suggestion was denied by him. It was also suggested that he and his wife were not working with the builder – Kumar Builders, and that, the appellant was not working there as a labour contractor. These suggestions were denied by Shivaji as not true.

8 The evidence of the doctors – Dr.Gautami (PW3) and Dr.Vijaylaxmi (PW4) is not very significant. Nothing which is of a conclusive nature could be revealed in the medical examination, either of the prosecutrix or of the appellant. The evidence of Dr.Vijaylaxmi, however, shows that she had recorded detailed history of the incident, as given to her by the prosecutrix, and what, according to this witness, was narrated to her by the prosecutrix is consistent with what had been mentioned in the First Information Report (FIR) lodged by her and also the evidence given by the prosecutrix in the court. The evidence of Babu Koli, a panch in respect of the seizure of the clothes of the appellant by the police on 28th December 2011, is also not very material.

9 Pratapsing Bahure (PW6), the Investigating Officer, states about having registered the report made by the prosecutrix to him on 27th December 2011. His evidence shows that he arrested the accused on 27th December 2011 i.e. on the date on which the report was lodged. He has mentioned about the various steps taken during investigation. In the cross-examination, it was suggested to him that the prosecutrix had not named anyone as the culprit, but this suggestion was denied by him. He categorically stated that the prosecutrix had given the name of the appellant as the offender. It was also suggested to him that the FIR has not been taken down as per the narration of the prosecutrix but had been written by this witness as per his 'whims' which was denied by him. He admitted to have arrested the appellant from the spot where the construction work was going on.

10 Mr.Munde, the learned counsel for the appellant, submitted that the prosecutrix could not be relied upon. According to him, even assuming that the act of sexual intercourse had taken place between the prosecutrix and the appellant, the

case was clearly of consent. He raised a number of contentions in support of his claim that the story put forth by the prosecutrix was not reliable. He submitted firstly, that, the prosecutrix had no reason to go to her house for having water, when arrangements had been made for drinking water on the site itself. This is based on the admission given by the prosecutrix in the cross-examination that at the workplace drinking water arrangement was there. It is also pointed out in this context that the investigation is not sincere and the Investigating Officer has falsely denied that arrangement for drinking water for the workers had been made on the site. I have considered the matter. Indeed, the Investigating Officer appears to be wrong in that regard and it is possible that he has given a wrong answer with the object of providing an explanation of the conduct of the prosecutrix in going to her residence for having water. However, I am unable to hold that this renders the version of the prosecutrix unbelievable or doubtful. Even if it is accepted that arrangements had been made for providing drinking water to the workers on the site itself, it would not mean that the workers would not go to their

residence to have water. This is particularly so, because, the residence of the prosecutrix was, apparently, just adjacent to the place where the construction work was going on. Moreover, if this point was to be highlighted, it was necessary to have questioned the prosecutrix in the cross-examination as to why she had gone to her residence for having water, when drinking water was available at the site itself. Since the cross-examiner had chosen to avoid putting such a question to the prosecutrix, not much importance to the availability of drinking water at the site can be given, so as to render the going of the prosecutrix to her residence for having water, unlikely or unbelievable.

11 It is also contended by Mr.Munde that the residence of the prosecutrix is not adjacent to the workplace, but about four furlongs away from the work site. Indeed, in the cross-examination of the prosecutrix, she has stated that the distance between her residence and the work site was of more than four furlongs. There is, however, some ambiguity in that regard. In the examination-in-chief, the prosecutrix clearly stated that there

was a tin shed residential house adjacent to the site, and that, she had gone to the tin shed for drinking water, where the incident took place. She has not categorically stated in her evidence that the incident took place 'at her residence' and what she has stated is that it took place 'in the tin shed.' Whether the residence, which she says was more than four furlongs away from the work site, is the same where the incident of rape took place, is not at all clear; and this is simply assumed by the learned counsel for the appellant. In this regard also, the cross-examiner has preferred to be vague. In my opinion, it is not possible to accept that the version of the prosecutrix is that the rape took place at her residence situate more than four furlongs away from the work site. If her evidence is carefully seen, it is clear that she speaks of the same having taken place in the 'tin shed' adjacent to the 'work site', though she has earlier described the tin shed as 'residential house property.' Thus, what the prosecutrix has stated is that the incident took place in the 'tin shed adjacent to the work site' and that the 'tin shed' was 'residential.' She did say about her residence being more than four furlongs away from the work site,

but never said that the incident took place there. Since the cross-examiner has avoided going deeper, and since the prosecutrix never stated that the incident took place at her residence situate about more than four furlongs away from the work site, it is not possible to disbelieve the prosecutrix or discard her testimony as unreliable on that count.

12 In support of his contention that the case could be of voluntary sexual intercourse between two adults, the learned counsel for the appellant highlighted the following from the evidence of the prosecutrix :

“He has also given me threats if I will shouted he kill me and throw away. While he was removing my clothes he was giving threats to me. I had told him my husband will also kill me and my izzat (dignity) will decline in the society.”

According to the learned counsel, this shows that the prosecutrix was actually afraid only of her husband and / or others knowing about the incident and had no other objection for the appellant

having intercourse with her. I find no substance in this contention. According to me, the utterances of the prosecutrix show an attempt on the part of the prosecutrix to plead with the appellant for mercy and sympathy and persuade him not to commit the act. It is not possible to hold that this suggests consent on the part of the prosecutrix.

13 In a prosecution with respect to an offence punishable under Section 376 of the IPC, the presumption contained in Section 114A of the Evidence Act cannot be lost sight of. The prosecutrix says that she did not consent to the act and in the circumstances of the case, there is no reason to disbelieve her. Her evidence is consistent. The delay in lodging the FIR has also been properly explained by her. Considering the strata of the society to which the prosecutrix and her husband belong, it was quite natural for the prosecutrix to expect a hostile reaction from her husband. In such a circumstance, it was quite natural on her part to try to avoid disclosure of the incident. The disclosure came to be made only when the husband observed some

abnormalities in her behaviour, noticed her crying and questioned her, whether she needed medical treatment. Apparently, the disclosure was made only after the husband showed a concern for her problems; and this sympathy shown by her husband to her, apparently led to her gathering courage to disclose the incident to her husband.

14 The appellant was in a dominating position as against the prosecutrix. He was a labour contractor and had the authority to remove the prosecutrix and / or her husband from the job. Considering this, merely because the prosecutrix did not physically resist the appellant and succumbed to the pressure brought by him, she cannot be believed to be a consenting party. On the contrary, her conduct, namely, of her not doing the usual activities and not reporting for work after the incident, supports her version. Incidentally, there has been no challenge in the cross-examination to the claim that after the incident the prosecutrix did not report for the duties.

15 The learned counsel for the appellant lastly submitted that the appellant was admittedly arrested from the spot after about four days from the alleged incident, and the fact that he had not absconded, itself indicates that the allegation alleged against him was false. I am unable to agree. In my opinion, considering the vulnerable position of the prosecutrix, who had expressed apprehension about her husband reacting with hostility towards her on knowing about the incident, and about loss of respect and reputation in the society, the appellant never expected that the prosecutrix would gather courage to report the matter to the police. Since he did not apprehend any danger, he did not abscond. The prosecutrix could gather the courage to lodge a report with the police only because of the sympathetic behaviour of her husband in taking her in confidence, after noticing her rather unusual behaviour.

16 The learned trial Judge has placed reliance on the evidence of the prosecutrix. The learned trial Judge had an opportunity to see the prosecutrix and her husband in the witness box and observe their demeanour. There is nothing in the evidence

of the prosecutrix or that of her husband which would create a doubt about the truth of the version of the prosecutrix. The questions put to the prosecutrix and her husband in the cross-examination are vague and evasive and not consistent with any one or more particular theory/theories. The cross-examination of these two witnesses has totally failed to shake the testimony of either of them, or to create a doubt about the reliability of the same.

17 It is true that it is not possible to agree with the entire reasoning of the learned trial Judge. It appears that the learned trial Judge has placed reliance on some statements made in the spot panchnama without the panch witnesses having been examined. This was not proper. As a matter of fact, even if the panch would be examined, the contents of the panchnama could not be read as substantive evidence, and the substantive evidence would be the oral evidence of such panch. However, the reliance placed on the evidence of the prosecutrix, and the ultimate conclusion arrived at by the learned trial Judge, appears to be proper and in accordance with law.

18 In my opinion, the prosecution had been successful in establishing the guilt of the accused and the appellant has been rightly convicted by the learned trial Judge.

19 The learned counsel for the appellant prays that the sentences imposed upon the appellant be reduced. The learned Judge has imposed only the sentence that is prescribed as 'minimum' for the offence punishable under Section 376 of the IPC. As the sentence imposed for the other offence is lesser, and would merge in the sentence provided for the offence punishable under Section 376 of the IPC, the sentences having been directed to run concurrently, no interference therewith is warranted.

20 The appeal is dismissed.

(ABHAY M. THIPSAY, J.)

CERTIFICATE

**Certified to be true and correct copy of the original
signed Judgment /Order.**