

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1149 OF 2006

Shamim Anwar Khan,	]	
Indian, Aged : 42 Years,	]	
Occ.: Pan Stall,	]	
R/of Firdosh Chawl, Room No.6,	]	
Rashid Compound, Kousa,	]	
Mumbra, Dist. Thane	]	 Appellant

Versus

State of Maharashtra,	]	
Through Mumbra Police Station	]	 Respondent

Ms. Rohini M. Dandekar, Appointed
Advocate, for the Appellant.

Mrs. G.P. Mulekar, A.P.P., for the
Respondent-State.

CORAM : SMT. V.K. TAHILRAMANI &
DR. SHALINI PHANSALKAR-JOSHI, J.J.

DATE : 17TH JULY, 2015.

ORAL JUDGMENT : [Per Dr. Shalini Phansalkar-Joshi, J.]

1. Appellant, who stands convicted by the Judgment and Order dated 16th September, 2006 in Sessions Case No.93 of 2006, delivered by the Additional Sessions Judge, Thane for the

offences punishable under Sections 376 and 506(2) of the IPC and sentenced to suffer life imprisonment and to pay fine of Rs.5,000/-, in default to suffer R.I. for 20 days, by this Appeal challenges his conviction and sentence.

2. Facts, as are necessary, for deciding this Appeal may be stated as follows :-

Prosecutrix in this case is a young adolescent girl of 16 years, *(her name is deliberately withheld to protect her identity)*, staying with her mother PW-2 Fatima and her step-father, the Appellant herein. When she was hardly 3 years of age, her real father expired. Within two years thereafter, her mother PW-2 Fatima got married with the Appellant and since then they were residing together.

3. It is alleged by the Prosecution that about one and a half year before lodging of the complaint, one day, while Prosecutrix was alone in the house, the Appellant committed forcible sexual intercourse with her and thereafter threatened her not to disclose about the same to anyone. Being frightened, she

remained quiet as she had apprehension due to threatening given by the Appellant that he may kill her and her mother. The Appellant then continued to rape her once or twice in a week for a long period of two to three months, as a result of which, she became pregnant. When she complained about pain in stomach, she was taken by her mother to PW-3 Dr. Nemichand Jain. Her sonography was performed, which revealed her pregnancy. Then she was admitted in the hospital of Dr. Dongre, where she delivered a male child.

4. After her delivery, when her mother PW-2 Fatima made enquiry with her, she ultimately disclosed that it was the Appellant who had committed rape on her on multiple occasions and, therefore, she has remained pregnant. After she gave this information to her mother, her mother started residing with her separately from the Appellant. Even then, Appellant continued to give threatening to her and her mother. Hence, ultimately, she and her mother went to the Police Station and lodged complaint (Exhibit-18) against the Appellant.

5. PW-7 PSI Raghunath Badgujar, who was attached to

Mumbra Police Station, registered the complaint of PW-1 the Prosecutrix vide Exhibit-18 and on the said complaint, registered C.R. No.380 of 2005 against the Appellant. During the course of investigation, he made Spot Panchanama (Exhibit-23) in the presence of the Panch PW-4 Mohammad Sayyad. He then referred the Prosecutrix for her medical examination at Rajiv Gandhi Chatrapati Shivaji Hospital, Kalwa, Dist. Thane. There, PW-9 Dr. Ashutosh Ajgaonkar examined the Prosecutrix and reported that her hymen was absent, being torn; she was habituated to sexual intercourse and there were signs of past pregnancy. He issued the Certificate (Exhibit-40) accordingly.

6. As a part of further investigation, PW-7 PSI Raghunath Badgujar recorded the statement of PW-5 Ayasha Rashid, who has taken child of the Prosecutrix and has handed over the custody of the child to PW-6 Roja Mudliyar for looking after the said child and for maintenance, with the consent of the Prosecutrix and her mother PW-2 Fatima.

7. PW-7 PSI Raghunath Badgujar has then collected the blood sample of the Prosecutrix, the Appellant, the child and two other

persons by name Salim and Juber and sent the same to Chemical Analyzer for D.N.A. testing. PW-8 Dilip Desai, Assistant Chemical Analyzer, Forensic Lab., Mumbai conducted the D.N.A. test and concluded that the Prosecutrix and the Appellant are the biological parents of the child. The D.N.A. Report is produced on record at Exhibit-32. Further to completion of investigation, PW-7 PSI Raghunath Badgujar filed Charge-Sheet in the Court against the Appellant.

8. On committal of the case to the Sessions Court, the Trial Court framed charge against the Appellant vide Exhibit-4. The Appellant pleaded not guilty and claimed trial, raising the defence of false implication.

9. In support of its case, Prosecution examined in all 9 witnesses and on appreciation of their evidence, the Trial Court held the guilt of the Appellant to be proved for both the offences punishable under Sections 376 and 506(2) of the IPC and convicted and sentenced him, as aforesaid.

10. This Judgment of the Trial Court is challenged in this Appeal

by the Appellant. When the Appeal came for hearing, since last more than 5 to 6 months, the Advocate engaged by the Appellant, who represents him in this Appeal, Mr. V.C. Arya has remained consistently absent. As the Appellant is in Jail since 2005, i.e. for more than 8 to 9 years, we have appointed Advocate Ms. Rohini Dandekar from the High Court Legal Services Authority to represent the Appellant in this case. With her able assistance, we have gone through the evidence of the prosecution witnesses and also perused the impugned Judgment of the Trial Court. We have also heard legal submissions advanced by learned A.P.P. and on the basis of the same, we are of the considered opinion that Prosecution has succeeded in proving its case against the Appellant beyond reasonable doubt for both the offences punishable under Sections 376 and 506(2) of the IPC. Our opinion and finding is based on the following reasons.

11. This being a case of sexual offence, the evidence of the Prosecutrix herself is of paramount significance. If her evidence inspires confidence in the judicial mind, then the conviction can rest on her sole testimony also. The nature of the offence itself is

such that no woman or, in this case, an adolescent girl will make any false allegation, which has the impact and effect of ruining her own reputation also. Here in the case, the Prosecutrix is a young girl of 16 years at the time of giving evidence in the Court. The incident had taken place about one and a half year prior to lodging of complaint and, therefore, at that time, she was hardly 14 to 15 years of age. Her father had expired when she was only of 3 years. Her mother then got married with the Appellant and hence since the age of 5 years, the Prosecutrix was residing along with her mother and the Appellant, i.e. her step-father, whom she was bound to consider and treat as her real father. This relationship between the Prosecutrix and the Appellant is of particular significance in the instant case and it is required to be borne in mind while considering the aspect of delay in lodging the complaint and also while appreciating the evidence of the Prosecutrix.

12. As per the evidence of the Prosecutrix, Appellant used to go to his Pan Shop at about 5 am in the morning and return home at 11 am. Her mother used to go to Bazar side for doing the domestic work and hence she and Appellant used to be alone in

the house. Appellant took the disadvantage of the said fact. One day in the morning, while she was cleaning utensils, Appellant came from back side and embraced her. She resisted and requested the Appellant to leave her, however, Appellant told her to keep quiet. Then he pressed her mouth, removed her pajama and did "*galat kam*" with her. She has stated what does she mean by "*galat kam*" to the effect that the Appellant has raped her. Then she started crying. However, Appellant threatened her to keep quiet, otherwise he will kill her and her mother.

13. As per evidence of the Prosecutrix, after this incident also, the Appellant continued to rape her once or twice in a week and it continued for two to three months. As a result of the threatening given by the Appellant of killing her and her mother and naturally being ashamed of the entire incident, she could not gather the courage to disclose about the said incident to her mother. However, one day she started getting pain in her stomach. Hence, her mother took her to the Dispensary of their Family Doctor PW-3 Dr. Nemichand Jain, who examined her and suspected either the tumor or the pregnancy. He advised

sonography and the Sonography Report revealed that Prosecutrix was pregnant. Thereafter she was admitted in the hospital of Dr. Dongare and there she delivered a male child. After her delivery, her mother asked her how it had happened and at that time, she disclosed what Appellant had done with her. Then she and her mother started residing separately from the Appellant. But thereafter her neighbours used to taunt them. The Appellant also used to come and threatened them. Hence, ultimately, she and her mother went to the Police Station and lodged the complaint (Exhibit-18) on 3rd December, 2005. In her evidence before the Court, she has further stated that she gave the complaint 4 to 5 months after the delivery, as Appellant used to threaten them not to give such complaint, otherwise he will kill her and her mother and also because she was having apprehension about her reputation.

14. This evidence of the Prosecutrix gets complete support and corroboration from the evidence of her mother PW-2 Fatima, who has also deposed that as she was going to the market in day time for her work, the Appellant and Prosecutrix used to be alone in the house. As the Appellant was her husband and the step-

father of the Prosecutrix, there was no reason for her at all to take any suspicion or to have any apprehension. That is the reason when Prosecutrix complained about the pain in her stomach, she took her to the Doctor apprehending that it may be a case of tumor. PW-3 Dr. Nemichand Jain has also deposed that when Prosecutrix and her mother PW-2 Fatima came to his clinic on 18th June, 2005 and Prosecutrix complained about the pain in her stomach, he also suspected that either it may be a tumor or pregnancy. Hence, after the sonography was done, he could confirm that it was a case of pregnancy.

15. As per evidence of PW-2 Fatima, the custody of that child was handed over to PW-5 Ayasha Rashid, the daughter-in-law of the Appellant, who further handed over the said custody to PW-6 Roja Mudliyar, her sister. It was did with the consent of the Prosecutrix and her mother PW-2 Fatima.

16. It is further evidence of PW-2 Fatima that after the delivery when she asked the Prosecutrix as to how it happened, at that time, she disclosed that the Appellant used to forcibly rape her and threaten her not to disclose about the same to anyone,

otherwise he will kill her and her mother. Therefore, after she came to know that the Appellant was responsible for the act, she started residing separately from him along with her daughter. However, even thereafter, the Appellant used to threaten her saying that she should bring the Prosecutrix and he will get her married. According to her evidence, the complaint was not lodged immediately as it was the question of reputation of her daughter and, secondly, they were also residing separately from the Appellant. However, when the Appellant continued the threatening, she had no option but to lodge the complaint.

17. This evidence of the Prosecutrix and her mother is supported from the evidence of PW-5 Ayasha and PW-6 Roja. Evidence of PW-5 Ayasha also proves that when she made enquiry with PW-2 Fatima as to how Prosecutrix had given birth to a child before marriage, PW-2 Fatima has told her that the child was of the Appellant and as the Prosecutrix was unmarried, in order to protect her reputation, PW-5 Ayasha took the responsibility of the child and gave it to her sister PW-6 Roja.

18. Then there is evidence of PW-9 Dr. Ashutosh Ajgaonkar,

who has examined the Prosecutrix, after she has lodged the complaint (Exhibit-18) and was referred by the Police to him. He has stated that the hymen was absent; prosecutrix was found to be habituated to sexual intercourse and there were signs of past pregnancy.

19. The crucial piece of evidence is the D.N.A. Report, proved through the evidence of PW-8 Dilip Desai, Assistant Chemical Analyzer, Forensic Lab., Mumbai. The blood samples of the Prosecutrix, the Appellant, the child and that of Juber and Salim were sent to him for conducting the D.N.A. test and after conduct of the D.N.A. test, he has concluded that the Prosecutrix and the Appellant are the biological parents of the child. His report is at Exhibit-32. There is hardly anything in his cross-examination to challenge the D.N.A. test and the report of the D.N.A. test is always considered to be conclusive judicially also, it being an exact science.

20. Thus, in this case, there is consistent and reliable evidence of the Prosecutrix, supported fully with the evidence of her mother PW-2 Fatima and also the medical and forensic evidence.

The only challenge learned Counsel for the Appellant has raised to this Prosecution case is the delay in lodging of the complaint, which, according to learned Counsel, is inordinate, of one and a half year. It is urged by her that even after the delivery of the Prosecutrix, complaint was not lodged immediately.

21. However, in our considered opinion, the delay in this case in lodging the complaint was bound to happen and the Prosecution has explained the said delay. In the complaint itself it is stated that due to the threatening given by the Appellant and Appellant being closely related to the Prosecutrix and her mother in his capacity as the step-father of the Prosecutrix, it cannot be expected that either the Prosecutrix or her mother will lodge the complaint immediately against him. Moreover, it was also the question of honour and reputation of the Prosecutrix herself, as she was an unmarried girl of hardly 15 to 16 years. Therefore, her prospects of marriage were also in doldrums. As far as possible, in cases of sexual offences, the efforts of family members are to suppress and conceal such incidents, which are considered as shameful and embarrassing. Especially, when the person who has committed the rape is one from the family and

closely related to the Prosecutrix and her mother; then it does not appear probable that immediately the complaint about such incident would be lodged. Every attempt is bound to be made to hush up the matter and that is what the Prosecutrix and her mother have done in this case. They have also handed over the custody of the child to other lady. Whatever was possible from their side to do, they have done it, even residing separately from the Appellant. However, only when the Appellant continued the threatening and harassment, they had no option but to lodge the complaint. Here in the facts and circumstances of the case, having regard to the social milieu, from which the Prosecutrix and her mother are hailing, the social mores and the fiduciary relationship between the Prosecutrix and the Appellant, it has to be held that the delay in lodging of the complaint is satisfactorily explained, as being apparent from the facts on record. The Prosecution case, therefore, cannot be disbelieved merely on that count.

22. There was absolutely no reason for either the Prosecutrix or her mother also to implicate the Appellant falsely, which was as good as breaking their own home and the stability of domestic

life. Moreover, the D.N.A. Report conclusively proves that the child was born from the Appellant, leaving no spec of doubt that it was Appellant and none else, who has committed forcible sexual intercourse with her.

23. The defence raised by the Appellant, as considered by the Trial Court, also shows that during the stage of investigation, he has expressed suspicion against one Juber and Salim. Therefore, to rule out this possibility, the Investigating Officer has collected D.N.A. samples of these two persons also along with the D.N.A. sample of the Appellant. However, the D.N.A. Report is conclusive to the effect that the child belongs to the Appellant and not to any of these persons.

24. On the receipt of this D.N.A. Report, the Appellant has taken the defence by moving an application (Exhibit-7) before the Trial Court that the child was begotten from one Yusuf. A suggestion to that effect has been given to the Prosecutrix and her mother. However, there is absolutely no evidence on record to that effect. It is as good as hurling the allegations against the Prosecutrix, who is a young innocent girl of 14 to 15 years of

age. It is pertinent to note that in his statement recorded under Section 313 of the Cr.P.C., Appellant has taken up entirely different defence about false implication; due to quarrel with Juber and Salim. However, no such suggestions are given either to the Prosecutrix or to her mother.

25. The point, therefore, to be stressed is that to escape from the clutches of the law, Appellant has changed his stands and defences at every stage of the proceedings. As he could not succeed in proving the allegation against Salim and Juber, he made allegations against Yusuf and ultimately the suggestion to the witnesses that to extract money, he is falsely implicated. There is least possibility of Prosecutrix or her mother implicating him falsely, having regard to the close and proximate relation between them. If he was maintaining and looking after the Prosecutrix and her mother, where the question arises of them implicating him falsely to extract the money.

26. To sum up, therefore, it has to be held that the Prosecution has succeeded in proving the guilt of the Appellant for both the offences punishable under Sections 376 and 506(2) of the IPC

beyond reasonable doubt. Considering the fact that the Appellant, who was step-father of the Prosecutrix, has betrayed the faith and trust of the child, the maximum punishment of life imprisonment, as imposed by the Trial Court, for the offence punishable under Section 376 of the IPC also, does not call for any interference. Hence, Appeal stands dismissed.

27. Fees to be paid to the Appointed Advocate for the Appellant Ms. Rohini M. Dandekar by the High Court Legal Services Committee is quantified at Rs.5,000/-.

[DR. SHALINI PHANSALKAR-JOSHI, J.] [SMT. V.K. TAHILRAMANI, J.]