

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO.575 OF 2003

Akhtar s/o Abaskhan Pathan,
Age-36 years, Occu:Agri.,
R/o-Dhamangaon, Tq-Phulambri,
Dist-Aurangabad.

...APPELLANT
(Orig. Accused)

VERSUS

The State of Maharashtra

...RESPONDENT

...
Mr. S.K. Barlota Advocate for Appellant.
Mrs. V.N. Patil-Jadhav, A.P.P. for Respondent.
...

CORAM: A.I.S. CHEEMA, J.

DATE OF RESERVING JUDGMENT : 17TH JUNE,2016.

DATE OF PRONOUNCING JUDGMENT: 12TH JULY, 2016.

JUDGMENT :

1. The Appellant (hereafter referred as "Accused") was charged with offence under Section

376 and 506 of the Indian Penal Code, 1860 ("IPC" in brief) in Sessions Case No.14 of 2003 before Ist Ad-hoc Additional Sessions Judge, Aurangabad. Accused came to be convicted for lesser offence of Section 354 of IPC and sentenced to suffer rigorous imprisonment for two years with fine of Rupees One Thousand and in default, to suffer further rigorous imprisonment for three months. He was acquitted, by the Judgment dated 29th July 2003, for offence punishable under Section 376 and 506 of IPC. Thus, this Appeal.

2. The case of prosecution, in short, is as follows:-

(A). On 6th October 2002 the prosecutrix (PW-6) (hereafter referred as "Victim"), (I am not putting her name on record. I will not put the name of mother (PW-1) and her father (PW-7) also on record to conceal their identity.) filed F.I.R. at Phulambri Police Station, Dist-Aurangabad which

was received by PW-8 A.P.I. Shriram Ghuge. The F.I.R. Exhibit 30, in brief, can be stated to be as under:-

. The Victim informed that she has a blind father and six sisters and one brother. Four sisters are married. She is unmarried. Her father has field in Dhamangaon Shivar and with her parents she was residing at the field. She never went to school. Near her field, there is field of Abbas Pathan, the father of Accused. This Abbas Pathan is brother of her father. The Accused is son of said Abbas. F.I.R. refers to the mother of victim giving Rs.50/- to the Accused for bringing medicine Entrane for spraying on crop and how the Accused was being reminded to bring the same and he was avoiding. Then it is mentioned that on 5th October 2002 Accused was called to the field and mother of the Victim again asked him regarding the medicine as she had given him Rs.50/-. Accused told that he has brought the said medicine and the

Victim be sent with him so that he will give it to her from his field. The Victim was sent with the Accused along with an empty tin. She was taken to the field of one Kadar Pathan and Accused asked him for measure, which he did not have. Then Accused asked the Victim to come along to his field for the medicine. On the way, there was a field of one Dadarao Dwarkunde (PW-2) where there was sugarcane crop. At about 11.00 a.m. when the Victim was near that field along with the Accused, the Accused held her hands and pulled her inside the field. In the crop the Accused forcibly removed her clothes and removed his own clothes and the F.I.R. gives details as to how intercourse was done against her wish. The F.I.R. mentions that thereafter the Accused gave her the concerned medicine and she went back crying and told the incident to her mother. Thus the F.I.R. came to be filed giving such details and crime was registered at 75 of 2002 at 11.00 a.m. on 6th October 2002.

(B). The Investigating Officer PW-8 Shriram Ghuge registered the offence and investigated the same. The Victim as well as the Accused were referred for medical examination. The clothes of the Victim as well as the Accused were seized. The samples of pubic hair, genital swab and nail clippings of the Accused as well as Victim were collected. Blood samples were also collected. The clothes along with such samples were sent to C.A. and the reports were obtained. Reports regarding medical examination of the Victim as well as Accused were collected. Statements of witnesses were recorded. After the investigation, charge-sheet came to be filed.

(C). In Sessions Court the Accused denied the charge under Section 376 and 506 of IPC as explained against him. The Accused pleaded not guilty. Defence of the Accused is that Shaikh Lal, brother of mother of Victim has dispute with the Accused on the count of sharing of water of well

and because of such dispute, the present case was filed and that it is false.

3. In the trial Court, evidence of eight witnesses was brought on record. The trial Court, after considering the evidence, found that offence of rape and criminal intimidation was not established, however, the offence of outraging of modesty of the Victim was proved. Consequently, the conviction and sentence as mentioned above, was imposed.

4. The learned counsel for the Appellant-Accused has submitted that the Panchas regarding seizure of clothes, PW-3 and PW-4 had turned hostile. Dr. Dinesh Kolaskar (PW-5) had only proved medical examination of the Accused done vide document Exhibit 25. It has been argued that the prosecution witnesses, namely PW-1, the mother and PW-7 the father of Victim have tried to show that the victim was raped. The Victim herself also

claimed that she was raped. It is argued that the record shows that the Victim was simpleton with poor understanding and although in the examination-in-chief by leading question admission was taken from her that intercourse had been done, she admitted in cross-examination that no such incident occurred. It is argued that in the cross-examination the victim accepted all the suggestions put by the Accused to the extent that no incident took place. According to the counsel, if she was disbelieved for offence under Section 376 of IPC, the Accused should not have been convicted under Section 354 of IPC also. It is argued that at the instance of the brother of mother of victim, false case has been filed. It is stated, the parents of the Victim wanted marriage to be brought about between the Accused and Victim, but as the same was not accepted by the family of Accused, false case is filed. The counsel submitted that the suggestions on this count have been denied by the witnesses, but such

defence was taken by the Accused.

5. As per the learned A.P.P., the victim herself was absolute simpleton with very poor understanding and thus her evidence was required to be carefully examined. According to the A.P.P., the trial Court before which the evidence of this witness was recorded and had opportunity to see her demeanour , correctly appreciated the evidence and while discarding the case under Section 376 of IPC, the trial Court correctly convicted the Accused under Section 354 of IPC as outraging of modesty was established. It has been argued that there was no dispute between the parents of the Victim and the Accused and it is unthinkable that because brother of mother of Victim had some dispute of share of water with Accused, these witnesses from the rural background would go to such an extent of making false allegations relating to modesty of the Victim. The learned A.P.P. submitted that the Appeal deserves to be

dismissed.

6. If the evidence of PW-1 and PW-7, the parents of the Victim is perused, it can be seen that both of the witnesses deposed that Rs.50/- had been given to the Accused to bring insecticide and after the money had been given, Accused did not bring the said insecticide and they had to remind the Accused. The evidence of mother (PW-1) shows that on the day of incident, the Accused told her that he will give the insecticide to the Victim and she should be sent with him and he accordingly took Victim and empty tin was carried. This PW-1 deposed that after about an hour the Victim came back crying and told her that the Accused had taken her in the crop of one Dadarao Sarjerao (PW-2) and that he had laid her on the ground and loosened her pant and removed her clothes as well as his own clothes and sat on her person. This PW-1 (mother) though asked repeatedly, was not ready to speak any further

regarding the act committed by the Accused. PW-7, the father of the Victim has also stated that the Victim came back after about one hour and that she was weeping and when he asked as to what happened, the Victim had told that the Accused had taken her in the sugarcane crop and removed her clothes and sat on her person. PW-7 claimed that the Victim told him that in the course of the incident the Accused did not allow her to run away and had lifted her legs. The witness claimed that except this the Victim had not told anything. In a leading question thereafter, father did accept that rape was committed on the Victim.

. The evidence of the parents shows inherent hesitation to speak about details of the incident. It lends credence to the evidence of these rustic villagers who were yet to get two of their daughters married.

7. The evidence of PW-1 and PW-7, parents of

the Victim as referred above, is relevant to the limited extent that after about an hour after the Victim was taken along by the Accused, the Victim did come back crying and told them about the incident. The details of the incident for these witnesses would be hear-say. What is material is the conduct of the Victim in immediately going to her parents crying and telling the incident which had occurred with her. The conduct of the victim immediately after incident is corroborative piece of evidence to the evidence of victim regarding the incident.

8. The evidence of PW-7 the father, shows that after such incident the brother-in-law Shaikh Lal was called and he was told about the incident and F.I.R. came to be filed on the next day. Learned counsel for Accused has tried to show that because of the dispute of accused with Shaikh Lal regarding water, false case is filed. The trial Court has discarded such defence and I also do not

find substance in the same. It is apparent from the evidence of PW-1, PW-7 as well as Victim that these people come from a rural background and are quite rustic. The Victim herself is absolute simpleton with poor understanding. It may be that these people may not have had the courage to immediately go and report such incident and may have thought it necessary to deliberate. By that itself it does not mean that no incident took place and imaginary F.I.R. is filed only because Shaikh Lal had some dispute of sharing of water with the Accused.

9. Coming to the evidence of PW-6 Victim herself, the trial Court recorded that she was not even in a position to tell her age properly. She claimed to be 9 years old while she appeared to be 13 or 14 years old. Because of her poor understanding, the trial Court recorded her evidence in question and answer form. The various questions recorded and answers given are part of

record. The cross-examination of the Victim shows that she virtually went on saying - "yes" to whatever question the cross examiner was putting. It is thus necessary to appreciate the evidence in proper perspective so that only because the Victim is simpleton, the offender should not get away. The trial Court discussed the evidence and while discarding the answers given to leading questions, the trial Court separated the evidence which the Victim had given on her own. Perusal of the evidence of the Victim shows that she stated that the Accused happened to be her brother as he is son of her uncle Abbas. When she was asked as to what happened on the day concerned, she stated that the Accused had taken her in sugarcane crop. At one point, she claimed that there was nobody in the sugarcane crop and she returned from sugarcane crop weeping to her field. When she was asked why she was weeping, she deposed that Accused had caught her hand. To another question as to what more had happened, she had at one point, stated

"nothing". Then some leading questions were put to her and she deposed that the Accused removed his clothes and her clothes. Her evidence, ignoring the leading questions, further shows that when she was asked as to whether Accused did anything wrong to her, she stated that he had sat on her person for long time and she felt pain. Her evidence shows that she did go back to her parents crying and told the incident.

10. Thus, the evidence of the Victim does show that the Accused had outraged her modesty. The clear evidence of this Victim was that when she was sent along with the Accused for getting insecticide, he did hold her hands and had taken her in the sugarcane crop. Such act by itself also would show that the Accused outraged her modesty.

11. In the cross-examination of the Victim, it was tried to show that her parents and other persons had told her that she would have to depose

in the Court. Question was put that her parents and maternal uncle told her in what manner she has to depose before the Court and so she was giving the evidence. The answer was - yes (like other various questions put). It cannot be forgotten that the Victim was coming from rural background and was illiterate as well as of very poor understanding as per the observations of the trial Court. If this was the level of understanding of the Victim, it may be that before coming to Court, her parents may have told as to why she was being called in the Court and that she may have to depose regarding the incident which had occurred. That by itself does not mean that the Victim was tutored so as to give false evidence. Had it been possible to tutor the Victim, she could have been tutored to deny the various suggestions which were being put up by the Accused. Rather the answers given by her shows that it was not possible to tutor her. In the cross-examination in answers to some questions she did state on her own

particulars like children of her daughter and that her uncle Shaikh Lal had dispute of sharing of water with father of accused and that it was two years old etc. Still in cross-examination, only a compound question was put to her that she was deposing to please her parents and nothing had happened. She replied - yes. This simpleton was not in cross-examination put specific question regarding her examination-in-chief that accused did hold her hand and pull in the field and sat on her person. She cannot be said to be shattered regarding such evidence of hers by putting compound - vague sentence (ending with words that "nothing had happened") looking to her level of understanding. To take another view, I feel, would mean such simpletons can with impunity be molested as they can be easily tricked in witness box. I find the answers given by her on her own in the examination-in-chief that the Accused had caught her and took her in the sugarcane crop and sat on her person, deserves to be accepted. The trial

Court has discussed the evidence and ignoring the answers given to leading questions, come to the conclusion that the Accused had forcibly taken the Victim in the crop and outraged her modesty. I do not find any reason to interfere with such findings recorded by the trial Court.

12. The trial Court rightly discussed the other evidence regarding the seizure of clothes and medical examination of the Accused, Victim and C.A. reports, to come to conclusion that rape had not been established. In fact the medical examination of the Victim showed that the hymen was not ruptured. In the absence of any other evidence that there was even partial penetration, the trial Court acquitted the Accused for offence punishable under Section 376 and 506 of IPC. There is no Appeal filed against acquittal on that count. The evidence on that count need not any further be discussed.

13. I find that the conviction under Section 354 of IPC as awarded by the trial Court is correct and based on the direct and circumstantial evidence available and on the basis of proper appreciation of the evidence.

14. For above reasons, there is no substance in the Appeal.

15. The Criminal Appeal stands rejected. The Appellant-Accused shall surrender to the Bail Bonds. He shall appear before the trial Court on 27th July 2016. The trial Court shall ensure the execution of the sentence passed.

[A.I.S. CHEEMA, J.]