

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO.662 OF 2003

- 1) Ajmerkhan s/o Fakir Mohd. Khan,
Age-22 years, Occu:Labourer,
R/o-Kunjkheda, Tq-Kannad,
Dist-Aurangabad,
- 2) Kalyan @ Nasibkhan s/o Gulfamkhan,
Age-20 years, Occu: and
R/o-As Above.

...APPELLANTS
(Orig. Accused)

VERSUS

The State of Maharashtra,
Through the Police Sub-Inspector,
Police Station, Kannad,
Tq-Kannad, Dist-Aurangabad.

...RESPONDENT

...
Shri P.F. Patni Advocate for Appellants.
Shri S.M. Ganachari, A.P.P. for Respondent.
...

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

DATE OF RESERVING JUDGMENT : 20TH APRIL,2016.

DATE OF PRONOUNCING JUDGMENT: 5TH MAY, 2016.

JUDGMENT :

1. Appellants are original accused Nos.1 and 2 who have been convicted under Section 354 of the Indian Penal Code, 1860 ("IPC" in short) to suffer rigorous imprisonment for two years and to pay fine of Rs.1000/- each and in default, to suffer simple imprisonment for three months, in Sessions Case No.89 of 2003 vide Judgment passed by Ist Ad-hoc Additional Sessions Judge, Aurangabad. This Appeal is against said conviction and sentence.

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

A). [I will refer to the prosecutrix as victim and will not name her.] The victim filed FIR Exhibit 16 on 9th January 2003 in Kannad Police Station reporting that her mother had separated from her father since about 8 years and she along with her mother and two brothers had been residing at Kunjkheda, at the place of her maternal uncle.

She had never gone to school. She reported that on 4th which was Saturday, at about 3.00 p.m. she had taken three buffaloes to the field of her maternal uncle Shabbir. Incident took place at about 5.00 p.m. when she was returning back home. The accused Ajmerkhan (accused No.1) and Kalya @ Nasibkhan (accused No.2) who were from their village, put her on the ground and accused No.2 pressed her mouth and held both her hands while accused No.1 held her from legs and hip and both of them picked her up and took her in the Nala of "Bangya". She shouted "BACHAO" i.e. save, but there was nobody. Accused No.2 Kalya stood on the embankment of the Nala to keep watch if anybody is coming and accused No.1 Ajmer opened the string of her Salwar and removed it and removing his own pant, committed intercourse on her. She reported that accused No.2 Kalya also was to violate her and when he started coming towards her, she threatened that she would commit suicide and so he stopped. She wore back her Salwar and accused No.1 threatened that if she tells the incident anybody,

he would kill her. At that time itself, aunt of accused No.2 Kalya, namely Baby had reached that side and called out to father of accused No.2 and father of accused No.2 also came there. At that time the accused persons ran away from there. Said Baby asked victim to go home. Victim reported that to avoid loss of respect, she did not tell the incident to anybody at home but her mother came to know the same from somewhere and on Monday she inquired about the incident from her and she told the incident to her mother. FIR mentions that mother of the victim went to the house of accused No.1 Ajmer to make complaint but his mother was not there and the villagers told mother of the victim not to report the matter to police so that when mother of accused No.1 comes, they will bring about marriage between accused No.1 and the victim. One day before the FIR, when the mother returned, in the evening there was meeting, but mother of accused No.1 refused that marriage may be performed. In the morning also effort was made but mother of accused did not come. Then the

villagers advised the victim and her mother to file complaint and thus victim had come with her mother and was filing the FIR.

B). The FIR was lodged on 9th January 2003 and offence came to be registered at Kannad Police Station vide Crime No.4 of 2003. PSI Manohar Dabhade (PW-5) investigated the offence. He seized the clothes of the victim vide Panchnama Exhibit 22. Spot-Panchnama was drawn vide Exhibit 23. When the Spot-Panchnama was carried out, from the spot broken pieces of bangle of the victim and her hair pin was also seized. Clothes of the accused persons were also seized, after they were arrested on 9th January 2003. The complainant as well as accused persons were got medically examined and the blood samples and other samples were collected. The seized articles and the blood samples etc. were sent to C.A. on 16th January 2003. C.A. Reports (Exhibit 29 to 33) were received. Subsequently, charge-sheet came to be filed.

C). Charge was framed against accused persons for offence punishable under Section 376(2)(g) of I.P.C. (as it then stood) The accused persons pleaded not guilty. Their defence is of denial. According to them, as the victim and her mother wanted that there should be marriage between the victim and accused No.1 and as the proposal was not accepted, false case is filed.

3. Before the Sessions Court, State brought on record the evidence of victim as PW-1. The doctor Vijay Patil was examined as PW-2. The mother of victim deposed as PW-3. I am not mentioning the name of the mother of victim also and would refer to her as mother of victim or as PW-3. PW-4 examined was Sarpanch of the village, namely, Ajmer Khan who has proved Panchnama Exhibit 22 regarding seizure of clothes of victim and Spot-Panchnama Exhibit 23. The Panchnamas of seizure of clothes of accused were admitted by them at Exhibit 10 and 11. The Investigating

Officer PSI Manohar has been examined as PW-5. The Sessions Court considered the evidence brought on record and although it accepted the evidence to hold that the incident of use of criminal force had taken place, it found that offence of rape had not been proved and thus instead of Section 376 of IPC, it convicted the accused persons for offence under Section 354 of IPC.

4. I have heard learned counsel for both sides. The learned counsel for the accused persons submitted that the oral evidence of the victim did not get support from the medical evidence and so offence under Section 376 of IPC was not proved. The victim did not have any injury on her person and the C.A. Reports did not conclusively prove that offence of rape was made out. According to the counsel, if offence under Section 376 of IPC was not found to be proved, there could not have been conviction under Section 354 and Section 354 of IPC should not have been invoked. It is argued that if the prosecutrix was disbelieved regarding

her evidence that accused No.1, with help of accused No.2, had raped her, then for Section 354 of IPC also she should have been disbelieved. It is argued that the evidence of the victim and her mother shows that at the instance of the villagers the FIR was filed. The offence was registered because the mother of accused No.1 did not agree to the marriage of the victim and accused No.1. It is claimed that there was no evidence of criminal force being used. The counsel argued that possibly accused No.1 and the victim may have been seen in compromising position and said Baby may have shouted and to avoid defamation the complaint may have been filed. It is argued that said Baby or father of accused No.1 were not examined. From C.A. Report, blood group of the accused could not be ascertained and even if semen was found on clothes of accused, that by itself was no evidence, as the accused persons are young persons and the clothes were seized after some days of incident. The offence was registered on 9th January 2003 although the incident occurred on 4th January

2003 and there was delay. There was dispute of land between uncle of victim and father of the accused persons and because of this, there were strained relations and false case is filed. According to the counsel, removal of Salwar does not amount to criminal force. The counsel relied on Judgment in the matter of **Premiya Alias Prem Prakash vs. State of Rajasthan, reported in 2008 (10) S.C.C. Page 81** to submit that in similar matter where Section 376 of IPC was reduced to Section 354 of IPC, the Hon'ble Supreme Court had released the accused persons reducing the sentence to that which was already undergone. Reliance is also placed on the case of **Husain Harsing Rathod vs. The State of Maharashtra, reported in 2014 All M.R. (Criminal) 3609** to submit that, in that matter on appreciation of evidence offence was not found to be proved and accused were given benefit of doubt. According to the counsel, in present matter also evidence is not sufficient and the offence is not established.

5. Against this, the learned A.P.P. submitted that PW-3, mother of the victim had been deserted by her husband and she was living at the mercy of her brother Shabbir Khan. The FIR itself gave explanation regarding the delay and there being no male member to support the victim and her mother, if there is some delay in filing of the FIR, that cannot be fatal. The evidence showed that accused Nos.1 and 2 colluded with each other to execute the incident but incidentally the aunt of accused No.2 Baby came in between and she shouted, attracting father of accused No.2, whose field was nearby, because of which accused persons ran away. The A.P.P. submitted that such aunt and father of accused No.2 would naturally not support the prosecution and thus they could not be examined. But the version of the prosecutrix - victim was reliable and the offence was clearly proved. Even if the villagers intervened for the honour of such poor illiterate victim, it cannot be said that the complaint filed was not true or

that the incident did not take place. In rural area, such poor helpless women would not make such false allegations which relate to the modesty of a young girl like victim. The Salwar of the victim had blood stains which had been washed and according to the learned A.P.P. the incident had indeed taken place but unfortunately the trial Court, instead of Section 376 of IPC, convicted the accused only under Section 354 of IPC. The A.P.P. submitted that the Judgment of conviction may not be disturbed and the Appeal may be dismissed.

6. The evidence of the victim shows that she is an illiterate labourer. Her evidence is that at the time of incident, accused No.2 Kalya and accused No.1 Ajmer caught her near the "Bangya - Nala" when she was grazing buffaloes. She deposed that accused No.2 caught her hands and also pressed her mouth while accused No.1 Ajmer loosened string of her Salwar. The evidence then mentions as to how rape was committed on her. Her

evidence is that at such time accused No.2 was standing on the top of the embankment of the Nala keeping watch if anybody is coming that side. She deposed that because of act of accused No.1, she felt pain. Accused No.1 also threatened to kill her if she discloses the incident to anybody. Her evidence is also that she had shouted, hearing which lady by name Baby came to that side of the spot. This Baby is paternal aunt of accused No.2. Victim deposed that said Baby had helped her to wear the Salwar. Baby had shouted out as to what has happened, which had attracted the father of accused No.2 who also came to the spot hearing the noise of Baby. At such time the accused persons had run away. According to her, Baby asked her to take her buffaloes and go home. This is the evidence of the victim regarding the incident. She has proved the FIR Exhibit 16. In material particulars regarding the incident, the FIR does support the victim.

7. Now, as regards delay, the evidence of

victim is that the accused No.1 had threatened to kill her and so she did not disclose the incident to anybody, but after 2-3 days her mother came to know about the incident and then she gave the details to her mother. She deposed that two persons had gone to meet the mother of accused No.1 in connection with this incident. In cross-examination, she deposed that she does not understand Marathi and had been to the police station as advised by the villagers.

8. Regarding the delay, the evidence of PW-3, the mother of victim also needs to be considered. She deposed that the incident had occurred on Saturday which was 4th date, eight months before her evidence was being recorded. Thus, even this witness is an illiterate labourer. She deposed that she came to know about the incident in the village and inquired about it to the victim. She had come to know about the incident on Monday. That would be 6th January 2003. Her evidence shows that victim had given her

details of the incident as can be seen from the FIR. In cross-examination, she was asked and she stated that mother of accused No.1 declined to perform the marriage of the victim and accused No.1. She deposed that when she came to know about the incident, she had been to father of accused No.1 and asked him to arrange for the marriage or else she would file case against him.

9. Thus, reading evidence of PW-1 victim and her mother PW-3 along with the FIR Exhibit 16, what appears is that after the incident became public knowledge, the mother of the victim, had tried to persuade the parents of accused No.1 to bring about marriage between accused No.1 and the victim, but they did not agree. This caused delay. Looking to the facts, it must be said to be a natural conduct of mother like PW-3 who had no support of her husband to take care of her young daughter. No fault can be found with her efforts which when failed, she reported the matter. It appears that the villagers tried to help but when

parents of accused No.1 did not agree, the incident was reported. By that itself, it cannot be said that false or imaginary incident was reported.

10. The counsel for accused referred to cross-examination of the victim, where at one place she was asked and she deposed that "prior" to the incident her mother and maternal uncle Shabbir had expressed the desire that she should marry with accused No.1 Ajmer but her mother did not agree to this proposal. The counsel tried to argue that this shows that even before the incident, there was such proposal and it was not accepted and thus according to the counsel, false case was brought about. I am not convinced. It has to be remembered that PW-1 is an illiterate rustic labourer. She was young inexperienced girl. In witness box, a compound sentence was put to her in cross-examination and it is not clear from the evidence that her attention was drawn to the aspect that this was relating to marriage proposal

"prior" to the incident and not after the incident. Apart from this, I will accept it for a moment that even before incident there was any such proposal and it was not accepted. Still, I would not believe that only because marriage proposal had not been accepted by a family in the village, a young girl like PW-1 and helpless woman like PW-3 the mother, would go to such extent which if they did not succeed, would only leave the victim defamed and thus injured, putting in jeopardy her future prospects of marriage.

11. It is then claimed that there were strained relations between the uncle of the victim and the accused persons regarding which Court litigation was pending. If the cross-examination of PW-1 the victim is perused, she accepted the suggestion put to her that she has another maternal uncle by name Ali and some litigations are going on between said Ali and father of the accused persons in the Court at Kannad. She deposed that her both maternal uncles are residing

nearby. Evidence shows that the victim and her mother had been living with her maternal uncle Shabbir Khan. Only because another uncle Ali may have been having such litigation, details of which are not known, it is unlikely that the respect of young girl would be put to stake.

12. It was then argued that the victim was not knowing Marathi and the FIR was written in Marathi. In an insensitive manner, two words relating to private parts of the victim and the accused from the FIR were put to her and she was asked if she knows the meaning of those words and she stated that she does not know meaning of the same. The evidence of PW-5 PSI Manohar Dabhade, the investigating officer shows in cross-examination that the complainant had told him that she can understand Marathi but cannot speak the language. He deposed that he translated her version of the incident given in Hindi into Marathi while writing the complaint. He even deposed that he had explained the meaning of the

words which were used by him in the complaint. There is no reason not to trust the investigating officer who was only discharging official duty to take down F.I.R. of an illiterate woman. The trial Court while dealing with the evidence on this count, wrongly appears to have stuck to the technicality of searching words in evidence that PSI Manohar Dabhade did not state that he had explained the complaint to the girl in Hindi. In fact the FIR Exhibit 16 at the end of the document, mentioned that the victim had given the complaint speaking in Hindi and that she understands Marathi. The FIR mentions that the FIR had been read over to the victim and had been correctly recorded. In spite of this, if one decides to raise suspicion, such suspicions can always be raised.

13. Then there is evidence of the victim stating that police had sent her to the hospital and the medical officer examined her and took samples of blood, pubic hair and nails. PW-5 has

also deposed that on 9th January 2003 itself he had referred the victim as well as both the accused persons for medical examination with forwarding letters like Exhibit 26 and 27. There is evidence of PW-2 Dr. Vijay Patil stating that he examined the victim on 10th January 2003 and had found that the victim had an old rupture to the hymen and there was no injury of violence found. Doctor deposed that the blood sample, sample of pubic hairs and nail of the victim were collected and handed over to the police. The evidence of PW-4 Ajmer Khan shows that in his presence the clothes of the victim were attached by police vide Panchnama Exhibit 22. The evidence of PW-5 PSI Manohar as well as Panch Ajmer Khan shows that when the Spot Panchnama Exhibit 23 was drawn on the spot, broken bangle pieces of the bangle of the victim and her hair pin was seized from the spot. Police had also collected the bangle which the victim was wearing. Evidence of PW-5 PSI Manohar shows that all these articles and blood samples etc. were sent to C.A. On the clothes of

accused persons stains of semen were detected by C.A., but then that would not be material as the clothes were collected after so many days of the incident and the accused persons happen to be young persons. What is material found is in C.A. Report Exhibit 29, which shows that on the Salwar of the victim, there were stains of blood which appeared to have been washed. This may also be possible because although the incident took place on 4th January 2003, the FIR came to be filed only on 9th January 2003 and meanwhile the victim may have washed her Salwar.

14. If the Judgment of the trial Court is perused, it discussed the evidence and observed that agricultural disputes between the villagers were common and it cannot be expected that due to such disputes the mother of victim would risk the future life and the prospects of the marriage of the victim. Trial Court also accepted the evidence that the mother had, after the incident, made attempts to settle the matter by bringing about

the marriage between the victim and accused No.1 but did not succeed. The fact that mother tried to bring about the marriage between the accused No.1 and the victim, was a conduct which trial Court found, shows that she did not have grudge against accused No.1 and there was no intention to take revenge. The trial Court discussed the evidence regarding alleged delay and concluded that there were sincere attempts made by the mother to bring about marriage and thus there was delay, which had been explained. The trial Court discussed the evidence regarding radiological test of the victim and her age. However, this is not a case of consensual sex and I am not going into discussion of that evidence. Trial Court discussed the evidence regarding seizure of various articles and found that only on the Salwar of the victim, human blood was detected. The detection of semen on the clothes of the accused could not be linked to the rape, was observed by the trial Court.

15. The Judgment of the trial Court shows

that although it was aware that there was no possibility of Baby, the aunt of accused No.2 and father of accused No.2 supporting the prosecution, still it wanted that such witnesses should have been examined. The trial Court observed that the evidence of victim shows that she raised noise only after the act of rape on her was over. The trial Court, however, ignored the evidence of victim that she was caught between two young persons like accused No.1 and accused No.2 and she had also deposed that accused No.2 had pressed her mouth and that accused No.1 had threatened her. I do not know how the trial Court was expecting that by examining the aunt Baby and father of accused No.2, the presence of accused on the spot could have been brought on record. If they are not likely to support, they will not support to any extent. Trial Court was aware that sole testimony of the victim also can be accepted, and also accepted the evidence of the victim, but observed that the victim had not deposed that there was any bleeding from her vagina or that she had sustained

any injury on other part of the body. Referring to the medical certificate, trial Court observed that it mentioned that there was old rupture of hymen but it was not made clear as to what was the duration of the rupture or how many days prior to the incident. I find, the doctor may be able to tell fresh rupture of hymen but when the doctor concludes that it is an old rupture, I do not think that the doctor would be able to tell as to how many days before examination the rupture happened. Trial Court observed that it would be far fetched presumption that every young girl remains virgin till her marriage. There appears no relevance of such observation. For such reasons, the trial Court concluded that medical evidence on the point of rape does not support the prosecution. It also observed that the evidence does not disclose any resistance on the part of the victim. I am not in agreement with such reasonings which trial Court recorded to tide over the evidence regarding rape. I have already mentioned that prosecutrix was caught between two

young persons like accused Nos.1 and 2, and both of them caught hold of her at the same time and in the circumstances, even if she did not have any physical hurt on other parts of her body, that by itself was not evidence against her. In such situations different persons may react differently. In fact there is evidence that the accused persons over powered the victim and her mouth was pressed and she was threatened and violated. I have discussed this evidence because before me the learned counsel for accused argued that if the accused was to be acquitted for offence under Section 376 of IPC, the accused could not have been convicted for offence under Section 354 of IPC. In fact looking at the evidence, it would not have been difficult even to accept that offence of rape had been proved. In fact it is unfortunate that State, which comes up in Appeals in petty matters, did not find it prudent to file appeal against the acquittal under Section 376 of IPC in the matter like present one, where helpless women like PW-1 and PW-3 were

sufferers.

16. The ingredients of Section 354 of IPC are ingrained in offence under Section 376 of IPC. When the accused were charged with offence under Section 376 of IPC, if the trial Court did not find 376 of IPC spelt out, it convicted the accused for offence under Section 354 of IPC. Looking to the evidence, if the trial Court has convicted the accused under Section 354 of IPC, I would not interfere with the same.

17. Facts of the case of **Husain Harsing Rathod**, referred supra, are clearly different. As regards the Judgment in the matter of **Premiya alias Prem Prakash**, referred above, the Hon'ble Supreme Court, no doubt, reduced the sentence to which was already undergone, but that case cannot be compared with the facts of the present matter. The Judgment of the Hon'ble Supreme Court itself shows that accused in that matter had already undergone nearly two years of sentence. Thus,

while maintaining the conviction of accused from 376 to Section 354 of IPC, the Hon'ble Supreme Court observed that custodial sentence shall be period already undergone. In the present matter the accused were arrested on 9th January 2003. It is stated that they were released on bail on 28th January 2003. Clearly, there is no comparison between the period of custody of these accused with that in the matter of **Premiya alias Prem Prakash.**

18. For reasons discussed, I do not find that there is any substance in the Appeal. The Appeal is dismissed. The Appellants shall surrender to their bail bonds before the trial Court on 9th May 2016. In default, the trial Court shall enforce the sentence as was passed in the Sessions Case No.89 of 2003.

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