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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.319 OF 1997**

Mohammad Hussain Mustafa Khan
age 22 years, resident of Shrinagar,
Warli Pada, Wagle Estate, Thane

...Appellant

Versus

The State of Maharashtra

...Respondent

Mr.S.R.Phanse, for the Appellant.
Ms.P.P.Shinde, A.P.P for the Respondent-State.

***CORAM : REVATI MOHITE DERE, J.
DATE : 20th JUNE, 2016***

ORAL JUDGMENT :

1. By this appeal, the appellant has impugned the Judgment and Order dated 24th October, 1996, passed by the III Additional Sessions Judge, Thane, convicting and sentencing the appellant in Sessions Case No.715 of 1995. The appellant was convicted for the offence punishable under Section 376(2)(g) of the Indian Penal Code and was sentenced to suffer RI for 7 years and to pay a fine of Rs.1,000/-, in default to suffer RI for six months.

2. Although the appellant was also found guilty, for the offence punishable under Sections 323 and 506 of the Indian Penal Code, no

separate sentence as a major punishment was awarded, for the offence punishable under Section 376(2)(g) of the Indian Penal Code. Except the appellant, all the other three co-accused have been acquitted by the learned Additional Sessions Judge of all the offences.

3. The prosecution case is as under:-

On 26th November, 1994, at about 11.00 p.m., the appellant along with co-accused including absconding accused – Prakash Maruti Vayadande, are alleged to have come to the prosecutrix's house, where she was residing with her husband and children at about 11.00 p.m. It is alleged that the accused gave fist and kick blows and forced there entry inside the house. It is alleged that the appellant along with co-accused – Prakash (absconding) and other co-accused held Ramkishan Ramnarayan Sharma –(PW.4) and took him to a nearby temple. It is alleged that thereafter the appellant and absconding accused - Prakash came home and sexually assaulted the complainant. Pursuant to the said incident, an FIR was lodged by the complainant with the Wagle Estate Police Station, alleging offences punishable under Section 376(2)(g), 323, 506 r/w 34 of the Indian Penal Code.

The appellant came to be arrested on 3rd December, 1994. After investigation, charge sheet was filed before the learned 3rd Joint Judicial Magistrate First Class, Thane. As the case was sessions triable, the case was committed to the Court of Sessions in November, 1995. The learned Sessions Judge, was pleased to frame charge under Sections 376(2)(g), 323, 506 r/w 34 of the Indian Penal Code as against the appellant and other co-accused. All the accused pleaded not guilty and claimed to be tried.

The prosecution in support of its case examined 12 witnesses; PW.1 - Dr.Jamil Ahmed Razak Shaikh, the doctor who examined the prosecutrix on 3rd December, 1994; PW.2 – Arun Abhimanyu Hadkar, panch to the seizure of clothes; PW.3 – the prosecutrix (complainant); PW.4 – the husband of the prosecutrix ; PW.5 – the minor son of the prosecutrix, who at the relevant time was aged 9 years; PW.6 – Dadu Maruti Patil, a neighbour ; PW.7 - Omprakash Pralhad Sharma, panch to the spot of the incident; PW.8 – Haribhau Maruti Patil, panch to the seizure of bed-sheet and quilt; PW.9 – Dagadu Ganpat Kolekar, neighbour; PW.10 – Prabhakar Shankar Nair, panch to the seizure of prosecutrix's clothes; PW.11 – A.P.I, Jaising Rongaji Kamble, the investigating officer and PW.12 – Manish Vitthal Ajinkya, PI of the Wagle Estate Police Station.

The defence of the appellant was that of denial and false implication. The learned Additional Sessions Judge after hearing the parties was pleased to convict the appellant as aforesaid.

4. Learned Counsel for the appellant contended that the appellant has been falsely implicated in the said case at the behest of PW.6- Dadu Maruti Patil, against whom the appellant had lodged a criminal case, prior to the incident. He submitted that there is a delay of 5 days in lodging the FIR. He submitted that there are several inconsistencies in the evidence of the prosecutrix, her husband and their minor son. He further submitted that the medical evidence also does not suggest that the complainant was subjected to sexual assault. According to the learned counsel there were about 400 to 500 huts in the vicinity, where the alleged incident took place. He submitted that considering the topography and the place where the incident took place, it was highly improbable, that neighbours had not witnessed the alleged incident.

5. Learned APP supported the impugned Judgment and Order. She submitted that there is no reason to disbelieve the prosecutrix and that

her evidence cannot be discarded. She does not dispute the fact, that there are inconsistencies in the evidence of witnesses, however, she submits that the inconsistencies are minor in nature.

6. With the help and assistance of the learned counsel for the appellant and the learned APP, I have gone through the entire evidence that has come on record and all the documents on which reliance was placed. PW.3 - prosecutrix has stated in her examination-in-chief, that she was residing in the hut alongwith her husband and two children for the last 10 years. She has stated that she knew the appellant and the absconding accused – Prakash, as they used to stay near the Hanuman temple. According to the prosecutrix, on 26th November, 1994, after dinner in the evening, they all went to sleep. She has stated that at about 11.00 p.m., the accused came and started banging the door by giving fist and kick blows. She has stated that as they were frightened, they did not open the door. She has further stated that later, they were compelled to open the door, as the accused were using abusive language and were asking them to open the door. She has stated that the appellant and the absconding accused - Prakash were accompanied by 3 other accused. She has further stated that the

accused asked her to step out of the house, after which they started assaulting her and her husband (PW.4). She has stated that when she started shouting, the appellant threatened her that he would kill her, if she shouted. She has stated that thereafter, the appellant asked her husband – PW.4 to accompany him to the temple. According to the prosecutrix, co-accused–Prakash (absconding accused) came again and asked her to open the door and threatened to kill her husband, if she failed to open the door. She has stated that hence she opened the door, after which co-accused – Prakash (absconding) entered her room and committed sexual intercourse with her against her wish. She has further stated that the appellant also came and committed sexual intercourse with her, without her consent. She has alleged that when she started shouting for help, the appellant threatened to kill her. According to the prosecutrix, after some time, when her husband – PW.4 came home, she disclosed to him, that the appellant and the absconding co-accused – Prakash had sexual intercourse with her against her wish. She has further stated that after some time, the appellant along with other co-accused came back, and again threatened them.

7. According to the prosecutrix, after 3 days, PW.6 – Dadu

Maruti Patil, her neighbour came and enquired with her, as to why she was nervous, pursuant to which she narrated the aforesaid incident to him. She has stated that thereafter, she along with PW.6 – Dadu Patil went to the police station and lodged a complaint on 2nd December, 1994, as against the appellant and others. She has identified the FIR lodged by her, at Exhibit – 19. She has stated that the police thereafter referred her to the hospital, for examination and also came home and drew the spot panchanama. She has identified the accused including the appellant in the Court. She has stated that the police had seized her petticoat, underwear, saree and bed-sheet and on being shown, she had identified the seized articles, being article nos.1 to 4. In her cross-examination, PW.3 has admitted that there are 400 to 500 huts in the vicinity and that there are two temples in the area viz., Hanuman Temple and Shankar Temple. She has stated that the Hanuman Temple was about 8 to 9 huts away towards east and the Shankar Temple was about 3 to 4 huts away towards west. She has admitted that there were huts which were situated by the side of her hut as well as besides both the temples. She has admitted that she approached the police on the day, on which she disclosed the aforesaid fact to PW.6 – Dadu Patil. She has admitted that the complaint (Exhibit – 19) was not read over to her and she did not know the

contents of the complaint. However, she has stated what was disclosed to the police, were facts deposed by her in her examination-in-chief. In the cross examination, certain material omissions were brought on record; with regard to the knocking of the door by the accused; abuses used by the appellant; assault by the accused on her and her husband; with regard to threats given by the accused, if she shouted; with regard to the fact that the appellant had taken her husband towards a temple; that the absconding co-accused – Prakash had entered her house when her husband was being taken towards the temple; that the sexual assault had taken place after the lights were put off; and that the appellant – accused along with his friends had come 3 times to her house and had threatened to kill her. She has admitted that on the next day of the incident, she had gone to School and on the 3rd day had gone with her husband. She has stated that she had not disclosed, that she was sexually assaulted, due to the threats given by the accused. She has admitted that she was shouting at the time of the said incident, however, nobody came to her rescue. According to the prosecutrix, during the course of sexual assault, she had sustained an injury to her right shoulder. She has further stated that she did not know, whether her husband, PW.4 had sustained any injury or not. She had admitted that

there was an open land in front of her room/hut and that the appellant had erected his hut in the said open space. According to the said witness, she was not aware whether her husband and PW.6 – Dadu Patil had obstructed the appellant and had restrained him from erecting the hut. She had denied the suggestion that there was any quarrel between her husband and the appellant, on account of the said open space. The said witness has admitted that the room/hut, where she was residing belonged to PW.6 – Dadu Patil. According to her, she did not know whether there was any quarrel between the appellant and PW.6 – Dadu Patil, on account of her house. She has admitted the suggestion, that she had lodged the complaint at the instance of PW.6 – Dadu Patil. PW.3 – the prosecutrix, has denied the suggestion, that no such incident as alleged had taken place and that she had involved the appellant because of the hostile relations between them.

8. PW.4 is the husband of the prosecutrix. He has stated that he was residing at the said place with his wife – PW.3 and his children for 10 years. He has also stated that he knew the appellant and the absconding accused – Prakash, as they were residing in the same area. He has stated that on 26th November, 1994 at about 11.00 p.m. after they went to sleep,

the appellant knocked the door and hence he opened the door and noticed that the appellant had come alongwith co-accused - Prakash and other accused. He had stated that the appellant held him and tried to pull him out of the room. He has stated that his wife PW.3 held him and did not allow him to leave the room. He had further stated that the appellant put his hand on his wife's mouth and stopped her from shouting. He has stated that one of the accused gave a blow with a stick on his back and thereafter, the accused took him to Hanuman temple, where they made him sit. He has stated that the appellant and other accused were present in the temple and that thereafter, they released him, pursuant to which he went to the house. The said witness has stated that on return, his wife disclosed to him that the present appellant and co-accused – Prakash (absconding) had committed sexual intercourse with her against her wish and had threatened to kill her. He has stated that the accused came on 3 occasions in the night. According to PW.4, he had disclosed the said fact, to his neighbour on the next day as well as to PW.6 – Dadu Patil and was advised to lodge a complaint, pursuant to which, they went to the police station and lodged a complaint. He has identified the accused as being the persons who had come to his house on the aforesaid date and time.

9. There are several omissions which were brought in the cross examination of the said witness. There is an omission with respect to the fact, that his wife tried to shout and that the appellant put his hand on her mouth and prevented her from shouting; that one of the accused assaulted him with a stick on his back; that he was taken to the Hanuman Temple; and that after the incident the accused had come to their room about 3 times. The said witness has also admitted that both, he and his wife cried for help however nobody came to help. He has admitted the appellant had erected a hut near the water tank. He has denied the suggestion that there was quarrel between him and the appellant and PW.6 – Dadu Patil in respect of the erection of a hut, by the appellant hence the appellant was falsely implicated.

10. The prosecution had also examined the son of PW.3 and PW.4, PW.5, a child witness, who was studying in the IV Standard at the relevant time. He has stated that on 26th November, 1994 at about 11.00 p.m., he was sleeping in the house when the appellant and co-accused – Prakash came to their house. He has stated that the accused gave kick blows on the door, pursuant to which his mother opened the door. He has stated that the co-

accused - Prakash held his father's hand and took him out of the room. He has further stated that thereafter co-accused Prakash entered the room, latched the door from inside and sexually assaulted his mother. He has stated that on seeing the said incident he went forward and bit co-accused - Prakash, who abused him and asked him to sleep and hence he went to the corner of the room. He has stated that thereafter the appellant came and also committed the said act on his mother. The said witness has in his cross examination admitted that his parents had asked him to depose, although he has denied the suggestion that no such incident had taken place.

11. The next witness examined by the prosecution is PW.6 – Dadu Maruti Patil, a resident of the village and neighbour of PW.9 – Dagadu Kolekar, and PW.4. PW.6 – Dadu Patil has in his examination-in-chief stated that on 26th November, 1994, he had gone to his native place and had returned to Thane on 28th November, 1994. He had deposed that he learnt from PW.9 – Dagadu Kolekar, that the accused had forcibly taken PW.4 out from his house and that PW.3 was raped. He has stated that on the next day, he went for his work and that on the third day he enquired with PW.4, who disclosed to him, that the accused had threatened him not to lodge a

complaint and hence they did not go to the police station. He has stated that he had accompanied PW.3 and PW.4 to the police station for lodging a complaint. PW.6 – Dadu Patil in his cross examination has stated that he had returned on the next day of the incident and he had learnt about the said incident on that day. He has stated that he had not gone to the house of PW.3 and PW.4 on that day. He has denied that he had accompanied the complainant to the police station. He has stated that he could not tell when PW.3 and PW.4 had gone to the police station. He has admitted that the appellant had lodged a complaint in the police station against him, however he has denied that the complaint was lodged on account of erection of a hut. He has stated that soon after the appellant's arrest, he was called by the police. Certain omissions were brought on record about disclosure made to him by PW.4. He had admitted that presently, he was occupying the room of the complainant.

12. The prosecution thereafter examined PW.9 – Dagadu Ganpat Kolekar, the neighbour of the prosecutrix. The said witness has stated that he was residing in the area for about 8 years. He has deposed that on 26th November, 1994, after taking his meal he went to sleep. He has stated that

at about 12.30 a.m. – 1.00 a.m. he heard shouts and hence he tried to open the door, however, he was prevented by his wife from doing so. He has stated that after some time, one Yadav came in front of his room and hence he opened the door. He has stated that one person i.e. co-accused – Prakash asked Yadav to go to his room. He has stated that when Yadav enquired with co-accused Prakash as to what had happened, Prakash is alleged to have slapped Yadav. He has stated that therefore he too returned to his house and closed the door. He has stated that there were 2 to 3 persons alongwith the appellant near the house of PW.4. He has stated that thereafter, twice he heard shouts from the house of PW.4. He has stated that on the next day, he disclosed the aforesaid fact to PW.6 – Dadu Patil. In the cross examination of PW.9 – Dagadu Kolekar, certain material omissions were brought on record i.e. at 1.00 a.m., he heard shouts from the house of PW.4; and that he had heard about the incident of rape from his wife. The said witness has admitted that PW.4 had not disclosed to him about the incident i.e. either of assault or of rape.

13. The second set of witnesses which were examined are the panchas, PW.2 – Arun Abhimanyu Hadkar, who had seized the clothes of

the appellant; PW.7-Omprakash Pralhad Sharma, the panch to the spot panchanama; PW.8 – Haribhau Maruti Patil, panch to the seizure of bed-sheet and quilt; and PW.10 – Prabhakar Shankar Nair, panch to the seizure of prosecutrix's clothes. Nothing incriminating was found in the said panchanamas i.e. spot panchanama or on the clothes of the prosecutrix/appellant to show his complicity.

14. The next crucial witness examined by the prosecution is PW.1 - Dr.Jamil Ahmed Razak Shaikh. The said witness in his examination in chief has deposed that on 3rd December, 1994, he examined the prosecutrix who was brought by Police Constable R.C.Dagade of the Wagle Estate Police Station. He has stated that there was history of rape by 3 persons on 27th November, 1994. On examination he found the patient mentally sound, conscious and general parameters normal. Obstetrics history given was three full term normal delivery, last delivery one and half years back, menstrual cycle was normal, nothing abnormal detected, on systemic examination, secondary sexual character-breast engorged and milk secretion present, axillary and pubic hair were scanty. On perspeculam examination, no external injury was seen. Internal examination showed that

vaginal patulas admits speculam easily; and Candidial discharge present. Per vaginal examination – cervic normal, uterus ante verted normal, fornasses clear. He has stated that the patient had complained of pain and tenderness, over back and left side. No echomysis seen. After examination, PW.1 - Dr.Jamil Shaikh had opined that the patient was habituated to sexual intercourse and no evidence of forceful intercourse or sexual transmitted disease present. Her blood, vaginal smear and vaginal swab, pubic hair were taken and accordingly certificate was issued. On the basis of the evidence that had come on record no cross examination was done.

15. API - Jaising Rongaji Kamble was examined at PW.11. He has stated that the complaint was entrusted to him for investigation pursuant to which the spot panchanama (Exhibit – 29) was done, clothes were seized, (Exhibit – 33) and thereafter appellant was arrested on 3rd December, 1994. He has stated that the appellant under Section 27 of the Evidence Act, produced his clothes (Exhibit – 17). He has stated that accused was reported to the hospital for examination and thereafter all the articles which were seized were forwarded to the C.A and thereafter case papers were entrusted to PW.12 – P.I, Manish Vitthal Ajinkya, of the Wagle

Estate Police Station.

16. P.I. - Manish Vitthal Ajinkya was examined as PW.12. He has stated that the case papers of C.R.No.302 of 1994 were entrusted to him on 5th December, 1994.

17. Perused the evidence as has come on record. The question that arises for consideration in the present case is, whether the appellant had committed an offence under Section 376(2)(g) of the Indian Penal Code on PW.3 – the prosecutrix (complainant). It is pertinent to note, that merely because the medical evidence shows that there was no forcible sexual intercourse does not necessarily mean that there was no rape. Similarly, merely because there is a delay of 5 days in lodging the FIR, does not mean that the delay is fatal. Each case is decided on the facts of that case and the evidence that has come on record. There is no hard and fast rule. The evidence on record will have to be scrutinised and considered to arrive at a conclusion, whether the evidence on record inspires confidence or not. In the present case, it will be necessary to scrutinise the evidence of PW.3, PW.4, PW.5 and PW.6. There are several contradictions and omissions in

the evidence of PW.3, PW.4, PW.5, per se and inter se. The evidence of PW.3 shows that after her husband was taken to the Hanuman Temple, co-accused - Prakash came and sexually assaulted her and thereafter the present appellant also came and sexually assaulted her. The evidence of PW.4 shows that the appellant was throughout present at the Hanuman Temple. The evidence of PW.4 does not in any way show, that the appellant had left the spot at any point of time and gone to his house and then returned back to Hanuman Temple. Again the evidence of PW.3 and PW.4 does not show the presence of PW.5 – their minor son; that he was present in the room at the relevant time and that he had seen the incident and that he had gone and bit co-accused – Prakash on his back. If PW.5 was present as alleged by the prosecution, the same would have certainly come in the evidence of PW.3 and PW.4. Not only this, there are several material omissions that have been brought on record. It also appears that there are 400 to 500 huts in the vicinity where the incident had taken place and near the temple where PW.4 was taken. According to PW.3 and 4 they had cried for help and were shouting however, no one came forward to help them. The incident had taken place at about 11.00 pm. in the night. The evidence of PW.9 – Dagadu Ganpat Kolekar, shows that he heard the

alleged shouts at about 12.30 a.m. to 1.00 a.m. The said witness does not have first hand knowledge that PW.3 was raped, what he has deposed is on the basis of hearsay evidence, which is inadmissible. It has also come on record more particularly, in the evidence of PW.3 that she has lodged the aforesaid complaint, at the instance of PW.6 – Dadu Patil. It is pertinent to note, that there was a dispute between the appellant and PW.6 – Dadu Patil, the owner to the room where the complainant and her husband were residing and that the appellant had filed a criminal case against PW.6 – Dadu Patil. If according to the prosecution, PW.4 was assaulted by the appellant, was true then the prosecution ought to have placed the injury certificate of PW.4 on record to show the nature of injuries sustained by him. The medical evidence is also of no assistance and does not support the prosecution case. The evidence adduced by the prosecution does not inspire confidence.

18. As far as CA reports are concerned, the said CA reports were admitted by the appellant, because the said CA reports were not incriminating in anyway, qua the appellant.

19. Considering the material on record, I am of the opinion that the prosecution has failed to prove its case beyond reasonable doubt.

20. In view of the aforesaid, the impugned Judgment and Order dated 24th October, 1996, passed by the III Additional Sessions Judge, Thane, convicting and sentencing the appellant in Sessions Case No.715 of 1995, is quashed and set aside and the appellant is acquitted with the offence with which he has been charged. His bail bond, if any, stand cancelled.

21. The appeal, is allowed, in the aforesaid terms.

22. The Court expresses a word of gratitude for the able assistance rendered by Advocate for the appellant, Mr.S.R.Phanse.

REVATI MOHITE DERE, J.