

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.505 OF 2013

- 1) Gajanan Khandu Tiwade
Age 50 yrs, Occ:Trade
R/o 25/366, Mahatma Phule
Housing Society, Shahapur,
Ichalkaranji, Tal:Hathkanangale,
District Kolhapur
- 2) Uttam Rajaram Kagle
Age 42 yrs, Occ.Trade,
R/o Yalgud, Tal.Hathkanangale,
District : Kolhapur .. Appellants

Versus

The State of Maharashtra .. Respondent

Mr.Girish Kulkarni, Advocate for the appellants.

Ms.V.S.Mhaispurkar, APP for the Respondent State.

CORAM : PN. DESHMUKH, J

DATED : 29th AUGUST, 2016

ORAL JUDGMENT :-

1 This Appeal takes exception to judgment dated 22nd April 2013 passed by the learned Addl. Sessions Judge, Kolhapur, thereby convicting both the appellants for the offences punishable under Section 376(2)(g), 506 IPC r/w Section 34 of the IPC, and

sentencing them to suffer RI for 10 years each, and to pay fine of Rs.5,000/- each, in default to suffer RI for one month. Both the appellants are further sentenced to suffer RI for 1(one) year for the offence punishable under section 506 of the IPC.

2 In brief, it is the case of the prosecution that prosecutrix who, admittedly, is married having two children and was residing alone after the death of her husband, in January 2012, was in search of work, and had accordingly come across one Sangita Chougule, resident of Ichalkaranji who agreed to help her out by finding some job saying that appellant no.1 Gajanan is her brother and being a social worker, he can provide some job to her in a power-loom factory. Sangita thereafter called prosecutrix in a shop styled as “Manavjeevan Electronics” where she was introduced to both the appellants, who on their introduction informed prosecutrix that they will help her to get sanctioned ration shop in her name. It is further case of prosecution that on this pretext both the appellants, on 2 – 3 occasions, took prosecutrix in their private car to Hathkanangale, and in this background, on 11th March 2012, both the accused took prosecutrix in their car along with Sangita, saying that they have to meet the Tahsildar and from there, they proceeded to Vadgaon

and stopped the car in front of Ashwini Lodge. Appellant Gajanan thereafter took prosecutrix in one of the rooms in the lodge saying that some Officer was present in the room to whom they have to meet in connection with grant of ration card. Prosecutrix accordingly, accompanied him, however, on entering the room, she did not find any Officer present there and at that time, appellant Gajanan closed the door from inside and claims to have requested her that she should submit him since he was arranging for sanction of her ration shop. According to the case of prosecution, appellant then sexually assaulted prosecutrix without her wish. Appellant before leaving the room extended threats not to disclose the incident to anyone. Immediately, after he left the room, appellant Uttam entered the room. He also subjected prosecutrix by sexual intercourse, and thereafter, all of them left the lodge. It is also case of prosecution that apart from appellants, Sangita Chougule extended threats to kill her in the event she disclosed incident to anyone, and after dropping prosecutrix at her house, all of them left away.

3 It appears to be further case of prosecution that prosecutrix disclosed above said incident to one Aayub Vijapure as well as to social workers i.e. Kalawati Patil and Tulasabai Katkar,

and on 20th June 2012, read one news item in Daily newspaper “Mahasatta” involving appellants in a case of rape on some other woman on the pretext of providing her ration shop. On going through this news, prosecutrix visited Vadgaon Police Station and lodged a report against appellants in respect of alleged incident dated 11th March 2012 to have occurred on that day between 1.00 p.m to 2.00 p.m.

4 On the basis of report, offence came to be registered vide Crime No.78/2012 which was investigated by PW 4 – Anil Vibhute API during the course of which he visited the lodge where incident was alleged to have taken place and seized one bed-sheet and Hotel register under seizure panchnama. He further seized clothes of prosecutrix as produced by her under panchnama, and sent her for medical examination to Rural Hospital, Pargaon. Both the appellants came to be arrested on 28th June 2012 and were referred for their medical examination. The seized muddemal articles were forwarded for its analysis to Chemical Analyzer. On collecting medical certificate of prosecutrix as well as of both the accused and the School leaving Certificate of prosecutrix, charge-sheet came to be filed before the learned JMFC, Vadgaon.

5 In the course of time, case came to be committed for trial before the learned Sessions Court. Charge is framed against the appellants for the offence punishable u/s.376(2)(g) r/w Section 34 IPC. They pleaded not guilty and claimed to be tried. Defence of appellants is that of total denial. It is their case that as it reveals from statement of accused u/s.313 of the Code of Criminal Procedure, due to political rivalry, on the say of one Datta Rane, prosecutrix has falsely implicated them.

6 To establish the charge levelled against appellants, prosecution, in all, examined four witnesses and had commenced its evidence by examining PW 1 Rahul Jagtap – panch witness in whose presence bed-sheet and Hotel register came to be seized under panchnama (Exhibit-37 and 38 respectively), PW 2 – Bajrang Dattatray Powar, ASI who has received the report (Exhibit-46) and registered FIR and has proved his Station Diary Entry (Exhibit-48), PW 3 prosecutrix and concluded its evidence on examining PW 4 – Anil Vibhute, API the Investigating Officer.

7 Heard learned counsel for the appellants and learned APP. With their assistance, we have scrutinized the evidence on record.

8 Learned counsel for the appellants has submitted that case of prosecution is full of doubts as, admittedly, report in respect of alleged incident is lodged after three months i.e. on 22nd June 2012, which according to learned counsel, in fact, supports the case of appellants of their false implication by prosecutrix on the say of Datta Rane. It is further pointed out that as to how case of prosecution is not reliable as there is non-examination of material witnesses i.e. Aayub, though his statement is found recorded during the course of investigation, and also on the count of non-examination of prosecutrix Sangita, though according to the evidence of prosecutrix, she had accompanied her to the office of Tahsildar, and in fact, has also contended that said Sangita after the incident had extended threats to her to not to disclose the incident to anyone. It is further pointed out that there is no investigation carried out on this aspect as there is no whisper with reference to Sangita in the charge-sheet. Similarly, it is further pointed out that no investigation is carried out with reference to Kalavati Patil to whom prosecutrix claims to have disclosed about the incident.

9 It is further contended that all the documents with regards to C.A. Reports, medical certificates of prosecutrix as well

as of accused are not disputed, as nothing can be established from these documents. Learned counsel for the appellants in support of his defence has tendered on record chart showing similar offences registered against the appellant Gajanan alleging that same are registered on the saying of Datta Rane, on the strength of report lodged by other prosecutrix, involved therein.

In the background of above submissions, it is therefore submitted that Appeal be allowed.

10 On the other hand, learned APP has supported the judgment of the learned Sessions Court and has submitted that there is ample evidence establishing involvement of appellants and prays that Appeal be dismissed.

11 On perusal of evidence of PW 3 - prosecutrix, it has come on record that she is married in the year 2003, having two children and after death of her husband, is staying alone keeping her children in her matrimonial home as she could not adjust with her in-laws and thus, started residing alone at village Yadrav. She has further stated that prior to incident while she was at Ichalkaranji, she happened to meet one Sangeeta Chougule (not

examined) and requested her to search for some job upon which she stated that her brother appellant – Gajanan was social worker and, accordingly, she had met him in shop styled as “Manavjeevan Electronics” along with Sangeeta and appellant no.2 Uttam. She has further stated about appellants' informing her of some scheme available for backward class people and of their assuring prosecutrix to help her out for getting necessary permission for opening a ration shop. She further stated about appellants visiting her house on this count on 2 – 3 occasions and taking her to the office of Tahsildar at Hathkanangale.

12 With reference to the incident, it is stated that on 11th March 2012, both the appellants took prosecutrix from her house on the pretext of going to Tahsildar's office at Hathkanangale to whom she accompanied along with Sangeeta. On visiting Tahsildar's office, both the appellants returned back to the car saying that now they have to proceed to Vadgaon to meet some Officer there and reached to Ashwini Lodge. After keeping prosecutrix in the car, appellant Gajanan went in the lodge and after returning back in 5 minutes, informed prosecutrix to accompany him to the lodge to meet Officer. Accordingly, she went inside the room in the lodge, however, did not find anyone

present there, but found appellant Gajanan on arriving in the room to have closed the door, and by pushing her on the cot and on removing her clothes forcibly, committed sexual intercourse with her against her wish. She stated that though she had resisted, she could not succeed and was threatened by appellant Gajanan to not to disclose about it to anyone and after latching the door from outside, left the room.

13 Prosecutrix has further stated that, thereafter, appellant no.2 Uttam after opening the latch, entered the room when she was wearing her clothes. However, he too committed forceful intercourse with her. She further stated that thereafter both the appellants along with Sangeeta threatened her to not to disclose the incident to anyone and left her at her house at village Yadrav.

14 With reference to evidence of prosecutrix, as aforesaid, it is to be noted that no explanation is put forth by prosecution for non-examination of Sangita though, according to the evidence of prosecutrix, it is this lady who introduced her to appellant Gajanan being her brother, and prosecutrix thereafter came in contact with appellant Uttam. Similarly, according to the

evidence of prosecutrix, on the day of incident, Sangeeta was accompanying both the appellants in their car while prosecutrix was initially taken from her house to Hathkanangale and thereafter to a lodge at Vadgaon. Moreover, it has also come in the evidence of prosecutrix that after the incident, apart from both the appellants, Sangeeta also extended threats to her to not to disclose the incident to anyone. In spite of above, admittedly, there is no reference of Sangeeta in the charge-sheet, nor any investigation is carried out with reference to Sangeeta's involvement.

15 From further evidence of prosecutrix, it has come on record that after the incident, she met one Aayub Vijapure to whom she disclosed the incident as well as to social workers Kalavati Patil and Tulasabai Katkar. Aayub Vijapure is not examined nor investigation appears to be carried out on these lines by recording statements of Kalavati Patil and Tulasabai Katkar during the course of investigation. In view of prosecutrix stating that she had disclosed incident to Aayub Vijapure, and in spite of prosecutrix claiming to disclose about the incident to this witness also, immediately after the incident, since neither of them are examined, there is nothing to believe evidence of prosecution, particularly when she is stated to have disclosed the

incident three months later. In that view of the matter, there remains nothing to corroborate evidence of prosecutrix.

16 Though it is settled law that conviction can be based upon sole evidence of prosecutrix, it is necessary to consider that evidence of prosecutrix has to be reliable before it is acted upon. The evidence of prosecutrix involved in this Appeal do not inspire confidence at all, as according to her evidence, inspite of incident dated 11th March 2012, she claims to have lodged report on 23rd June 2012 by visiting Vadgaon Police Station. The reason put forth by prosecutrix to explain the delay also does not appear to be convincing, as according to her further evidence, it is only on 20th June 2012 after she read some news item in the local newspaper involving appellants to have similarly deceived some other female and of their committing rape on her, she visited police station and lodged her report. The reason put forth does not appear to be convincing, at all, more particularly, when it is the specific case of appellants that prosecutrix on the say of one Datta Rane has falsely involved them, as in her cross-examination, prosecutrix is specifically suggested that she knows Datta Rane of Ichalkaranji – social worker of that area with whom she was actively working for *Mahila Bachhat Gat* though these suggestions are denied by her.

Prosecutrix is further suggested that she knows Sunita Sutar who had introduced prosecutrix to Datta Rane who later on, was also found involved in a rape case involving Sunita as prosecutrix and Datta Rane as accused. Prosecutrix has admitted that appellant Uttam is news reporter of local newspaper at Ichalkaranji. However, he is unable to state if there were various news item published by him against Datta Rane and had also filed Writ Petition against Datta Rane before this Court. Prosecutrix is specifically suggested that she had lodged a false complaint on the say of Datta Rane and apart from her, one Shubhangi Kamble, Ujwala Jabir used to file false cases against persons at the instance of Datta Rane. She has denied that complaint giving rise to registration of present crime is also drafted and prepared by Datta Rane which she has presented before police station. In the background of above case of defence, it is lastly suggested to her that no incident, as alleged, has ever taken place, and she had lodged false report, which suggestions are denied by her.

17 In the background of case of defence as aforesaid, and having considering fact of three months delay in lodging report which is not at all satisfactorily explained, evidence of prosecutrix does not inspire confidence as it is her own case that after the

demise of her husband, she is residing alone and has no fixed place of residence, and was thus suggested that she does not possess any documentary evidence to establish her permanent address which fact is duly admitted by her, and has further admitted to have knowledge of placement of Tahsildar's office of Hathkanangale, and also admits that whether any documents were filled by her required for obtaining permission to run ration shop.

18 In the background of above, there appears substance when it is suggested to the prosecutrix that appellants never took her to the office of Tahsildar at Hathkanangale though she had denied this suggestion. Even with reference to the incident at Ashwini lodge, when her evidence is perused, it has come on record that it is a Hotel having Bar room, and a lodge and when she entered the premises, no one was present there and she directly went to the room of which appellant Gajanan opened the door, and to whom she followed. Though she admits to have knowledge that the place where she was taken was not good and further admits that inspite of her not seeing any Officer inside the room, she made no attempts to go out of the room, but is found to have occupied the chair and some time thereafter, appellant Gajanan closed the door. At that moment, she asked him why she was

closing the door. Above piece of her evidence thus, creates doubt in the case of prosecution of appellants taking her to the Hotel room against her wish. On the contrary, it has further come in her evidence that during the course of incident, she had not sustained any injuries on her person, and thereafter, though appellant no.2 Uttam is attempted to have entered the room and subjected her to sexual assault, as all of them came down from the second floor, admittedly, she did not raise any shouts, nor informed about the incident to any person or Manager, who, at that time, were present in the lodge. In fact, it appears that prosecutrix inspite of such incident, preferred to accompany both the appellants and went with them though admits that police station was situated in front of the same hotel. No reason is put forth by prosecutrix to not to visit the police station and in fact, had stated that she did not find it necessary though it was situated opposite the Hotel stating that due to threats she was frightened.

19 Above conduct of prosecutrix also speaks in volumes, doubting the case of prosecution as such, it is difficult to believe that it is only on reading some news item in Daily Newspaper on 20th June 2012 prosecutrix lodged a report on 22nd June 2012 with reference to incident dated 11th March 2012.

20 From the evidence of PW 1 Rahul Jagtap, it has come on record that on 23rd June 2012, he had accompanied police to the lodge wherein, in his presence under panchnama Exhibit-37, one bed-sheet came to be seized and under panchnama Exhibit-38, Hotel register came to be seized. However, according to the C.A report on record at Exhibit-55, nothing was found on the bed-sheet which came to be seized from the room, and naturally nothing even otherwise could have been found on the bed-sheet after a gap of three months. Similarly, it has come in evidence of PW no.1 Rahul Jagtap that the entries mentioned in the register are only with reference to one lady and one male visiting the hotel. No names are mentioned therein. It as also come in his evidence that the rooms were provided to customers for couple of hours, and that the place where the incident is alleged to have occurred is involved for carrying illegal activities. It has also come in the evidence of PW 1 Rahul who is independent witness that prosecutrix who was present on the spot when the panchnama came to be drawn had informed that she on her own had visited the lodge, as such case of prosecution falls on this count also, Similarly, above evidence does not lead case of prosecution any further.

21 From the impugned judgment, it appears that apart from examination of four witnesses, genuineness of documents being medical reports, C.A. Reports, panchnamas filed with the charge-sheet are rightly not disputed by accused in view of the fact of registration of crime belatedly after three months, and in that view of the matter, though according to case of prosecution, clothes of prosecutrix as produced by her after lodging of report, came to be seized. Nothing incriminating is found on the clothes as per C.A report at Exhibit-55.

22 On perusal of evidence of PW 4 Anil Vibhute – Investigating Officer, he has admitted that he knows Datta Rane of Ichalkaranji who in the year 2008 was arrested for the offence u/s.376 IPC, and further admits that appellant Uttam is Reporter of a local newspaper, and is suggested of his filing false case against the appellants at the instance of Datta Rane. Though these suggestions are denied by Investigating Officer from the above discussed evidence, and even according to the medical certificate Exhibit 63 on record, though prosecutrix is stated to be habituated for sexual intercourse, and as such, no definite opinion of forceful intercourse is stated to be given. It cannot be said that charge levelled against the appellant can said to have been established.

23 Considering the overall evidence as above, Appeal is thus liable to be allowed as the evidence of prosecutrix itself is doubtful and from her evidence, no case of alleged gang-rape on her can said to be established, and in fact, it is found that there was no resistance by the prosecutrix, who on her own appears to have accompanied appellants to Ashwini lodge. So also, apart from reasons as stated above, there is no medical evidence establishing rape upon prosecutrix nor there is evidence of C.A.

24 In that view of the matter, and as already stated earlier, as no investigation is carried out with reference to Sangita, though it is the case of prosecutrix that she along with both the appellants were present in the car when prosecutrix was taken to lodge, and in fact, claims that both the appellants along with Sangita had extended threats to her after the incident to not to disclose about it to anyone, and as FIR is also silent to the effect that statement of Aayub is recorded to whom prosecutrix claims to have immediately stated about the incident, appeal is liable to be allowed by giving benefit of doubt.

25 In that view of the matter, following order is passed.

ORDER

Appeal is allowed.

Conviction and sentence imposed upon the appellants for the offence punishable u/s. 376(2)(g), 506 IPC r/w Section 34 of the IPC, is set aside.

Appellants be released forthwith if they are not required in any other case.

Fine amount, if any, paid by appellants be returned back to them.

(PN. DESHMUKH, J)