

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE JURISDICTION
CRIMINAL APPEAL NO. 472 OF 2010
WITH
CRIMINAL APPLICATION NO. 1475 OF 2015
IN
CRIMINAL APPEAL NO. 472 OF 2010

1. Basudev Baburam Yadav
2. Babulal Hansaram Gautam
3. Vikram Punwasi Sonkar
All R/o Shoharat Ali Godown,
Near Tol Naka, Govegaon,
Tal. Bhiwandi Dist. Thane

.....Appellants

V/s.

The State of Maharashtra and another

....Respondents

Ms. Tanaya Goswami a/w Mr. Shailesh Kharat appointed Advocates
for Appellant Nos. 1 & 2.

Ms. Rupali M. Shinde, Appointed Advocate for Appellant no. 3.

Mrs. A. A. Mane APP for the State.

CORAM : SMT. SADHANA S. JADHAV, J.

DATED : MARCH 10, 2016.

JUDGMENT :

Appellants herein are convicted for offence punishable under section 366 of Indian Penal Code and sentenced to suffer rigorous imprisonment for 3 years and fine of Rs. 5000/- in default to suffer simple imprisonment for 6

months each. They are also convicted for offence punishable under section 376 (2) (g) of Indian Penal Code and sentenced to suffer rigorous imprisonment for 10 years and fine of Rs. 30,000/- each in default to suffer further rigorous imprisonment for one year. Appellants are also convicted for offence punishable under section 506 of Indian Penal Code and sentenced to suffer simple imprisonment for 6 months and fine of Rs. 1000/- in default to suffer simple imprisonment for 6 months by Ad-hoc Asstt. Sessions Judge, Thane vide Judgment and Order dated 15/05/2010 in Sessions Case No. 458 of 2008.

2) Such of the facts necessary for the decision of this appeal are as follows:

(i) The victim was residing with P.W. 1 Shantabai Choure who happens to be cousin aunt of the victim. On 06/09/2008, P.W. 1 lodged a report at Shantinagar Police Station Bhiwandi alleging therein that she resides with her family and the victim. Her husband happens to be a labour and the victim who is aged about 16 years old is working as labour in the scrap godown of Hazrat Sheth. Her daughters are also doing labour work at Gove Toll Naka.

(ii) According to the complainant on 04/09/2008 at about 9.00 a.m., all the

three girls had left the house for their respective jobs. At about 5.00 p.m., all the girls had returned home as usual. At about 5.00 p.m. victim had been to Kongaon to fetch milk from the stall which was situated next to Ajit Petrol Pump. She did not return for quite sometime and therefore they started searching for her. Finally they lodged the missing report at Shantinagar Police Station which was registered as Missing Report No. 62 of 2008. They continued to search her. At about 9.00 p.m. the victim was spotted passing from the Kongaon Goa Naka. Complainant called her. As soon as the victim saw the complainant, she started crying. Upon enquiry, she informed the complainant that when she had been to fetch milk near Ajit Petrol Pump, three boys (Present Appellants) who were working in the adjoining scrap godown met her. Basudev asked her whether she would marry him. She refused. When she was proceeding further, all the three accused came in an auto rickshaw and pulled her in the auto. They left the rickshaw near Vidyamandir. Thereafter, Vikram and Babulal had gagged her mouth and had held her. They had taken her behind the school. Despite her resistance, they all ravished her. Then they gave her Rs. 100/-. They threatened her of dire consequences.

(iii) On the basis of the said report, crime no. 268 of 2008 was registered

against the accused/appellants for offence punishable under sections 363, 366 (A), 376 & 506 of Indian Penal Code.

(iv) After completion of investigation charge-sheet was filed on 21/03/2009. Case was committed to the court of Sessions and registered as Sessions Case No. 458 of 2008. Prosecution examined 7 witnesses to bring home the guilt of the accused.

3) Case rests mainly on the evidence of P.W. 1 Shantabai who happens to be the first informant and maternal aunt of the victim, P.W. 2 the victim, P.W. 5 Medical Officer and P.W. 7 who happens to be Investigating Officer.

4) P.W. 1 Shantabai has deposed before the Court in accordance with the F.I.R. lodged by her. F.I.R. is marked at Exhibit 10.

5) It is elicited in the cross-examination that P.W. 1 was not acquainted with the accused. The milk vendor stays near Ajit Petrol Pump and the complainant resides with the victim behind Royal Petrol Pump at village Gove. There are shops in village Gove also. Ajit Petrol Pump is at distance of 15 minutes from the house of the victim and is situated at Kongaon. That Kongaon and Govegaon are distinct villages. It takes 10 minutes to reach Kalyan railway station from Ajit Petrol Pump. It is specifically admitted in the

cross-examination by P.W. 1 that victim returned home after 28 hours. The victim had disclosed to P.W. 1 that she had stayed at Kalyan railway station for the whole night and was wandering in Kalyan city during the whole night. That she was having injuries on her both hands.

6) P.W. 2 the victim has deposed before the Court that she was working as labour in a godown. Accused were also working there. She has deposed before the court that she had returned home from work at 5.30 p.m. on 04/09/2008. She had been to Kongaon to bring milk. She did not get milk there and therefore she returned home. She then reached near Atgaon road. Accused no. 1 was standing on the road. He had called her by name Ashwini. According to her, she is also known as Ashwini. He had taken her by the side of the road and proposed to her. She had denied the proposal. He had again offered her that he would marry her and take her to his village. At that juncture, other 2 accused who were standing near the gate approached her. They gagged her mouth. She had attempted to raise cries, however, they threatened her. They had taken her near the school and thereafter she was ravished by all three accused persons. She then went to Kalyan by rickshaw. She stayed at Kalyan through the night. She had no money to go to her

village. She then went to Govenaka by bus and proceeded to the petrol pump. She met her maternal aunt near the petrol pump and thereafter she had disclosed the incident to P.W. 1 who happens to be her aunt.

7) In the cross-examination, she has admitted that after she was left by the accused, they did not follow her to Kalyan and then she returned to Kongaon on the next day. She has also admitted that she was taking education in Ashram Shala Kalyan for 2 years when she was studying in 5th & 6th standard. She was aware that she could reach Kongaon by bus from Kalyan. That she was sitting at Kalyan railway station since evening. Kalyan railway station is a junction. It is also admitted that she had seen the police on Kalyan railway station. She had not disclosed the incident to the police nor to the public on railway station. She had never been to Beed alone prior to the incident. She did not have any difficulties to reach Kongaon to Kalyan on the next day in the morning. She was at Kalyan railway station on the next day evening. She has also admitted that there are several milk shops in Govegaon. Atgaon school where she was ravished is at distance of 5 to 10 minutes walk from Kalyan. School was having holidays at that time. That she had sustained injuries on her back during the incident as well as on her elbows. She had

shown the injuries to the doctor when she was examined. An omission is elicited that she had disclosed to the police that she was taken in the rickshaw, however, the same does not find place in her statement under section 161 of Code of Criminal Procedure, 1973.

8) P. W. 3 Mohd. Yunus is the panch for spot Panchanama. It is elicited in the cross-examination that at the time of conducting spot Panchanama no other person had acted as a panch. It is also admitted that victim, police and P.W. 3 were the only persons when the spot Panchanama was prepared. P.W. 4 Popat Rokade is the panch for seizure of clothes of the victim. Their evidence in the present case need not be discussed.

9) P.W. 5 Dr. Arti Dixit is Medical Officer who has examined victim on 06/09/2008. She has deposed before the court that according to the police officer and the complainant the victim was subjected to gang rape. She examined the victim. She did not find any external injury. Vulva of the victim was swollen, reddish. There was a fresh tear of hymen. Medical certificate issued by P.W. 5 is marked at Exhibit 26. In the cross-examination, P.W. 5 has admitted that certificate Exhibit 26 is prepared from the notes in MLC register. There is no communication in the medical certificate that the victim

was subjected to forcible intercourse. The ossification test of the victim was not conducted. Two finger test was conducted, however, there is no reference to it in the certificate or in the MLC Register. P.W. 5 has further admitted that the possibility that the vulva is reddish and swollen due to unhygienic condition cannot be ruled out. P.W. 5 has further defined fresh injury as an injury which is normally within 6 hours prior to the examination. P.W. 5 did not observe any traces of injury on the back or elbow of the victim, neither there were any external injuries on her person. She did not notice any signs of mud on her body. She has further admitted that in case where victim is subjected to forceful intercourse by 3 to 4 young persons, there may be internal injuries, however, in the present case, she did not find any such injuries.

10) Medical certificate is at Exhibit 26. The same has been admitted in evidence. It is a matter of record that the victim was examined by P.W. 5 on 06/09/2008 at about 2.30 p.m. The date of incident is 04/09/2008 between 5.30 p.m. to 7.30 p.m. Suffice it to say that as defined by P.W. 5 the injuries observed on the private parts of the victim cannot be said to be fresh injuries as she had been examined almost after 45 hours. The proforma of medical

examination, coloumn no. 10 also shows over writing as far as date is concerned wherein 05/09/2008 has been re-written as 04/09/2008. The proforma shows that the blood grouping was done, however, it is clear that from the evidence of P.W. 5 that Medical Officer had not taken the blood sample of the victim.

11) P. W. 6 Dinkar Patil is a hostile witness.

12) P.W. 7 Janardan Babar is the Investigating Officer. According to him, on 06/09/2008 P.W. 1 had lodged the report. Offence was registered and the investigation was handed over to him. He had taken the steps for investigation and had filed the charge-sheet. C.A. Report is at Exhibit 35.

13) In the cross-examination, it is elicited that father of the victim resides in Beed District and his statement has not been recorded. Investigating Officer had not called for birth certificate from Grampanchayat Jeevachiwadi where the victim was born. That the victim was learning in Ashram School at Kalyan. Investigating Officer had not issued any letter to school for obtaining the birth certificate or the school leaving certificate. He had not requested the Medical Officer to conduct ossification test in order to ascertain her age. It is also admitted that incident has occurred in the rainy season and there was

mud and soil at the spot of incident. The clothes seized from the victim did not have any marks of mud or soil. It is also admitted by P.W. 7 that he had not recorded statements of any person from Kalyan station.

14) Exhibit 35 is the Chemical Analysis report of the victim. The report shows that on 19/09/2008 two phials were received for analysis. The result of analysis is that no semen was detected on Exhibit 2 & 3. Exhibit 2 is the vaginal swab and Exhibit 3 is pubic hair.

15) The Jurisprudence contemplates that in a case under section 376 of Indian Penal Code the uncorroborated testimony of the prosecutrix can be relied upon provided that :

(i) It is a sterling testimony (ii) It appears to be truthful (iii) and would inspire the confidence of the Court.

16) In the case of **Sadashiv Ramrao Hadbe vs State of Maharashtra And another** reported in (2006) 10 SCC 92, the Hon'ble Apex Court observed as follows:

“It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring of confidence in the mind of the court. If the version given by the

prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen.”

17) In the present case, the evidence of the victim does not appear to be truthful and therefore, would not inspire the confidence of the court. In the present case, the victim admits that there are several milk shops in Govegaon. 15 to 20 minutes are required by walk from Govegaon to petrol pump of Kongaon. That she had been all the way to Kongaon to bring milk. She has deposed before the Court that when she did not get milk at Kongaon, she had returned home but had gone to Atgaon road. That the accused no. 1 was standing on the road. There was no reason for the victim to go to Atgaon road. It is not her case that she could not get milk at Govegaon. It is further pertinent to note that accused persons had not kept the victim under detention not had restrained her from moving freely. That instead of going home, victim had gone to Kalyan all the way by rickshaw. She stayed at Kalyan station for

the whole night. According to her, she has no money to go to Govenaka by bus and therefore, she walked down to the petrol pump where she was spotted by P.W. 1. No reason is assigned for not returning home. She has neither deposed before the court that due to the said trauma, she was in such a state of mind that she could not go home. Accused had not followed her. Moreover, her oral version is not corroborated by medical evidence. F.I.R. was lodged by P.W. 1 on the basis of hearsay statement of the victim. It cannot be ignored that the victim was acquainted with all the accused.

18) It is in these circumstances that evidence of the victim does not appear to be of a sterling nature and therefore does not deserve to be relied upon.

19) On 03/03/2016, learned APP had filed report on record showing that original accused no. 3 had undergone substantive sentence of 9 years 1 month and 19 days. Accused nos. 1 & 2 had in fact filed an application to withdraw the appeal as they accepted the conviction. However, the said application was rejected on 28/10/2015.

20) Learned counsel appointed for the appellants submits that accused nos. 1 & 2 had been misguided by the jail mates that appeal would not be heard in the near future and that the possibility of enhancement of sentence cannot be

ruled out.

21) In the facts and circumstances of the case, accused who have almost undergone the whole of the substantive sentence of 10 years, deserve to be acquitted.

22) This Court cannot part with the Judgment without recording appreciation for the learned counsel appointed for the appellants. Legal fees to be paid by the High Court Legal Services Committee to the appointed Advocates is quantified at 2,000/- each, to be paid to them within three months from today.

ORDER

- (i) Appeal is allowed.
- (ii) The conviction of the appellants for the offence punishable under Sections 366, 376 (2) (g) and 506 of the Indian Penal Code recorded by the Ad-hoc Asst. Sessions Judge, Thane, vide Judgment and order dated 15/05/2010 is hereby quashed and set aside.
- (iii) The appellants are acquitted of all the charges levelled against them.
- (iv) The appellants be set at liberty forthwith, if not required in any other offence.

- (v) Fine, if paid be refunded to them.
 - (vi) The professional fees of the Advocates so appointed are quantified to the tune of Rs. 2,000 (Rupees two thousand only) each, to be paid to them within three months from today.
- 23) Appeal stands disposed of accordingly. As the appeal is disposed of, the Criminal Application does not survive and stands disposed of accordingly.

(SMT. SADHANA S. JADHAV, J.)