

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.72 OF 2017

Sambhaji Sopan Bobade,
Age 29 years, Occu: Agril.,
R/o Shirshi (Bk),
Sonpeth, Dist. Parbhani.

...APPELLANT

VERSUS

The State of Maharashtra
Through the Police Station Sonpeth,
Dist. Parbhani.

...RESPONDENTS

...
Shri S.V.Mundhe, Advocate for appellant.
Shri S.P.Tiwari, APP for respondent State.

...
CORAM: P.R. BORA, J.

Date of reserving the judgment: 22/9/2017

Date of pronouncing the judgment: **28/11 /2017**

JUDGMENT:

1. The appellant has filed the present appeal against the judgment and order passed by the Additional Sessions Judge, Gangakhed, in Special (POCSO) Case No.03/2016. The appellant has been convicted by the learned Special Judge for the offenses punishable under Sections 452 and 376 of IPC

and is sentenced to suffer rigorous imprisonment for seven years for the offense punishable under Section 376 of IPC with fine of Rs.1,000/-; in default, to suffer further rigorous imprisonment for three months, and rigorous imprisonment for one year for the offense punishable under Section 452 of IPC with fine of Rs.500/-; in default, to suffer further rigorous imprisonment for one month.

2. It was the case of the prosecution that on 22nd of December, 2015, the appellant, who is hereinafter referred to as the accused, dragged the prosecutrix, who was cleaning utensils in front of her house, situated at village Shirsi, along with her sister, namely, Dipali, and forcibly entered in the house of the prosecutrix along with the prosecutrix, bolted the house from inside and committed rape on the prosecutrix. The act of the accused was resisted by the prosecutrix by raising shouts. Hearing the shouts of the prosecutrix, PW 3, namely, Kondabai, along with one Mirabai, who were stated to be neighbours, reached to the house of the prosecutrix and compelled the accused to open the door of the house and brought the accused out of the house. The persons viz. Harshal and Pinnu, then took away the accused from there.

3. At the relevant time, the mother and father of the prosecutrix both were not at home. After they returned to home in the evening, prosecutrix narrated the incident to her mother and then on 24th of December, 2015, report was lodged at Sonpeth Police Station in regard to the alleged incident against the accused whereupon the investigation was initiated. Initially, the offense was registered under Section 354 of IPC and 7 and 8 of the Protection of Children from Sexual Offenses Act, 2012 (hereinafter referred to as the POCSO Act), however, since the prosecutrix in her statement recorded by the Police, disclosed that the accused committed rape on her, offense under Section 376 of IPC and the offenses under Sections 3 and 4 of the POCSO Act were added against the accused.

4. The prosecutrix was sent for medical examination and the medical report in that regard was obtained. Necessary samples were collected and were forwarded to the Chemical Analyzer. The accused was arrested and he was also medically examined. His blood and semen samples were collected and the same were also sent for chemical analysis. In the meanwhile, spot panchnama was prepared, the clothes on the person of the prosecutrix were seized and the

statements of the witnesses were recorded. The evidence as about the age of the prosecutrix was also collected and after completing the investigation, the chargesheet was filed in the Special Court at Gangakhed whereupon Special Case No.3/2016 was registered against the accused. The learned Sessions Judge on 26.7.2016 framed the charge against the accused and since the accused pleaded not guilty and claimed to be tried, the trial was proceeded further.

5. In order to prove the guilt of the accused, as many as 9 witnesses were examined by the prosecution. Accused denied the charges levelled against him and took a defense that he was falsely implicated in the crime on account of previous enmity between him and the father of the prosecutrix. The accused did not enter into the witness box nor examined any witnesses in his defense.

6. The learned Sessions Court, after having assessed the oral as well as the documentary evidence brought on record, though acquitted the accused from the offenses under the POCSO Act, held him guilty for the offenses punishable under Sections 452 and 376 of the IPC and sentenced him to suffer the punishments as noted hereinabove. Aggrieved

thereby, the appellant has preferred the present appeal.

7. Shri S.V.Mundhe, learned Counsel appearing for the appellant accused, criticized the impugned judgment on several grounds. Learned Counsel submitted that though there are several discrepancies as well as omissions in the statements recorded of the prosecutrix during the course of the trial, the learned Sessions Court has implicitly relied upon the said testimony and though there was no corroboration to the facts stated by the prosecutrix in her testimony before the Court, the Sessions Court has wrongly held the appellant guilty for the offenses punishable under Sections 452 as well as 376 of the IPC and convicted him for the said offenses. Learned Counsel further submitted that the prosecution did not bring on record sufficient medical evidence so as to prove that the prosecutrix was raped by the accused. Learned Counsel further submitted that the Chemical Analyzer's reports also do not in any way indicate the occurrence of rape and, as such, in no case, the accused could have been convicted for an offense under Section 376 of the IPC.

8. Learned Counsel further submitted that from the admissions given by PW 3 Kondabai, it is evident that she was

an interested witness and, as such, her evidence was not liable to be relied upon. Even otherwise, according to the learned Counsel, it was not possible for PW 3 Kondabai to view anything from outside as to what was going on inside the house of the prosecutrix at the relevant time. Learned Counsel submitted that, thus, there was absolutely no evidence before the Sessions Court showing complicity of the accused in the commission of the alleged crime, however, inspite of that, in a pre-determined manner, the Sessions Court has convicted the accused. Learned Counsel, therefore, prayed for setting aside the impugned judgment and order and, consequently, to acquit the accused of the charges levelled against him.

9. Learned A.P.P. supported the impugned judgment and order.

10. I have perused the impugned judgment as well as the evidence on record. The First Information Report in the present matter was admittedly lodged by PW 1 Rukhminibai, who happens to be the mother of the prosecutrix. The alleged incident happened on 22nd of December, 2015. Rukhminibai lodged the report of the alleged incident on 24th of December, 2015. It was the first objection raised by the learned Counsel

for the accused that there was considerable delay in lodging the report of the alleged incident and the same has not been explained by the prosecution. Ostensibly, there appears substance in the objection so raised on behalf of the accused. However, on perusal of the record, it is revealed that the complaint so lodged by Rukhminibai was entered in the Police record of Police Station, Sonpeth, on 00.15 hrs. on 24th December, 2015. It is, thus, evident that, may be at late hours but the FIR was practically lodged on 23rd of December, 2015, i.e. on the next day of the alleged incident. When the FiR was registered at 00.15 hrs., it can be reasonably inferred that the complainant might be there in the Police Station prior to few hours of the registration of the said complaint, meaning thereby, on 23rd December, 2015.

11. Even then, the question would remain why the complainant waited till night of 23rd of December, 2015, when the alleged incident had occurred on 22nd December, 2015. It is true that nothing has been brought on record by the prosecution to explain the said delay. However, as has been discussed by the learned Sessions Judge, merely on the said ground it would be wholly unjust to discard the prosecution case. As has been held by the Honourable Apex Court in the

case of Ravinder Kumar and another Vs. State of Punjab (2001 CRI.L.J. 4242), though prompt and immediate lodging of the FIR is ideal, as that would give the prosecution a twin advantage; first is that it affords commencement of the investigation without any time lapse, and second is that it expels the opportunity for any possible concoction of a false version. Barring these two plus points, the demerits of the delayed FIR cannot operate as a fatal to any prosecution case.

12. In the report so lodged by PW 1 Rukhminibai, admittedly, there was no allegation against the accused that he committed rape on the prosecutrix. The record reveals that in her supplementary statement recorded on 26th of December, 2015, Rukhminibai disclosed to the investigating officer that subsequently, she had come to know from women residing adjacent to her house, as well as from the disclosure made by the prosecutrix, that the accused committed forcible intercourse with the prosecutrix against her will. As has come on record through the evidence of PI Meena Kardak (PW 7), the prosecutrix disclosed in her statement recorded by said Meena Kardak that she was subjected to forcible rape by the accused and, as such, with the permission of the learned Magistrate, offense under Section 376 of IPC was added in the crime

registered against the accused.

13. In the light of the facts as aforesaid if the testimony of Rukhminibai (PW 1) is perused, she has not specifically deposed that the prosecutrix disclosed to her that the accused committed rape on her. Perusal of the oral evidence of PW 1 Rukhminibai reveals that she has re-narrated the facts which were allegedly stated to her by the prosecutrix. Rukhminibai in her evidence has deposed that,

" Kavita further informed that the accused caught hold her and took her inside the house. Kavita informed me that the accused put the latch of the door from inside. Kavita informed that the accused removed the clothes from his person. Kavita informed that the accused also removed the clothes on her person. Kavita informed that she raised the shouts. Kavita informed that on the shouts as raised by her, females came and constrained the accused to open the door. The witnesses by names Pinoo and Harshu took out the accused out side from the house. On the next day of the incident, Kondabai and Meerabai have informed me about the incident as happened."

From the aforesaid version, it becomes clear that PW 1 Rukhminibai did not depose that the prosecutrix informed her or disclosed to her that the accused had forcible sexual intercourse with her without her consent.

14. In her testimony before the Court, the prosecutrix

has, however, specifically deposed that the accused inserted his penis in her private part. In view of the fact that in the First Information Report lodged by PW 1 Rukhminibai, there was no mention that the prosecutrix was raped by the accused, and further that in her testimony also, PW 1 Rukhminibai did not depose any such fact, the fact stated by the prosecutrix in her testimony before the Court that she was raped by the accused requires to be closely scrutinized.

15. In this regard the testimony of PW 3 Kondabai also bears material importance. According to the case of the prosecution, after hearing the alarms given by the prosecutrix, Kondabai had been to the house of the prosecutrix along with one Mirabai. It would be, therefore, apt to look into the testimony of PW 3 Kondabai. As has been deposed by PW 3 Kondabai, at the relevant time, she and one Mirabai were sitting in front of her house and they heard the noise of shouting from the house of prosecutrix. As further deposed by said Kondabai, she along with Mirabai reached at the house of the prosecutrix and peeped through the slit of the door of the house of the prosecutrix whereupon she noticed that prosecutrix and the accused, both were inside the house and no clothes were there on person of both of them. As further

deposed by Kondabai, the prosecutrix and the accused hurriedly came out and the accused was removed from the said place by Harshal and Pinnu, who were called at the said place by her. It is, thus, evident that PW 3 Kondabai has also not deposed any such fact before the Court disclosing that the accused committed rape on the prosecutrix.

16. As has come on record, the prosecutrix was sent to the Sub-District Hospital for medical examination on 24th December, 2015. PW 6 Dr. Manisha Rathod conducted her medical examination and prepared a report in that regard. I have carefully perused the said report as well as the testimony of PW 6 Dr. Manisha. As was opined by Dr. Manisha, the injuries as were noticed on the person of prosecutrix were possible during the sexual assault. In her entire evidence PW 6 Dr. Manisha has nowhere clarified whether from the examination of the prosecutrix any such concrete inference was emerging that she was subjected to forcible intercourse in the recent past. As deposed by Dr. Manisha, the hymen of the prosecutrix was noticed to be torn and was admitting two fingers. In the cross examination, Dr. Manisha admitted that in case of a married woman, the hymen admits two fingers. Thus, from the testimony of Dr. Manisha and the medical

examination report of the prosecutrix at Exh.41, no such concrete inference can be drawn that the prosecutrix was subjected to forcible intercourse.

17. Now remains the evidence in the form of the reports received from the Chemical Analyzer. As has come on record, the clothes on the person of the prosecutrix as well as her vaginal swab were forwarded for chemical examination. The reports received in that regard are at Exh.47 and Exh.48. The report at Exh.47 pertains to the clothes of the prosecutrix, more particularly, Salwar, Kurta, Jangia. The report reveals that no blood was detected on the Salwar or Kurta of the prosecutrix. Blood was detected on the Jangia of the prosecutrix, however, no semen was noticed on it. Blood detected on it was of human origin and was of group 'A'. It has also come on record through the document at Exh.48 that blood group of the prosecutrix was of Group A. Thus, the blood detected on the said Jangia was of the prosecutrix, however, no semen was noticed on it. From the report at Exh.48 it is further revealed that no semen was noticed in the vaginal swab of the prosecutrix.

18. If the entire aforesaid evidence is analyzed, it

appears difficult to accept the version of the prosecutrix that the accused had forcible intercourse with her. As noted earlier, in the FIR initially lodged by PW 1 Rukhminibai, it was not alleged that the accused committed rape on the prosecutrix. The allegations were restricted to pressing of breasts of the prosecutrix by the accused. Though in her supplementary statement PW 3 Rukhminibai added that the prosecutrix also informed her that the accused had forcible intercourse with her, in her evidence before the Court she did not specifically depose the said fact and her testimony was restricted only to the extent of saying that the accused removed the clothes from his person and also from the person of the prosecutrix. More importantly, the prosecutrix in her cross examination has clearly admitted that her mother instructed her to depose before the Court that the accused inserted his penis in her private part. In view of the evidence as above, serious doubts are created about the fact deposed by the prosecutrix that the accused had forcible intercourse with her.

19. There cannot be a dispute that in case of rape, the statement of the prosecutrix alone can be a basis for convicting the accused for the said offense and no further corroboration

may be required. However, as has been laid down by the Honourable Apex Court in the case of Ramdas & others Vs. State of Maharashtra (AIR 2007 Supreme Court 155), the conviction in a rape case can be based solely on the testimony of the prosecutrix but that can be done in a case where the Court is convinced about truthfulness of the prosecutrix and there exists no circumstance which casts a shadow of doubt over her veracity. If the evidence of the prosecutrix is of such a quality, the order of conviction may rest solely on the basis of her testimony.

20. Learned Sessions Judge has also referred to few other judgments of the Honourable Apex Court; for example, (1) the State of Maharashtra vs. Rameshwar Shridhar Jaware and another (2007 ALL MR (Cri) 2761, (2) Sudhanshu Sekar Sahoo Vs. The State of Orissa (2003 Supreme Court Cases (Cri.) 1484, (3) Vimal Suresh Kamble Vs. Chaluverapinake Apal S.P. and another (2003 Criminal Law Journal 910), wherein also it is consistently held that in rape cases, the conviction can be solely based on the evidence of the victim provided such evidence inspires confidence and appears to be natural and truthful.

21. The facts which are deposed by the prosecutrix in her testimony before the Court, if scrutinized in the light of the evidence of the other witnesses, and the documentary evidence on record, it is difficult to agree with the conclusion recorded by the learned Additional Sessions Judge that the prosecution has, beyond reasonable doubt, proved that the accused committed rape on the prosecutrix. As noted earlier, in the FIR lodged by the mother of the prosecutrix which, according to her own version, was based on the facts disclosed to her by the prosecutrix, no such complaint was made that the accused had forcible sexual intercourse with the prosecutrix. It was complained that the accused laid on the person of the prosecutrix and pressed her breasts. In her testimony before the Court, the mother of the prosecutrix (PW 1 Rukhminibai) has deposed that the prosecutrix informed her that the accused removed the clothes on his person and also removed the clothes on her person. Further, nothing more has been deposed by PW 1 Rukhminibai that the prosecutrix also told her that accused thereafter had sexual intercourse with the prosecutrix. It is significant to note that, according to the case of the prosecution, two days after lodging of the report, Rukhminibai (PW 1) gave her supplementary statement making further allegation that the accused inserted his private

part in the vagina of the prosecutrix whereupon the offense earlier registered under Section 354 of the IPC was converted into an offense under Section 376 of IPC. However, as stated above, in her testimony before the Court, Rukhminibai (PW 1) did not depose before the Court that the accused committed sexual intercourse with the prosecutrix. Similarly, from the medical evidence on record also, no such irresistible inference can be drawn that the accused had sexual intercourse with the prosecutrix. In view of the evidence as above, the argument made by the learned A.P.P. that the prosecutrix has clearly deposed that the accused inserted his private part in her vagina and, as such, believing her version, the conclusion recorded by the trial Court that the accused committed rape on the prosecutrix, is sound, and does not require any interference, cannot be accepted. I reiterate that the prosecutrix in her cross examination has given a vital admission that the fact stated by her in her testimony before the Court that the accused inserted his penis in her private part was stated by her on instructions of her mother. In the circumstances, I have no doubt that the prosecution has failed in proving the offense under Section 376 of IPC against the accused.

22. The next question, therefore, arises as to whether

any offense is then made out against the accused or he deserves to be acquitted. Learned Counsel for the appellant accused, after having advanced his submissions for claiming acquittal of the accused of the charges levelled against him, had alternatively submitted that from the prosecution evidence, if at all any offense can be said to have been made out against the accused, is under Section 354 of the IPC. In view of the evidence on record, the submission so made by the learned Counsel is difficult to be accepted.

23. Though there is no clinching evidence proving beyond reasonable doubt that the accused had forcible sexual intercourse with the prosecutrix without her consent, the prosecution has, undoubtedly, proved that the accused dragged the prosecutrix in her home and bolted the door of the house from inside. From the testimony of the prosecutrix read with testimony of PW 3 Kondabai, it is also established that the prosecutrix raised shouts at the relevant time. As has been deposed by PW 3 Kondabai, after hearing such shouts, she along with one Mirabai, rushed to the house of the prosecutrix. Kondabai, PW 3, has also deposed that when she and Mirabai peeped inside the house of the prosecutrix from a slit in the door, it was noticed by her that there were no clothes on the

person of the accused as well as the prosecutrix. Though an objection was raised that Kondabai was an interested witness, as she is the close relative of the prosecutrix, I do not see any reason to disbelieve the fact stated by her in her testimony before the Court on the said ground.

24. Now, it would be useful to again look into the facts as were stated by the prosecutrix in her testimony. It has come in the evidence of the prosecutrix that the accused bite on her right hand near elbow. Prosecutrix had also deposed that the accused was again intending to repeat the said act. In the medical examination of the prosecutrix, teeth bite marks over her right arm were noticed. The fact stated by the prosecutrix that the accused bite on her right arm is, thus, fully corroborated by the medical evidence.

25. Removing the clothes on his person by the accused, removal of the clothes by him on the person of the prosecutrix leads to the only inference that the accused was intending to commit rape on the prosecutrix. The further act of the accused to bite the right hand of the prosecutrix and, as stated by the prosecutrix, his intention to repeat the said act, establishes that the accused had gone beyond the stage of

preparation and, in such circumstances, mere absence of the further evidence that the accused did not attempt penetration would not absolve him from the offense of attempt to commit rape. The very act of the accused to drag the prosecutrix from outside of her house to the inside of the house, to bolt the door of the house from inside also sufficiently indicates the intention of the accused of committing rape on the prosecutrix. The further acts of the accused, as I discussed hereinbefore, un-doubtedly amounts to an attempt by the accused to commit rape on the prosecutrix. Having regard to the aforesaid acts of the accused, which have been proved by the prosecution beyond reasonable doubt, it would not be a case of mere assault under Section 354 of IPC. From the acts of the accused it is difficult to accept the contention of the learned Counsel appearing for the accused that the same would amount to outraging modesty of the prosecutrix. Considering the acts of the accused of removing clothes on his own person, removing clothes on the person of the prosecutrix, biting the arm of the prosecutrix lead to the only inference that the accused was determined to have sexual intercourse with the prosecutrix at any cost, however, he could not succeed in the same as because prosecutrix raised shouts and, in response to the shouts so raised by her, Kondabai, Mirabai, etc. rushed to

the house of the prosecutrix.

26. For the reasons as aforesaid, the conviction of the appellant by the trial Court for an offense under Section 376 of IPC deserves to be altered to the conviction under Section 376 read with Section 511 of IPC. In the result, the following order is passed:

ORDER

1. The conviction of the accused as ordered by the trial Court under Section 376 of IPC stands set aside. The appellant - accused, namely, Sambhaji Sopan Bobade, is convicted for an offense under Section 376 read with Section 511 of the IPC and is sentenced to suffer rigorous imprisonment for four years and to pay fine of Rs. 75,000/- (Rs. seventy five thousand); in default, to suffer further rigorous imprisonment for one year.

2. The sentence awarded by the trial Court for the offense under Section 452 of the IPC is maintained as it is.

3. Both the sentences shall run concurrently.

4. The accused would be entitled for set off under Section 428 of Code of Criminal Procedure for the period he has undergone in jail.

5. Fine amount be deposited in the Sessions Court. If the said amount is realized, the Sessions Court shall pay an amount of Rs.70,000/- (Rs. seventy thousand) out of that to the prosecutrix in the present case on proper identification. Balance amount of Rs.5,000/- be credited to the Government.

Criminal Appeal, thus, stands partly allowed in above terms.

(P.R.BORA)
JUDGE

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