

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

CRIMINAL APPEAL NO.456/2001

Imtiyajbi w/o Akbar Shah
Age 66 years, Occu-Household
R/o Borwadi, Tq.Phulambri,
District Aurangabad

..Appellant
[Orig.Accused No.2.]

Versus

The State of Maharashtra,
Copy to be served to the
Public Pleader of High Court
of Bombay Bench at Aurangabad

..Respondent

Mr.A.C.Bhagure, Advocate
(Appointed through legal aid) for appellant
Mrs.V.N.Patil-Jadhav, APP for Respondent-State

**CORAM : V.L.ACHLIYA,J.
DATE : 25/04/2017.**

ORAL JUDGMENT :-

1] Being aggrieved by the judgment and order dated 23/10/2001 passed in Sessions Case No.301/2000 by the Sessions Judge, Aurangabad convicting the appellant under Section 307 of IPC and sentenced to suffer R.I. for four years

and pay fine of Rs.500/- and in default to suffer R.I. for one month,the appellant has preferred this appeal.

2] In brief, the facts leading to prosecution of accused and filing of appeal are summarized as under :

a] On 29/7/2000, Shakilabee Hasan Shah the complainant (PW1) lodged complaint with police station, Sillod alleging therein that her brother Raju Shah (accused no.1) and her maternal aunt Imtiyazbi Akbar Shah i.e. appellant accused no.2 pushed her into well on 28/7/2000 with intention to commit her murder.

b] On 29/7/2000 the complainant visited police station at Sillod and lodged complaint alleging therein that about four years prior to the incident she married to one Hasan Shah R/o Hatmali. After a period of one year of her marriage, she left her matrimonial house and came to Borwadi at the house of her parents due to matrimonial dispute with her husband, mother-in-law and father-in-law. While staying in the house of her parents, she developed pregnancy of seven months due to illicit relations with a person from her village. After knowing about her pregnancy, the accused did not like her illicit relationship with the person from the village. They used to abuse her and insisted to get terminate the pregnancy.

c] On 28/7/2000, both the accused took her from village Borwadi to Sillod by telling her that they are going to Sillod to get her pregnancy terminated in the hospital at Sillod.

From Sillod, the accused took her to Amthana and thereafter from Amthana, they took her towards village Charner on foot. At about 8.30 p.m. they took her near the well. Accused no.2 put cotton leave ball into her mouth and pushed her into the well. She fell into the well. While falling down in the well, she luckily caught the iron pipe inside the well. She caught hold the pipe and raised shouts for help. Next day in the morning at about 6.30 a.m. one Vinayakrao Dhumal (PW3) resident of village Charner when passing by the side of the well, heard her shouts. He therefore, went towards the well and saw her inside the well. He asked her to wait and told her that he will bring other persons from village to take her out. Lateron he returned with one Ambadas Parkhe and with the help of rope they took out her from the well. Lateron they enquired from her about her name and place of residence. She narrated the incident and told them that her brother and maternal aunt pushed her into the well.

d] Head Constable Bhikaji Pandit (PW4) recorded her complaint. On the basis of complaint registered, offence u/s 307 r/w 34 of IPC came to be registered vide Crime No.110/2000 as against accused no.1 and 2. PSI Ramesh Mundhe (PW5) conducted the investigation. During the course of investigation, he visited the spot of the incident and recorded panchanama vide Exh.9. The complainant was referred for medical treatment to Government hospital, Sillod. Statements of witnesses which includes Vinayakrao Dhumal (PW3) came to be recorded during the course of investigation. On completion of investigation, charge sheet was prepared and

filed in the Court of JMFC, Sillod. In due course the case was committed to Sessions Court, Aurangabad.

3] The accused were charged u/s 307 r/w 34 of IPC. Both of them pleaded not guilty and claimed to be tried. In order to prove its case, the prosecution has examined five witnesses and further proved certain documents by admission. The accused have taken defence of total denial and false implication at the instance of complainant. On conclusion of trial, the learned Sessions Judge, Aurangabad acquitted accused no.1 and convicted appellant accused no.2 and awarded sentence as above. Being aggrieved, appellant no.2 has preferred this Appeal.

4] I have heard submissions advanced by Mr.Bhagure, counsel appointed through legal aid to represent the appellant and learned APP for the State and further carefully perused record and proceedings.

5] In nutshell, it is the contention of learned counsel for the appellant that there is no cogent, convincing and reliable evidence to sustain the conviction. He submits that Shakilabee (PW1) complainant the prime witness for the prosecution has not supported the case of prosecution. He further submits that there is no evidence as such to establish that the complainant was pushed into the well. He has contended that the trial Court has convicted the appellant without any legally sustainable evidence and the reasons and findings recorded are based upon assumptions, presumptions, surmises and conjectures.

He submits that it is highly improbable to believe that a woman in the advanced stage of pregnancy of seven months pushed into well survived after 10-11 hours. By referring the injury certificate, the learned counsel submits that the injury in the nature of abrasion was only noticed during the medical examination which itself raises serious doubt as to story as put forth by prosecutrix.

In the light of overall evidence, the learned counsel submits that the entire story of the prosecution appears to be unnatural. He has strenuously contended that there is no evidence as such to show that complainant was pushed into the well and that too by accused no.2. By referring the position depicted in the spot panchanama (Exh.9), the learned counsel submits that it is highly improbable to accept that a person pushed in the well survive for the period about 11 hours by holding iron pipe and that too when the complainant claimed to be carrying seven months pregnancy. He therefore submits that the entire story of the prosecution appears to be unnatural and not believable. He has further contended that the findings recorded by the trial Court are inconsistent and self contradictory. While recording finding to point No.1, the learned Judge has recorded conclusion in negative. Still the appellant has been convicted for offence u/s 307 of IPC. He therefore, urged to acquit the accused.

6] On the other hand, learned APP has supported the judgment and order passed by trial Court with contention that the reasons and findings recorded by trial Court are fully in

consonance with the evidence on record. She submits that the prosecutrix though declared hostile, but in cross examination by the learned APP, she has fully supported the case of the prosecution except the fact regarding pushing her into well by accused no.2. By referring testimony of (PW1) the learned APP submits that the testimony of complainant finds due corroboration on all material facts by Vinayak (PW3). It is pointed out that the complaint was lodged after the complainant was taken out from well by Vinayak (PW3). In the complaint, the complainant has narrated the incident in detail. On the basis of the complaint lodged, offence came to be registered against both the accused. Spot panchanama Exh.9 provides due corroboration to the testimony of complainant. Similarly the injuries found on the person of the complainant immediately after complainant was taken from the well she was referred for medical treatment. The report of medical examination also corroborate the testimony of P.W.1. She submits that it has been brought on record that the complainant was got released from remand home by accused no.1 after registration of offence u/s 376 of IPC at her instance against the person who made her pregnant. She submits that though complainant (PW1) was declared hostile, but in her cross examination she supported the entire case of the prosecution except the fact regarding pushing her into well by accused. She submits that the witness declared hostile cannot be a ground to reject the testimony of witness in toto. The testimony of such witness not shaken on material point in cross examination cannot be brushed aside. In this context, learned counsel has placed reliance on the decisions of Apex Court in the case of **Syed Akbar V/s State of Karnataka**

reported in AIR 1979 S.C.1848 and in the case of State of U.P. V/s Ramesh Prasad Misra and another reported in AIR 1996 S.C.2766.

7] As discussed, the prosecution has approached with the case that Shakilabee complainant (PW1) married about four years prior to the incident. She left her matrimonial house and came to stay at village Borwadi due to matrimonial discord with her husband and in laws. She was residing at her parents house since three years prior to the incident. Besides her parents, her brother Raju Shah (accused no.1) and maternal aunt Imtiyajbi (accused no.2) were also residing in same house. She developed illicit relationship with Vaijinath Pathade from village Borwadi. Due to her illicit relationship, she developed pregnancy of seven months. After knowing about her illicit relationship and carrying pregnancy of seven months, the accused abused her. They persuaded her to get her pregnancy terminated. On 28/7/2000, the complainant was taken by accused nos. 1 and 2 from village Borwadi by telling her that they have to go to Sillod to get her pregnancy terminated. Believing in the words of her brother and maternal aunt, prosecutrix accompanied them to get the pregnancy terminated. It is the case of the prosecution that accused took her from village Borwadi with intention to kill her. Pursuant to their plan, they brought the complainant from Borwadi to Sillod and from Sillod they took her to Amthana. When the complainant enquired about the hospital, the accused told her that it is located near to that place. She was taken on foot towards Charner and in Charner shivar, they took her near the

well located in the field. The accused no.2 put cotton leave ball in her mouth and pushed her into the well. It is further case of the prosecution that after pushing complainant into the well, the accused left the place. Due to sheer luck, the complainant instead of falling into water in the well, got the support of one iron pipe in the well. She caught hold pipe and raised shouts for help. On next day in the morning, i.e. on 29/7/2000, Vinayak (PW3) while passing by side of the well, after hearing the shouts went to well and then with the help of one other person took her from the well. Immediately thereafter, she lodged complaint and thereafter she was referred for medical examination.

8] If we consider the entire case of the prosecution in the light of evidence adduced in the case, then the testimony of the complainant Shakilabi (PW1) and the person who has taken out her from the well i.e. Vinayak (PW3) are important and relevant to arrive at a finding as to whether prosecution has proved its case beyond reasonable doubt or not.

9] Shakilabee (PW1) the complainant in the case was examined by prosecution vide Exh.6. She deposed as per the case of prosecution that after matrimonial discord she left house of her husband and started to reside at Borwadi with accused persons. She further deposed that while residing at Borwadi, she developed illicit relations with one Vaijinath Pathade and conceived pregnancy of seven months from him. She further deposed that due to her illicit relationship and pregnancy from Vaijinath Pathade there used to be quarrel between her and

accused. They used to abuse her and force to abort her pregnancy. She further deposed that on the day of incident, she had gone to village Charner.

10] Since the complainant found to be suppressing truth, she was declared hostile and cross examined at length by APP. In the cross examination, the complainant i.e. (PW1) fully supported the case of prosecution except the fact that she was pushed into well by accused no.2. She has admitted that she had visited police station Sillod and lodged complaint and it bears her thumb impression. She categorically admitted that on the date of incident she went alongwith accused in S.T. bus near village Chowka and from Chowka they went to Sillod in taxi. She further admitted that from Sillod she alongwith accused went to Amthana and from Amthana they went to Charner on foot. She further admitted that when they reached Charner it became dark. She admitted that throughout night, she was in well and holding pipe and raised shouts for help. She further admitted that after hearing shouts two persons came to the well and took out her from the well. She further admitted that police Patil took her to police station, Sillod. Thus if we consider the overall testimony of the complainant i.e. P.W.1, then she has entirely deposed as per the case of the prosecution except the fact that she was pushed into well by accused no.2.

11] It has been brought through her cross examination by learned APP that after lodging complaint against Vaijinath Pathare u/s 376 of IPC, the complainant (PW1) was sent to

remand home at Aurangabad. About one month prior to recording of her evidence, she was released from remand home. She was released from remand home with the help of accused no.1. She has further admitted that she was residing with accused no.1.

12] If we consider the cross examination of P.W.1 by learned counsel for the defence, then there is no challenge to the material facts deposed by the witnesses in her examination in chief as well as the admission brought through cross examination by learned APP.

13] It is quite settled position in law that only for the reason the witness is declared hostile, the testimony of such witness cannot be rejected in toto. If it is found that the creditability of the witness has not been completely shaken and considering the evidence of the witness as a whole, the Court may rely upon part of the testimony which it finds to be credit-worthy and act upon it. In this context, learned counsel for the applicant has rightly placed reliance on the decision of the Apex Court in the case of **Syed Akbar V/s State of Karnataka reported in AIR 1979 S.C.1848**. In para 12 the Apex Court has observed as under :

“12] As a legal proposition, it is now settled by the decisions of this Court, that the evidence of prosecution witness cannot be rejected wholesale, merely on the ground that the prosecution had dubbed him 'hostile' and had cross-examined him. We need say no more than reiterate what this Court said on this point in Sat

Paul V.Delhi Administration (1976) 2 SCR 11 :
AIR 1976 SC 294 :

“Even in a criminal prosecution when witness is cross-examined and contradicted with the leave of the Court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept in the light of the other evidence on the record, that part of his testimony which he finds to be credit-worthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should, as a matter of prudence, discard his evidence in toto.”

14] Learned APP has further relied upon decision of the Apex Court in the case of **State of U.P. V/s Ramesh Prasad Misra and another reported in AIR 1996 S.C.2766**, wherein the Apex Court has held that the evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or accused. It can be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted.

15] Thus keeping in mind the broad principles laid down as to

acceptability of the testimony of the hostile witness and note of caution to be kept in mind while appreciating the evidence of such witness, I proceed to analyse the testimony of complainant (PW1). As discussed the complainant i.e. P.W.1 though declared hostile but supported the prosecution in its entirety except to the fact that she was pushed into the well by accused no.2. If we consider overall testimony of the witness in the light of other evidence on record then the testimony of Vinayak (PW3) corroborates the testimony of (PW1) on all material particulars. He has categorically deposed that on 29/7/2000 at about 7.30 a.m. while he was passing by the side of the well of Aba Parkhe, he heard shouts as "Bhaiya Muze Bachav". He therefore, went to the well and saw one girl inside the well and she was holding pipe in her hand. He therefore went to bring persons to take out her from the well. On the way, he met Ambadas Parkhe and disclosed him about the girl lying in the well. He further deposed that with the help of Ambadas, he took out that girl from the well. After the girl was taken out from well, he made enquiry with her. She disclosed that she was from Borwadi and accompanied with her brother and maternal aunt and her maternal aunt pushed her into the well. No material brought through the cross examination of P.W.3 to disbelieve him or raise any doubt as to the facts deposed by her. P.W.3 is natural witness to incident. There is nothing elicited through cross examination to show that he had any reason to depose against the accused. Therefore the material facts deposed by P.W.1 finds due corroboration from independent witness i.e. Vinayakrao (PW3). It is pertinent to note that the complainant has admitted that she lodged complaint with police station,

Sillod. She has also admitted that police patil had taken her to Sillod. Although the complainant has deposed that she was not aware as contents of her complaint, but there is no reason for the police officer to record false complaint against the accused. It has been brought on record that the complainant was released from remand home about one month prior to her recording of evidence and she was residing with accused. Therefore, inference can be drawn as to reason for showing such hostility and favour to the accused.

16] If we consider testimony of prosecutrix duly corroborated by testimony of (PW3) in the light of documentary evidence i.e. the spot panchanama Ex.9 as well as the injury certificate Exh.10 then it provides due corroboration to testimony of complainant. It is admitted by the complainant that after she was taken out from the well located at Charner she was taken to police station where she lodged complaint. Exh.9 i.e. the spot panchanama reflects that the well was situated in the field of Aba Parkhe located at village Charner. It is mentioned in the panchanama that in the well two iron angles and iron pipe of electric motor found to be existence. At a distance of 2 ft. above the water level, two couplings were found to be installed to that iron pipe. It is pertinent to note that P.W.3 has categorically deposed that he heard the shouts from the well located in the field of Aba Parkhe and therefore, he went towards that well and noticed the girl inside the well and holding pipe with her hands. Beside the spot panchanama, injury certificate at Exh.10 (admitted by defence lawyer) depicts that there were two abrasions noticed on the right leg and left leg just below the

knee on examination of complainant i.e. P.W.1. She was examined on 29/7/2000 at 10.30 p.m. The injuries were found to be caused within 36 hours of the examination and probably caused by hard and blunt object. It appears from the injury certificate that the complainant was sent for medical examination and treatment on 29/7/2000 i.e. the day on which she was removed from the well and lodged complaint. She was examined on 29/7/2000 at 10.30 p.m. Thus the complainant was examined within 2-3 hours of her removal from the well. Thus report of medical examination also supports the case of prosecution and corroborate the testimony of P.W.1.

17] Prosecution has examined Bhikaji Pandit (PW4) the then police Head Constable attached to police station Sillod who recorded complaint of the complainant. He deposed that on 29/7/2000 while he was on duty, the complainant visited police station at 7 a.m. and lodged complaint vide Exh.7. On the basis of complaint, he registered offence u/s 307 of IPC vide Crime No.110/2000. There is nothing brought through the cross examination of P.W.4 to discard his testimony. There was no reason for P.W.4 to have recorded the false complaint against the accused.

18] Thus the evidence as adduced by the prosecution if considered in its totality, then it establishes the case of the prosecution that the accused appellant has attempted to cause death of complainant Shakilabi due to the reason that she developed pregnancy out of illicit relationship. The facts deposed by the witness clearly make out that with intention to

kill the Complainant (PW1) the appellant accused had taken her from village Borwadi on the pretext to take her to hospital to get her pregnancy terminated and instead of taking her to hospital she was taken to isolated place at village Charner and pushed into the well. If the complainant would not have caught hold the pipe and saved her, it was eminent that death would have occurred due to fall in the water in the well. The act committed by accused squarely covered by offence punishable u/s 307 of IPC.

19] Although it is contended that the story of the prosecution found to be unnatural and the girl carrying seven months pregnancy would not have survived the whole night by holding the pipe inside the well, I do not see any reason to accept this contention. There is absolutely no evidence to show that witnesses examined by prosecution had animosity with the accused. There was no reason for the complainant to cook such false story and to implicate the accused. It is pertinent to note that accused involved in the case are closely related with the complainant. As discussed the spot panchanama reflects the existence of pipe in the well as well as two angles fitted in the well for the purpose of installation of motor found sufficient to accept the case of the prosecution that the complainant survived by holding pipe of the electric motor pump lying installed in the well. It can be safely inferred that she got support of the angles and by holding the pipe she could save herself throughout the night. Therefore no serious doubt can be raised as to overall case of the prosecution.

20] In view of the discussion made in the foregoing para, I am of the view that the reasons and findings recorded by trial Court convicting the appellant are quite consistent with the evidence on record. The view taken by trial Court is a possible view in the matter. There is no reason to interfere with the reasons and findings recorded by the trial Court. I am therefore, not inclined to interfere with the reasons and findings recorded by the trial Court convicting the appellant u/s 307 of IPC. In the result the Appeal is dismissed. The appellant is granted eight weeks time to surrender before the trial Court.

21] The advocate appointed through legal aid to represent the appellant, be paid fees as per Rules.

(V.L.ACHLIYA,J.)

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