

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

CRIMINAL APPEAL NO. 253 OF 2003

Bajeya s/o Nareya Padvi,
Age 22 years, Occu. Agri.,
R/o Walval, Taluka Akrani,
District Nandurbar

..Appellant

Versus

1. The State of Maharashtra,
2. Sheklibai w/o Jordar Pawra,
Age 40 years, Occu. Agri.,
R/o Walval, Taluka Akrani,
District Nandurbar

..Respondents

Mr Chaitanya C. Deshpande, Advocate h/f Mr C.R. Deshpande, Advocate
for appellant
Mrs P.V. Diggikar, A.P.P. for respondent no.2

CORAM : A.M. DHAVAL, J.

DATE : 25th July 2017

ORAL JUDGMENT

1. This is an appeal by the accused who was convicted for the offence punishable under Section 376 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for seven years and to pay fine of Rs.2,000/-, in default to suffer simple imprisonment for six months and conviction under Section 506 (2) of the Indian Penal Code and sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs.1,000/-, in default to suffer simple imprisonment for three months.

2. The impugned judgment is delivered by the Ist Ad hoc Additional Sessions Judge, Shahada in Sessions Case No.38 of 2000 on 24th March 2003 based on sole testimony of the prosecutrix.

3. On 15th February 2000, at 23.50 hrs., P.W.2-S (Name withheld) lodged F.I.R. at Dhadgaon Police Station, on the basis of which the crime was registered at C.R.No.8/2000 for the offences punishable under Sections 376, 506 (2) of the Indian Penal Code.

4. F.I.R. Exh.14 disclosed that the prosecutrix aged 32 years was married having two daughters and was in the last stage of pregnancy (nine months old pregnancy). Her husband was doing labour work at village Dongargaon and was occasionally visiting her place of residence Walwal, Taluka Akrani, District Nandurbar. On 13th February 2000, at about 8.00 p.m., P.W.-S got up and came out of the house for urination along with her small kid. At that time, the accused came there under the influence of liquor, held her hand and called upon her to allow him to have sex with her lest she would be thrown in a valley. He snatched away the child carried by her and kept it aside. He removed her saree and dragged her to forest. After dragging her upto a distance of half kilometer, he laid her down removed his own clothes and committed forcible sexual intercourse with her. She raised shouts. About four to five persons, including P.W.4 – Meharya and one Leharya came there. Then accused picked up his clothes and fled away. Those people reached her to her house. She narrated them the story of rape. She wore her saree lying in front of her house. On the next day, she sent one Fokrya to her husband to carry the message about the incident. Her husband returned home at 5.00 p.m. She narrated to him the incident of rape by the accused, but as it was late night, on the next day she and her husband went to Dhadgaon

Police Station and lodged F.I.R. at Exh.14. As she was speaking in Adiwasi, the F.I.R. was recorded in Marathi through an interpreter. After registration of crime, the matter was investigated into. The prosecutrix was got medically examined. No external injury or injury on her private part was noticed. The spot panchnama was drawn in the forest. The accused came to be arrested and he was medically examined. He was found to be having minor injuries, mostly abrasions. The seized property was forwarded to Chemical Analyser's office. The reports of the chemical analysts did not help the prosecution in any way, as no blood or semen was found on the clothes of the prosecutrix and the accused. After completion of investigation, the charge-sheet came to be filed in the Court of Judicial Magistrate, Dhadgaon and in due course, the case was committed to the Court of Sessions, Shahada.

5. The learned Ad hoc Additional Sessions Judge framed charge at Exh.4 under Sections 376, 506 (2) of Indian Penal Code. The accused pleaded not guilty. The prosecution examined six witnesses. The defence of the accused is of total denial. It is case of the accused that father-in-law of the prosecutrix had lodged a case against his brother and, therefore, the prosecutrix has falsely implicated him.

6. At the trial, most of the witnesses turned hostile. The learned Ad hoc Additional Sessions Judge relied on the sole testimony of the prosecutrix corroborated by the contents of the F.I.R. and supported by her husband's evidence and convicted and sentenced the accused, as referred above. Hence, this appeal.

7. Learned Advocate Mr Chaitanya Deshpande, holding for Mr C.R. Deshpande for the appellant argued that except the prosecutrix, there is no other evidence supporting the prosecution case. P.W.4-Meharya eye witness, P.W.5-Shevantabai, wife of brother-in-law of the prosecutrix, P.W.3 – spot panch Mona have all turned hostile. The medical evidence shown no external injury either on private part or on the body of the prosecutrix. The Chemical Analysts' reports Exhs.28,29,30 do not support the prosecution, as no blood or semen was found on the clothes or on the pubic hair and vaginal smear of the prosecutrix. P.W.6 – Jordar, husband of the prosecutrix has not supported her on the point of case of rape. He merely stated that she told him that she was dragged by the accused. He relied upon the judgment of Apex Court in **Narender Kumar Vs. State (NCT of Delhi)** delivered in Criminal Appeal Nos.2066-67 of 2009 on 25th May 2012.

8. Per contra, learned A.P.P. Mrs Diggikar supported the judgment. She argued that it is well settled that sole testimony of the prosecutrix if found reliable and trustworthy, is sufficient for conviction. In the instant case, the evidence of prosecutrix is consistent with the F.I.R. and it is supported by her husband. The prosecutrix was married lady, mother of two children and in the last stage of pregnancy. She has no reason to lodge false F.I.R against the accused. It is, therefore, submitted that no interference is called for in the conviction and sentence awarded by the learned trial Judge.

9. The points for my consideration with my findings are as follows :

- (I) Whether the prosecution has proved that the accused committed rape on P.W.2-S ? ..Not proved
- (II) Whether the prosecution has proved that the accused intimidated P.W.2-S with threat of killing so that she should surrender to him for rape ? ..Not proved
- (III) Whether any interference is called for in the conviction and sentence ? .. Yes⁸
- (IV) What order ? ..The accused is acquitted of all the charges

REASONS

10. The prosecution has examined following six witnesses :

Group A	P.W.2 Prosecutrix
	P.W.4 - Meharya, eye witness (turned hostile)
Group B	P.W.5 - Shevantabai, wife of brother-in-law of the prosecutrix - who had shown the spot
	P.W.6 - Jordar, husband fo the prosecutrix to whom the incident was narrated by the prosecutrix
	P.W.3 - Mona, a hostile spot panch
	P.W.1 - Kirma is mere interpreter whose services were utilised for recording the evidence of the witnesses, who were speaking in Adiwasi language.

11. The following documents are brought on record :

- (I) F.I.R. - Exh.14
- (II) Seizure of Ghagra of P.W.2 - S Exh.22
- (III) Spot panchnama Exh.23
- (IV) Medical Certificate of the prosecutrix admitted by the defence Exh.24
- (V) Injury certificate of the accused Exh.25
- (VI) Chemical Analysts reports Exhs.28,29,30

12. The prosecution heavily relied on the evidence of the prosecutrix. There is no medical corroboration nor there is corroboration by independent witnesses with regard to incident of rape. While P.W.3, 4 and 5 are hostile witnesses. Medical certificate shows no injuries on any private part nor any injury was noted on any part of the body, but the certificate shows that the prosecutrix was pregnant with pregnancy of thirty-six weeks. It is obvious that the certificate shows that she was habituated to sexual intercourse. The Chemical Analysts' reports show no blood or semen on samples of pubic hair, vaginal smear and on the clothes of the prosecutrix and the accused. It is no doubt true that in case of rape, the credibility of the prosecutrix is the most important thing and her evidence if found to be trustworthy and reliable, she can be believed without any corroboration. Learned A.P.P. has relied on the judgment in **Mithu Rai Vs. State of Delhi, 2015 SCC Online (Del) 7289**, wherein it is observed :

“ The conviction on the sole evidence of a child witness is permissible if such witness is found competent to testify and the court after careful scrutiny of evidence is convinced about the quality and reliability of the same. It should be accepted albeit with circumspection. In rape case, before recording conviction on the solitary testimony of a child witness, i.e. prosecutrix herein, the court has to ensure that she is a reliable witness. If her testimony is found to be trustworthy and reliable then conviction can be recorded on her sole testimony.”

13. P.W.2-S has deposed that the incident took place about four years earlier. At that time, she was having two children and she was pregnant for nine months. Her husband was at Dongargaon and she along with her children was residing in the house at Walwal. At 8.00 p.m., she came outside her house for urination and she saw the accused Bajeya present there under the influence of liquor. He threw away her child caught hold her hand and dragged her to the forest. The accused threatened her that if she was not ready for sexual intercourse with him, he would throw her in a valley. At that time, she had worn only *Ghagra*. The accused removed his clothes and committed forcible sex with her. She raised shouts and Meharya and Leharya came there on hearing the shouts. At that time the accused ran away. She was brought home by those persons. She sent one Fokrya to Dongargaon to inform the incident to her husband. On the next day, at 5.00 p.m. her husband returned home. She narrated the incident to her husband. On the next day, they went to Dhadgaon Police Station, where she lodged the F.I.R. Her version in Adiwasi language was converted into Marathi with the help of interpreter and

the F.I.R. was recorded, which is at Exh.14. She stated that she had shown the spot to the Police. She identified the accused present before the Police. The cross-examination of P.W.2-S is not effective. It shows that her husband used to be away from the house for labour work for fifteen days at a stretch and used to come occasionally. She was illiterate and was not knowing the timings. She stated that she was taken by the accused up to a distance of half kilometer. She returned home at pre-dawn. While going to Police Station, she was wearing the same *Ghagra*, which she was wearing while she was taken to the forest by the accused. Her evidence shows that for approaching the Police Station at Dhadgaon, she had to travel by foot up to village Kakarda and then there was vehicle facility from Kakarda to Dhadgaon. She stated that she had narrated the incident to Police Patil, but he did not accompany her. She denied rest of the suggestions. P.W.6 – Jordar is husband of P.W.2-S. He stated that one Fokrya came to him and told him that the accused had caught hold his wife at 8.00 p.m. Therefore, he returned home and his wife told him that accused Bajeya had dragged her to the forest. He stated that as the matter was not settled in village, they went to Police Station. He stated that it requires two and half hours to reach Kakarda on foot from his village Walwal and there is vehicle facility to reach Dhadgaon from Kakarda. Rajya is brother of the accused. P.W.6 - Jordar denied that his father has lodged case against his brother Rajya.

14. As discussed earlier, most of the evidence is against the prosecution. The evidence in favour of the prosecution is of P.W.2-S,

who stated about rape. There is no effective cross-examination of P.W.-S and no enmity is brought on record to show that P.W.2-S would falsely implicate the accused.

15. Mr Chaitanya Deshpande, learned Advocate for the appellant relied on the judgment in **Narender Kumar Vs. State** (cited supra), wherein it is observed that :

“23. The courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the evidence of witnesses which are not of a substantial character.

However, even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient on the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the victim and other witness have falsely implicated the accused. Prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defence. However great the suspicion against the accused and however strong the moral belief and conviction of the court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence (emphasis supplied).

24. Prosecution has to prove its case beyond reasonable doubt and cannot take support from the

weakness of the case of defence. There must be proper legal evidence and material on record to record the conviction of the accused. Conviction can be based on sole testimony of the prosecutrix provided it lends assurance of her testimony. However, in case the court has reason not to accept the version of prosecutrix on its face value, it may take search for corroboration. In case the evidence is read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix case becomes liable to be rejected.

25. The instant case is required to be decided in the light of the aforesaid settled legal propositions.

We have appreciated the evidence on record and reached the conclusions mentioned hereinabove. Even by stretch of imagination it cannot be held that the prosecutrix was not knowing the appellant prior to the incident. The given facts and circumstances, make it crystal clear that if the evidence of the prosecutrix is read and considered in totality of the circumstances alongwith the other evidence on record, in which the offence is alleged to have been committed, we are of the view that her deposition does not inspire confidence.”

In that case, there was effective cross-examination to bring on record material contradictions with her previous statement and she did not raise alarm and had not lodged any report about teasing by the accused in the past. In the said case, there were nail marks on her breasts.

16. In **Tameezuddin @ Tammu Vs. State of (Nct)**, reported in 2009 (15) SCC 566, the Apex Court observed in paragraph 9 as follows:

“9. It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter. We are of the opinion that story is indeed improbable.”

In that case, the story regarding luring of the accused to the Police Station and stating by the P.W.1 that everything was forgiven and forgotten was dis-believed. Two or three witnesses present in the factory premises, when the rape was committed were not examined. Therefore, in spite of semen stains found in the vaginal swabs and on Salwar, it was held that it was a case of sexual intercourse and not rape.

17. In the present case, evidence of P.W.6 – husband of the prosecutrix does not support her evidence. In fact, it creates doubt about entire story of P.W.2-S. According to her, she sent Fokrya to Dongargaon to inform her husband about the incident of rape and when her husband returned home, she narrated the entire incident to him, but her husband merely stated that Fokrya told him that the accused Bajeya had caught hold his wife at 8.00 p.m. and when he returned home, his wife told him that at 8.00 p.m., the accused Bajeya had caught hold her and dragged her. His evidence is conspicuously

silent about the narration of incident of rape. P.W.2-S waited for return of her husband before lodging the F.I.R. It is obvious and expected that she should have disclosed the incident of rape to him, but evidence of P.W.6 – Jordar does not disclose that she had narrated the incident of rape to him. This is highly suspicious. P.W.6 Jordar when reached to his village, there was attempt to settle the matter in the village itself, which indicates that the incident was not as serious like rape, but might be a minor incident of outraging modesty.

18. As far as evidence of P.W.2-S is concerned, though there is no effective cross-examination, I find many inherent improbabilities in her evidence. She deposed that the incident began at 8.00 p.m. when she had come out for urination along with her child. At that time, the accused came there and he threw away her child and dragged her to the forest. The accused threatened her at that time. Her subsequent evidence shows that she raised shouts after the incident of rape was over and then persons from the neighbourhood gathered there and the accused fled away. At the time of incident, P.W.2-S was having two children and was in the last stage of pregnancy. Her young child was thrown away by the accused and she was dragged. It is obvious and inherently probable that she would have resisted and raised shouts at that very moment. Her evidence does not show that she raised shouts when her child was thrown and she was dragged up to a distance of half kilometer in the forest. The prosecution had not drawn a sketch map showing the location of the houses of prosecutrix, houses of witnesses and the place of incident. There is no material to

show that there was electrical light near the hut of P.W.2-S or near the spot. There is no evidence to show that Meharya and Leharya were residing in the forest near the spot. It is not acceptable that P.W.2-S could not have raised shouts for a considerable time right from the time of holding her hand and dragging her upto a distance of half kilometer and then subjecting her to rape and she would only shout after the rape is over. Her evidence shows that the incident began at 8.00 p.m. and she returned at pre-dawn. Though she is illiterate Adiwasī lady, her evidence showing such a huge time required for her return cannot be accepted when her small kids were in the house unattended. As stated earlier, Meharya who was examined turned hostile, while Leharya was not examined. There were more witnesses, but the prosecution has not examined any of them. It is one thing that the witnesses are not available, as no witnesses are generally available at the time of offence of rape, but in the present case, at the time of offence, the witnesses were available and one of them is not supporting, whereas the others are not examined. Surprisingly, P.W.5 – Shevantabai who is wife of brother-in-law of the prosecutrix has also not supported her. According to prosecution, she had shown the spot to the Police. Obviously, P.W.2-S must have narrated the incident to her but she has also turned hostile. When all these facts are considered in totality, those raise a serious doubt about the evidence of P.W.2-S notwithstanding the consistency in her evidence with the F.I.R. and absence of any effective cross-examination. In such case, there is some corroboration required but there is no corroboration of whatsoever nature. There is no corroboration of medical evidence or

other witnesses and not even from her husband. I find that these facts raise a reasonable doubt. Though the evidence of rape victim should not be subjected to minute scrutiny, as observed in Tameeluddin's case, (cited supra), mere statement of rape by raped victim by itself is not sufficient. Her evidence should be probable, logical and should inspire confidence in the mind of the Judge. I find that the evidence of P.W.2-S is not of such a nature.

19. The Judge of the trial Court did not find it material that P.W.2-S did not tell her husband about rape. I find it very material.

20. If all the things taken together are considered logically and rationally, the fact emerges that there may be some minor incident. The accused under the influence of liquor might have caught hold hand of P.W.2-S. There was attempt for settlement but as the same was not successful, the F.I.R. came to be lodged. However, it appears that subsequently, the incident has been substantially exaggerated to the extent of rape. Considering the nature of matter, I find that evidence of P.W.2-S not trustworthy. As such, her evidence is to be discarded in toto. In the result, conviction and sentence recorded by learned trial Judge is not sustainable. Hence, I answer the points in the negative and pass the following order :

ORDER

1. The appeal is allowed.
2. The judgment and order dated 24th March 2003, passed by First Ad-hoc Additional Sessions Judge, Shahada in Sessions Case No.38 of

2000, thereby convicting the appellant under Section 376 and 506 (2) of the Indian Penal Code and the sentence imposed on the appellant and order of compensation are hereby set aside.

3. The appellant-accused is acquitted of the offences punishable under Sections 376 and 506 (2) of the Indian Penal Code.

4. His bail bond stands cancelled. The appellant shall furnish fresh bail bond of Rs.5,000/- with one surety in the like amount under Section 437-A of the Indian Penal Code.

(A.M. DHAVAL, J.)

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