

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

CRIMINAL APPEAL NO.562 OF 2015

Shri Suresh @ Dursing Jahagraya Pawara,
Age 31 years, Occ. Agriculture Labour,
R/o. Kauthal,
Tal. & Dist. Dhule.

...APPELLANT

VERSUS

1. The State of Maharashtra.
- (2. Balabai Sagar Pawara,
Age Major, Occ. Labour,
R/o. Bhorteek, Tal.Shirpur,
Dist. Dhule.)

(Appeal dismissed against R.No.2
as per Court order dt.14.10.2016)

...RESPONDENTS

...

Shri Shrikant S.Patil, Advocate for appellant.

Shri R.B.Bagul, APP for respondent State.

...

CORAM: P.R. BORA, J.

Date of reserving the judgment:21/9/2017

Date of pronouncing the judgment: 27/11/2017

JUDGMENT:

1. The appellant has filed the present appeal against the judgment and order passed in Sessions case No.111/2014 decided by the Court of Additional Sessions Judge at Dhule on 24th of June, 2015.

2. The appellant was prosecuted by Police Station, Songir, taluka and district Dhule, for the offenses punishable under Sections 376 and 506 of Indian Penal Code and vide the impugned judgment and order has been convicted by the Sessions Court for both the aforesaid offenses. The learned Sessions Court has sentenced the appellant to suffer rigorous imprisonment for seven years and a fine of Rs.3,000/-; in default, to suffer simple imprisonment for three months for the offense punishable under Section 376 of IPC whereas, for the offense under Section 506 (II) of IPC the appellant has been sentenced to suffer rigorous imprisonment for two years. Both the sentences are directed to run concurrently. Aggrieved thereby, the appellant has preferred the present appeal.

3. The prosecution case, in brief, is as under:

That, on 9th of April, 2014, when prosecutrix was in her house in the field situated at village Tamaswadi with her children, namely, Pooja, aged about two years, and Vikram, aged about three months, at about 8 p.m., the appellant (hereinafter referred to as the accused), entered in her house and told her that her husband will be coming late in the night and he has asked him to take along with him the prosecutrix and her children at his house, to stay there for a night. The prosecutrix though was reluctant to go along with the accused, since he insisted and gave the reference of the husband of the prosecutrix, she became ready to go along with the accused. While she and her children were going along with the accused, after having walked some distance, the accused dragged the prosecutrix in standing crop of maize in one field and committed forcible intercourse with her. Accused had threatened prosecutrix not to shout or raise alarm or else he would kill her and her two children. The accused had also gagged the mouth of the prosecutrix so that she shall not shout. After having intercourse with the prosecutrix,

the accused fled from the spot. The prosecutrix then, along with her children, reached home and when her husband returned from Dhule, she narrated the entire incident to him.

4. On the next day of the alleged incident, the prosecutrix went to Police Station, Songir, along with her husband and employer of her husband and lodged the report of the alleged incident. On the report so lodged by the prosecutrix, the offence was registered against the accused under Sections 376 and 506 of IPC and the investigation was set in motion. The accused was arrested and while in Police custody, discovered the clothes on his person. The investigating officer then carried out usual formalities of preparing spot panchnama, etc. The prosecutrix was sent for medical examination. The statements of all necessary witnesses were examined by the investigating officer. The blood, and semen samples, collected of the prosecutrix, as well as of the accused, were forwarded for chemical analysis and the reports were obtained. After completing the investigation, chargesheet was filed and the case was

committed to the Court of Sessions.

5. The learned Additional Sessions Judge, after having considered the oral and documentary evidence brought on record by the prosecution, held the accused guilty for the offenses punishable under Section 376(1) and 506 of IPC and sentenced the accused with the imprisonment as noted hereinabove. Aggrieved thereby, the appellant has filed the present appeal.

6. Shri S.S.Patil, learned Counsel appearing for the accused, assailed the impugned judgment on several grounds. Learned Counsel submitted that the trial Court has failed in not appreciating that the FIR of the alleged incident was lodged after about 24 hours. Learned Counsel submitted that the delay which has occurred in lodging the report has not at all been explained by the prosecution. Learned Counsel further submitted that the unexplained delay in filing the FIR raises serious doubts about genuineness of the complaint lodged by the prosecutrix. The learned Counsel further submitted that in the medical examination of the prosecutrix, no injury

has been noticed on her person. Learned Counsel submitted that when it was the case of the prosecutrix that she resisted the sexual assault on her by the accused, it appears improbable that no injury was caused to the prosecutrix. Learned Counsel submitted that though the vaginal swab, etc. were also collected of the prosecutrix, nothing incriminating was revealed through the Chemical Analyzer's report. No semen was detected in the vaginal swab of the prosecutrix. The learned Counsel submitted that the prosecution has utterly failed in proving that the prosecutrix was subjected for any forcible intercourse. The learned Counsel further submitted that the prosecutrix does not know any other language than Pawara but, while recording her statement, no interpreter was called so as to correctly translate the narration of the prosecutrix in Marathi. Learned Counsel further submitted that the learned Sessions Judge has ignored the vital admissions given by the prosecution witnesses and more particularly by the prosecutrix herself. The learned Counsel further submitted that the trial Court has failed in appreciating that the prosecutrix candidly admitted in her cross examination that the contents of the FIR were stated by

one Shri Borse, the employer of her husband. The learned Counsel further submitted that though the prosecution evidence is wholly insufficient, and shrouded with doubts, the learned Additional Sessions Judge has erroneously held the accused guilty for the offenses alleged against him. The learned Counsel, therefore, prayed for setting aside the order of conviction and to acquit the accused of the charges levelled against him.

7. Learned A.P.P. Shri R.B. Bagul, opposed the submissions made on behalf of the appellant. Learned A.P.P. supported the impugned judgment and order. He submitted that by examining 11 witnesses, the prosecution has beyond any reasonable doubt proved the guilt of the accused. The learned A.P.P. submitted that the delay has been reasonably explained by the prosecution. The learned A.P.P. further submitted that in the medical examination of the accused, after his arrest, several injuries were noticed on the person of the accused. Learned A.P.P. submitted that the injuries noticed on the person of the accused lead to an inference that the prosecutrix had resisted the sexual intercourse by the

accused. Learned A.P.P. submitted that in absence of any cogent explanation given by the accused as about the injuries noticed on his person, it has to be held that the injuries noticed on the person of the accused were caused to him during the alleged accident. Learned Counsel submitted that the prosecutrix understands the Marathi language. The learned A.P.P. submitted that the testimony of the prosecutrix fully inspires confidence. Learned A.P.P. submitted that the learned Sessions Court has passed a well reasoned order and no interference is required in the order so passed. Consequently, he prayed for dismissal of the appeal.

8. The law is well settled that in the case of a rape, if the evidence of the prosecutrix is found trustworthy, believable and is free from reasonable doubts, the conviction of the accused can be based on the sole testimony of the prosecutrix and the Court shall not seek any further corroboration to the version of the prosecutrix in such matters.

9. In the instant matter, the learned Additional

Sessions Judge has held the testimony of the prosecutrix to be dependable and the conviction of the accused is mainly based on her evidence though the learned trial Court has also relied upon the evidence of PW 8 Sagar i.e. husband of the prosecutrix, the evidence in the form of recovery of clothes on person of the accused in pursuance of his memorandum and the evidence of PW 10 Dr. Ajit Patil, who had examined the accused after his arrest and had noticed certain injuries on his person. It was the case of the prosecution that said injuries were caused to the accused during the course of his alleged intercourse with the prosecutrix and the contention so raised has been accepted by the learned Additional Sessions Judge.

10. After having perused the entire evidence on record, it is, however, difficult to agree with the findings recorded by the learned Additional Sessions Judge. First, it has to be ascertained whether the evidence of the prosecutrix inspires confidence and can be believed to be true so as to confirm the conviction of the accused as ordered by the trial Court.

11. The FIR of the alleged incident was lodged on 10th of April, 2014. The alleged incident is stated to have happened on 9th of April, 2014. As is revealing from the contents of the FIR, on 9.4.2014, in between 8 p.m. to 8.30 p.m. the accused went to the house of the prosecutrix situated in the agricultural field belonging to one Raju Borse at village Tamaswadi and told the prosecutrix that her husband may come home late in the night from Dhule and he has, therefore, asked the accused to take the prosecutrix with him at his house. Though the prosecutrix initially refused to go along with the accused, when the accused insisted, believing that her husband might have really told the accused to take the prosecutrix at his house, the prosecutrix along with her daughter aged about two years and her son, aged about three months, agreed to go along with the accused.

12. When the accused and the prosecutrix along with her children were so proceeding, the accused, dragged the prosecutrix in one field wherein there was a standing crop of maize and the prosecutrix opposed the accused and also raised shouts but the accused gagged

her mouth, and threatened her that if she does not allow him to have sexual intercourse with her, he will kill her as well as her two children. Thereafter, the accused made the prosecutrix lie down in the said maize field, and had forcible sexual intercourse with her. At the relevant time, the daughter of the prosecutrix was made to sit nearby and the accused had snatched the son of the prosecutrix from her and had thrown him nearby in the said field itself. After having intercourse with the prosecutrix, the accused fled from the said spot and the prosecutrix with great difficulty returned to her house with her children.

13. At about 10 p.m., the husband of the prosecutrix returned to home along with his employer, namely, Raju Borse, as well as the tractor driver, namely, Bhila Master. The prosecutrix disclosed the alleged incident to them. They all were enraged. The husband of prosecutrix, his employer Raju Borse and tractor driver Bhila Master then jointly proceeded in search of the accused towards his field. The accused, however, was not found at his house. On the next day also the husband of the prosecutrix searched for the accused, however, he

could not be traced out. Thereafter, the prosecutrix, her husband and his employer Raju Borse went to Police Station, Songir and lodged report of the alleged incident.

14. In light of the facts appearing in the F.I.R., when I perused the evidence of the prosecutrix before the Court, it is apparently noticed that she did not state many material facts stated in the F.I.R. Her testimony before the Court nowhere reveals that when she proceeded along with the accused, her daughter and the son were with her. The prosecutrix also did not state that the accused snatched her son from her and threw him in the field before having sexual intercourse with her. In her testimony before the Court, the prosecutrix also did not state that the accused threatened her that if she did not allow him to have sexual intercourse with her, he would kill her and her children. What she has deposed is the fact that accused threatened her that he will kill her if she refuses for intercourse with him. The prosecutrix has then testified that after having intercourse with her, the accused reached her back to her house, and ran away thereafter.

15. In the FIR it was specifically alleged by the prosecutrix that when she proceeded with the accused on his insistence, towards his house, her daughter was held by the accused and the son was with her. It was further averred in the said report that after the accused dragged her in the standing maize crop, he snatched her son from her and threw him in the said field and made her daughter to sit in the said field nearby. It was also alleged by the prosecutrix that, when she started shouting in protest, the accused threatened her that if she refuses to have intercourse with him, he would kill her and her children there itself. In the FIR it was further stated by the prosecutrix that after having intercourse with her, the accused fled from there and, thereafter, with great difficulty, she along with her children reached to her house.

16. It is difficult to accept that the prosecutrix would have forgotten the aforesaid facts while deposing before the Court. The facts which have been omitted by the prosecutrix cannot be said to be insignificant or

immaterial. Had the children be really with the prosecutrix, it is improbable that she would forget to state the said fact in her testimony before the Court. It also cannot be accepted that the prosecutrix would have forgotten to depose before the Court that her son was snatched from her by the accused before committing sexual intercourse with her and further that the said child was thrown in the field and that the daughter was asked to sit nearby. As has come on record, the son of the prosecutrix at the relevant time was aged about only three months and the daughter was aged about two years. Having regard to the ages of her children, there is no possibility that the prosecutrix would have gone along with the accused leaving them alone at the house. Further, had it been the fact as mentioned in the First Information report that after committing rape on the prosecutrix, the accused fled away from there and the prosecutrix, with great difficulty returned home along with her children, in no case it would have been deposed by the prosecutrix in her testimony before the Court that after having sexual intercourse with her, the accused reached her at her house. Similarly, had it been the fact as mentioned in the FIR that at about 10 p.m. on that day, the husband of the prosecutrix returned to home and to reach him at his home, his employer Raju Borse and the tractor driver Bhila Master had

been to her house and that the prosecutrix disclosed the alleged incident to all of them, the prosecutrix would not have forgotten to depose the said fact in her testimony before the Court. More importantly, it was also the contention of the prosecutrix in her report that, after she disclosed that the accused committed rape on her, her husband, the employer of her husband and one Bhila Master had become furious and immediately proceeded in search of the accused towards the field wherein he was residing. However, he was not found there. The aforesaid fact has also not been deposed by the prosecutrix in her testimony before the Court. This was also an important fact since it contains an information that she disclosed the alleged misdeed of the accused to her husband who was at that time accompanied with his employer and one more person and that they all became furious and immediately proceeded in search of the accused towards his field. It also appears improbable that such an important fact would be missed by the prosecutrix while giving her evidence before the Court.

17. In view of the above, serious doubts are created about the prosecution case and in such circumstances, it would be very unsafe to rely upon the sole testimony of the

prosecutrix to hold the accused guilty of the offence charged against him.

18. Further, there is absolutely no explanation as to why the prosecutrix and her husband did not immediately approach the nearest Police Station and lodge the report against the accused. In fact, the incident was so serious that the report of it must have been lodged by the prosecutrix and her husband without any loss of time. As has come on record, on the date of the incident, his employer had been to his house to reach the husband of the prosecutrix on motor cycle. It has also come on record that the prosecutrix disclosed the alleged incident not only to her husband but also to his employer and to one more person, namely, Bhila Master, who was also with them. In the circumstances, in fact, it was not impossible for the prosecutrix or for her husband to approach the nearest Police Station immediately and to lodge the report of the alleged incident. Even if it is assumed that the husband of the prosecutrix and his employer were first intending to find out the accused and were searching for him, the report could have been lodged in the morning of 10th of April. However, the report came to be lodged on 10th of April, 2014, at 23.35 hours i.e. in the late night. The report was thus lodged admittedly

after 24 hours of the occurrence of the alleged incident. The prosecution has not brought on record any circumstance to justify the delay so caused in filing the report by the prosecutrix. In the instant case there is no scope for taking a plea that there were no means to reach to the nearest Police Station in view of the fact that when the prosecutrix disclosed the alleged incident to her husband, his employer was also present there who is an agriculturist as well as a trader. Further, as has come on record, the said employer himself took the husband of the prosecutrix with him on his motor cycle to find out the accused. It is also the matter of record that when the prosecutrix went to Police Station, Songir for lodging the report the employer of her husband was accompanying them. It was, thus, quite possible to immediately lodge the report on the same day or in any case on the next day morning. There is absolutely no explanation as to why the report was not lodged till late night of the second day. The delay occurred in lodging the FIR raises doubts about the genuineness of the prosecution case.

19. After lodging of the report the prosecutrix was immediately referred for her medical examination. She was examined by Dr.Arun Narayan Ambalkar (PW 1) who was

attached to Shri Bhausaheb Hire Government Medical College, Dhule, as Assistant Professor. In the medical examination of the prosecutrix no external injury was found anywhere on her body. When it is the case of the prosecution that the prosecutrix opposed and resisted the accused for having sexual intercourse with her, it appears improbable that no injury was found anywhere on her body. As is revealing from the material on record, some injuries were noticed on the person of the accused. According to the discussion made by the learned trial Court since the accused did not provide any explanation for such injuries on his person, an inference was liable to be drawn that the said injuries were caused to him in the alleged incident of forcible rape committed by him on the prosecutrix. Learned Additional Sessions Judge has observed that injuries as were caused to the accused were liable to be caused in the case of forcible intercourse. The observation made and the conclusion recorded by the learned Additional Sessions Judge is wholly erroneous. If this is to be accepted that in an attempt of resisting the accused from committing sexual intercourse, the prosecutrix had caused the said injuries to the accused, it is difficult to accept that no injury, not even a minor abrasion, was caused to the prosecutrix.

20. As noted hereinabove, the learned Additional Sessions Judge has presumed that the prosecutrix resisted the accused from committing sexual intercourse with her. As has been observed by the learned Additional Sessions Judge, the injury on the face of the accused was liable to be caused by the prosecutrix. As per the learned Additional Sessions Judge, the prosecutrix has scratched the face of the accused and the injuries noticed on face of the accused were indicating the said fact. The observation so made by the learned Sessions Judge is without any evidence on record. On the contrary, the evidence on record falsifies any such presumption. The material on record shows that at the time of medical examination of the prosecutrix, sample of her blood, vaginal swab as well as her nail clippings were obtained and seized and were forwarded for their chemical analysis. The report of the Chemical Analyzer (Exh.19) demonstrates that neither blood nor tissue matter was detected in the nail clippings of the prosecutrix. Had it been the fact that the prosecutrix had scratched the face of the accused, and the injuries noticed on the face of the accused were result of the said act of the prosecutrix, in her nail clippings the blood and the tissue matter must have been detected. Absence of blood or tissue matter in the nail clippings rules out the possibility of prosecutrix

causing any injury on the face of the accused.

21. It is also the matter of record that no semen was detected in the pubic hairs collected of the prosecutrix or in the vaginal swab of the prosecutrix. As has been deposed by PW 1 Dr. Arun Ambalkar, since after the alleged incident, the prosecutrix had taken bath and had washed her body, no semen was likely to be detected in the sample of pubic hair or in the vaginal swab. Though it is true that merely because no semen was detected in the vaginal swab or on pubic hair, no such conclusion can be drawn that the prosecutrix was not subjected for forcible sexual intercourse, reasonable doubts are certainly created about the case of the prosecution. Moreover, as I stated earlier, in such circumstances, the testimony of the prosecutrix must inspire full confidence. In the present case, as has been elaborately discussed by me hereinabove, the evidence of the prosecutrix does not inspire such confidence.

22. As I noted earlier, the injuries noticed on the person of the accused had much weighed in the mind of the learned Additional Sessions Judge in holding that the said injuries support the case of the prosecution that the accused committed sexual intercourse with the prosecutrix. The learned Additional

Sessions Judge has further observed that the defense raised by the accused as about the said injuries on his person is unacceptable. It appears to me that the entire discussion made by the learned Additional Sessions Judge is irrelevant and against the settled legal principles. First, it has to be kept in mind that the failure on the part of the accused to prove his defense cannot be a ground for holding him guilty for the offense charged against him unless the prosecution has undoubtedly proved his guilt by leading cogent and sufficient evidence on record. In the instant case, as I discussed hereinbefore, the testimony of the prosecutrix does not inspire confidence. The facts as are appearing in the FIR are not corroborated by the prosecutrix in her testimony before the Court. The entire case of the prosecution appears improbable. The delay in lodging the FIR has also not been properly explained. Absence of any external injury on the person of the prosecutrix is also one of the cause which raises reasonable doubt about the prosecution case.

23. It was sought to be canvassed by the learned A.P.P. that the injuries on the person of the accused which have not been properly explained by the accused, indicate the guilt of the accused. The argument so made by the learned A.P.P. is

liable to be rejected at the threshold. If it is accepted that the prosecutrix while resisting the accused from committing sexual intercourse with her, caused the injuries to the accused on his face, on his cheek, etc., it is quite improbable and unacceptable that no injury would be caused on any part of the body of the prosecutrix. Moreover, Dr. Patil (PW) who had examined the accused, did not state in his testimony before the Court that the injuries as were noticed on the person of the accused were liable to be caused in an attempt by him to commit forcible sexual intercourse with the prosecutrix. In his examination in chief, nothing has been asked to Dr. Patil as about the probable cause of such injuries on the person of the accused. As against it, the accused has brought on record the probable cause for the injuries caused to him. More importantly, it is not the case of the prosecution that the prosecutrix scratched the face of the accused or caused any such injuries as were noticed on the person of the accused. I have elaborately discussed hereinbefore the evidence of the prosecutrix. In her testimony before the Court she has not even whispered that she scratched the face of the accused. As noted earlier, neither blood nor any tissue matter was detected in the nail clippings of the prosecutrix. The prosecution has, thus, utterly failed in bringing on record any evidence to show that the

injuries as were noticed on the person of the accused were caused to him at the time of his alleged forcible sexual intercourse with the prosecutrix. As such, in fact, there was no burden on the accused to explain how the injuries noticed on his person were caused to him. Moreover, plausible explanation has been given by the accused for such injuries appearing on his person. There seems no reason to disbelieve the version of the accused.

24. After having considered the entire evidence on record, I find it difficult to agree with the findings recorded by the learned Additional Sessions Judge. The prosecution has failed in bringing on record any conclusive evidence to prove the guilt of the accused. The testimony of the prosecutrix is not free from doubts. It would be very unsafe to base the conviction of the accused merely on the basis of the evidence of the prosecutrix. The entire case of the prosecution is shrouded with doubts. Lastly, it was sought to be canvassed by Shri Bagul that the accused has not brought on record any reason as to why the prosecutrix would indulge in falsely implicating the accused in such a heinous crime. According to the learned A.P.P., in absence of any such circumstance brought on record, it has to be presumed that the allegations

made by the prosecutrix are true. The submission so made by the learned A.P.P. is liable to be turned down for many reasons. Firstly, it is incorrect that the accused has not brought on record any circumstance. As has come on record, Raju Borse, the employer of the husband of the prosecutrix, was desiring that the accused shall work with him and some amount was also therefore, given to the accused but he refused to work for said Raju Borse. Apart from the said fact, the submission so made is against the settled principles of law. The initial burden is on the prosecution to prove its case beyond reasonable doubt. Merely because the accused failed in bringing on record any circumstance to show that there was any reason for the prosecutrix to falsely implicate him in the alleged crime, the guilt of the accused cannot be said to have been proved. The prosecution has to stand on its own legs. In the instant matter, I reiterate that the prosecution has failed in bringing on record any such evidence to prove the guilt of the accused beyond reasonable doubt. The prosecution evidence is not free from doubt, benefit of which would certainly go to the accused.

25. In the foregoing circumstances, the judgment and order passed by the trial Court is liable to be set aside. Hence,

the following order:

ORDER

1. The judgment and order passed in Sessions Case No. 111/2014, dated 24th of June, 2015, by the Additional Sessions Judge at Dhule is quashed and set aside.
2. The appellant accused is acquitted of all the charges levelled against him. He be released forthwith, if not required in any case or crime.
3. Fine amount, if any, paid by the accused be refunded to him.
4. Criminal Appeal (No.562/2015) stands allowed in the aforesaid terms.

(P.R.BORA)
JUDGE

...