

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.369 OF 2012

MURGAN @ DILLI AMMASHI DEVENDRA)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Ms.Nasreen Ayubi, Appointed Advocate for the Appellant.

Ms.P.N.Dabholkar, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 10th AUGUST 2017

ORAL JUDGMENT :

1 By this appeal, the appellant / accused is challenging the judgment and order dated 20th December 2008 passed by the learned Additional Sessions Judge, Greater Bombay, Mumbai, in Sessions Case No.2 of 2008, thereby convicting him of the offences punishable under Sections 341 and 376(1) read with 34 of the Indian Penal Code (IPC). The appellant / accused is sentenced to suffer simple imprisonment for one month for the offence punishable under Section 341 read with 34 of the IPC, and for the

offence punishable under Section 376(1) read with 34 of the IPC, he is sentenced to suffer rigorous imprisonment for a period of 7 years and to pay fine of Rs.5,000/-, in default, to undergo further rigorous imprisonment for 6 months.

2 Facts leading to the institution of the present appeal can be summarized thus :

(a) The prosecutrix used to reside in a hostel at village Lasangaon for the purpose of school education. To celebrate holy month of Ramzan, she had returned to her parental house located at Room No.12, New Mhada Transit Camp Chawl No.A/50, Kokari Agar, Antop Hill, Mumbai. On 2nd October 2007, when she was all alone at her house, at about 6.00 p.m., the appellant / accused along with his two associates entered inside her house and with the help of his two associates committed rape on the prosecutrix / PW1. The prosecutrix / PW1 then attempted to contact her mother telephonically, but could not. Because of the horrified incident, being disturbed mentally, she consumed eighteen tablets of medicine of her mother and became unconscious.

(b) At about 10 p.m. of that day, her mother PW2 Kamrunissa Zuber Khan returned to the house along with father of the prosecutrix. They saw the prosecutrix lying in the house in unconscious condition. The prosecutrix was then immediately admitted to Sion hospital, Mumbai, for medical treatment.

(c) According to the prosecution case, the prosecutrix regained consciousness on 4th October 2007 and she narrated the incident to her parents. She did not disclose the same to police on that day. On the next day i.e. on 5th October 2007, the prosecutrix reported the incident to police and accordingly, the First Information Report (FIR) (Exhibit 10) came to be recorded. Consequently, Crime No. 206 of 2007 for the offence punishable under Section 376 read with 34 of the IPC came to be registered with Wadala T.T. Police Station, Mumbai, against the appellant / accused and his two associates. After registration of the crime in question, investigation started. Police recorded spot panchnama by visiting the spot of the incident. Clothes of the prosecutrix came to be seized. Statement of witnesses were recorded and the

appellant / accused came to be arrested. His clothes were also seized. Papers of medical treatment of the prosecutrix came to be collected. Seized articles were sent for chemical analysis. On completion of routine investigation, the charge-sheet came to be filed.

(d) After committal of the case, Charge for the offences punishable under Section 341 read with 34 of the IPC and under Section 376 read with 34 of the IPC came to be framed against the appellant / accused. He pleaded not guilty and claimed trial.

(e) In order to bring home the guilt of the appellant / accused, the prosecution has examined in all seven witnesses and also relied on documentary evidence. PW1 is the prosecutrix and the report lodged by her is at Exhibits 10 and 10A. PW2 Kamrunissa Khan is the mother of the prosecutrix. PW3 Mohd. Nasir Shaikh is panch witness to the seizure panchnama Exhibit 13 whereby clothes of the prosecutrix were seized on 5th October 2007. PW4 Dr.Gene Thomas is Medical Officer working with Lokmanya Tilak

Hospital, Sion. She treated the prosecutrix and subsequently referred her for further examination to Gynecologist PW6 Dr.Rajesh Dere, working in the said hospital. PW5 Abdul Gafar Ibrahim Shaikh is a panch witness to the seizure panchnama Exhibit 17 by which clothes of the appellant / accused came to be seized on 7th October 2007. Suhas Anant Yadav, P.S.I. who investigated the crime in question is examined as PW7. Spot panchnama is at Exhibit 24.

(f) After hearing the parties, by the impugned judgment and order, the learned trial court was pleased to convict the appellant / accused and he was sentenced as indicated in the opening paragraph of this judgment.

3 I have heard Ms.Nasreen Ayubi, the learned advocate appearing for the appellant / accused. By taking me through the entire record and proceedings, the learned advocate argued that the evidence adduced by the prosecution goes to show that the family of the prosecutrix and that of the appellant / accused were

on hostile terms. Though PW2 Kamrunissa Khan claimed that the appellant/accused had given threats of dire consequences to her, strangely enough, no report of such threats came to be lodged by her at any point of time. The enmity between the parties points out that the appellant/accused is falsely implicated in the crime in question by the prosecuting party, because of dispute over electric connection to the house of the prosecutrix and her mother. It is further argued that forensic evidence in no manner supports the case of the prosecution and Chemical Analyser's reports are negative. The learned advocate by pointing out evidence of the prosecutrix as well as her mother PW2 Kamrunissa Khan argued that the incident in question allegedly took place in a populous locality of the slum at Antop Hill. However, no independent witness is examined by the prosecution to show that the appellant/accused and his associates entered the house or ran away from the said house because of sound of falling of utensils. Arrest panchnama of the appellant/accused is not prepared nor proved during the course of the trial. With this, the learned advocate argued that the appellant/accused is entitled for benefit of doubt.

4 The learned APP supported the impugned judgment and order of conviction by contending that in the offences of this nature, the court is bound to be sensitive and cannot get swayed away by minor discrepancies in the evidence of prosecution. It is further argued by the learned APP that oral evidence of the prosecutrix is clear and consistent with other evidence adduced by the prosecution on record. The prosecutrix has clearly deposed about the incident by giving details thereof while in the witness box. The evidence of the prosecutrix shows that her mouth was gagged at the time of the incident. My attention is drawn to the statement of the prosecutrix in the cross-examination that because of ramzan nobody came out of the house at the relevant time. It is further argued that evidence that evidence of PW6 Dr.Rajesh Dere fully supports and corroborates the version of the prosecutrix.

5 I have carefully considered the rival submissions and also perused the record and proceedings.

6 Evidence on record and particularly coming out from the mouth of the prosecutrix as well as her mother PW2 Kamrunissa Khan shows that the prosecutrix was residing in a hostel at Lasangaon for the purpose of education and she had returned just 20 -22 days back to her parental house to celebrate holy month of Ramzan. As seen from the evidence of PW2 Kamrunissa Khan, at the time of the incident, her daughter i.e. PW1 was alone at the house. This fact is also vouched by the prosecutrix i.e. PW1. There is no material in cross-examination of both these witnesses to infer that there was somebody else accompanying the prosecutrix at the time of the incident at her home. On this backdrop, let us examine what the prosecutrix deposed about the actual incident.

7 It is evidence of the prosecutrix that at about 6.00 p.m. of 2nd October 2007, she was preparing food at her house. She further deposed that the appellant / accused accompanied by his two associates entered in her house. One of the associates of the appellant / accused closed the door from inside and another

gagged her mouth. Her thighs were pressed by both of them and then, the appellant / accused removed the salwar and committed rape on her. As per version of the prosecutrix, then she kicked the appellant / accused causing his fall on the utensils kept in the house. Because of the sound of falling of utensils, the appellant / accused and his associates ran away from the spot. The prosecutrix further stated that, thereafter, she tried to contact her mother by making a telephone call. Her evidence shows that she was out of house for that purpose for five minutes. She could not contact her mother. Then, she decided to commit suicide and consumed 18 tablets of medicine prescribed to her mother and became unconscious. The prosecutrix candidly stated that she regained consciousness on 4th October 2007 at hospital and then disclosed the incident to her parents on 5th October 2007. In her cross-examination, it is elicited from her that on 4th October 2007 itself, she disclosed the incident to her mother as well as to the doctor. Her cross-examination further reflects that she was an indoor patient at the hospital for twelve days. The prosecutrix further admitted that in front of her room, there is a lane and

thereafter a chawl. People used to go by that lane. It is worthwhile to note that evidence of the prosecutrix that the appellant / accused entered inside her house accompanied by his two associates and raped her with active assistance of his associates is not at all challenged in the cross-examination. Even no suggestion of denials are given to the prosecutrix during the course of her cross-examination by the defence. This fact assumes overbearing importance in the matter, as the incident deposed by the prosecutrix is not challenged in the cross-examination.

8 It is well settled that in sexual offences, the court is expected to be sensitive and broader probabilities of the case of the prosecution are required to be considered, rather than giving importance to minor discrepancies and contradictions. If the victim of rape states on oath that she was forcibly subjected to sexual intercourse, her statement needs to be accepted, normally even if it remains uncorroborated, because the very nature of such offence makes it impossible to seek corroboration. If the evidence of the victim of the offence is trustworthy, then there is no need of

searching for corroboration to her testimony. However, let us attempt to scan the evidence of the prosecution in order to ascertain whether version of the prosecutrix gains corroboration from other evidence on record.

9 The prosecutrix claimed that she regained consciousness on 4th October 2007. Medical evidence which I propose to discuss subsequently, do demonstrate that the prosecutrix regained consciousness on 4th October 2007. She claims that she lodged report on 5th October 2007 after narrating the incident to her mother and the doctor on 4th October 2007. The report lodged by the prosecutrix is at Exhibits 10 and 10A. When it is compared with her substantive evidence before the court, it is seen that evidence of the prosecutrix is perfectly in consonance with her FIR and as such, she stands corroborated by the FIR lodged by her.

10 PW2 Kamrunissa Khan in her chief-examination itself has stated that she had dispute with the appellant / accused over

the issue of electric connection and as she could not pay an amount of Rs.2,000/- demanded by the appellant / accused on that count, she was subjected to threats and the appellant / accused threatened her that he will do such an act that she will remember him throughout her life. No doubt, hostility is a double edged weapon, but many a times, it acts as a motive for commission of crime.

11 The mother of the prosecutrix further deposed that upon finding her daughter unconscious on 2nd October 2007, she took her to Sion hospital where she was admitted as an indoor patient. PW2 Kamrunissa Khan further deposed that on 4th October 2007, her daughter (PW1) regained consciousness and had disclosed to her that on 2nd October 2007, the appellant / accused Murgan along with two unknown persons entered in the house and the appellant / accused forcibly committed rape on her.

12 From cross-examination of PW2 Kamrunissa Khan it is brought on record that it was in the morning hours of 4th October

2007 itself that PW1 had disclosed the incident to this witness. It is also elicited from the cross-examination of PW2 Kamrunissa Khan that the distance between Wadala T.T. Police Station and her house can be travelled within a span of five minutes. She also admitted that she had not disclosed the incident to police on 4th October 2007 but with an explanation that she was under the shock of the incident. This witness has also admitted that her house is surrounded by other houses where people reside. This witness further admitted that she had not lodged any complaint about threats given by the appellant / accused.

13 On appreciation of evidence of PW1 prosecutrix and her mother PW2 Kamrunissa Khan, it is crystal clear that the incident in question was disclosed by the prosecutrix to her mother in the morning hours of 4th October 2007 when the prosecutrix regained consciousness. This narration constitutes former statement of the prosecutrix in respect of the incident when her mind was unpolluted from the external interference. Use of such former statement of the prosecutrix can be made to

corroborate her version as per the provisions of Section 157 of the Evidence Act. Evidence of PW2 Kamrunissa Khan disclosing former statement of the prosecutrix made to her immediately after regaining consciousness after the incident in question, fully corroborates the version of the prosecutrix.

14 The line of cross-examination of PW2 Kamrunissa Khan – mother of the prosecutrix is to the effect that despite knowing about the incident on 4th October 2007 itself and though her house is very near to the jurisdictional police station, no attempts were made by the prosecuting party to lodge the FIR against the appellant / accused. The testimony of the mother of the prosecutrix contains answer to this aspect of the matter. She deposed that she was under mental shock. One may argue that the incident in question took place on 2nd October 2007, the prosecutrix regained consciousness on 4th October 2007, her parents as well as the doctor were informed about the incident on 4th October 2007 itself, but still the FIR came to be lodged on 5th October 2007, and therefore, there is delay in lodging the FIR,

which is fatal to the prosecution. However, it needs to be kept in mind that the prosecutrix has deposed that on 4th October 2007 because of pain and agony of the incident she could not lodge report to the police. Her mother PW2 Kamrunissa Khan has stated that as she was under mental shock after hearing the disclosure by the prosecutrix, she could not lodge the report on 4th October 2007 itself. If properly explained, delay in lodging the FIR in the matter of sexual offence is of no consequence. Valuable reference can be had to this proposition from the judgment of the Hon'ble High Court in the matter of **Bharwada Bhoginbhai Hirjibhai vs. State of Gujarath**¹ wherein the Hon'ble Apex Court has considered and enumerated several reasons for delay in approaching police in sexual offences. Those are as under :

(1) A girl or a woman in the tradition bound non-permissive Society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred.

¹ AIR 1983 Supreme Court 753

(2) She would be conscious of the danger of being ostracised by the Society or being looked down by the Society including by her own family members, relatives, friends and neighbours.

(3) She would have to brave the whole world.

(4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered.

(5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family.

(6) It would almost inevitably and almost invariably result in mental torture and suffering to herself.

(7) The fear of being taunted by others will always haunt her.

(8) She would feel extremely embarrassed in relating the incident to others being over powered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo.

(9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy.

(10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour.

(11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence.

(12) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross examination by Counsel for the culprit, and the risk of being disbelieved, acts as a deterrent.

In the light of these observations, though infact a marginal delay in lodging the FIR finds explanation in the case of the prosecution, even if it is assumed that there is some delay in lodging the FIR, it is of no consequence.

15 As mentioned in foregoing paragraph, enmity is a double edged weapon and can prove to be a motive for commission of offence. In the case in hand, the prosecutrix and her family members were residing in a slum area. As seen from the evidence of PW2 Kamrunissa Khan, it was the appellant / accused who had demanded an amount of Rs.2,000/- for getting electric connection to her room. The appellant / accused is not an employee of electric supply company. This indicates that the appellant / accused was in a dominating position to demand an amount of Rs.2,000/- from the family of the prosecutrix for getting supply of electricity to their house. Considering the fact that parents of the prosecutrix were residing in the slum area having dominance of the appellant / accused, the fact that PW2 Kamrunissa Khan had not lodged report of previous threat by the appellant / accused to the police, cannot be given any overbearing importance to reject her testimony. For these reasons, testimony of the prosecutrix as well as her mother are found to be reliable and trustworthy.

16 The next piece of corroborating material to the version of the prosecutrix is the medical evidence adduced by the prosecution on record. Evidence of PW4 Dr.Gene Thomas, so also contemporaneous papers of medical treatment of the prosecutrix which are at Exhibit 15A congruously shows that it was in the night intervening 2nd October 2007 and 3rd October 2007 and precisely at about 2.32 a.m. of 3rd October 2007, that the prosecutrix was admitted to Lokmanya Tilak Municipal Hospital. Evidence of PW4 Dr.Gene Thomas shows that after regaining consciousness, the prosecutrix /pw1 had given history of sexual assault, and therefore, she was referred to gynecologist i.e. PW6 Dr.Rajesh Dere. As per version of PW6 Dr.Rajesh Dere, on 4th October 2007, he examined the prosecutrix and recorded history given by her in medical case papers (Exhibit 15A). As per version of this witness, upon examining the prosecutrix medically, he found evidence of reddening in surrounding area of introitus hymen present marginally. There was a bruise mark, pink in colour on right elbow, medial side of the prosecutrix. PW6 Dr.Rajesh Dere deposed that after medical examination of the

prosecutrix, he opined (Exhibit 22) that there is evidence of recent sexual intercourse with the prosecutrix with evidence of sign of struggle.

17 Evidence of PW4 Dr.Gene Thomas and PW6 Dr.Rajesh Dere is gaining corroboration from papers of medical treatment at Exhibit 15A as well as certificate Exhibit 22. Papers of medical treatment of the prosecutrix show that the attending Medical Officers i.e. PW4 Dr.Gene Thomas and PW6 Dr.Rajesh Dere had recorded the history as sexual assault by three persons. Name of the appellant / accused is figuring as the culprit in the history recorded at 8.15 a.m. of 4th October 2007 by the Medical Officers in the medical case papers at Exhibit 15A. These medical papers also reveal that upon internal examination of the prosecutrix, the Medical Officers found her hymen absent as well as reddening in area around introitus hymen. PW6 Dr.Rajesh Dere had recorded history given by the prosecutrix at 1.15 p.m. of 4th October 2007, as reflected in medical case papers Exhibit 15A wherein the prosecutrix had narrated about sexual assault by the appellant /

accused. This medical evidence is fully corroborating the version of the prosecutrix.

18 Clothes of the prosecutrix came to be seized vide seizure panchnama Exhibit 13 in presence of PW3 Mohd. Nasir Shaikh by the Investigating Officer PW7 P.S.I. Suhas Anant Yadav. Evidence of PW3 Mohd. Nasir Shaikh, to the effect that upon seizure, clothes of the prosecutrix were sealed, is not challenged in the cross-examination. Those were subjected to forensic examination and the report of the Chemical Analyser is at Exhibit 26. It shows that salwar and kurta of the prosecutrix were stained with human blood. This implies that the prosecutrix was subjected to violence and corroborates her version about the incident.

19 Undoubtedly, the place of the incident is surrounded by several houses. It is a populous area. House of the prosecutrix was having lane in front of it, which was used by passers by. The defence has criticized the

version of the prosecution by stating that, still, no independent witness who had seen the appellant / accused and his associates entering in the house or leaving the house, so also hearing sounds of falling of utensils are examined by the prosecution. This submission is not having any merit because evidence of the prosecutrix shows that her mouth was gagged at the time of the incident in question. It was the month of holy Ramzan and the prosecutrix has stated that because of this reason, nobody was coming out of the house. Even otherwise, when available evidence is sufficient for proving the guilt, the non-examination of other witnesses, though available, does not render the prosecution case suspect.

20 In the result, the prosecution has established that the appellant / accused with the help of his associates wrongfully restrained the prosecutrix / PW1 and committed rape on her. The sentence imposed is also legal and appropriate. The appeal is devoid of merit and the same is dismissed.

(A. M. BADAR, J.)