

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.415 OF 2012

1) MARUTI SURESH PAVALE)
2) NITIN VITTHAL PAVALE)...APPELLANTS

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Ms.Nasreen Ayubi, Advocate for the Appellants.

Mr.A.R.Kapadnis, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 2nd MARCH 2017.

JUDGMENT :

1 Appellants / accused by this appeal are challenging the judgment and order dated 16th August 2011 passed by the learned Special Judge under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, Pune, in Special Case No.35 of 2008, thereby convicting both of them of offence punishable under Sections 376(2)(g), 323 read with 34 and 506 read with 34

of the Indian Penal Code (IPC). For the offence punishable under Section 376(2)(g) of the IPC, they are sentenced to suffer rigorous imprisonment for 10 years apart from payment of fine of Rs.5,000/- by each of them, in default, to suffer simple imprisonment for 6 months. For the offence punishable under Section 323 read with 34 of the IPC, both the appellants are sentenced to suffer rigorous imprisonment for 6 months. For the offence punishable under Section 506 read with 34 of the IPC, they are further sentenced to suffer rigorous imprisonment for 6 months. However, both of them are acquitted of offence punishable under Sections 3(1)(xi) and 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act.

2 Briefly stated, facts of prosecution case are thus :

Informant prosecutrix PW1 as well as her husband PW2 Pravin were residents of Village Vardade in Haveli Taluka of Pune District. They are both blind. On 29th August 2008 they had both come to Pune and after finishing off their work. At about 8 p.m., they boarded the bus and reached Khadakwasla at about 9

p.m. They both then waited for a bus for going to their village Vardade. They made inquiry about the arrival of the bus for village Vardade to owner of a pan stall situated at Khadakwasla. At about 9.30 p.m., a passenger jeep came there and PW1 – the prosecutrix and her husband PW2 Pravin boarded that passenger jeep which was going to Panshet as the driver of the said jeep assured to take them to their village Vardade. The blind couple noted from the voice of people in that passenger jeep that there were three men and one woman in that jeep besides the driver. After some time, two men and a woman alighted from the jeep which proceeded further at village Khanapur. At that place, the driver of the jeep called out to his associate Keshav by taking his name and asked Keshav to bring a bottle of water. When Keshav left with other persons, the driver of the jeep made inquiry from PW2 Pravin as to whether PW1prosecutrix is his wife and whether they both are blind. There was some conversation between them and thereafter the person who was addressed as Keshav returned back with a bottle of water. Then onwards journey started. The jeep then proceeded further and after ten minutes the driver of

the jeep stopped the jeep and asked PW1 prosecutrix and her husband PW2 Pravin to get down from the jeep by stating that they have reached their village Vardade. They both alighted but while treading the road found that they have not reached village Vardade.

3 According to prosecution case, at this juncture, the man who was addressed by the driver as Keshav, caught hold of the prosecutrix – PW1 and pushed her to the ground. She was then dragged to the nearby pit. It is the case of prosecution that, then, the driver of the jeep so also the person addressed as Keshav, who was in company of the driver of the jeep, committed rape on the prosecutrix – PW1. They, then, made the couple sit in the same jeep and reached them to their village Vardade. The jeep then went towards Panshet. The prosecutrix – PW1 and her husband PW2 Pravin, then returned to their house. PW2 Pravin called on phone number 100 and he was informed by the police that they should go to Khadakwasla police outpost. On the next day, the couple narrated the incident to their neighbor Ramesh

Yadav. The couple was frightened. Ultimately, they mustered courage and went to police station on 1st September 2008 and lodged the report. Ultimately crime number 399 of 2008 came to the registered at Police Station Haveli, for the offences punishable under Sections 376(2)(g), 323, 506(2) read with 34 of the IPC.

4 Routine investigation followed. On the basis of information from the pan stall owner, both the appellants / accused came to be arrested. Their clothes were seized. The prosecutrix was sent for medical examination. As it was revealed that she and her husband belonged to Scheduled Castes, the offence punishable under Section 3(1)(xi) and 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act came to be added to the case diary of the crime in question. Statement of witnesses came to be recorded. Seized articles were sent for forensic examination. The vaginal swab of the prosecutrix as well as sample of blood of accused persons was sent for forensic examination. Identification parade was held. On completion of the investigation, appellants / accused came to be charge-sheeted.

5 The learned Special Judge framed and explained charges to the appellants /accused. They pleaded not guilty and claimed trial. In order to bring home the guilt to appellants /accused, the prosecution has examined in all twenty witnesses. Ultimately, appellants / accused came to be convicted of offences punishable under Sections 376(2)(g), 323 read with 34 and 506 read with 34 of the IPC and they are sentenced accordingly, as indicated in the opening paragraph of this judgment.

6 I have heard Ms.Ayubi, the learned advocate appearing for appellants / accused persons. She argued that there is no proper identification of appellants / accused. PW1 – prosecutrix as well as PW2 Pravin are blind and as such, their evidence regarding identification of appellants / accused cannot be accepted. She further argued that, other evidence of prosecution is also discrepant. No proper Test Identification Parade was conducted and therefore, appellants / accused are entitled for benefit of doubt.

7 As against this, the learned APP supported the impugned judgment and order of conviction and contended that by adducing clear and cogent evidence, the prosecution has proved guilt of both accused persons.

8 I have carefully considered the rival submissions and also perused record and proceedings including oral evidence as well as documentary evidence adduced by the prosecution. As it is the case of prosecution that both appellants / accused persons have committed rape on PW1 – the prosecutrix, apart from causing hurt to her and criminally intimidating PW1 – the prosecutrix and her husband PW2 Pravin, fate of the prosecution case, to a large extent, hinges on testimony of both these witnesses. If ultimately, testimony of both these witnesses is found to be trustworthy and truthful, then the conviction recorded by the trial court will have to be maintained. Therefore, it is apposite to consider testimony of PW1 – the prosecutrix and PW2 Pravin at the outset.

9 It is in evidence of PW1 – the prosecutrix and her husband PW2 Pravin that on 29th August 2008, they had been to Pune and at about 8.00 p.m., they boarded the bus for returning to their village Vardade. They alighted from the bus at Khadakwasla at about 9.00 p.m. for going to their village Vardade. There they met pan stall owner PW4 Prashant Badade and inquired with him about mode of travel to village Vardade. They remained at the bus stop of Khadakwasla up to 9.03 p.m. Both these witnesses further deposed that at about 9.03 p.m., one passenger jeep came there and the driver of that jeep asked them as to where they wanted to go. The driver informed them that he is going to Panshet and he would drop them at village Vardade. Evidence of PW1 – the prosecutrix and her husband PW2 Pravin shows that, therefore, they boarded that passenger jeep. Apart from them, there were three men and one woman as well as the driver in the said jeep. Both these witnesses stated that after travelling some distance, two men and one woman alighted from the jeep. The jeep then stopped at village Khanapur. The driver

asked one person by calling out to him as Keshav to bring a bottle of water. When that person left, the driver had a talk with PW2 Pravin for making inquiries about their marital status, place of residence, whether they can see etc. Then, the man who left for bringing the water bottle, returned and the jeep proceeded further. As per their version, apart from both of them, except the driver and the another person, there was nobody in the passenger jeep. After treading some distance, the driver of the jeep stopped the jeep and informed both of them that they had reached their village. The couple then alighted from the jeep. It is in evidence of both these witnesses that then they started walking ahead with the help of sticks with them. However, they felt a pit instead of their routine road of the village. PW2 Pravin noticed that the way was not a familiar way.

10 What happened next is seen from evidence of PW1 – the prosecutrix. She deposed that, then, the person other than the driver, who was called as Keshav by the driver, caught her and pushed her in the pit. The driver of the jeep caught hold of her

husband. Thereafter, the person who was called as Keshav lifted her saree, removed her nicker and attempted to commit rape on her. The attempt was not successful. Then, as per version of the prosecutrix, the driver of the vehicle committed rape on her, and thereafter, the person, who was called as Keshav, committed rape on her.

11 PW2 Pravin has deposed that after alighting from the jeep and noticing that they are not on a familiar way, he heard sound of the scuffle and shouts of his wife “save save.” PW2 Pravin deposed that the driver of the jeep caught hold of him and threatened him to keep quiet. He heard sound of dragging his wife. After sometime, as per version of this witness, the driver went away and he was still hearing sound of cries of his wife. As deposed by PW2 Pravin, after about 15 minutes, the driver and the person who was addressed by the driver as Keshav, came back along with his wife. They were made to sit in the vehicle and both of them were then dropped at village Vardade.

12 Evidence of the couple further shows that then PW2 Pravin called on telephone number 100, contacted the police, but he was advised to go to police out post at Khadakwasla. Because of frightened state of mind, they could not go to police out post at Khadakwasla in night hours. It is in their evidence that they had disclosed the incident to their neighbor, named Ramesh Yadav. On 1st September 2008, they both went to Khadakwasla police out post and the report came to be lodged. PW1 – the prosecutrix deposed that the person who was addressed as Keshav was having beard. She stated that clothes worn by her, at the time of the incident, were handed over to police, and she was taken for medical examination. both these witnesses deposed that they were called for identification parade. Evidence of PW2 Pravin shows that he had identified accused persons. PW2 Pravin further deposed that he was also called by police to identify the vehicle and from five similar vehicles he identified the passenger jeep, in which they travelled, as its back seat was in torn condition and there was an iron rod below the seat.

13 Evidence of both these witnesses came to be criticized on the ground that there is delay of about two days in lodging the FIR. However, delay in lodging the report in rape cases cannot be ritualistic formula to discard case of the prosecution. In the case in hand, the couple is a blind couple. They had reached at their home in a remote village named Vardade, after the incident at late night. Police station was not situated in the village. Rather, the nearest available police out post was at Khadakwasla, in a totally distant village. The blind couple had suffered the trauma of rape on the wife. In such a situation, it is not expected of a blind couple to approach police immediately. It is seen that their neighbour had also not offered necessary help to them. This, satisfactorily explains the delay in lodging FIR, as even immediate phone call to phone number 100 meant for help by police to the citizens, did not yield the desired result. Apart from this, there seems to be no material from cross-examination of both these witnesses, to disbelieve their version about the incident in question.

14 Now let us examine whether other evidence adduced by the prosecution corroborates version of both these witnesses and identity of both appellants / accused is established therefrom. PW4 Prashant Badade, owner of the pan stall at village Khadakwasla, shows that his pan stall is at Khadakwasla bus stop. On 29th August 2008, at about 9.30 p.m., one blind couple alighted from the bust at the said bus stop. PW4 Prashant Badade further deposed that the couple was waiting for a bus. In the meanwhile, a Mahendra jeep driven by appellant accused no.2 Nitin Pavale came there from the side of Pune. It was carrying 2/3 other passengers. As seen from the evidence of PW4 Prashant Badade, the blind couple boarded in Mahendra jeep driven by appellant / accused Nitin Pavale for their onwards journey.

15 PW6 Sachin Javalekar is one of the passengers travelling in the passenger jeep in which the victim of the crime was travelling. It is in evidence of PW6 Sachin Javalekar that from Dandekar bridge area of Pune, at about 8.15 p.m. of 29th

August 2008, he boarded the passenger jeep driven by appellant / accused no.2 Nitin Pavale for going to Khanapur. This witness was knowing appellant / accused no.2 Nitin Pavale. He deposed that appellant / accused no.1 Maruti Pavale was also in the said jeep. As per version of this witness, when the jeep reached at Khadakwasla bus stop, a blind couple boarded that jeep. At that time, two ladies and one passenger named Narayan Javale, apart from both appellants / accused were travelling in that jeep. As per version of PW6 Sachin Javale, at village Gorekhand, other ladies passengers from the jeep alighted the jeep. He further deposed that he himself as well as co-passenger Narayan Javale got down a Khanapur, leaving the blind couple in the jeep in company of both appellants / accused. The jeep then went towards Panshet. Evidence of PW4 Prashant Badade and PW6 Sachin Javale as such, goes to show that PW1 – the prosecutrix and PW2 Pravin were in company of both appellants / accused up to village Khanapur and then continued to be in company of accused persons when the passenger jeep left Khanapur and went towards Panshet.

16 Test Identification Parade (TIP) was conducted by the prosecution for identifying accused persons on 18th November 2008. As PW1 – the prosecutrix and her husband PW2 Pravin are blind, the identification was adopted through voice and evidence of PW11 Jagdish N. - the Executive Magistrate, who conducted this parade shows that twelve dummies were used apart from appellants / accused for the purpose of conducting voice identification parade. Each person was asked to read a paragraph selected from Marathi newspaper. Evidence of PW11 Jagdish N. – the Executive Magistrate shows that PW2 Pravin has pointed both appellants / accused persons from their voice and accordingly, Memorandum of Test Identification Parade at Exhibit 51 came to be prepared. There is no reason to disbelieve version of PW11 Jagdish N. Cumulative effect of evidence coming from mouth of PW1 - the prosecutrix, her husband PW2 Pravin, PW4 Prashant Badade, PW6 Sachin Javale and PW11 Jagdish N. – the Executive Magistrate, is that of establishing identity of appellants / accused as the perpetrators of the crime in question. However, this is not the only evidence which is available against both appellants / accused persons.

17 During the course of investigation, the Investigator

had collected and seized vaginal swap of the prosecutrix PW1. The sample was collected in presence of the Resident Medical Officer of the hospital, apart from the other nurses and Dr.Pankaj, the lecturer of the unit. That sample came to be dispatched by the Sassoon General Hospital of Pune to the forensic laboratory at Mumbai vide letter Exhibit 98. Sample of blood of both appellants / accused was drawn for conducting the DNA test and it was carried to the forensic laboratory by PW15 Uttam Kamble. Evidence of PW18 Shrikant Lad, Assistant Chemical Analyser of the forensic laboratory at Mumbai shows that upon chemical analysis of the vaginal swap of the prosecutrix and sample of blood of both appellants / accused persons, it was revealed that DNA profile of the semen detected in the vaginal swab of the victim and the DNA profile of the blood of both appellants / accused persons are of the same paternal progeny. The semen i.e. sperms found in the vaginal swap of the prosecutrix were those of appellants / accused persons. PW18 Shrikant Lad, Assistant Chemical Analyser, proved the report at Exhibits 96 and 97 which corroborates his version. With this evidence on record, complicity

of both appellants / accused persons in the crime in question of commission of rape on the prosecutrix, is fully established.

18 Evidence of prosecutrix PW1 shows that she was dragged by appellants / accused person and was taken to the pit where she was subjected to sexual violence. It is seen from the evidence of the prosecutrix PW1 as well as her husband PW2 Pravin that the couple was criminally intimidated by appellants / accused persons. In the wake of this evidence, no fault can be found in the finding of the learned Special Judge recording guilt of both appellants / accused persons for offences punishable under Sections 376(2)(g), 323 read with 34 and 506 read with 34 of the IPC. Proportionality is also maintained by the learned Special Judge while sentencing both appellants / accused persons, by keeping in mind, nature of proved offence.

19 In the result, the appeal is devoid of merits and the same is dismissed.

(A. M. BADAR, J.)