

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.367 OF 2014

ASLAM RASHID SHAIKH

)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA

)...RESPONDENT

Ms.Rohini Dandekar, Appointed Advocate for the Appellant.

Ms.N.S.Jain, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 1st SEPTEMBER 2017

ORAL JUDGMENT :

1 By this appeal, the appellant / accused is challenging the judgment and order dated 4th February 2013 passed by the learned Additional Sessions Judge, Greater Mumbai, in Sessions Case No.11 of 2012, thereby convicting the appellant / accused for the offence punishable under Section 376 of the Indian Penal Code (IPC) and sentencing him to suffer rigorous imprisonment

for 7 years, apart from directing him to pay fine of Rs.5,000/-, and in default directing him to undergo further rigorous imprisonment for 6 months.

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

(a) The prosecutrix / PW1 was minor at the time of the alleged incident. She had lost her father. She was taken care of by her stepmother. However, her stepmother intended to marry her to an old person. The prosecutrix refused. Hence, her stepmother gave Rs.500/- to her and asked her to go to Mumbai. As the prosecutrix was virtually driven out of her house at Bihar by her stepmother, she came to Mumbai by train. By walking she went to Seven Bungalows area of Mumbai and started weeping. An old lady named Suman gave shelter to her. However, soon thereafter, as said Suman became angry with her because she was unable to cook food, the prosecutrix took shelter of a person named Iqbal and started residing at his house with Iqbal and his wife.

(b) According to prosecution case, Iqbal committed rape on the prosecutrix by indulging in forcible sexual intercourse with her on few occasions. Then, the prosecutrix was introduced to the appellant / accused Aslam. One day, Aslam took her to a cart selling vada pav and then she was taken to the grocery shop where the appellant / accused Aslam used to work. Thereafter, the appellant / accused took her in the nearby washroom and committed rape on her.

(c) The prosecutrix / PW1 then returned to the house of Iqbal and his wife. Then again, she started residing with the old lady named Suman.

(d) In the meanwhile, PW2 Rebeka Bhingardive, A.S.I. working with Versova Police Station came to know from maid servant working in the area that a minor girl has come in the slum area and is wandering here and there. PW2 Rebeka Bhingardive then traced out the prosecutrix. Upon inquiring with her, the prosecutrix disclosed the incident which took place and lodged the

report which resulted in registration of Crime No.307 of 2011 for the offence punishable under Section 376 read with Section 34 of the IPC with Police Station Versova. The appellant / accused came to be arrested. Co-accused Iqbal could not be arrested by police. The prosecutrix was subjected to medical examination as well as ossification test. Her clothes and clothes of the appellant / accused came to be seized and on completion of routine investigation, the appellant / accused came to be charge-sheeted.

(e) The appellant / accused pleaded not guilty to the charge framed and explained to him and claimed trial. The prosecution examined in all six witnesses to prove the charge leveled against the appellant / accused. PW1 is the prosecutrix and the First Information Report (FIR) lodged by her on 24th July 2011 is at Exhibit 13. Rebeka Bhingardive, A.S.I. is examined as PW2. PW3 Dr.Baban Shinde, at the relevant time, was working as Medical Officer at Nagpada Police hospital. He had examined the prosecutrix and conducted ossification test on her. PW4 Suresh Wadke, P.S.I. with Versova Police Station had recorded the FIR

Exhibit 13. He had seized clothes of the prosecutrix vide panchnama Exhibit 22 and had conducted spot panchnama Exhibit 23. PW5 Bapu Bhandalkar, A.P.I., had conducted the investigation of this crime. PW6 Rajni Salunkhe is a panch witness to the seizure panchnama Exhibit 27, whereby clothes of the appellant / accused came to be seized.

(f) Defence of the appellant / accused is that of total denial. After hearing the parties, by the impugned judgment and order, the learned Additional Sessions Judge, Greater Bombay, Mumbai, was pleased to convict the appellant / accused for the offence punishable under Section 376 of the IPC and he was sentenced accordingly, as indicated in opening paragraph of the judgment.

3 I have heard Ms.Rohini Dandekar, the learned advocate appointed at the cost of the State to represent the appellant / accused. By taking me through the record and proceedings, she vehemently argued that entire conduct of the

prosecutrix is unnatural. The prosecutrix could have disclosed to wife of Iqbal about commission of rape on her by Iqbal as well as the appellant / accused Aslam. According to the learned advocate appearing for the appellant / accused, evidence of the prosecutrix shows that the appellant / accused had taken a room on rent. If really the appellant / accused was intending to commit rape on the prosecutrix, he could have very well done that act in the room itself. The spot of the incident, as seen from evidence on record, was not suitable for commission of such an act, as its floor was wet and evidence of the prosecutrix on this aspect is clear. Therefore, case of the prosecution suffers from improbability. The learned advocate further argued that evidence of the prosecutrix and that of PW2 Rebeka Bhingardive, A.S.I., is totally divergent. PW2 Rebeka Bhingardive deposed that the prosecutrix was found in company of the appellant / accused whereas according to the prosecution, she learnt about arrest of accused person while staying with an old lady named Suman and then she went to Police Station. With this, the learned advocate submitted that the learned trial court erred in convicting the appellant / accused.

4 I have heard the learned APP appearing for the State. She supported the impugned judgment and order by submitting that evidence of the prosecutrix establishes the guilt of the appellant / accused.

5 I have carefully considered the rival submissions. I have also gone through the record and proceedings including oral as well as documentary evidence adduced by the parties.

6 Case of the prosecution is to the effect that the appellant / accused had committed rape on the PW1/prosecutrix, who at the relevant time had not attained the consenting age, she being below 16 years of age. The prosecutrix was hailing from Bihar State. After death of her father, she was maintained by her stepmother for some time and then she was left to fend herself by asking her to leave the house for Bombay. Considering this background of the prosecutrix, one cannot expect any documentary evidence regarding her age. Hence, no infirmity can be found in the case of the prosecution merely because

documentary evidence regarding age of the prosecutrix is not placed on record.

7 Be that as it may, for establishing age of the prosecutrix, the prosecution has relied on evidence of PW3 Dr.Baban Shinde of Nagpada Police hospital. This witness had conducted ossification test on the PW1 / prosecutrix in July 2011 and had deposed that the PW1 / prosecutrix was aged about 14 to 15 years at that time. Evidence of this witness is duly corroborated by contemporaneous certificate issued by him by conducting ossification test. Evidence of PW3 Dr.Baban Shinde, so far as it relates to age of the prosecutrix, is not at all challenged in the cross-examination. The prosecutrix herself had deposed her age as 15 years. Even if margin of error in ossification test is considered, then also it appears that the prosecutrix, at the time of alleged commission of rape on her by the appellant / accused was below 16 years of age.

8 Dehors her age, let us examine whether prosecution is successful in establishing commission of rape on the prosecutrix. The consent, as understood in law, is an act of reason, mind weighing as in balance, what is good and what is bad, for oneself. The theory of consensual sex is not propounded even in cross-examination of prosecutrix, as defence of the appellant / accused is that of total denial. In the wake of this situation, it is in evidence of the prosecutrix that after she reached Mumbai, she took shelter at the house of an old lady named Suman. She resided there for about a month and then as that lady was annoyed with her, she left the house. As per version of the PW1 / prosecutrix, one Irfan then reached her to the house of one Bhabhi, who was wife of Iqbal. She stayed with Iqbal and his wife and during that stay, on a few occasions, Iqbal committed rape on her. The PW1/ prosecutrix further deposed that then Iqbal introduced her to the appellant / accused Aslam. His wife asked her about marriage with Aslam. Said Aslam had hired a room. The prosecutrix further deposed that on one occasion, said Aslam took her to a garden and then to a vadapav shop. Then, she was

taken by Aslam to a bathroom, near the shop, where she was raped by said Aslam. The prosecutrix deposed that as she was frightened, she did not shout. Then, wife of Iqbal told her not to reside in their house. She, therefore, joined company of Suman. Within one to two months, she learnt about arrest of accused person and therefore, along with Bhabhi (wife of Iqbal) she went to police station and lodged report Exhibit 13.

9 The prosecutrix was subjected to searching cross-examination. Some omissions were pointed out in her version during cross-examination. However, core of her testimony, so far as offence of rape is concerned, is not at all shaken. There is no cross-examination on the point of offence of rape committed on her by Aslam. Her cross-examination does not indicate that what had taken place between her and Aslam on that day, was with her consent and with her free will she submitted her chastity at the disposal of said Aslam. Consequently, there is no reason to disbelieve version of the PW1 / prosecutrix about commission of forcible sexual intercourse with her by Aslam.

10 The prosecutrix was at the mercy of strangers after she was literally driven out of her house in Bihar State by her stepmother. Initially, she took shelter in the house of Suman and then at the house of Iqbal and his wife. In such a situation, it was not expected of the prosecutrix to muster the courage to disclose the incident to either wife of Iqbal or to Suman. The prosecutrix must have feared that because of such disclosure, she might have been driven out by those persons, who had offered shelter to her. Hence, in the fact situation of the instant case, conduct of the prosecutrix of not disclosing the incident to others, does not make her version doubtful. Similarly, choice of place of incident, cannot throw doubt on case of the prosecution. Evidence of the prosecutrix shows that the appellant / accused had chosen bathroom to commit the offence. There can be several reasons for choice of place of offence. Cross-examination of the prosecutrix does not show that room which was taken on rent by Aslam was located at a secluded place and as such, was more suitable for commission of offence. Merely because the act was committed in the bathroom, though the appellant / accused was having a

rented room at his disposal, is not sufficient to discard version of the prosecutrix about the incident.

11 Evidence of the prosecutrix that she was subjected to forcible sexual intercourse by the appellant / accused is gaining corroboration from version of PW3 Dr.Baban Shinde who examined her medically after lodging the FIR. Evidence of PW3 Dr.Baban Shinde shows that upon internal examination of the prosecutrix, he found her hymen torn at 3, 6 and 9 O' Clock positions. This medical evidence duly corroborates testimony of the prosecutrix.

12 Clothes of the prosecutrix came to be seized by seizure panchnama Exhibit 22 and that of the appellant / accused came to be seized by panchnama at Exhibit 27, as seen from evidence of PW4 Suresh Wadke, P.S.I, and that of PW6 Rajni Salunkhe. However, forensic evidence is not supporting the case of the prosecution. Evidence of PW5 Bapu Bhandalkar, A.P.I., explains the line of investigation conducted by him.

13 As the clear, cogent and trustworthy evidence of the prosecutrix is supported by medical evidence adduced by the prosecution, no infirmity can be found in the impugned judgment and order of conviction, and as such, the appeal fails. Hence the order :

ORDER

The appeal is dismissed.

(A. M. BADAR, J.)