

CRIMINAL APPEAL NO.507 OF 2011

...Appellant

...Respondent

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Mr. P.H. Gaikwad-Patil, APP for the Respondent -State.

DATED : 7th/8th AUGUST, 2017.

ORAL JUDGMENT :

The Appellant herein, who was the accused in Sessions Case No.11 of 2010 has challenged the judgment and order dated 6th April, 2011 whereby the learned Special Judge, Baramati, convicted and sentenced the Appellant as under:

- i) rigorous imprisonment for ten years and fine of Rs.1,000/- i/d rigorous imprisonment for three months for the offence punishable under section 376 IPC;
- (ii) rigorous imprisonment for seven years and fine of Rs.1,000/- i/d rigorous imprisonment for three

months for the offence punishable under section 366
IPC;

(iii) rigorous imprisonment for three years and fine of
Rs.500/- i/d rigorous imprisonment for three
months for the offence punishable under section 363
IPC;

(iv) rigorous imprisonment for two years and fine of
Rs.500/- i/d. rigorous imprisonment for three
months for the offence punishable under section 506
IPC;

(v) rigorous imprisonment for five years and fine of
Rs.1000/- i/d. rigorous imprisonment for three
months for the offence punishable under section 3(i)
(xii) of the Scheduled Castes and Scheduled Tribes
(Prevention of Atrocities) Act, 1989.

2. The case of the prosecution in brief is that on 13.11.2009 the prosecutrix, who was a minor girl of scheduled caste, was playing with her friends near Siddheshwar Temple at Baramati. It is alleged that the Appellant came near the said temple and under the pretext of dropping the prosecutrix to her residence, he took her near the canal at

Baramati. The Appellant took the prosecutrix under a nilgiri tree, he tied her hands by nylon rope and stuffed a handkerchief in her mouth and thereafter had forcible sexual intercourse with her. After the said incident, the Appellant dropped the prosecutrix near the school. He threatened to cause death of prosecutrix in case she disclosed the incident to anyone. The prosecutrix thereafter returned to her residence. On the next day at about 4 to 4.30 p.m. on being questioned about her whereabouts on the previous evening, the prosecutrix narrated the incident to her mother. The prosecutrix alongwith her parents went to the police station and lodged the First Information Report (FIR), which is at Exhibit-15.

3. The case was investigated by PW6- Namdev Miottewas, Dy. S.P., Baramati. He recorded the statements of PW3- Nandkumar Sable, father of the prosecutrix and other prosecution witnesses. He referred the prosecutrix for medical examination. She was examined by Dr. Rahul Lakhe from Sasoon General Hospital. The prosecutrix was also examined by Dr. Amol Shinde (PW5) for age assessment. The Investigating Officer obtained caste certificate (EXh.33 &34). The prosecution has also relied upon School Admission Form (Exh.28), School Leaving and Bonafide Certificate (Exhs.30 and 31) and the

extract of School Register (Exh.29) to prove the age of the prosecutrix. The Investigating Officer prepared spot panchanama at Exhibit 17, he arrested the Appellant and recovered the nylon rope and the handkerchief from the scene of offence, as per the disclosure statement made by the Appellant. He seized the clothes worn by the Appellant as well as by the prosecutrix and referred the said clothes and the other material including vaginal swab and smears for chemical analysis. Upon concluding the investigation, the Investigating Officer submitted the charge sheet for the above mentioned offences.

4. The case was committed to the Court of Sessions, Baramati, District-Pune. The learned Special Judge, Baramati framed the charge. The Appellant pleaded not guilty and claimed to be tried. The prosecution in support of its case examined six witnesses. The statement of the Appellant was recorded under section 313 of the Code of Criminal Procedure. The defence of the Appellant was of false implication.

5. The learned Special Judge, after considering the evidence on record, held the Appellant guilty and convicted and sentenced him as stated above. Being aggrieved by the conviction and sentence, the

Appellant has preferred this appeal.

6. Ms Shaikh Gazala Riyaz, the learned counsel for the accused has submitted that the prosecution has failed to prove that as on the date of incident the prosecutrix was below 16 years of age. She has further submitted that the evidence of the prosecutrix is not corroborated by medical evidence. She has submitted that the CA report also does not conclusively show that the victim was subjected to rape. She has submitted that the testimony of the prosecutrix does not inspire confidence and hence, accused cannot be convicted solely on the basis of uncorroborated testimony of the prosecutrix. She has relied upon the decisions of the Apex Court in *Bibhishan Vs. State of Maharashtra*, 2008 ALL MR (Cri) 517(SC), *Dominic Misquita and Etc. Vs. The State*, 1996 CRI. L.J. 2799, *Balasaheb Vs. The State of Maharashtra* 1994 CRI L.J. 3044, judgment of the Calcutta High Court in *M.C. Prasannan Vs. State*, 1999 (2) Crimes 475, and judgments of this Court in *Sheikh Salim Sheikh Ismail Vs. State of Maharashtra* 2005 (2) Bom.C.R. (Cri.) 322, *Aba @ Dinkar Girdhar Koli vs. State of Maharashtra*, 2008 (3) AIR Bom R 332, *State of Maharashtra vs. Rameshwar Shridhar Jaware and Anr*, 2008 CRI. L.J. 675, *State of Maharashtra Vs. Subhash Haribhau Bagale*, 2008

(1) Bom.C.R. (Cri.) 388.

7. Mr. P.H. Gaikwad, the learned APP has submitted that the impugned judgment does not call for interference. He submits that the evidence of PW5-Dr. Shinde as well as the School records amply prove that the prosecutrix was below 16 years of age. He further submits that the testimony of the prosecutrix cannot be disbelieved for want of corroboration, moreover when the testimony of the prosecutrix inspires confidence proves the involvement of the accused. He has further submitted that the fact that nylon rope and handkerchief were recovered from the spot of the incident as per the disclosure statement made by the accused corroborates the testimony of the prosecutrix. He has relied upon the decisions of the Apex Court in *Lillu @ Rajesh & Anr. Vs. State of Haryana 2013 DGLS (Soft.) 251*, *State of Uttar Pradesh Vs. Chhoteylal, 2011 DGLS (Soft.) 51*, *Puran Chand vs. State of H.P , (2014) 5 SCC 689*, *Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat (1983) 3 SCC 217*, *State of U.P Vs. Chhoteylal AIR 2011 SC 697*, *Lillu alias Rajesh and Anr. vs. State of Haryana, AIR 2013 SC 1784*.

8. I have perused the records and considered the submissions

advanced by the learned counsel for the accused and the learned APP for the Respondent -State.

9. The accused is alleged to have kidnapped and had sexual intercourse with the prosecutrix, who was below 16 years of age who belongs to a Scheduled Caste. As regards the age of the prosecutrix, the testimony of the prosecutrix reveals that her date of birth is 5.6.1996. She has deposed that as on the date of the incident she was studying in VIth standard in School No.6 of Baramati Nagar Parishad.

10. The prosecution has not produced the birth certificate of the prosecutrix. Nevertheless, the prosecution has examined PW2- Ushadevi Gondarde, the Head Mistress of School No.6 of Baramati Nagar Parishad. The testimony of PW2 reveals that the prosecutrix was a student of the said School from 26.6.2001 till 29.7.2010. She has produced the admission application at Exhibit 28 submitted by the father of the prosecutrix. She has also produced extract of the entry at Sr. No.4132 in the General Register of the School wherein the date of the birth of the prosecutrix is recorded as 5.6.1996. PW2 has also produced School Leaving Certificate and Bonafide Certificate at Exhibits 30 and 31 wherein the birth date of the prosecutrix is

recorded as 5.6.1996. No evidence has been elicited in the cross examination to impeach the credibility of this witness and/or to disbelieve her testimony. The evidence of PW2 vis-a-vis certificates at Ex. 30 and 31 thus prove that the prosecutrix was a student of School No.6 of Baramati Nagar Parishad and that as per the school records her birth date is 5.6.1996.

11. The prosecution has also examined PW5 Dr Amol Shinde, Assistant Professor in Forensic Medical Department, B.J. Medical, Pune, who had examined the prosecutrix for age determination. PW5-Dr. Amol Shinde has deposed that he had conducted radiological examination of the prosecutrix. He has opined that on the basis of the clinical and radiological examination, the age of the prosecutrix on 18.11.2009 was above 13 years but below 15 years, including the error of margin of two years. He has produced the age assessment report at Exh.40. In his cross-examination, he has stated that centers for lower end of humerus appear before age of 14 and fuse between age of 14 to 16. He has stated that considering the radiological findings, the age of the prosecutrix could be between 14 to 16 years. He has denied the suggestion that the age of the prosecutrix was between 16 to 18 years.

12. It may be mentioned that in *State of Uttar Pradesh Vs. Choteylal 2011 AIR (SC) 697*, the Apex Court after considering a three Judge Bench decision in *State of Karnataka Vs. Bantara Sudhakara @ Sudha (2008) 11 SCC 38* has held that there is no such rule much less and absolute one that two years have to be added to the age determined by a Doctor. In the instant case, the evidence on record reveals that the prosecutrix was a student of sixth standard and as per the school records, as on the date of the incident she was about 13 years of age. The evidence of PW5 also reveals that the prosecutrix was between the age group of 14 to 15 years. A cumulative reading of the evidence of PW2 and PW5 supports the case of the prosecution that as on the date of the alleged incident, the prosecutrix was below 16 years of age.

13. As regards the caste of the prosecutrix, the testimony of the prosecutrix (PW1) and her father Nandkumar Sable (PW3) vis-à-vis the certificates at Ex. 33 and 34 reveal that the prosecutrix belongs to Hindu Mahar Caste, which is recognized as a Scheduled Caste.

14. The next crucial question is whether the prosecution has established beyond reasonable doubt that the Appellant had kidnapped

her from lawful guardianship and had sexual intercourse with the prosecutrix with or without her consent.

15. The Apex Court in catena of decisions including the decisions in *Bharwada Bhoginbai Hirjibhai, Choteylal (supra)* and other decisions relied upon by the prosecution has held that a victim of rape is not an accomplice to the crime. Her evidence cannot be tested with suspicion as that of an accomplice. Her evidence is similar to the evidence to an injured witness and conviction can be based on the testimony of the rape victim without seeking corroboration, if her testimony inspires confidence. It is only by way of abundant caution the Court may look for some corroboration so as to satisfy its conscious and rule out false accusation. It is also well settled that the character or the reputation of the prosecutrix is of no relevance and that her testimony cannot be discarded on the ground that the prosecutrix is a woman of easy virtue. The Apex Court has also observed that in appreciating the evidence of the prosecutrix the Court should examine the broader probabilities of the case and should not get swayed by minor contradictions and insignificant discrepancies particularly keeping in mind the prevalent conditions in the Indian Society.

16. In the light of the above well-settled principles, the moot question for consideration is whether the testimony of the prosecutrix is credible and worthy of reliance.

17. The testimony of the prosecutrix reveals that on 13.11.2009 she was in school between 11.00 a.m. to 4.00 p.m. she left the school at about 4.30 p.m. along with her friends Pooja, Komal, Surmaya and Saniya. After playing outside Siddheshwar Temple for about half an hour, her friends left the place. While she was searching for her footwear, the accused came on a motorcycle and on the pretext of dropping her home, he took her towards Gandhi Chowk, Bhaagwan Chowk and then to Patas Road. The accused told her to keep quiet when she told him that the said road does not lead to her house. The accused proceeded towards the canal road. He parked the motorcycle near the Ring Road, Baramati. He took her near a nilgiri tree, tied her hands with a nylon rope and stuffed a handkerchief in her mouth and thereafter had sexual intercourse with her. He threatened to kill her in case she disclosed the incident to anyone. The accused thereafter untied the nylon rope, removed the handkerchief from her mouth, and dropped her near the school from where she walked home.

18. PW1 has deposed that on the next day at about 11.00 a.m. her mother told her that her friends had come home to inquire about her. When the mother of the prosecutrix questioned her as to where she had gone after the examination on the previous evening, that she narrated the incident to her. Her mother narrated the incident to her father after he returned home at about 10.00 p.m. The parents of the prosecutrix took her to the police station on the same night and she lodged the FIR, at Exh.15. She has deposed that she has shown the place of the incident to the police on 15.11.2009. She also handed over her clothes worn by her on the date of the incident to the police. She was sent to the Sasoon General Hospital, Pune for medical examination.

19. In her cross-examination, PW1 has deposed that she knew the accused since her childhood. She has deposed that the accused used to talk to her and her family members whenever he passed by her house. She has further stated that they passed through heavy traffic and a market while proceeding towards the canal. She has stated that construction work of a bridge was in progress at the place where the accused had parked the motorcycle. She has stated that after parking the motorcycle they walked for about 15 to 20 minutes to reach the

place of the incident.

20. The testimony of the prosecutrix reveals that after the school hours she had played with her friends for about half an hour. Her friends had left the place but she remained behind to search for her footwear. It was at this time that the accused took her on his motorcycle under the pretext of dropping her home. It is pertinent to note that the prosecution has not examined the friends of the prosecutrix to prove her presence near the temple i.e. the place from where the accused had allegedly kidnapped the prosecutrix. This was relevant as the evidence of the prosecutrix reveals that her friends had gone to her house and inquired about her with her mother. This fact clearly indicates that the prosecutrix was not with her friends outside the Sidheshwar temple and this casts a doubt on the veracity of her statement that the accused had taken her away from near the temple.

21. The evidence of the prosecutrix further reveals that the accused had taken her from a crowded locality and thereafter she had walked with the accused to the place of the incident for about 15 to 20 minutes. The evidence of the prosecutrix does not indicate that she had raised any alarm and had tried to draw attention of any person.

22. The prosecutrix has claimed that after the incident the accused had dropped her near the school and that she had walked home from the school. Her mother was present in the house. The prosecution has not examined the mother of the prosecutrix and has not adduced any evidence to prove the physical or mental state of the prosecutrix immediately after she had returned home. The evidence of the prosecutrix also reveals that she had not disclosed the incident to her mother till the time her mother questioned her as to her whereabouts on the previous day after her examination. The conduct of the prosecutrix in not confiding with her mother is highly unnatural. On thread bear analysis of the evidence, in my considered view, the evidence of the prosecutrix is not of sterling quality and hence cannot form sole basis of conviction.

23. It is also to be noted that the prosecutrix has stated that the accused had tied her hands by a nylon rope and had forcible sexual intercourse with her. She has stated in her cross-examination that she had sustained injuries on her private parts. It is to be noted that Dr. Rahul Lakhe at Sasoon General Hospital had examined the prosecutrix. The medical report at Exhibit 38 indicates that there were no injuries

on either the genitals or any other part of the body of the prosecutrix. The hymen was torn. The Doctor had opined that the prosecutrix was habituated to penetrative vaginal sexual intercourse.

24. The medical evidence does not indicate that there were any marks of tying of a nylon rope. There were no injuries on genitals or any other part of the body. The medical evidence rules out the possibility of recent forcible sexual intercourse. The medical evidence therefore, does not corroborate the testimony of the prosecutrix.

25. The medical report at Exhibit 38 reveals that pubic hair, vaginal smears and swabs of the prosecutrix were collected. The said material alongwith the clothes of the prosecutrix as well as the clothes of the accused were sent for CFSL examination. The CFSL report, which is at Exhibit 44 reveals that no semen was detected on either vaginal smear swab or clothes of the prosecutrix and the accused. The said report also therefore, does not corroborate the case of the prosecution.

26. It may be mentioned that the CA report shows that the underwear of the prosecutrix was stained with blood and that it

appeared to be washed. The evidence of PW1 indicates that at the relevant time, she was having her menstrual cycle. Hence, finding of blood stains on the underwear of the prosecutrix can hardly be considered as a relevant circumstance. In short, the medical evidence as well as the CA report does not in any manner corroborate the testimony of the prosecutrix.

27. The prosecution has examined PW4 - Santosh Bhopkar to prove the recovery of the nylon rope and the handkerchief at the instance of the accused. PW4 has deposed that on 18.11.2009 he was called to the police station at Baramati city police station. He has stated that the accused was present at the police station. He had disclosed that he was ready to produce the rope and the handkerchief, which were kept in the bush at the place of the incident. He has stated that the disclosure statement was recorded in their presence. Thereafter they proceeded to the place of the incident. He has stated that the accused had removed one nylon rope and a handkerchief from the bushes at the place of the incident. The said handkerchief and nylon rope were seized under the panchanama at Exhibits 36 and 37. He has denied the suggestion that the accused had not made any disclosure statement and that nylon and handkerchief were not

recovered at the instance of the accused.

28. It may be mentioned that the testimony of the prosecutrix does not indicate that the accused had concealed the rope and the handkerchief in the bushes. Furthermore, the investigating officer had already visited the place of the incident on 15.11.2009 and had drawn a spot panchanama in presence of pancha witnesses. The spot panchanama at Exhibit 17 contains a vivid description and details of the place of the incident. It is indeed surprising to note that despite such thorough search of the place of the incident, the investigating officer had not noticed the rope and the handkerchief. The recovery of the said rope and the handkerchief is doubtful and cannot be believed. Even otherwise, there is absolutely no evidence to prove that the said nylon rope and handkerchief were used to tie the hands or to gag the mouth of the prosecutrix and hence the recovery of the rope and the handkerchief has no evidentiary value.

29. In the case of *Sadashiv Ramrao Hadbe v/s State of Maharashtra (2006) 10 SCC 92*, the Apex Court has observed thus:

8. It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is

capable of inspiring of confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen.

30. In the instant case, the deposition of the prosecutrix taken as a whole, does not inspire confidence. The evidence of the prosecutrix is not corroborated by medical or any other evidence. Under the circumstances, the accused cannot be convicted on the sole testimony of the prosecutrix.

31. Under the circumstances and in view of discussion supra, the impugned judgment cannot be sustained. Hence, the following order:-

(i) The appeal is allowed;

(ii) The conviction and sentence recorded by Special

Sessions Judge, Baramati vide impugned judgment dated 6.4.2011 in Special Case No.11 of 2010 is quashed and set aside;

- (iii) The accused is acquitted of offences punishable under sections 376, 363, 366 and 506 of the Indian Penal Code and section 3(i) (xii) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989;
- (iv) The accused be released forthwith if not required in any other case.

(ANUJA PRABHUDESSAI, J.)