

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NO.449 OF 2013
WITH
CRIMINAL APPLICATION NO.587 OF 2013
IN
CRIMINAL APPEAL NO.449 OF 2013**

ANANT @ ANNA SHANKAR SHIVDE)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

WITH

SUO MOTU NOTICE NO.1 OF 2016

HIGH COURT ON ITS OWN MOTION)...APPELLANT

V/s.

ANANT @ ANNA SHANKAR SHIVDE)...RESPONDENT

Mr.V.V.Purwant a/w. Mr.Sachin Deokar, Advocate for the
Applicant / Appellant.

Mr.S.V.Gavand, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 17th APRIL 2017.

JUDGMENT :

1 While considering application for suspension of sentence and releasing the applicant / accused on bail, this court on 3rd May 2013 was pleased to issue a notice for enhancement of the sentence imposed on the applicant / accused. Today, the application for suspension of sentence and releasing the applicant / accused on bail along with suo moto notice for enhancement of sentence came up for hearing and both parties have advanced their arguments thereon and prayed that the appeal may also be disposed of as they have nothing more to submit even on merits of the case. That is how, the appeal is being decided.

2 This is an appeal challenging the judgment and order dated 20th March 2013 passed by the learned Ad-hoc Additional Sessions Judge, Kalyan, in Sessions Case No.184 of 2011, whereby, the appellant / accused is convicted of offences punishable under Sections 363, 376 and 506 of the IPC. For offences punishable under Sections 363 and 376 of the IPC, the

appellant / accused is sentenced to suffer rigorous imprisonment for a period of 4 years on each count and for the offence punishable under Section 506 of the IPC, he is sentenced to suffer rigorous imprisonment for a period of 1 year. The learned trial court directed that all substantive sentences to run concurrently.

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

The prosecutrix (PW1) is an adult lady residing at Village Dalal Pada. Her mother PW2 Vithabai had deserted father of the prosecutrix, who was residing at Bhavarthe Pada, since childhood of the prosecutrix. Both mother and daughter were residing with Jaywant Dalal - brother of PW2 Vithabai since prior to about 18 years of the incident in question. Jaywant – brother of PW2 Vithabai was residing with his wife, one unmarried daughter and two sons, apart from the prosecutrix and her mother at Village Dalal Pada.

4 According to the prosecution case, the incident took place on 12th June 2011. One month prior to the incident, the prosecutrix had been to T.D.C. bank at Shenva for depositing bill of electricity charges. When she was waiting for a bus at Shenva Naka, the appellant / accused came there and asked her whether she wants to marry or not. The prosecutrix did not reply.

5 On 12th June 2011, the prosecutrix was all alone in her house at Dalal Pada. At about 12.30 p.m., the appellant / accused came to her house and informed her that her brother has met with an accident and he is lying on road. He directed her to take money for admitting her brother to hospital and accordingly, the prosecutrix took an amount of Rs.1100/- and went with the appellant / accused. It is case of the prosecution that the appellant / accused had brought a jeep which was parked on road and the driver thereof was sitting at the steering wheel. The appellant / accused then pushed the prosecutrix on the seat of the jeep, tied her mouth by a handkerchief and took her to Kalwada forest area. He took her out from the jeep, pushed her on the

stones, removed her clothes as well as his clothes, and committed rape on her. A person riding on the scooty saw her and stopped. He asked the prosecutrix as to what happened. She disclosed the incident to him. He made her to wear her clothes and brought her to Village Dolkhamb. On his instructions, she sat in the S.T. Bus and went to Shahapur. The appellant / accused chased her. By a rickshaw, she then went to Shahapur Police Station. There, she disclosed the incident to police. Police from Kinhavali Police Station were then called. The prosecutrix then lodged her report at Exhibit 14 which resulted in registration of Crime No.I-30 of 2011 for offences punishable under Sections 376, 363 and 506 read with 34 of the IPC.

6 During the course of investigation, the Investigating Officer has visited the spot of the incident and seized articles found on the spot. Photographs of the spot of the incident were taken. The prosecutrix was subjected to medical examination. The accused came to be arrested. Sample of his semen was taken. Statement of witnesses came to be recorded and on completion of

routine investigation, the appellant / accused came to be charge-sheeted.

7 The learned trial court framed charges for offences punishable under Sections 363, 376 and 506 of the IPC against the appellant / accused. He abjured his guilt and claimed trial. In support of its case, the prosecution has examined as many as nine witnesses. The defence of the appellant / accused is that of total denial. According to defence, there was a love affair between the prosecutrix and the appellant / accused and the prosecutrix proposed to marry her but that proposal came to be rejected by the appellant / accused and then the prosecutrix started demanding money from him, which ultimately resulted in his false implication.

8 After hearing the parties, the appellant / accused came to be convicted and sentenced as indicated in the opening paragraph of this judgment.

9 I have heard the learned advocate appearing for the appellant / accused. He argued that entire evidence of the prosecution is suffering from several infirmities and inconsistencies. The prosecution has sought to establish totally improbable case and evidence of the prosecutrix, who is an adult lady, does not inspire confidence to base conviction. Her evidence is unsupported by medical evidence on record. Though it is case of the prosecution that the incident was witnessed by a rider of the scooty and he had taken the prosecutrix to Village Dolkhamb, this witness is not traced out and examined by the prosecution. Driver of the jeep by which the prosecutrix was allegedly taken is also not examined by tracing him out. During investigation, so called jeep was also not seized. Medical evidence is not supporting case of the prosecutrix and as such, the appellant / accused deserves acquittal. Therefore, notice of enhancement of sentence issued to him needs to be discharged.

10 The learned APP supported the impugned judgment and order contending that it is well settled that evidence of victim

of the rape is required to be accepted by considering broad probabilities of the prosecution case. The learned APP argued that evidence of the prosecutrix is gaining corroboration from the spot panchnama so also the medical evidence adduced by the prosecution on record.

11 I have carefully considered the rival submissions and also perused the record and proceedings including deposition of witnesses and the impugned judgment and order. The principal charge against the appellant / original accused is to the effect that after abducting the prosecutrix he had committed rape on her in the forest area of Village Kalwada. By now it is well settled that finding of guilt in case of rape can be based on the uncorroborated evidence of the prosecutrix, as the very nature of the offence makes it difficult to get direct corroborative evidence. Minor discrepancies in the version of the prosecutrix cannot be made use of, for acquitting the accused in cases of sexual offences. In certain cases, however, corroboration is ordinarily required. Testimony of a woman having attained majority and who is

habitual to sexual intercourse may require corroboration depending on facts of a particular case as there is likelihood of leveling accusation of rape on account of instinct of self preservation. These aspects will have to be kept in mind in order to appreciate evidence adduced by the prosecution in the instant case and for coming to the conclusion as to the truthfulness of evidence of the prosecutrix.

12 In tune with her FIR at Exhibit 14, PW1 - prosecutrix has deposed that a month prior to the incident in question, the appellant / accused approached her when she was waiting at Shenva Naka after depositing the bill of electricity and had asked her whether she wants to marry or not. The prosecutrix has not stated in her evidence as to whether this question was asked by the appellant / accused with his own reference or it was a general question. Then, as per version of the prosecutrix, when there was nobody at her house on 12th June 2011, at about 12.30 p.m., the appellant / accused came and told her about accident of her brother. He asked her to take money for admitting her brother,

who was lying on road, to the hospital. The prosecutrix stated that she took an amount of Rs.1100/- and went with the appellant / accused. As per her version, the appellant / accused had brought a jeep with a driver and it was parked on the road. When they reached near the jeep, the appellant / accused pushed her on the seat of that jeep, tied her mouth by a handkerchief and though she attempted to shout, her shouts were inaudible because handkerchief was tied on her mouth. Then, the appellant / accused took her to Kalwada forest area and the journey, as per her version, took a time of about one and a half hours. There she was taken out of the vehicle at about 2 p.m. The prosecutrix stated that she was then pushed on stones. The appellant / accused removed his clothes and denuded her. He threw her clothes on a tree, applied condom to his penis and committed rape on her. Then, as per version of the prosecutrix, she rushed at the rider of the scooty who was going by that road. That person took her clothes from the tree and made her to wear those clothes. She was then taken by the scooty rider to village Dolkhamb. As per his instructions, she then went to Shahapur Police Station by a

bus. There the appellant / accused followed her on a motorcycle and threatened her. Thereafter, police from Kinhavali Police station were called at Police Station Shahapur. Then, she lodged the FIR Exhibit 14. This is what the adult prosecutrix is deposing about the incident of commission of rape on her, after abducting her from her house by the appellant / accused. To examine trustworthiness of this version, let us look into the material brought on record from her cross-examination. This is necessary in order to ascertain whether a probable story is made out by the prosecutrix in order to rely on her version about the incident.

13 Cross-examination of the prosecutrix reveals the following facts :

(a) Since her childhood, the prosecutrix and her mother PW2 Vithabai were residing at the house of Jayant Dalal – maternal uncle of the prosecutrix. Jayant Dalal has one unmarried daughter and two sons. Totally seven persons reside in his house. Jayant Dalal use to earn his livelihood by working as a daily labourer. Father of the prosecutrix is not having any independent

source of income and her mother had deserted her father. Mother of the prosecutrix is also unable to do any work because of various ailments. The incident in question took place on 12th June 2011 which was a Sunday. Still, the prosecutrix claims that there was nobody at her house, though she was staying in the house of her maternal uncle having seven inmates in the house. Considering the financial status of her maternal uncle Jaywant Dalal – sole earning member of the house, the prosecutrix has not disclosed how she managed to get an amount of Rs.1100/- from the house, when there was nobody in the house. The prosecutrix has not spoken about any independent source of income to her. Where other members of the family were on that day, is also not disclosed by the prosecutrix. She also claims that she had not disclosed the fact that she is leaving the house for admitting her brother to hospital even to her neighbours or villagers.

(b) The prosecutrix claims that she accompanied the appellant / accused on getting information from him that her brother met with an accident and is lying on the road. She stated that the appellant / accused had brought a jeep with a driver for

taking her to the place of the accident. Her evidence shows that she was following the appellant / accused to the vehicle. If that was so, then obviously there was no reason for the appellant / accused to push her into the four wheeler vehicle. Her cross-examination reveals that when the appellant / accused pushed her inside the vehicle, she shouted but nobody from the village came for her help. This implies that other villagers were very much present on the spot when the prosecutrix was being abducted by pushing her in the four wheeler vehicle by the appellant / accused. The village in which the prosecutrix was residing was a small village named Dalal Pada. Her maternal uncle himself is having surname Dalal. Normally, villagers know each other and such incident spreads like fire in the village. However, strangely enough, the prosecutrix claimed that nobody came for helping her while she was being abducted. She stated in her cross-examination that during the journey from her house to the jeep, she did not come across any person of her acquaintance. In such a small village like Dalal Pada, where persons from the same community reside, this is wholly unbelievable and improbable.

(c) Evidence of the prosecutrix shows that after leaving the house at 12.30 p.m., she was taken to the forest by the appellant / accused and then they reached Kalwada forest area at 2.00 p.m. This implies, the prosecutrix was taken to a very long distance. What happened thereafter is also strange. As per version of the prosecutrix coming on record from her cross-examination, the appellant / accused had dragged her inside the forest area. He then caused her fall on stones. She resisted the move of the appellant / accused in dragging her inside the forest area and thereby her legs were injured. Her cross-examination reveals that she was taken to a far off place inside the forest from the road, as she stated that the distance from the road to the spot of the incident was a distance which can be covered by walking for five to ten minutes. She does not claim that while walking or being taken to such a long distance, her mouth was gagged making her unable to shout.

(d) How the actual incident took place, as claimed by the prosecutrix, is also surprising. As seen from her cross-examination, when inside the forest area the appellant / accused was removing his clothes, she attempted to run but the appellant / accused was

successful in catching hold of her and then she was again dragged at the same place. She claimed that then she made second attempt to run away when the appellant / accused was applying condom to his penis. That attempt also spoiled as the appellant / accused had pushed her. Probability of such happening will be tested by comparing this evidence with the medical evidence on record in subsequent paragraphs.

(e) In chief-examination the prosecutrix has stated that she saw the scooty rider going by the road and therefore she rushed at him, obviously in naked condition, as she has further stated that the said person took out her clothes from the tree. However, in cross-examination, the prosecutrix is stating that the scooty rider came to her on the spot, gave clothes to her by taking those out from the tree and then she was taken by him to village Dolkhamb. When the actual spot of incident was deep inside the forest i.e at a distance which can be covered by walking for five to ten minutes, how this scooty rider proceeding from the road had witnessed the prosecutrix deep inside the forest, is a question which remained unanswered from the evidence of the prosecutrix. This aspect makes her

testimony highly artificial and doubtful. She is apparently not stating the true and correct facts.

14 All these aspects which are coming on record from cross-examination of the prosecutrix makes her version about the incident of abduction and rape highly doubtful and as such, no explicit reliance can be placed on her version, unless the same is corroborated by other evidence on record.

15 The prosecutrix was subjected to medical examination on the very next day of the incident itself. As per prosecution case, she was raped on rough and stony surface of the forest by the appellant / accused. PW5 Dr.Sanjiv Dhanegave, Medical Officer, Shahapur, had examined the prosecutrix on 13th June 2011 itself. Evidence of this witness shows that there was no external injury on person of the prosecutrix. Upon local examination, he found private part of the prosecutrix normal. Though this witness has noticed partially torn hymen of the prosecutrix, he has not spoken that it was freshly torn. Thus,

there was absolutely no injury on the person of the prosecutrix even though she came to be examined immediately after the alleged incident by PW5 Dr. Sanjiv Dhanegave.

16 From evidence of PW6 Anil Shirose – photographer, the prosecution has proved photographs of the spot of the incident which are at Exhibit 23. These photographs were exhibited as those were referred to the Medical Officer i.e. PW5 Dr. Sanjiv Dhanegave. The prosecutrix claimed to have been dragged deep inside the forest at a distance which may be travelled by five to ten minutes walk. She claimed to have suffered injuries to her legs. She claims to have been raped by causing her fall on stones and that too after denuding her completely. Photographs at Exhibit 23, where the incident in question took place, show that the surface of the forest area was rocky being infested with stones and pebbles. The prosecutrix has stated in her cross-examination that she attempted to resist the move of the appellant / accused to drag and rape her. The rape was after causing fall of the prosecutrix on rough surface having stones and pebbles. Still, no

external injury was found on person of the prosecutrix. If all such, as narrated by the prosecutrix, had happened, then in normal course there should have been bruises, abrasions and scratches on back, buttocks and legs of the prosecutrix, apart from suffering internal injuries. To conclude, the medical evidence is also not supporting the version of the prosecutrix.

17 According to the prosecution case, the appellant / accused was accompanied by his driver and the prosecutrix was taken in a four wheeler jeep to the spot of the incident. Neither during investigation of the crime in question the driver of the appellant / accused was traced out nor that jeep came to be seized. The Investigator could not trace out the person i.e. the rider of the scooty who had seen the post event happening and who had provided clothes to the prosecutrix and brought her to Village Dolkhamb. This raises serious doubts on veracity of the prosecutrix. There is a big question mark as to whether prosecutrix was really abducted by a four wheeler vehicle driven by the driver of the appellant / accused and whether subsequently

she had been extricated from clutches of the appellant / accused by a rider of a scooty.

18 The prosecution had attempted to collect forensic evidence against the appellant / accused. However, the same is also not supporting the case of the prosecution, in any manner. No male DNA was found on nicker of the prosecutrix. The prosecution has claimed that a used condom was seized from the spot of the incident vide spot panchnama Exhibit 33. However, C.A. Report Exhibit 27 shows that no male DNA was detected on that condom.

19 PW4 Sudhakar Dalal – nephew of the mother of the prosecutrix has turned hostile to the prosecution. Evidence of PW2 Vithabai – mother of the prosecutrix is of no assistance to establish the charges leveled against the appellant / accused as she claims to be out of the house at the time of the alleged incident. Other witnesses are panch witnesses and Investigator who explained the line of investigation. Their investigation is not

of any assistance to bring home the guilt to the appellant / accused.

20 In the light of the foregoing discussion, it cannot be said that the prosecution has proved its case against the appellant / accused beyond all reasonable doubts. Evidence of the prosecutrix suffers from several infirmities as well as improbabilities and as such, is doubtful. Ultimately, benefit of doubt goes to the appellant / accused and therefore the following order :

ORDER

- i) The appeal is allowed.

- ii) The impugned judgment and order dated 20th March 2013 passed by the learned Ad-hoc Additional Sessions Judge, Kalyan, convicting the appellant / accused of offences punishable under Sections 363, 376 and 506 of the IPC and sentencing him accordingly, is quashed and set aside.

- iii) The appellant / accused is acquitted of offences punishable under Sections 363, 376 and 506 of the IPC.
- iv) Resultantly, suo motu notice for enhancement of sentence stands discharged.
- v) In view of disposal of appeal, Criminal Application No.587 of 2013 stands disposed of.

(A. M. BADAR, J.)