

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 470 OF 2002

The State of Maharashtra.
(Through the P.S.O. Parli
Police Station, Dist. Beed)

.... Appellant

Versus

Arjun Poma Chavan
Age: 23 years, Occu: Agriculture
R/o Krishnanagar Tanda,
u/v. Poulpimpri, Tq. Parli,
Dist. Beed.

.... Respondent.

Shri. V.S. Badakh, Additional Public Prosecutor, for appellant-
State.

Shri. S.S. Chaudhari, Advocate for respondent.

**CORAM : T.V. NALAWADE AND
ARUN M. DHAVAL, JJ.**

DATED : 20 MARCH 2018

JUDGMENT : (PER T.V. NALAWADE, J.)

1) The appeal is filed against judgment and order of Sessions Case No. 29/2000, which was pending in the Court of learned 2nd Additional Sessions Judge, Ambajogai, District Beed. The Trial Court has acquitted the respondent of the offence of rape punishable under section 376 (2) (e) of Indian

Penal Code (hereinafter referred to as 'IPC' for short). Both the sides are heard.

2) Initially two Judges of this Bench were divided in opinions and with their opinions the matter was laid before another Hon'ble Judge. The said another Hon'ble Judge of this Court has given opinion that the appeal deserves to be dismissed and the decision of the trial Court of acquittal cannot be interfered with. Both the Judges of this Bench considered the said opinion and they have decided to accept the opinion of the Hon'ble the third Judge and so present judgment is in accordance with the opinion given by the Hon'ble third Judge of this Court.

3) In short, the facts leading to the institution of present proceeding can be stated as follows :-

The prosecutrix was aged about 23 years at the relevant time and she was carrying of four months. She was cohabiting with her husband at Poulpimpri Tanda, Tq. Parli, District Beed. The accused is relative of her husband and he was also resident of the same locality at the relevant time.

4) The incident in question took place on 13.5.1999 at about 10.00 to 10.30 p.m. On that day, there was function at Dhanaltanda of Jagran, Gondhal and so, the relatives of the husband, who were living with him like his elder brother Bapurao, younger brother Kanhubhau and wife of Bapurao had gone to Dhanaltanda. The parents of husband like Bhagwan and Parabai had gone to Jalgavhan to attend a marriage. The husband was present at the station, but he had gone to attend a function in the village. At about 10.00 to 10.30 p.m. the prosecutrix was sleeping in the courtyard of her house with the kids of her sister in law.

5) The accused, who was aged about 23 years at the relevant time, came to the place where prosecutrix was sleeping and he made the prosecutrix to wake up. Then he started asking her to come with him to other place and he started pulling her. The prosecutrix realised the ill intention of accused and she said that by relation, he was like her father in law and further, she was pregnant and so he should not do such thing. She even gave abuses to him. But, he tried to sleep over her in the courtyard. When the prosecutrix started shouting, accused gagged her mouth by using his one hand

and then started dragging her by holding her hair towards the space where he wanted to commit the offence. He also gave threat of life to the prosecutrix and gave beating to her by using hands.

6) After taking the prosecutrix to some distance from the house of prosecutrix, the accused forcibly took sexual intercourse with the prosecutrix. Due to force used by the accused, the prosecutrix sustained injury over her chest like abrasion and she sustained injury over right hand and her bangles got broken at the place where incident took place. When the accused left the place after committing the offence, the prosecutrix returned to home and she started crying. The husband returned from function and he made inquiry as to why she was crying. The prosecutrix disclosed the incident to her husband.

7) The husband of the prosecutrix went to Dhanaltanda to call the relatives and persons from his family. When the relatives gathered, the prosecutrix disclosed the incident to them also. As it was night time, they did not go to

the police station immediately after the incident. They went to the police station on next morning and prosecutrix gave report against the accused. On the basis of this report, the crime at C.R. No. 46/1999 came to be registered in Shirsala Police Station for the offence punishable under section 376, 323, 506 of IPC. The prosecutrix was referred for medical examination. Some injuries like scratches, abrasions were found on her hand and above chest. Vaginal swab was taken. The clothes produced by the prosecutrix were taken over under panchanama. The police prepared spot panchanama on the same day and took over the pieces of bangles lying on the spot which was shown by prosecutrix. The accused came to be arrested.

8) During investigation, statements of husband and other relatives of the prosecutrix came to be recorded and aforesaid articles came to be sent to C.A. office. Semen was detected on the petticoat of prosecutrix. After completion of investigation, charge sheet came to be filed for offence of rape punishable under section 376 (2) (e) of IPC which was in force at the relevant time.

9) The charge was framed. The prosecution examined in all ten witnesses. The accused pleaded not guilty and he took the defense of total denial. The Trial Court has held that probably there was consent of prosecutrix if there was sexual intercourse and benefit of doubt is given to the respondent.

10) The evidence of prosecutrix (PW 7) shows that she was aged about 23 years at the relevant time. The accused was also of the same age. In the cross examination of prosecutrix, it is brought on the record that the accused was classmate of younger brother of husband of prosecutrix and he used to visit the house of prosecutrix. The land of accused is situated adjacent to the residential place of prosecutrix and accused was also relative of husband of prosecutrix.

11) The evidence of prosecutrix (PW 7) shows that the elder members of house of prosecutrix except her husband were not at station. Though the husband was at station, he had gone to some place to attend Gondhal function. Thus, his return was expected at any time.

12) The prosecutrix has deposed that she was sleeping in the courtyard of house with the kids of her sister in law and the incident took place at about 10.30 p.m. She has given evidence that first the accused made her to wake up from sleep, then gagged her mouth by using one hand and then dragged her towards manure depot. She has deposed that after taking her towards the spot where the incident took place, the accused lifted her Sari, scratched on breast and then undressed himself. She has given evidence that accused virtually slept over her body, took sexual intercourse and then ran away. She has deposed that due to the incident, her bangles got broken and she sustained injury to her right hand.

13) The prosecutrix has deposed that when her husband returned to home, she disclosed the incident to him. She has given evidence that the husband then called the relatives from various places where they had gone and they went to police station on the next day to give report. The report given by the prosecutrix is proved in her evidence as Exh. 31. The evidence is given that she produced the clothes like Sari, blouse, petticoat before police and she had showed the spot of incident to police.

14) The cross examination of prosecutrix (PW 7) shows that there are two rooms to her house. There are other houses in the same lane in a row and at least four houses are there in the vicinity of the house of prosecutrix. The prosecutrix has given the names of those neighbours in the cross examination. She has given evidence that due to heat of summer, all inhabitants of that locality were sleeping in the courtyard. Thus, the neighbours were also sleeping in the courtyard. The prosecutrix tried to change her version during her cross examination in the Court. She firstly stated that due to gagging of mouth, she could not raise hue and cry and then she admitted that she had raised hue and cry when she was taken to manure depot. She has given evidence that accused had removed the buttons of her blouse one by one and then he had undressed himself. Her evidence shows that even when accused left the spot, she did not call the neighbours. The evidence of husband of prosecutrix shows that he had no intention to approach police, but due to insistence of prosecutrix, he took the prosecutrix to police to give the report. This circumstance shows that the prosecutrix wanted to disclose the incident to everybody and so, it was necessary

for the prosecutrix to explain as to why she did not call the neighbours.

15) Panch witnesses Laxman (PW 2) and Somnath (PW 3) are examined to prove the spot panchanama, but they turned hostile. By proving the spot panchanama, the prosecution wanted to prove that pieces of bangles were lying at the spot shown by the prosecutrix. There is, however, evidence of Investigating Officer Shankar (PW 9) on the spot panchanama. Panch witnesses Dinkar (PW 4) and Syed Ayub (PW 5) on panchanama of seizure of clothes of prosecutrix also turned hostile and there is the evidence of Investigating Officer Shankar (PW 9) on this panchanama.

16) Even if the spot panchanama at Exh. 22 is read in the evidence, it shows that the house of prosecutrix had three rooms and the spot of offence shown by the prosecutrix is situated at the distance of 35 ft. from the house. The spot is shown in the field of Namdev Khira. There was heap of fodder and according to the prosecutrix, incident took place there. In the vicinity of heap of fodder, there were heaps of fodder of other farmers.

17) Though the houses, neighbours are not mentioned in the spot panchanama, the prosecutrix has admitted in her evidence that she had the neighbours and their houses were in the vicinity of her house. No marks of resistance were found in the courtyard of the house.

18) Dr. Surekha Unwane (PW 6) examined the prosecutrix on 14.5.1999. She found following injuries on the person of prosecutrix :-

- (i) Abrasion over chest on right side below clavicle, 1 cm. x 1/4 cm. oblique.
- (ii) Abrasion over right wrist, 1/2 cm. x 1/2 cm. oblique in direction.

According to Dr. Surekha (PW 6), the age of the injuries was within 24 hours and the injuries were caused by hard and blunt object. Both the injuries are described as simple injuries. The doctor did not find any external injury over private part or on thighs. The doctor has given evidence that she was carrying of 10 weeks. Accordingly, the certificate was issued by the doctor, which is at Exh. 27.

19) The evidence of Dr. Unwane (PW 6) shows that she was not in a position to give definite opinion as to whether the prosecutrix had taken sexual intercourse recently. She has given evidence that injury No. 1 can be caused by nail scratch and if resistance is offered. However, in the cross examination, doctor has given evidence that both the injuries can be self-inflicted.

20) The C.A. report at Exh. 40 shows that on petticoat some semen stains were found and there were some semen stains on Sari also and semen stains were of blood group 'B'. The record and the evidence does not show that police had collected the blood of husband and blood of accused to ascertain their blood group. The prosecutrix was married, her husband was at home and so it was necessary for the investigating agency to collect the blood sample of husband also, but that was not done. The evidence of doctor shows that no sperm was visible when doctor took vaginal swab.

21) Nanasaheb (PW 8), husband of prosecutrix has given evidence that on that day, he returned to home at about

10.00 to 10.30 p.m. The same time is given as time of incident by the prosecutrix. He has given evidence that after learning about the incident from prosecutrix, he called relatives from various places and as the prosecutrix insisted for approaching police, he took the prosecutrix to police for giving the report on the next day.

22) The aforesaid evidence and the circumstances show that prosecutrix had many opportunities to raise hue and cry, but she did not raise hue and cry and she did not call anybody for help. In ordinary course, if hue and cry was raised, her neighbours would have rushed to the spot and they would have saved her. As already observed, the husband was present at the station and he was to return at any moment on that day. There is nothing on the record to infer that accused was knowing that all the members of family of prosecutrix including her husband were not at home. The evidence shows that as per the prosecutrix the incident was started in the courtyard of the house, but no sign of resistance like pieces of broken bangles were found in the courtyard. When it is the version of the prosecutrix that she was virtually dragged by

holding her hair by the accused, no such injuries were found on the person of prosecutrix.

23) The evidence discussed above shows that F.I.R. was given late. The explanation given by the prosecutrix or her husband in respect of delay is not that plausible. This delay has created further doubt about the version of prosecutrix.

24) The learned APP submitted that provision of section 114-A of the Evidence Act can be used and it needs to be presumed that prosecutrix had not consented. In view of the provision of IPC used against the accused and the date of incident, the provision of section 114-A of the Evidence Act is not available in the present matter.

25) The learned counsel for the accused placed reliance on some observations made by the Apex Court in the case reported as **AIR 1977 SUPREME COURT 1307 [Pratap Misra and Ors. Vs. State of Orissa]**. In that case, in view of the facts and circumstances, the Court held that absence of marks of resistance had created probability that if there was intercourse, it was with consent. The facts and circumstances

of each and every case are always different and it is up to the Court to see as to whether there was possibly consent or there was no consent. In the present matter, the Trial Court has formed the opinion that there was sexual intercourse, but there is a probability that there was consent. There is also other probability that there was no sexual intercourse. Thus, the view taken by the Trial Court is possible view and this Court sees no reason to interfere in the decision of the Trial Court. In the result, the appeal stands dismissed.

Sd/-
(ARUN M. DHAVALE, J.)

Sd/-
(T.V. NALAWADE, J.)

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