

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 494 OF 2016

Ramdas alias Ramkisan s/o Nagnath
Hulgunde,
Age : 29 years, Occu: Labourer,
R/o: Mangalwar Peth, Hamal Galli,
Ambejogai, Taluka : Ambejogai,
District Beed.

(At present the Appellant is in Nashik
Central Jail, Nashik Road, Nashik,
Taluka and District: Nashik).

Appellant/Accused

VERSUS

The State of Maharashtra,
through the Police Station Officer,
Ambejogai (City) Police Station,
Taluka : Ambejogai, District : Beed.

[Notice to the Respondent to be served
through the Public Prosecutor, High
Court of Bombay, Bench at
Aurangabad].

**Respondent/
Prosecution
(Original
Complainant)**

Mr. Rajandre S. Deshmukh for the Appellant.

Mr. K. D. Munde, APP for the Respondent – State.

Mr. A. L. Kanade, Assist to APP.

CORAM : K. L. WADANE, J.

Reserved on : 19th October, 2018

Pronounced on : 23rd October, 2018

JUDGMENT:

1. This criminal appeal is being directed against the impugned judgment and order dated 25.07.2016 by which the appellant is convicted for the offence punishable under Section 376 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs.2,000/-. He is further convicted for the offence punishable under Section 452 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.1,000/-. The accused is convicted under Section 323 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for six months and to pay a fine of Rs.500/-. The accused is further convicted under Section 506 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.1,000/-. The appellant is also found guilty for the offence punishable under Section 3 [2] [V] of SC and ST [Prevention of Atrocities] Act, 1989 and sentenced to suffer rigorous imprisonment for 10 years and to pay fine of Rs.2,000/-.

2. PW-1 - Victim lodged a complaint to the Police Station Ambajogai on 22.05.2015 alleging that on 21.05.2015 her husband Manoj went to Barshi and sent a message through brother-in-law Ashok

that he is coming late to house, therefore, the prosecutrix slept in her house without latching the door from inside.

3. On 22.05.2015 at about 2:30 am, suddenly the accused entered into the house and latched the door from inside. At that time the prosecutrix awakened and inquired with the accused as to why he entered into the house. At that time prosecutrix tried to make hue and cry, however, the accused pressed her mouth and also threatened to kill. Thereafter, the accused committed sexual intercourse. At that time, the husband returned to her home and knocked the door. The prosecutrix pushed the accused, she received injuries on her neck. The prosecutrix removed the latch of the door then her husband tried to caught hold but the accused ran away by giving jerk to PW3 - Manoj. In order to establish the offence leveled against the appellant the prosecution has examined in all 9 witnesses :

PW-1 - prosecutrix,

PW-2 Dinesh s/o Bhima Shinde - Panch Spot,

PW-3 - Manoj s/o Laximan Waghmare, the husband of PW-1,

PW-4 - Ravindra Vishwanath Shinde Police Personnel who carried the Muddemal Article to CA.

PW-5 - Dr. Samata Onkardas Agrwal and

PW-6 - Dr. Khan Shahin Banu Iliyas both examined the prosecutrix.

PW-7 - Yashwant Kondiram Waghmare Panch Spot.

PW-8 - Dr. Tushar Vasant Deshmukh who examined the accused.

PW-9 - Maheboob Ismail Shaikh Retd. Dy. S. P. Majalgaon.

4. Beside the oral evidence of the aforesaid witnesses, prosecution has relied upon the contents of Spot Panchnama Exh. 20, CA report Exh. 28, 29 and 30. Injury Certificate Exh.39, Report Exh. 40, Medical Certificate of the accused Exh. 55. After recording the evidence of the aforesaid witnesses, the statement of the accused was recorded under Section 313 of the Code of Criminal Procedure and after hearing both side accused/appellant is convicted as referred above.

5. Looking to the line of the cross-examination and the statement of accused under Section 313 of Cr. P. C., the defence of the accused appears to be the prosecutrix was the consenting party for the sexual intercourse, therefore, looking to the defence of the accused, it is not necessary to re-examine and re-assess the evidence of the CA report and other formal evidence adduced on behalf of the prosecution. Since the sexual intercourse between the PW-1 and the accused has been admitted, therefore, the very short question arose for consideration is that, whether the prosecutrix was consenting party to the sexual intercourse or not. To examine this limited issue it is necessary to look into the oral evidence as well as medical evidence adduced on behalf of the prosecution.

6. Mr. Deshmukh the learned counsel for the appellant submits that the accused-appellant is residing in the same lane where the house of the prosecutrix is situated. During the cross-examination certain suggestions were given that the prosecutrix having love affair with the accused even before her marriage, however, that suggestions were denied. Mr. Deshmukh by referring certain circumstances appearing in the evidence i.e. the prosecutrix has not closed the door from inside, indicates that it was with intention to facilitate the accused to enter her house and therefore Mr. Deshmukh submitted that the prosecutrix was consenting party. His next argument is that looking to situation of the spot other relatives i.e. in laws were residing in the same building but in the different rooms. But due to the incident nobody was awakened, that suggest that the prosecutrix was consenting party. I have carefully examined the evidence on record from the same it appears that the door of the room of the prosecutrix was not latched from inside because the prosecutrix received the message from her brother-in-law that her husband went to Barshi and returning home at late hours. Therefore, it seems that the prosecutrix slept in the room by not latching the door from inside.

7. On perusal of the oral evidence of the prosecutrix, it appears

that her brother-in-law Ashok came to her at about 11:30 p.m. and told that her husband Manoj will be coming late in the night and she should not sleep, therefore, the prosecutrix instead of latching the door from inside just closed the same and later on at about 12:00 midnight she slept. On perusal of the further evidence as to the commission of the rape the prosecutrix deposed in following words :

"At about 2.30 am [down] accused entered into my room by opening the door and has latched the same from inside. I awoken by that time. I asked him as to why he entered in to my house and go out from the house. When I tried to cry, he pressed my mouth. Then he threatened me saying keep quiet and in case I cried then he will finish me. Thereafter he pushed me on the cot and made me to lie thereon. Thereafter, I tried to resist him by giving kick blows then he pressed my mouth. Thereafter he caught hold my hand tightly then by one hand uplifted my sari and petticoat. Thereafter he inserted his penis in to my vagina and has thereby forcibly committed rape upon me. After some time, my husband who went to Barshi came all of sudden and he has knocked the door from outside. Then I tried to push the accused by giving jerk, he gave slap on my neck by that time caused abrasion with his nail and also bleeding from the said injury. By scuffling with accused I removed the latch of room. I started crying and accused Ramdas hidden himself beneath cot. My husband caught hold him, thereafter my in-laws, brother of husband came there, then accused gave jerk to my husband and ran away."

8. On careful scrutiny of the aforesaid evidence, it appears that the accused entered into the house of the prosecutrix and when prosecutrix tried to make hue and cry, he pressed her mouth therefore it

appears that there was no time for the prosecutrix to make hue and cry. Not only this the accused threatened her to kill. Thereafter, he pushed her on the cot. The prosecutrix tried to resist him by giving kick blows, then the accused pressed her mouth and had committed rape forcibly. From these circumstances, it appears that there was no time for the prosecutrix to raise hue and cry as immediately accused pressed her mouth.

9. Looking to the evidence of Manoj Waghmare, it appears that at the relevant time of the incident he returned from Barshi and he knocked the door and heard the cries of prosecutrix from inside. When prosecutrix opened the door, she started feeling giddiness and all of a sudden she fell down on the ground. Immediately the prosecutrix disclosed that the accused committed rape on her. Then this witness seen the accused hidden beneath the cot. Accused was about to run but PW-3 caught hold his hand. This witness cried loudly thereafter other family members gathered there. In the meantime the accused gave jerk and ran away. Looking to the evidence of this witness it appears that immediately after arrival of this witness prosecutrix opened the door and disclosed that the accused had committed rape on her. The first information report was immediately lodged after the incident. There is

no delay in lodging the first information report. So the evidence of the PW - 1 and PW - 3 is inconsistent as to the incident has deposed by the PW - 1 prosecutrix.

10. In addition to oral evidence of PW-1 and PW-3 there is evidence of Dr. Samata Onkardas Agrwal and Dr. Khan Shahin. Dr. Samata Onkardas Agrwal deposed that on 22.05.2015 the prosecutrix was referred for medical examination. At the time of examination she gave a history that her neighbor entered in to her room, latched the door from inside, removed her clothes and committed rape on her. On external examination Dr. Agarwal found abrasion over front of neck admeasuring 6x1 cm. She also noticed a minor abrasions over hands of the prosecutrix and the prosecutrix inform to this witness that the bangles were broken. From the evidence of Dr. Agrawal, it appears that she collected the sample of vaginal swab. Pathological report received on next day and as per this report there was evidence of spermatozoa indicative of sexual intercourse. In the cross-examination this witness has stated that she examined thighs of the patient and has not noticed any abrasion or marks of force or violence. She examined both the joints of the patient and has not noticed any abrasion mark thereupon. This appears because from the record and evidence it is seen that the

accused committed sexual intercourse with the prosecutrix on the cot and the bed, therefore, due to the mattress no injuries on the back, thighs or buttock of the prosecutrix is possible. Injury certificate of the prosecutrix is on record wherein nature of the injury and the history is recorded by this witness. The report of the medical examination for sexual assault is placed on record in which also the injuries on the person of the prosecutrix are mentioned.

11. PW - 8 Dr. Tushar Deshmukh examined the accused on 22.05.2015 and found following external injuries:

Abrasion on anterior neck

- i) 5x0.5 cm on cricoid region (upper).
- ii) right side neck 3x0.5 cm.
- iii) left side neck 4x0.5 cm (upper).

12. So looking to the external injuries received by the prosecutrix as well as the accused, it appears that the prosecutrix tried to resist the sexual intercourse of the accused and in the attempt of resistance both of them have received injuries i.e. mark of violence. This is the most important circumstance appearing against the accused to rule out the theory of consent. In addition to that panch witnesses namely PW-7 Yashwant Waghmare and PW-2 Dinesh Shinde that the

broken pieces of bangles were lying in the room and same were seized by the police from the spot. If all these circumstances are taken into consideration, it reveals that there was no consent of the prosecutrix to the sexual intercourse by the accused. Mr. Deshmukh the learned counsel for the appellant relied upon the observation in the case of *Criminal Appeal No. 544/2018* by the Hon'ble Supreme Court wherein it is observed :

"6. We are conscious that the courts shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If the evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations or sexual assaults. (see State of Punjab vs. Gurmit Singh, (1996) 2 SCC 384 (para21))."

13. I have carefully gone through the above observation. In the present case evidence of prosecutrix inspires confidence. In addition

other evidence is available in the form of corroboration.

14. Thus in the totality of the circumstances, I am inclined to take a view that the prosecution has succeeded in proving that the act committed by the accused was a forcible act and not consensual. The appeal, therefore, has to fail. It is, accordingly, dismissed. The conviction and the sentence of the accused - appellant is upheld.

(K. L. WADANE, J.)