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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.612 OF 1999

The State of Maharashtra	]	..Appellant
	]	(Original Complainant)

Versus

Lahanu Namdeo Ganore	]	
Age: 35 years,	]	
Resident of Wag-lud,	]	..Respondent
Taluka – Dindori, District-Nashik.	]	(Original Accused)

Mrs.M.M. Deshmukh, APP for the Appellant-State.

Mr.Prosper D'souza, appointed Advocate for the Respondent.

**CORAM : INDRAJIT MAHANTY &
V.K. JADHAV, JJ.**

JUDGMENT RESERVED ON : **30TH NOVEMBER, 2018**

JUDGMENT PRONOUNCED ON : **19TH DECEMBER, 2018**

JUDGMENT [Per : INDRAJIT MAHANTY, J.]

1. The present Appeal under Section 378(1) of the Code of Criminal Procedure, 1973, has been filed by the State of Maharashtra against the Judgment and Order of acquittal of the Respondent-Lahanu Namdeo Ganore (original accused) for the alleged offences under Section

376, 302 and 201 of the Indian Penal Code and under Section 3(1)(x) and 3(2)(v) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989, delivered by the Additional Sessions Judge Nashik, on 31st March, 1999 in Special Sessions Case No.43 of 1998.

2. The prosecution case in brief is as under :

(i) Devidas Laxman Gangode-Complainant, resident of Village Pofshi was married to victim. The Complainant Devidas and his wife -victim were Hindu Kokana by caste, which is admittedly a Scheduled Tribe. The complainant Devidas was residing with the victim at Village Waglud which is adjacent to Village Pofshi.

(ii) On 29th July 1998 at about 10.00 a.m. after taking his meals, the complainant Devidas left home for the river for fishing and asked the victim to take their buffalos for grazing. It is, further, stated by the complainant that, while he was returning at 5.30 p.m. and proceeding towards his village, he saw one of his buffalo walking towards house, but the victim was not to be seen. Consequently, he took the buffalos home, tethered them in the cattle shed and on enquiry from his children learnt that the victim had left home at about 12.00 noon with the buffalos for grazing, but had not returned. Therefore, the complainant proceeded towards the forest in search of the victim and met one Hiranman Rajaram Chaudhari who

told him that he had seen the victim grazing buffalos in the forest and that he had also seen the accused "Lahanu Ganore" in the forest. He, further, told that the accused had driven his buffalos towards his house.

(iii) The complainant Devidas, on receiving this information, went to the forest alongwith some others. It is alleged that while searching for the victim in the forest, they saw accused Lahanu Ganore coming from his house. On being asked as to whether he had seen the victim, it is alleged that the accused replied that he had seen the victim at about 4.00 p.m. at Mavlyacha Kap. The complainant then proceeded to search for the victim and found certain drag marks on the ground which he followed and he found the victim lying on the ground and her body was covered with a blanket. By then it was 6.30 p.m. He removed the blanket and found that the victim was dead and her body was naked and that there were certain ligature marks of strangulation on her neck as well as there was bleeding from her mouth.

(iv) The accused was also present there and since there appeared to have injury on his face which was bleeding, one Kantilal Popat Chaudhari-PW 6 asked him as to what happened to his face and caught hold of his hand, but the accused is alleged to have ran away by giving a jerk to his hand. Although some persons chased the accused, they could not catch hold of him.

(v) It is further stated that one Jagan Tungar was sent to the village to inform about the incident to the Police Patil and the Police Patil came there, noted the complaint of the Complainant Devidas, took him to the Police Station, where the complaint was lodged against the accused narrating of the incident and alleging that it was the accused who had committed rape on the victim and killed her with intention that she would not tell about the incident to anybody and thereafter concealed the dead body in the forest.

(vi) Police took various steps in the matter. After completion of investigation, charge-sheet was submitted in the Court of Judicial Magistrate, First Class, Dindori, and since the offence punishable under Section 376 of the Indian Penal Code was exclusively triable by the Court of Sessions, the learned Judicial Magistrate, First Class, Dindori, committed the case to the Court of Sessions at Nashik for trial.

3. Charges were framed for the offences punishable under Section 376, 302 and 201 of the Indian Penal Code and under Section 3(1)(x) and 3(2)(v) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 against the accused-respondent, who pleaded not guilty and therefore, the trial was conducted.

4. The learned Sessions Judge, Nashik, after perusing the entire evidence, both oral and documentary, framed following points, arrived at the following findings and stated the reasons in the impugned Judgment for acquitting the accused-respondent.

Sr.No.	POINTS	FINDINGS
i)	<i>Is it proved that on 29.7.98 in between 12 noon to 6.30 p.m. the accused has committed rape on complainant's wife -victim in the forest land of Village Phopashi ?</i>	No.
ii)	<i>Is it proved that on 29.7.98 the accused has committed murder of victim ?</i>	
iii)	<i>Is it proved that on 29.7.98 the accused has caused disappearance of the evidence of the crime committed by him with intention to screen himself from the legal punishment ?</i>	No.
iv)	<i>Is it proved that the victim was the member of Scheduled Tribe ?</i>	Yes.
v)	<i>Is it proved that the accused is not a member of SC or ST ?</i>	Yes.
vi)	<i>Is it proved that the accused not being the member of SC or ST was in a position to dominate the victim and used that position to exploit her sexually ?</i>	No.
vii)	<i>What offence, if any, committed ?</i>	No offence committed.
viii)	<i>What order ?</i>	The accused is acquitted.

5. Mrs.M.M. Deshmukh, A.P.P. for the State vehemently contended that the learned trial Court had failed to appreciate the evidence of PW 5-Chitrakala Mohan Raut, an eye witness whose evidence is claimed to have been corroborated by the other prosecution witnesses. The learned

A.P.P. contended that the reasons ascribed by the learned Sessions Judge for disbelieving the evidence of PW 5-Chitrakala, the sole eye witness, are wholly erroneous and not based on a proper assessment of her evidence.

6. Per contra, Mr. Prosper D'souza, Amicus curie appointed by the Court contended that, the learned Sessions Judge was fully justified in disbelieving the evidence of star witness viz. PW 5- Chitrakala for the reasons noted in the Judgment and there is no ground for justifying any interference at the present stage.

7. In the light of the aforesaid submission, it becomes necessary on our part in the present Appeal to scan the entire evidence on record and in particular the evidence of PW 5-Chitrakala, on whose evidence the State/ Public Prosecutor vehemently relies upon.

8. PW 5- Chitrajaka Raut claims that she had gone to the forest land of Popashi for cutting grass. She had further deposed as follows :

“ It was about 3 p.m. I was cutting the grass. I heard the cry for help, in vernacular “DHAVADHAVA MALA VACHAVA”. It was the voice of victim. I went towards that, by cutting a distance of about 15 feet (Kasarbhar Antar). I saw the accused Lahanu Hitting a stick on victim's head. He then throttled her and committed rape on her. The accused threatened me saying that if I would tell it to anybody he would do the same thing with me. I was frightened and ran away.

On the next day I told the incident to my father Jayram Gavit. Police recorded my statement. The accused before the court is the same Lahanu Ganore. That day the accused had worn a banian and a pant, and his scarf was lying on the ground.

Three days thereafter the police had called me to the Central Jail at Nashik.

The Magistrate present there asked me to identify the accused. I identified the accused from amongst the 8 persons. The stick article no.9 before the court is the same stick, which the accused had used for the assault.”

9. From the record of the present case, it is clear that the alleged offence occurred on 29th July 1998 and the accused Lahanu was called to the Police Station on 1st August 1998. Thereafter, he purportedly gave a statement (Exhibit 20) leading to the production of a stick and gave recovery of the stick under Panchanama (Exhibit 21). The Test Identification Parade of the accused was held on 27th August 1998 as stated by PW 8-Sudhakar Shankar More.

10. The report of the Test Identification Parade is at Exhibit 24. In paragraph 4 of the Examination-in-chief it is stated by PW 8 as follows :

“I asked him that he was at liberty to change his clothes if at all, he wanted to do so. He refused it, but he chose to put on the footwear of a dummy person at sr. no.5. The accused and all the dummy persons were in prisoners' uniform.”

This statement of PW 8 Sudhakar More, as available from Test Identification Parade Report-Exhibit 24 has also been dealt with by the learned Sessions Judge at Paragraph 19 of the Judgment, where, he has held that, admittedly there was an injury on the upper lip of the accused which was visible, the Special Judicial Magistrate has not taken care to cover this injury. The learned Sessions Judge, further held that, admittedly, the right cheek of the accused is hollow one, but care was not taken to select the

persons of the same physic as dummy persons which is very essential for holding a Test Identification Parade. He, further, held that, admittedly, the accused had nail marks on his cheek and his hair had grown grey, but care was not taken to select the persons resembling physic of the accused as dummy persons. The learned Sessions Judge further observed that, Mr. More-PW 8 says that all the dummy persons had worn prisoners uniform as they were prisoners from Central Prison. Therefore, it is not possible to know about the clothes which the accused had worn at the time of the Test Identification Parade. He, further held that, admittedly, at that time, the accused was not a Prisoner, since he was an under trial prisoner; it possibly means, that the accused must not have been in prisoners uniform and consequently if the accused was in civil dress and the dummy persons were in prisoners uniform, it would have been very easy for any witness to identify such person from amongst those alleged dummy persons. .

11. In this respect, it is also essential to take note of the various rules that the learned Magistrate must follow while holding a Test Identification Parade. One such rule viz. 16(2) (b) of the Criminal Manual, reads thus :

“ It should be fair and seem to be fair and every precaution must be taken to exclude any suspicion of unfairness or risk of erroneous identification through the witnesses' attention being directed specially to the suspected persons instead of equally to all the persons to be paraded.”

12. It clearly appears that the aforesaid process has not been strictly complied with in the present case and it is well settled in the catena of decisions decided by the Bombay High Court that where there has been contravention of the guidelines laid down in the Criminal Manual, the evidence of the Identification Parade cannot be relied upon and it must result in giving benefit of doubt to the accused.

In the case of **Mahesh Rohidas Kinalkar v. State of Goa**¹ it is held thus :

“ Identification completed in two phases and at both time, all dummy persons remain the same but also they stood at the same place. The only change was change in the place of the accused. Special Judicial Magistrate stated in his report that he had questioned the identifying of the witnesses as they have seen the accused after the incident and before the commencement of the identification parade. But he had not mentioned this fact in the memorandum. This is in contravention of the guidelines laid down in Criminal Manual. The impression is created after going through the evidence that the identification parade was deliberately organised in chaotic manner.

This has resulted in giving benefit of doubt to the accused, therefore conviction and sentence was set aside by Single Judge of Bombay High Court.”

In the case of **Arjun Ganpat Sandbhor vs. State of Maharashtra**² it is held that,

“ Dacoity committed by the Applicant and other Co-Accused in which the Truck Driver was killed. Son of deceased is the sole eye witness. The Police had called him in the Police Station and when the vehicle was going on, the Police showed him the Accused persons. The said identification of the Appellant is in doldrums. There is anomaly regarding the age of the said witness, which apparently creates suspicion. All Accused were put for identification. In first round four Accused were paraded in identification whereas at the 2nd round four Accused and in the last round one Accused was paraded. The same is against the Guidelines prescribed under the Criminal Manual. The conviction and sentence quashed and set aside.”

1 2005(2) Bom.C.R. (Cri) 670

2 2012(3) Bom.C.R. 326 (Cri)(DB)

In the case of **Khemraj s/o Bhayyalal Sharmagat v. State of Maharashtra**³ it is held thus :

“Appellant allegedly assisted and facilitated main accused who had committed sexual intercourse on prosecutrix. Version given by prosecutrix about presence and role played by the appellant found to be inconsistent. Factum of identification of the appellant not established. No other evidence showing presence of the appellant at the time of occurrence of the incident. Finding recorded by the Trial Court holding the appellant guilty, erroneous and based on no evidence. Conviction and sentence passed against the appellant set aside.”

13. It is also relevant here to take a note of the fact that while the occurrence is alleged to have taken place on 29th July 1998 and the accused was called to the Police Station on 1st August, 1998 and arrested. Nothing has been brought on record by the prosecution to indicate the reason for holding Test Identification Parade only on 27th August, 1998 i.e. after a period of 26 days. It is also well settled by the Hon'ble Apex Court that, where there was delay in holding test identification parade after arrest of the accused, without any explanation for causing delay, the evidence of such test identification parade cannot be relied upon and benefit of doubt ought to be extended to the accused. In the case of **Musheer Khan vs. State of M.P.**⁴ it is observed thus,

“Insofar as the identification of A-5 is concerned that has taken place at a very delayed stage, namely, his identification took place on 24-1-2001 and the incident is of 29-11-2000, even though A-5 was arrested on 22-12-2000. There is no explanation why his identification parade was held on 24-1-2001 which is after a gap of over a month from the date of arrest and after about 3 months from the date of the incident. No reliance ought to have been placed by the courts below or the High Court on such delayed TI parade for which there is no explanation by the prosecution”.

³ 2004(4)Mh.L.J. 1098

⁴ 2010(1) Bom.C.R.(Cri.)506

14. In view of the findings recorded by us hereinabove, we are of the considered view that no justifiable nor lawful reason subsist for interfering with the order of acquittal passed by the learned Sessions Judge.

15. Accordingly, Criminal Appeal No.612 of 1999 stands dismissed.

(V.K.JADHAV, J)

(INDRAJIT MAHANTY, J)