

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NO.92 OF 2013
WITH
CRIMINAL APPLICATION NO.845 OF 2017
IN
CRIMINAL APPEAL NO.92 OF 2013**

Johny @ John David Sheri

Aged about 40 years, Occ. Business,
Residing at Room No.16, Sagar Kutir,
Zopadpatti, 7 Bunglow, Versova,
Andheri (W), Mumbai.

At present at Kolhapur Jail ... **Appellant/Applicant**
V/s.

The State of Maharashtra

At the instance of Sr.Inspector of
Police, Versova Police Station in
C.R.No.443/2011.

... **Respondent**

.....

Mr.Abhaykumar Apte, Appointed Advocate for the
Appellant/Applicant.

Mr.Prashant Jadhav, APP for the Respondent/State.

....

CORAM : A.M.BADAR J.

DATED : 19th MARCH 2018.

ORAL JUDGMENT :

1 This is an appeal by the convict challenging his
conviction as well as resultant sentence for the offence punishable

under Section 376 of the Indian Penal Code recorded by the learned Additional Sessions Judge, City Civil and Sessions Court, Greater Mumbai in Session Case No.206 of 2012 decided on 19/12/2012. The appellant/accused is sentenced to suffer rigorous imprisonment for seven years apart from payment of fine of Rs.5,000/- and in default of payment of fine he is directed to further undergo further rigorous imprisonment for six months.

2 Briefly stated, the prosecution case is thus :

- (a) First Informant is the alleged victim of the crime in question. At the time of lodging the FIR on 04/12/2011, she was 14 years old. The appellant/accused is her father. She along with appellant/accused, her two school going brothers and mother were residing in Room No.17, Sagar Kutir Nagar, 7 Bungalow, Andheri. House of the prosecutrix was on the first floor, whereas the ground floor was occupied by his uncle James, his wife and two children. Apart from this house, family of the appellant/accused and the prosecutrix were possessing one hut which was situated in the vicinity. They were doing business of selling illicit liquor in that hut.
- (b) P.W.No.2 Manda Alfred Sheri is wife of younger brother of father of the appellant/accused. P.W.No.4 George Alfred Sheri is son of P.W.No.2 Manda Alfred Sheri and cousin of the appellant/accused. P.W.No.3 Rajni @ Ruksana Jagannath

Salunkhe is neighbourer as well as friend of P.W.No.2 Manda Alfred Sheri. They were residing in the vicinity of the house of the P.W.No.1/prosecutrix as well as the appellant/accused.

- (c) According to the prosecution case, the prosecutrix/P.W.No.1 was taking education in 7th Standard St.Luise Convent High School, Andheri, Mumbai. Her mother was doing work as a maid-servant, whereas her father i.e. appellant/accused was doing sundry work.
- (d) The prosecutrix/P.W.No.1 alleged commission of rape on her repeatedly by the appellant/accused from the day of Lord Ganesh Immersion Ceremony of the year 2010 to Diwali festival of the next year i.e. 2011. The first such incident took place on the day of Lord Ganesh Immersion ceremony of the year 2010 at about 6.30 p.m. On that day, the appellant/accused came to the house when the prosecutrix/P.W.No.1 was sleeping. After denuding her, he committed rape on her. The second such incident took place after two months. The appellant/accused took the prosecutrix/P.W.No.1 from her school and brought her back to his house and committed rape on her. Thereafter, during Diwali festival of 2011 on the pretext of meeting his brother-in-law, the appellant/accused took the prosecutrix/P.W.No.1 from Mumbai to Pune and committed rape on her at Mukesh Lodge at Pune. On the

next day, when the appellant/accused was sleeping, the prosecutrix/P.W.No.1 informed her mother telephonically about the incident. On return to Mumbai, the prosecutrix/P.W.No.1 instead of going to her house located at Room No.17, went to the hut and informed the incident to her mother. Thereafter, she went to disclose the incident to her uncle named James. Then with the cousin of James, prosecutrix/P.W.No.1 went to the Police Station and lodged report (Exhibit 10) against the appellant/accused, which has resulted in registration of Crime No.443 of 2011 for offences punishable under Sections 376, 323 and 506 of the IPC against the appellant/accused with Versova Police Station, Mumbai.

- (e) Routine investigation followed. Statement of witnesses of came to be recorded and prosecutrix was sent for medical examination. The spot was inspected and on completion of investigation, the appellant/accused came to be charge-sheeted.
- (f) The charge for offences punishable under Sections 376, 506 and 323 of the IPC was framed and explained to the appellant/accused. He pleaded not guilty and claimed trial. In support of the charge, the prosecution has examined in all seven witnesses. The prosecutrix is examined as P.W.No.1

and her FIR lodged on 04/12/2011 is at Exhibit 10. Manda Alfred Sheri is examined as P.W.No.2, whereas her friend Rajni @ Ruksana Jagannath Salunkhe is examined as P.W.No.3. George Alfred Sheri is examined as P.W.No.4. Dr.Baban Shinde, Medical Officer working with Nagpada Hospital is examined as P.W.No.5. Exhibit 21 is the report of medical examination of the prosecutrix. Anand Shinde, PSI, Versova Police Station is examined as P.W.No.6. Another Investigating Officer Ramdas More, Police Inspector is examined P.W.No.7.

- (g) The defence of the appellant/accused was that of total denial. He, however, did not enter in defence.
- (h) After hearing the parties, by the impugned Judgment and Order dated 19/12/2012 passed in Sessions Case No.206 of 2012, the learned Additional Sessions Judge, Greater Mumbai was pleased to convict the appellant/accused for offence punishable under Section 376 of the IPC, whereas he came to be acquitted of offences punishable under Sections 323, 506 of the IPC. He is sentenced as indicated in opening paragraph of this Judgment for the offence punishable under Section 376 of the IPC.

3 I heard Shri.Apte, the learned Advocate appointed to

represent the appellant/accused at the cost of the State. He vehemently argued that evidence of the prosecutrix and particularly, material brought on record from her cross-examination is sufficient to conclude that the prosecution has failed to establish the guilt of the appellant/accused beyond all reasonable doubts. The appellant/accused has probalilized his defence and he has been falsely implicated in the crime in question.

4 The learned Additional Public Prosecutor argued that the prosecutrix was cross-examined after two months of recording her chief-examination and, therefore, she has deposed in favour of the appellant/accused in the cross-examination. The learned Additional Public Prosecutor further argued that Section 153 of the Evidence Act became relevant on this aspect and, as such, the impugned Judgment and Order cannot be interfered with.

5 I have carefully considered the rival submissions and also perused the entire Record and Proceedings including depositions of witnesses as well as evidence adduced on record by the prosecution.

6 At the outset, it needs to be put on record that in a criminal trial, degree of proof is stricter than what is required in civil proceedings. In criminal trial however serious the facts and

circumstances of the case may be, the charges made against the accused are required to be proved beyond all reasonable doubts and requirement of proof cannot lie in the realm of surmises and conjecture. The requirement that charges in criminal trial are required to be proved beyond all reasonable doubts is not diluted even in sexual offences including one punishable under Section 376 of the IPC. Section 3 of the Indian Evidence Act, 1872 prescribes definition of term “proof”. The fact is said to be proved when after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of particular case, to act upon the supposition that it exists. This is the standard which is required for holding fact as 'proved'. Keeping in mind these aspects, let us examine evidence adduced by the prosecution in order to ascertain whether the prosecution has successfully established the fact that the appellant/accused, who is father of the prosecutrix, who at the relevant time was a minor girl had repeatedly committed forcible sexual intercourse with her at his house as well as Mukesh Lodge at Pune.

7 Considering the allegations levelled against the appellant/accused in the prosecution case, to a large extent, hinges on the testimony of the prosecutrix, who happens to be daughter of the appellant/accused. It is well settled that in case of sexual offences, if evidence of prosecutrix/victim of the crime in

question if found to be reliable and trustworthy, then the same does not require any corroboration and the conviction can safely be based on uncorroborated testimony of the prosecutrix. Similarly, evidence in such matters is required to be appreciated keeping in mind broader probabilities of the prosecution case.

8 According to the prosecution case, the prosecutrix/P.W.No.1 had firstly disclosed the alleged incident of repeated rape to her mother and then her mother had directed her to approach her grand-mother for visiting the Police Station. That is how, according to the prosecution case, along with P.W.No.2 Manda Alfred Sheri and other relatives, the prosecutrix approached Versova Police Station and lodged report (Exhibit 10) on 04/12/2011. As against this, it is the defence of the appellant/accused that his family was financially sound because of their business of selling illicit liquor and, therefore, his other relatives harbouring grudge against him. That is how, they concocted and implicated the appellant/accused in a false case of rape on his minor daughter.

9 On this factual backdrop, it is in the evidence of prosecutrix/P.W.No.1 that on the day of Lord Ganesh Immersion Ceremony of 2010 at about 4.30 p.m. to 5.00 p.m., when she was sleeping in the house, the appellant/accused came and committed rape on her. Thereafter, he warned her not to disclose the

incident to her mother. The prosecutrix has described the act of commission of rape by stating that 'गंदा काम किया', apart from describing actually as to what happened on that day. Then, as per her statement, on one day of the year 2011, the appellant/accused took her to the house from the school, removed her clothes and did 'गंदा काम' with her. Thereafter, he threatened her not to disclose the incident to her mother. The prosecutrix on this occasion has not stated as to what she meant by 'गंदा काम'. The prosecutrix/P.W.No.1 further deposed that during Diwali vacation of the year 2011, the appellant/accused told her mother that his brother-in-law has come to Pune from Dubai and had called him along with prosecutrix. Despite resistance by her mother, appellant/accused took her to Pune. He booked a room at Mukesh Lodge and committed rape on her. Apart from describing the actual incident, the prosecutrix once again narrated the incident by saying that the appellant/accused had done 'गंदा काम' with her. She further deposed that when her mother telephonically called her father, her father falsely disclosed her that they are still undergoing journey by the bus. Thereafter, in the midnight, as stated by the prosecutrix, they went to the house of her aunt. On the next day morning, her mother made a telephonic call when her father was sleeping. Taking the opportunity, she told her mother that the appellant/accused had committed rape on her at the lodge. As per version of the prosecutrix then in the noon time, her mother repeatedly called her father i.e. appellant/accused and insisted

him to return back to Mumbai. On the next day morning, they returned to Mumbai and on reaching the home, she ran to the hut and narrated the incident to her mother, who inquired about the same with her father. Her father then assaulted her mother. The prosecutrix further deposed that on 04/12/2011, when her mother was returning with her from the church, she told her to lodge report against the appellant/accused and, therefore, she went to her grand-mother, disclosed the incident to her and then along with other relatives as well as her grand-mother, she went to the Police Station and lodged report (Exhibit 10).

10 The prosecutrix, who disclosed her age as 14 years while in the witness box has deposed about the incident in clear words with all necessary details and, therefore, at the first blush, her evidence gives an impression that the same can be explicitly relied upon for basing the conviction. After lodging the FIR, the prosecutrix, as seen from the evidence, was sent to the Children Home. She deposed that after the incident she is lodged at Sneh Sadan, Mumbai where she continued to reside even when her evidence came to be recorded before the learned trial Court. Cross-examination of the prosecutrix assumes importance in the wake of material surfaced on record during her cross-examination. The prosecutrix has stated that the hut located in the vicinity of her house possessed by her family is meant for doing liquor business. The prosecutrix further stated in her cross-examination

that P.W.No.2 Manda Alfred Sheri, P.W.No.4 George Alfred Sheri and P.W.No.3 Rajni @ Ruksana Jagannath Salunkhe were having grudge against her family because her family is financially sound. They all were not having cordial relations with her family and they were not on talking terms with her family members. The prosecutrix had stated in her cross-examination that she had been to the house of P.W.No.2 Manda Alfred Sheri, who happens to be wife of younger brother of father of the appellant/accused to disclose her that her father i.e. appellant/accused beaten her. She further stated that except that she had not disclosed anything to P.W.No.2 Manda Alfred Sheri. The prosecutrix further stated in her cross-examination that she along with Manda, George and Anthony went to the Police Station. As per version of the prosecutrix, police had not inquired about the incident from her, but her signature was taken on the FIR on the pretext of sending her to Children Home. The prosecutrix has further stated that she did not know the contents of FIR (Exhibit 10) and it was signed by her only at the instance of her aunt. To crown this all, the prosecutrix has admitted in her cross-examination that her father i.e. the present appellant/accused did not commit any 'गंदा काम' with her. She stated that the story that her father committed rape on her is concocted by police, her aunt as well as others and the said story is false. She further stated that her father is falsely implicated by police as well as her aunt. Apart from this, the prosecutrix has further stated that she has deposed whatever she

has stated in chief-examination as per say of the police as police threatened her that else they will implicate her mother in false case and will send her in jail. At this juncture, it is apposite to note that evidence of the prosecutrix shows that her mother was doing the business of illicit liquor in the hut located in the vicinity and, therefore, a doubt creeps in mind whether version of the prosecutrix in her chief-examination was outcome of pressure exerted on her by police.

11 Thus, this material brought on record from cross-examination of the prosecutrix has entirely demolished the substratum of the prosecution case fully and completely. The prudent prosecutor faced with such situation would have at least declared the prosecutrix hostile and would have cross-examined her on all these aspects. This has not been done for the reason best known to the prosecution. This inaction by the prosecutor has resulted in leaving the entire material brought on record from the cross-examination of the prosecution unchallenged. This unchallenged version of the prosecutrix coming on record from her cross-examination is showing that she had been to the relatives including P.W.No.2 Manda Alfred Sheri and P.W.No.4 George Alfred Sheri to disclose that her father beats her and then she was taken to the Police Station where these relatives concocted and lodged false report against her father.

12 It is worthwhile to note that even at the time of

recording her evidence, the prosecutrix was staying with the Children Home i.e. Sneh Sadan as stated by her. There is nothing in her evidence to show that she was under the influence of her father i.e. appellant/accused while she was in the witness box. She had disowned the FIR. On this backdrop, cross-examination of P.W.No.6 Anand Shinde, PSI Versova Police Station, who had investigated the crime in question at the inception shows that he had recorded statement of P.W.No.2 Manda Alfred Sheri and thereafter obtained her thumb impression and gave it to P.W.No.7 Ramdas More, Police Inspector. Though this witness has denied that in collusion with his seniors as well as other people, he torn the statement of P.W.No.2 Manda Alfred Sheri, which was having her thumb impression, it needs to be put on record that such statement which was undisputedly recorded by P.W.No.6 Anand Shinde, PSI is not forthcoming. Even cross-examination of P.W.No.2 Manda Alfred Sheri goes to show that when she along with others went to the Police Station, police were not believing the version of the prosecutrix. They inquired about the incident from all of them. Then after recording the contents, her thumb impression was obtained on the statement. This material elicited from cross-examination of P.W.No.2 Manda Alfred Sheri points out that disbelieving the prosecutrix, police made inquiry from others including P.W.No.2 Manda Alfred Sheri and recorded her statement and thereafter her thumb impression was obtained on her recorded statement. A lurking doubt creeps in the judicial

mind as to whether it was the FIR of the crime in question which appears to have been suppressed by the prosecution, making the prosecution case suspect, as the prosecutrix has stated that she had not stated anything to police.

13 Another glaring aspect which casts a shadow on the prosecution case is condition of the prosecutrix/P.W.No.1 when she had been to the Police Station accompanied by relatives of her father i.e. the appellant/accused as well as others, so also her condition when she had been to her relatives to disclose the alleged incident. P.W.No.2 Manda Alfred Sheri has repeatedly stated that when the prosecutrix/P.W.No.1 had been to her house, she was frightened and shivering. Similar is the version of her uncle P.W.No.4 George Alfred Sheri. As against this, P.W.No.5 Dr.Baban Shinde, who medically examined the prosecutrix has stated that her mental condition was sound and her gait was normal. In the wake of the fact deposed by the prosecutrix in her cross-examination that she was not at all inquired by the police when she had been to the Police Station with her relatives and just signed the FIR only on the say of her aunt without knowing the contents thereof, this factor assumes importance. The relatives of the prosecutrix, who accompanied to the Police Station, are stating that she was frightened and shivering, whereas the attending Medical Officer found her behaviour normal. The prosecutrix is stating that she had complained to her parental relatives that her

father beats her and, thereafter, her father is falsely implicated in rape case by her parental relatives. This aspect, on the backdrop of finding the condition of the prosecutrix normal by the Medical Officer, who examined her, is also making the prosecution case suspect.

14 It is well settled that when the available evidence against the accused suffers from infirmities and is doubtful, then non-examination of the material witness becomes an important factor to cast shadow of doubts on the prosecution case. In the case in hand, the prosecutrix has initially disclosed the incident to her mother. As per the prosecution case and version of the prosecutrix, it was her mother, who had insisted her to lodge report against her father. That is how, the prosecutrix went to P.W.No.2 Manda Alfred Sheri. The first version of the incident was heard by the mother of the prosecutrix from her. Therefore, mother of the prosecutrix was an important witness in this case. No reason can be gathered from the Record and Proceedings as to why the mother of the prosecutrix is not examined by the prosecution apart from not cross-examining the prosecutrix by declaring her as hostile.

15 Further scrutiny of the evidence of the prosecutrix shows that she was sharing her house along with her mother and father with her two brothers namely Hansel and Ornald, who were taking education in 9th and 8th Standard respectively at St. Blaise

High School, Amboli. Timing of their school was from 7.10 a.m. to 1.00 noon, whereas school timing of prosecutrix was 7.15 a.m. to 1.00 noon. The prosecutrix has candidly stated in her cross-examination that after school hours she as well as her brothers used to stay at her house. Her uncle James, wife of James and their two children Maria and Alex also used to be present at their house, which is on the ground floor. It has also come on record from the evidence of the prosecutrix that in front of their house, there is only available open space in the locality, which always used to be inhabited by 15 to 20 persons. House of the prosecutrix was comprising of two small rooms. With such facts situation prevalent on the scene of occurrence, moot question arises as to whether it was possible for the father of the prosecutrix to commit rape on his daughter while his two sons as well as other relatives were in the house. This question is not being answered in the evidence adduced by the prosecution.

16 Net result of foregoing discussion makes it clear that it is not possible to believe what the prosecutrix had stated in her chief-examination in the light of facts which she has deposed to in the cross-examination. It is not possible to conclude which part of her evidence is correct. Whether she is stating true facts in her chief-examination or whether she is disclosing correct facts in her cross-examination is difficult to decide. Her evidence is not gaining corroboration from other evidence adduced by the

prosecution. Forensic evidence is also not supporting the case of prosecution. It is not clear as to whether the FIR was actually lodged by the prosecutrix or by P.W.No.2 Manda Alfred Sheri, whose statement was recorded by P.W.No.5 Anand Shinde, PSI, on which she has put her thumb impression.

17 To conclude, evidence adduced by the prosecutrix is not sufficient to come to the conclusion that the appellant/accused had committed rape on his minor daughter. The available material on record is not sufficient to prompt the prudent person to form an opinion that the appellant/accused had committed rape on his minor daughter. Though the FIR was lodged on 04/12/2011 and the alleged incident of last rape on the prosecutrix was shortly committed prior to lodging of the FIR. It took place allegedly at the Mukesh Lodge, Pune. The prosecution has failed to bring on record the evidence in the form of Booking Register of the Mukesh Lodge and has not even cared to examine any of the employee of the Mukesh Lodge to depose that at the time of the Diwali festival of the year 2011, the appellant/accused accompanied by the prosecutrix had been to that Lodge and had stayed there.

18 In this view of the matter, the impugned Judgment and Order of conviction and resultant sentence cannot be sustained. The same is based on the surmises and conjunctures by ignoring

the material elicited from cross-examination of the prosecutrix.
Therefore, the Order :

ORDER

- (i) The Appeal is allowed.
- (ii) The impugned Judgment and Order of conviction and resultant sentence is quashed and set aside.
- (iii) The appellant/accused is acquitted of the offence punishable under Section 376 of the Indian Penal Code and he be set at liberty, if not required in any other case.
- (iv) With disposal of the appeal, Criminal Application bearing No.845 of 2017 submitted by the appellant/accused in a frustrated manner to permit him to withdraw his appeal as it is not listed for final hearing, also stands disposed of.

(A.M.BADAR J.)