

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 119 OF 2014

Udaykumar Kisan Velonde.

Age : 34 yrs., Occ: Driver,
R/at-L-4 Ward, Room No. 20,
BMC Colony, Santosh Nagar,
Goregaon(E), Mumbai.

(At present in Thane Prison)

..Appellant.

V/s.

The State of Maharashtra

(At the instance of Inspector of Police,
Dindoshi Police Station)

..Respondents.

Mr. Lokesh Zade, Advocate appointed by Court for appellant.

Mr. Y.M. Nakhwa, APP for State.

CORAM : SMT. SADHANA S. JADHAV,J.

DATE : NOVEMBER 22, 2018.

JUDGMENT :

1 The appellant herein is convicted for the offence punishable under section 376 of the Indian Penal Code and sentenced to suffer R.I. for 10 years and fine of Rs. 20,000/- I.d. further R.I. for 3 years. The appellant is also convicted for offence punishable under section 450 of the Indian Penal Code and sentenced to suffer R.I. for 5 years and fine of Rs. 10,000/- I.d. R.I. for one month, by the Additional Sessions Judge,

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Greater Bombay in Sessions Case No. 210 of 2011 vide Judgment and Order dated 20/11/2013. Hence, this Appeal.

2 Such of the facts necessary for the decision of this Appeal are as follows :

(i) On 25/7/2011 Mrs. X lodged a report at Dindoshi Police Station alleging therein that she resides in BMC Colony, H-Ward, room No. 27, at Goregaon on rent. The appellant happens to be the owner of the room. The appellant had been to her house a week ago and had demanded rent. Her father had requested him to reiterate the demand in the following week. She has also alleged that there was a leakage in the room. That the owner was to lay plastic sheet on the roof. She was aware of all these things.

(ii) According to her, on that day i.e. on 24/7/2011, she was alone at home. She had heard a knock on the door at about 5 p.m. Upon enquiry the person standing out had informed her that he is the owner of the room and that he had come to lay plastic on the roof. Thereafter, she opened the door. That the appellant was accompanied by one unknown person. The appellant had sent his companion to get ladder in order to lay plastic sheet. That she was cleaning utensils in the house. She had herself closed the door from inside.

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(iii) After some time, she had suddenly realised that she had been gaged by her mouth and that the appellant had pushed her against her will and had caught hold of both the hands and thereafter, he had ravished her.

(iv) In the meanwhile, there was a knock on the door. That he had untied the knot of the handkerchief to her mouth. The complainant was crying. Her sister Savita was at the door step. The moment she opened the door, the appellant had fled from the room.

(v) The complainant had disclosed the incident to her sister. She has also alleged that the appellant was dragged to her house by the people. He was assaulted and thereafter, arrested by the police. Thereafter, they had approached the police station and set the law into motion. On the basis of the said report, Crime No. 267 of 2011 was registered at the police station against the appellant for the offence punishable under section 376 of the Indian Penal Code.

(vi) After completion of investigation, charge-sheet was filed. The case was committed to the Court of Sessions and registered as Sessions Case No. 210 of 2011. The prosecution examined as many as 9 witnesses to bring home the guilt of the accused. One defence witness was examined, who happens to be the head mistress, of the school last

attended by the complainant.

3 The case mainly rests on the evidence of the complainant and the medical evidence. The deposition of P.W. 1 is in consonance with the first information report. According to her, her mouth was tied with handkerchief and her hands were twisted against wall. The first information report is marked at Exh. 12. In the cross-examination, she had admitted that a week prior to the incident, the accused had been to her house to demand rent. At that time, he had not misbehaved with her. Her father had asked him to revisit in order to receive rent as he did not have money to pay the rent.

4 It is pertinent to note that in the cross-examination, she has admitted that she had left the school in the year 2005 and thereafter, she had never attended any school. She has also admitted that it is a thickly populated colony and that the distance between two houses is less than 2 feet. Usually, soon after her parents left the house for work, she used to visit her neighbours, relatives and her sisters who are residing in close proximity of her house, rather in the same colony. It is also admitted that the road passing in front of her room is busy. Normally, children are playing opposite her house. It is also admitted that her house is close to Mariamma temple and that devotees used to visit temple

throughout day. That there used to be pooja in the morning as well as in the evening.

5 When she was confronted with the first information report which is at Exh. 12, she has stated that she had not named accused in the FIR. A suggestion was given in the cross-examination that she had intimate relations with one Rajesh and he used to visit her house in the absence of her parents.

6 P.W. 1 has further admitted that when the door was knocked, the caller had not disclosed his name. It is further admitted that two persons, for whom she opened door, were unknown to her and therefore, she had not named any particular person in the FIR. It is also stated that the passers by are visible from the window. She had denied the suggestion that the person who had entered the house had shut the window. In the cross-examination, she had reiterated more than once that the person, who knocked the door and who entered the house, were unknown to her. This admission would assume significance for the simple reason that the test identification parade is not held.

7 There is also an admission that she had seen the accused/appellant when he had been to her house for demanding rent.

She has deposed before the Court that she has been ravished by unknown person. However, she has admitted in answer to Court question that the accused/appellant had been to her house one week prior to the incident for demanding rent. She has feigned ignorance in respect of the name of the owner of the room and had reiterated that she had not named the appellant in the FIR.

8 It is also admitted that on the same day in the evening, her brother-in-law had called upon the accused and asked him to visit the house and that the accused had obliged. After the accused visited her house, he was assaulted by the residents of the locality and he was taken to the police station. She has denied to have stated the portion marked "A" in the FIR, which is in respect of the visit of her sister Savita at the relevant time. She has further deposed that she could not raise hue and cry as her mouth was tied with handkerchief and her hands were pinned against the wall. That she had not raised shout even after the incident.

9 The learned Counsel appointed for the appellant has drawn attention of this Court to the fact that there was further cross-examination, in which she has admitted that she has got married in the year 2011 and her husband's name is Mintu Kumar and that she had got married just two months' prior to the incident and that her husband was

staying at Bihar. It is also submitted across the bar that the said fact has not been disclosed in the first information report.

10 The prosecutrix was subjected to medical examination and was examined by P.W. 5 Dr. Kalyankar. Dr. Kalyankar has deposed before the Court that on 25/7/2011 he examined the prosecutrix and recorded the history. She has disclosed to the doctor that on the date of the incident i.e. on 25/7/2011 son of her landlord had knocked the door. He had demanded the plastic sheet to cover roof and when she went to kitchen to bring the plastic sheet, he had tied her mouth with handkerchief and had ravished her. She had disclosed to the doctor that when he was ravishing her, her sister who is staying nearby came to her house and alerted neighbours and gathered public and assaulted the son of the owner and handed him over to the police.

11 It is further stated that there is no external injury on her person. The result of the ossification test was that her age was between 13 to 14 years with 6 months error on either side. The medical certificate is at Exh. 23. On the same day he had examined the accused and had found nail marks over right side face, contusion on the right side face, contused abrasions over right side back thoracic region and several abrasions on his person and the age of injury was within 24 hours.

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Medical certificate of the accused is at Exh. 25.

12 In the cross-examination, the doctor has admitted that the injuries sustained by the accused are possible by hard and blunt object except injury No. 2, which was possible by fists blow. That at the time of examination, he did not find any injury on the private part or any injury or any foreign body. It is specifically admitted that while narrating the history of the incident, the prosecutrix had not narrated any type of resistance by her. The doctor had further admitted that the ossification test may vary from person to person. It is also admitted that in course of chemical analysis, no particles of semen are detected. There is no observation of the doctor either to the effect that there is evidence of forcible sexual intercourse.

13 Perusal of the spot panchanama would show that the window in the said room was in fact, ventilator which is hardly at a distance of 6 inch to 1 ft. from the ceiling and therefore, anything happening in the room would not be visible to the passers by. The learned Counsel appointed for the appellant vehemently submitted that there is inherent inconsistency in the deposition of P.W.1. The prosecution has not examined Savita for the reasons best known to the prosecution.

14 The learned Counsel submits that the question is as to whether Savita had visited the house when the act was being committed by the appellant or after the prosecutrix was ravished as P.W. 1 has disclosed that Savita had visited the house alongwith neighbours at the first instance itself. It is pertinent to note that even according to P.W.1, it was not the accused who had closed the door but the prosecutrix has closed the door herself. There is nothing to indicate that the door was latched from inside. There was no attempt by the accused either to close the door or to latch the door from the inside.

15 The prosecution has examined mother of the prosecutrix Premasheeladevi Jha who is P.W. 2. Her evidence is only hearsay evidence. P.W. 3 Anjani Mishra as well as P.W. 4. Nitin Sanap have been examined by the prosecution only to substantiate that the accused was assaulted by the neighbours out of their house on the same day. P.W. 6 Padam Vishwkarma is the panch for seizure panchanama of clothes of the prosecutrix as well as spot panchanama and P.W. 7 Vishnu Vairat is the panch for seizure of the clothes of the accused.

16 Upon perusal of CA report at Exh. 19, it is clear that there was no blood or semen detected on the clothes of the accused and his blood group was "A". As far as the prosecutrix is concerned, there was no

semen detected on the vaginal smear although she was examined within few hours after the incident. No blood was detected either on the clothes or on the hair.

17 Learned Counsel appointed for the appellant submits that it is the case of the prosecution that the prosecutrix was minor, who was hardly 13 to 14 years old. However, age of the prosecutrix has not been established by the prosecution in accordance with law. The defence witness Mrs. Chandrama Verma has specifically stated that the school leaving certificate, which is being relied upon by the investigating agency, has not been issued from her school. Therefore, according to the learned Counsel, ascertainment of the age of the prosecutrix is shrouded with mystery. Moreover, she happens to be a married woman.

18 P.W. 8, The investigating officer API Tanaji Kanade has deposed before the Court that on 24/7/2011 he was attached to Dindoshi Police Station. That the prosecutrix has visited police station alongwith her parents at about 7.55 p.m. and lodged the FIR against her landlord Uday Kumar Velonde and alleged that he had committed rape on her. He had reduced report into writing and on the basis of the said report had registered Crime No. 267 of 2011. The investigation was set in motion. That the accused was brought to the police station by the residents of

BMC colony. It is also noted in the arrest panchanama that the accused was assaulted and had sustained injury on his face and back. On the next day, the investigation was handed over to another officer. P.W. 8 has admitted in the cross-examination that at the time of registration of FIR, the age of the prosecutrix was not disclosed. That there was neither any enquiry nor investigation about the person who had accompanied the accused at the relevant time and is alleged to have brought a ladder in her presence. He has proved the portion marked "A" in the FIR. It is also admitted that in the course of investigation, no independent witnesses have come forward to speak about the said incident. It is also admitted that the spot of incident is slum area and in front of her house, there is a public road. According to the investigating officer, passers by can peep through window and see what is happening inside.

19 P.W. 9 Suresh Nirmal who happens to be the Senior P.I. attached to Dindoshi Police Station has filed the charge-sheet after completion of investigation. It is admitted in the cross-examination that he had recorded statement of Vilas Waghmare, who had brought the ladder on that day. It is pertinent to note that Vilas Waghmare has not been examined by the prosecution for the reasons best known to it. The ladder is not seized. He has also recorded statement of one Sunita Soni who had witnessed the incident of affixing the said ladder to the

room. There is no investigation in respect of the son of the room owner. There is no witness to substantiate the allegation that the prosecutrix had raised hue and cry. It is also admitted that on the day of the incident, no witness had come forward and neither was willing to disclose about the incident. The witness has also admitted that he had not verified the genuineness of the school leaving certificate. In any case, the head mistress had denied the issuance of the school leaving certificate.

20 The learned APP has vehemently submitted that there were nail marks on the face of the accused and therefore, an inference can be drawn that there was resistance by the prosecutrix and therefore, she had caused injury on his face in the course of resistance. The said submission is not supported by any material on record. Moreover, the Court cannot be oblivious of the fact that even according to the prosecutrix, there was no resistance and that her hands were pinned against the wall and therefore, she could not have caused injury of nail marks on his face.

21 In fact, there was more than sufficient material to infer that the injuries sustained by the accused was the result of the assault by the neighbours and relatives of the prosecutrix. The nail clippings of the

prosecutrix have not been taken. Instead, the investigating agency had taken nail clipping of the accused.

22 The very fact that even according to the prosecutrix, the accused was unknown to her and according to her, she had not named him in the FIR, would create doubt as to whether it was the appellant who had subjected the prosecutrix to sexual assault or whether the incident has occurred as narrated by the prosecutrix. Narration of the incident before the medical officer and the police officer are at variance and therefore, it would be difficult to hold that the prosecution has proved the guilt of the accused beyond reasonable doubt.

23 The reliance can be placed on the Supreme Court Judgment in the case of **Sudhansu Sekhar Sahoo v/s. State of Orissa reported in (2002) 10 SCC 743**. The Hon'ble Apex Court has observed as follows :

“18. It is well settled that in rape cases the conviction can be solely based on the evidence of the victim, provided such evidence inspires confidence in the mind of the court. The victim is not treated as an accomplice, but could only be characterised as injured witness. It is also reasonable to assume that no woman would falsely implicate a person in a sexual offence as the honour and prestige of that woman also would be at stake. However, the evidence of the prosecution shall be cogent and convincing and if there is any supporting

material likely to be available, then the rule of prudence requires that evidence of the victim may be supported by such corroborative material."

24 In view of the aforesaid circumstances, it is clear that the prosecution has failed to prove the guilt of the accused beyond reasonable doubt.

25 The learned Counsel Mr. Zade has been appointed to espouse the cause of the appellant . It would be difficult to part with Judgment without recording appreciation for the efforts made by the learned Counsel to espouse the cause of the appellant and to assist the Court after going through the records and proceedings and hence, professional fees of the learned Counsel are quantified at Rs. 7,000/- or as per rules.

26 Hence, following order is passed.

ORDER

(i) The appeal is allowed.

(ii) The Judgment and order passed by the learned Additional Sessions Judge, Greater Bombay dated 20/11/2013 is hereby quashed and set aside. The appellant is acquitted of all the charges.

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(iii) The appellant be released forthwith, if not required in other offence.

(iv) The fine amount, if paid, be refunded.

27 The appeal is disposed of accordingly.

Registry to communicate this Order to the appellant, who is lodged in jail.

[SMT. SADHANA S. JADHAV, J.]