

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.721 OF 2014

Sarvar Mohd. Raza @ Ajay
Age - 28 years, Occu: Auto Rickshaw Driver,
R/o. Haji Ganj, Dist: Sultan Pur,
Taluka Lamuha, State U.P.
At present in Nashik Road Central Prison,
Nashik

.... Appellant
(Orig. Accused No.1)

versus

The State of Maharashtra
(At the instance of Bandra Police Station
vide C.R.No.185 of 2012)

... Respondent

**WITH
CRIMINAL APPEAL (ST) NO.206 OF 2015**

Mohd. Haiderali
Abdulmajid Hashmi @ Suraj
Age : 27 years, Occ: Auto Rickshaw Driver,
R/o. Mirzapur,
Post-Putlighar, Thana Kotal,
Dist-Mirzapur,
State – Uttar Pradesh

.... Appellant
(Orig. Accused No.2)

versus

The State of Maharashtra
(At the instance of Bandra Police Station
vide C.R.No.185 of 2012)

... Respondent

.....

- Mr.Aniket Vagal, Advocate for the Appellant in Appeal No.721/14.
- None for the Appellant in Appeal (St) No.206/15.
- Mrs.M.M. Deshmukh, APP for the State/Respondent.

**CORAM : B. R. GAVAI &
SARANG V. KOTWAL, JJ.
DATE : 05th JULY, 2018**

JUDGMENT (PER : SARANG V. KOTWAL, J.) :

1. Both these Appeals are preferred by Appellants against the Judgment and Order dated 28/08/2014 passed by the learned Additional Sessions Judge, Greater Mumbai, in Sessions Case No.646/12. Appeal No.721/14 is preferred by the original accused No.1 Sarvar Mohd. Raza @ Ajay and Appeal (ST) No.206/15 is preferred by original accused No.2 Mohd. Haiderali Abdulmajid Hashmi @ Suraj. For the sake of convenience the Appellants in both these Appeals are referred to hereinafter by their status in the Sessions Case as the accused.

2. By the impugned Judgment and Order both the accused were convicted and sentenced as follows:

(1) Accused No.1 was convicted for the offence punishable u/s 363 of IPC and was sentenced to suffer rigorous imprisonment for seven years and

to pay a fine of Rs.500/-, in default of payment to undergo further rigorous imprisonment for two months.

- (2) Accused Nos.1 and 2 were convicted for the offence punishable u/s 366 of IPC and were sentenced to suffer rigorous imprisonment for ten years and to pay a fine of Rs.1,000/- each, in default of payment to undergo further rigorous imprisonment for three months.*
- (3) Accused Nos.1 and 2 were also convicted for the offence punishable u/s 354 of IPC and were sentenced to suffer rigorous imprisonment for five years and to pay a fine of Rs.500/- each, in default of payment to undergo further rigorous imprisonment for three months.*
- (4) Accused No.1 was also convicted for the offence punishable u/s 376(2)(i) of IPC and were sentenced to suffer imprisonment for life and to pay a fine of Rs.1,000/-, in default of payment to undergo further rigorous imprisonment for three months.*

(4) *All the sentences were directed to run concurrently.*

(5) *Both the accused were granted set off for the period of imprisonment already undergone by them.*

3. The prosecution case has unfolded through the evidence of the prosecutrix case who was examined as P.W.2. According to the prosecution case, both these accused committed rape on the prosecutrix on 19/05/2012. The prosecutrix went to Nagpada Police Station with the help of a police constable attached to Nagpada Police Station. The police attached to Nagpada police station, were led to Bandra (E) locality, as they wanted to verify the jurisdiction for investigation. She showed two persons sitting in an Autorickshaw and told the police that they were the culprits. The police accosted them. These two persons were allegedly the present Appellants. According to the prosecution case, the accused No.2 Mohd. Haiderali Abdulmajid Hashmi @ Suraj as well as the accused No.1 Sarvar Mohd. Raza @ Ajay had committed

rape on her. Thereafter the accused were handed over to the officers of Bandra Police Station. C.R.No.185/12 was registered against them. The Police officers at Bandra Police Station recorded statements of the police officers from Nagpada Police Station. Investigation was carried out. The prosecutrix was sent for medical examination. Even the accused were sent for medical examination. The statements of various witnesses were recorded and at the conclusion of the investigation, the charge-sheet was filed. As the case was exclusively triable by the Court of Sessions, it was committed to the Court of Sessions at Mumbai.

4. During trial, the prosecution examined 10 witnesses. The main witness was the prosecutrix herself, who was examined as P.W.2. At the conclusion of the trial both the accused were convicted and sentenced as mentioned earlier.
5. We have heard the learned Counsel Mr.Aniket Vagal for the Appellant in Appeal No.721/14. Nobody was present and

represented the Appellant in Appeal (ST) No.206/15. We also heard the learned APP Mrs. M.M. Deshmukh for the State of Maharashtra.

6. P.W.2 was 17 years of age when her evidence was recorded in the Court in September 2013. She has deposed that she is basically from Post-Bandka, Ujjain, Madhya Pradesh. She has deposed that on 19/05/2012, she had left her village to go to Punjab to her brother's house. She had Rs.400/- with her. Her mother refused to give her more money and instead slapped her. Therefore she got angry and decided to go to her brother's place in Punjab. Her brother was doing labour work. P.W.2 has deposed that she got angry with her mother and therefore left her house without informing anybody. On that day, her mother had gone to Ujjain. P.W.2 has deposed that she first went to Ujjain by Bus and then went to the railway station and sat in a train in the evening under the impression that the train would take her to Punjab. Instead, the train was for Mumbai and reached Mumbai at 05.45 a.m. One lady at the railway station

told her that she had mistakenly come to Mumbai, instead of Punjab and she should go back to Ujjain from Bandra and she should go to Bandra by a local train. P.W.2 has further deposed that then she went to Bandra where she saw one Rikshawala. P.W.2 has claimed that the said Rikshawala was the accused No.2. She further deposed that she made enquiries with him regarding the train to Ujjain. According to her, the accused No.2 offered to accompany her to Ujjain and called accused No.1. She has further deposed that they gave her something to eat and thereafter they took her to Seashore. She has further deposed that accused No.2 had gone to bring water. In the meantime, the accused No.1 committed rape on her. Then she was taken by them to a Theater. She has deposed that she was feeling giddy and even vomited because of the food they had given her. She has further deposed that in the Theater the accused No.2 committed rape on her. She has further deposed that then they hired a Rickshaw and took her to one house and then again both of them committed rape. She further deposed that after she started bleeding from her private parts, the accused got

frightened. They asked her to go away and told her not to make any complaint to the police. P.W.2 has further deposed that, then she came back to Mumbai in a local train and went to one police station. The police officer took her in a police vehicle to Bandra. Both the accused were standing near a Rikshaw. P.W.2 pointed out them to the police. Police then caught hold of them and recorded her complaint. She has deposed that her complaint was recorded at the police station at Mumbai railway station. But she was unable to state the name of the police station. Thereafter she was kept at Dongri Shelter Home. She has claimed that accused had thrown away her blood stained clothes and had given her new clothes. She has deposed that on the date of commission of offence, she was 13 years of age. In the cross-examination she was confronted with her statements in the FIR. The entire story of a lady named Sunita meeting her on her alighting in Mumbai, is missing from her FIR. P.W.1 could not explain as to why it was not mentioned in the FIR. She has admitted that there was crowd near the Sea and in the Theater. She further admitted in the cross-examination that police had

told her to state that her age was 13 years. She also could not explain as to why it was not mentioned in the FIR that accused No.1 had committed rape on her near the Sea. She also could not explain as to why it was not mentioned in her FIR that they had committed rape one after the other in the house after coming back from the Theater.

7. Apart from P.W.2, the prosecution has examined other witnesses. P.W.1 was a Pancha called by the officers of Bandra Police Station on 20/05/2012 at 07.00 a.m. He claims that the prosecutrix showed them the places i.e. Bandstand, Nandi Theater and Bandra Terminal, where the incident occurred in parts. P.W.3 Dr.Baban Shripati Shinde, attached to Nagpada Hospital had medically examined the victim on 20/05/2012 between 04.45 p.m. to 05.30 p.m. On examination, P.W.3 did not find any injuries on her private parts or other parts of the body. He found that the Hymen was torn and tears were old and healed. According to him, the age of the victim was between 13-14 years. He stated that he had determined her age on the basis

of general examination. This witness has also examined both the accused and did not find any injuries on them. The medical reports are produced at Ex.33, 34 and 35.

8. P.W.4 Smt. Chanda Rohidas Walvi, was attached to Nagpada Police Station, who had accompanied the other police officers and the prosecutrix to Bandra Terminal, where the prosecutrix allegedly identified the accused, who were sitting in one Rikshaw. P.W.5 was a Pancha in whose presence the clothes of the prosecutrix were taken charge of and seized. P.W.6 API Gajanan Khanderao Jogdand was attached to Nirmal Nagar Police Station. He had recorded the statement of the prosecutrix which was treated subsequently as the FIR. The offence was registered at C.R.No.00/12 and was thereafter forwarded to Bandra Police Station. The officers of Nagpada Police Station PSI Bhosale and others handed over the two accused and the victim to Bandra Police Station as the offence had taken place within the jurisdiction of Bandra Police Station. P.W.7 PI Sanjay Abaji Bhosale was attached to Nagpada Police Station. On

19/08/2012 at about 07.30 p.m. police constable on mobile van of Nagpada brought the victim to him. Thereafter the victim told her story. Then at her instance they went to Bandra East locality, where the accused were seen sitting in a Rickshaw and this witness had apprehended them. P.W.8 API Sanjiv Krishna Phulpagare was attached to Bandra Police Station and had registered C.R.No.185/12 u/s 376, 354 r/w 34 of IPC at Bandra Police Station. He had conducted the investigation till the victim was sent for medical examination. P.W.9 Najmuddin Jahangir Momin was a hostile witness and does not help prosecution in any manner. P.W.10 P.I. Nandkumar Ramhari Gaikwad then attached to Bandra Police Station had conducted the further investigation and had recorded the statement of owner of the room where allegedly the rape was committed.

9. We have gone through the entire evidence and we are of the opinion that the story given by the prosecutrix is simply unbelievable. There are no corroborative pieces of evidence either. P.W.2 had come to Mumbai for the first time from her

village at Ujjain. She has deposed that she met a lady when she came to Mumbai and at that time she came to know that she had come to Mumbai instead of Punjab. P.W.2 further claims that on the suggestion of that lady, she went to Bandra Station by a local train. It is difficult to believe that a teenager who does not know the difference between Punjab and Mumbai, could go to Bandra by a local train on her own. Her further story that she met the accused there, who took wrong advantage of her situation, is clearly unbelievable. She had claimed that she was taken near sea and to a Theater, which she later pointed out as Nandi Theater. She claims that she was raped at both these places. She also admitted that these places were crowded. It is simply impossible that such offence could be committed at such crowded places. Thereafter she was taken to a room and again rape was committed on her and then she was asked to go away. P.W.2 has not further explained as to how and why she came to Nagpada. The most unbelievable part of the story is that, after she informed the police officers at Nagpada Police Station, they again went to the locality of Bandra (E) and they simply found

both the accused sitting in a Rickshaw. It is impossible to believe that the victim who was not familiar with Mumbai and who had come to Mumbai for the first time in her life, would lead the police to the exact spot in Mumbai, where the accused were easily apprehended by them. It is also difficult to believe that after registration of the FIR, she could lead the police party to all the places where allegedly different parts of the offence had taken place. Mumbai being a mega-city, is it impossible for a newcomer to remember the different locations and lead the police officer to those locations.

10. We are conscious of the settled principle that conviction can be based on the sole testimony of the prosecutrix. However, if the evidence given by the prosecutrix is not reliable or is intrinsically improbable as in the instant case, then the corroborative pieces of evidence assume importance. In the instant case not only there is no corroboration, but in fact the medical evidence belies the version given by the prosecutrix. Her medical examination has shown that there were no injuries on

her person including her private parts. The hymen was torn and the tears were “old and healed” that clearly rules out the immediate forcible sexual assault within a couple of days prior to her examination. Not surprisingly even the accused did not have any injuries on their persons. Very conveniently, the blood stained clothes are not before the Court on the specious ground that the accused had given different clothes to the prosecutrix. The story of the prosecutrix is full of omissions. Her story is improbable and in our opinion, it definitely does not pass the test of reliable evidence, warranting the conviction of the accused in such a serious offence. There are no incriminating C.A. reports connecting the Appellants with the present crime. Hence there are no grounds, on which, the conviction can be sustained. Hence, the following order :

ORDER

1. The Appeals are allowed.
2. The order of conviction and sentence dated 28/08/2014 passed by the learned Additional

Sessions Judge, Grater Mumbai, is quashed and set aside.

3. The Appellants are acquitted of the charges charged with.
4. The Appellants are directed to be set at liberty forthwith if not required in any other crime.

(SARANG V. KOTWAL, J.)

(B. R. GAVAI, J.)