

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.507 OF 2014

SHANTARAM VISHNU PARED)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Shantanu Phanse, Appointed Advocate for the Appellant.

Ms.V.S.Mhaispurkar, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 6th JUNE 2018

ORAL JUDGMENT :

1 By this appeal, the appellant/accused is challenging the judgment and order dated 21st October 2013 passed by the learned Additional Sessions Judge, Vasai, District Thane, in Sessions Case No.83 of 2011, thereby convicting him of offences punishable under Sections 376 and 323 of the Indian Penal Code. For the offence punishable under Section 376 of the Indian Penal Code, he has been sentenced to suffer rigorous imprisonment for 8 years apart from imposition of fine of Rs.25,000/- and default

sentence of 6 months. For the offence punishable under Section 323 of the Indian Penal Code, the appellant/accused is sentenced to suffer rigorous imprisonment for 6 months apart from imposition of fine of Rs.1,000/- and default sentence of 2 months. Substantive sentences are directed to run concurrently.

2 Facts leading to the prosecution of the appellant/accused projected from Police Report can be summarized thus :

- (a) The alleged victim of the crime in question as well as the appellant/accused Shantaram Pared are residents of Village Khandipada, Post Kaman, Taluka Vasai. The victim of the crime in question is a married lady residing along with her husband Manoj in a tenanted premises owned by PW6 Shakil Shaikh. The appellant/accused was residing in the neighbourhood of PW6 Shakil Shaikh. The incident in question took place on 18th July 2011 at Village Khandipada. According to the prosecution case, the victim of the crime in question left her house for easing, at about 6.45 p.m. She

went to open place near nala. The appellant/accused, who was present there, tried to embrace her. By extruding herself from the clutches of the accused, the victim married lady ran away, and in the process of fleeing from the clutches of the appellant/accused, she fell down at the muddy area. The appellant/accused then overpowered her and committed rape on her thrice during the period from 6.45 p.m. to about 9.30 p.m. of 18th July 2011.

- (b) It is case of the prosecution that the appellant/accused was apprehended by the villagers and he as well as the victim lady were taken to the police station by PW1 Appa Jadhav, Police Constable and PW7 Aatmaram Dighe, Police Constable attached to Manikpur Police Station, who had visited the spot after getting intimation about commission of offence.
- (c) On the basis of report lodged by the victim married lady, First Information Report (FIR) Exhibit 19 came to be

registered at Manikpur Police Station, which resulted in registration of Crime No.I-251 of 2011 against the appellant/accused. The offence came to be investigated by PW5 Kerubhau Kolhe, Assistant Police Inspector of Manikpur Police Station. During the course of investigation, he visited the spot of incident and drew Spot Panchnama Exhibit 30 in presence of PW4 Ramkrushna Thorat. Clothes of the victim married lady came to be seized vide Seizure Panchnama Exhibit 29. The appellant/accused came to be arrested and his clothes also came to be seized. Seized articles were sent for chemical analysis. Statement of witnesses came to be recorded and on completion of investigation, the appellant/accused came to be charge-sheeted.

- (d) The Charge for offences punishable under Sections 376 and 323 of the Indian Penal Code was framed and explained to the appellant/accused. He abjured his guilt and claimed trial.

- (e) In order to bring home the guilt to the appellant/accused, the prosecution has examined in all seven witnesses. Police Head Constable Appa Jadhav is examined as PW1. Police Head Constable Ashok Bagul is examined as PW2. The FIR recorded by him is at Exhibit 19. Dr.Rina Walinjkar, Medical Officer attached to Primary Health Center, Navghar, is examined as PW3. Exhibit 23 is the Medico Legal Certificate of the victim lady. Panch witness Ramkrushna Thorat is examined as PW4. Exhibit 29 is the Seizure Panchnama of the clothes of the victim lady and Exhibit 30 is the Spot Panchnama. Investigating Officer Kerubhau Kolhe is examined as PW5. Shakil Shaikh – neighbour of the appellant/accused as well as the landlord of the victim lady is examined as PW6. Aatmaram Dighe, Police Constable, Manikpur Police Station, is examined as PW7.
- (f) The defence of the appellant/accused was that of total denial. However, he did not enter in the defence.

(g) Upon hearing the parties, the learned trial court by relying on circumstantial evidence, was pleased to convict the appellant/accused of offences punishable under Sections 376 and 323 of the Indian Penal Code. The victim lady, on whom the rape was allegedly committed by the appellant/accused, is not examined by the prosecution. The learned trial court, by the impugned judgment and order, has placed reliance on the circumstance that the victim lady was seen by the witnesses in abnormal condition and her clothes were found to be torn. The learned trial court, further, found that there were injuries on the person of the victim lady, so also the appellant/accused was also found to have sustained injuries. On the basis of these circumstances, the conviction came to be recorded.

3 I have heard Shri Shantanu Phanse, the learned advocate appointed to represent the appellant/accused at the cost of the State. He vehemently argued that circumstances relied by the prosecution are not sufficient to bring home the guilt for

offences punishable under Sections 376 and 323 of the Indian Penal Code and the impugned judgment and order is perverse.

4 The learned APP supported the impugned judgment and order of conviction as well as the resultant sentence by contending that the appellant/accused and the victim married lady were found in Village Khandipada by PW1 Appa Jadhav, Police Head Constable and PW7 Aatmaram Dighe, Police Constable. Both police personnel stated that when they visited the spot, the victim lady was in semiconscious condition. The learned APP further argued that the history narrated by the victim lady to the Medical Officer shows that she was raped by the appellant/accused and therefore the impugned judgment and order of conviction needs to be sustained.

5 I have carefully considered the rival submissions and also perused the Record and Proceedings including the oral as well as documentary evidence. Undisputedly, the victim of the crime in question is not examined by the prosecution. It is case of

the prosecution that the victim of the sexual offence along with her husband namely Manoj were residing in Village Khandipada in a tenanted premises owned by PW6 Shakil Shaikh. Even Manoj, husband of the victim lady, is not examined by the prosecution. The entire case of the prosecution, therefore, rests on circumstantial evidence.

6 It is well settled that for proving a crime, it is necessary that the crime must be seen to have been committed or must be proved by direct ocular evidence. The offence can be proved by circumstantial evidence. The principal fact or factum probandum may be proved indirectly by means of certain inferences drawn from factum probans. However, it is also settled that, in the case based on circumstantial evidence, the circumstances relied by the prosecution should be of a definite tendency unerringly pointing towards guilt of the accused. The circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused

and none else. Keeping in mind these principles, let us consider the case in hand, in order to ascertain whether the appellant/accused had committed forcible sexual intercourse with the victim married lady in the evening hours of 18th July 2011 at Village Khandipada in Vasai Taluka of Thane District.

7 The star witness for the prosecution is PW6 Shakil Shaikh. This neighbour of the appellant/accused and landlord of the victim married lady was not present on the scene of occurrence at the time of the occurrence. All that which he says is he returned from Bhiwandi at about 9.30 p.m. of 18th July 2011 and saw a mob gathered in front of house of the appellant/accused. He, further, deposed that, he had also seen the victim married lady in semiconscious condition with torn clothes at that place. As per version of this witness, there were several persons present in front of house of the appellant/accused.

8 Considering the evidence of PW6 Shakil Shaikh, let us examine whether the incident in question happened in the house

of the appellant/accused, which is situated at Village Khandipada. The Investigating Officer has recorded the panchnama of scene of occurrence, which is at Exhibit 30. PW4 Ramkrushna Thorat is the panch witness to the Spot Panchnama prepared by PW5 Kerubhau Kolhe of Manikpur Police Station. Perusal of Spot Panchnama, Exhibit 30, shows that the spot of the incident was an open place in the vicinity of Village Khandipada, which was used for the purpose of easing by the villagers. It was situated far away from the village. Spot Panchnama shows that a pair of chappals (footwear) was found on the scene of occurrence. This makes it clear that the incident in question did not take place at the house of the appellant/accused. PW6 Shakil Shaikh had seen post event happenings of presence of the appellant/accused in front of his house, so also that of the victim married lady. This evidence is not sufficient to jump to the conclusion that because of finding the appellant/accused and the victim married lady in front of the house of the appellant/accused, the appellant/accused had committed rape on her.

9 The prosecution has also relied on evidence of PW1 Appa Jadhav, Police Head Constable, and PW7 Aatmaram Dighe, Police Constable, to infer guilt of the appellant/accused. Both these police personnel, as per their version, were on patrolling duty at Bafana Police Outpost, when they got a telephonic call that the appellant/accused had committed rape on the victim married lady. They both along with their colleagues went to Village Khandipada at about 10.00 p.m. of 18th July 2011. Their evidence shows that the appellant/accused was found in custody of the mob and a person named Manoj claiming to be husband of the victim married lady, told them that when his wife had been to attend nature's call, the appellant/accused had committed rape on her. As stated in foregoing paragraphs, the prosecution has not examined said Manoj, and evidence of both these witnesses, so far as narrations of said Manoj is concerned, is of no consequence to infer guilt of the appellant/accused.

10 PW2 Ashok Bagul, Police Head Constable, had recorded the FIR Exhibit 19 allegedly lodged by the victim of the

crime in question. The FIR, at Exhibit 19, is a piece of corroborative evidence, and it cannot be used as substantive corroboration unless and until the First Informant is examined. As such, this evidence is of no avail to the prosecution for fastening the guilt on the appellant/accused.

11 PW3 Dr.Rina Walinjkar, Medical Officer of the Primary Health Center, had examined the victim lady on 19th July 2011. She found in all nineteen injuries on the person of the victim married lady which were in the nature of abrasions. Exhibit 23 is the Medico Legal Certificate. Evidence of PW3 Dr.Rina Walinjkar shows that injuries found on the person of the victim lady were simple in nature. Perusal of evidence of PW3 Dr.Rina Walinjkar shows that, though there were several injuries in the nature of abrasions over the body of the victim married lady, there was not a single injury on the private part of the victim married lady. PW3 Dr.Rina Walinjkar had collected sample of vaginal swap of the victim married lady.

12 Evidence of the prosecution shows that seized articles including seized samples were sent for chemical analysis. Request letter at Exhibit 35 makes this position clear. However, the prosecution has not placed on record the Chemical Analyser's Report in respect of the articles sent for chemical analysis except the Chemical Analyser's Report in respect of seized petticoat of the victim married lady. This Chemical Analyser's Report at Exhibit 36 shows that upon chemical examination of the seized petticoat, neither blood nor semens was detected thereon. This forensic evidence is also not supporting the case of the prosecution.

13 The appellant/accused was examined on 21st July 2011 and he was found to have suffered twenty injuries in the nature of abrasions and contusions. Evidence of PW1 Appa Jadhav, Police Head Constable and that of PW7 Aatmaram Dighe, Police Constable, shows that those injuries were attributable to the assault made on him by the mob. These injuries, as such, are not of any avail to the prosecution for proving the Charge.

14 Thus, entire evidence of the prosecution, even if accepted as it is, then also it fails to establish the Charge leveled against the appellant/accused. The proved circumstances, taken cumulatively, are not forming the chain so complete to indicate guilt of the appellant/accused. Thus, the appellant/accused is entitled for benefit of doubt. The impugned judgment and order of conviction, which is based on incomplete chain of circumstances, cannot be sustained in the wake of evidence on record. Therefore, the order :

ORDER

- i) The appeal is allowed.

- ii) The impugned judgment and order of conviction and the resultant sentence recorded by the learned Additional Sessions Judge, Vasai, District Thane, in Sessions Case No.83 of 2011 is quashed and set aside.

- iii) The appellant/accused is acquitted of offences punishable under Sections 376 and 323 of the Indian Penal Code. He be set at liberty, if not required in any other case.
- iv) Fine amount, if any deposited by him, be refunded to him.

(A. M. BADAR, J.)