

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.756 OF 2013

Mahesh Ratan Shinde ... **Appellant**

R/at Behind Vajreshwari Temple,

House of Vasant Gaikwad,

Taluka – Bhivandi, Dist. Thane,

Original R/at P Choube,

Taluka – Jakadevi,

District Ratnagiri.

At present at Ratnagiri Central Prison

V/s.

The State of Maharashtra

(At the instance of Virar Police Station) ... **Respondent**

Ms.Megha Bajoria, appointed Advocate for the appellant.

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

CORAM : A.M.BADAR J.

DATED : 17th APRIL 2018.

ORAL JUDGMENT :

1. The appellant/accused by this appeal has challenged the judgment and order dated 27th February, 2013 passed by the learned Additional Sessions Judge, Vasai in Sessions Case No.73 of 2011

thereby convicting the appellant/accused of offence punishable under Sections 376 and 323 of the Indian Penal Code. For the offence punishable under Section 376 of the Indian Penal Code, the appellant/accused is sentenced to suffer rigorous imprisonment for seven years apart from payment of fine Rs.7,000/- and default sentence of simple imprisonment for six months. For the offence punishable under Section 323 of the Indian Penal Code, he has been sentenced to suffer rigorous imprisonment for three years, apart from payment of fine Rs.1,000/- and default sentence of simple imprisonment for one month. The learned trial Court directed all substantive sentences shall run concurrently.

2. Facts leading to the prosecution of the appellant/accused can be summarized thus;

- a. The prosecutrix PW4, at the relevant time, was aged about 29 years. She was unmarried. She used to reside with the family of her elder sister PW1 Baby at Village Usgaon in Vasai Taluka of Thane District. Her mother used to stay with them. The prosecutrix was suffering from epilepsy.
- b. The incident in question took place on 6th March, 2011. On that day at about 6 p.m., the prosecutrix/PW4 had been to area known as Wadi in the vicinity of her house for answering nature's call. At that time, the appellant/accused allegedly came to her and after denuding her, committed rape on her. Because of threats given by him, the prosecutrix/PW4 could not raise any hue and cry. The prosecutrix PW4 became

unconscious because of this incident. The incident came to the knowledge of inmates of house of the prosecutrix PW4. They took her to the Primary Health Centre, Parol for medical treatment.

- c. At Primary Health Centre Parol, report of the incident in question was lodged by PW4 with PW5 B.S.Pardesi, Police Sub Inspector. Accordingly, Crime No.76 of 2011 for offence under Sections 354, 323, 506 came to be registered with Police Station Virar, Thane. On the next date, statement of the prosecutrix PW4 came to be recorded and Section 376 of IPC was added to the case diary of the crime.
- d. The prosecutrix PW4 was referred to the Rural Hospital Virar where she came to be examined by PW7 Dr. Shrutika Ganpatrao Rathod, medical officer.
- e. During the course of investigation, the spot of the incident came to be inspected in presence of PW3 Mukesh Jadhav, panch witness by investigating officer PW5 B.S.Pardesi, PSI. The spot panchanama came to be recorded and the articles found lying at the spot of the incident came to be seized.
- f. According to the prosecution, the villagers apprehended the appellant/accused and brought him to the police station where PW5 B.S.Pardesi, PSI arrested him. His clothes, came to be seized in presence of PW3 Mukesh Jadhav, panch witness vide seizure panchaname Exh.31 on 7th March, 2011 itself. Seized articles were sent for medical analysis. On completion of routine investigation, the appellant/accused came to be

chargesheeted.

- g. The learned trial court framed the charge for offence punishable under Sections 376, 323 and 506 of the IPC against the appellant/accused. He pleaded not guilty and claimed trial.
- h. In order to bring home the guilt to the appellant/accused, the prosecution has examined in all seven witnesses. Elder sister of the prosecutrix namely Baby is examined as PW1. Cousin of the prosecutrix namely Mangala Londhe is examined as PW2. Panch Witness Mukesh Jadhav is examined as PW3. The spot-cum-seizure panchanama is at Exh.30 where as seizure panchanama seizing clothes of the appellant/accused is at Exh.31. The prosecutrix is examined as PW4 and the First Information Report lodged by her while taking the treatment at the Primary Health Centre is at Exh.33. Investigating Officer B.S.Pardesi is examined as PW5. Dr. Suresh Janu Chavan, medical officer with Primary Health Centre is examined as PW6. Exh.49 is the injury certificate issued by him. Dr.Shrutika Ganpatrao Rathod, medical officer working with Rural hospital, Virar is examined as PW7. Exh.41 is the medico-legal certificate issued by her.
- i. The defence of the appellant/accused was of total denial. According to him, after completing his work he was waiting at Usgaon Naka for boarding the bus. At that time, someone hit on his head and he became unconscious. On suspicion, he was falsely implicated in the crime in question. The appellant/accused, however, did not enter in defence.

j. After hearing the parties, by the impugned judgment and order, the learned trial Court was pleased to convict the appellant/accused of the offences punishable under Section 376, 323 of the IPC. He was, accordingly, sentenced as indicated in the opening paragraph of this judgment.

3. I heard Ms. Bajoria, the learned Advocate appointed to represent the appellant/accused at the costs of the State. She argued that evidence adduced by the prosecution is not sufficient to establish identity of the appellant/accused as perpetrator of the crime in question. She further argued that evidence of the prosecution is suffering from discrepancies and evidence about identification of the appellant/accused is coming on record by way of omissions. As the omissions are in respect of material part of the prosecution case, those needs to be ignored. The learned Advocate further raised several points such as who had wrapped saree when the prosecutrix was lying in nude condition at the spot, probability of happening of such incident at the place which was located near the busy road having traffic of vehicle as well as people etc. However, those aspect needs to be ignored as in such case, evidence is required to be evaluated by keeping in mind broader possibility of the prosecution case and, therefore, those arguments are not reproduced in detail.

4. The learned APP supported the impugned judgment and order of conviction by contending that the appellant/accused was

apprehended at the spot by the villagers and then he was taken to the police station. The medical evidence is supporting the case of the prosecution.

5. I have considered the rival submissions and also perused the record and proceedings including copies of the deposition of the prosecution witnesses as well as documentary evidence adduced on record by the prosecution.

6. As the case in the hand is in respect of the sexual offence, undoubtedly, evidence led by the prosecution will have to be appreciated by keeping in mind broader probabilities of the prosecution case. It is well settled that victim of such offence is not accomplice and therefore if her evidence is found truthful the same can be accepted without corroboration. The very nature of such offence makes the availability of direct corroborating evidence difficult. Therefore, in such offence, if ultimately the evidence of the prosecutrix is found to be truthful then conviction can be based on such solitary evidence. Let us, therefore, examine what the prosecutrix PW4 is stating about incidence.

7. It is in the evidence of the prosecutrix PW4 that at about 6.00 pm on 6th March, 2011, she had been to answer nature's calls at Wadi. Then one person came there, held her neck, torned her clothes and committed rape on her. The prosecutrix further deposed that then she cried for help and when her sister came there the rapist ran

away from the spot. The prosecutrix further deposed that then her sister wrapped her saree around her body and took her to her house. She was then taken to the Rural Hospital Parol where she was admitted and examined. The prosecutrix deposed that then her FIR at Exh.33 came to be recorded at that hospital. She claimed to have shown the spot of the incident to the police subsequently.

8. Though, the prosecutrix PW4 has stated the incident as well as the post evidents happening, her examination shows that at the time of commission of rape on her she became unconscious and she regained conscious later. Her evidence shows that the appellant/accused was unknown to her and she came to know that the villagers apprehended him. She was never called by the police to identify the accused.

9. Overall scrutiny of evidence of the prosecution shows that after the incident, the appellant/accused was not shown to her at any time in order to ascertain whether he was the same person who had committed rape on her on the day of the incident. The evidence of the investigating officer PW5 B.S.Pardesi, PSI confirms the fact that the appellant/accused was stranger to the prosecutrix PW4 and the appellant/accused was never subjected to the test identification parade. In such a situation, it was incumbent on the part of the prosecution, at least to get identity of the appellant/accused as perpetrator of the crime in question, fixed by showing him to the prosecutrix while she was in the dock. However, for the reasons best

known to the prosecution, no efforts were taken to point out the appellant/accused to the prosecutrix at the time of recording of her statement in order to ascertain whether the appellant/accused was the perpetrator of the crime in question. This casts a serious shadow of doubt on the case of the prosecution and as the appellant/accused was not got identified by the prosecutrix while she was in the witness box, the benefit of doubt naturally goes to the appellant/accused. However, keeping this aspect aside, let us examine whether through evidence of other witnesses, the prosecution is successful in establishing identity of the appellant/accused as the person who committed rape on the prosecutrix on 6th March, 2011.

10. The prosecution attempted to establish the identity of the appellant/accused through evidence of PW1 Baby who is elder sister of the prosecutrix/PW4. As per version of this witness, as the prosecutrix PW4 left the house at 6.00 pm, but did not return for a considerable time, she went to the place where the prosecutrix/PW4 used to go for answering nature's calls. PW1 Baby deposed that the appellant/accused was present there but he ran away after seeing her. PW1 Baby in her statement before the Court has stated that she found her sister i.e. prosecutrix lying in unconscious condition with no clothes on her person. Her clothes were lying on the spot. She took prosecutrix to her house, and with the help of PW2 Mangala Londhe and her neighbours the prosecutrix was taken to the hospital. As per version of PW1 Baby, the prosecutrix regained senses and thereafter she told that she has been raped. The cross examination

of PW1 Baby makes it clear that the prosecutrix regained senses at the Primary Health Centre of Parol.

11. Evidence of PW1 Baby who immediately visited the spot of the incident, thus it makes clear that the prosecutrix was lying unconscious on the spot and she regained conscious at the Primary Health Centre Parol. This evidence again makes it clear that after apprehending the appellant/accused by the villagers, she had no opportunity to see the appellant accused. He was not even shown to the prosecutrix at the time of recording her statement in the Court.

12. So far as the material part of the evidence of PW1 Baby which is to the effect that she had seen the appellant/accused present at the spot of the incident while the prosecutrix lying there in naked condition is concerned, the same is coming on record by way of omission. The subsequent part of her evidence that the appellant/accused ran away after seeing her is also coming on record by way of omission. On this aspect, examination of PW1 Baby is clear. The omissions in her previous statement made before the police are proved by the defence through cross-examination of PW5 B.S.Pardesi, PSI. If really PW1 Baby had seen appellant/accused present at the spot of the incident, she would have certainly narrated this fact while recording statement under Section 161 of the Cr.P.C. to police. This part of her evidence which is regarding identity of the appellant accused is coming on record by way of omission. Hence her evidence to that effect needs to be ignored. If this part of her

testimony is ignored then there remains nothing in evidence of PW1 Baby to establish identity of the appellant/accused as perpetrator of the crime in question. To crown this all, even PW1 Baby while in the witness box has not stated that the appellant/accused sitting in the dock is the same person who was seen by her at the spot of the incident. Thus, even evidence of PW1 Baby is of no assistance to the prosecution to establish the identity of the appellant/accused as the rapist involved in commission of rape on the prosecutrix.

13. The defence has admitted, the injury certificate issued by the Rural Hospital, Vasai which shows that the prosecutrix had suffered several injuries in the form of abrasion, contusion, lacerated wounds over her limbs, skull as well as on back. Evidence of PW7 Shrutika Rathod shows that the prosecutrix was subjected to forceable sexual intercourse. However, there is no evidence to establish identity of the appellant/accused as the person who committed rape on the prosecutrix.

14. The spot of the incident was inspected by PW5 B.S.Pardesi, PSI, in presence of panch witness PW3 Mukesh Jadhav on 7th March, 2011. Apart from clothes of the prosecutrix, the investigator had found the mobile handset and leather wallet at the spot of the incident. These articles were seized vide spot-cum-seizure panchanama at Exh.30. PW5 B.S.Pardesi, PSI investigating officer, in his cross examination has candidly admitted that there is no evidence to show that the mobile handset as well as wallet found at the scene

of occurrence belongs to the appellant/accused. This also casts a serious shadow of doubt on involvement of the appellant/accused in the crime in question.

15. According to the prosecution case, the appellant/accused was apprehended by the villagers and then he was taken to the police station. The prosecution has not examined any person from the village who had apprehended the appellant/accused in order to establish connection of the appellant/accused with the crime in question.

16. Net result of the foregoing discussion requires me to hold that in the case in hand, the prosecution has failed to establish the identity of the appellant/accused as the perpetrator of the crime in question and he is certainly entitled for benefit of doubt. Therefore, the following order;

:: ORDER ::

- i) Appeal is allowed.
- ii) The impugned judgment and order dated 27th February, 2013 passed by the learned Additional Sessions Judge, Vasai in Sessions Case No.73 of 2011 thereby convicting the appellant/accused for offence punishable under Sections 376 and 323 of the IPC and sentencing him accordingly, is quashed and set aside.
- iii) The appellant is acquitted of offences punishable under Sections 376 and 323 of IPC.

- iv) The appellant be set at liberty, if not required in any other case.
- v) Fine amount, if any, paid by him be refunded to the appellant.
- vi) Appeal is disposed of accordingly.

(A.M.BADAR J.)