

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

CRIMINAL APPEAL NO.899 OF 2011

1) Yogesh Mahadev Thopate
2) Geeta @ Anita Ramesh Savale
3) Vinit Jagdish Chitnis
Versus
The State of Maharashtra

...Appellants
(orig. accused Nos.1, 3 and 7)
...Respondents

**WITH
CRIMINAL APPEAL NO.928 OF 2011**

Sandeep Manohar Shinde
Versus
The State of Maharashtra
(Through Mahad City Police Station)

...Appellant
(orig. accused No.5)
...Respondent

**WITH
CRIMINAL APPEAL NO.929 OF 2011**

1) Santosh Kisan Pathare
2) Rushikesh @ Anu Anant Lakeshri
3) Mayur Shrikant Purohit
Versus
The State of Maharashtra

...Appellants
(orig. accused Nos.2, 4 and 6)
...Respondents

...

Ms Megha Bajoria i/b. Mr. K.S. Patil for the Appellant No.1 in Appeal No.899 of 2011.

Mr. Nitin Sejpai and Ms Pooja Bhojane for the Appellant Nos.2 and 3 in Appeal No.899 of 2011.

Mr. Tejesh Dande for the Appellant in Appeal No.928 of 2011.

Mr. Prashant M. Patil for the Appellants in Appeal No.929 of 2011.

Mrs. N.S. Jain, APP for the Respondent-State in all matters.

**CORAM: SMT. ANUJA PRABHUDESSAI, J.
JUDGMENT RESERVED ON: 12th JULY, 2018
JUDGMENT PRONOUNCED ON: 18th JULY, 2018.**

JUDGMENT:

The appellants in Criminal Appeal No. 899 of 2011 were the accused Nos.1, 3 and 7, the appellant in Criminal Appeal No.928 of 2011 was accused No.5 and the appellants in Criminal Appeal No.929 of 2011 were accused Nos.2, 4 and 6 respectively in Sessions Case No.12 of 2010 (hereinafter referred to as "accused"). They have challenged the judgment dated 20th July, 2011 in Sessions Case No.12 of 2010.

2. By the impugned judgment, the accused no.1 has been held guilty of committing offence under Section 376 and 120B of the IPC and Section 3(1)(x) and (xii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short "the SC & ST Act). He has been sentenced to undergo rigorous imprisonment for a period of 10 years with fine of Rs.5000/- i/d. simple imprisonment for six months, for offence p.u.s.376 of IPC r/w. Section 120B IPC, and rigorous imprisonment for a period of five years and to pay fine of Rs.5000/- i/d. to suffer imprisonment for six months for offence punishable under Section 3(1)(x) and (xii) of the SC & ST Act.

3. The accused nos. 2 to 7 have been held guilty of offence punishable under Section 3(1)(x) and (xii) of the SC & ST Act. They have been sentenced to undergo rigorous imprisonment for 7 years

each and to pay a fine of Rs.5000/- each i/d. to suffer simple imprisonment for six months each, and rigorous imprisonment for five years each with fine of Rs.5000/- each i/d. to suffer simple imprisonment for six months each The period undergone during trial is ordered to be set off under Section 428 of the Cr.P.C.

4. The case of the prosecution in brief is that the prosecutrix (PW2), who was a minor and a member of scheduled caste, was studying in 10th Standard in Sadguru Anand Maharaj Vidyalaya, Nate, Taluka Mahad. It is alleged that the accused used to constantly and intentionally insult the prosecutrix (PW2) by making rude, humiliating and degrading remarks. It is alleged that the accused had entered into a criminal conspiracy to commit rape on the prosecutrix (PW2) and in furtherance of criminal conspiracy; the accused no.1 took her to the house of accused no.3 on 31.10.2008 and committed rape on her.

5. The prosecutrix had not disclosed the incident to her grand parents with whom she was residing at the time of the incident. However, about 7 to 8 days after the incident she told her grandmother that she wanted to be with her mother (PW3) at Wadala. Her grandmother took her to the house of her maternal aunt at Kalyan and thereafter on 11.11.2009 her maternal aunt took the prosecutrix (PW2)

to her mother. The prosecutrix (PW2) disclosed the incident to her mother(PW3) when she was questioned as to why she had left the village when her exams were approaching.

6. On 23.11.2009 her mother took her to the clinic of PW1-Dr. Preeti Matlawala. After recording the history given by the prosecutrix, PW1 conducted pregnancy test and also referred the prosecutrix for sonography test. The pregnancy test was negative.

7. On 9.12.2009 PW2 alongwith her mother (PW3) went to the Women Cell at Dadar and narrated the incident. As required by the women cell she gave a written complaint to the Women Cell regarding the said incident on 24.12.2009. The Women Cell referred her to Wadala police station. Accordingly she went to Wadala Police Station on 24.12.2009 and lodged the First Information Report (Exh-61). The police personnel at Wadala police station took the prosecutrix and her mother to Mahad City Police Station. PW16 Subhash, who at the relevant time was attached to Mahad City Police Station, received the said FIR (Exh.61) and after going through the same he registered Crime No.104 of 2009 under Sections 376 and 120 B of the IPC.

8. He seized the clothes produced by the prosecutrix under

Panchnama at Exhibit 90, which was drawn in presence of PW7-Yashodhan Shirke. PW16 visited Nathe village. The prosecutrix showed him the house of Geeta Salvi (A3) wherein she was allegedly raped. He conducted scene of offence panchanama (Exh.92) in presence of PW8-Sadashiv Jangam. He recorded the supplementary statement of the prosecutrix, arrested the accused and seized the clothes worn by them on the date of the incident under panchaname Exh.127 in presence of PW15 Mohan Khambe.

9. PW16 referred the prosecutrix as well as the accused for medical examination at PHC-Mahad. PW10-Dr. Ashish Suresh Talekar, examined the prosecutrix and submitted the certificate at Exh-98, which indicated that the hymen was ruptured, vagina was diluted and that there were no injury marks on her body. PW10 further opined that that prosecutrix was between the age group of 14 to 16 years. Upon examining the accused, he opined that there were no injuries on the private parts of the accused.

10. In the course of the investigation it was revealed that the prosecutrix belonged to Mahar caste, whereas the accused were of Maratha community. The prosecutrix being a member of scheduled

caste the provisions under SC & ST Act were added and as per the directions of S.P. Raikar, investigation was handed over to SDPO-Mahad. The investigation was taken over by PW-17 by Prakash Bhaurao Jadhav, SDPO-Mahad. He arrested the other unknown persons, who were involved in the incident held the ID parade through PW5 -Uttam Kumbhar, Nayab Tahasildar-Mahad. He obtained the caste certificate, seized all the incriminating material and upon completion of the investigation filed a charge sheet against the aforesaid accused.

11. Upon the case being committed to the Sessions Court, charge was framed and explained to the accused. The accused pleaded not guilty to the charge. The prosecution in support of its case examined 17 witnesses. The statements of the accused were recorded under section 313 of Cr.P.C. The defence of the accused was of total denial. The learned Sessions Judge, upon appreciating the evidence on record and considering the submissions advanced by the learned Counsel for the respective accused held the accused guilty and sentenced as stated above. Being aggrieved by this conviction and sentence, the aforesaid accused have preferred these appeals.

12. By order dated 12th August, 2011, this Court had suspended the sentence imposed on the accused Nos.2 to 7 and they were ordered to be released on bail. The accused No.1 was in custody pending trial and since the sentence was not suspended pending appeal, he has already completed the term of sentence.

13. Heard learned Counsel Ms. Megha Bajoria, the learned Counsel for the accused no.1. Mr Prashant Patil, the learned Counsel for the accused nos.2, 4 and 6 and Mr. Nitin Sejpai the learned Counsel for the accused nos.3 and 7. Mr. Tejas Dande the learned Counsel for the accused no.5 and Mrs. N.S.Jain, the learned APP for the State.

14. The main contention of the learned Counsels for the accused is that there is an inordinate delay in filing the FIR. It is further alleged that the testimony of the prosecutrix suffers from material omissions and contradictions and does not inspire confidence. The learned Counsel for the accused have further submitted that there is absolutely no evidence to prove criminal conspiracy. They contend that the conviction is based on surmises and conjunction and the same cannot be sustained.

15. The learned APP contends that the prosecutrix was a minor and is a member of schedule caste. She is coming from a lower strata of society and considering the age of the prosecutrix, the nature of the offence, and the mental trauma undergone by the prosecutrix, the delay in lodging the FIR is of no consequence. She has further submitted that the testimony of the prosecutrix amply proves that she was humiliated and insulted by the accused and that she was subjected to rape. The learned APP therefore contends that the conviction is based on the evidence on record and does not warrant any interference.

16. I have perused the records and considered the submissions advanced by the learned Counsels for the respective parties. The evidence on record, more particularly the Caste Certificate at Exhibit 106 vis-à-vis the evidence of PW12 Jitendra Tembhe proves that the prosecutrix belongs to Baudha Caste which is recognized as Scheduled Caste. It is also not in dispute that the prosecutrix was born on 5th July, 1995 and she was below 18 years of age on the date of the incident. Thus the evidence on record amply proves that that the victim was a minor and a member of scheduled caste.

17. The accused are alleged to have committed rape on a minor girl. The alleged offence was committed on 31.10.2009, whereas the report at Exh.61 was lodged on 24.12.2009. It is thus evident that the complaint was lodged about 45 days after the date of the incident. The prosecutrix (PW2) has admitted that during this period she had not disclosed the incident to her grandparents, or mother or any other member of the family. Suffice it to say that this would be a natural conduct of a victim of sexual assault. As it has been held by the Apex Court in *Satpal Singh vs. State of Haryana* 28.7.2010 (1992) 4 SCC 172, in a rape case the prosecutrix remains worried about her future, she remains in traumatic state of mind, and the family of the victim generally shows reluctance to go to the police station because of societies attitude towards such a woman. It casts doubt and shame upon her rather than comfort and sympathize with her. The Honourable Supreme Court has held that considering the above facts the delay in lodging FIR in sexual assault cannot be equated with the case involving other offences. The Apex Court has therefore held that the delay in lodging FIR in a sexual offence has to be considered with a different yard stick. It is thus evident that in cases of such nature delay per se is not a ground to disbelieve the testimony of the prosecutrix.

18. Now coming to the merits of the case, the case of the prosecution rests mainly on the testimony of the prosecutrix (PW2). It is a well settled proposition that the victim of sexual assault is not to be treated as an accomplice. Her evidence does not require corroboration and conviction can be based on the sole testimony of the prosecutrix. It is only when the court finds the testimony to be untrustworthy and difficult to place implicit reliance upon, that it may seek corroboration, either in the form of direct or circumstantial evidence to lend assurance to her last testimony. The testimony of the prosecutrix requires to be considered in the light of the aforesaid settled legal proposition.

19. The testimony of the prosecutrix(PW2) reveals that in the year-2009 she was studying in 10th standard in Sadguru Anand Maharaj Vidyalaya, Nate, Taluka Mahad. At the relevant time she was residing with her grand parents at village Katala. Her school was at a distance of about 2 kms from her place of residence. She has deposed that she used to meet accused no.4 Rishikesh on the way to her school. He developed friendly relations with her and lateron expressed his desire to have physical relations. She contends that when she refused to have physical relations with the accused no.4, he threatened her that in case she does not permit him to have physical relations, the same

would be done through someone else.

20. PW1 further claims that the accused No.5 Sandip has a hair cutting saloon which is on the way to her school. Whenever she used to pass by the said saloon, accused No.5 used to pass lewd comments. He used to claim that she was sleeping with thousands of people, and that she should give up her education and start prostitution. She claims that accused nos.1, 2 and 4 to 7 who used to be present at the saloon also used to pass such comments and laugh at her.

21. The prosecutrix (PW2) claims that the accused no.2 Santosh is a member of the School Committee. In the month of September 2009, the accused no.2 told her that forms are available in the school for availing finance for purchasing bicycle. He took her phone number and address and used to call her on her phone. He told her that he would provide her a bicycle of her choice and also assured her that he would manage to give her question papers of SSC examination. She has deposed that the accused no.2 used to tell her to accompany him to Mahad City. She claims that in the year 2009, on the day of Dassera the accused no.2 came to her house and told her grandmother about the availability of bicycle from Government Quota. She claims that the accused no.2 had expressed his desire to have

physical relations with her and when she flatly refused. He told her that he had taken her photographs and threatened to circulate the same in the school.

22. The prosecutrix claims that on 30.10.2009 accused no.1 called her on the phone and told her that he had her photographs which were taken by the accused no.2 and that he would bring his mobile and show the said photographs to her and thereafter delete the same. She claims that on 31.10.2009 while she was proceeding to the school, the accused no.1 told her that the mobile was at his residence and asked her to accompany him on his motorcycle so that he could show her the photographs and delete the same.

23. The prosecutrix (PW2) claims that the accused no.1 took her to the house of accused No.3 Geeta. The accused no.3 was present in the house. The accused no.1 had some conversation with the accused no.3 and thereafter the accused no.3 told her to sit in the room and that she had to clean the floor. She claims that the accused no.1 left the house telling her that he would bring her photographs. In the meantime she sat in the room. About 15 minutes later, she came out of the room. She has stated that the accused no.3 was not present in the

house. In the meanwhile, the accused no.1 came and when she questioned him about the photographs he replied that he did not have any photographs. The accused no.1 forcibly took her inside the room. Sometime later, someone knocked the door from outside. When the accused no.1 opened the door, she saw him talking to accused no.7 Vineet. One more person was also present with the accused no.7. However, she could not see him properly. Thereafter accused no.1 came inside the room and had forcible sexual intercourse with her. She claims that during this time somebody was laughing from outside. She claims that thereafter she wore her clothes and walked out of the room. After she had covered some distance, the accused no.1 came to her and told her to accompany him on the motorcycle. She accompanied the accused no.1. He dropped her some distance away from the house.

24. The prosecutrix (PW2) claims that she had not disclosed the incident to anyone, as she was scared. On the next day when she was in the school, some boys from her school laughed at her and passed humiliating and insulting comments. In the evening she received a phone call from the accused no.1. He told her that he wanted to see her. She told the accused that she was not interested in

seeing him. She claims that thereafter she did not attend the school as she apprehended danger at the hands of the accused.

25. About 8 to 10 days after the incident, she told her grandmother that she wanted to go to her mother at Wadala. She claims that her grandmother brought her to Kalyan, at the house of her uncle. On 11.11.2009 her maternal uncle took her to Wadala. She claims that she had not disclosed the incident to her mother. However, since she was feeling nauseous and feverish, her mother took her to the family doctor. Her mother also asked her why she was quiet and weeping all the time, and as to why she had left the village when she had to appear for 10th standard examination. At that time she disclosed the incident to her mother, and her mother took her to a gynecologist. She narrated the incident to the doctor. The doctor asked her whether she had reported the incident to the police. She told the doctor that she did not want to report the incident to the police as she had no support and she was scared that the incident would tarnish her reputation. The doctor examined her and prescribed some medicines. She claims that subsequently she told her mother that they should lodge a complaint against the accused.

26. On 9.12 2009 she accompanied her mother to Women Cell at Dadar. She narrated the incident to a lady present at the Women Cell, who told her to give a written statement. On 24.12.2009 she once again went to Women Cell and gave her complaint in writing. The Women Cell advised her to lodge a police complaint at Wadala Police Station. Accordingly, she went to the Wadala Police Station and lodged a report(Exh. 61) against the accused. On 24.12.2009 they were told that the incident had occurred at Mahad and that she had to report the incident to Mahad Police Station. She was provided with one police constable to go to Mahad Police Station. Accordingly, she went to Mahad Police Station on 26.12.2009 and gave the statement.

27. The testimony of the prosecutrix indicates that she has attributed following role to each of the accused:-

- (i) The accused No.4 had developed friendly relations with her. He had pressurised her to have sexual relationship and when she had refused, he threatened her that she would be ravished by some others.
- (ii) Accused No.2, who was a member of the school committee had tried to befriend her by assuring to assist her in getting a bicycle from the government quota and

also by promising her to provide SSC question papers.

The accused No.2 asked for sexual favours and when she refused he threatened to circulate her photographs.

(iii) The accused No.5, who owns a haircutting saloon used to pass obscene and humiliating comments whenever she passed by his saloon.

(iv) The accused Nos.1, 2 and 4 to 7 also used to stand near the saloon of accused No.5 and make similar humiliating and degrading comments against the prosecutrix.

(v) The accused No.1 took her to the house of accused No.3 under the pretext of getting the cell phone of the accused No.2 for deleting her pictures and subjected her to rape.

(vi) The accused No.7 was outside the room when she was being ravished by the accused No.1.

28. It may be mentioned that though the prosecutrix has claimed that the accused No.4 Rishikesh Nate had developed friendship with her and had expressed to have physical relation with her, no such statement was made in the FIR at Exh.61. In fact, the prosecutrix has not made any accusations against accused No.4-Rishikesh in the FIR at

Exh.61. Similarly, she had not stated in the First Information Report that the accused No.2 had asked for sexual favours and that when she refused, he threatened to circulate her photographs. It is also pertinent to note that the evidence of PW2 does not indicate that the accused No.2 had any occasion to take her photographs. The Cell phone of the accused No.2 was seized and nothing objectionable was found in the Cell Phone. Though the prosecutrix had said that the accused No.2 used to call her on her Cell Phone, the CDR records do not support her contention.

29. It is also pertinent to note that the prosecutrix had not stated in the FIR that the accused No.5-Sandip Shinde had made a comment that she was sleeping with several people and that instead of studying she should start prostitution. The prosecutrix had also not stated in the FIR that the accused Nos.1, 2, 4 to 7 used to stand outside the saloon of accused No.5 and pass rude, degrading and humiliating comments and/or that they used to laugh at her.

30. It is also to be noted that the testimony of the prosecutrix indicates that she was raped only by the accused no.1 and that the accused no.7 and another boy, whom she could not see, were outside the room and that they were laughing while she was being ravished by

the accused No.1. Whereas, in the first information report at Exh.61 she had claimed that the accused no.1 and his two friends had entered the room and closed the door from inside. She had further stated that the accused No.1 had disrobed her, one of the boys held her hands while the other held her legs and that the accused No.1 raped her. Her testimony indicates that after the incident, the accused No.1 had dropped on the way to her house by his scooter, whereas in the first information report she had stated that due to physical discomfort she stayed in the said room till about 12 to 12.15 p.m. and that thereafter she went to her house. It is also to be noted that the accused No.3 was implicated in the said crime on the ground that she had allowed the accused No.1 to commit the offence of rape in her house. However, in her testimony before the Court PW2 has given a clean cheat to accused No.3.

31. The aforesaid omissions and contradictions, have been brought on record and duly proved. It is true that while appreciating the evidence of a witness and particularly of a prosecutrix, minor discrepancies on trivial matters cannot be given undue importance. The approach must be whether the evidence read as a whole appears to have a ring of truth. In the instant case the omissions and

contradictions cannot be brushed aside as trivial or insignificant. In fact, these material omissions and contradictions, which have been brought on record affect the core of the prosecution case and cast a doubt on the credibility of the witness and consequently prompts the court not to place implicit reliance on the testimony of the prosecution. This being the case and in the absence of any corroborative evidence, it would not be safe place to base conviction solely on the basis of the testimony of the prosecutrix.

32. Under the circumstances, the prosecution has failed to prove the offences beyond reasonable doubts. Hence, the convictions and sentences cannot be sustained. The Appeals are allowed.

(SMT. ANUJA PRABHUDESSAI, J.)