

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1000 OF 2014

Ashpak Lalmohammad
Mohammad Ansari,
Convict No.C-6161,
Aged about 25 years,
Aat present in Judicial custody
at Kolhapur Central Prison.
R/o. Chavindra Road, Ramnagart,
Bhagwan Seth Chawl, Shantinagar,
Bhiwandi.

..Appellant.

Versus

State of Maharashtra
through Mahatma Phule Chowk
Police Station, Bhiwandi.

..Respondent.

Mr. Rajesh Dharap, Appointed Advocate for the Appellant.
Mr. V.V.Gangurde, APP. for the State.

CORAM : A.S.GADKARI, J.
DATE : 6th March, 2018

ORAL JUDGMENT:

1. The appellant is the original accused No.3 in Sessions Case No. 227 of 2011. The appellant has been convicted for the offence punishable under Section 376(2)(g) of the Indian Penal Code and sentenced to suffer rigorous imprisonment for ten years and to pay a fine of Rs.1000/-, in default of payment of fine to further suffer

rigorous imprisonment for 15 days, by the learned District Judge-2 and Additional Sessions Judge, Kalyan in Sessions Case No.227 of 2011 by its Judgment and Order dated 6.1.2014.

2. The present appeal was filed through Jail by the appellant and it was admitted on 6.1.2014. By an order dated 15.12.2014 this Court appointed Advocate Shri. Rajesh Dharap as an Amicus Curiae to espouse the cause of the appellant.

3. Heard Shri. Dharap, learned Amicus curiae for the appellant and Shri. Gangurde, learned APP. for the State. Perused the entire record.

4. The incident in question had taken place on 21.6.2011 at about 3.00 a.m. at the back side wall of platform No.1 of Kalyan Railway Station.

It is the prosecution case that, the prosecutrix was aged about 17 years on the date of incident and was a college going girl, residing along with her parents at Saraswat Colony, Dombivli, District Thane. In the year 2011, she was studying in Modern College at Dombivli. She had a boy friend namely Devendra Kadam (P.W.2) who was also residing at Dombivli. That the prosecutrix developed friendship with one Rehan Shaikh a resident of Pune

through Internet and they used to chat with each other on it. When this fact came to the knowledge of the parents of the prosecutrix, they in the night of 19.6.2011 scolded her. The prosecutrix got annoyed and left the house in the fit of anger on 20.6.2011 and went to meet her boy friend Rehan Shaikh at Pune. As the prosecutrix was not traceable, her father lodged missing report with Ramnagar Police Station, Dombivli. The said fact of lodgment of missing report was informed to the prosecutrix on phone by her friend Ms. Prajkta Andhare, also a resident of Dombivli. The prosecutrix therefore, decided to return to her home after leaving the company of her boy friend Rehan Shaikh, at Pune railway station and she boarded Chennai Express at about 11.20 p.m. at Pune, to return to her home. That, before starting her return journey the prosecutrix contacted her boy friend Devendra Kadam who was residing at Dombivli and asked him to come to Kalyan Railway Station to pick her up. That, the prosecutrix reached Kalyan Railway Station in the wee hours of 21.6.2011 at about 2.30 a.m. and alighted at platform No.6 at Kalyan Railway Station. Her boy friend Devendra Kadam was already present there.

At about 2.30 a.m. a local train proceeding towards Dombivli

was not available and therefore the prosecutrix waited for some time at railway station. That, the prosecutrix along with her boy friend Devendra Kadam thereafter went to platform No.1 and walked upto the end of said platform. They thereafter sat at the backside of the compound wall of the said railway platform. When the prosecutrix and her boy friend were sitting at the back side of the compound wall of the railway station, the accused persons noticed them. The accused persons came near the prosecutrix and her boy friend and questioned them, as to what they were doing at that place at the said odd hours. The accused No.1-Anilkumar Pathak thereafter slapped her boy friend and also threatened them with a blade. The prosecutrix and her boy friend got frightened due to the said assault and started running away from the said place. That, the appellant/ accused No.3, was armed with a wooden log and chased the boy friend of the prosecutrix and drove him away while the accused No.1 Anilkumar Pathak caught hold of the prosecutrix. That, the accused persons thereafter dragged the prosecutrix by extending threats of dire consequences at the back side of platform No.1 and thereafter committed rape on her one after other. The accused No.1 Anilkumar Pathak stuffed

handkerchief in the mouth of the prosecutrix while committing rape on her. That, the original accused No.2 Jakir Khan was standing near the scene of offence and more particularly, behind a tree to keep watch on others. That, after the accused No.1 and appellant committed the offence as contemplated under Section 376 of the Indian Penal Code, the accused No.2 Jakir Khan also expressed his desire to commit sexual intercourse with the prosecutrix but the prosecutrix threatened him of lodging complaint with the police and therefore, the co-accused Jakir Khan left the said place.

The prosecutrix thereafter went to Kalyan Railway Police Station and narrated the incident to the police. Her complaint was recorded and on the basis of the same crime bearing C.R. No.I-291/2011 was registered with Kalyan Railway Police Station. During the course of investigation, the accused persons were arrested and a wooden log has been recovered by the Investigating Agency at the instance of the appellant. As far as accused No.1 Anilkumar Pathak is concerned, the articles namely, a handkerchief and a blade used in the commission of the crime were recovered at his instance. After completion of investigation, the police submitted the charge sheet before the Court of competent jurisdiction. As the

present crime was exclusively triable by the Court of Sessions the learned Judicial Magistrate First Class, Railway Court, Kalyan committed the case to the Court of Sessions as contemplated under Section 209 of the Cr.P.C. The learned Trial Court framed the charge below Exh.6. The said charge was read over and explained to the accused persons to which they denied and claimed to be tried. The prosecution in support of its case examined in all 15-witnesses. The accused in their defence examined one witness. The learned Additional Sessions Judge, Kalyan after recording the evidence and after hearing the parties to the said case was pleased to convict the appellant by the impugned Judgment and Order as stated herein above.

5. Mr. Dharap, the learned Amicus curiae submitted that though the prosecutrix has identified the appellant in test identification parade and in the Court, the common intention in committing an offence under Section 376(2)(g) cannot be inferred from the evidence on record. He submitted that it is the accused No.1 Anilkumar Pathak against whom there is sufficient evidence including medical evidence to connect him with the present crime, however, as far as the present appellant is concerned, the

circumstance of medical evidence is lacking in that behalf. He submitted that, assuming that the presence of the appellant at the scene of offence is proved by the prosecution, his commission of actual act as contemplated under Section 376 of the Indian Penal Code is not proved by the prosecution beyond reasonable doubt. He submitted that the prosecution has categorically stated that when the accused No.1 Anilkumar Pathak was committing the act of rape upon her, the present appellant was not present at the scene of offence and he was busy in driving away her boy friend Devendra Kadam (P.W.2) from there. He therefore, submitted that, at the most the role attributed to the appellant is that, he had intention in driving away the boy friend of the prosecutrix from the scene of offence. However, the common intention as is required under Section 376(2)(g) read with Explanation-I, of the Indian Penal Code at the behest of the appellant is insufficient and therefore, the appellant cannot be convicted under Section 376(2)(g) of the Indian Penal Code. In support of his contention, he relied upon three decisions of the Supreme Court namely i) Ashok Kumar vs. State of Haryana reported in (2003) 2 SCC 143 ii) Pradeep Kumar vs. Union Administration, Chandigarh reported in (2006) 10 SCC 608 and iii)

Om Prakash vs. State of Haryana reported n (2011) 14 SCC 309.

Mr. Dharap then contended that there is no possibility of the appellant committing the said crime in a short span as narrated by the prosecutrix and therefore his involvement in the present crime can be ruled out. He submitted that Accused No.2 Jakir Khan who was in fact present at the scene of offence when the alleged offence of rape was committed by the accused Anilkumar Pathak (A-1) has been acquitted by the Trial Court and the present appellant has committed lessor role than the said accused Jakir Khan. He lastly submitted that as the appellant and other accused persons noticed the prosecutrix with her boy friend Devendra Kadam (D.W.2) in indulging into obscene activities/ compromising position, they questioned them and thereafter the appellant drove away her boy friend from the scene of offence and therefore, with a view to take revenge the appellant has been falsely implicated in the present crime. He therefore, prayed that the present appeal may be allowed and the appellant may be acquitted from the charges framed against him.

6. Per contra, the learned APP. vehemently opposed the appeal and submitted that the prosecution has proved its case beyond

reasonable doubt and there is no question of false implication of the appellant. He therefore, prayed that the present appeal may be dismissed and the conviction and sentence imposed upon the appellant may be upheld.

7. The prosecutrix in her testimony apart from the facts mentioned in the foregoing paras upto the meeting with her boy friend Devendra Kadam (P.W.2) at platform No.6 of Kalyan Railway Station at about 2.30a.m. has further deposed that they both came to platform No.1 and went at the end of said platform. They were sitting at the backside of the compound wall, when two persons came there and one person asked Devendra Kadam (P.W.2) as to what they were doing there and slapped him. That, Devendra Kadam pushed them and started to run. That, the prosecutrix also started to run. That the first person thereafter caught hold of her dragged near a ditch and committed forcible sexual intercourse with her. That, the first person stuffed handkerchief in her mouth at the time of commission of the said act. That, after the first person completed the said act of rape, the other person came there and he also committed forcible sexual intercourse with her. The prosecutrix has identified the appellant in the Court as the second person who

subsequently committed rape on her. She has further deposed that she had identified the appellant in the test identification parade also which was conducted at Adharwadi Jail during the course of investigation. After perusing the evidence of the prosecutrix, this Court is of the considered opinion that same is fully trustworthy and reliable.

8. It is the settled position of law as has been enumerated by the Supreme Court in the case of Aman Kumar and anr. Vs. State of Haryana reported in AIR 2004 SC. 1497, wherein it has been held that, there is no rule of law that the testimony of the prosecutrix cannot be acted without corroboration in material particulars. She stands at a higher pedestal than an injured witnesses. That in the later case, there is injury in the physical form, while in the former it is both physical as well as psychological and emotional. The same view is further reiterated by the Supreme Court in the case of State of Himachal Pradesh vs. Shree Kant Shekari reported in AIR 2004 SC 4404

It is to be noted here that P.W.2 Devendra Kadam i.e. the friend of the victim girl who was accompanying her at the time of the offence has also identified the appellant and deposed about his

presence, who threatened him and chased him with a wooden log in his hand. The evidence of P.W.2 Devendra Kadam undoubtedly lends corroboration to the testimony of the prosecutrix. The Medical Officer (P.W.5) in her testimony has also stated that when the victim girl was brought to her for medical examination, her close clothes were stained with mud and the prosecutrix has given the narration of sexual assault while giving her consent for medical examination. The mud stained clothes of the prosecutrix as has been mentioned by the Medical Officer (P.W.5) further corroborates the version of the prosecutrix that the appellant along with other accused committed the offence of sexual assault on her near a ditch.

9. This leads me to deal with the contention of the learned counsel for the appellant that, there was no common intention at the behest of the appellant to commit the said crime. It is the settled position of law that, in order to establish an offence under Section 376(2)(g) read with Explanation-I of the Indian Penal Code, the prosecution must adduce evidence to indicate that more than one accused had acted in concert and in such an event, if rape had been committed by even one, all the accused will be guilty irrespective of the fact that prosecutrix had been raped by one or more of them

and it is not necessary for the prosecution to adduce evidence of completed act of rape by each one of the accused. That, in other words this provision embodies a principle of joint liability and the essence of that liability is the existence of common intention. That, the common intention pre-supposes prior concert which may be determined from the conduct of offenders revealed during the course of action and it could arise and be formed suddenly, but, there must be meeting of minds. It is not enough to have the same intention independently of each of the offenders. In such cases there must be criminal sharing marking out a certain measure of jointness in the commission of offence. [Reliance is placed in the case of *Ashok Kumar vs. State of Haryana (supra)*]. The said view is subsequently followed by the supreme Court in the case of *Pradeep Kumar vs. Union of Administration, Chandigarh* and *Om Prakash vs. State of Haryana (supra)*.

10. In the present case, the prosecutrix has categorically stated that when she along with her boy friend were sitting at the backside of compound wall of platform No.1 of Kalyan Railway Station two persons came there and one person slapped Devendra Kadam (P.W.2) and the other person chased him. That, the first person

thereafter committed rape upon her and after the first person completed the said act of rape, the other person came there and he also committed the forcible sexual intercourse with her. As noted earlier, the second person named by the prosecutrix is the appellant herein. It clearly appears from the record, that after noticing a young girl at an isolated place in the wee hours, the accused persons had decided to exploit the situation by sexually assaulting the victim girl and therefore, the accused persons came near the prosecutrix in order to satisfy their lust. After perusing the testimony of the prosecutrix, it is apparent that the appellant was sharing common intention with accused No.1, Anilkumar Pathak and the appellant not only facilitated Anilkumar Pathak in commission of the said crime as contemplated under Section 376 of the I.P.C. but the appellant also committed the said crime of forcible sexual intercourse with the prosecutrix. Therefore, in considered view of this Court, the offence against the appellant as alleged under Section 376(2)(g) of the Indian Penal Code has been proved beyond reasonable doubt by the prosecution.

11. In view of the above, I find no merits in the appeal and the appeal is accordingly dismissed.

12. Before parting with the Judgment, this Court places on record the best efforts put in by Shri. Dharap, learned Amicus Curiae in ably assisting this Court for espousing the cause of the appellant. The professional fees of Mr. Dharap is quantified at Rs.5000/-. The said fees be paid by the High Court Legal Aid Services Committee within 4-weeks from the date of receipt of the present Judgment and Order.

13. It is submitted that the appellant is lodged in Kolhapur Central Prison, Kolhapur. The registry is hereby directed to communicate the present Judgment and Order to the appellant accordingly.

(A.S.GADKARI, J.)