

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.538 OF 2016

Vishwas Shipurtya Kale,
Age : 33 years, Hindu, Occu : Labour,
Indian Inhabitant, R/at.: Post:Velapur,
Taluka : Malshiras, Dist.:Solapur. ... **Appellant**

V/s.

The State of Maharashtra,
(Through Indapur Police Station
in CR No.213/2011.) ... **Respondent**

.....

Mr.Vikas K. Singh, Appointed Advocate for the Appellant.

Mr.S.V.Gavand, APP for the Respondent/State.

....

CORAM : A.M.BADAR J.

DATED : 8th OCTOBER 2018.

ORAL JUDGMENT :

1 By this appeal, the appellant/accused is challenging the Judgment and Order dated 16/04/2016 passed by the learned Additional Session Judge - 1, Baramati, District Pune in Sessions Case No.38 of 2012 thereby convicting him of the offences punishable under Section 376(2)(g), 341 and 368 of the Indian Penal Code. For the offences punishable under Sections 376(2)(g)

and 368 of the Indian Penal Code, the appellant/accused is sentenced to suffer rigorous imprisonment for ten years apart from payment of fine of Rs.1,000/-, on each count. For the offence punishable under Section 341 of the Indian Penal Code, the appellant/accused is sentenced to suffer rigorous imprisonment for one year apart from payment of fine of Rs.500/- and in default to undergo simple imprisonment for one month.

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

- (a) The prosecutrix/P.W.No.1 is a married woman having four sons and a daughter. Along with her husband and children, she used to reside at Kachare Vasti, Kati in Indapur Taluka, Pune District. The appellant/accused as well as absconding accused were known to her.
- (b) According to the prosecution case, on 13/10/2011, after completing her labour work, the prosecutrix/P.W.No.1 returned to her house and thereafter left the house for purchasing grocery. When she reached near the house of one Mahadev Patil, appellant/accused Vishwas Kale, Rahul Kale and Chandya Pawar came there on two motorcycles. Appellant/accused Rahul Kale offered lift to her. The prosecutrix/P.W.No.1, therefore, took a pillion seat on the

motorcycle of appellant/accused. Instead taking her towards her village, the appellant/accused took her near the tank of village Varkute. She was then raped by appellant/accused Vishwas Kale by dragging her in a ditch. Thereafter, her face including eyes were covered and tied by scarf. She was made to sit on the motorcycle of the appellant/accused. Co-accused Rahul Kale sat behind her on that motorcycle. Then she was taken by the accused persons in the field of *jawar* after a journey of about four hours on the motorcycle. There, accused persons including the appellant/accused uttered that they want to keep her as concubine and for the period of four days, she was kept in that field where *jawar* crop was grown. All accused persons in furtherance of their common intention committed rape on her in that field. After about four days, appellant/accused Vishwas Kale left the spot. Thereafter also co-accused Rahul and Chandya continued to rape per. Then on 18/10/2011 at about 8.30 p.m., the prosecutrix/P.W.No.1 was left at village Velapur by the co-accused with a direction that she should go to the house of her father-in-law, which was situated in that village. Accordingly, the prosecutrix/P.W.No.1 alleged that she went to the house of her father-in-law named Appa. She did not disclose the incident for two days out of the fear. Then, on 21/10/2011, she lodged the report of the incident to Police Station, Indapur which has resulted in registration of Crime No.313 of 2011 against the

accused persons. Wheels of investigation were then set in motion.

(c) During the course of investigation, the prosecutrix/P.W.No.1 was sent to the Sasoon Hospital, Pune for medical examination. She was examined by P.W.No.7 Dr.Vipul Gurav. The spot of the incident came to be inspected in presence of panch witness P.W.No.3 Ramesh Kale. Spot panchanama (Exhibit 20) came to be prepared. Clothes of the prosecutrix/P.W.No.1 came to be seized. The appellant/accused came to be arrested. Statement of witnesses came to be recorded. Seized articles were sent for chemical analysis. On completion of investigation, the appellant/accused came to be charge-sheeted. The Investigator could not apprehend co-accused Rahul Kale and Chandya Pawar.

(d) The learned Additional Sessions Judge, Baramati framed and explained the charge for the offences punishable under Sections 376(g), 342 read with 34, 323 read with 34, 363 read with 34, 366 read with 34, 368 read with 34, 504 read with 34 and 506 read with 34 of the Indian Penal Code to the appellant/accused. He abjured his guilt and claimed trial. In order to bring home the guilt to the appellant/accused, the prosecution has examined in all seven witnesses. The victim of the crime in question is examined as P.W.No.1. Her

mother-in-law Dropada is examined as P.W.No.2. panch witness to the spot panchanama Ramesh Kale is examined as P.W.No.3. Bhanudas Kale is examined as P.W.No.4. Sureshsingh Pardeshi, a panch witness is examined as P.W.No.5. Investigating Officer Ramdas Aware, is examined as P.W.No.6, whereas Medical officer Dr.Vipul Gurav is examined as P.W.No.7.

(e) Defence of the appellant/accused was that of total denial. However, he did not enter in the defence. After hearing the parties, the learned trial Court was pleased to convict the appellant/accused of the offences punishable under Sections 376(2)(g), 341 and 368 of the Indian Penal Code and he is sentenced accordingly as indicated in the opening paragraph of this Judgment.

3 I heard Shri.Vikas Singh, the learned Counsel appointed to represent the appellant/accused at the cost of the State. He drew my attention to the evidence of the prosecutrix/ P.W.No.1 and argued that she is not a witness of truth. Her evidence shows that the incident is inherently improbable. Her evidence is not supported or corroborated by any other evidence. The FIR is belated and possibility of concoction cannot be ruled out. Therefore, the appellant/accused is entitled for benefit of doubt.

4 The learned Additional Public Prosecutor supported the impugned Judgment by contending that victim of the sexual offence cannot be treated as accomplice requiring corroboration to her version. The conviction can be safely recorded even on the basis of uncorroborated testimony of the prosecutrix. The learned Additional Public Prosecutor argued that evidence of P.W.No.4 Bhanudas Kale shows that he has seen the prosecutrix/P.W.No.1 going along with appellant/accused on the motorcycle and version of this witness substantially corroborates evidence of the prosecutrix/P.W.No.1.

5 I have carefully considered the rival submissions and also perused the Record and Proceedings including oral as well as documentary evidence adduced by the prosecution. I am of the considered opinion that for the reasons stated in subsequent paragraphs, the appellant/accused is entitled for benefit of doubt.

6 The prosecutrix/P.W.No.1 was a fully grown adult lady at the time of the incident in question. She was mother of four sons and a daughter. She was residing along with her husband and children at Kachare Vasti, Kati in Indapur Taluka in Pune District. Her chief-examination itself shows that she was acquainted with the accused persons including the appellant/accused. The prosecutrix/P.W.No.1 has deposed in tune with the

prosecution case to state that she was offered a lift by appellant/accused Vishwas Kale for reaching to her village and that is how she sat on the motorcycle of appellant/accused Vishwas Kale. As per her version, then appellant/accused Vishwas Kale took her near the tank. The co-accused also followed them there on the motorcycle. The prosecutrix/P.W.No.1 deposed that then all three accused persons started taking with each other. Thereafter, the appellant/accused dragged her in a ditch and committed forcible sexual intercourse with her. Then her face was tied by a scarf and the appellant/accused asked her to sit on his motorcycle. Co-accused Rahul Kale sat behind her and she was taken by the appellant/accused to the field of grown up *jawar* crop. There accused Chandya Pawar followed them by another motorcycle. The prosecutrix/P.W.No.1 stated that this journey took two to two and half hours.

7 The prosecutrix/P.W.No.1 further testified that she was kept in that field of *jawar* for the period of four days where all three accused persons successively raped her. She was being fed with by giving her *bhajiya*, *vada pav* and *biscuits*. Thereafter, appellant/accused Vishal Kale got phone call and he left the field. Then also co-accused Rahul Kale and Chandya Pawar continued to rape her. Then they left her at village Velapur by motorcycle. She went to the house of her father-in-law situated at that village Velapur. The prosecutrix/P.W.No.1 in her chief-examination itself

had stated that house of appellant/accused Vishal Kale so also that of other accused persons were situated at village Velapur. The prosecutrix/P.W.No.1 further testified that at village Velapur, wives and children of accused persons abused her and beaten her. She was then taken in custody by police from Velapur Police Station. On the next day, policemen from Bawada Out-post were called. On the next date, she was given in custody of her husband. The prosecutrix/P.W.No.1 further stated that for two days thereafter she did not lodge any complaint. However, on 21/10/2011 she lodged the report. Perusal of chief-examination of the prosecutrix/P.W.No.1 did not show any explanation for lodging the FIR belatedly.

8 Material elicited from cross-examination of the prosecutrix/P.W.No.1 is interesting. It reflects that the appellant/accused is nephew of the father-in-law of the prosecutrix/P.W.No.1. He was on visiting terms with her. He used to come to her house frequently. The prosecutrix/P.W.No.1 made it clear in her cross-examination that at the time of marriage of uncle of the appellant/accused, she went more close to the appellant/accused. However, she denied that the said intimacy converted in love affairs between them. The prosecutrix/P.W.No.1 accepted the fact that on return to village Velapur from the agriculture field, there was quarrel between her and wives of accused persons. Police came to the spot. She was taken in custody by police. However,

accused persons were not arrested though she was taken in custody at village Velapur on her return. As per version of the prosecutrix/P.W.No.1, she did not disclose any incident to police at that time. To crown this all, the prosecutrix/P.W.No.1 has candidly accepted the fact that she was taken in custody by police from house of the appellant/accused Vishal Kale.

9 In her cross-examination, the prosecutrix/P.W.No.1 has stated that after she was taken in custody by police from the house of the appellant/accused, for the period of two days, there was discussion between her and her family members about the complaint which was to be lodged against accused persons and after due deliberation she lodged complaint against the accused persons.

10 If material elicited from cross-examination of the prosecutrix/P.W.No.1 is considered in proper perspective then it becomes clear that the prosecutrix/P.W.No.1, who was a fully grown adult female, voluntarily sat on motorcycle of the appellant/accused with whom she was having acquaintance. Though she claimed to have been raped by the appellant/accused, she still sat on his motorcycle again and travelled with him for about two to two and half hours. Throughout this long journey, the prosecutrix/P.W.No.1 had tons of opportunities to raise shouts and to save herself. She did not do so. Then, she claimed to be

kept at the open *jawar* field for the period of four days, where she was raped by the appellant/accused along with other co-accused successively. Perusal of the spot panchanama (Exhibit 20) shows that fields of other agriculturists were there on three side of that field. On the southern side of that field, there was *kachha dambari* road and house of one Subhash Sandipan Koli. Her evidence shows that she was not kept in any hut, but she was kept in open space. The spot panchanama does not also reflect existence of any hut in that field. Evidence of the prosecutrix/P.W.No.1 does not show that she was under surveillance of the appellant/accused, so also his two associates in that long stay of four days. She must be going for answering nature's call during these four days. Why the prosecutrix/P.W.No.1 did not make any attempt to save herself from clutches of the appellant/accused during the period of four days is a fact which is not explained by the prosecution in its case. The prosecutrix/P.W.No.1 had tons of opportunities to give calls for saving herself. She had opportunity to run from the field where she was kept as she never claimed that she was kept tied in that field. However, the evidence of the prosecutrix/P.W.No.1 does not show that she has taken any opportunity to leave the company of the appellant/accused as well as the co-accused.

11 If really the prosecutrix/P.W.No.1 was abducted then raped by three adult person continuously for four days and then

she was left to village Velapur, it was not expected her to be found in the house of the appellant/accused. House of her father-in-law was situated in the very same village. However, the prosecutrix/P.W.No.1 herself has stated that police took her in custody after quarrel from the house of the appellant/accused. This makes her evidence improbable and untrustworthy. After taking the custody of the prosecutrix/P.W.No.1, the Velapur Police, as per her testimony, had handed over her to Bawada Police Out-post. Then she was given in custody of her husband. Cross-examination of the prosecutrix/P.W.No.1 shows that she was in custody of police for one day. During this period, nothing prevented her from registering her grievance with the police. This did not happen. After joining company of her in-laws, the prosecutrix/P.W.No.1 did not lodge report to police about the incident of gang rape by three persons. Her evidence indicates that by deliberating for two days, the FIR came to be lodged. There is no plausible explanation for this delay in lodging the FIR on 21/10/2011. At this juncture, it is apposite to quote observations of the Honourable Apex Court in the matter of *Thulia Kali v. The State of Tamil Nadu*¹. The relevant portion of paragraph 12 from the Judgment of the Honourable Apex Court read thus :

“The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the

1 (1972) 2 Supreme Court Cases 393.

circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as the names of eye-witnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a creature of after-thought. On account of delay, the report not only get bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is, therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained.”

12 Unexplained delay in lodging the FIR by the prosecutrix/P.W.No.1 that too after deliberation gives indication that it is a result of concoction and embellishment. At this juncture, it is apposite to note the observations of the Honourable Apex Court in the matter of *Sheikh Zakir v. State of Bihar*¹. How evidence of the victim of the sexual offence, when such victim is grown up married woman, needs to be appreciated can be found in the ratio of this judgment. Relevant portion from paragraph 9 of this Judgment reads thus :

“9. Even though a victim of rape cannot be treated as an accomplice, on account of a long time of judicial decisions rendered in our country over a

1 AIR 1983 SUPREME COURT 911.

number of years, the evidence of the victim in a rape case is treated almost like the evidence of an accomplice requiring corroboration. (Vide Rameshwar v. State of Rajasthan, 1952 SCR 377 : (AIR 1952 SC 54) : Gurucharan Singh v. State of Haryana, (1973) 2 SCR 197 : (AIR 1972 SC 2661) and Krishan Lal v. State of Haryana, (1980) 3 SCR 305 : (AIR 1980 SC 1252). It is accepted by the Indian Courts that the rule of corroboration in such cases ought to be as enunciated by Lord Reading C. J. in King v. Baskerville, (1916) 2 KB 658. Where the case is tried with the aid of a jury as in England it is necessary that a Judge should draw the attention of the jury to the above rule of practice regarding corroboration wherever such corroborating is needed. But where a case is tried by a Judge alone, as it is now being done in India, there must be an indication in the course of the Judgment that the Judge had this rule in his mind when he prepared the Judgment and if in a given case the Judge finds that there is no need for such corroboration he should give reasons for dispensing with the necessity for such corroboration. But if a conviction is based on the evidence of the prosecutrix without any corroboration it will not be illegal on that sole ground. In the case of a grown up and married woman it is always safe to insist on such corroboration. Wherever corroboration is necessary it should be from an independent source but it is not necessary that every part of the evidence

of the victim should be confirmed in every detail by independent evidence. Such corroboration can be sought from either direct evidence or circumstantial evidence or from both.”

13 The prosecutrix/P.W.No.1 claimed to have stayed in open agriculture field where *jawar* crop was grown. She claimed to have suffered continuous forcible sexual intercourse by three fully grown adult male persons. After lodging the FIR, she was sent for medical examination to the Sasoon Hospital, Pune. P.W.No.7 Dr.Vipul Gurav has examined her. His evidence shows that on the medical examination of the prosecutrix/P.W.No.1, there were no external injuries on all over her body. If the prosecutrix/P.W.No.1 had really undergone ordeal of rape by three adult persons continuously for four days on rough surface of the agriculture field, then she must have suffered at least some external injuries on her person. Non-finding of any external injury on person of the prosecutrix/P.W.No.1 creates doubt on her version regarding the incident. That apart, even no internal injuries were found by P.W.No.7 Dr.Vipul Gurav on medical examination of the prosecutrix/P.W.No.1. If she was a subject of lust of three adult persons and if she was actually being raped continuously for four days by those three persons, then her private part must have shown some signs such as swelling, redness etc. Non-finding of any internal injuries on the prosecutrix/P.W.No.1 makes her version suspect.

14 No doubt during examination, the Medical Officer found two abrasions on her left forearm, but those appear to be resulted on scabies suffered by the prosecutrix/P.W.No.1.

15 Chemical Analysis report at Exhibit 32 shows that petticoat of the prosecutrix/P.W.No.1 was stained with semen. However, finding of semen stains on the petticoat of a married woman is of no consequence. Blood group of the appellant/accused could not be determined and as such, those semen stains cannot be attributed to the appellant/accused. In the result, it needs to be held that the prosecution has failed to establish guilt of the appellant/accused beyond all reasonable doubts. The appellant/accused is entitled for benefit of doubt. Therefore, the Order :

ORDER

- (i) The Appeal is allowed.
- (ii) The impugned Judgment and Order dated 16/04/2015 passed by the learned Additional Sessions Judge - 1, Baramati in Sessions Case No.38 of 2012 is quashed and set aside.
- (iii) The appellant/accused is acquitted of the offences punishable under Sections 376(2)(g), 341 and 368 of the Indian Penal Code.

(iv) Fine amount, if any, paid by him be refunded to him.

(v) The appellant/accused be released forthwith if not required any other offence.

(vi) The Appeal is disposed of accordingly.

(A.M.BADAR J.)

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Dattatraya
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by Raju
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