

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.637 OF 1997

KRISHNA JANU DIGHE

)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA

)...RESPONDENT

Mr.N.M.Nadar i/b. Mr.S.V.Marwadi, Advocate for the Appellant.

Mrs.M.M.Deshmukh, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 9th AUGUST 2019

JUDGMENT :

1 By this appeal, the appellant/convicted accused is challenging the judgment and order dated 27th August 1997 passed by the learned Additional Sessions Judge, Thane, in Sessions Case No.186 of 1992, thereby convicting him of the offence punishable under Section 376 of the Indian Penal Code

and sentencing him to suffer rigorous imprisonment for a period of 5 years apart from direction to pay fine of Rs.500/-, and in default, to undergo further rigorous imprisonment for a period of 2 months.

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

- (a) The prosecutrix was a minor female child, below 16 years of age, at the time of the incident, which took place at about 8 a.m. of 8th November 1991 in the vicinity of Village Moha (Budruk) at Jawhar Taluka of Thane District. The prosecutrix (PW1), as usual, had left her home at about 6 a.m. of 8th November 1991 for grazing her bullocks and cow. At about 8 a.m., when she was grazing her cattle, the appellant/convicted accused came from behind, caught hold of her right hand and after gagging her mouth by a chaddar, which was wrapped by the prosecutrix on her person, took her towards the nearby tree. There, he made her to lie, removed her clothes and committed rape on her. In that

process, ear rings and nose ring of the prosecutrix went missing.

- (b) After the incident, the prosecutrix (PW1) returned to her house and disclosed the incident to her mother PW2 Yashodabai. Along with her parents, she then went to PW3 Vithhal Bhore , who happened to be the Police Patil of the village. The incident was disclosed to him. The prosecutrix/PW1, accompanied by her parents and PW3 Vithhal Bhore, Police Patil, then went to Police Station Vikramgad. At the said Police station, the prosecutrix lodged the FIR on 8th November 1991 itself and accordingly, PW5 Sharad More, Police Sub-Inspector, registered the offence vide Crime No.36 of 1991 under Sections 376 and 427 of the Indian Penal Code. The spot was inspected and Spot Panchnama Exhibit 12 came to be prepared. Clothes viz. underwear, shirt, half shirt and chaddar belonging to the prosecutrix/PW1 came to be seized vide Seizure Panchnama Exhibit 13. Underwear of the appellant/

convicted accused came to be seized vide Panchnama Exhibit 14, after arresting him.

- (c) On 9th November 1991, PW4 Dr.Kisan Ubale, Medical Officer of the Civil Hospital, Thane, examined the prosecutrix/PW1 and issued Medical Certificate Exhibit 24 by preparing Medico Legal Case Papers Exhibit 23. The appellant/convicted accused came to be examined by PW6 Dr.Srikrishna Dhone on 9th November 1991. After completing necessary investigation, the appellant/convicted accused came to be charge-sheeted.
- (d) On committal of the case, Charge for the offence punishable under Section 376 of the Indian Penal Code was framed and explained to the appellant/convicted accused. He pleaded not guilty and claimed trial.
- (e) In order to bring home the guilt to the appellant/convicted accused, the prosecution has examined in all six witnesses.

The prosecutrix is examined as PW1 and the report lodged by her on the date of the incident i.e. on 8th November 1991 is at Exhibit 8. Her mother Yashodabai is examined as PW2. Vithhal Bhore, Police Patil of Village Moha, is examined as PW3. Medical Officer of Civil Hospital, Thane, Dr.Kisan Ubale is examined as PW4. Investigating Officer Sharad More, Police Sub-Inspector of Vikramgad Police Station is examined as PW5. Dr.Srikrishna Dhone of the Civil Hospital, Thane, who examined the appellant/convicted accused is examined as PW6.

- (f) Defence of the appellant/convicted accused was that of total denial. However, he did not enter in defence. After hearing the parties, by the impugned judgment and order, the learned trial court was pleased to convict the appellant/accused and sentenced him as indicated in the opening paragraph of this judgment.

3 I have heard the learned counsel appearing for the appellant/convicted accused and also perused the written submissions tendered by him on record. In submissions of the learned counsel for the appellant/convicted accused, there is delay in lodging the FIR. Deposition of the prosecutrix/PW1 is not inspiring confidence as there were no injuries on her body. Her hymen was found to be intact and forensic evidence is not supporting her version. The Medical Officer had issued only Provisional certificate, after examining the prosecutrix/PW1. It is further argued that the conduct of the prosecutrix/PW1 in yielding for the sexual intercourse without resistance casts a shadow of doubt on the prosecution case. Stalk panchas are used and spot of the incident is also not proved. According to the learned counsel for the appellant/convicted accused, evidence adduced by the prosecution is falling short to prove the guilt of the appellant/convicted accused, and therefore, he is entitled for acquittal. To buttress this submission, the learned counsel placed reliance on following judgments :

a) State of Maharashtra vs. Rameshwar Shridhar Jaware

and Another¹

- b) Paramjit Singh vs. State of Himachal Pradesh²**
- c) Thana Ram vs. State of Rajasthan³**
- d) Ravindra Dinkar Patil vs. State of Maharashtra⁴**
- e) Data Xiva Naique Desai and Another vs. The State⁵**

4 The learned APP supported the impugned judgment and order by contending that there is no necessity of seeking corroboration to the version of the prosecutrix/PW1. It is found truthful and in the case in hand, her evidence is supported by other evidence adduced by the prosecution.

5 I have considered the rival submissions and also perused the record and proceedings. At the outset, it needs to be mentioned here that the medical evidence is a corroborative piece of evidence and if the same does not support the otherwise clinching and trustworthy ocular evidence of the prosecutrix/PW1,

1 2008 Cri.L.J. 675
 2 1987 Cri.L.J. 1266
 3 1996 Cri.L.J. 502
 4 1989 Cri.L.J. 394 Bom
 5 1867 Cri.L.J. 52

then the court is bound to place reliance on ocular evidence rather than preferring to place reliance on medical evidence. In case of **Ranjit Hazarika vs. State of Assam**⁶ the opinion of the doctor was that no rape appeared to have committed because of the absence of rupture of hymen and injuries on the private part of the prosecutrix. However, in that matter, the Honourable Apex Court took a view that the medical opinion cannot throw over board an otherwise cogent and trustworthy evidence of the prosecutrix.

Similarly, the Honourable Apex Court in the matter of **B.C.Deva vs. State of Karnataka**⁷ was pleased to convict the accused therein, despite the fact that no injuries were found on the person of the prosecutrix. Following are the relevant observations of the Honourable Apex Court in paragraph 18 thereof :

“18 The plea that no marks of injuries were found either on the person of the accused or the person of the prosecutrix, does not lead to any inference that the accused has not committed

6 (1998) 8 SCC 635

7 (2007) 12 SCC 122

forcible sexual intercourse on the prosecutrix. Though the report of the gynaecologist pertaining to the medical examination of the prosecutrix does not disclose any evidence of sexual intercourse, yet even in the absence of any corroboration of medical evidence, the oral testimony of the prosecutrix, which is found to be cogent, reliable, convincing and trustworthy has to be accepted.”

Similarly, so far as delay in lodging the FIR in a rape case is concerned, following are the observations of the Honourable Apex Court in the matter of **State of Himachal Pradesh vs. Shree Kant Shekari**⁸ wherein it is held thus in paragraph no.18 :-

“18 The unusual circumstances satisfactorily explained the delay in lodging of the first information report. In any event, delay per se is not a mitigating circumstance for the accused when accusations of rape are involved. Delay in lodging first information report cannot be used as a ritualistic formula for discarding prosecution case and doubting its authenticity. It only puts the Court on guard to search for and consider if any explanation has been offered for the delay. Once it

8 2004 ALL M R (Cri.) 3145 (S.C.)

is offered, the Court is to only see whether it is satisfactory or not. In a case if the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is a relevant factor. On the other hand satisfactory explanation of the delay is weighty enough to reject the plea of false implication or vulnerability of prosecution case. As the factual scenario shows, the victim was totally unaware of the catastrophe which had befallen to her. That being so, the mere delay in lodging of first information report does not in any way render prosecution version brittle. These aspects were highlighted in **Tulshidas Kanolkar Vs. State of Goa (2003 (8) SCC 590).**"

6 By now it is well settled that the courts dealing with the rape cases shoulder a greater responsibility and they are supposed to deal with such cases with utmost sincerity. While deciding such cases, the court is required to examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix.

If evidence of the prosecutrix inspires confidence, it is required to be relied upon without seeking further corroboration of her statement. However, if for some reason, it is difficult to place reliance on version of the prosecutrix, then the court is justified in looking for corroborative evidence which may lend assurance to the testimony of the prosecutrix. Keeping in mind these principles of appreciation of evidence in rape cases, let us now examine the case in hand.

7 In the instant case, according to the prosecution, the prosecutrix/PW1 was below 16 years of age and she was taking education at the Ashram School. Her evidence reveals that because of Diwali holidays, she had returned to her home, situated at Village Moha in Jawhar Taluka of Thane District. She testified that in the morning hours of 8th November 1991, she had gone to the forest area for grazing cattle. At about 8.00 a.m. of that day, when she was grazing cattle, the appellant/convicted accused came from her backside, caught hold of her hand, gagged her mouth by using her chaddar and took her beneath the nearby

tree by dragging. She further deposed that there she was made to lie and by removing her clothes, the appellant/convicted accused committed rape on her. Her ear rings and nose ring went missing. After finishing the act, the appellant/convicted accused went away and she returned to her house, while crying. She disclosed the incident to her mother, who in turn, disclosed the same to her father. As per version of the prosecutrix/PW1, then they went to PW3 Vithhal Bhore, Police Patil of the village, who took them to Police Station Vikramgad, and there she lodged the report Exhibit 8. Subsequently, she was medically examined.

8 Except giving suggestions to her that on 8th November 1991, the appellant/convicted accused did not come towards her and did not commit rape on her, there is virtually no effective cross-examination of the prosecutrix/PW1, in so far as the incident is concerned. It is elicited during her cross-examination that in the year 1991, she was studying in 6th Standard and after joining her residential school in the month of June, she returned to her village, only at the time of Diwali festival. Thus, there is

nothing on record to disbelieve version of the prosecutrix/PW1 that in the morning hours of 8th November 1991, the appellant/convicted accused committed rape on her by denuding her, when she was grazing cattle.

9 Version of the prosecutrix/PW1 is gaining corroboration by the FIR Exhibit 8 lodged by her with promptitude. Though it is averred that there is delay in lodging the FIR, the FIR at Exhibit 8 reflects that the same was lodged on the day of the incident i.e. on 8th November 1991 itself. This aspect is further clear from evidence of PW5 Sharad More, Police Inspector of Vikramgad Police Station, who recorded the FIR at Exhibit 8. His evidence makes it clear that the same was recorded on 8th November 1991 only. That apart, evidence of PW3 Vithhal Bhore, Police Patil, makes it clear that Vikramgad Police Station is at a distance of about 10 kilometers from Village Moha. Evidence of PW2 Yashodabai (mother) and that of PW3 Vithhal Bhore, Police Patil, makes it clear that after disclosure of the incident by the prosecutrix/PW1, her parents went to PW3

Vithhal Bhore, Police Patil, and from there they went to Vikramgad Police Station. It is, thus, seen that the FIR came to be lodged within few hours of the incident, and therefore, it cannot be said that there is delay in lodging the FIR. Ultimately, the prosecutrix/PW1 returned to her house after the incident, narrated the incident to her parents and then they went to PW3 Vithhal Bhore, Police Patil of the village and subsequently visited the Police station. Therefore, no substance can be found in contention of the learned counsel for the appellant/convicted accused that there is delay in lodging the FIR.

10 Now let us examine whether other evidence of prosecution is corroborating the version of the prosecutrix/PW1. Conduct of the prosecutrix/PW1, after the incident, is reflected from evidence of the mother PW2 Yashodabai. Evidence of PW2 Yashodabai shows that on the day of the incident, at about 8 a.m. to 9.00 a.m., the prosecutrix/PW1 reported back to her house while crying and disclosed the incident of commission of rape by the appellant/convicted accused on her. This evidence of PW2

Yashodabai is not at all shattered in the cross-examination. Disclosure of the prosecutrix/PW1 regarding the incident implicating the appellant/convicted accused, soon after commission of rape, is certainly admissible in the wake of provisions of Section 157 of the Evidence Act. Evidence of the prosecutrix/PW1, as such, stands corroborated by her disclosure to her mother, coming on record through evidence of her mother. Similar is the case in so far as evidence of PW3 Vithhal Bhore, Police Patil, is concerned. His evidence also shows that on the day of the incident, the prosecutrix/PW1 along with her parents came to his house and narrated the incident of commission of rape by the appellant/convicted accused on her.

11 The prosecutrix/PW1 was medically examined on the very next day of the incident. Upon her medical examination, PW4 Dr.Kisan Ubale, Medical Officer with the Civil Hospital, Thane, found following injuries on her private part :

- “1 Laceration on posterior part of vulva
 measuring 1 cm. x $\frac{1}{4}$ cm.
- 2 Laceration to lateral part of vulva

measuring $\frac{1}{2}$ cm. X $\frac{1}{4}$ cm. on each side”

Contemporaneous Medico Legal Certificate Exhibit 24 is corroborating version of PW4 Dr.Kisan Ubale, Medical Officer, on the aspect of injury suffered by the prosecutrix/PW1 in the incident. Evidence of PW4 Dr.Kisan Ubale, Medical Officer, so far as injury suffered by the prosecutrix/PW1, has virtually gone unchallenged and as such, there is no reason to disbelieve the same. In view of finding of injuries on private part of the prosecutrix/PW1, immediately on the very same day by the Medical Officer, her evidence stands corroborated regarding commission of rape on her by the appellant/convicted accused. The injuries found, according to the Medical Officer, were caused within thirty hours of the incident. This evidence also matches the time of the incident, as alleged by the prosecutrix/PW1, to a large extent. In view of this medical evidence adduced by the prosecution, contention of the learned counsel for the appellant/convicted accused that there was no tearing of hymen, cannot be accepted. Similarly, judgment of the learned Division Bench of this court in the matter of **Rameshwar Shridhar Jaware**

and another (supra) which proceeded on facts of that case, is not applicable to the case in hand. Same is the case, so far as judgment of the learned Single Judge of this court in the matter of Ravindra Dinkar Patil (supra) is concerned. That judgment also proceeded on the facts of the said case. The appellant/convicted accused was examined by PW6 Dr.Srikrishna Dhone of the Civil Hospital, Thane, on the very next day of the incident i.e. on 9th November 1991. It was found during his examination that the appellant/convicted accused had suffered bleeding wound over his left toe. The Medical Officer further opined that prepuce of the appellant/convicted accused can be retracted. The Medical Officer, with these findings, opined that the injury to the left toe is possible while having sexual intercourse and retraction of prepuce is an indication of capacity of a male to perform sexual intercourse. In cross-examination of this Medical Officer, nothing was put up to him to suggest the way and manner in which the appellant/convicted accused had sustained injury to his left toe. Finding of injury on the person of the appellant/convicted accused by the Medical Officer also corroborates the version of the

prosecutrix/PW1 that the appellant/convicted accused had committed rape on her in the forest area, by dragging her and denuding her.

12 True it is, that there is no forensic evidence to show presence of semen on clothes of the prosecutrix/PW1. But that is not a decisive factor in the light of law laid down by the Honourable Apex Court regarding appreciation of evidence of a victim in a rape case. Judgment in the matter of **Thana Ram (supra)** is also not helpful to the defence in the light of overwhelming evidence adduced by the prosecution to prove the Charge. Age of the prosecutrix/PW1 is not relevant in the instant case, as there was no theory of consensual sex. Therefore, judgment in the matter of **Paramjit Singh (supra)** is of no consequence. In the matter of **Data Xiva Naique Desai (supra)**, the court of Judicial Commissioner has discussed general rule regarding duty of the prosecution to prove essential ingredients of the offence alleged against the accused.

13 The discussion made in the foregoing paragraphs makes it clear that the prosecution has proved the guilt of the appellant/convicted accused in respect of the Charge leveled against him, beyond all reasonable doubts. In this view of the matter, the appeal is devoid of substance and therefore, the order :

ORDER

The appeal is dismissed.

(A. M. BADAR, J.)