

Anand

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

CRIMINAL APPEAL NO. 53 OF 2014

WITH

CRIMINAL APPLICATION NO. 457 OF 2019

IN

CRIMINAL APPEAL NO. 53 OF 2014

WITH

CRIMINAL APPLICATION NO. 1078 OF 2018

IN

CRIMINAL APPEAL NO. 53 OF 2014

WITH

CRIMINAL APPLICATION NO. 1144 OF 2016

IN

CRIMINAL APPEAL NO. 53 OF 2014

WITH

CRIMINAL APPLICATION NO. 1239 OF 2017

IN

CRIMINAL APPEAL NO. 53 OF 2014

Sandeep Irla alias Sandya Chinnya Irla

.Appellant/
Applicant

Vs.

The State of Maharashtra

.Respondent

WITH

CRIMINAL APPEAL NO. 164 OF 2014

Om alias Vinayak Shridhar Gaikwad

.Appellant

V/s.

The State of Maharashtra

.Respondent

WITH

CRIMINAL APPEAL NO. 229 OF 2014
WITH
CRIMINAL APPLICATION NO. 1659 OF 2018
IN
CRIMINAL APPEAL NO. 229 OF 2014

Kumar alias Kalya Chinnu Devendra .Appellant/
Applicant

Vs.

The State of Maharashtra .Respondent

Mr. Nandkumar Sawant, Advocate, for the Appellant in
Cri. Appeal No. 53 of 2014

Ms Farhana Shah, Appointed Advocate, for the Appellants in
Cri. Appeal Nos. 164 & 229 of 2014

Mr. S. V. Gavand, APP, for the Respondent – State in all matters

CORAM : REVATI MOHITE DERE, J.

DATE : 25.04.2019

ORAL JUDGMENT

. By these Appeals, the Appellants have impugned the Judgment and Order dated 23.12.2013 passed by the learned Sessions Judge, City Civil & Sessions Court, Greater Bombay in Sessions Case No. 679 of 2012, convicting and sentencing them as under :-

- for the offence punishable under Section 376(2)(g) of the Indian Penal Code, to suffer R. I. for ten years and to pay fine of Rs. 1,000/- each, in default to suffer R. I. for one year.

- for the offence punishable under Section 324 r/w 34 of the Indian Penal Code, to suffer R. I. for one year and to pay fine of Rs. 500/- each, in default to suffer R. I. for three months.

Vide the aforesaid Judgment, the learned Sessions Judge was pleased to acquit the original accused No. 2 – Yogesh Kanojia, the original accused No. 5 – Mahesh Verma and the original accused No. 6 – Mohd. Khan.

Both the aforesaid sentences were directed to run concurrently.

2. Before, I proceed with the facts, it is pertinent to note, that when the aforesaid Bail Applications were listed it was urged by Mr. Sawant, learned counsel for the Appellants, that the

learned Sessions Judge, had breached the principles of natural justice i. e. no opportunity to cross examine some of the witnesses, including the victim was accorded to some of the accused. It was urged that the accused were denied a fair trial. Learned APP also did not dispute the fact, that the accused were not given a fair trial. Accordingly, vide order dated 26.03.2019, instead of setting aside the impugned Judgment and Order and remanding the entire case back to the trial Court, as the Appellants had undergone more than 7 years in jail, the case was remitted to the trial Court only for a limited purpose i. e. to permit the original accused No. 3 to cross examine PW.1 (prosecutrix) and original accused Nos. 1 & 3 to cross examine PW.4. After recording the cross examination, the evidence so recorded was directed to be forwarded to this Court. Accordingly, the learned Sessions Judge, after completing the recording of evidence, has forwarded the evidence to this Court, pursuant to which the Appeals are taken up for final hearing.

3. According to the prosecution, the incident took place in the first week of May, 2012 at around 12.00 midnight.

According to the prosecution, the prosecutrix (PW.1), aged 15-16 years was raped by the Appellants, one after the other. The Appellants are also stated to have assaulted the prosecutrix with a belt and given her Cigarette burns on her left cheek and right wrist, during the commission of the said offence. The prosecutrix is stated to have disclosed the said incident to her friend – Pooja with whom she was staying, and thereafter, to one social worker in the said area, Ms Amruta, who took her to Asha Sadan (Women's Home). As the prosecutrix was suffering from pain, and as there was infection to her private part, she was taken to the J. J. Hospital for treatment. Considering the history given by the prosecutrix that she was subjected to gang rape, she was asked to lodge a complaint with the police station. On 16.06.2012, the prosecutrix's statement was recorded by the Wadala TT Police Station, pursuant to which, C. R. No. 142 of 2012 was registered as against the Appellants and three others, for the offences punishable under Sections 376(2)(g), 324, 506(II) r/w 34 of the Indian Penal Code. The prosecutrix was sent for her medical examination to Nagpada Police Hospital, where it was revealed that her hymen was torn. The age of the prosecutrix was found to

be 13-14 years. It may be noted that the prosecutrix during the course of investigation was again referred for medical examination on 07.07.2012, as the earlier Injury Certificate issued by the Nagpada Police Hospital was silent as regards the case of the prosecutrix about having received Cigarette burns and assault with a belt, by the accused at the time of the incident. The prosecutrix was again examined on 07.07.2012 by the same Doctor at the Nagpada Police Hospital and Medical Certificate was issued. After the spot panchanama was drawn, the statements of witnesses were recorded and after investigation, charge-sheet was filed in the Court of the learned Metropolitan Magistrate, 29th Court, Dadar, Mumbai. As the offence punishable under Section 376(2) (g) was exclusively triable by the Sessions Court, the case was committed to the Court of Sessions, for trial.

4. The learned Sessions Judge framed charge as against the Appellants to which they pleaded not guilty and claimed to be tried.

5. The prosecution in support of its case examined six

witnesses; PW.1 – prosecutrix, (Complainant) aged between 15-16 years; PW.2 – Dr. Baban Shinde, Medical officer, who examined the prosecutrix on 21.06.2012 and 07.07.2012; PW.3 - Pooja Jadhav, to whom the prosecutrix had disclosed about rape by the Appellants (said witness has turned hostile); PW.4 – Sudarshana Paramane, PSI, who recorded the FIR and conducted the spot panchanama; PW.5 – Prajakta Kothekar, teacher of the School, where the prosecutrix was studying (said witness has deposed the date of birth of the prosecutrix as 08.10.1996) and PW.6 – Tukaram Jadhav, the investigating officer.

6. The defence of the Appellants was that of total denial and false implication.

7. The learned Sessions Judge after considering the evidence on record was pleased to convict and sentence the Appellants as aforestated, in para 1. The other three co-accused i. e. Yogesh Kanojia alias Nepali Raju Kanojia, original accused No. 2, Mahesh Devendra Verma, original accused No. 5 & Mohd. Akbar Salim Khan, original accused No. 6 were acquitted of

all the offences, by the learned Sessions Judge, as the evidence qua them was not sufficient to prove their complicity in the said offences.

8. Learned counsel for the Appellants assailed the Judgment and Order as well as the freshly recorded evidence on several counts. They submitted that there are several infirmities and contradictions inter se in the evidence of the prosecutrix and as such, reliance cannot be placed on her sole testimony. They submitted that no independent witness was examined by the prosecution, to corroborate the testimony of the prosecutrix, with regard to the sexual assault on her. They further submitted that there is a delay of 46 days in lodging the FIR inasmuch as, the incident of sexual assault allegedly took place in the first week of May, 2012, whereas, the prosecutrix's statement was recorded on 16.06.2012. Learned counsel further submitted that the evidence of the prosecutrix is doubtful and cannot be implicitly relied upon, as the prosecution had failed to examine Fatima with whom the prosecutrix was residing. It was submitted that the alleged incident could not have taken place in a crowded locality; and that

there is no evidence to show in whose house the prosecutrix was taken, where she was sexually assaulted. According to the learned counsel, non-disclosure of the incident of sexual assault either at Asha Sadan or to the CWC or to Ms Amruta, who was working with an NGO, also raises suspicion on the prosecutrix's case of sexual assault on her.

9. Learned APP submitted that the prosecutrix's evidence is trustworthy, reliable and inspires confidence, and as such conviction can be awarded based on her sole testimony. He submitted that delay in lodging the FIR, in the facts, stands sufficiently explained. According to the learned APP, the medical evidence on record also corroborates the prosecutrix's testimony.

10. Heard learned counsel for the parties at length and perused the evidence and documents on record with their assistance.

11. The question that falls for consideration is whether the evidence of the prosecutrix (PW.1) inspires confidence and is

reliable and trustworthy and whether it can form the sole basis for convicting the Appellants. The evidence of the prosecutrix reveals that her mother had performed three marriages and her step-father had attempted to rape her, as a result of which she was constrained to leave her mother's house and stay with her friend – Pooja; that as Pooja had gone out of station at the time of the incident, she was residing in the house of one Fatima at the MHADA transit camp; and that she was maintaining herself by working as a maid servant and with one Caterer. According to the prosecutrix, on the day of the incident when she returned home after completing her work, the Appellants were sitting outside Fatima's house and were under the influence of alcohol; that she entered Fatima's house and closed the door; that pursuant thereto, the Appellants started knocking at the door at around 1.00 a. m.; that when Fatima opened the door, the Appellant – Kumar asked Fatima to send her (prosecutrix) out; that Appellant - Kumar pulled her out of the house; that the Appellants took her to one vacant room; that they pushed her inside the room; that the Appellant – Kumar closed the door and assaulted her with the belt and removed her clothes; that when she refused to take off her

clothes, the Appellant – Kumar gave Cigarette burns on her cheek; that after committing sexual intercourse with her he went outside and the Appellant – Vinayak came in the room and had forcible sexual intercourse with her, without her consent; that when he went out and Appellant – Sandeep came in the room and he too had forcible sexual intercourse with her. According to the prosecutrix, she became unconscious and when she regained consciousness, she saw accused No. 2 – Yogesh sprinkling water on her face. She has stated that in the morning, after she regained consciousness, she went to Fatima's house and started weeping; that on the next day, when accused No. 5 – Mahesh came to meet her, she disclosed the incident to Fatima & Mahesh. Thereafter, she disclosed the incident after a few days i. e. in the last month of May to one Amruta who sent her to Asha Sadan. As the prosecutrix had urination problem, she was taken to the J. J. Hospital. Considering her disclosure i. e. of sexual assault, the authorities at the J. J. Hospital were not ready to take her, being a police case. Accordingly, the police were informed, pursuant to which the prosecutrix's statement was recorded by the Wadala TT Police Station on 16.06.2012 and FIR was registered as against the

Appellants for the alleged offences. Thereafter, the prosecutrix was sent to Nagpada Police Hospital for examination.

12. Although, the prosecutrix was cross examined at length, nothing is elicited in her cross, to disbelieve her testimony. The evidence of the prosecutrix, with regard to the Appellants taking her forcibly to a room, assaulting her and thereafter, committing rape on her, one after the other, has remained unshattered. In fact, there is no cross-examination of the prosecutrix with respect to the evidence that the Appellants had raped her and as such, the said evidence has gone unchallenged.

13. The evidence of the prosecutrix is fully corroborated and supported by the evidence of PW.2 – Dr. Shinde who initially examined her on 21.06.2012 and thereafter, on 07.07.2012. According to PW. 2 – Dr. Shinde, the victim (prosecutrix) had given him history that about one and a half months prior, the Appellants – Vinayak, Kumar and Sandeep had held her and taken her to one vacant room where she was raped one after the other. On the medical examination of the prosecutrix, PW.2 – Dr. Shinde

has stated that the hymen of the prosecutrix was torn and the position of tears was 1, 4, 9 and 11 clock. The tears were stated to be old healed. Her blood was collected for grouping and ossification test was also done. According to PW.2 – Dr. Shinde, the age of the prosecutrix was between 13-14 years. The evidence of PW.2 – Dr. Shinde shows that he again examined the prosecutrix on 07.07.2012, as in the earlier Medical Certificate (Exh. 39), there was no reference with regard to the injuries that were caused to the prosecutrix, by belt and cigarette. The evidence of PW.2 – Dr. Shinde shows that he examined the prosecutrix again on 07.07.2012, when the prosecutrix reiterated to the Doctor, that she was raped by Vinayak, Sandeep and Kumar (Appellants). The prosecutrix is alleged to have stated that before the sexual assault, Appellant - Kumar had given her Cigarette burns on her left cheek and right wrist and had also assaulted her on the right hand and left leg by leather belt. On her examination, PW.2 – Dr. Shinde found the following injuries on her person which are as under :-

“(1) Circular scar over left cheek, 1 cm in diameter, black in colour, non tender.

(2) Four circular scars over posterior aspect of right forearm. Distal ½ portion. They are in two rows. 0.8 cm to 1 cm in diameters. Black in colour, non tender.

(3) Scar over right thigh. Medical aspect. Lower 1/3 portion. 6 cm x 4 cm oblique in direction. Non tender. Black in colour.

(4) Scar over anterior aspect of left leg lower ½ portion. 4 cm x 3 cm. Oblique in direction. Black in colour.

Non tender.”

PW.2 – Dr. Shinde opined that scar Nos. 1 & 2 were caused by Cigarette burns and scar Nos. 3 & 4 by hard and blunt object. Accordingly, Dr. Shinde issued another Injury Certificate (Exh. 69).

14. Thus, the medical evidence on record clearly supports and corroborates the prosecutrix's evidence that the Appellants had given her Cigarette burns on her left cheek and right wrist

and that she was assaulted with a leather belt (as she was refusing to remove her clothes), before she was sexually assaulted. It is pertinent to note that there is no suggestion given to PW.2 – Dr. Shinde that the injuries could have been caused by some other instrument. It may be noted, that in the Injury Certificate (Exh. 39) issued by Dr. Shinde, when he examined the prosecutrix on 21.06.2012, he had noted the said injuries as identification marks of the prosecutrix.

15. The evidence of PW.3 – Pooja Jadhav with whom the prosecutrix stayed for a few days prior to the incident also corroborates to some extent the disclosure made by the prosecutrix to PW.3 – Pooja. Although PW.3 – Pooja has resiled from her statement, she has admitted that the prosecutrix had come to stay with her for two days and that at that time she told her that she was raped. Although, according to the prosecution, the prosecutrix had disclosed the names to PW.3 – Pooja, the said witness has denied the said portion marked 'A'. It appears from the tenor of the cross examination of PW.3 – Pooja that as her husband was called to the police station alongwith accused to

find out his role in the incident, she was not willing to support the prosecution case. However, the fact remains that the evidence of PW.3 – Pooja to the extent, that the prosecutrix had disclosed to her, that she was raped stands corroborated. It is well settled that if the testimony of the prosecutrix is found to be convincing, trustworthy and reliable, that by itself can form the basis of conviction of the accused and no corroboration is necessary. In the case of *State of Maharashtra Vs. Chandraprakash Kewalchand Jain* reported in *AIR 1990 SC 658*, the Apex Court observed as under :-

“The evidence of a prosecutrix must be judged in the backdrop of the particular fact and situation in which she was placed. The victim of a sexual offence cannot be put on par with an accomplice. She is in fact a victim of the crime and her evidence must receive the same weight as is attached to an injured in cases of physical violence. To insist on corroboration except in the rarest or rare cases, is to equate a woman who is a victim of the lust of another with an accomplice to the crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her story will not be believed unless it is corroborated as in the case of an accomplice to a crime.”

16. In fact, the Apex Court has gone to the extent of holding that though medical evidence is extremely important in a rape case, absence of medical evidence would not necessarily lead to an acquittal. It is observed that the opinion of a Doctor, cannot throw out, an otherwise cogent and trustworthy evidence of the victim. It is, thus, well settled that if the testimony of the prosecutrix is found to be trustworthy and cogent, irrespective of the medical evidence, conviction can be recorded.

17. In the present case, not only does the prosecutrix's evidence inspire confidence but also stands corroborated by the medical evidence. It also finds corroboration from the evidence of PW.3 – Pooja, who has supported the prosecution case with respect to the disclosure made by the prosecutrix to her, that she was raped by the Appellants. In the facts, having regard to the prosecutrix's background, that she had left home as her mother had married thrice, and her step father had attempted to rape her, that she was staying with friends, her vulnerable age, her illiteracy, delay in lodging the FIR is certainly not fatal.

18. As far as the age of the prosecutrix is concerned, the same need not be gone into whether she was a minor at the relevant time or not, as the fact remains that the prosecutrix was between 15-17 years age at the relevant time. Since the evidence of the prosecutrix is found to be cogent and trustworthy supported by the medical evidence on record, it is not necessary to consider whether the prosecution has proved, that the prosecutrix was a minor at the time of the incident or not.

19. Having regard to what is stated aforesaid, the Order of conviction and sentence is upheld. However, in view of the fresh recording of evidence pursuant to the Order dated 26.03.2019, the reasons are substituted by this Judgment. Accordingly, the Appeals are dismissed.

20. In view of disposal of the Appeals, Cri. Application Nos. 457 of 2019, 1078 of 2018, 1144 of 2016, 1239 of 2017 and 1659 of 2018 do not survive and the same stand disposed of accordingly.

21. I would like to record a word of appreciation for the able assistance provided and the efforts taken by Ms Farhana Shah, as an appointed advocate, in conducting the Appeals, being Cri. Appeal Nos. 164 & 229 of 2014.

22. High Court Legal Services Committee to award fees of the learned appointed advocate, as per Rules.

(REVATI MOHITE DERE, J.)