

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 904 OF 2014

1. Shahid Sayyed Shaikh.

Age : 21 years, residing at Mankhurd
Lallubhai Compound, "B" Wing,
Room No. 522, Mankhurd,
Mumbai 400 022.

2. Imran Abdul Hamid Shaikh.

Age : 20 years, Occ:-
residing at Shri Sundar Kamlanagar,
Garib Nawaj Chowk, Room No. 307,
Bhau Daji Road, Sion, Mumbai 22.

..Appellants.

v/s.

The State of Maharashtra

(at the instance of Matunga Police Station

vide C.R. No. 90 of 2013)

..Respondent.

WITH

CRIMINAL APPEAL NO. 219 OF 2015

Ganesh Laxman Gurav,

Age: 19 years. Residing at

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Room No. 201, 2nd floor, Building No. 23,
Foolpada, Ramchander Nagar, Virar(East),
Thane. Indian inhabitant, currently
incarcerated at Dhule Central Prison.

..Appellant.

v/s.

The State of Maharashtra
(Matunga Police Station)

..Respondent.

Mr. Aniket Vagal, advocate for appellant in Appeal No. 904/2014.

Ms. Shradha Sawant, advocate appointed for appellant in Appeal No.
219 of 2015.

CORAM : SMT. SADHANA S. JADHAV,J.

DATE : MARCH 18, 2019.

JUDGMENT :

1 The appellants herein are convicted for the offences punishable under section 323, 376(D), 377, 120-B, 452 and 506 of the Indian Penal Code vide Judgment and Order dated 5/11/2014 by the Additional Sessions Judge, City Civil & Sessions Court, Gr. Bombay in Sessions Case No. 752 of 2013. The appellants are sentenced to suffer R.I. for one year and to pay fine of Rs. 1,000/- each I.d. to suffer R.I. for 15 days for offence punishable under section 323 of the Indian Penal Code. The appellants are sentenced

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to suffer R.I. for 20 years for offence punishable under section 376(D) of the Indian Penal Code. The appellants herein are sentenced to suffer R.I. for 10 years and fine of Rs. 5,000/- each I.d. to suffer R.I. for 3 months for offence punishable under section 377 of the Indian Penal Code. The appellants are further sentenced to suffer R.I. for one year for offence punishable under section 120-B of the Indian Penal Code. The appellants are also sentenced to suffer R.I. for 7 years and to pay fine of Rs. 5,000/- each I.d. to suffer R.I. for 3 months for offence punishable under section 452 of Indian Penal Code. The appellants herein are also sentenced to suffer R.I. for one year and to pay fine of Rs. 500/- each I.d. to suffer R.I. for one month for offence punishable under section 506 of the Indian Penal Code. Hence, these appeals.

2 Such of the facts necessary for the decision of these appeals are as follows :

(i) The victim in the present case was a married woman staying with her husband at Matunga just near railway track. They were living in a hut, which had no electricity connection.

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(ii) It is the case of the prosecution that the accused No. 3 and Siddhu were known to the prosecutrix. That on 15th March, 2013 both of them entered the house of the victim alongwith five other persons, at midnight. Her husband was beaten by them. He was thrown out of the hut. The accused had forcible sexual intercourse with the victim. They had unnatural sex. The incident was going on till 1.15 a.m. of 16/3/2013.

(iii) After departure of the accused, the victim had been to Matunga Railway station. Her husband was taking rest near the gate of RPF Police Chowki as he was injured at the hands of the accused persons.

(iv) It is alleged that the victim had seen Siddhu alongwith unknown person on the track at Matunga soon after the incident. Therefore, she alone went to CSMT railway station and had taken rest in the night.

(v) In the morning she came and met her husband at Matunga

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railway station. She went to Matunga Railway police station to lodge a complaint. However, she was referred to Dadar Railway Police Station. Her statement was recorded by the police at Dadar Police Station and was registered at 00/13 number and then referred to Matunga Police Station for investigation as the incident had occurred within the jurisdiction of Matunga Police Station.

(vi) Crime No. 90 of 2013 was registered at Matunga Police Station on 16th March, 2014 against accused for the offence punishable under section 323, 506, 376(2)(g), 377 and 120-B of the Indian Penal Code. The case was registered as Sessions Case No. 752 of 2013.

3 The prosecution examined as many as 14 witnesses to bring home the guilt of the accused. However, the case rests upon the evidence of P.W. 1 complainant, P.W. 2 Bhalchandra Sitaram Saini, husband of the victim, P.W. 6 Ravindra Jadhav and P.W. 7 Rambadan Chauhan who are the independent witnesses, P.W. 9 Dr. Atul Aswani who examined the husband of the victim, P.W. 10 Dr. Baban Shinde who examined the victim herself, P.W. 12 Atul

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Adurkar who registered Crime at Matunga Police Station, P.W. 13 Suresh Parab, Investigating Officer first in point of time and P.W.14 Raghvendra Thakur, subsequent investigating officer.

4 It is pertinent to note that all the accused in the present case are in the age group of 20 to 23 years.

5 P.W. 1 has stated in her substantive evidence that she was staying with her husband **Vinod Shani** in a hut at Matunga railway station track No. 4. That there was no electric connection in her hut and according to her, light of nearby pole standing near the track was sufficient. She was knowing two boys namely, Siddhu and Anup for 3 years since she had seen them moving around in the said vicinity.

6 That, on the day of the incident, she was sleeping in her hut. She heard someone calling her husband by name “Bala” and she woke him up. Her husband was about to leave the hut when he was assaulted on his left leg with a stump. The others followed the same and assaulted him. As a result of which he fell in the drainage.

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He was then tied with the rope. Her husband was then assaulted by two more persons. Four persons had entered into the hut, tore her clothes and outraged her modesty. In all 6 persons had sexual intercourse with her one after another. Accused persons again assaulted her husband. Siddhu was the last person to come inside the hut and had unnatural intercourse with her. It was 1.30 a.m. at that time.

7 The couple managed to get up and walked from railway track towards station. One Deva had enquired with her. It is specifically submitted by the prosecutrix that when she was at station, she saw Siddhu roaming with another person. She slept at CSMT station, while husband had been to Matunga station. She met her husband at Matunga Railway station. They lodged report at Dadar Railway Police Station, which was then transferred to Matunga Police Station. She admitted the contents of the FIR and hence, it was marked at Exh. 21.

8 She has denied in the cross-examination that tent of railway gang-men is in front of her hut. According to her, in front of

the same track, there is office of union and she was staying there for last 4 years. Her admissions are as follows :

Persons who are working on the track are also staying near the track. She cultivates vegetables near the track by using water from the drainage. That, there are small houses near her hut. That, the local trains are running on the track till 2 a.m.. Her hut is near platform No. 4 at Matunga railway station. That there is road near her hut. It is like a small lane. There is a bridge near the lane. There is also shop of motor mechanic and that the people visit said mechanic shop at all times. There are street lights in the lane. Trains going to CSMT and leaving Mumbai for other destination passes from platform Nos. 3 and 4. Every 5-10 minutes, local trains passes by. That, police are patrolling on the railway station. Vegetable markets is also at Matunga railway station and vegetable vendors used to sleep on the platform. The complainant prosecutrix has admitted that she had not disclosed about the said incident to anybody in the vicinity neither to the union office. That, at about 2 a.m. she had been to east side of railway station for purchasing coffee and disclosed about the said incident to one friend of her

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husband (not examined). She had to climb the bridge for bringing coffee. That, the road between her hut and bridge is not smooth. She had reached CSMT railway station at 2.22 a.m. It was crowded even then. Police were available. However, she did not disclose it to anybody. She did not visit any hospital at night.

9 The prosecutrix has clearly admitted that she is staying in Bombay for last 12 years and she knows how to reach Sion Hospital, K.E.M. hospital or Matunga Government Hospital. She has also admitted that she was sleeping in just one cloth from night to morning. Her first husband is Pravin Bhavad. Three children begotten from the said marriage reside with her husband. She has begotten one daughter from Vinod Sainee.

10 In fact, she has also admitted that she first had been to Matunga Police station and had been informed that they do not register non-cognizable cases and therefore, she was referred to Dadar Police Station. She had been to Matunga Railway Police Station at 9 a.m. . She has also admitted that the police from Dadar Police Station had made enquiries with the persons staying adjacent

to her hut. It is also admitted that both the police station had not referred her for medical check-up. That after 2-3 days Matunga Police sent her for medical check up.

11 She has also admitted that 2 to 3 days after registration of FIR, police had shown accused persons to her whom they had arrested in the said offence. She had identified the accused in the police station. When she went to prison for test identification parade, police had asked her to identify the persons whom she had identified in the police station.

12 P.W. 2 Bhalchandra Saini is the husband of the prosecutrix. He claims to know Siddhu, Anup and Ganya. According to him, on the day of incident, miscreants had knocked the door. When he opened the door, he was assaulted by Bamboo stick on his legs. Since he was assaulted, he went out of the house and all the persons entered in the house and closed the door and the incident was going on till last train was leaving. According to him, since he was unable to walk, he had slept near RPF chowky gate. He was informed by his wife that all the persons, who had entered the

house, had sexual intercourse with her one after another. The witness had identified the accused No. 1 Ganesh and accused No. 4 Shahid. He has admitted that place where they live was always crowded. According to him, his wife was sent for medical check-up at 12 noon. He had not accompanied her. It is admitted that when the accused persons were arrested, he was in the police station for more than half an hour. He has admitted that accused were shown to his wife at the police station.

13 P.W. 3 Vasu Naik who is the panch for scene of offence panchanama of the site of hut and it is always crowded area. The scene of offence panchanama is at Exh. 24. It indicates that the hut had tin sheet and it had iron door. The room was measuring 7 x 7 ft. The room is made up of cement and iron sheets and the roof is also of cement and iron. There is window to the said room. Outside the window there is MSEB pole. From the northern side the tin sheet is open and it is possible to go into the adjacent room which is measuring 5 x 7 ft. It is clear that the scene of offence panchanama is not in consonance with the description of the hut given by P.W. 1.

14 P.W.8 Dattatray Kamble has conducted test identification parade at Arthur Road Jail on 4/4/2013. He has admitted that there is no seal of the jail on the memorandum of identification parade. From his evidence all that can be said is he had only proved that he has only conducted test identification parade but not known what had occurred in the course of conducting the said test identification parade.

15 P.W.9 Dr. Atul Aswani, who was medical officer, Sion Hospital had examined P.W. 2 on 16/3/2013 at about 5.40 p.m. He had examined said patient who had complained of pain in his right knee, thumb and right elbow. Injury certificate is proved and is made at Exh. 44. P.W. 2 had not sustained any cut injury.

16 P.W.10 Dr. Baban Shinde had examined prosecutrix on 16/3/2013. She was referred by Dadar Railway Police Station. She had given history of forcible sexual intercourse by Anup, Siddhu and one unknown person. She had sustained contusions on her left leg. There was tenderness. There were no injuries on her private part or breast. Tenderness at anal sphincture was present. Her private

parts were normal. There was no foreign body found.

17 It is admitted in the cross-examination that if a woman is raped by about 8 persons, she cannot get up and walk within a moment. That such injured victim would require medical treatment. Doctor has admitted that in the present case, there was no injury on her private part or no injury to her perineum. Medical examination certificate is at Exh. 47.

18 P.W. 11 Shakir Ahmed Shaikh was attached to Dadar Railway Police Station and had registered offence at 00/2013 and had referred the victim to Nagpada Police Hospital for medical check-up. According to the said officer, car shed of railway is just close to the hut and the area is always crowded.

19 P.W.13 Suresh Parab, Sr. P.I. is the first investigating officer. According to him, statement of the husband of the victim was recorded on 19th March, 2013. That her husband was present when her statement was recorded. The officer had collected CCTV footage of CSMT railway station in the course of investigation. According to him, platform Nos. 3 and 4 are for fast railway tracks.

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The accused were arrested on 16th March, 2013.

20 P.W. 14 Raghvendra Thakur was attached to Matunga Police Station. He is investigating officer in C.R. No. 90 of 2013. According to him, on 4th April, 2013 in the course of investigation, he conducted test identification parade at the police station.

21 Learned Counsel for the appellant has rightly submitted that the evidence of the victim does not inspire confidence of any kind. It is seen from the records that the description of the hut as given by her does not match with the scene of offence panchanama. That she had seen accused Siddhu moving on the railway tracks soon after the incident. However, she had neither informed the police about the same, although, it is not her case that she was threatened by Siddhu on the railway track. Thirdly, chronology of events including bringing of the coffee by climbing a bridge soon after the incident, travelling to CSMT railway station for no reason, returning to Matunga, then to Dadar and coupled with her statement that Matunga Police had informed her that they do not register non-cognizable cases. Fourthly that, the medical evidence falsify her

contention that she was sexually assaulted by almost 8 persons.

22 It is true that in a rape case, accused can be convicted on the solitary testimony of the prosecutrix provided that it is a sterling testimony. It cannot be believed that the accused would be moving freely on the same track soon after the incident. Medical certificate of P.W. 2 also does not indicate that he had sustained grievous injuries. Complaint was only of pain in knees and elbows. Some corroboration of the narration of the incident by the complainant could perhaps be found if medical evidence was categorical about commission of rape. Her narration that her husband was tied with rope and was also assaulted by the miscreants while leaving the spot does not find corroboration in the substantive evidence of her husband. In fact, the house had a door which was actually opened by the husband. Therefore, the description of the house given by her also does not support her case. Clothes of the victim were seized from the spot. Chemical analyser's report does not support her case in any way. The statement of the prosecutrix in rape case would be the best evidence. However, the Court cannot presume same to be gospel truth.

23 Most important aspect which is fatal to the prosecution is the test identification parade. Accused were shown to the victim in the police station. P.W.14 had also admitted that in the course of investigation, he had conducted test identification parade at the police station. The Supreme Court as well as this Court has in catena of decision deprecated practice of conducting test identification parade at the police station. Moreover, contents of the memorandum are not proved.

24 The Apex Court in the case of **Rajoo and ors. v/s. State of M.P. reported in AIR 2009 SC page 858** has held as follows :

“Moreover, in the light of the fact that the witness had been shown to the prosecutrix not once but several times while they were in police custody, the identification parade held by PW5 is even otherwise meaningless.”

The facts in the said case were similar to the present one.

The Apex Court has held that -

“To our mind the truth and falsehood are so inextricably intertwined, that it is impossible to discern where one ends

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and the other begins.”

Therefore the accused were granted benefit of doubt.

25 P.W. 1 cannot be treated as reliable witness. Learned Counsel for the appellant has also placed reliance upon the judgment of the Apex Court in the case of **Yogesh Singh v/s. Mahabeer Singh & ors. (Criminal Appeal No. 1482 of 2013)** to substantiate his contention about the testimony of the witnesses who are not reliable.

The Apex Court has observed as follows :

“It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the Court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version.”

26 In view of the above discussion and upon recording finding that P.W. 1 and 2 cannot be treated as reliable witness, accused deserve benefit of doubt. Hence, following order is passed :

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ORDER

- (i) The appeals are allowed.
- (ii) The Judgment and Order passed by the Additional Sessions Judge, City Civil & Sessions Court, Greater Bombay dated 05.11.2014 in Sessions Case No. 752 of 2013 for the offence punishable under section 323, 376(D), 377, 120-B, 452 and 506 of the Indian Penal Code is hereby quashed and set aside.
- (iii) The appellants herein are acquitted of all the charges levelled against them. They shall be released forthwith, if not required, in any other case.
- (iv) Fine amount, if paid, be refunded.

27 Ms. Shradha Sawant, advocate appointed for appellant in Cr. Appeal No. 219 of 2015 be paid professional fee as per the rules by the High Court Legal Aid Services Committee.

28 The appeals are disposed of accordingly.

[SMT. SADHANA S. JADHAV, J.]