

Anand

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

CRIMINAL APPEAL NO. 278 OF 2006

Ashok Fulchand Jadhav .Appellant
Age : 34 yrs, Occu :
R/at : 565 Quarter, R. No. 92/4,
S. R. P. Group No. 7, Daund,
Taluka – Daund,
District – Pune.

Vs.

The State of Maharashtra .Respondent
(Through officer – incharge, Daund Police Station)

Mr. N. S. Mundargi, Advocate, for the Appellant
Mr. P. H. Gaikwad, APP, for the Respondent – State

CORAM : REVATI MOHITE DERE, J.

DATE : 18.03.2019

ORAL JUDGMENT

. This Appeal is directed against the Judgment & Order dated 31.01.2006 passed by the learned IIIrd Additional District & Sessions Judge, Baramati, District – Pune in Sessions Case No. 6 of 2004, convicting and sentencing the Appellant as under :-

- for the offence punishable under Section 376 of the Indian Penal Code to suffer R. I. for seven years and to pay fine of Rs. 5,000/-, in default to undergo further R. I. for one year;
- for the offence punishable under Section 451 of the Indian Penal Code to undergo R. I. for one year and to pay fine of Rs. 500/-, in default to undergo further R. I. for three months;
- for the offence punishable under Section 506 of the Indian Penal Code to undergo R. I. for one year and to pay fine of Rs. 500/-, in default to undergo further R. I. for three months.

The said substantive sentences were directed to run concurrently.

2. The prosecution case in brief is as under :-

PW.8 – Ashok Shankarrao Survegandh, P. I. was attached to the Daund Police Station at the relevant time. He has stated that he had written a letter to the Commandant of S. R. P.,

Nagpur (Exh. 11) and that the report of the prosecutrix (PW.3) was accepted by the Deputy Superintendent of Police, Shri Ingawale, pursuant to which he handed over the investigation to PSI, Shri Maksare, who registered C. R. No. 107 of 2003 against the Appellant for the offences punishable under Sections 376, 506 and 452 of the Indian Penal Code. The Appellant was arrested on 25.09.2003 under an arrest panchanama (Exh. 10). Thereafter, PW.8 – PI Survegandh proceeded to the place of occurrence and drew the scene of offence panchanama (Exh. 23), recorded the statement of witnesses including that of the prosecutrix's husband – PW.5; sent the prosecutrix (PW.3) for medical examination and also seized her clothes under a panchanama (Exh. 50). He has stated that on 01.10.2003, the prosecutrix showed her inclination to go with her brother and accordingly, was sent with her brother. During the course of investigation, C. A. Reports were received and after investigation, charge-sheet was filed as against the Appellant in the Court of the learned J. M. F. C., Daund on 23.10.2003. Since the offences were session triable, the case was committed to the Court of Sessions.

3. The learned Sessions Judge framed charge as against the Appellant for the offences punishable under Sections 376, 451 and 506 of the Indian Penal Code. The Appellant pleaded not guilty to the same and claimed to be tried.

4. The prosecution in support of its case examined eight witnesses; PW.1 – brother of the victim; PW.2 – Nandkumar Jagtap, panch to the spot panchanama (Exh. 23); PW.3 – the prosecutrix; PW.4 – mother of the prosecutrix; PW.5 – husband of the prosecutrix; PW.6 – Dr. Santosh Gondkar, Chief Resident Doctor in the Gynecological Department, Sasoon Hospital, Pune; PW.7 – Sanjaykumar Verma, Commandant of S. R. P., Group No. VII at Daund and PW.8 – P. I., Ashok Survegandh, the investigating officer.

5. The defence of the Appellant was that of false implication. According to the Appellant, the relations between him and PW.3 (prosecutrix) were consensual and that PW.3 had filed a false case against him, to get maintenance from her

husband (PW.5). The Appellant examined himself as a defence witness i. e. DW.1.

6. The learned Sessions Judge, after considering the evidence on record, convicted & sentenced the Appellant as stated aforesaid in para 1 of the Judgment.

7. Learned counsel for the Appellant submitted that although the Appellant disputes the allegations of rape, he does not dispute the fact, that he was in a relationship with the prosecutrix (PW.3) and that the relations between them were consensual. He submits that the evidence on record, in particular the answers given by PW.5, PW.3 & PW.7 in their cross-examination, clearly shows that the Appellant was in a relationship with the prosecutrix and that the said fact was also known to the prosecutrix's husband (PW.5) and others. He further submitted that the evidence of PW.7 – Commandant of S. R. P. also shows that the prosecutrix's husband had disclosed to him about the illicit relations between the Appellant and his wife (PW.3). Learned counsel submitted that there is a delay of seven

months in lodging the FIR, inasmuch, the incident had taken place on 12.02.2003, whereas the FIR was lodged on 25.09.2003. He submits that the overwhelming circumstances and the evidence on record clearly shows that the Appellant had not raped the prosecutrix and that the relations between them were consensual.

8. Learned APP submitted that no interference was warranted in the impugned Judgment and Order of conviction and sentence.

9. Heard learned counsel for the parties and perused the evidence with their assistance.

10. In order to prove allegations of 376, the prosecution examined PW.3 – the prosecutrix, PW.4 & PW.1 – mother & brother of the prosecutrix respectively, PW.5 – husband of the prosecutrix and PW.7 – Shri Varma, Commandant of S. R. P.

11. As far as the evidence of PW.3 – the prosecutrix is concerned, she has stated that she got married to PW.5 on

05.05.1993; that her husband (PW.5) was working as a Constable with the S. R. P. at Daund and as such, she was residing with him at Daund, in the Government quarters; that her husband's native place was Waghachi Wadi, Taluka – Karmala, District – Solapur and that he would go to his native place every Thursday, as it was his weekly off; and that her husband would leave for his native place on Wednesday at about 5.00 to 6.00 p. m. and would return on the next date i. e. on Thursday in the evening. She has stated that she knew the Appellant, as he was working with the S. R. P. and was also residing in the same Government quarter, at Daund. She has stated that the incident took place on 12.02.2003 i. e. on Wednesday. According to PW.3, on the said date, her husband left home for his native place at Waghachi Wadi at about 5.00 to 6.00 p. m., after which she was alone at home; that after dinner, she fell asleep at about 8.00 p. m.; that after some time, the door bell rang, pursuant to which she got up and switched on the light; that when she opened the door, she saw the Appellant standing at the door; that the Appellant entered the house and sexually assaulted her; and that as a result of the same, she fainted and re-gained consciousness in

the morning. She has further stated that when she woke up, she closed the door from inside and again slept in the house. According to PW.3, her husband returned at about 7.00 p. m. on the next day i. e. Thursday, and that on his return she informed him about the incident i. e. of sexual assault by the Appellant. She has stated that they approached PW.7 – Commandant on the next date at 11.00 a. m., who promised speedy justice to her. She has further stated that after the said incident, her husband started suspecting her character and started assaulting her, pursuant to which, she left his house and went to her parents. She has stated that thereafter, she lodged a complaint with the Daund Police Station on 25.09.2003 i. e. after almost seven months of the incident. After registration of the complaint, she was medically examined and her clothes were seized under a panchanama.

12. The said witness was cross examined at length. She has admitted that she had filed a Petition seeking maintenance (Maintenance Petition No. 87 of 2003) in the Karjat Court after she went to her parents house i. e. within two to three months of the incident. She has admitted that her husband had contracted

second marriage and that she had even filed a complaint against him. She has further admitted that there is no document to show that she had lodged a written complaint with PW.7 i. e. the Commandant, with respect to the sexual assault by the Appellant. She has also admitted that after the said incident, her husband was not maintaining her. Although it was sought to be suggested to the said witness in the cross-examination that she had lodged the FIR, against the Appellant at the instance of her husband (PW.5) and as her husband was not providing maintenance to her, she has denied the same. PW.3 has also denied the suggestion that she had voluntarily opened the door for the Appellant and had permitted him to come inside and that her husband i. e. PW.5 had entered the house through the back door and had found them in a compromising position, pursuant to which the Appellant fled from the spot.

13. The prosecutrix's husband was examined as PW.5. In his evidence, PW.5 has stated that he was working with the S. R. P., Daund for 15 years and that at the relevant time, was residing in a Government quarter. He has stated that Thursday,

being his weekly off, he left for his native place on Wednesday i. e. 12.02.2003 at about 5.00 p. m. He has stated that his wife was alone at home and that he returned on the next date i. e. on Thursday at 7.00 p. m. According to PW.5, when he returned, he found his wife was sleeping and that she was upset. He has stated that when he inquired with her, she told him about the incident of sexual assault on her by the Appellant. According to PW.5, on the next date, he along with his wife (PW.3) approached PW.7 – Commandant of the S. R. P. He has stated that PW. 7 – Commandant asked them to keep quiet and promised to give them justice, within two to three months, pursuant to which, he returned home. He has stated that his mother-in-law came to their house after four days, pursuant to which, he again went to the office of PW.7. He has stated that again PW.7 asked them to keep quiet and promised to give them justice within one or two months. He has stated that thereafter, his wife (PW.3) accompanied her mother back to the village and was residing with her mother since then. He has stated that on 04.07.2003, when he moved the authorities, including D. I. G., they asked him not to approach the police and promised to initiate departmental action

as against the Appellant. He has stated that thereafter, his mental condition was not good, requiring him to take treatment at the Sassoon Hospital, Pune. He has stated that the Appellant was transferred to Nagpur, after the incident. He has stated that his wife i. e. PW.3 lodged a report / FIR with the Daund Police Station on 25.09.2003.

14. PW.5 (prosecutrix's husband) in his cross-examination has admitted that his wife (PW.3) had filed a complaint in the Court against him, as he had contracted a second marriage; that his wife had filed a Maintenance Petition thereafter, in the Karjat Court; and that he had engaged an Advocate, who filed his say in the said Petition. A specific question was put to PW.5 in the cross-examination, to the effect, that in the say filed to the Maintenance Petition, he had mentioned that his wife was maintaining illicit relations with the Appellant, to which he replied that his mental condition was not well and he did not know how the say was drafted by his Advocate. The said witness when confronted has stated, that he does not remember whether he had averred in his say to the Maintenance Petition filed by his

wife; that he had waited in Daund and did not proceed to his native place on 12.02.2003; that within two hours (of his leaving), the Appellant rang the door bell; that his wife opened the door and after ten minutes, the Appellant went inside; that he bolted the door from outside; that thereafter, entered the house from the back door; that he saw the Appellant and his wife in a compromising position; that the Appellant and wife put on their clothes; that his wife went from the back door and removed the bolt from outside the front door and thereafter, his wife and the Appellant ran away; and were away for about one month; and that the relatives of his wife tried to search for her. He has also denied that he had averred in the say that his wife was maintaining illicit relations with the Appellant. The said witness has, however, admitted that he had not asked his wife to lodge a report / FIR with the police.

15. As far as the evidence of PW. 1 – brother of the prosecutrix (PW.3) is concerned, he has stated that the incident had taken place two years back; that his mother and brother had gone to PW.3's house and had returned after five to six days with

his sister; and, that his mother had disclosed that his sister was raped. He has specifically stated that on enquiry with his sister i. e. PW.3, she did not disclose anything. In his cross-examination, he has admitted that his sister (PW.3) had prosecuted her husband (PW.5) for contracting second marriage and that his sister had also filed a Maintenance Petition in the Karjat Court, after she came to reside at their house.

16. As far as the evidence of PW.4 i. e. mother of the prosecutrix is concerned, she has stated that after two to four days of the incident, her daughter came to her house. She has stated that her daughter lodged a complaint but she did not know when.

17. As far as the evidence of PW.7 – Shri Varma, Commandant of S. R. P. is concerned, he has stated that PW.5 (prosecutrix's husband) was working with the S. R. P. at the relevant time and that the Appellant was also working as a Constable with the S. R. P. He has stated that in February, 2003, PW.5 met him and told him that in his absence, the Appellant visited his house and raped his wife. He has further stated that he

asked PW.5 to file a written complaint to him or directly approach the police station. He has further stated that after four to five days, Gangaram, his wife and mother-in-law approached him and gave the same story. He has stated that in the month of May, 2003, PW.3 had filed a complaint with him about her husband (PW.5) ill treating her. He has stated that PW. 5 had also complained to him, that the Appellant was frequently visiting his house in his absence. He has stated that neither PW.5 nor the prosecutrix (PW.3) had filed a complaint with him in writing. PW.7, Shri Varma has stated that PW.3 had made a complaint with regard to the second marriage contracted by her husband – PW.5.

18. The Appellant examined himself as a defence witness (DW.1). The Appellant has in his evidence stated that he was working with S. R. P., as a Constable and was posted at Daund and was occupying a Government quarter at the relevant time. He has stated that his wife was also residing with him in 1997. He has stated that (PW.5) was also working with the S. R. P. and was residing in the same Government quarters alongwith his wife

– PW.3. According to DW.1, he became friendly with PW.5's wife and they were in an illicit relationship for about 1-1/2 – 2 years, prior to the incident. He has further stated that whenever PW.5 was out on duty, he was maintaining illicit relations with PW.3. He has stated that on 12.02.2003, PW.3 came to the vegetable shop at 5.30 p. m., where he was present and told him that PW.5 had gone to his village and that he should come to her house in the evening. He has stated that at about 8.00 p. m., he went to PW.3's house, rang the bell, pursuant to which, PW.3 opened the door and allowed him to come inside. He has further stated that PW.3 closed the door, pursuant to which, he sat on the Diwan and they chatted for some time; that when they were in a compromising position, PW.5 came from the back door; hence they put on their clothes; and that PW.5 started abusing them. He has further stated that as the front door was bolted from outside by PW.5, PW.3 went out from the back door and opened the front door, pursuant to which, he left the house. He has stated that thereafter, PW.5 abused and assaulted PW.3 and drove her out of the house, pursuant to which, both the of them i. e. PW.3 and the said witness left Daund, for a month. He has stated that PW.3's

family members caught them at Shirdi and took PW.3 home. He has stated that PW.3 lodged the said report / FIR against him, only at the instance of her husband, who had promised to maintain her, if she did so. Several suggestions were put to the said witness, however, the same were denied by him.

19. The defence taken by the Appellant is a bold defence. According to the Appellant, he was in a relationship with PW.3 and as such, the same was consensual. The said evidence of DW.1 cannot be brushed aside lightly, but will have to be considered and given due weightage, on par with prosecution witnesses. The question that arises is that, if DW.1 is to be believed, does his evidence shake the basic foundation of the prosecution case ? The Apex Court in the case of *Dudh Nath Pandey Vs. State of U. P.*, reported in **1981 SCC (Cri) 379** observed in para 19 as under :-

“19.....Defence witnesses are entitled to equal treatment with those of the prosecution. And, Courts ought to overcome their traditional, instinctive disbelief in defence witnesses. Quite often, they tell lies but so do the prosecution witnesses.....”

Similarly, in *State of U. P. Vs. Babu Ram*, reported in (2000) 4 Supreme Court Cases 515, the Apex Court has in para 23 observed as under :-

“23. Depositions of witnesses, whether they are examined on the prosecution side or defence side or as court witnesses, are oral evidence in the case and hence the scrutiny thereof shall be without any predilection or bias. No witness is entitled to get better treatment merely because he was examined as a prosecution witness or even as a court witness. It is judicial scrutiny which is warranted in respect of the depositions of all witnesses for which different yardsticks cannot be prescribed as for those different categories of witnesses.”

20. Considering the aforesaid legal position and having carefully perused the evidence on record, in particular, the evidence of PW.1, PW.3, PW.4, PW.5, PW.7 and DW.1, it appears that the Appellant and PW.3 were in a relationship, which was consensual in nature. The defence that the Appellant was in a relationship with PW.3 and would visit her house, when PW.5 would go his native place seems probable and will have to be accepted. In fact, the Appellant's case, that the Appellant and

PW.3 were in an illicit relationship, also finds corroboration and acceptance by some of the prosecution witnesses i. e. PW.5 and PW.7. The evidence of PW.5 shows that PW.5 had filed his say to the Maintenance Petition filed by PW.3, wherein, PW.5 had stated that the Appellant was in relationship with his wife (PW.3); that on the date of the incident, although he had disclosed that he was going to his native place, he did not go and came home, only to find the Appellant and PW.3 in a compromising position. PW.5 has not been able to satisfactorily explain how these facts have come in the say filed by him to the Maintenance Petition of his wife (PW.3). The said evidence cannot be brushed aside and ignored and in fact, is in consonance with the Appellant's case. PW.7 – Shri Varma's evidence also fortifies the Appellant's case, that PW.5 had complained to him about the illicit relations between his wife and the Appellant. PW.7 is an independent witness. He was the Commandant of S. R. P. and the senior of PW.5 and the Appellant. There is no reason to disbelieve his testimony with regard to the disclosure made to him by PW.5, with respect to the illicit relations between PW.5's wife and the Appellant. The prosecution has also not placed on record the

alleged complaint made by PW.5 to his superiors in writing, complaining of rape. Admittedly, the FIR has been lodged belatedly i. e. almost after seven months. Delay, in the facts, is significant and as such fatal. No plausible reason for delay in lodging the FIR is forthcoming. The evidence of PW.3 (prosecutrix) raises several questions and is not free from infirmities. Neither the spot panchanama nor the seizure of the prosecutrix's clothes nor the C. A. Report in any way assist the prosecution case. It appears, in the facts, that PW.3 had lodged the FIR alleging rape, so that she could get maintenance from her husband.

21. Having regard to the evidence on record, the conviction of the Appellant cannot be sustained.

22. Accordingly, the Appeal is allowed and the impugned Judgment and Order of conviction and sentence dated 31.01.2006 passed by the learned IIIrd Additional District & Sessions Judge, Baramati, District – Pune in Sessions Case No. 6 of 2004 is quashed and set aside. The Appellant is acquitted of the offences

for which he was convicted. The bail bonds of the Appellant stand cancelled.

(REVATI MOHITE DERE, J.)