

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.525 OF 2016

BARKYA @ BARKU DAGADU HILAM)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mrs.Sonia Miskin, Appointed Advocate for the Appellant.

Mr.A.R.Kapadnis, APP for the Respondent – State.

WITH

CRIMINAL APPEAL NO.658 OF 2016

PRABHAKAR MAHADU MUKNE)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Ms.Ameeta Kuttikrishnan, Appointed Advocate for the Appellant.

Mr.A.R.Kapadnis, APP for the Respondent – State.

CORAM : A. M. BADAR, J.

DATE : 17th SEPTEMBER 2019

ORAL JUDGMENT :

1 Criminal Appeal No.525 of 2016 is filed by original accused no.2 Barkya @ Barku Hiram whereas Criminal Appeal No.658 of 2016 is filed by original accused no.1 Prabhakar Mukne. By these appeals, both these appellants/convicted accused are challenging the judgment and order dated 17th December 2015 passed by the learned Additional Sessions Judge, Nashik, in Sessions Case No.78 of 2013 thereby convicting both of them of the offence punishable under Section 376(2)(g) of the Indian Penal Code and sentencing them to suffer rigorous imprisonment for 10 years apart from direction to pay fine of Rs.1,000/- by each of them and in default, to undergo rigorous imprisonment for 3 months.

2 Facts, in brief, leading to the prosecution as well as resultant conviction of the appellants/convicted accused, can be summarized thus :

- (a) The First Informant/prosecutrix who is examined as the PW1 is a married woman residing at Village Pandhurli in Sinnar Taluka of Nashik District. She was staying along with her in-laws, husband Ratnakar, who is examined as PW2, sister-in-law Rekha as well as her son and daughter. PW5 Sitabai Jadhav is maternal aunt of her husband and she used to reside at Village Borkhind in Sinnar Taluka. On 27th June 2012, at about 11.00 a.m. in the morning, the prosecutrix/PW1 along with her sister-in-law Rekha had been to the house of PW5 Sitabai Jadhav for inviting her to their house for dinner. After extending necessary invitation, at about 3.30 p.m. of that day, PW5 Sitabai Jadhav along with her grandson Deepak and Rekha started proceeding for Pandhurli by motorcycle whereas the prosecutrix/PW1 started her return journey to Pandhurli by walk.
- (b) When the prosecutrix/PW1 was crossing house of persons from Kathwadi community, absconding accused Navnath Mhaskar and the appellants/convicted accused were seen

sitting in front of the house. They followed the prosecutrix/PW1 at some distance. Thereafter, at a secluded place. Absconding accused Navnath Mhaskar caught hold of the prosecutrix/PW1 from behind, removed her knicker and committed rape on her. Thereafter, appellant/convicted accused Barkya @ Barku Hilam threatened her by means of knife and had also committed rape on her, after dragging her at some distance. Appellant/convicted accused Prabhakar Mukne was keeping watch and was insisting absconding accused Navnath Mhaskar to finish off the job immediately.

- (c) According to the prosecution case, during the course of the incident in question, the bundle which was being carried by the prosecutrix/PW1 on her head, containing raw mangoes and other articles, fell down. Her bangles were broken. Gold necklace of the prosecutrix/PW1 was snatched by absconding accused Navnath Mhaskar. When mother of the absconding accused Navnath Mhaskar happened to proceed

from the vicinity of the spot of the incident, she was asked to go to her house by absconding accused Navnath Mhaskar. The prosecutrix/PW1 saw absconding accused Navnath Mhaskar was holding her blouse and knicker. The prosecutrix/PW1 then managed to wrap her saree on her person and started running away from the spot. Her footwear remained on the spot. She was chased till some distance by the accused persons and then they fled towards garden of chikoo.

- (d) On return to her house, the prosecutrix/PW1 disclosed the incident to her husband PW2 Ratnakar and other relatives. Along with her husband and relatives, she then returned back to the spot of the incident but despite search, they were unable to trace out the accused persons. Therefore, the prosecutrix/PW1 along with her relatives went to Police Station Sinnar and lodged report Exhibit 9 on 27th June 2012 itself, which resulted in registration of Crime No.I-205 of 2012 for offences punishable under Sections 392 and 376(g) of the Indian Penal Code.

- (e) Routine investigation followed. Spot of the incident came to be inspected by police in presence of panch witness PW3 Ramdas Kunde. Spot Panchnama Exhibits 14 and 15 came to be prepared. Broken pieces of bangles, pair of footwear, knicker and blouse of the prosecutrix/PW1 came to be seized. Her saree and petticoat came to be seized in presence of PW6 Dnyandeo Ganjave vide Panchnama Exhibits 24 and 25 on 28th June 2012. The prosecutrix/PW1 was sent for medical examination on 27th June 2012 itself and she was clinically examined by PW9 Dr.Bhikan More and then gynecological examination on the prosecutrix/PW1 was conducted by PW7 Dr.Gorakhanath Gore.
- (f) After arrest of appellants/convicted accused persons, Test Identification Parade was conducted by PW8 Sunil Saundane, Tahsildar and PW10 Prashant Patil, Nayab Tahsildar. The prosecutrix/PW1 identified the appellants/convicted accused persons. Seized articles were sent for chemical analysis and on completion of

investigation, the appellants/convicted accused persons came to be charge-sheeted.

- (g) Initially, the trial as against appellant/convicted accused Prabhakar Mukne came to be started, as he pleaded not guilty and claimed trial, after Charge was explained to him. During pendency of the trial, appellant/convicted accused Barkya @ Barku Hiram came to be arrested and as he pleaded not guilty when the Charge was explained to him, he was also subjected to trial. The prosecution witnesses already examined were recalled for cross-examination on behalf of appellant/convicted accused Barkya @ Barku Hiram.
- (h) After examining 12 prosecution witnesses, on closure of case of the prosecution, statement of appellants/convicted accused persons came to be recorded. Their defence was that of false implication. However, they did not enter in the defence.

(i) After hearing the parties, by the impugned judgment and order, the learned trial court concluded that the appellants/convicted accused persons along with absconding accused Navnath Mhaskar committed gang rape on the prosecutrix/PW1. However, it was held that the prosecution failed to prove that they committed robbery. That is how, the appellants/accused persons were convicted and sentenced for the offence punishable under Section 376(2)(g) of the Indian Penal Code, as indicated in the opening paragraph of this judgment.

3 I have heard the learned advocates appearing for both the appellants/convicted accused. They vehemently argued that evidence regarding identity of the appellants/convicted accused coming from the mouth of the prosecutrix/PW1 is highly doubtful. Her cross-examination reveals that she was shown some photographs and by looking at those photographs, she has implicated the appellants/convicted accused persons. It is further argued that the prosecutrix/PW1 is implicating the

appellants/convicted accused persons on the say of her husband PW2 Ratnakar. According to the learned advocates appearing for the appellants/convicted accused persons, Test Identification Parades conducted by the prosecution were not proper. The appellants/convicted accused persons were seen by the prosecutrix/PW1 earlier to conducting of the Test Identification Parades and as such, that evidence is of no consequence. Medical evidence is also not supporting the case of the prosecution and therefore, appeals need to be allowed.

4 The learned APP supported the impugned judgment and order of conviction and the resultant sentence.

5 I have considered the submissions so advanced and also perused the record and proceedings including oral as well as documentary evidence.

6 In this case, according to the prosecution, the appellants/convicted accused persons along with absconding

accused Navnath Mhaskar had committed gang rape on the prosecutrix/PW1, who happens to be a married woman. The incident in question allegedly took place during the course of return journey of the prosecutrix/PW1 from Borkhind to Pandhurli. At this juncture, it is necessary to keep in mind the law regarding appreciation of evidence in rape cases crystallized by catena of judgments by the Honourable Supreme Court. In the case of **State of Punjab vs. Gurmeet Singh**¹ the Honourable Apex Court took a view that the Courts dealing with the rape cases shoulder a greater responsibility and they must deal with such cases with utmost sincerity. Relevant paragraph of the said judgment is reproduced as under :

“....It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a

¹ 1996 Cri.L.J. 172

physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.”

7 Keeping in mind this position of law regarding appreciation of evidence of the victim of rape, let us examine evidence of the prosecutrix/PW1 in order to ascertain whether the prosecution has proved the Charge. The prosecutrix/PW1 has deposed in tune with the prosecution case and her evidence reveals that at about 11.00 a.m. of 27th June 2012, she had gone to the house of PW5 Sitabai Jadhav along with her sister-in-law Rekha for inviting PW5 Sitabai Jadhav to their house at Pandhurli in Sinnar Taluka. She stated that after necessary formalities of extending invitation, PW5 Sitabai Jadhav along with her grandson Deepak and Rekha started proceeding towards Pandhurli by motorcycle where as she started her return journey by walk with bundle of raw mangoes on her head. The prosecutrix/PW1 testified that at the “vasti” of Kathwadi people, she saw Navnath Mhaskar along with two others standing in the courtyard of the house. They came behind her and thereafter one amongst them pressed her eyes and mouth. That person, to whom the prosecutrix/PW1 named as Navnath Mhaskar, removed her

knicker and committed rape on her. The prosecutrix/PW1 further stated that, then by threatening her by knife, appellant/convicted accused Barkya dragged her near the *bandh* and committed rape on her. Her blouse was removed by him and her clothes were torn. So far as appellant/convicted accused Prabhakar Mukne is concerned, as per version of the prosecutrix/PW1, he was standing at the upper side and was shouting that a vehicle has come. The prosecutrix/PW1 stated that because of this incident, the bundle which she was carrying on her head, fell down. Her green coloured bangles were broken. Her towel as well as slippers remained on the spot. As per her version, she wrapped saree on her person and started running away. The appellants/accused persons ran away towards the chikoo garden. On return, she disclosed the incident to inmates of her house including her husband PW2 Ratnakar. They, then, returned to the spot of the incident for searching the appellants/accused persons but they were not traceable. She, therefore, went to the Police Station Sinnar and lodged report Exhibit 9 on the very same day.

8 Perusal of her cross-examination shows that the defence attempted to challenge identity of appellants/accused persons. In cross-examination, this witness stated that she was not knowing Navnath Mhaskar prior to the incident but had named Navnath in her First Information Report (FIR) Exhibit 9. Effect of this admission in the cross-examination will have to be considered by perusing the FIR Exhibit 9. It makes the things clear. The FIR Exhibit 9 clearly reveals that as another person was taking name of the person, who was committing rape on her, and was addressing him as Navnath, she has named the rapist as Navnath. She further admitted that police showed photographs and told name of that person as Navnath. She further admitted that when she went to the police station, her husband had told her that the said person is Navnath. All these questions were addressed in respect of identity of Navnath, who is absconding. The FIR makes it clear that as she heard name Navnath from the co-accused, she had stated that name in the FIR. Showing of photographs of the said person to her by police, infact, cements her evidence regarding identity of the culprit.

9 So far as appellant/convicted accused Prabhakar Mukne is concerned, the prosecutrix/PW1 has candidly deposed that one month after the incident, when she, accompanied by her husband, had been to Village Sonambe, she saw this accused who had accompanied Navnath at the time of the incident. That is how, upon being informed to Police Station Sinnar, appellant/convicted accused Prabhakar Mukne came to be arrested. In cross-examination, the prosecutrix/PW1 has stated that police as well as her husband told name of that appellant/convicted accused as Prabhakar to her. This information is inconsequential so as to doubt version of the prosecutrix/PW1. Ultimately, she was not knowing this appellant/convicted accused Prabhakar Mukne prior to the incident, and as such, somebody needs to inform her name of this appellant/convicted accused. Therefore, the fact that this appellant/convicted accused Prabhakar Mukne was brought to her house and his name was told to her by police as well as her husband cannot be considered as a factor which doubts her version regarding identity. Appellant/convicted accused

Prabhakar Mukne is the person who was guarding the spot at the time of commission of the offence. Mere information regarding name of unknown person does not mean that such unknown person had not participated in the act of the offence.

10 So far as appellant/convicted accused Barkya @ Barku Hiram is concerned, his identity is not challenged in the cross-examination. It is brought on record from cross-examination of the prosecutrix/PW1 on behalf of this appellant/convicted accused that the incident lasted for two hours and it took place on the road having traffic. This material elicited from the cross-examination of the prosecutrix/PW1 reveals that she had ample opportunity to see the rapists and to identify them subsequently. This material brought on record from cross-examination shows that the prosecutrix/PW1 had an opportunity to see the appellants/accused persons for a period of about two hours in broad day light at 4.00 p.m. of 27th June 2012. Thus, dock identification of both appellants/convicted accused persons by the prosecutrix/PW1 gets authenticity by material elicited from cross-examination. Hence, it

cannot be said that the prosecutrix/PW1 did not have opportunity to identify the appellants/convicted accused persons.

11 Now let us examine whether version of the prosecutrix/PW1, who happens to be a married woman, is gaining corroboration from other evidence on record, though such corroboration is not required, if ultimately, it is found that her version is truthful. On the day of the incident itself, the prosecutrix/PW1 was referred for medical examination. PW9 Dr.Bhikan More had conducted clinical examination of the prosecutrix/PW1. Evidence of this Medical Officer, which is gaining corroboration by contemporaneous medical record, which is at Exhibit 27, goes to show that the prosecutrix/PW1 was having abrasion over right knee and left ankle. Cross-examination of PW9 Dr.Bhikan More shows that abrasion can be caused by running. This portion of his evidence cannot be accepted because merely by running without suffering a fall, abrasion cannot be caused. Suffice to state that the prosecutrix/PW1 was found having abrasion on her right knee as well as left ankle on the day

of the incident itself. Gynecological examination of the prosecutrix/PW1 was conducted on the very same day by PW7 Dr.Gorakhanath Gore. This witness found pubic hair of the prosecutrix/PW1 matted. In cross-examination it is elicited from him that during sexual assault committed by three persons, a woman can get injuries. This proposition cannot be doubted but if a woman meekly surrenders to the brutal force of three rapists, then there cannot be any injuries to her private part, when the victim is a married woman. As such, non-finding of injuries on private part of the prosecutrix/PW1 cannot doubt her testimony in respect of the incident. Matting of pubic hair, found soon after the incident, corroborates version of the prosecutrix/PW1 regarding commission of rape on her. In **B.C.Deva v. State of Karnataka**², inspite of the fact that no injuries were found on person of the prosecutrix, yet finding her version to be reliable and trustworthy, the Honourable Apex Court upheld the conviction of the accused. The Court observed thus :

“18 The plea that no marks of injuries were found either on the person of the accused or the

² (2007) 12 SCC 122

person of the prosecutrix, does not lead to any inference that the accused has not committed forcible sexual intercourse on the prosecutrix. Though the report of the gynecologist 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.”

12 As seen from evidence of panch witness PW3 Ramdas Kunde and that of PW12 Nilesh Mainkar, Investigating Officer, spot of the incident came to be inspected on the day of the incident i.e. on 27th June 2012. Evidence of both these witnesses goes to show that this incident took place on kuccha road leading from Aagaskhind to Borkhind. It was a pathway and as such, the question of heavy traffic on such village pathway does not arise. During inspection of the spot of incident, both these witnesses found scattered raw mangoes, ladies scarf, towel, pieces of bangles as well as pair of ladies footwear. Accordingly, Spot Panchnama Exhibit 14 came to be recorded from 8.50 p.m. to

9.40 p.m. of 27th June 2012. Police guard was stationed to preserve the situation prevalent on the spot of the incident because of night hours.

13 On the next day i.e. on 28th June 2012, PW12 Nilesh Mainkar, Investigating Officer, accompanied by panch witnesses including PW3 Ramdas Kunde, again visited the spot of the incident. At chikoo garden in the vicinity of the actual spot, they found a knicker as well as a blouse. Those articles came to be seized vide Panchnama Exhibit 15 and those were shown to the prosecutrix/PW1 on the very same day in presence of PW4 Shantaram Kawathe, panch witness. The prosecutrix/PW1 identified those clothes to be belonging to her. This situation found prevalent on the spot of the incident and proved by the prosecution through oral evidence as well as contemporaneous documentary evidence, corroborates version of the prosecutrix/PW1 to the effect that, after commission of rape on her, accused persons ran towards the chikoo field. Finding of knicker and

blouse of the prosecutrix/PW1 in that field certainly corroborates her version regarding the incident in question.

14 Evidence of PW2 Ratnakar and that of PW5 Sitabai Jadhav is reflecting narrations of the prosecutrix/PW1 made to them soon after the incident. Both these witnesses have spoken that she had narrated the incident of sexual assault on her, on return to the house after her visit to Borkhind. This disclosure of the prosecutrix/PW1 to both these witnesses certainly corroborates her version as per provisions of Section 157 of the Evidence Act.

15 Thus, evidence of the prosecutrix/PW1, as discussed in foregoing paragraphs, certainly establishes that the prosecutrix/PW1 was subjected to gang rape by accused persons including the appellants/convicted accused persons. No infirmity, as such, can be found in the impugned judgment and order of conviction and the resultant sentence. The appeals, as such, are devoid of merits. Therefore the order :

ORDER

The appeals are dismissed.

(A. M. BADAR, J.)