

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 366 OF 2002

Sachin
R. Patil

Digitally signed
by Sachin R.
Patil
Date: 2020.12.15
16:26:53 +0530

The State of Maharashtra

)

...Appellant
(Orig. Complainant)

VERSUS

Ganesh Kisan Mukne,
Age 24 years,
R/o. Mukne House,
Old Chinchpada, Kalwa

)

)

)

)

...Respondent
(Orig Accused)

Mr V B Konde-Deshmukh, APP for the Appellant – State.
None for the Respondent.

CORAM : PRASANNA B. VARALE &
V.G. BISHT, JJ.

DATE : DECEMBER 10, 2020.

JUDGMENT (PER PRASANNA B. VARALE, J)

1. Being aggrieved by the judgment and order passed by the Learned ii Ad-hoc, Assistant Sessions Judge, Thane, dated 15th December, 2002 in Sessions Case No. 42/98 whereby the Respondents (Orig. Accused) was acquitted of offences punishable under Section 376 of Indian Penal Code (for short “IPC”) the present Criminal Appeal is preferred by the Appellant – State of Maharashtra.

2. Heard learned APP, Mr V.B. Konde-Deshmukh for the Appellant – State.

3. The case of the prosecution emerged out from the report lodged at the instance of prosecutrix (PW 5) and which can be summarized as under:

The prosecutrix along with her husband and a newly born baby shifted to the place of incident i.e. at Kalwa, Dist. Thane as the cousin uncle was working as watchman in a building under construction. The prosecutrix and her husband was in search of job and to earn livelihood started residing in an open area at first floor in the said building under construction. On 11.09.1997 at about 7.30 pm accused reached the area wherein prosecutrix and her husband were residing along with newly born child. Kerosene lamp was in use for illumination. The accused was having a talk with the husband of prosecutrix. The accused handed over the money to the husband of prosecutrix and asked him to get some food item i.e. vegetable and chapati from a restaurant. Husband of the prosecutrix returned with the food item. The accused again asked husband of the prosecutrix to bring Masala pan.

When the husband of the prosecutrix left the spot, the accused came near the cot where the prosecutrix was lying. Accused snatched the baby from the prosecutrix and kept the baby on bed and made the baby to sleep. Then accused dragged the prosecutrix to the next room i.e. kitchen, made the prosecutrix lie on the kitchen platform and by removing his apparels committed rape on the prosecutrix. Though, the prosecutrix was resisting accused did not pay heed and committed forcible intercourse. Husband of the prosecutrix (PW 1) reached the place and started calling the prosecutrix by her name. Accused jumped from the window and fled away from the spot. The prosecutrix and her husband approached the police station and lodged the report against the accused. Ramchandra Gaikwad (PW 7), Assistant Sub-Inspector, was the duty officer at Kalwa Police Station at the relevant time. The report was lodged at the instance of prosecutrix and was reduced into writing and offence was registered on the basis of the report. As the investigating agency was set in motion, Ajij Gulam Attar (PW 9) took the necessary steps in the process of investigation, such as, effecting arrest of the accused in presence of the panchas, drawing the arrest panchanama, seizure of clothes accused as well as seizure of clothes of prosecutrix,

forwarding the seized articles to chemical analyzer, collecting the report from the CA laboratory and on finding that there is sufficient evidence against the accused charge-sheet was filed against the accused. As the case being exclusively triable by the Court of Sessions, same was committed to the Court of Sessions for trial. The accused pleaded not guilty and claimed trial. The defence of the accused was of false implication. The accused was subjected to statement under Section 313 of the Cr.P.C. exposing the incriminating circumstances against him.

4. On appreciation of evidence, the learned Ad-hoc Assistant Sessions Judge was unable to find any evidence against the accused so as to hold accused guilty of the offence charged against him. The learned Sessions Court vide judgment and order dated 15th December, 2002 acquitted the accused of the offence punishable under Section 376 of the IPC.

5. Learned APP vehemently submitted before this Court that the prosecution has established its case against the accused with all necessary evidence. It is the submission of learned APP that the version of prosecutrix clearly show that the accused with ill-motive initially

approached the husband of the prosecutrix and on pretext of bringing food items send him to restaurant. Then accused waited till the arrival of the husband firstly, and again send husband of prosecutrix for bringing masala pan and when the husband of prosecutrix left the spot accused sexually exploited the prosecutrix. Learned APP further submitted that the accused by using force gagged the mouth of prosecutrix and as the prosecutrix was helpless the accused committed rape on the prosecutrix. Learned APP then submitted that the CA report supports the case of prosecution as the semen was found on the saree of the prosecutrix. Learned APP then submitted that the learned Sessions Court failed to appreciate the evidence in its proper perspective and arrived at an erroneous conclusions. Thus, learned APP prayed for allowing the appeal.

6. Though respondent duly served, none appears for the Respondent.

7. With the able assistance of learned APP, we have gone through the record.

8. The prosecution in support of its case examined, as many as,

9 witnesses they are as follows: Harishankar Tijaram Dindore (PW 1), husband of prosecutrix, Mangesh Wagh (PW 2) panch witness to spot panchanama (Exh. 12), seizure panchanama of clothes of accused (Exh. 14), he also pancha to seizure of clothes of prosecutrix (Exh. 15), Dr. Sarita Damodar Patil (PW 3), who had examined the prosecutrix and issued medical certificate (Exh. 17), Dr. Keru Kisanrao More (PW 4), who had examined the accused and proved the extract of register (Exh. 22), Prosecutrix (PW 5), Sriram Sitaram Ikhankr (PW 6), pancha witness for effecting arrest of accused, Ramchandra Chango Gaikwad (PW 7), Assistant Sub-Inspector, Masnu Gangaram Patil (PW 8), another pancha to effecting arrest of accused, and Ajij Gulam Attar (PW 9), PSI, Investigating officer.

9. Harishankar Tijaram Dindore (PW 1) deposed before the Court that prior to shifting the place of incident i.e. Chinchpada near Kalwa along with his wife and newly born baby residing at Khardi. He further deposed that at Kalwa the family was residing in an under construction building having no doors and windows. He further deposed that his cousin father-in-law was a watchman on the construction work of that building. Harishankar (PW 1) then refers to incident took place on

11.09.1997. PW 1 then stated that at that time kerosene lamp was burning. He stated that at about 7.00 pm he was talking with his wife and at that time accused came to that room where the family was residing and then he made inquiry about watchman. Accused then asked Harishankar (PW 1) whether he would bring grocery articles for him (for accused) from the shop. Harishankar (PW 1) expressed his willingness. The accused then by paying an amount of Rs. 35 asked Harishankar (PW 1) to get the food items from one Apsara hotel. Harishankar (PW 1) returned to his house along with food item after 1 ½ hours till that time accused was standing out of the room. Then accused paid Rs. 8.50 and asked Harishankar (PW 1) to bring masala pan from square. On return of Harishankar (PW 1) after 15-20 minutes, he found that the newly born baby was lying on the cot alone, as such, he started searching for his wife. Then he took the kerosene lamp and went towards the kitchen. When he entered in the kitchen accused jumped out from the window of the kitchen. He saw his wife was lying on the kitchen platform and she told that accused committed forcible rape on her by dragging her to kitchen and gagged her mouth. Harishankar (PW 1) further deposed that though he made search for accused, accused was not traceable. Thereafter, he

along with his wife went to police station and lodged the report against the accused. Harishankar (PW 1) then identified the clothes of the accused seized by the investigating officer. He further deposed that the police authorities referred his wife to civil hospital for medical examination.

In cross-examination, Harishankar (PW 1) denied the suggestion of lodging a false case against the accused at the instance of some builders, namely, Bhagwan Fasade and mother of Prakash wagh. He gives an important admission that the police outpost is situated at the distance of 1 furlong from Jai Mata Di building (the building which was under construction and in the same building Harishankar (PW 1) along with his family where residing in one room). Harishankar (PW 1) admits in the cross-examination that Bhagwan Fasade and mother of Prakash Wagh were residing in the vicinity of Jai Mata Di building.

10. Mangesh Gopal Wagh (PW 2), acted as a panch witness, through him the prosecution proved the spot panchanam Exh. 12, seizure of clothes of accused Exh. 14 and seizure of clothes of victim Exh. 15. Mangesh (PW 2) then gave description of the kitchen room. Mangesh (PW 2) deposed before the Court that the kitchen room was of

8x8 sq.ft. Then he deposed that the accused led the police and panchas to the bathroom wherein the accused had kept his clothes for washing and the police seized one white trouser, one white shirt and one white baniyan at the instance of accused. Similarly, he states about the seizure of the clothes of the prosecutrix, namely creamish colour saree, red colour petticoat.

In the cross-examination, Mangesh (PW 2) states that he is owner of a building, namely, Shiv Tirth which is adjacent to the spot of incident. Then he states that he along with his mother and other family members resides on the ground floor of that building and distance between Jai Mata Di and his building i.e. Shiv Tirth is about 10 feet. Then he stated that at the distance of 5 feet there is another building, namely, Bhoyar building and one Gaurav apartment is also at the distance of 5 feet from Jai Mata Di building towards northern side and towards southern side there is also one building, namely, Gurukrupa building. Mangesh (PW 2) deposed before the Court that all these buildings are multistory and the buildings are occupied by inhabitants. Then initially he denied the suggestion about dispute between him and accused in respect of their respective chawls and he further stated that the

dispute might have been occurred between the accused and his elder brother, namely, Prakash Wagh. Then there is an important admission by this witness is that Bhagwan Fasale is his relative.

11. Dr. Sarita Patil (PW 3). On the date of incident she was working as Class-I Gynecologist in the civil hospital, Thane and prosecutrix was referred to her by Rabale Police station. She deposed before the Court that on examination she found that there were no injury to libia majora and libia minora. She further deposed that on abdominal examination, she observed her uterus of normal size after delivery. Her servix and vagina were healthy, her lociya was also healthy. On per-vaginal examination, her uterus size was found normal. There was no any mase felt. She took her vaginal swab, pubic hair and blood for chemical analysis. She further deposed before Court that as the patient was a married women she could not form any opinion as to whether rape was committed upon her or not on the date and time disclosed by her. She further deposed that in married women the vagina is always patulous i.e. it admits two fingers easily without difficulty. She further deposed that it is not necessary that if rape is committed there should be any injury on private part of a married women and she further states that after

conducting medical examination of the prosecutrix, medical certificate (Exh. 17) was issued to her and the same was in her hand writing and bears her signature.

12. Keru Kisanrao More (PW 5). In the year 1997, he was attached to civil hospital, Thane. On 12.09.1997 he had examined accused on a reference by Rabale Police Station. Then he deposed that on medical examination he recorded the entry in MLC register giving his opinion that the accused was capable of performing sexual intercourse. Exh. 22 is the extract of the register having an endorsement entry.

13. Prosecutrix (PW 5) is the most important witness. She deposed before the Court that at the time of incident she was residing at Kalwa in a building under construction. She further deposed that her uncle was working as a watchman on the construction site of the building and the family came to the said place for shelter and for earning livelihood. She further deposed that the incident occurred on 11.09.1997. She deposed that her husband was also present at home. At about 7.30 pm accused send her husband to bring food items. She further deposed that she had a small female child of 12 days. Thereafter, the accused send

her husband to bring pan by paying Rs. 8.50/-. She further deposed that accused snatched her daughter from her possession and put her down on the floor. Thereafter accused dragged her in another room by pressing her mouth. She further deposed that accused made her to sleep on the kitchen ota of that room. Thereafter, accused removed her wearing clothes and committed rape on her. She further deposed that meanwhile, her husband returned back home and he witnessed the accused. Accused, therefore, jumped down from the window of the kitchen. Her husband chased the accused, but he could not nab him. She further stated that at about 10.30 pm, they went to Kalwa Police outpost for lodging the FIR. Her husband lodged FIR against the accused to police Station. She narrated the whole incident to the police and police reduced it into writing.

In the cross-examination, prosecutrix admits that the said building i.e. Jai Mata Di building was surrounded by other building and they were fully occupied by inhabitants and there is also very important admission in the cross-examination prosecutrix states that she did not raise shouts when accused snatched her daughter from her possession and put her down. She further deposed that kitchen ota was at a height of

3 to 4 feet from the flooring.

14. Sriram Sitaram Ikhankar (PW 6), panch witness had not supported the case of prosecution on the aspect of effecting arrest of the accused in his presence, as such, he is declared hostile and is of no help to the prosecution.

15. Ramchandra Chango Gaikwad (PW 7), deposed before the Court that on 11.09.1997 he was depute on Kalwa Police outpost. Then he stated before the Court that complainant came to outpost and lodged report against accused. The complaint was reduced into writing and the said report was send to Rabale Police Station for registration of offence. He states that thumb impression of the complainant was obtained and the further investigation was entrusted to PSI Mr. Aji Attar (PW 9).

In the cross-examination, Ramchandra (PW 7) admits that social worker Mrs. Wagh accompanied the complainant to outpost. He also admits that he did not record the statement of Mrs. Wagh.

16. Masnu Gangaram Patil (PW 8), is another panch for effecting arrest of the accused and he states before Court that the panchanama was already prepared by the police and his signature was

obtained on the panchanama. This witness is also of no help to the prosecution.

17. Mr. Ajij Attar (PW 9), who took over the investigation from Mr. Gaikwad (PW 7) and in his deposition before Court he states about the formalities of the investigation undertaken by him, such as, preparation of the spot panchanama, seizure of the clothes of the accused, seizure of the clothes of the prosecutrix, referring the prosecutrix as well as accused for medical examination and forwarding the vaginal swab, blood samples and samples of pubic hair to forensic laboratory for chemical analysis. He then states about the collecting necessary medical certificates as well as CA reports. He also states about filing of charge-sheet against the accused.

In the cross-examination Mr. Ajij (PW 9) admits that there are buildings around the said Jai Mata Di building towards eastern and southern side. He further admits that these are the multistory buildings. He further deposed before Court that he did not record the statements of the occupants residing in those surrounding buildings.

18. It is true that sexual exploitation of a woman is a heinous

crime. In so far as the present appeal is concerned, the allegation against the accused is of forcible rape, as such, with all due care and caution we have gone through the evidence and assessed the evidence. On going through the evidence minutely, we are of the opinion that the evidence collected by the prosecution falls too short to hold accused guilty for commission of offence and further hold him guilty for offence charged against him.

19. Now we may state our reasons by referring to the evidence brought before the Court below.

20. Harishankar (PW 1) reached the spot and on finding that the child is laying on cot alone gives call to his wife and he rushed towards the kitchen, at that point of time accused jumped out from the window of the kitchen. Then he states that along with his wife he approached the police station and the report is lodged against the accused. As per the version of Harishankar (PW 1) the accused approached his room at about 7.00 pm. Considering the sequence of events the accused asked Harishankar (PW 1) to get food items. Then again asked Harishankar (PW 1) to get masala pan and then sexually exploited the prosecutrix, so

by taking into consideration this sequence of events it must have been a span to 1 to 1 and ½ hours i.e. at about 8.30 and the report is lodged at 10.30. It came in the evidence that police outpost is situated from the spot of incident a furlong away. There is no explanation coming before the Court as to why it took nearly two hours for lodgment of a report about such a serious offence, when Harishankar (PW 1) deposed before the Court that outpost is hardly a furlong away from the place of incident and thus, this unexplained delay certainly raises doubt about truthfulness of the incident.

21. Harishankar (PW 1), Mangesh (PW 2), Prosecutrix (PW 5), Ajj Attar (PW 9), all these witnesses in chorus admits that the said building is surrounded by other buildings and in those buildings occupants are residing. Now in the backdrop of this fact, if one goes through the evidence of prosecutrix, it reveals that in the cross-examination the prosecutrix clearly admits that she did not raise shouts when accused snatched her daughter from her possession. Considering the version of prosecutrix (PW 5), firstly that the accused snatched her daughter from her possession and put her down on the floor and then by dragging her to another room and then her admission in cross-

examination that the building in which family was residing was surrounded by other building and they were fully occupied by the owners and the prosecutrix did not raise shouts when accused snatched her daughter from her possession and put her down makes the version doubtful. As per the version of prosecutrix accused snatched her daughter from her possession and put her down on the floor, this act of the accused was clear indication of ill-will and at that point of time the prosecutrix was in a position to raise hue and cry but she permitted the accused to put the child on the floor and then allowed to be dragged by him to the another room i.e. kitchen, this would not have been a natural reaction of the prosecutrix. Then prosecutrix stated that she was initially dragged in the room i.e. kitchen by pressing her mouth. Then accused made her to sleep on the kitchen ota and then removed her clothes and forcibly committed rape on her. The prosecutrix in her version nowhere states that the accused either tied her mouth by any cloth so as to prevent the prosecutrix from raising any hue and cry. As per her version the accused pressed her mouth and then dragged her from one room to another room and made her to sleep on kitchen ota and removed his clothes and clothes of the prosecutrix. There is nothing in the version of

prosecutrix to show that she made any attempt either of resistance or releasing herself free from the clutches of accused, again this would not be a natural reaction of the prosecutrix.

As stated above, when the accused snatched the child from her possession and put the child down on the floor he was acting with an ill-motive and the prosecutrix having an opportunity to resist him or raised a hue and cry opposing the act of the accused and seeking help from the nearby residence or occupants but she failed to do anything and this certainly raises doubt about the version of the prosecutrix.

22. Another feature noted by us is the prosecutrix in her deposition nowhere refers about the presence of Mrs. Wagh, whereas Ramchandra Gaikwad (PW 7) in his cross-examination admits that social worker Mrs. Wagh accompanied complainant to the outpost. He also admits that he did not record the statement of Mrs. Wagh. Now about the presence of Mrs. Wagh though Ramchandra (PW 7) specifically refers to her presence, neither prosecutrix nor Harishankar (PW 1) her husband makes reference about the presence of Mrs. Wagh at the time of approaching the police station and lodging the report. Mangesh Wagh (PW 2) who has acted as panch witness to spot and two seizure

panchanama i.e. Exh. 12, 14 and 15 respectively admits in the cross-examination that there might have been a dispute between the accused and elder brother Prakash Wagh. He also admits that watchman Bhagwan Fasale is his relative. Bhagwan Fasale is admittedly cousin uncle of prosecutrix and Harishankar (PW 1) as well as prosecutrix (PW 5) both have stated before the Court that so as to seek shelter and earn livelihood they approached Bhagwan Fasale and were residing in that building under construction with the assistance of Bhagwan Fasale. In view of this fact, Mangesh Wagh (PW 2) cannot be treated as an independent witness and his version cannot be accepted on its face value.

23. Apart from this material, the other material also failed to inspire confidence of this Court in respect of the prosecution case. The prosecutrix nowhere states about any injury being caused either to her or to accused but then the investigating agency seized the clothes and Ajj Attar (PW 9), IO, states that the trouser of accused and his blue shirt were stained with blood as well as the petticoat and saree of the accused are also stained with blood. Now having this blood stains on the clothes of the accused and prosecutrix when there is nothing in the version of prosecutrix of having any injury either to herself or the accused raises a

serious doubt in respect of this material collected by the investigating agency and submitted before the Court as an incriminating circumstance against the accused.

24. The learned Court below was also justified in making certain observations in respect of CA report and it reads thus:

The C.A. reports Exh. 32, 33 and 34 also do not disclose anything in favour of prosecution. No semen was detected in the vaginal swab, vaginal smear and pubic hair of the prosecutrix, as is evident from C.A. report Exh. 32. But, the semen stains were detected on sari and petticoat of the prosecutrix. How come the semen did not fall on the vagina, but fell on the clothes of the prosecutrix? Whether the accused ejaculated himself on the clothes of the prosecutrix and not in vagina? It may happen if the accused makes a plan to ejaculate outside, in order to avoid the conviction. But, the accused does not seem to be wise enough to do extent, from his external appearance. Something appears to be fishy and doubtful. NO doubt, the blood group of the accused and that of the semen detected on cloths of the prosecutrix is same i.e. B+. But, the test of semen of the accused remained inconclusive during the course of chemical

analysis. The blood group of accused's semen could not be detected. Then whose semen was found on the cloths of the prosecutrix?

25. In view of this fact, we may refer to the judgment of the Apex Court in the case of Santosh Prasad alias Santosh Kumar Vs. State of Bihar¹ and the Court was pleased to observe thus:

5.

5.1.

5.2.

5.3. As per the FSL report, the blood group on the petticoat and the semen on the petticoat are stated to be inconclusive. Therefore, the only evidence available on record would be the deposition of the prosecutrix. It cannot be disputed that there can be a conviction solely based on the evidence of the prosecutrix. However, the evidence must be reliable and trustworthy. Therefore, now let us examine the evidence of the prosecutrix and consider whether in the facts and circumstances of the case is it safe to convict the accused solely based on the deposition of the prosecutrix, more particularly when neither the medical report/evidence supports nor other witnesses support and it has come on record that there was an enmity between both the parties.

¹ (2020) 3 SCC 443

5.4.

5.4.1.

5.4.2.

5.4.3.

5.5.

26. As stated above, both the witnesses on the aspect of effecting the arrest of the accused are not supporting the case of prosecution, thus, even the arrest of the accused becomes doubtful. The conduct of the prosecutrix is highly doubtful and not natural. The version of the material witnesses is also neither consistent nor truthful, as such it fails to inspire the confidence of this Court.

27. Considering the above referred facts, we are of the opinion that there are many missing links in the case of prosecution. The so called incriminating circumstances against the accused are falling too short to point out the authorship of the crime. We are unable to find either any illegality or perversity in appreciation of the evidence by Court below. Accordingly, the conclusion drawn by the learned Sessions Judge and thereby recording the order of acquittal needs no interference at the hands of this Court, as such, appeal thus, being merit-less, deserves to be

dismissed. Accordingly, Criminal Appeal is dismissed.

28. This judgment will be digitally signed by the Private Secretary of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

(V.G. BISHT, J.)

(PRASANNA B. VARALE, J.)