

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 346 OF 2004

Sachin
R. Patil

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The State of Maharashtra)
(Through P.I. Nashik Road)
Police Station))

...Appellant
(Orig. Complainant)

VERSUS

1. Ashok Tukaram Dhamne)
Age 30 years, R/o Sarole,)
Tal. & Dist. Ahmadnagar)

2. Narendra Ramdas Wagh)
Age 28 years,)
R/o Kedgaon, Tal. Shrirampur,)
Dist. Ahmadnagar.)

3. Sukhdeo Maruti Gawli)
Age 50 years, R/o Pavan)
Apartment, Plot No. 14.)

4. Vimal Sukhdeo Gawli)
Age 48 years, r/o Pavan)
Apatment, Artiliary Centre)
Road, Plot No. 14, Nashik Road)

5. Minakshi Tukaram Takte)
Age 45 years, r/o Artiliary)
Centre Road, Awate Mala,)
Nashik Road.)

6. Ku. Vaishali Eaknath Takte)
Age 20 years, r/o Awate Mala,)
Artiliary Centre Road,)
Nashik Road)

...Respondent
(Orig Accused)

Mr H J Dedhia, APP for the Appellant – State.

Mr Sujay Gawade i/by Ms. Ram and Company for Respondent Nos. 1 to 4 and 6.

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

DATE : SEPTEMBER 25, 2020.

JUDGMENT (PER PRASANNA B. VARALE, J)

1. The present Criminal Appeal is preferred against the judgment and order passed by the Learned 4th Additional Sessions Judge, Nashik dated 27th November, 2003 in Sessions Case No. 167 of 2002, whereby Respondents herein (Orig. Accused Nos. 1 to 6) were acquitted for the offences charged against them.

2. Heard learned APP, Mr H J Dedhia for the Appellant – State and Mr Sujay Gawade for Respondent Nos. 1 to 4 and 6. (Respondent No. 5 during pendency of the Appeal expired.)

3. The case of the prosecution is reflected through PW 1 (Prosecutrix), through first information report based on statement of prosecutrix recorded in Bytco Hospital, Nashik Road on 05th January,

2002. PW 1 (Prosecutrix) stated that her brother, namely, Rajendra along with herself were running a shop on rental basis since year 1999 which is situated in the premises of one Pavan Apartment. Accused No. 3 – Sukhdeo Maruti Gawli was the owner of the said shop. It was further stated that on an assurance given by Accused No. 3 – Sukhdeo who was a military personnel that he would arrange for an employment for her brother in military services, therefore, mother of prosecutrix and her brother gave an amount of Rs. 1,00,000/- to Accused no. 3. Accused No. 3 – Sukhdeo failed to provide any employment to Rajendra in military services, as such, Rajendra and his mother as well as prosecutrix made a demand to return the said amount. Accused No. 3 – Sukhdeo instead of returning the said amount has provided the said shop on rental basis and it was agreed between the parties to adjust the amount of rent as against the amount of Rs. 1,00,000/-. Accused No. 3 – Sukhdeo was insisting for vacating the shop. As against demand of Accused No. 3 – Sukhdeo, the brother Rajendra and prosecutrix were insisting for continuation of his shop till the entire amount of Rs. 1,00,000/- is adjusted against the rent.

4. She further stated that on 05th January, 2002 at about 9.00

a.m. she reached to the shop. As per daily routine opened and cleaned the shop and was sitting in the shop. At about 9.15 am Accused no. 3 – Sukhdeo entered in the shop and Accused Nos. 1 and 2 followed the Accused no. 3. Accused no. 3 – Sukhdeo then directed Accused nos. 1 and 2 to commit such an act leading to suicide by prosecutrix and then also stated that they should not leave any evidence of their misdeeds. Accused no. 3 – Sukhdeo then closed the shutter of the shop. As per the statement of prosecutrix Accused no. 3 was standing outside the shop, whereas Accused nos. 1 and 2 were inside the shop. Thereafter, Accused nos. 1 and 2 removed condom from the pocket of their trousers and then by applying condom Accused nos. 1 and 2 sexually exploited the prosecutrix one after the another. She further stated that Accused Nos. 1 and 2 removed all the clothes from the person of the prosecutrix. She was forcefully lie down and both the accused person committed rape on her. She further stated that both the accused persons had a bite on her cheek. She further stated that in her resistance she suffered certain injuries on her left knee and then accused nos. 1 and 2 opened the shutter. She further stated that three ladies were standing outside the shop, namely, one was wife of accused no. 3, one was Smt. Takate and another was

daughter of Takate Vaishali. She further stated that the ladies were standing outside the shop pushed undergarments and petticoat in front of the shutter and they gave slaps to her. She further stated that though she raised hue and cry none rushed to help her. She further stated that within a short span her mother reached to spot of incident. Accused no. 3 gave slaps to mother of prosecutrix. Mother of prosecutrix immediately shifted prosecutrix to Nashik Road police station in auto rickshaw. The police personnel available in the police station referred the prosecutrix to Bytco Hospital for treatment.

5. On statement of prosecutrix which is recorded in Bytco Hospital, Nashik Road first information report was registered against the accused persons under Sections 376, 342, 323 read with 34 of the Indian Penal Code. Investigating machinery was set in motion on the basis of first information report. The necessary formalities of investigation were conducted, such as, recording of statement of witnesses, seizure of the clothes of prosecutrix and the accused persons, forwarding the material to chemical analyzer, etc. On completion of the investigation charge-sheet was filed against the accused persons in the Court of JMFC at Nashik Road. In turn learned JMFC, Nashik Road committed the case

for trial the Court of Sessions. Charges were framed on 12th August, 2003 to which the accused persons pleaded not guilty. The defence of the accused persons was of two folds i.e. total denial and false implication.

6. The accused persons in their written statement submitted that the period of contract was already over and instead of vacating the shop as per the agreement, the prosecutrix and her brother were illegally occupying the shop and denied to vacate the shop. As such, an application was filed to the police station on 01.01.2002 seeking help of police machinery. On receipt of the said application police had called prosecutrix and her husband in the police station on 04.01.2002. It was stated that the accused no. 3 was availing a legal remedy for vacating the shop in the form of filing a suit in the competent Court. Thus, it was defence of the accused persons that with an ulterior motive a false case was registered against the accused persons.

7. The prosecution in support of its case, examined as many as, 6 witnesses, namely, PW 1 (Prosecutrix), Radhabai Kekan (PW 2) who is mother of the prosecutrix, Rajendra Madhav Kekan (PW 3) brother of the prosecutrix, Sampat Shriram Pawar (PW 4) police constable who

referred the prosecutrix to the Bytco Hospital for medical treatment, Dr. Jadhav (PW 5) is M.O. who issued medical certificate to the prosecutrix, and Bhika Mankar (PW 6) who is I.O.

Besides this oral evidence, the prosecution is backing on the documentary evidence such as (1) agreement in between accused no.3 and the brother of the prosecutrix in respect of the shop, (2) photographs of the inner side of the shop taken after the incident, (3) copy of the entry in the N.C. Register in respect of the complaint lodged by the accused no. 3 against the prosecutrix, on 05.01.2002 at about 10.20 a.m. (4) memo by which the prosecutrix was referred to the doctor, (5) report made by the police head constable to PSI Shri Mankar on 05.01.2002 after he referred the prosecutrix to the doctor, (6) medical certificate of the prosecutrix issued at 11 a.m. on 05.01.2002, (7) list of the specimen such as vaginal swab, pubic hair, cotton swab, etc collected by the doctor at the time of the medical examination of the prosecutrix, (8) medical certificate of the accused no. 4 issued at 11.00 a.m. on 05.01.2002, (9) physical examination report of the accused no. 2, (10) physical examination report of the accused no. 1, (11) spot panchnama, (12) seizure panchnama of the clothes of the prosecutrix, (13) seizure

panchnama of the clothes of accused no. 1, (14) seizure panchnama of the clothes of accused no. 2, (15) spot map, (16) C.A. reports.

8. The learned Additional Sessions Judge, Nashik on material presented before him framed the following points for consideration which is reproduced herein below for ready reference:

1. *Is it proved by the prosecution that the accused nos. 1 to 6 in-furtherance of their common intention of assaulting complainant, wrongfully confined in a shop in her possession by pulling down the shutter thereof at about 9.30 a.m. on 05.01.02?*
2. *Is it proved by the prosecution that the accused nos. 1 and 2 entered into the shop of the complainant in her possession with the intention of committing offence and insulted her to annoy her in-furtherance of their common intention?*
3. *Is it proved by the prosecution that the accused nos. 1 and 2 committed rape on the prosecutrix inside the shop?*
4. *Is it proved by the prosecution that the accused nos. 1 and 2 pushed the complainant out of the shop and then accused nos. 3 to 6 beat her with an intention of causing*

hurt to her?

5. *Is it proved by the prosecution that the accused nos. 1 to 6 infurtherence of their common intention, intentionally insulted her by abusing her and thereby gave provocation to her, intending or knowing it to be likely that to break public peace?*
6. *Whether any offence has been committed by any of the accused?*

9. The learned Additional Sessions Judge on appreciation of evidence arrived at the conclusion that the evidence brought by the prosecution falls too short to hold accused persons guilty for the charges levelled against them and accordingly, recorded negative findings.

10. Learned APP, Mr H J Dedhia appearing for the Appellant – State vehemently submitted before us that the Trial Court failed to appreciate the evidence in proper perspective. It was submitted by the learned APP that the learned Trial Court ought not to have discarded the evidence of material witnesses who were the star witnesses, namely, PW 1 (Prosecutrix) and Radhabai Kekan (PW 2) mother of prosecutrix. It was also submitted by the learned APP that apart from the ocular testimonies

of the witnesses, there was sufficient material in the form of the documentary evidence to support the prosecution case. It was also submitted by the learned APP that the learned Trial Court gave undue weightage to minor contradictions and omissions. Thus, the learned APP prayed that the Criminal Appeal be allowed.

11. Per contra, learned Counsel appearing for the Respondents submitted that no error is committed by the learned Trial Court. Learned Counsel appearing for Respondents submitted that on a thorough scrutiny of the evidence the learned Trial Court arrived at a proper conclusion that the prosecution case falls too short to hold the accused persons guilty. Learned Counsel appearing for Respondents then submitted that contradictions and omissions in the testimonies of the so called star witnesses are material contradiction and omission and the version of these witnesses failed to inspire the confidence of the Court on the contrary, it only supports the case of defence of the false implication in the crime. Thus, learned Counsel appearing for the Respondents prayed for dismissal of the Appeal.

12. With the able assistance of learned Counsel appearing for the

respective parties we have gone through the evidence and the material placed before us. On going through the entire material, we are of the opinion that the learned Trial Court committed no error in appreciation of the evidence. We also find considerable merit in the submissions of learned Counsel appearing for the Respondents that the evidence of the so called star witnesses suffers from material contradictions and omissions and only supporting the defence of false implication. Moving a step ahead we may say that we are constrained to state that the scrutiny of material evidence lead to the conclusion that the case registered against the Accused persons – Respondents herein is by way of a counter blast to the proceedings initiated by Accused no. 3.

13. Now we may first refer to the evidence of PW 1 (Prosecutrix) and then Radhabai Kekan (PW 2) who is the mother of prosecutrix.

14. PW 1 (Prosecutrix) in her substantive evidence before learned Trial Court states that the Accused no. 3 is the owner of the premises i.e. shop and further she states that the shop being run by herself and her brother. She further states about parting of amount of Rs. 1,00,000/- to Accused No. 3 for providing an employment to her

brother and then failure of Accused No. 3 to repay the said amount and then she states that she was running this shop on rental basis at Rs. 300 per month since year 1999. In so far as the incident dated 05.01.2002 is concerned, she deposed before Court that at about 9.00 a.m she opened shop and at that time Accused No. 3 came their and there was an exchange of words between accused no. 3 and the prosecutrix. Accused nos. 1 and 2 were followed Accused no. 3 and both of them entered in the shop. Accused no. 3 directed them to do something so that the prosecutrix commit suicide. She states that accused no. 3 came out of his shop and pulled shutter down, whereas, accused nos. 1 and 2 were inside the shop along with prosecutrix. She further states about her sexual exploitation at the hands of accused nos. 1 and 2. She stated that she became unconscious and accused nos. 1 and 2 threw her out of the shop in unconscious condition. She states that her mother reached the shop and she made an attempt to provide her saree but accused persons started beating her mother. She states that she narrated entire incident to her mother and her mother and herself proceeded to police station. After reaching police station, police referred her to Bytco Hospital. One Shri Mankar, PSI had arrived at hospital while she was under treatment. She

stated that though Mr Mankar wanted to record her statement but Doctor who was present their told Mr Mankar to record the statement after half an hour as prosecutrix was not in a good condition to give statement. Accordingly, Mr Mankar again reached the hospital after sometime and she narrated the incident to Mr Mankar. Mr Mankar then recorded her statement. She further stated that she was admitted in the hospital for about 8 days. Then she identified the clothes shown to her and also identified the clothes worn by accused nos. 1 and 2.

In her cross-examination material contradictions more particularly, on the aspect of rape committed by the accused nos. 1 and 2 as alleged by the prosecutrix are brought on record. Those contradictions rightly observed by the learned Trial Court are referred to in the judgment and for ready reference we reproduce herein below in verbatim:

The prosecutrix in the F.I.R. (Exh.30) has contended that both the accused nos. 1 & 2 alternatively had sexual intercourse with her. IN her oral evidence she has however simply said that there was an attempt to commit rape on her by these accused. There thus appears major contradiction in the oral evidence and the

F.I.R. In the F.I.R. she has stated that before having such sexual intercourse they applied condoms to their private parts., and then caught hold her and compelled to lie down on the floor, in the oral evidence however she said that for about 20 minutes accused were trying to catch her, and she was running inside the shop throughout this period, and accused nos. 1 & 2 were following her. There is nothing to this effect stated by her in the F.I.R. Omission in the F.I.R. of this fact is also material one to affect the credibility of her evidence. In the cross-examination she has said that when she was being tried to be caught by the accused nos. 1 & 2 she did not throw any articles in her shop on the accused to protect herself. The record does not show that during this entire episode articles in the shop were damaged. On the contrary, in the photographs on record at Exh. 32 to 34, which are produced by the prosecution itself, and which prosecutrix admits to have been taken after the incident, it does not appear at all that the articles in the shop were damaged or dis-placed.

15. Rajendra Kekan – PW 3, who is the brother of prosecutrix, is a witness on the backdrop of the incident dated 05.01.2002, namely, payment of an amount Rs. 1,00,000/- to Accused No. 3 for recruitment in military services, his failure to provide the employment and also

failure to return the amount. This witness then states about letting of the premises/shop on lease. He also states about the complaint lodged against PW 1 and 3 at the instance of Accused No. 3. In so far as incident dated 05.01.2002 is concerned, he states that at that time he was out of station, as such, this witness is not of much help to the prosecution.

16. Sampat Pawar – PW 4, who is the head constable attached to Nashik Road Police station, plays a very limited role in the investigation. It is important to note that PW 1 (Prosecutrix) though approaches police station on 05.01.2002 she only refers to act of assault. It can further be stated that it was expected of prosecutrix to disclose the act of sexual exploitation to the police officer when she approached to police station on 05.02.2002 and her silence only creates doubt about the truthfulness of the incident.

17. On the scrutiny of the version of the prosecutrix it revealed that there is delay in report and reason assigned for the delay only creates doubt about truthfulness of the report. The prosecutrix states that Mr Mankar attended the hospital and wanted to record the statement but doctor informed Mr Mankar that she was not in a condition to give

statement and asked Mr Mankar to come after sometime.

18. Mr Mankar – PW 6 who is I.O. and he states about the steps taken by him in the process of investigation and the contradictions and omissions are brought on record through this witness. Mr Mankar deposed that initially on receipt of the information he reached the hospital at about 12.30. He further deposed that doctor in the hospital asked him to come back again after sometime and accordingly, he went to the hospital at about 2.00 p.m. There is nothing in the version of Mr Mankar to support and suggest that when Mr Mankar initially reached the hospital and prosecutrix was not in a position to give statement. We may also state that the document placed on record in the form of medial report at Exh. 44 shows that the prosecutrix had about seven minor injuries such as abrasion and contusion and considering nature of those injuries it is difficult to believe version of the prosecutrix that she was not in a position to give any statement when Mr Mankar reached to hospital on receipt of the information. Prosecutrix in her version stated that her mother reached the shop and she went to the police station and thereafter, the police machinery referred the prosecutrix to Bytco hospital, therefore, the record clearly indicates that mother of the

prosecutrix was available all along but for the reasons best known to the prosecution no attempt was made to record the statement of the mother and statement of prosecutrix was recorded after six hours of the incident.

Considering these facts the opinion drawn by the Trial Court that the delay in lodging the report is not explained and as such delay in lodging the report in this case is fatal to the prosecution.

19. It is the version of prosecutrix that the incident took place in the morning hours i.e. at about 9.30 a.m and there were atleast 50 passerby on the street at the relevant time. It is also came in the evidence that the road in front of this shop is a busy road. It also came in the evidence that there were adjusant shops.

Now considering this scenario i.e. incident took place at about 9.30 am, there were adjacent shops to this shop wherein the alleged incident took place, there were 50 passerby on the street, and the version of prosecutrix that though she raised hue and cry none rushed to the place of incident, seems to be improbable and thus the version of prosecutrix becomes doubtful.

20. Pitambar Jadhav – PW 5, who is the medical officer at Bytco Hospital, Nashik Road. On 05.01.2002 he attached to Bytco Hospital as Casualty M.O. during 8 a.m. to 2 p.m. In clinical examination of prosecutrix he found following injuries on the person of prosecutrix:

1. *Abrasion on right cheek, linear finger, nail mark, two in number.*
2. *Typical teeth mark two in number with abrasion just above the upper injury.*
3. *Contusion on left thigh on antero medical aspect of middle of left thigh. 5Cm. X 1Cm. Transverse.*
4. *Contusion over left leg on calf on middle area 2 Cm x 3Cm.*
5. *Abrasion over left foot on dorsum, near great toe on medial size 1 Cm. X 1 Cm.*
6. *Finger nail mark over dorsum right forearm two in number.*
7. *Abrasion over left middle finger 1 Cm x 1 Cm. On dorsum of middle phalanx.*
8. *She was complaining of pain over right shoulder.*

The medical evidence is also not supporting the ocular evidence of prosecutrix.

21. The learned Trial Court on the backdrop of the medical report made following observations :

On examination there was slight tenderness. There were no injuries to her private part. There appears no injury to her right or left hand and legs, which could have been caused to her by the accused nos. 1 & 2 when she was caught hold by them, during the intercourse by another. Doctor has admitted that, all these injuries can be caused simultaneously in assault or scuffle. Thus the evidence on record rules out the possibility of her being raped by the accused nos. 1 & 2 even the attempt to commit the rape also does not appear to have been made-out.

22. In our opinion, the learned Trial Court committed no error in forming the opinion that the evidence on record rules out possibility of the prosecutrix being raped by accused nos. 1 and 2 even the attempt to commit rape does not appears to have been made out.

23. Per contra, the material placed on record in the form of the copy of the agreement shows that the brother of the prosecutrix agreed to occupy the shop only for a period of two years i.e. from 20.09.1999 to 20.08.2000 and agreed to deliver vacant possession of the shop on expiry of the period.

Prosecutrix in her cross-examination admitted that on expiry

of the lease period accused no. 3 demanded the possession of the shop. Prosecutrix deposed before Court that accused nos. 1 and 2 did not allow her to reached up to the shutter and for about 20 minutes she was running inside the shop and accused nos. 1 and 2 were trying to catch prosecutrix.

Now on the backdrop of version of the prosecutrix before the Court that she was running in the shop for nearly 20 minutes and accused nos. 1 and 2 were trying to catch her, if we peruse the evidence in the form of photographs exhibited before Court as Exhibit Nos. 32, 33 and 34 would not indicate any damage caused to the articles placed in the shop. It could not have been possible that prosecutrix was running in the shop to save herself from accused nos. 1 and 2 and accused nos. 1 and 2 were chasing her and in spite of these things articles in the shop would remained intact.

24. Learned Trial Court was justified in making the following observations:

Considering the gravity, circumstances, and the allegations, the articles in the shop were bound to have been dis-placed or damaged. The probability therefore does not indicate that

the accused nos. 1 & 2 in this manner had tried to have sexual assault on the prosecutrix.

25. Learned Trial Court was justified in accepting the defence theory of the false implication and we may state that the material placed on record would indicate that the case registered against the accused persons is nothing but a counter blast to the proceedings initiated by the accused no. 3.

26. The prosecution case also becomes doubtful on the backdrop of the fact that the prosecution examined two witnesses as eye witnesses, namely, PW 1 (Prosecutrix) and Radhabai Kekan (PW 2) who is mother of the prosecutrix. The record indicates that apart from prosecutrix and her mother's statement, statement of some other witnesses were also recorded and the list of those witnesses find place in the charge-sheet but, for the reasons best known to the prosecution those witnesses, who could have been eye witnesses in all probability were not examined by the prosecution. An inference was drawn by the learned Trial Court that the witnesses were not examined by the prosecution for the reason that either they were not supporting the case of the prosecution or their version was

leading to false implication of the accused persons.

27. In so far as testimony of the Radhabai – PW 2 who is mother of prosecutrix is concerned, the learned Trial Court specifically referred to contradictions in the statement of those two eye witnesses and we reproduce the same as follows:

In the present case, in the statements of those two eye witnesses i.e. prosecutrix and her mother there are numerous contradictions and they are:

- I) The prosecutrix says that shutter was fully down, whereas her mother says that it was half open.*
- II) The prosecutrix says that her mother came on the spot after she was raped, whereas the mother says that she was present there, and in her presence only accused no. 3 instigated the accused nos. 1 and 2 to do such thing so that the prosecutrix should commit suicide.*
- III) The mother in the next breathe of the earlier statement says that when she reached there her daughter was found lying on the steps in half naked condition.*
- IV) The prosecutrix said that accused nos. 4 to 6 assaulted her mother when she was thrown outside the shop, whereas mother says that accused nos. 5 provided the clothes to the prosecutrix.*

- V) *The prosecutrix says that when she was thrown outside the shop, she suffered head injury, whereas her mother does not say anything about it. The medical evidence does not say anything about the head injury to the prosecutrix.*
- VI) *The prosecutrix says that her mother was beaten by the accused nos. 4 to 6, whereas the mother alleges that accused no. 4 only tried to snatch her hair and pushed her.*
- VII) *The prosecutrix says that she narrated the entire incident to her mother and then she herself and her mother went to the police station. The mother however did not tell anything about it to the police after they reached in the police station.*
- VIII) *In the statement before police, accused no.4 is alleged to have snatched the hair of the prosecutrix as so stated by the mother in her evidence bu the prosecutrix does not say anything about it.*

28. Learned Trial Court was also justified in observing that the prosecution had suppressed genesis of crime. The learned Trial Court on appreciation of evidence find that there were as many as six factors making the prosecution case unreliable and they are as follows:

- 1) *Delay in lodging the F.I.R.*

- 2) *Non-examination of the independent witnesses.*
- 3) *Contradictions in the oral evidence of the two witnesses who are closely related to each other.*
- 4) *Absence of explanation by the prosecution about the injuries on the person of accused no. 4.*
- 5) *Registration of non-cognizable case against the prosecutrix on the same day at about 10.20 a.m. against the prosecutrix.*
- 6) *Suppression on the part of the prosecution of the evidence to the genesis of the crime.*

29. We also find considerable merit in the submissions of learned Counsel appearing for the Respondents that the Trial Court committed no error in appreciation of evidence and the contradictions and omission in the version of so called eye witnesses are the material contradictions and omissions and the only conclusion which can be drawn that the prosecution failed to bring before Court the credible evidence and evidence brought before Court was utterly insufficient to hold accused persons guilty.

30. On consideration and scrutiny of evidence, we are of the opinion that Criminal Appeal is devoid of merits. Resultantly, Criminal

Appeal is dismissed.

31. 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.)