

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.961 OF 2003**

The State of Maharashtra)Appellant/Complainant

V/s.

Mohammad Isaq Mohammad Ansari)
Age 40 Years, Occupation : Business)
R/o. House No.1044, New Nana Peth,)
Pune)Respondent/Accused

Ms. Pallavi Dabholkar, APP for State – Appellant.

Ms. Tahera R. Qureshi for respondent.

Ms. Dipali Tupe, original complainant present.

**CORAM : K.R.SHRIRAM, J.
DATE : 7th FEBRUARY 2020**

ORAL JUDGMENT :

1 This is an appeal impugning an order and judgment dated 17th March 2003 passed by the 10th Additional Sessions Judge, Pune, acquitting accused of offences punishable under Section 3 (1) (xi) (*assaults or uses force to any woman belonging to a Scheduled Caste or a Scheduled Tribe with intent to dishonour or outrage her modesty*) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (SC and ST Act) and under Section 354 (*Assault or criminal force to woman with intent to outrage her modesty*) and 341 (*Punishment for wrongful restraint*) of the Indian Penal Code (IPC).

2 Pursuant to notice issued by this Court in accordance with order dated 3rd September 2019, complainant (PW-1) – Dipali Tupe, is present in Court. PW-1 was asked, on the Court's request, by the learned APP whether she wants to engage another lawyer to represent her. Learned APP informed

that PW-1 stated that she does not want to be independently represented.

3 The case of the prosecution in brief is that the complainant Dipali Sanjay Tupe (PW-1), who was at the relevant time, i.e., 27th November 1999, of 12 years of age, was residing at 853, Bhavani Peth with her mother, two brothers, two sisters and grandmother Sita Tupe, who is PW-2. PW-1's father had died two years before the incident. Mother of PW-1 is working as a maid. In November 1999, PW-1 was studying in 6th grade in a primary school. Accused was running a STD booth opposite the house of PW-1 (complainant). PW-1 used to go regularly to the said STD booth to make phone calls. On the fateful night of 27th November 1999 at about 8.30 p.m. complainant went to the STD booth of accused to make phone call to her cousin sister Shital Tupe. PW-1 used the telephone instrument in the telephone booth. When PW-1 dialed the number of Shital, there was no response and the phone kept ringing. The line got disconnected. Accused then entered the phone booth/cabin and dialed the number of Shital, which was given by complainant and handed over the phone to PW-1. PW-1 found the phone ringing but there was no response. At that time, it is alleged, as complainant was trying to go out of the cabin, accused inappropriately touched her on various parts of her body. It is stated by the prosecution that complainant, when she went to make the phone call, she was accompanied by her friend, who was also around 12 years of age – Rani Waghmare and Rani Waghmare was her neighbor. The FIR says Rani Waghmare was witness

to the incident. After the incident, complainant and Rani Waghmare were going home and complainant was weeping. They happened to meet complainant's grandmother (PW-2) in the lane and PW-2 asked PW-1 why she was weeping and PW-1 narrated the incident. PW-2, therefore, took complainant to Sant Kabir Police Chowky, which is under Samarth Police Station and complaint was lodged. In the FIR, there is a statement that accused knew complainant belonged to Matang caste.

4 After investigation by PW-7 - P.S.I. Rajendra Haribhau Bahirat, further investigation was handed over to A.C.P. Bhaurao Manga Wadile (PW-6). PW-6 recorded statements of witnesses, conducted spot panchnama and also obtained medical certificate of complainant. On 29th November 1999 PW-6 recorded further statements of witnesses and also verified the caste of accused. After completion of investigation, chargesheet was submitted. Accused pleaded not guilty and claimed to be tried. In his statement under Section 313 of the Code of Criminal Procedure, accused denied all allegations and has also added that on the fateful night he was actually assaulted by five or six boys who came to his STD booth and made phone calls to somebody and when he demanded payment for the phone calls, they beat him up. Accused then went to Police Chowky and Police referred him to Sassoon Hospital for medical examination. But when accused returned to the Police Chowky, he was arrested. According to accused, the case made out by the prosecution is false.

After considering the evidence and hearing the counsel for prosecution and defence, the impugned judgment was passed.

5 The Apex Court in ***Ghurey Lal Vs. State of U.P.***¹ has culled out the factors to be kept in mind by the Appellate Court while hearing an appeal against acquittal. Paragraph nos.72 and 73 of the said judgment read as under:

72. The following principles emerge from the cases above:

1. The appellate court may review the evidence in appeals against acquittal under sections 378 and 386 of the Criminal Procedure Code, 1973. Its power of reviewing evidence is wide and the appellate court can reappreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law.

2. The accused is presumed innocent until proven guilty.

The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.

3. Due or proper weight and consideration must be given to the trial court's decision. This is especially true when a witness' credibility is at issue. It is not enough for the High Court to take a different view of the evidence. There must also be substantial and compelling reasons for holding that trial court was wrong.

73. In light of the above, the High Court and other appellate courts should follow the well settled principles crystallized by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal:

1. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when:

1. (2008) 10 SCC 450

i) The trial court's conclusion with regard to the facts is palpably wrong;

ii) The trial court's decision was based on an erroneous view of law;

iii) The trial court's judgment is likely to result in "grave miscarriage of justice";

iv) The entire approach of the trial court in dealing with the evidence was patently illegal;

v) The trial court's judgment was manifestly unjust and unreasonable;

vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/ report of the Ballistic expert, etc.

vii) This list is intended to be illustrative, not exhaustive.

2. The Appellate Court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused.

6 The Apex Court in many other judgments including ***Murlidhar & Ors. Vs. State of Karnataka***² has held that unless, the conclusions reached by the trial court are found to be palpably wrong or based on erroneous view of the law or if such conclusions are allowed to stand, they are likely to result in grave injustice. Appellate Court should not interfere with the conclusions of the Trial Court. Apex Court also held that merely because the appellate court on re-appreciation and re-evaluation of the evidence is inclined to take a different view, interference with the judgment of acquittal is not justified if the view taken by the trial court is a possible view.

2. (2014) 5 SCC 730

We must also keep in mind that there is a presumption of innocence in favour of respondent and such presumption is strengthened by the order of acquittal passed in his favour by the Trial Court.

7 The Apex Court in *Ramesh Babulal Doshi Vs. State of Gujarat*³ has held that if the Appellate Court holds, for reasons to be recorded that the order of acquittal cannot at all be sustained because Appellate Court finds the order to be palpably wrong, manifestly erroneous or demonstrably unsustainable, Appellate Court can reappraise the evidence to arrive at its own conclusions. In other words, if Appellate Court finds that there was nothing wrong or manifestly erroneous with the order of the Trial Court, the Appeal Court need not even re-appraise the evidence and arrive at its own conclusions.

8 I have considered the evidence and after hearing the learned APP Ms. Dabholkar for appellant and Ms. Qureshi for respondent, I do not find any reason to interfere in the impugned judgment.

9 It is the case of prosecution that after the alleged incident, when complainant was going home weeping, complainant happened to meet her grandmother (PW-2) in a lane and complainant narrated the incident. PW-1, in her examination in chief, has said that the STD booth is opposite her house. So therefore, from cabin to a lane, where she was walking to go home when she happened to meet her grandmother (PW-2) is a mystery. PW-1 says that she narrated the incident to her grandmother (PW-2) and the

3. 1996 SCC (cri) 972

grandmother took her to the Police straightaway and the complaint was lodged. PW-2 says that when PW-1 narrated the incident to her, she went to the STD booth of accused and when she asked accused, he said he did nothing and she could do whatever she wanted to. Therefore, there is one contradiction.

10 PW-5, a social worker, says in his examination in chief that on 27th November 1999 at about 8.30 p.m. he had been near the house of PW-1 near the lane of her house and she was weeping and on inquiry, complainant narrated the incident. PW-1 and PW-2 do not mention anywhere about meeting PW-5.

11 The most glaring error in the case of prosecution is not getting the star witness Rani Waghmare to testify. In the FIR, it is stated that Rani Waghmare was an eye witness to the alleged incident. Statement of Rani Waghmare has also been recorded by the Police. But Rani Waghmare is not called to testify. Prosecution, it is recorded in the impugned judgment, stated that Rani Waghmare was married and settled somewhere. Nothing prevented prosecution to make an application to the Court to summon this star witness who could have corroborated what PW-1 states. PW-2, PW-5 and others were not eye witnesses to the incident. In the chargesheet, 21 witnesses have been listed but strangely only 7 witnesses have been examined.

12 Ms. Dabholkar, learned APP submitted that PW-1 was a child witness who has given very impressive narration of the incident. Learned

APP submitted that there was no reason why PW-1 would have made these allegations against accused if there was no truth in that and therefore, even if she is the lone witness, on her sole testimony, accused should be convicted. Ms. Dabholkar submitted that it is settled law that even if PW-1 was the sole witness, there is no bar for the Court to rely only on that evidence and sentence accused.

Certainly there can be no disagreement on the said prepositions in law. But whether that sole witness's evidence is absolutely unimpeachable depends on facts and circumstances of every case. In my view, in this case, the sole witness (PW-1), who is also complainant, does not stand in that exalted position of an absolutely reliable witness.

13 Complaint is not only under Section 354 of IPC but strangely under Section 3 (1) (xi) of the SC and ST Act also. As regards Section 341 of IPC, there is no evidence of wrongful restraint. Even PW-1 does not say anywhere that she was restrained from going out of the phone booth. PW-1 says when she was going out of the phone booth, accused inappropriately touched her.

14 I asked myself how would a 12 years old child know the provisions of SC and ST Act. Why would a child, whose modesty allegedly has been dishonoured or outraged, make out a case under SC and ST Act. It is not the case of prosecution that accused even took the name of her caste at the time of incident. Why would a 12 years old child in the FIR mention

about her own caste. In a case of this kind, the FIR, I would have expected to be alleging offences only under the provisions of Section 354 of IPC. The fact that SC and ST provisions have been inserted shows that PW-1 was tutored to make those statements in the FIR. Similarly PW-1 was tutored to state in the evidence that accused knew her caste. Therefore, this impinges on the integrity of this witness.

15 Further the FIR is silent on the fact that before going to the Police, PW-1 told the incident to her grandmother and Nandu Bhongale (PW-5) when she was returning to the home. But in the examination in chief, PW-1 says, she told her grandmother about the incident. PW-1 does not say she met Nandu Bhongale at all before going to the Police or soon after the incident but Nandu Bhongale (PW-5) says PW-1 mentioned to him about the incident soon after the incident. Therefore, the Trial Court was not wrong in concluding that there was material improvement by PW-1 in her evidence. Therefore, the fact that there is no independent corroboration to the evidence of complainant is a major defect in the case of prosecution. Rani Waghmare would have been the best witness for the prosecution. But for reasons unexplained prosecution chose not to produce Rani Waghmare as a witness.

16 As regards Section 3 (1) (xi) of the SC and ST Act is concerned, Ms. Dabholkar relying upon the judgment of the Apex Court in ***Madan Lal V/s. State of Jammu and Kashmir***⁴ submitted that the Apex Court held that

4. (1997) 7 SCC 677

the evidence of the victim, who was a student and her mother, ought to have been believed. The Sessions Court had on scrutiny of prosecution evidence came to the conclusion that the case hinges on the sole testimony of prosecutrix. In setting aside the order of acquittal, the High Court came to the conclusion that the entire approach of the Trial Court in the matter of appreciation of evidence lacked objectivity. The High Court on scrutiny of evidence, apart from relying on the testimony of the prosecutrix, came to hold that the fact that the prosecutrix narrated the story of the incident to her mother immediately when the mother was available in the evening; and that the Salwar of the prosecutrix, which she was wearing at the time of occurrence, was seized and on chemical analysis was found to be carrying stains of semen; and other evidence makes prosecutrix's statement acceptable and believable. The Supreme Court upheld the conviction by the High Court and concluded that the evidence of prosecutrix can be safely relied upon. In my view, there cannot be any straight jacket formula to decide whether the evidence of the sole testimony of complainant can be safely relied upon. It depends on facts and circumstances of each case and the evidence in each case. In the present case, apart from what I have noted earlier, complainant has not even disclosed the incident to her own mother with whom complainant was living. The mother also is not a witness. A girl of 12 years while confessing would have immediately narrated the incident to her mother but nothing of that has come on record. For reasons mentioned above, including that complainant has been tutored to add

allegations under SC and ST Act, also shows that the sole testimony of complainant is not entirely reliable.

17 There is no evidence, except statement of PW-1, that accused knew PW-1 belonged to Matang community, to prove at the time of incident accused knew PW-1 belonged to Matang community and knowing so, assaulted or used force with intention to dishonour or outrage her modesty.

The Kerala High Court in *Suresh @ Makkan Suresh V/s. State of Kerala*⁵ has held that in order to attract the provision of Section 3 (1) (xi) of SC/ST Act, there has to be an element of racial prejudice or atleast the act should have been committed by accused with the full knowledge that it was being committed on a member who belonged to Scheduled Caste or Scheduled Tribe community. In the case, at hand, except PW-1 saying that accused knew PW-1 belonged to Matang caste, there is no allegation or evidence to show that the alleged act was committed because she belonged to a lower caste. If that is absent, the offence cannot be attracted.

The Delhi High Court in *D.P. Vats V/s. State and Ors.*⁶ while dealing with Section 3 (1) (xi) held that the person assaulting and using force must know that the woman against whom he was doing belonged to SC/ST. If he did not know that the woman belonged to SC/ST, the offence under sub-section (1) (xi) would not be attracted.

5. CRL.A. No.275 of 2008 dated 27th November 2013

6. 99 (2003) DLT 167

Similarly, the Madhya Pradesh High Court in ***Baja alias Bajasingh V/s. State of M.P.***⁷ held that to hold a person as having committed the offence under Section 3 (1) (xi), there has to be evidence to show that accused used criminal force on the prosecutrix to outrage her modesty only because she belonged to a particular caste or community. The Madhya Pradesh High Court relying upon the judgment of the Apex Court in ***Vidyadharan V/s. State of Kerala***⁸ held that neither the offence under Section 354 nor the one under Section 509 of IPC is punishable with imprisonment for a term of 10 years. As such, the ingredient that it is committed on the ground that the victim belongs to a Scheduled Caste or a Scheduled Tribe, which is *sine quo non* for applying the provision of SC and ST Act is not attracted.

The charge under Section 3 of SC and ST Act, therefore, has to fail.

18 Ms. Dabholkar submitted that even if the provisions of SC and ST Act cannot stick, certainly the ingredients of Section 354 of IPC has been proved. I am afraid, I cannot agree with Ms. Dabholkar because the entire evidence is depending on the sole testimony of PW-1, which as noted earlier, cannot be accepted without any corroboration.

19 In the circumstances, I cannot conclude that there was anything palpably wrong with the impugned judgment. There is an acquittal and

7. 2011 SCC Online MP 1464

8 . (2004) 1 SCC 215

therefore, there is double presumption in favour of accused. Firstly, the presumption of innocence available to the accused under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, accused having secured acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the Trial Court. For acquitting accused, the Trial Court observed that the prosecution had failed to prove its case. The order of acquittal, in my view, cannot be interfered with.

20 Appeal dismissed.

(K.R. SHRIRAM, J.)