

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1070 OF 2006

THE STATE OF MAHARASHTRA)...APPELLANT

V/s.

**1) SAIFULLA MOHAMMAD AKTAR SHAIKH)
2) SAU.SUGARA MEHEMOOD ALAM SAYYAD)...RESPONDENTS**

Mr.A.R.Patil, APP for the Appellant – State.

None for the Respondent.

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

DATE : 22nd DECEMBER 2020

JUDGMENT : (PER : V. G. BISHT, J.)

1 This appeal is filed by the State challenging the judgment and order of acquittal dated 7th April 2006 passed in Sessions Case No.389 of 2005 by the 3rd Additional Sessions Judge, Thane, for the offences punishable under Sections 376 & 376 read with 109 of the Indian Penal Code (IPC).

2 The factual matrix of the case is that the prosecutrix at the relevant time was residing with her brother viz., Mehemood Alam Maqbool Ahmed Sayyed (PW2) and his wife viz., Smt.Sugara Mehemood Alam Sayyed (A-2). Accused Saifulla Mohammad Aktar Shaikh (A-1) is the brother of the A-2.

3 Two months prior to the lodging of the report, the prosecution alleges that in the afternoon at about 2.30 p.m., A-1 visited the house of PW2. The prosecutrix, at the relevant time, was on the upper storey of the house. She was dragged to downstairs. The prosecutrix asked the A-1 not to catch hold of her and when she tried to open the latch of the door, it was latched from outside. The prosecution further alleges that A-1 then made the prosecutrix lie on a cot and by threatening with a knife, forcibly committed rape on her.

4 According to the prosecution when A-2 came after half an hour and opened the door, A-1 ran away. However, the prosecutrix did not tell the incident to A-2 as she apprehended that there would be a quarrel between A-2 and her brother (PW2).

5 The prosecution alleges that after fifteen days of the said incident, when A-2 had gone to her parents, at about 6.00 p.m. A-1 again came and again forcibly raped her. This incident was also not told by the prosecutrix to anybody.

6 The prosecution then contends that after four to five days of the second incident, A-2 started telling prosecutrix that she is a dirty girl and had done wrong things with her brother. However, the prosecutrix retorted by saying that it was her brother i.e. A-1 who had done wrong things with her. The prosecutrix was then beaten by the A-2.

7 The prosecution further contends that PW2 brother realizing that something had happened with his sister, he started enquiring but she did not tell fearing that there would be quarrel between PW2 brother and A-2. When the prosecutrix's brother insisted her to tell him as to what had happened, the prosecutrix asked PW2 brother to take her to Khansab (PW4) and that she would tell him in the presence of Khansab. Accordingly, PW2 brother took the prosecutrix to Khansab along with maternal aunt

of prosecutrix namely Bitto Mohammad Yasin Khan (PW1) and there the prosecutrix narrated the incident.

8 It appears from the record that then the prosecutrix was taken to Shanti Nagar Police Station where she lodged the complaint against both the accused on the basis of which C.R.No.100 of 2003 for the offences 376 and 109 of the IPC was registered with Police Station Shanti Nagar.

9 It then appears from the record that PW5 Investigating Officer visited the place of occurrence and prepared Spot Panchnama (Exh. 13) and recorded statement of witnesses. As PW5 was transferred, he handed over the investigation papers to Assistant Police Inspector Bhujbal of Shanti Nagar Police Station who took over the investigation. Assistant Police Inspector Bhujbal seized various articles and sent it to Chemical Analyzer and on completion of investigation forwarded the charge-sheet against the accused.

10 The prosecution, in order to bring home the charge, has examined as many as five witnesses and exhibited a number of documents. The respondents-accused were questioned under Section 313 of the Code of Criminal Procedure (Cr.P.C.) about the incriminating evidence and circumstances and they denied all of them as false. According to A-1, as he used to help his sister (A-2), a false case is filed against him. Similarly, according to A-2 her husband i.e. PW2 wanted talaq from her and therefore, she has been falsely implicated.

11 Mr.Patil, learned APP, submitted that despite there being cogent and convincing evidence of the prosecutrix, maternal aunt and brother, the learned Trial Judge erred in holding that none of the testimonies inspire confidence. Rather, the learned Trial Judge ought to have convicted the accused considering the evidence on record. The learned APP then urged that in the above premise, the appeal deserves to be allowed.

12 None for the respondents-accused when called.

13 We have carefully gone through the record with the help of learned APP. We notice from the FIR that at the time of lodging of report, the prosecutrix was 13 years old. This clearly goes to show that the alleged incident in question took place when the prosecutrix was a minor. In order to substantiate case of the prosecution and as also what we gather from the submissions advanced before us by the learned APP, the material witnesses are the maternal aunt, brother and the prosecutrix herself. Needless to say, except these close relations, no other witnesses are forthcoming.

14 Before we look into the factual aspect of the case and as also the aspect of minority of the prosecutrix at the relevant time or otherwise, we would like to refer to the judgments of the Hon'ble Apex Court with regard to appreciation of evidence in case of sexual assault.

15 The Hon'ble Apex Court in the judgment rendered in the case of Mukesh vs. State of Chattisgarh¹ held that the sole

¹ (2014) 10 SCC 327 = (2014) CRI.L.J. 4900 (SC)

testimony of the prosecutrix is sufficient to establish the offence of rape even in the absence of corroborative evidence.

16 The Hon'ble Apex Court also in the judgment rendered in the case of **State of Himachal Pradesh vs. Manga Singh**² in paragraph no.11 has held as under :

“11 The conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence. The conviction can be based solely on the solitary evidence of the prosecutrix and no corroboration be required unless there are compelling reasons which necessitate the courts to insist for corroboration of her statement. Corroboration of the testimony of the prosecutrix is not a requirement of law; but a guidance of prudence under the given facts and circumstances. Minor contractions or small discrepancies should not be a ground for throwing the evidence of the prosecutrix.”

17 PW3 prosecutrix states in her evidence (Exh. 18) that at the relevant time, she was staying with her brother Mehemoood

2 2018 SCC Online SC 2886 : AIR Online 2018 SC 1019

Alam Maqbool Ahmed Sayyed (PW2). A-2 is the wife of her brother and A-1 is the brother of A-2.

18 It is her further evidence that in the month of March 2003 A-1 came to her brother's house at 2.30 p.m. Her brother was not present. Two of her brother's children and her sister-in-law i.e. A-2 were there whereas two of the children had gone for tuition. At that time, she was on the first floor. It is her further evidence that A-1 came to the first floor and caught hold of her hand and brought her downstairs forcibly. She asked A-1 not to hold her but to leave her. On coming downstairs, she tried to open the outside door of the house but it was latched from outside and therefore, she could not open it. A-2 was also not in the house. It is her further evidence that A-1 then threw her on the bed, threatened her with a knife and then removed her clothes and his clothes and did "galat kaam".

19 It is her her further evidence that after sometime A-2 came upstairs with a papaya and asked her to eat papaya. The prosecutrix then told her that she was having pain in her head

because of the injury sustained on the head. A-2 then asked her to eat papaya and said that everything would be alright. She also asked her not to tell about the incident to her brother and she would get her married with the A-1. So she did not tell about the incident to anyone including her brother.

20 The evidence of the prosecutrix then shows that after about fifteen days, A-1 again came to her brother's house when she was alone in the house. A-1 bolted the door from inside, brought her downstairs and again did "galat kaam". Thereafter, he opened the door and went away. According to her, after sometime, A-2 came to the house and she narrated the incident to which A-2 asked her not to tell about it to her (prosecutrix's) brother as her brother would beat both of them.

21 Her evidence then shows that in the month of April 2003 there was a quarrel between her and A-2. A-2 told her "*Tu Gandi Ladki Hai. Tune Mere Bhai Ke Sath Galat Kam Kiya Hai.*" She told A-2 that "*Maine Tere Bhai Ke Sath Galat Kam Nahi Kiya, Usne Mere Sath Kiya.*" After her brother (PW2) returned home,

A-2 told him something and thereafter her brother slapped her. Thereafter, there used to be daily quarrels between her and A-2. Her brother (PW2) then went to the house of her aunt Bitto (PW1) and told her to enquire as to why there were daily quarrels between her (prosecutrix) and A-2.

22 It is her further evidence that when her aunt Bitto (PW1) called her, she went to her house but refused to tell her anything saying that if she tells her what had happened, A-2 and her brother would beat her. She further told her aunt Bitto (PW1) that she would speak only in front of Khan (PW4). Then, she, aunt Bitto (PW1), her brother (PW2) and sister went to the house of Khan where she narrated the entire incident. From there they went to police station and she lodged the complaint. She then proved her First Information Report (FIR) at Exh. 19.

23 Although the FIR shows that at the time of lodging of report, the prosecutrix was 13 years old, we are very much surprised to say that throughout her evidence neither the prosecutrix nor PW2 brother has anywhere specifically deposed

about the date of birth of the prosecutrix. The whole prosecution evidence is totally silent as to the age of the prosecutrix at the time of the alleged incident. Moreover, since there is no evidence regarding the date of birth of the prosecutrix, no evidence, to our dismay, is adduced by the prosecution to that effect. Even PW5 Investigating Officer does not say a single word in his evidence as to the date of birth of the prosecutrix. There appears to be a total failure in as much as the evidence of PW5 Investigating Officer does not reveal as to what steps were taken by him during the course of investigation to ascertain the date of birth of the prosecutrix, particularly when at the time of lodging of the report she had given her age as of 13 years. In the circumstances, we are left with no option but to conclude that the prosecution has outrightly failed to prove that prosecutrix was a minor at the time of the incident.

24 From the evidence of PW3 prosecutrix, it is clear that at the time of first sexual assault, two of her brother's children were very much present in the house while other two children had

gone for tuition. It also appears that when A-1 came and dragged her from upstairs to downstairs and when she tried to open the door, she found that the door was latched from outside and A-2 was missing from the house. There is no evidence at all to show that while she was being dragged from upstairs to downstairs, whether she offered any kind of resistance or tried to resist the act of A-1. It further appears that she even did not raise commotion knowing fully well that the children of her brother were very much present in the house. She tried to depose in the evidence that she was threatened by knife by A-1 but that is a very vague statement and does not make it clear what kind of threats were given by A-1.

25 The next part of her evidence shows that after the incident, A-2 appeared with a papaya and asked her to eat it. She also advised her not to tell about the incident to her brother (PW2) and that she would get her married with A-1. Therefore, the prosecutrix did not tell about the incident to anyone including her brother (PW2). This material piece of evidence indicates two

thing. Firstly, A-2 was knowing as to what had happened in her absence and probably it may be with her active connivance that the door was latched from outside and, secondly, A-2 was not present when the alleged sexual assault was going on. Interestingly, the FIR is totally silent as to the this part of the evidence which we have discussed hereinabove. There is absolutely no murmur that the prosecutrix after the incident was offered with papaya and further that A-2 asked her not to disclose the incident to anybody and that she would ensure that she was married with A-1. It is also not the case in the FIR that because of this assurance, the prosecutrix did not reveal the incident to anyone including her own brother (PW2).

26 The next sexual assault took place after fifteen days of the first one in the similar fashion except that this time there was no brandishing of knife as was in the first sexual assault. Again, there was no resistance coming from the side of the prosecutrix. After the incident when A-2 returned to the house, prosecutrix narrated her as to what had happened but then again A-2 advised

her not to tell about the incident to her brother (PW2) otherwise both of them would be beaten. This is, again, not the case of the prosecutrix in her FIR.

27 Her evidence, lastly, shows that it was PW2 brother who asked PW1 Bitto - maternal aunt of the prosecutrix to ascertain from the prosecutrix the reason behind their constant frictions and quarrels between the prosecutrix and A-2. Because of this, prosecutrix was summoned by PW1. What was the interaction between the prosecutrix and PW1 will have to be ascertained after going through the evidence of PW1.

28 PW1 Bitto Mohammad Yasin Khan states in her evidence (Exh. 10) that on 21st May 2003 the prosecutrix had come to her house and at that time, this witness asked her as to why there used to be frequent quarrels between her and A-2. The prosecutrix then told that if she tells the reason for quarrel, her brother i.e. PW2 would beat her and A-2. The prosecutrix further told her that she should be taken to Khansab (PW4) who is PW2's friend and then the prosecutrix would disclose the reason for the

quarrels. After reaching the residence of Khansab, the prosecutrix told them that A-1 had done “galat kaam” with her.

29 Whatever PW1 has deposed as to the insistence of the prosecutrix that she should be taken to the house of Khansab and then only she would disclose the incident and the fact that if she reveals the reason behind the quarrel she and A-2 would be beaten by PW2 brother, has never been part of prosecution case or for that matter FIR.

30 Similarly, it appears from the evidence of PW1 that when the prosecutrix was taken to the house of Khansab, she indeed told that A-1 had done “galat kaam” with her. The incident of first and second sexual assault were not clearly narrated in the presence of Khansab and a vague statement was made that A-1 had done “galat kaam” with the prosecutrix. We do not approve of this piece of evidence and so also the earlier evidence coming from the mouth of PW1 which is not the part of the FIR, as is already indicated by us hereinabove.

31 This takes us to the evidence of PW2 brother. PW2 Mehemood Alam Maqbool Ahmed Sayyed states in his evidence (Exh. 11) that when the prosecutrix came to stay with him, in the beginning the relations between A-2 and prosecutrix were very cordial and so he was very happy. After sometime in the month of April 2003 there used to be quarrels between A-2 and the prosecutrix. He, therefore, told his aunt Bitto (PW1) to ask the prosecutrix as to why the quarrels are taking place between them. Then the prosecutrix was called in the house of his aunt Bitto (PW1). He was also present there. He asked the prosecutrix about the quarrel but she refused to tell him and told PW1 that she would tell what had happened in presence of Khan. Then he, PW1 and the prosecutrix went to the house of Khansab. He was sitting outside when the prosecutrix told Khan what had happened.

32 It is his further evidence that when he went inside the room, the prosecutrix stated that on one day A-1 had come. A-2 was also present in the house. Then A-2 stood outside the house.

A-1 went upstairs room and from there he dragged her inside the room, made her fall down on the bed and then by threatening by knife did “galat kaam” with her.

33 First of all, it is not at all the case of the prosecution as is deposed by PW2 that at the request of this witness to PW1, the prosecutrix was summoned in the house of PW1 and he also accompanied there. Similarly, it is also not the case of the prosecution that in the house of PW1, when this witness asked about the quarrel between the prosecutrix and A-2, the prosecutrix told that she would tell everything in presence of Khan. Similarly, it is also not the case of the prosecution that when they all i.e. PW1, PW2 and prosecutrix went to the house of Khansab (PW4) this witness sat outside and thereafter the prosecutrix narrated the incident. It is also not the case of the prosecution that after sometime this witness went inside the room of Khansab and then again the prosecutrix repeated about her sexual ordeal at the hands of A-1. If the prosecutrix was to repeat and narrate the incident again in front of her own brother, then

there was, at the first instance, no reason for this witness to sit outside the room of Khansab. For all these reasons, the testimony of PW2 brother does not sound convincing to us.

34 The last witness examined by the prosecution is PW4 Kalamuddin Assakulla Khan i.e. Khansab at Exh. 19. PW4 states in his evidence (Exh. 19) that when the prosecutrix, her brother (PW2) and aunt (PW1) arrived at his residence, he asked the prosecutrix as to what had happened. The prosecutrix told him that it had happened two months ago, twice. She also told that A-1 with the help of A-2 had raped her. It is pertinent to note that no specific details, as is given in the FIR and as also by the prosecutrix in her evidence, were given by this witness. Except this, there is nothing in his evidence.

35 Having regard to the above discussion and as also the conduct of the prosecutrix and the fact that the prosecution has failed to prove that at the time of the alleged incident the prosecutrix was a minor, we are constrained to observe that the

truthfulness of the incident was something other than what is alleged in the FIR. Thus, the evidence and the circumstances available on record do not rule out the possibility of a consensual act.

36 To conclude, we hold that the learned Trial Judge was justified in acquitting the accused in absence of clear and unambiguous evidence pointing out the involvement of the accused in this crime. We do not find any illegality or perversity in the finding recorded by the learned Trial Judge.

37 For the aforesaid reasons, we find no merit in the appeal and the same is dismissed.

(V. G. BISHT, J.)

(PRASANNA B. VARALE, J.)

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