

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL APPEAL NO. 101/2020.

Mr. Jirakhan Mamraj Maliya,
Aged about 32 years, Occupation
Labour, resident of Paraswani,
Tah. Arang, District Raipur (Chattisgarh). ... **APPELLANT.**

VERSUS

The State of Maharashtra,
through P.S.O. Police Station,
Sindewahi, Tq. Sindewahi,
District Chandrapur. ... **RESPONDENT.**

Shri Y.B. Mandpe, Advocate for the Appellant.
Shri S.D. Sirpurkar, A.P.P. for Respondent.

CORAM : VINAY JOSHI, J.

DATE : NOVEMBER 27, 2020.

ORAL JUDGMENT :

Heard.

2. Challenge in this appeal is to the judgment and order of conviction dated 31.01.2020, recorded by the Additional Sessions

Judge, Chandrapur in Sessions Case No.68/2018. The appellant was held guilty for the offence punishable under Sections 450, 376 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for 5 years and to pay fine of Rs.1000/- with default clause for offence punishable under Section 450 of the Indian Penal Code, and sentenced to undergo rigorous imprisonment for 10 years and to pay fine of Rs.2500/- with default clause for the offence punishable under Section 376 of the Indian Penal Code.

3. The prosecution case in nutshell is that the accused has committed forcible sexual intercourse i.e. rape on the prosecutrix aged 70 years. The victim, an old aged lady, lodged report on 28.05.2018 regarding occurrence. It is stated that she was residing alone at her house. On the date of occurrence, around 9 p.m., the accused entered her house, switched off the light, pressed her mouth, undressed her and had forcible sexual intercourse. Since it was late hours, the victim remained at her house only and on the following day in the morning she went to the house of her grand children and informed the things. In turn they took the victim to police station where she lodged the report.

4. On the basis of said report, police carried out investigation. The victim as well as accused were got medically

examined. Necessary samples were collected and clothes were seized for chemical analysis examination. Panchnama of the scene of offence was drawn. After completing all the formalities of investigation, final report came to be filed.

5. In order to prove the guilt of the accused, prosecution has examined in all 9 witnesses. Unfortunate to the prosecution, the old aged victim died after few months of the occurrence and therefore, she was not available for leading evidence. The prosecution evidence consists of two grand children of the victim, panch witnesses, police person, medical officer and some witness in whose presence the victim allegedly gave her statement to the police. The trial Court has returned the finding of guilt primely on the basis of medical evidence and the evidence for PW.4 Rajendra and PW.5 Shekhar, who were grand children of the victim. As per their evidence, on the following day of the occurrence, the victim disclosed the occurrence to them, which is relied by the trial Court.

6. Though the prosecution has examined in all 9 witnesses, admittedly, the evidence of victim is not available, as she died natural death, therefore, it would be advantageous to turn to the medical evidence as the same has become a prime basis for recording conviction.

7. PW.7 Dr. Dipti on medical examination of the victim has stated about the history of rape. She found that there was hymen injury, edges were torn and abrasion were noted over fourchette. All injuries were fresh. Accordingly she has issued a medico legal certificate (Exh.39). On perusal of the medical certificate, it reveals that besides injuries on the private part the Doctor did not find any external injuries on the person of the victim. Though there was hymen injury and edges were torn, however, on query (Exh.38) the Doctor was unable to make any comment about sexual intercourse. Pertinent to note that the victim was old aged i.e. 70 years of age, and therefore, there is possibility of having injury by other reason like scratching etc. Even if it is presumed that the medical evidence suggests forcible intercourse, however, it does not mean that the accused is the author of those injuries, for which reliable evidence is required.

8. The prosecution has examined PW.4 – Rajendra and PW.5 Shekhar, who were grand sons of victim. It is their evidence that on 28.05.2018 in the morning victim came to their house and informed that accused had committed forcible sexual intercourse on earlier night. Certainly their evidence falls in the category of

hearsay nature. No doubt merely because the victim is not available for giving evidence that cannot be a reason to acquit the accused, however, there must be some sort of convincing evidence to establish the nexus of accused with the act of criminality. None of the witnesses had stated that they have either seen the accused while entering into the house of the victim or leaving the place or even seen the accused in the said vicinity at the relevant time.

9. The prosecution has examined P.W.2 Sangeeta and P.W. 3 Meenakshi, who have stated that in their presence the police have recorded statement of the victim. Though they deposed about the contents of statement, that cannot take shape of substantive evidence. Pertinent to not that clothes as well as samples were sent for chemical analyzation. The C.A. report discloses that neither blood nor semen stains were detected on either of the clothes or at vaginal swab or pubic hairs of victim. The prosecution has not examined the police person who has recorded statement of victim. The statement of victim recorded by the police which is termed as FIR, can be used for contradiction or for corroboration. However, in absence of substantive evidence, the conviction cannot be recorded on the basis of corroborative piece of evidence. It is settled criminal law that on mere assumption or surmises, the accused cannot be

convicted. Burden of proof lies on the prosecution is heavy and guilt has to be established beyond reasonable doubt. In absence of victims' evidence, as well as other circumstantial evidence to suggest that the accused has committed the offence, it is not possible to record the finding of guilt.

10. The trial Court erred in recording the conviction by relying on the material which does not bring the prosecution case within the requirement of requisite standard of proof. In view of above, the appeal is allowed. The impugned judgment and order of conviction passed by the District and Sessions Judge, Chandrapur in Sessions Case No. 68/2018 on 31.01.2019, is hereby quashed and set aside. The accused is acquitted of the charge of offence punishable under Sections 450 and 376 of the Indian Penal Code.

The appellant / accused is in jail, he be released forthwith, if not required in any other offence. Fine amount, if deposited, be refunded to accused. Muddemal property be dealt with in accordance with law.

JUDGE

Rgd.