

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.56 OF 2020

Shravankumar @ Rahul Dhanaram ...Appellant
Sharma

Versus

The State of Maharashtra ...Respondent

**WITH
CRIMINAL APPEAL NO.1594 OF 2019**

1) Sumit Sudhir Chaudhary
2) Mrs. Richa Sumit Chaudhary ...Appellants

Versus

The State of Maharashtra ...Respondent

....

Mr. S.V. Marwadi with Mr. N.M. Nadar i/b. M/s. M.D. Mali and Co. for the Appellant in Appeal/56/2020.

Mr. Gaurav Parkar with Mr. Shantaram Kadam for the Appellant in Appeal/1594/2019.

Mr. S.V. Gavand, APP for Respondent -State in both the appeals.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED: 14th DECEMBER, 2021.

ORAL JUDGMENT:-

1. These appeals are directed against judgment dated 23/10/2021 in Sessions Case No.120 of 2016, Raigad at Alibag. The Appellant in Criminal Appeal No.56 of 2020 is accused No.1 and Appellants in Criminal Appeal No.1594 of 2019 are accused Nos.2 and 3

in Sessions Case No.120 of 2016, Raigad-Alibag (hereinafter referred to as 'accused Nos.1, 2 and 3').

2. By the impugned judgment the learned Judge held the accused No.1 guilty of (i) offence punishable under Section 376 of the IPC and sentenced to suffer 10 years rigorous imprisonment with fine of Rs.2,000/- i/d. rigorous imprisonment for one year, (ii) offence punishable under Section 323 of the IPC and sentenced to suffer rigorous imprisonment for three months and fine of Rs.200 i/d rigorous imprisonment for 15 days, (iii) offence punishable under Section 506 of the IPC and sentenced rigorous imprisonment for six months and to pay fine of Rs.500/- i/d rigorous imprisonment for one month. The accused Nos.2 and 3 are held guilty of offence punishable under Section 376 r/w. 34 of the IPC and sentenced to suffer rigorous imprisonment for one year and fine of Rs.500/- i/d. rigorous imprisonment for one month.

3. The case of the prosecution in brief is that on 29/08/2015 the prosecutrix (PW1) had gone for a picnic along with these three accused. The prosecutrix had alleged that on 29/08/2015 at about 3.00 am. while she was sleeping in Room No.204 of Naik Cottage, Nagav, Tal-Alibag, the accused No.1 committed rape on her. The prosecutrix has also alleged

that accused No.1 had slapped her and caused other injuries and also threatened her not to disclose the incident to anyone. The accused Nos.2 and 3 are alleged to have assisted the accused No.1 in the said act.

4. On 30/08/2015 the prosecutrix lodged the FIR at Exhibit 72 at Khargar Police station. The crime was registered by PSI-Bhise of Khargar Police Station. He went to Alibag police station along with the victim and handed over the copy of the FIR and other materials/exhibits alongwith medical report to PW14-PSI Shrikant Pandhare. PW14 took over the investigation. He seized the register of Naik Cottage and other incriminating material, conducted the scene of offence panchanama, forwarded all the exhibits /incriminating material to CFSL Lab, Kalina Mumbai and referred the prosecutrix to KEM Hospital for medical examination. He recorded the statements of the witnesses, arrested the accused, seized their clothes and sent them for medical examination and upon completion of the investigation filed a charge sheet against the accused for offences as stated above.

5. The accused pleaded not guilty to the charge and claimed to be tried. The prosecution in support of its case examined 14 witnesses. Statements of the accused were recorded under Section 313 of Cr.P.C. The

defence was of total denial and of false implication. Upon evaluating the evidence, the learned Judge held that the prosecution has established that the accused No.1 had subjected PW1 to rape and accused Nos.2 and 3 assisted him in committing the said act. Learned Judge also held that the charge of Sections 323 and 506 was proved against accused No.1 and not against accused Nos.2 and 3. Hence, accused Nos.2 and 3 were acquitted of the same and all the three accused were convicted of offence punishable under Section 376 of IPC. Being aggrieved by the judgment accused have filed these appeals.

6. Heard Mr. S.V. Marwadi, learned counsel for accused No.1 in Criminal Appeal No. 56 of 2020, Mr. Gaurav Parkar, learned counsel for accused Nos.2 and 3 in Criminal Appeal No.1594 of 2019 and Mr. S.V. Gavand, learned APP for Respondent -State. I have perused the records and considered the submissions advanced by learned counsel for the respective parties.

7. The case of the prosecution rests mainly on the testimony of prosecutrix (PW1). It is well settled that conviction can be based on the sole testimony of prosecutrix provided the testimony of the prosecutrix is absolutely trustworthy, unblemished and is of sterling quality. In *Rai*

Sandeep alias Deepu v. State (NCT of Delhi), (2012) 8 SCC 21 the Apex

Court has held thus:

"22. In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have correlation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version

should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all 12 other such similar tests to be applied, can it be held that such a witness can be called as a "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

8. Hence, the question for consideration is whether the evidence of the prosecutrix is reliable and whether she has emerged as truthful witness and passed the test of being a "sterling witness". In this regard it is pertinent to note that the evidence of PW1 indicates that she was doing a course in fashion designing in Navi Mumbai and had taken admission in

NIFT college, Kharghar. She was earlier staying in a rental premises in Arham Archate and since 20/08/2015 she was residing as a paying guest with Sushila Choudhari, mother/mother-in-law of the Accused No.2 and accused No.3.

9. PW1-prosecutrix has deposed that on 27/08/2015 she alongwith all the three accused went for a picnic at Alibag. They started from Kharghar at 8.00 to 8.30 p.m and reached Alibag at 11.30 pm. They wandered for sometime in Alibag. They were unable to get any accommodation at Alibag hence they booked two rooms being room Nos.204 and 206 at Naik Cottage Nagav. She has deposed that she and accused No.3 occupied room No.204 whereas accused Nos.1 and 2 occupied Room No.206.

10. On the next morning at about 11.00 a.m. they went to Kashid Beach and returned the same night. She was tired and hence she went to sleep in Room No.204. She left the door of the room open since accused No.3-Richa was to come later. She has deposed that sometime later she felt presence of some person on her and saw accused No.1. He assaulted her and threatened to cause her death. He pressed her mouth with his hands and thereafter removed her clothes and had forcible sexual

intercourse with her. She has deposed that she tried to push him but accused No.1 bit her on her right breast and before leaving the room he threatened to kill her in case she disclosed the incident to anyone.

11. PW1 claims that by about 7.00 am to 8.00 am. she wore her clothes and went to Room No.206. She told the accused Nos.2 and 3 that she wanted to go home. They got ready and left the cottage by 8.00 am to 8.30 am. She has deposed that they first dropped accused No.3-Richa at Panvel and thereafter accused Nos.1 and 2 dropped her at Khargar at about 10.30 am. PW1 has deposed that sometime later she made a phone call to one Rahul. She disclosed the entire incident to him. She also broke a window pane of the bedroom and in the process sustained an injury on her wrist. She claims that Rahul removed the glass from her wrist and in the process he too sustained an injury. She has deposed that Rahul took her to the hospital at Kamothe by vehicle of accused No.2. She made a phone call to accused No.2, his mother and her parents and brother and disclosed the entire incident to them. She has stated that after discussing the matter with her parents, she decided to lodge a report and accordingly she went to Khargar police station and lodged the report at Exhibit-72.

12. The evidence of PW1 reveals that her friend Rahul Raj was the

first person to whom she had disclosed the incident. He had also taken her to the MGM Hospital, Kamothe. For the reasons not known, the investigating officer has not recorded the statement of said Rahul Raj, who was her close friend and who was the first person to know about the incident. The evidence of PW1 indicates that the accused had forcible sexual intercourse with her and had threatened to cause her death. Despite which she did not disclose the incident to accused Nos.2 and 3, who were occupying the next room.

13. The evidence of PW8-Prakash Choudhari, Manager of the said Naik Cottage reveals that the prosecutrix was totally in a normal condition while leaving the cottage. The evidence on record also reveals that even after the incident, the prosecutrix had returned to Khargar along with the accused. Conduct of the prosecutrix in not disclosing the incident to her friends and further leaving the room along with the accused and accompanying him till Khargar is unnatural. Furthermore, she has implicated the accused Nos.2 and 3 for having assisted accused No.1 in committing the crime. Yet she requested accused No.2 to provide his vehicle to go the MGM Hospital at Kamothe. It is also to be noted that though she had been to MGM Hospital along with her friend Rahul, she had not lodged any complaint against the accused in police chowky in

MGM Hospital.

14. On 31/08/2015, upon registration of the crime at Khargar police station, the prosecutrix was referred to Municipal Corporation Hospital at Vashi, for medical examination. She was examined by PW13-Dr. Jaya Srinivasan. PW13 has deposed that the prosecutrix had (i) Bite mark on right breast, red in colour, (ii) Lacerated wound size 3 x ½ cm on left elbow, (iii) Multiple linear abrasions on left wrist-size 4 to 5 cm, (iv) Superficial injury on inner side of upper lip (tooth mark). PW13 has deposed that there was no external injury on her private part. Her hymen was torn. It was an old tear. She collected the blood sample, vaginal swab, fingernail clippings of right hand of the victim and handed over the same to the police.

15. On 31/08/2015, after taking over the investigation PW14-Shrikant Pandhare referred the prosecutrix to KEM Hospital for medical examination. She was examined by PW12-Dr. Hemlata Pandey on 1/9/2015. The evidence of PW12 indicates that there were human bite marks on the right breast as well as on the left breast of the prosecutrix. It is to be noted earlier when prosecutrix was examined by PW13 she had not noticed any bite marks on the left breast of the prosecutrix. The

prosecutrix had claimed that she had broken a glass pane and sustained injuries on her wrist. The medical evidence only indicates that she had only some abrasions on her wrist. The medical evidence does not support the case of rape.

16. It is also to be noted that the prosecutrix has deposed that her friend Rahul Raj had taken her to MGM Hospital at Kamothe. The prosecution has not examined the Doctor, who had allegedly treated the prosecutrix at MGM Hospital even before she was treated by PW12 and 13. She has further admitted that she and Rahul Raj disclosed to the Medical Officer at MGM Hospital that she had sustained injury in an accident. She has admitted that she had not shown the injury mark on her lips and breasts to the Medical Officer at MGM Hospital and that she had not taken any treatment for injury on lips and breasts.

17. The evidence of PW8, who had seen the prosecutrix leaving the hotel does not indicate that he had seen any injury mark on the lips, wrist or on the elbow of the prosecutrix. The medical evidence indicates that injuries on the lips and breasts were fresh. It is to be noted that the prosecutrix was examined more than 24 hours after the incident. In between she was in company with Rahul Raj, who was her close friend.

PW12 and 13 have not given the age of the injury, hence there is no cogent and conclusive evidence to link these injuries with the alleged incident.

18. The CFSL report at Exhibits-118, 141 and 142 also indicate that no semen or blood was detected on the bed sheet seized from Room No.204, nicker and leggings /night pant of the prosecutrix. No semen was detected on the vaginal swabs, pubic hair and that neither blood nor tissue matter was detected in the nail clippings of the prosecutrix. The CFSL report further reveals that no semen or vaginal fluid was detected on the pubic hair of the accused. Similarly, neither blood nor any tissue matter was detected in his nail clippings. The CA report therefore does not help the prosecution in proving the guilt of the accused No.1.

19. Having gone through the entire evidence on record, in my considered view the evidence of the prosecutrix is not reliable. She is not a sterling witness and as such no conviction can be based on the sole testimony of the prosecutrix. The prosecution has failed to prove beyond reasonable doubt that the accused No.1 had committed rape on the prosecutrix and that the accused Nos.2 and 3 had assisted him in committing rape. Hence, the conviction of the accused cannot be sustained.

20. Under the circumstances and in view of discussion supra the appeals are allowed. The impugned judgment dated 23/10/2019 passed by learned Additional Sessions Judge-1, Raigad at Alibag in Sessions Case No.120 of 2016 is quashed and set aside. The Appellants/accused stand acquitted. They be released forthwith, if not required in any other crime.

(SMT. ANUJA PRABHUDESSAI, J.)

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