

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

CRIMINAL APPEAL NO.222 OF 2018

Moreshwar s/o. Bajirao Halami,
Aged about 28 Yrs., Occ. : Cultivation,
R/o. Malewada, Th. – Kurkheda,
Dist. Gadchiroli.
(Presently at Central Prison, Nagpur). **APPELLANT**

----- **VERSUS** -----

State of Maharashtra,
Through P. S. O., P. S. Purada,
Tah. - Kurkheda, Dist. Gadchiroli. **RESPONDENT**

AND

CRIMINAL APPEAL NO.14 OF 2018

Suresh Mansaram Dakhane,
Aged about 30 years, Occ. : Cultivation,
R/o. Malewada, Tah. Kurkheda,
Dist. Gadchiroli. **APPELLANT**

----- **VERSUS** -----

State of Maharashtra,
Through P. S. O., Purada,
Tq. - Kurkheda & Distt. Gadchiroli. **RESPONDENT**

Mr. A. S. Band, Advocate for the Appellant in Cr. Appeal No.222/18.
Mr. A. D. Ramteke, Advocate for the Appellant in Cr. Appeal No.14/18.
Mr. S. M. Ghodeswar, A.P.P. for the Respondent/State in both Appeals.

CORAM : **V. M. DESHPANDE AND
AMIT B. BORKAR, JJ.**

RESERVED ON : **08.09.2021.**
PRONOUNCED ON : **21.09.2021.**

JUDGMENT : [PER: AMIT B. BORKAR, J.]

1. Two persons namely Moreshwar Bajirao Halami and Suresh Mansaram Dakhane were tried by the learned Additional Sessions Judge, Gadchiroli in Special Atrocity Case No.5/2014 for the offences punishable under Sections 376-D, 341, 323 and Section 34 of the Indian Penal Code and Section 325 read with Section 34 of the Indian Penal Code and Sections 3(1)(xii) and 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (in short “the Act of 1989”). Vide judgment and order dated 15.11.2017, the learned Sessions Judge found them guilty of the offences under Sections 376-D, 341, 323 read with Section 34 of the Indian Penal Code, Sections 3(1)(xii) of the Atrocities Act and Section 325 read with 34 of the Indian Penal Code and directed each of them to suffer rigorous imprisonment for 20 years and to pay fine of Rs.10,000/- each.

2. Aggrieved by the said judgment and order, Moreshwar Bajirao Halami filed Criminal Appeal No.222/2018 and Suresh Mansaram Dakhane filed Criminal Appeal No.14/2018 in this Court. Since both these appeals arise out of common factual matrix and the impugned judgment, we are disposing them by one judgment.

3. The prosecution case in short is as under :-

The victim – Jayvanta Sitaram Tumretti (PW-1) alongwith her husband – Sitaram Tumretti (PW-2) were going to Lekurbodi on 24.01.2014. However as they missed the bus scheduled at 3.30 p.m., they were returning to their village on foot. Around 5.30 p.m. when they reached field of Surya Lengure, the accused No.1, a juvenile and another person who was known to the victim by face came from behind and held the victim. They shut her mouth with handkerchief and dragged her to a nearby nullah. Her husband tried to rescue her, but the accused beat him, due to which he fled towards his village. Thereafter, the juvenile held hands of the victim while accused No.1 held her legs. The third person removed her clothes and raped her. Thereafter, accused No.1 and juvenile also raped her. When she shouted, the accused pressed her mouth with hands and beat her with kicks and fists. Therefore, her face was swollen and she became unconscious. After some time, when her husband came along with 4-5 villagers, the accused along with juvenile had left the spot of incident. The victim was thereafter brought to her home. Next day morning when her health deteriorated, she was taken to Government Hospital, Malewada. Dr. Atul Gaurkar (PW-10) attended her. Dr. Gaurkar (PW-10) informed the incident to police on disclosure of the incident to him by the victim. The police immediately came and recorded statement

of victim and thereafter she was referred to the Civil Hospital, Gadchiroli for further treatment. The victim (PW-1) lodged a complaint, which was registered for the offences punishable under Sections 376-D, 341, 325 read with 34 of the Indian Penal Code along with Section 3(1)(xii) and 3(2)(v) of the Act of 1989.

4. The investigation was conducted in usual manner by Sachin Pandkar, S.D.P.O., who visited spot of incident and drawn spot panchnama; recorded statement of witnesses. After completion of the investigation, the Investigating Officer submitted charge-sheet against the accused persons before the learned Judicial Magistrate First Class, Kurkheda. Since the offences registered against the appellants are exclusively triable by the Court of Sessions, the learned Judicial Magistrate First Class committed the case for trial to the Sessions Court under Section 209 of the Code of Criminal Procedure. The appellants were charged for the offences under Sections 376-D, 341, 323 and 325 read with Section 34 of the Indian Penal Code and Sections 3(1)(xii) and 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, to which they pleaded not guilty and claimed to be tried.

5. During the trial, the prosecution in all, examined 12 witnesses, out of which, informant/victim- Jaywanta rendered

ocular account of the incident. The defence of the appellants was denial but they examined no witness to substantiate it. The learned Trial Judge believed the evidence adduced by the prosecution and convicted and sentenced the appellants in the manner stated in paragraph No.1. Hence, this appeal.

6. We have heard Mr. A. S. Band, the learned Counsel for the appellant in Criminal Appeal No.222/2018 and Mr. A. D. Ramteke, the learned Counsel for the appellant in Criminal Appeal No.14/2018 and Mr. S. M. Ghodeswar, the learned Additional Public Prosecutor for the respondents/State.

7. In our view, these appeals deserve to be allowed for the evidence on record does not warrant that it would be safe to act on statement of informant/victim-Jaywanta (PW-1) and statement of her husband (PW-2).

8. In paragraph No.2 we have set out the prosecution story on the basis of recitals contained in the report (Exh.22) of Jaywanta (PW-1) and her statement. In short she stated in the evidence that on the date of incident, when they had to go to her parental home at Lekurbodi, they did not get any bus till 4.00 p.m. and therefore, they decided to return to their village. On the way when they reached to the filed of Surya Lengure, both the accused

came from behind and held hands of victim. One juvenile in conflict was also with them. They dragged her to nullah, which was about to 20 to 25 ft. away. When her husband tried to rescue her, the accused No.1 beat him with fists and blow. Her husband then ran towards their village. The juvenile held her hand and accused No.1 held her legs and they committed rape on her. She therefore fell unconscious. When her husband returned to the spot along with Dayaram Margaye (PW-5), Dhaniram Kowase (PW-4) and her daughter Vandana Sitaram Tumretti (PW-3), her daughter gave her water to drink and she put on her clothes. Next day, the victim was taken to Malewada Hospital. Her face was badly swollen due to beating and she could not take meals. When she disclosed incident to the Medical Officer, he informed police and police recorded her statement.

9. It is pertinent to point out that during her cross-examination, she admitted that one day before the incident, her husband had taken her to a doctor at Malewada for treatment as she had swelling on her face, chest and stomach. This admission assumes importance in the light of admission of Dhaniram Rama Kowachi (PW-4) and her daughter Vandana Sitaram Tumretti (PW-3), who in his cross-examination stated that the victim and her husband were not on cordial terms and there were frequent

disputes between them. Dhaniram (PW-4) stated that husband of the victim used to beat her. The victim in her cross-examination admitted that Dinkar and Shakun had asked her husband to take victim to her home as she was over drunk at the time of returning home on the day of incident. These admission raises strong possibility that the husband of the victim had beaten her one day prior to the incident and therefore, the victim had visited doctor with swelling on her face, chest and stomach.

10. The doubt about credibility of testimony of the victim that the appellants raped her is further strengthened by the fact that the victim on her own did not file complaint with the police, but when she went to Malewada Hospital on the next day, Dr. Atul Gaurkar (PW-10) informed the police about the incident and thereafter, the victim lodged report with police. We find victim's conduct in not informing the police about the incident and lodging report only after doctor informed the police about the incident to be very unnatural.

11. Another reason which throw a clouds of doubt on her claim of appellants committing rape on her, is the fact that there was no mud on the clothes of the victim and accused, particularly when it is the case of the prosecution that the incident occurred near nullah, where the land was filled with mud.

12. As per the case of the prosecution, the spot panchnama was conducted between 15.30 to 16.00 on 25.01.2014. The victim (PW-1) stated in her evidence that she was admitted to Government Hospital at Malewada at 9.30 a.m. on 25.01.2014. Mulahiza Form (Exh.53) shows that the victim was referred to the General Hospital, Gadchiroli for further medical examination at 10.00 a.m on 25.01.2014. It has come on record that distance between Malewada and Gadchiroli is about 80 Kilometer. The victim was admitted in General Hospital, Gadchiroli on the same day i.e. on 25.01.2014, which is clear from the evidence of Madhuri Pravin Kilnake (PW-11). The case of the prosecution is that the spot of incident was shown by the victim herself. If the victim was referred to the Civil Hospital, Gadchiroli at 10.00 a.m. on 25.01.2014 and was admitted in the said Hospital on 25.01.2014, the spot panchnama at the pointing out the spot by the victim becomes doubtful. Once the evidentiary value of the spot panchnama extinguishes, in our judgment, in the facts of the present case, the failure of the prosecution to prove the place of incident knocks out very bottom of the prosecution case. Once the Court feels convinced that the incident did not take place at the purported place of incident, the evidence of witnesses, who deposed that the incident did take place there, is obviously rendered unreliable. In our view, in some cases, and the present case is certainly one of them, where failure to prove

place of incident, can be a sufficient ground to throw out the prosecution case.

13. Another circumstance which falsifies the testimony of victim that the incident occurred around 5.30 p.m. on 24.01.2014 is that the victim had told Dr. Gaurkar that some one assaulted her on 24.01.2014 at about 7.30 a.m as is evident from information given by Dr. Atul Gaurkar (PW-10) to Investigating Officer, Police Station, Malewada (Exh.51). In our judgment had the incident really occurred in the evening at 5.30 p.m., the victim would not have told Dr. Gaurkar (PW-10) that some one assaulted her at 7.30 a.m. on 24.01.2014.

14. The unnatural conduct of Jaywanta (PW-1) victim in not informing police about incident and giving her statement only after the information given by Dr. Gaurkar (PW-10); disclosing Dr. Gaurkar (PW-10) that someone assaulted her at about 7.30 a.m. on 24.01.2014; absence of mud on the clothes of victim and accused; serious doubt about spot panchnama prepared at 15.30 p.m. on 25.01.2014 when the victim was admitted to Hospital at Gadchiroli; visiting doctor one day prior to the incident with swollen face, chest and stomach, renders testimony of victim unsafe to accept and accordingly we reject it.

15. Once we do not accept the testimony of the victim - Jaywanta (PW-1), it follows as a logical imperative that the evidence of Sitaram Kolya Tumretti (PW-2)- husband and Vandana Sitaram Tumretti (PW-3) – daughter of the victim who were present before and after the incident of rape, cannot be accepted.

16. Apart from the aforesaid infirmities, it needs to be noted that the victim had not named Suresh – accused No.2 in her First Information Report though she was knowing about him. There is no evidence in the form of chemical analysis, which would implicate the appellants in the crime against them.

17. For the said reasons, in our view, it would not be safe to sustain the conviction of the appellants on the statements of victim - Jaywanta (PW-1), Sitaram (PW-2) and Vandana (PW-3). We feel it is a case wherein the appellants deserve the benefit of doubt.

18. In the result, we pass following order :

- i] The Criminal Appeal No.222/2018 and Criminal Appeal No.14/2018 are allowed.
- ii] The conviction and sentence of the appellants for the offences punishable under Sections 376-D, 341, 323

read with Section 34 of the Indian Penal Code, Sections 3(1)(xii) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 and Section 325 read with Section 34 of the Indian Penal Code are quashed and set aside.

- iii] The appellant Moreshwar Bajirao Halami and Suresh Mansaram Dakhane are acquitted of charge under Sections 376-D, 341, 323 read with Section 34 of the Indian Penal Code, Sections 3(1)(xii) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 and Section 325 read with Section 34 of the Indian Penal Code.
- iv] Moreshwar Bajirao Halami being in jail shall be set at liberty forthwith, if not required in any other crime.
- v] The appeals are allowed in the above terms. Pending application(s), if any, stand(s) disposed of.

JUDGE

JUDGE