

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

CRIMINAL APPEAL NO. 79 OF 2018

Nitin Pritam Bairisal Aged about 28 years, Occu. Labour, R/o Dhobi Chawl, TB Ward, Nagpur	}	.. <u>APPELLANT</u>
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Versus

State of Maharashtra, Through Police Station Officer, Imamwada Police Station, Nagpur	}	.. <u>RESPONDENT</u>
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Mr. M.N. Ali, Advocate for appellant
Mr. T.A. Mirza, A.P.P for respondent

WITH

CRIMINAL APPEAL NO. 38 OF 2019

Ganesh S/o Ramdas Satpute Aged 25 years, Occ. Labour, R/o T.B. Ward Servant Quarters, Nagpur (Presently Central Prison At Nagpur)	}	.. <u>APPELLANT</u>
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Versus

The State of Maharashtra Through A.C.P Ajni Division, Police Station, Imamwada, Nagpur	}	.. <u>RESPONDENT</u>
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Mr. C.R. Thakur, Advocate for appellant
Mr. T.A. Mirza, A.P.P for respondent

WITH

CRIMINAL APPEAL NO. 419 OF 2018

Karunanand S/o Ramesh Moon,
Aged about 27 years, Occ. Labour,
R/o Behind Ashok Buddha Vihar, Nagpur
(Presently Central Prison At Nagpur) } .. APPELLANT

Versus

The State of Maharashtra
Through A.C.P. Ajni Division, Police
Station Imamwada, Nagpur } .. RESPONDENT

Mr. C.R. Thakur, Advocate for appellant
Mr. T.A. Mirza, A.P.P for respondent

WITH

CRIMINAL APPEAL NO. 323 OF 2021

Rohit s/o Sanjay Tambe
Aged about 25 years,
Occupation : Labour,
R/o T.B. Ward Quarter No. 6/11,
District : Nagpur } .. APPELLANT

Versus

State of Maharashtra
Through ACP Ajni Division, Imamwada
Police Station, Nagpur } .. RESPONDENT

Mr. P.W. Mirza, Advocate appointed for appellant
Mr. T.A. Mirza, A.P.P for respondent

CORAM: V.M. DESHPANDE, &
AMIT B. BORKAR, JJ.

DATE : 17/09/2021

JUDGMENT : (Per : Amit B. Borkar, J.)

Four persons namely Ganesh S/o Ramdas Satpute, Karunanand S/o Ramesh Moon, Rohit S/o Sanjay Tambe and Nitin Pritam Bairisal, were tried by the Special Judge, M.C.O.C., Nagpur for offences punishable under Sections 376(2)(g), 377, 341, 323, 394, 504 and 506-B read with Section 34 of the Indian Penal Code (IPC), Section 3 punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (POSCO Act) and Section 3 (1)(i) of the Maharashtra Control of Organized Crime Act (M.C.O.C. Act). Vide a judgment and order dated 27/12/2017, the learned Special Judge (M.C.O.C.) and Additional Sessions Judge – 5, Nagpur convicted and sentenced them in the manner stated hereinafter;

- i. All four accused are sentenced to undergo rigorous imprisonment for remainder of their natural life and to pay fine of Rs.10,000/-, in default to suffer simple imprisonment for one year for offences under Section 376(D) of IPC.
- ii. For offence punishable under Section 4 of the POSCO Act, all four were sentenced to undergo rigorous imprisonment

for life and to pay fine of Rs.10,000/-, in default to undergo simple imprisonment for one year;

iii. For offence under Section 506-B of IPC, all four were directed to undergo rigorous imprisonment for three years and to pay fine of Rs.1000/- and in default to suffer simple imprisonment for one month;

iv. Under Section 341 of IPC, accused No.1 to 3 were directed to undergo simple imprisonment for one month and to pay fine of Rs.1000/- and in default to suffer simple imprisonment for 15 days

v. Under Section 323 of IPC, accused No.1 to 3 were directed to undergo simple imprisonment for six months and to pay fine of Rs.1000/- and in default to suffer simple imprisonment for one month.

The Sessions Court acquitted them for offences under Sections 377, 504, 394 read with Section 34 of the IPC and also under Sections 3 and 3(4) of the M.C.O.C Act. Accused No.4 Nitin was acquitted for offences punishable under Sections 341 and 323 of the IPC.

2. Aggrieved by the said judgment and order appellants - Nitin Pritam Bairisal filed Criminal Appeal No.79/2018, Karunanand S/o Ramesh Moon filed Criminal Appeal No. 419/2018, Ganesh S/o Ramdas Satpute filed Criminal Appeal No. 38/2019 and Rohit S/o Sanjay Tambe filed Criminal Appeal No.323/2021 in this Court. Since all 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 / informant along with her friend PW 2, who was on his bicycle were returning from her work towards her house via T.B. Ward on 24/05/2015. The accused persons intercepted them near T.B. Ward. The accused persons beat the victim and her friend PW 2, with the result PW 2 left the spot. After PW 2 left the spot, the accused persons took the informant / victim in the shrubs near the rivulets and forcibly committed sexual intercourse as well as carnal intercourse with the informant / victim. The accused persons threatened the victim not to disclose the incident to anybody else they will kill her

and her parents. The accused persons dropped her at some distance and fled away from the spot. The victim was afraid. The victim reached her house at around 11:00 to 11:30 p.m. She disclosed the incident to her mother. Her parents along with the victim went to Police Station Imamwada and narrated the incident to police. The victim was sent for medical examination after her report was recorded. The victim was medically examined by Dr. Pratik Sahdeo Gilbe along with Dr. Ashwin Sontakke on 25/05/2015 at 7:30 a.m. They found following injuries on the body of the victim.

“i] Crecentric abrasion over dorsum of left hand at the base of thumb of size 1 Cm. X 0.1 Cm. reddish in colour, swelling present, simple. The injuries were fresh and age was between 8 to 24 hours.

ii] Linear abrasion over left waist on lower outer quadrant oblique ad-measuring 4 X 0.2 CM., Reddish in colour, simple, fresh and age of injury between 8 to 24 hours.

iii] Abrasion over left lumbar region, ad-measuring 2 X 1.5 Cm. Reddish in colour, swelling present, simple, fresh and age of injury was between 8 to 24 hours.

On local examination, pubic hairs sparse and stained with blood clots. Labai majora and minora were normal with blood clot, adherent. Clitoris normal. Vagina was reddish inflamed with blood clots adherent. Hymen present, edges inflamed, bleeding present, oedema present. Position of hymen tears at 12,3 and 6 ‘O’

clock position. On P.S. examination vagina reddish and inflamed, cervix normal, bleeding present, oral cavity normal, victim complained of pain in neck region.”

The Duty Officer sent the police party for search of the accused persons. The police brought three accused persons. The police seized and sealed clothes of the victim found on her person. Since the victim was aged about 17 years at the time of the incident, offence under Section 3 punishable under Section 4 of the POSCO Act was also registered along with offences under Sections 376(2)(g), 323, 504, 506-B of the IPC were registered.

4. The investigating agency while carrying out investigation found that the accused No.1 Ganesh had formed organized crime syndicate and had committed various offences for pecuniary gain and more than one charge-sheet had been filed against him and other members of the gang within period of 10 years and therefore, offences under Sections 3(1)(i) of the M.C.O.C. Act was also registered. Shital Hirode (PW 10) carried out part of the investigation and Dhanaji s/o Bhagwan Shingade

(PW12) carried out remaining part of the investigation. The Investigating Officer after completion of investigation submitted charge-sheet.

5. The learned Special Judge framed charges on the grounds stated in paragraph No.1 of the judgment. The accused pleaded not guilty to the charges and claimed to be tried.

6. In the trial Court, the prosecution examined as many as 18 witnesses. In defence, no witness was examined. The learned Trial Judge believed the evidence adduced by the prosecution and convicted and sentenced them in the manner stated in paragraph No.1 above.

7. Hence, these appeals.

8. We have heard Mr. M.N. Ali, learned Advocate for the appellant in Criminal Appeal No. 79/2018, Mr. C.R. Thakur, learned Advocate for appellant in Criminal Appeal No. 38/2019, Mr. Parwez Mirza, learned Advocate appointed for the appellant

in Criminal Appeal No. 323/2021 and Mr. C.R. Thakur, learned Advocate for appellant in Criminal Appeal No. 419/2018, Mr. T.A. Mirza, learned Additional Public Prosecutor for the respondent / State in all appeals.

9. We have gone through the depositions of prosecution witnesses; material exhibits tendered and proved by the prosecution; statements of appellants recorded under Section 313 of the Code of Criminal Procedure (Cr.P.C.) and the impugned judgment and order and after giving our due deliberation to the matter, we are constrained to observe that we do not find any substance in these appeals.

10. The crucial evidence in the instant case is of the victim (identity withheld) (PW1). In short, she stated that on the date of the incident at about 7:30 p.m. when she was returning to her house, she met her friend PW 2 (identity withheld) at Krida Chowk, who was on bicycle. The victim along with PW 2 started proceeding towards her house. While passing T.B. Ward three boys intercepted them. She had given

description and clothing of all three accused persons. She identified the accused persons, who intercepted them. They caused PW 2 to leave the spot and after PW 2 left the spot, they took her in shrubs near rivulets. The accused No.1 Ganesh Satpute removed her clothes. She told Ganesh Satpute that she was having menstrual cycle by requesting her not to perform immoral act. The accused No.1 beat her and put her finger in her private part and committed forcible sexual intercourse with her. She stated that thereafter accused No.3 Rohit Tambe had forcible sexual intercourse with her on the point of knife. She stated that thereafter accused No.2 Karunanand also performed forcible sexual intercourse with her and thereafter accused No.4 Nitin Bairisal developed forcible sexual intercourse and unnatural carnal intercourse with her.

11. The victim was thereafter dropped at some distance by the accused persons and threatened her not to disclose the incident to anybody else they will kill her and her parents. The victim reached her house at around 11:00 to 11:30 p.m. and narrated the incident to her mother.

12. The victim along with her mother went to Police Station and narrated the incident. After the victim gave description of the three accused persons, the Duty Officer sent police party for taking search of accused persons and arrested three accused while recording of the report was in progress ,.

13. We have gone through the statement of the victim (PW1) and we find it inspire confidence. Her evidence shows that she identified the appellants on the basis of their physical description and clothings worn by them. In her cross-examination, suggestions were given about wrong identification of the accused persons and absence of light at the time of the incident, but, the defence was not successful in shattering the testimony of victim (PW1). She stated that she had seen faces of the accused persons in the light of DJ and on the night of the incident it was full moon day. Though there are minor omission about the flash light of DJ, but, the said omission will not affect the core of the case of the prosecution as the statement regarding full moon day and light of DJ were by way of

explanations.

14. It should be borne in mind that if a witness has no reason to falsely implicate the accused, the Court is very slow in rejecting his testimony. The reason is that normally human experience is that in absence of any rancor or ill-will a person will not falsely implicate another.

15. It is significant to point out that the victim (PW1) had no rancor or animosity against the appellants and in our view, in absence of the same should not have falsely implicated the appellants.

16. Corroboration to the testimony of the victim (PW1) comes from hidden witness (PW2), who in his testimony corroborated the statement of PW 1, till he left the spot of incident before the incident of actual rape occurred. The description and clothings of accused persons and their bodily description is corroborated by PW 2. He also corroborated DJ music going on in the nearby area. He stated that in order to

save himself he fled the spot of the incident. In his cross-examination, the defence tried to make capital out of not reporting the incident, but, PW 2 explained his act of not reporting the incident by stating that he was feeling giddy and was afraid and therefore, he did not lodge the report. On overall consideration of his evidence, we are of the view that the testimony of PW 2 inspires confidence.

17. Again corroboration is forthcoming to the statement of the prosecutrix by the injuries of the victim. As mentioned earlier on 25/05/2015, the victim was medically examined and Dr. Pratik Sahdeo Gilbe (PW 3) along with Dr. Ashwin Sontakke found injuries mentioned above on the person of the victim.

18. The corroboration is lent to the evidence of the victim by prompt FIR of the incident which was lodged by the victim at 00:10 AM on 25/05/2015. The incident occurred between 20:30 to 22:30 on 24/05/2015. The FIR appears to be lodged within three hours giving description of the accused. It is pertinent to note that three accused persons were

apprehended while the process of recording of FIR was lodged. The Criminal Courts attached great importance to lodging of prompt FIR. A prompt FIR largely eliminates chances of improvement and impleadments in the prosecution story.

19. Again clinching corroboration is forthcoming by the fact that DNA of accused No.4 Nitin and accused No.3 Rohit. The prosecution examined Vaishali Mahajan (PW 15), who is Assistant Chemical Analyzer, who verified the seal over the parcels received by her and found them to be intact. She stated that she carried out Short Tandem Repeat (S.T.R.) Geno Typing and get examined DNA profile of the victim and the accused persons. She found DNA profile of blood stains of the victim with DNA profile of accused No.3 and 4.

20. In the case of **Mukesh and Another Vs. State (NCT of Delhi) and others** reported in **(2017) 6 SCC 1**, the Hon'ble Apex Court has held that the DNA report deserves to be accepted unless it is absolutely dented; for non-acceptance of the same, it has to be established that there had been no quality or quality

assurance. If the sampling is proper and if there is no evidence as to tampering of samples DNA test reports has to be accepted. It has been further held that the identification of DNA generic fingerprint is 100% precise and accurate. DNA report and the findings thereon being scientifically accurate, established clear link involving the accused persons in the incident.

21. In the present case, though it is submission of Mr. M.N. Ali, Advocate for the appellant that kit was not used for collection of DNA, the same by itself does not lead to the conclusion that there was no quality control. It needs to be noted that there is no evidence or admission in the cross-examination to suggest that report was dented or there was no quality control or quality assurance. The defence has given suggestion to Vaishali Mahajan (PW15) about the sanctity and better result of samples, but, suggestions given are general suggestions. There is no admission by any witness which will indicate that there was no quality control or quality assurance. There is no evidence of tampering of samples. Therefore, in our opinion, the prosecution has clearly established link between

the accused persons and the victim.

22. The corroboration to the testimony of the victim is also lent by the report of the Chemical Analyst, who found human blood on the clothes of the accused No.4 Nitin. The prosecution has duly proved sealing of clothes from the evidence of Shital Hirode (PW 10).

23. There is no requirement in law that corroboration can only be by plurality of evidence for that would be rendering not the provisions of Section 134 of the Indian Evidence Act, which rendered conviction on the testimony of single witness permissibly. It can also be from circumstances, as observed in paragraph No.12 of the Hon'ble Apex Court in the of quoted judgment of **Vadivelu Thevar Vs. State of Madras** reported in **AIR 1957 SC 614**.

24. The learned Advocate for the appellants submitted that this is the case of mistaken identity as there is failure on the part of the investigating agency to hold test identification

parade and therefore, the appellants are entitled to the benefit of doubt. It is well settled that evidence of mere test identification of accused at the trial for the first time is from its very nature inherently of a weak character. The purpose of prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to general law for corroboration of sworn testimony of witnesses in the Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when the Court is impressed by a particular witness on whose testimony it can rely, without such corroboration. But, failure to hold a test identification parade would not make inadmissible, the evidence of identification in Court. The identification parade belong to the stage of investigation and there is no provision in the Code of Criminal Procedure, which obliges the investigating agency to hold or confers a right upon accused to claim a test identification parade. The test identification parade do not constitute substantive evidence. The substantive evidence is the evidence

of identification in Court. In the instant case, the victim had sufficient opportunity to observe features of the appellants, who raped her one after another. After the rape was committed she was threatened and intimidated by the appellants. The description of the identity of the appellants was provided by the victim to the police within three hours of the incident while lodging First Information Report. It was full moon night. She had a reason to remember their faces as they had committed a heinous offence and put her to shame. In fact, on account of her traumatic and tragic experience the faces and identities of the appellants must have imprinted on her memory and there was no chance of her making mistake about their identity. The victim appears to be witness on whom implicit reliance can be placed. There is no reason why should she falsely identify the appellants as perpetrators of crime if they had not actually committed the offence.

25. The evidence of Ujwala Andhare (PW8), the birth certificate (Exh.95) entries in school register stating birth of victim of 13/12/1998 sufficiently proves that the victim was

child within the meaning of Section 2 (1)(d) of the POSCO Act at the time of incident.

26. While ordinarily there is presumption of innocence in a relation to the accused, Section 29 of the POSCO Act creates a presumption of guilt on the part of the accused if he is prosecuted for committing, abating or attempting certain offences under the said Act. Section 29 of the said Act reads as under :

“29. Presumption as to certain offences. - Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3,5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.”

27. The question when presumption of guilt gets triggered has been addressed, by various High Courts in POSCO Act, holding that such presumption comes into play only when the prosecution established facts that form basis of such presumption. In our view, in the instant case, the prosecution has been able to establish foundational facts to trigger presumption under Section 29 of the said Act.

28. Considering evidence of victim (PW1), hidden witness (PW 2), PW4, Vaishali Mahajan (PW15), Shital Hirode (PW 10), DNA reports and CA reports, the prosecution has proved beyond doubt that the appellants have committed offences under Sections 376(D), 506-B, 341, 323 read with Section 34 of the Indian Penal Code and Section 4 of the POSCO Act. So far as sentences of the appellants are concerned, the nature of act committed by the appellants and the nature in which they committed the same calls for deterrent sentence and the learned Trial Court was justified in imposing imprisonment for life for remainder of their life.

29. We therefore, feel that the sentences of the appellants are not excessive. At any rate, they have been directed to run concurrently with their major sentences.

30. For the said reasons, we confirm the conviction and the sentences of the appellants on all counts and dismissed these appeals.

31. The appellants are in jail and shall remain there till they served out their sentences.

32. We appreciate the efforts taken by Mr. Parvez Mirza, learned counsel who was appointed to represent the appellant in Criminal Appeal No. 323/2021. He graciously submitted before the Court that he will not be accepting the professional fees for drafting and conducting the appeal. We appreciate this gesture of Mr. Parvez Mirza.

Rule is discharged.

JUDGE

JUDGE

MP Deshpande