

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

CRIMINAL APPEAL NO. 608 OF 2010

Ashok s/o Bhagwanji Sable,
Aged about 51 years, Occu: Labourer,
R/o Rohana, Khaparkheda, Tah. Saoner,
District – Nagpur.

.... **APPELLANT**

// VERSUS //

The State of Maharashtra,
Through Police Station Khaparkheda,
District- Nagpur.

.... **RESPONDENT**

Shri R.S. Thakur, Advocate for the Appellant
Ms Shamshi Haider, Additional Public Prosecutor for the Respondent-State.

CORAM : N.B. SURYAWANSHI, J.
DATED : 15.02.2021.

ORAL JUDGMENT :

1. The appellant is convicted in Sessions Trial No. 63/2010 by the Sessions Judge, Nagpur under Section 376 (1) of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for seven years and to pay a fine of Rs. 2,000/- (Rs. Two Thousand only), in default of payment of fine, to suffer further simple imprisonment for three months, and under Section

452 of the Indian Penal Code, he is sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs. 1,000/- (Rs. One Thousand only), in default of payment of fine, to suffer further simple imprisonment for one month. By this appeal, he has challenged the conviction.

2. The prosecution case, in short, is that the prosecutrix is a married lady aged 22 years staying with her parents at village Rohana as her husband had deserted her. She had one year old son who was staying with her husband. The accused was residing adjoining to the house of the prosecutrix. On 17.11.2009, the parents and grandmother of the prosecutrix had gone to hospital at Nagpur. Her brother had gone for work. On that day at about 17.30 hours, the prosecutrix and her younger sister were at home. The younger sister of the prosecutrix was studying in front of her house. It was evening time, the prosecutrix was alone in the house. At that time, the accused entered her house and ravished her. The younger sister saw the incident and raised hue and cry, because of which, the neighbours gathered. The maternal uncle of the prosecutrix was residing in front of the house of the

prosecutrix took her to the Police Station and lodged a report, on the basis of which, Crime No. 147/2009 for offences under Sections 376 and 452 of the Indian Penal Code was registered at Khaparkheda Police Station, on 18.11. 2009. On the same day, the accused was arrested. The prosecutrix was sent for medical examination. After conducting the investigation, a chargesheet came to be filed.

3. Charge under Sections 376 and 452 of the Indian Penal Code was framed against the accused by the learned Sessions Court. He denied the charge and claimed to be innocent. The learned Trial Court, after recording the evidence, convicted the appellant. Hence the present appeal.

4. The learned Advocate for the appellant submitted that the prosecutrix was a consenting party. The evidence on record clearly spells out the consent on the part of the prosecutrix. The medical evidence does not support the prosecution case. There is no corroboration to the testimony of the prosecutrix. He therefore submitted that the learned Trial Court erred in convicting the

appellant. He submitted that the appeal may be allowed by acquitting the appellant.

5. Per contra the learned Additional Public Prosecutor submitted that the learned Trial Court was justified in convicting the appellant by relying on the testimony of the prosecutrix. The evidence of PW-2 corroborates the testimony of the prosecutrix. According to her, the learned Trial Court has properly appreciated the evidence and has rightly convicted the appellant. She therefore submitted that the appeal may be dismissed.

In support of her arguments, she relied upon the ratio in **State of U.P .vs. Chhoteylal, reported in AIR 2011 SC 697.**

6. Heard learned advocate for the Appellant and the learned Additional Public Prosecutor for the Respondent-State at length. Perused the record.

7. The prosecution has examined four witnesses in support of its case. PW-1, the prosecutrix, described the incident in the following words :

“The accused came in the house in a drinking condition. He embraced me. He fell me down. He lifted my clothes and removed my knicker and he had done sexual intercourse with me. At the same time, my sister came with her school bag and shouted. She called the neighbours. The accused went away.”

8. On a Court question as to what clothes she was wearing at the time of incident, she answered that she was wearing Saree of brown colour, Peticoat, Blouse and Black knicker. She further stated that her peticoat was torn due to the forceful intercourse.

During the cross-examination, she admitted that before the incident, the accused and her family were on visiting terms. At the time of the incident, her sister PW-2 was sitting at a close distance outside the house. She also admitted that at the time of incident, PW-2 went to her maternal uncle's house and she did not shout publicly. She further admitted that till the police came, the people in the locality were not knowing about the incident. Her sister PW-2 scolded her as to why the accused came and sat with

her. She also admitted that “it is correct to say that had Ankita not shouted, the incident would not have been disclosed. It is correct to say that I went to the Police Station at the instance of my maternal uncle. It is correct to say that I was thinking that without any reason, I was taken to the Police Station and from there to the hospital.”

On being questioned by the Court as to whether she was supporting the incident, she answered no, she was not supporting. She was pushing him towards the cupboard, he again caught her. When she was asked whether she was not shouting, she answered that she was telling the appellant to go to his house.

9. PW-2 Ankita is the younger sister of the prosecutrix. She deposed that the prosecutrix was alone in the house at the time of the incident and she was studying on the road outside the house. She came inside for taking her book. At that time, she saw the accused lying on the body of her sister. She shouted and neighbours gathered. Thereafter, her maternal uncle came and took the prosecutrix to the Police Station.

In the cross-examination, she admitted that the door of the house was open as usual. She also admitted that she told her maternal aunt that she saw the accused and the prosecutrix sleeping together. She also admitted that she was annoyed with the prosecutrix and the accused. She further admitted that police did not enquire with her on the day of the incident. She gave the names of the persons who gathered due to her shouts.

10. PW-4 is the maternal uncle of the prosecutrix. He deposed that he had gone to the market on the day of the incident. When he came back, he saw the prosecutrix crying. He asked the reason and she told him that accused raped her by pressing her mouth. At the instance of the prosecutrix, he gave a report (FIR Exh.10).

In his cross-examination, omission that he saw the prosecutrix crying and she told him for giving report, was brought on record. This omission was proved in the evidence of investigating officer PW-6.

11. The medical report Exhibit-19 states that there was no evidence of external injury over the body of the prosecutrix. It further states that it could not be commented that forcible sexual intercourse occurred or not. The report further certifies that there was no evidence of any injury over the body or the genitals of the prosecutrix. It could not be commented that whether semen was present inside the vagina or not. The samples were collected at the time of medical examination.

12. Exhibit-13 and Exhibit-14 are Chemical Analysers' reports. Exhibit-13 is the report of the knicker of the prosecutrix, no semen was detected on it. The blood group of the blood sample could not be determined, as the results were inconclusive. Exhibit-14 is the report of the swabs taken from the private part of the prosecutrix. Neither blood nor tissue matter was detected, so also no semen nor spermatozoa was detected in those samples.

13. On evaluation of the evidence of the prosecutrix, it is clear that the prosecutrix was a consenting party. She has categorically admitted in cross-examination that if Ankita had not

shouted, the incident would not have been disclosed. She also admitted that she went to the Police Station at the instance of her maternal uncle. Her further admission that it was correct to say that she was thinking that without any reason, she was taken to the Police Station and from there to the hospital and her admission that till the police came, the people in the locality were not knowing about the incident also shows that she was a consenting party. When she was asked, as to whether, she was not shouting, she replied that she was telling the accused to go to his house. All these admissions invariably indicate that the prosecutrix was a consenting party. It appears that only when she was caught by her younger sister in the act, she went and lodged a report at the instance of her maternal uncle.

14. The medical evidence also does not support the prosecution case. There were no injury marks on the body and private parts of the prosecutrix. The medical evidence could not comment, whether the forcible sexual intercourse had occurred or not. The chemical analysers' reports also do not support the

prosecution case, as no semen was detected on the knicker or in the vaginal swab of the prosecutrix.

15. Prosecutrix, PW-2 and PW-4 contradict each other on material particulars. It appears from the evidence of the prosecution that only because sister of the prosecutrix caught her, her maternal uncle forced her to lodge the report. Admittedly, at the time of incident, the door of the house was open. The prosecutrix had an opportunity to raise hue and cry, which she has not done. All these aspects invariably indicate that she was a consenting party.

16. The learned Trial Court has believed the sole testimony of the prosecutrix while convicting the appellant. The learned Trial Court has ignored the admissions given by the prosecutrix during the cross-examination as well as the medical evidence and the chemical analysers reports. The impugned conviction recorded by the learned Trial Court is therefore unsustainable in the facts of the present case.

17. The learned Additional Public Prosecutor has relied upon the ratio in **Chhoteylal** (supra) wherein, the prosecutrix was

less than 18 years of age at the time of incident. She was removed from the lawful custody of her brother. She was taken to a different villages by two adult members under the threats and was kept in a rented room for many days, where the accused no.1 had forcible sexual intercourse with her. She was threatened. In those facts, the Honourable Supreme Court refused to accept the defence of consent.

18. The learned advocate for the appellant has placed reliance in the case of **Bhagwan Charan Mate .vs. State of Maharashtra, 2006 ALL MR (CRI) 1366**, wherein this Court, on the basis of doctors opinion, held that no sexual intercourse was committed, since there were no injuries on the person and private part of the prosecutrix and there was no corroboration to her testimony. This ratio, supports the case of the appellant.

19. For the aforestated reasons, the conviction recorded by the learned Trial Court is unsustainable in law and in the facts of the case. The appeal deserves to be allowed. Hence the following order :

ORDER

1. Criminal Appeal No. 608/2010 is **allowed**.
2. Impugned judgement and order of conviction passed by the learned Session Judge, Nagpur in Sessions Trial No.63/2010 thereby convicting the appellant under Section 376 (1) and Section 452 of the Indian Penal Code is hereby quashed and set aside.
3. The appellant is acquitted of all the charges levelled against him.
4. His bail bonds stand cancelled.
5. Fine amount, if any, deposited by the appellant be refunded to him.
6. The appellant shall furnish bail bond in the sum of ₹ 15,000/- with one or two sureties in the like amount before the Trial Court, in terms of Section 437-A of the Code of Criminal Procedure, 1973.

(N. B. SURYAWANSHI, J.)