

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD**

**CRIMINAL APPEAL NO. 652 OF 2015**

Santosh @ Bhurya Baliram Koli

..APPELLANT

VERSUS

State of Maharashtra and Another

..RESPONDENTS

....  
Mr. P.S. Paranjape, Advocate for appellant

Smt. D.S. Jape, A.P.P. for respondent no.1 – State

Mr. R.M. Deshmukh, Advocate for respondent no.2 (appointed through Legal Aid)

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**CORAM : R.G. AVACHAT, J.**

**DATED : 01<sup>st</sup> MARCH, 2022**

**PER COURT :**

1. Heard.

2. The challenge in this appeal is to an order dated 30<sup>th</sup> July, 2015 passed by the learned Additional Sessions Judge, Dhule in Sessions Case No. 74 of 2013. Vide the impugned order, the appellant herein was convicted for the offences punishable under Sections 376(2)(g) and 323 of the Indian Penal Code, and therefore, sentenced to suffer rigorous imprisonment for ten years and fine of Rs.5,000/- and sentence to suffer simple imprisonment for three months and fine of Rs.1,000/- respectively. In default of payment of fine, he has been directed to undergo simple imprisonment for two months and seven days respectively.

3. The facts giving rise to the present appeal are as under :-

The prosecutrix (P.W.4) was nineteen years of age at the relevant time. She hailed from village Buranpada, Tq. Dhadgaon, Dist. Nandurbar. For about seven days next before 02<sup>nd</sup> January, 2013 she had been to Dondaicha alongwith her husband - Mona (P.W.6) for labour work. On 30<sup>th</sup> December, 2012 by 03.00 p.m. the prosecutrix took bath in Amravati river at Dondaicha. She was changing clothes on her person. Two persons were present on the bank of the river. They were staring at her. One of them came close to the prosecutrix. He had covered his face with handkerchief. He undressed her. The culprit had put a stone in the mouth of the prosecutrix so as to prevent her raise alarm. He then had sexual intercourse against her wish and without her consent. The prosecutrix became unconscious. After about half an hour she removed the stone. Took a sip of water. Covered her person with a shawl. She then crawled upto the nearby hill. There was one lady sifting the sand. She came close to her. Meanwhile husband of the prosecutrix and others arrived. They first shifted the prosecutrix to the Cottage Hospital at Dondaicha. She was then moved to the Civil Hospital, Dhule. She was again brought back to the Cottage Hospital at Dondaicha. The prosecutrix was unable to speak due to the injuries to her mouth, and therefore, no First Information Report ('F.I.R.') was lodged by her immediately. She claims to have gained consciousness on 02<sup>nd</sup> January,

2013. She then narrated her husband what had happened with her and then lodged the F.I.R. (Exh.25).

4. The prosecutrix was medically screened. Offence vide Crime No. 1 of 2013 came to be registered. Scene of offence panchanama was drawn. Statements of the persons acquainted with the facts and circumstances of the case were recorded. The appellant and his associate were overpowered. The appellant's associate was found to be a juvenile. He was, therefore, proceeded against separately. On arrest of the appellant, he was medically examined. Test identification parade was held. On completion of investigation, the appellant was proceeded against by filing charge-sheet.

5. The charge (Exh.3) was framed. The appellant pleaded not guilty. His claim was of false implication. The prosecution examined twelve witnesses. Some documents were also produced in evidence. On appreciation of the evidence, the trial Court convicted and sentenced the appellant as stated above.

6. Learned counsel for the appellant would submit that although twelve witnesses were examined by the prosecution, the relevant evidence for deciding the present appeal would be that of only four witnesses, viz. the

prosecutrix, her husband, medical officer who examined her and one more witness. According to learned counsel, the F.I.R. was lodged three days after the alleged incident. The delay has not been properly explained. The appellant had neither been named nor has he been described in the F.I.R. The appellant was shown to the prosecutrix by the police before test identification parade. The husband of the prosecutrix and another witness did not participate in the test identification parade. According to the learned counsel, it is very unfortunate that based on such evidence, the appellant came to be convicted and even remained behind bars for seven years when this appeal came to be heard. Learned counsel ultimately urged for allowing the appeal.

7. Learned A.P.P. and learned counsel appointed to represent Respondent No.2 – prosecutrix would, on the other hand, submit that the appellant had been identified before the trial Court. He had also been identified in test identification parade. The prosecutrix has no reason to falsely implicate the appellant sparing the real culprit. According to both the learned counsel, the appeal deserves to be dismissed.

8. Considered the submissions advanced. Perused the evidence relied on. Gone through the impugned order of conviction. The incident took place in the bed of Amravati river at Dondaicha by 03.00 p.m. on 30<sup>th</sup>

December, 2012. The prosecutrix gave her evidence some what consistent with the allegations in the F.I.R. It is in her evidence that she was changing her clothes after taking bath in the river. There were two persons on the bank of the river. The appellant committed rape of her. He then made her unconscious. He had put a stone in her mouth. After having covered her person with clothes, she went to the nearby hillock crawling. Lalitabai (P.W.7) was there. The prosecutrix gave her call. Lalitabai, in turn, called the husband of the prosecutrix. The husband, in turn, called the villagers. The prosecutrix was taken to Cottage Hospital, Dondaicha. She was then moved to Civil Hospital, Dhule. Again she was brought back to Cottage Hospital, Dondaicha. She was there for two days. She was unable to speak. Police had come to the hospital. Her statement was recorded in the hospital. In the cross-examination, the prosecutrix testified that the culprit had covered his face with handkerchief. She, therefore, could not identify him properly. Police had shown the appellant, and therefore, she identified him.

9. Dr. Nileshkumar Pawar (P.W.1) testified that he had examined the prosecutrix on 03<sup>rd</sup> January, 2013 to find following injuries on her person :-

- i) *Swelling over nose approx. 1x1 c.m.*
- ii) *Swelling over right parietal occipital region approx. 2x2 c.m.*
- iii) *Abrasion seen over right elbow on posterior aspect with*
- iv) *Scab formation with brown to black colour approx 2.2. c.m.*
- v) *Abrasion over right knee on anterior aspect approx 1x1 c.m. with scab formation, brown to black colour*

- vi) *Abrasion over left knee on anterior aspect with scab formation brown to black colour, approx. 1X1 c.m.*
- vii) *Bruises over left thigh, on lateral aspect on lower 1/3rd of thigh approx 1x1 c.m., with greenish colour*
- viii) *Bruises over right thigh on lateral aspect, approx. 1x1 c.m. with greenish bluish colour*

10. It is in his evidence that on her vaginal examination no signs of injuries were seen. No bleeding or blood clot was noticed. Vaginal swab was obtained. He had reserved the final opinion pending receipt of C.A. report. He has however testified from medical examination that he could say that there was sexual assault on the prosecutrix. The medical certificate of the prosecutrix is at Exhibit 18.

11. It has come in the evidence of Mona (P.W.6) that the incident took place two and half years before 06<sup>th</sup> June, 2015. On the given day he was on labour work at Dabri. While he was busy in work, he saw the appellant and one another person running away. He questioned the appellant why did he run, the appellant replied 'काही नाही'. According to him, both of them were frightened. Thereafter, one lady Lalitabai (P.W.7) called him. He went there to see his wife had covered her waist with *Lungi*. There were injuries on her knees and on mouth as well. The prosecutrix was unable to speak. He, therefore, rushed the prosecutrix to Cottage Hospital, Dondaicha and then to Civil Hospital at Dhule. She was brought back to Cottage Hospital,

Dondaicha. When she became able to speak, she shared with him her ordeal. Then the F.I.R. was lodged.

12. Lalitabai (P.W.7) testified that on the given day she was sifting sand. She had seen two persons sitting at a hillock. One of them had his face covered with handkerchief. She saw both of them ran away. She identified the appellant as one of those two. It is further in her evidence that the prosecutrix had given her call. She, therefore, went close to her. The prosecutrix had suffered injuries. Blood was oozing from her mouth.

Evidence of rest of the witnesses is not that much relevant. Two of them are panch witnesses. Other two are police officials, who did investigation of the crime. One is an Executive Magistrate, who held the test identification parade. Learned A.P.P. does not dispute that evidence of these other witnesses are not that much relevant to decide the present appeal.

13. Let us now appreciate the evidence. The incident took place by 03.00 p.m. on 30<sup>th</sup> December, 2012. The F.I.R. (Exh.25) was lodged three days thereafter i.e. on 02<sup>nd</sup> January, 2013. Neither the name nor description of the appellant has been given in the F.I.R. As such, the crime was registered against an unknown person. It is not known as to how the appellant came to be overpowered. According to the prosecutrix, she was unable to speak since the appellant had placed a stone in her mouth. Injuries

found on her person during her medical examination do not suggest the prosecutrix to have had suffered any injury to her mouth. According to the prosecutrix herself, she had reached the hillock by crawling. The injuries on her person, noticed by the medical officer, must therefore be as a result of her crawling through the river bed and hillock as well. On her vaginal examination, no signs of injuries were seen. The police had shown the prosecutrix appellant before the test identification parade. The prosecutrix on her own admitted to have identified the appellant as he had earlier been shown by the police to her. The husband of the prosecutrix (P.W.7) and Lalitabai (P.W.6), who claim to have had seen the appellant and one more person running away, did not participate in test identification parade. Both of them had also not given description of any of those two. The prosecutrix had even testified that the averments in the F.I.R. were narrated by her husband, thereafter she had put her thumb impression on the F.I.R. Recovery of handkerchief and clothes on the person of the appellant pursuant to the disclosure statement (Exh.30) do not support the prosecution case.

14. The appellant, who was medically examined, some injuries were noticed on his person. He was however examined after six days of the alleged incident. The medical officer (P.W.1), who examined him, opined that he had suffered injuries within forty-eight hours next before he was medically examined. Thus, the medical examination of the appellant,

indicating some injuries on his person, appears to have no relevance with the crime in question. As such, the evidence referred to hereinabove and appreciation thereof leads this Court to conclude that the prosecution failed to bring home the charge beyond reasonable doubt. Based on the aforesaid evidence, the trial Court ought not to have convicted the appellant. The appeal, therefore, succeeds. Hence the following order :-

### **ORDER**

- (i) Criminal appeal is allowed.
- (ii) The order of conviction and sentence dated 30<sup>th</sup> July, 2015 passed by learned Additional Sessions Judge, Dhule, in Sessions Case No.74 of 2013, is set aside.
- (iii) The appellant is acquitted of the offences punishable under Sections 376(2)(g) and 323 of Indian Penal Code. He be released forthwith, if not required in any other case.
- (iv) Fine amount, if any, paid by the appellant be refunded to him.
- (v) Fees of Mr. R.M.Deshmukh, learned counsel appointed for Respondent No.2 is quantified at Rs.5,000/-.

**( R.G. AVACHAT, J. )**