

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

CRIMINAL APPEAL NO.538 OF 2018

1. Prashant Ekanath Ghorpade, &
2. Shobha Ekanath Ghorpade. Appellants
Versus
The State of Maharashtra
and another Respondents

.....
Mr. Abhaykumar Apte, Advocate for the Appellants.
Mr. S.R. Agarkar, APP for the Respondent No.1-State.
.....

CORAM : SARANG V. KOTWAL, J.

DATE : 16th NOVEMBER, 2022

ORAL JUDGMENT :

1. The appellants have challenged the judgment and order dated 25.4.2018 passed by the Additional Sessions Judge, Satara in Sessions Case No.84/2013. The appellant No.1 was the original accused No.1 and the appellant No.2 was the original accused No.3 in the said case. At the conclusion of the trial, the appellant No.1 was convicted for commission of offence punishable under Section 376 of the Indian Penal Code and was sentenced to suffer RI for seven years and to pay fine of Rs.10,000/- and in default of

payment of fine to suffer SI for six months. He was acquitted of all the charges for commission of offence punishable under Sections 451, 506, 323 and 417 of IPC. He was directed to pay compensation of Rs.5 Lakhs to the victim under the provisions of Section 357 of Cr.PC.

2. The appellant No.2 was convicted for commission of offence punishable under Section 312 of IPC and was sentenced to suffer SI for three years and to pay fine of Rs.10,000/- and in default to suffer SI for six months. She was acquitted from the charges of commission of offence punishable under Section 417 of IPC. There were two more accused i.e. accused No.2 and accused No.4. Both of them were acquitted of the charges under Sections 313 and 417 of IPC.

3. Heard Shri Abhaykumar Apte, learned counsel for the appellants and Shri S.R. Agarkar, learned APP for the respondent No.1-State.

4. The prosecution case, in brief, is that the victim and the appellants were the neighbours and were knowing each other. The

appellant No.1 committed forcible sexual intercourse with the victim on 19.6.2011 and 25.6.2011 resulting in her pregnancy. Initially, the victim did not inform anybody about the pregnancy, but, when her parents came to know about her pregnancy, she named the appellant No.1. Both the families met. Two documents on the stamp papers were executed. One was signed by the appellant No.1 and the other stamp paper was signed by the appellant No.2 and her husband (original accused No.2). On these notarized documents, it was agreed that the marriage would be performed between the victim and the appellant No.1. Accordingly engagement ceremony was fixed in December, 2011 but the appellants' family did not turn up for the function. Therefore, ultimately the victim lodged her FIR at Wai police station vide C.R. No.116/2011 on 23.12.2011. The appellant No.1 was arrested on 26.12.2011. In the meantime, the procedure for medical termination of pregnancy was performed with the victim and her pregnancy was terminated on 29.11.2011. After registration of FIR, investigation was carried out and at the conclusion of investigation, the charge-sheet was filed. The case was tried before the Sessions

Court.

5. During trial, the prosecution examined seven witnesses including the victim, her father, her maternal uncle, panchas, Medical Officer who conducted the MTP procedure and the investigating officer. The defence of the appellants was of total denial to the respective charges framed and the evidence led against them.

6. On behalf of the defence, two witnesses DW-1 cousin of the appellant No.1 and DW-2 his employer were examined to prove his alibi on both these dates of incidents. After recording the evidence and statements of the appellants under Section 313 of Cr.P.C. and after hearing the arguments, learned Judge believed the prosecution case. Learned Judge then convicted and sentenced the appellants, as mentioned earlier.

7. The main witness in this case, of course, is the victim herself. She is examined as PW-1. She has stated that she was seventeen years of age at the time of incident. Her parents were doing labour work. She was studying in tenth standard. She knew

the appellant No.1. Their family was neighbour of the victim's family. The victim's father used to treat the appellant No.2 as his sister. They were thus having family relations. On 19.6.2011, it was a Sunday. It was a holiday and, therefore, she was at home. Her parents had gone out for their work at 8.00 a.m.. Her brother was playing outside. At 1.30 p.m., suddenly the appellant No.1 came to her house. He closed the door of the house. He came close and put his hand on her back. She objected and pushed him. But he overpowered her. It is her case that after that he had forcible sexual intercourse with her. He threatened that he would kill her brother if she disclosed that incident to anybody. Then he left. She had not disclosed this incident to anybody out of fear.

8. On 25.6.2011 it was a Saturday. She had gone to the school and had returned at around 12.00 p.m.. Her parents had gone to attend to their work. Her brother had gone out taking their sheep for grazing. At about 2.00 p.m., again the appellant No.1 came to her house. He again committed forcible sexual intercourse with her by threatening her. He issued the same threats. Again she

was scared and did not inform this incident to anybody.

9. After that she missed her menstrual cycle. She realized that she was pregnant. Her parents realized this. They took her in confidence. Then she narrated those two incidents to them. Her parents approached the appellant No.1, the accused No.2 and the appellant No.2. They showed inclination for marriage. They suggested that her pregnancy should be terminated as she was below 18 years of age. The original accused No.4 was the paternal uncle of the appellant No.1 and brother of the original accused No.2. He was a doctor and his hospital was at Wai. He suggested that the procedure for Medical Termination of Pregnancy [MTP] could be conducted in the hospital of Dr. Deshpande at Wai. The appellant No.2 and the original accused No.2 i.e. her husband executed a notarized document on a stamp paper, whereas the appellant No.1 executed a separate notarized document. Those documents are produced on record at Exhibits-69 and 70. Both these documents were also signed by the victim and her parents. They were in the nature of declaration that the marriage would

take place between the appellant No.1 and the victim and the engagement was to take place in December, 2011. The victim would be looked after properly by the appellant No.1 and his family. Those documents also mention that the victim had become pregnant because of their physical relations. It was mentioned in those documents that the marriage was to take place after the victim had attained 18 years of age.

10. As suggested, the victim, her mother and the appellant No.2 had approached Dr. Deshpande. Initially, Dr. Deshpande refused to conduct the procedure for termination of pregnancy. She referred the victim to Civil Hospital, Satara but again at the instance of accused No.4, the MTP procedure was conducted on 29.11.2011. After that, engagement ceremony was fixed on 18.12.2011, but, on that date inspite of the victim's family making arrangements, the appellants' family did not turn up. The appellant No.1 refused to marry her and on 23.12.2011 PW-1 lodged the FIR against the accused at Wai police station. She was medically examined. This is her examination-in-chief.

11. In her cross-examination, which was quite lengthy, hardly anything favourable to the defence was brought out. In the cross-examination, she deposed that on 21st or 22nd July, 2011 she realized that she was pregnant. She deposed that after 25.6.2011, she did not meet the appellant No.1. She had stopped going to school because her pregnancy had become apparent. She further deposed that it would be correct to say that she was feeling that the pregnancy should be terminated. She had given her consent for abortion in the medical papers. She had signed the consent form on 28.11.2011. Her parents had told her that it was agreed that the MTP procedure would take place in the hospital of Dr. Deshpande. She did not have any documentary proof to show that the preparations for their engagements were made. They had invited 10 to 15 people. According to her, the incidents had taken place at the same spot in the middle room of her house. She had tried to resist by giving fist and kick blows but the appellant No.1 had gagged her mouth. Her parents had told that her pregnancy should be terminated. On 24.11.2011, the appellant No.2 had taken the victim and her parents to the hospital of Dr.Deshpande. The

consent forms are produced on record at Exhibits-74 and 75. The FIR at Exhibit-71 substantially corroborated her evidence.

12. PW-2 Shripati was the pancha for seizure of clothes of the victim. Since there are no CA reports regarding these clothes, his evidence is not much important.

13. PW-3 Ananda was a pancha for spot panchnama. Here again the spot panchnama does not reveal anything of significance. It is produced on record at Exhibit-80.

14. PW-4 is another important witness. He is father of the victim. After describing his family and his work and also after describing the nature of their relations with the appellants, he had deposed that on 18.11.2011 his wife told about the incidents dated 19th & 25th June, 2011. He made enquiries with PW-1. She narrated the incidents to him. PW-4 then called his brothers-in-law i.e. brothers of his wife who were working in Pune and Mumbai. He himself, his wife, the victim and both these brothers of his wife went to the house of the appellants. The appellant No.2 and her husband requested them not to disclose those incidents to anybody

and told them that they would marry the appellant No.1 with the victim. They further told PW-4's family and others that before marriage, the pregnancy would have to be terminated. It was agreed that such procedure would be conducted in the clinic of Dr. Deshpande at Wai. The appellant No.2 and her husband had suggested the name of Dr. Deshpande. Initially on 24.11.2011, PW-1 was admitted in the hospital of Dr. Deshpande but pregnancy was not terminated. On 28.11.2011, Dr. Deshpande referred PW-1 to Civil Hospital, Satara. Then PW-1 and others went to the house of accused No.4 Dr. Ghorpade. With his intervention, Dr. Deshpande agreed to conduct the procedure. On 29.11.2011, the MTP procedure was conducted by Dr. Deshpande. At that time, PW-4's wife, the appellant No.2, two uncles of the victim and PW-4 himself were present in the hospital. On 1.12.2011, PW-1 was discharged from the hospital. It was agreed between the parties that the engagement would take place on 18.12.2011. He then made arrangements but the appellants left their house in the evening of 17.12.2011 itself. After that on 23.12.2011, PW-1 lodged her FIR. Again, his lengthy cross-examination did not yield anything much

to throw further light on the evidence. He denied the suggestion that his brothers-in-law conspired together and lodged a false case against the appellants.

15. PW-6 was the maternal uncle of PW-1. He described the events after he received a phone call from PW-4. He and his brother were called by PW-4 to his house. They were told about the victim's condition. She was crying. She narrated the incidents. Then PW-6 along with PW-4 and others approached the appellant's family. He gave rest of his evidence similar to that of PW-4 and PW-1. He denied the suggestion that they had beaten the appellant No.1 or that they had threatened him and had obtained signatures on the stamp papers.

16. PW-5 Dr. Deshpande had terminated the pregnancy. She has deposed that on 24.11.2011 the victim had come to her clinic. She was accompanied by her mother and the appellant No.2. PW-1 the victim was found pregnant for 19 to 20 weeks. Her mother and the appellant No.2 told her that the victim was to get married with the appellant No.1. There was no police case involved. PW-5 then

obtained consent of the victim's mother and the appellant No.2. The consent form is produced on record at Exhibit-87. On 28.11.2011, she referred PW-1 to the Civil Hospital, Satara for termination of pregnancy. But on that day, at about 7.45 p.m. Dr. Ghorpade called her and told her that the appellant No.1 was his relative and that the appellant No.1 was to marry PW-1 and he told PW-5 Dr. Deshpande to carry out the procedure for termination of pregnancy. For termination of pregnancy of a fetus of 12 to 20 weeks, second opinion of a gynecologist was required. Dr. Ghorpade himself gave that opinion and then the procedure for termination of pregnancy was performed. She produced all the medical papers on record.

Her cross-examination was mainly directed to bring on record that the procedure adopted by her was not proper. Her cross-examination was more regarding her actions rather than bringing out the relevant material regarding the subject matter of the trial. In one question she answered that if the date of last menstrual period was on 21.6.2011 then the probable pregnancy would be

upto 23 weeks on 28.11.2011. The defence wanted to take advantage of this admission to submit that the dates of incidents and the period for pregnancy could not be matched.

17. PW-7 API Shrikant Dongre had conducted the investigation. He has deposed about conducting the spot panchnama, arresting the accused, seizure of the stamp papers, seizure of clothes of the victims and recording of statements. All this investigation is part of the record, which is discussed in the evidence of other witnesses.

. This was the evidence led by the prosecution.

18. As mentioned earlier, the defence denied everything and examined two defence witnesses. DW-1 was the cousin of the appellant No.1. According to her, it was her birthday on 19.6.2011. The appellant No.1 was working in Pune. When he was in college, the appellant No.1 used to stay with the family of DW-1. In the year 2011, he was working in a company at Pune and he was staying at Pune. On 19.6.2011, he had come to Pasarni for DW-1's birthday and then he had returned back to Pune at 8.30 p.m. Thus, DW-1

wanted to provide defence in the nature of alibi to the appellant No.1. However, she did not produce any record to show that her birthday was really on 19.6.2011. She has not given any corroborative material to show that her birthday was really on 19.6.2011 and that the appellant No.1 had really visited her throughout the day.

19. DW-2 was the Director of the Company where the appellant No.1 was working as an employee. According to her, on 25.6.2011, the appellant No.1 was at their Satara office. He had reached the office at 9.00 a.m. and had left at 6.20 p.m. She produced the attendance sheet on record at Exhibit-126 before the trial Court.

In the cross-examination conducted by learned APP she admitted that in the year 2011, the appellant No.1 was not a permanent employee. She accepted that the attendance sheet did not bear her signature and she also accepted that she had not maintained the attendance sheets.

Based on these admissions, the learned trial Judge had

disbelieved this witness. Learned Judge has further observed that the village of the victim was 15 km away from Wai and Pasarni village is about 2 km from Wai and a person could go to both the places on the same day and, therefore, he has disbelieved the evidence of DW-1 as a whole. As far as DW-2 is concerned, learned Judge has observed that on 25.6.2011, the appellant was in the same Satara District.

20. Learned counsel for the appellants submitted that the evidence of two defence witnesses proves alibi of the appellant No.1. According to him, there was no reason to disbelieve these defence witnesses. Their evidence should be treated at par with the evidence of the prosecution witnesses. According to Shri Apte, the date of pregnancy and the alleged incidents do not match. If the incident had really taken place on those two dates of June i.e. 19.6.2011 and 25.6.2011, her pregnancy would be of 23 weeks and not 19 weeks when she was examined. There was no corroborative evidence in the form of DNA and CA reports. He relied on the judgment of a Single Judge Bench of this Court reported in **2017(5)**

Mh.L.J. (Cri.) 531 in the case of **Lotan Budha Chaudhari Vs. State of Maharashtra and another** to contend that DNA test to ascertain paternity of the child was not conducted and, therefore, benefit was given to the accused in that case. He also relied on the judgment of another Single Judge bench of this Court reported in **2018(1) Mh.L.J. (Cri.) 164** in the case of **Suresh @ Dursingh Jahagraya Pawara Vs. State of Maharashtra and another** wherein it was observed that failure on part of the accused to prove his defence cannot be a ground for holding him guilty for offence charged against him unless the prosecution has proved his guilt beyond doubt by leading cogent and sufficient evidence.

21. Learned APP, on the other hand, submitted that PW-1 has given clear and cogent evidence. There was no reason to disbelieve her. On the other hand, the conduct of the accused, and in particular that of the appellant No.1, shows that his intentions were never honest. The accused had tricked the victim and her family to believe that marriage would take place and they also executed documents to that effect and themselves insisted that the

pregnancy be terminated. After that the procedure was performed and they did not take any steps to perform marriage. In fact, inspite of declaring the date and after PW-4 made arrangements for the function they did not turn up for the engagement ceremony. This conduct shows malafide intentions on the part of the appellant No.1 and his family. He submitted that the appellant No.2 had signed all the consent forms and was instrumental in suggesting that the pregnancy be terminated and, therefore, even against her, conviction under Section 312 of IPC is properly recorded.

22. I have considered these submissions. I have carefully considered the evidence of PW-1. It is her specific case that on those two occasions, the appellants entered her house and committed forcible sexual intercourse with her.

23. The criticism by the defence counsel that she had not immediately narrated those incidents to anybody else does not have much force. She was a young girl and naturally she was afraid because of the entire situation. The situation became worse once she realised that she was pregnant. She could not tell about her

pregnancy to her parents and it was only after signs of pregnancy became apparent; her parents made enquiries and the incident came to light.

24. Considering the situation in which the victim was put, she cannot be blamed for not disclosing those incidents to anybody else. Her conduct will have to be compared with the conduct of the appellant No.1. As mentioned earlier, the appellant No.1 and his parents executed two separate documents Exhibits-69 & 70. In both these documents it was mentioned that the victim and the appellant No.1 had physical relations resulting in her pregnancy. Though the document executed by the appellant No.2 and her husband mentions that the physical relations were the result of the inducement made by the appellant No.1 both these documents are separately signed by the appellant No.1's parents i.e. appellant No.2 and her husband; and the second document is signed by the appellant No.1 himself. There was absolutely no grievance made by any of them before any of the authorities or before any third person that they were forced to execute those documents.

25. In the examination under Section 313 of Cr.P.C. there was simple denial regarding execution of these documents. No further explanation is offered. Even while putting forth the defence, no suggestions were given to make the Court believe that documents were forcibly got executed by the victim's family. These two documents are important in the context of the case. These documents also mention that the victim was pregnant at that time. There was no immediate denial by the appellant No.1 about this fact and, therefore, there is no immediate denial that he had caused the pregnancy. Therefore, comparing conduct of PW-1 the victim and the appellant No.1, it can safely be held that the version of PW-1 the victim is believable.

26. As far as the defence of *alibi* is concerned, the learned Judge has rightly discarded the same. DW-1 who was the cousin of the appellant No.1 has deposed that the appellant No.1 had attended her birthday in a different village on 19.6.2011. It was very easy for her to produce some documents to show that indeed on that day it was her birthday, but, it was not done. She was an

interested witness, and as observed by learned Judge her village was not very far from the village of the victim and the appellant. Thus, this evidence will not help the appellant No.1 to prove that he was not present in the village of the victim on the date and at the time of incident on 19.6.2011.

27. The second defence witness has produced the attendance sheets register which she has not maintained herself and it was not signed by her. Therefore, that document does not really have any evidentiary value. Beyond that, she has not given any evidence based on her personal knowledge. Thus, the appellant No.1 has failed to prove his *alibi*.

28. The evidence of Dr. Deshpande (PW-5) shows that the victim was pregnant and her pregnancy was terminated. These facts are undisputed.

29. Considering the clear evidence of PW-1 and the circumstances surrounding her evidence, it did not matter that the DNA test was not conducted or the CA report was not available. The clothes were seized much later after the FIR was lodged and,

therefore, in any case they would not have thrown any light on the incidents itself. As far as DNA test is concerned, it could not be performed because on that day the the case was not registered mainly because of the assurance of the appellant's family. Therefore, the defence cannot take advantage of non-performance of DNA test.

30. The judgment in the case of **Lotan Chaudhari** (supra) relied on by Shri Apte had referred to non-conduct of DNA test. Therefore, the facts in the present case are entirely different and it is explained through the circumstances why the DNA test was not conducted. Therefore, this judgment is not applicable in this case.

31. As far as the judgment in the case of **Suresh Pawara** (supra) is concerned, even that case is not applicable because in this case the evidence of the victim is found to be trustworthy. That judgment itself shows that if the evidence of the victim is found trustworthy, believable and is free from reasonable doubts, the conviction of the accused can be based on sole testimony of the victim. In this case, I am applying the same principles. Since the

victim's evidence is trustworthy there is no reason to give any benefit of doubt to the appellant No.1.

32. Considering all these aspects, the prosecution has proved beyond reasonable doubt that the appellant No.1 had committed rape on PW-1 and, therefore, there is no reason to interfere with the conviction and sentence recorded against him. In any case the minimum sentence is imposed on him and, therefore, there is no scope to reduce it further. The sentence is imposed in accordance with the section which was in existence at the time of the incidents.

33. As far as the appellant No.2 is concerned, she was convicted and sentenced for commission of offence punishable under Section 312 of IPC. Said Section reads thus:

“312. Causing miscarriage. – Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years,

and shall also be liable to fine.

Explanation.—A woman who causes herself to miscarry, is within the meaning of this section.”

34. She is not convicted for any other Section. The evidence shows that the victim’s parents themselves had decided that the pregnancy be terminated. The appellant No.2 had accompanied them to the clinic of Dr.Deshpande and she had signed some forms along with mother of the victim. Therefore, it cannot be said that the appellant No.2 had caused miscarriage. Her act will not fall within the meaning of Section 312 of IPC. The evidence clearly shows that the victim herself wanted to terminate her pregnancy and she was a minor. But her parents also wanted her pregnancy be terminated and steps were taken in that behalf. Therefore, merely accompanying the victim and her mother and signing some forms would not attract the ingredients of Section 312 of IPC against the appellant No.2. Therefore, the appellant No.2 deserves to be acquitted. Hence, the following order :

:: O R D E R ::

- i. The appeal is partly allowed.
- ii. The conviction and sentence recorded against the appellant No.1 Prashant Ekanath Ghorpade vide judgment and order dated 25.4.2018 passed by the Additional Sessions Judge, Satara in Sessions Case No.84/2013 is maintained. The appeal on his behalf is dismissed.
- iii. The conviction and sentence recorded by the learned Additional Sessions Judge, Satara vide judgment and order dated 25.4.2018 passed in Sessions Case No.84/2013 against the appellant No.2 Shobha Ekanath Ghorpade, who was original accused No.3, is set aside. The appellant No.2 is acquitted from those charges. The appellant No.2 is on bail. Her bail bonds shall stand discharged.
- iv. With these observations, the Criminal Appeal is disposed of.

(SARANG V. KOTWAL, J.)