

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

Criminal Appeal No.1142 of 2013

Nandlal Zagadu Yadav
presently
Suptd. Kolhapur Central Prison
Residing at Gangubai Chawl, Nasir
Pada, Hanuman Nagar, Kandivali (East),
Mumbai.

... Appellant
(Org. Accused)

V/s.

1. The State of Maharashtra
Through the Sr. Inspector
Malawani Police Station

2. XYZ
Amboli Patak, Gate No.24,
Indira Nagar, Welfare Sangh,
Jogeshwari (E), Mumbai-60.

... Respondents

Mr. M.M. Khokhawala a/w. Ms.Megha Puralkar for the appellant.

Mr. V.V. Phatate for Respondent No.2 (Appointed)
Mr. H.J. Dedhia, APP for the State.

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**CORAM : PRASANNA B. VARALE
& SHRIKANT D. KULKARNI, JJ.**

**Reserved on: 12th July 2022.
Pronounced on: 21st July 2022.**

JUDGMENT (PER SHRIKANT D. KULKARNI, J)

The appellant-accused who has been convicted for the offences punishable under Sections 342 and 376 of IPC by the Additional Sessions Judge, Greater Mumbai in Sessions Case No.77/2008 questioned the legality and correctness of his conviction and sentence for life imprisonment on various grounds.

2. The prosecution case in nutshell is as under.

The victim who is adult stated to be a patient of schizophrenia, a mental disease. On 7th March 2008 around 1.30 p.m. she boarded one auto-rickshaw which was driven by the appellant-accused and asked him to take her for roaming. The victim was taken to Jogaiwadi Guest House at about 3.00p.m.. The appellant had taken room No.B/2. It is the case of the prosecution that the appellant committed rape on the victim in the said room. Any how the victim raised hue and cry for help. The Manager of the said guest house rushed to the room and gave call. The door was opened and victim came out of the room and ran outside the guest house. She approached to two rickshaw drivers who were at rickshaw stop and narrated the incident to them, when they made enquiry with her as to why she was crying. Those two rickshaw drivers caught accused and brought the victim and the appellant to Madh Beat police Chowki. The Police Officer attached to Madh Beat police Chowki made enquiry with the victim. The victim

narrated the incident to the police officer. The victim girl and the appellant were brought to Malwani Police Station. Police Constable, Nitin Shinde, lodged the FIR against the appellant-accused on the basis of narration given by victim. On the basis of FIR lodged by the police Constable-Shinde, Crime No.56/2008 under Section 376 of IPC came to be registered at Malwani Police Station.

3. The investigation was entrusted to API, Manohar Harpude. He arrested the accused and seized clothes of the victim girl. The panchnama of scene of offence came to be prepared. Victim was referred for medical examination at Nagpada Police Hospital. Investigation Officer could not record the statement of the victim girl as she was not in a position to narrate about the incident. Remaining part of investigation was conducted by Police Inspector-Jamdade (PW No.11) who recorded statement of two auto rickshaw drivers who brought the victim girl at Madh Beat police Chowki. He despatched the mudemal articles to the forensic laboratory for analysis and report. After completion of investigation, the investigation officer found sufficient evidence against the appellant-accused. The chargesheet came to be filed in the Court of Metropolitan Magistrate at Borivali, Mumbai who committed this case to the Sessions Court, Greater Mumbai, Dindoshi Sessions Division, Mumbai.

4. The learned Additional Sessions Judge framed the charge against the appellant-accused for the offences punishable under Section 376 and 342 of IPC. The accused pleaded not guilty and the trial was commenced. The prosecution machinery has examined in all 11 witnesses. Apart from that the prosecution agency has also pressed into service documentary evidence in the form of panchnamas, reports of chemical analyser and medical certificate of victim.

5. The learned Additional Sessions Judge after appreciating the evidence on record and considering the argument advanced on behalf of prosecution and the defence was pleased to hold the appellant-accused guilty for the offences punishable under Section 342 and 376 of IPC and sentenced to suffer rigorous imprisonment for life and slapped total fine of Rs.11,000/- with default stipulation.

6. Feeling aggrieved by the impugned judgment and order of conviction rendered by Additional Sessions Judge, Greater Mumbai (Sessions Division, Dindoshi), the appellant-accused has challenged the decision on various grounds by way of this appeal under Section 374 of Cr.P.C.

7. Heard Mr. M.M. Khokhawala, learned Counsel for the appellant-accused and Mr. H.J. Dedhia, learned APP for the State assisted by Shri

Phatate, learned counsel for the victim, at length.

8. Mr.Khokhawala, learned Counsel for the appellant, invited our attention to the evidence of PW No.1 -Nitin Shinde, police Constable, PW No.2-Tirumal Konar (Manager of the Guest House) and PW No.3 Khaliluddin Jaffar Hussain. He strenuously argued that spot of incident is not duly proved. It is seriously under cloud. He submitted that according to PW No.1 police Constable-Shinde, the place of incident is room situated in one guest house at Jogaiwadi. Whereas PW No.2-Tirumal Konar who is Manager of said guest house has stated name of guest house known as Jogaiwadi guest house at Dharavli. The extract of the guest house is placed on record by the prosecution vide Exhibit 17. It indicates that name of the guest house is quite different. The name of the guest house is Namdev Annaji Mhatre's Jogaiwadi Guest House. Mr. Khokhawala then invited our attention that above said two witnesses have stated that incident of rape had taken place in Jogaiwadi guest house in room No.B/2 whereas extract of the guest house vide Exhibiti 17 speaks that it was room No.A/10 allegedly booked by the appellant-accused. Mr.Khokhawala, learned Counsel, therefore, vehemently submitted that the crime scene is not proved by the prosecution.

9. Mr. Khokhawala, learned Counsel for the appellant forcefully

submitted that victim was allegedly a patient of schizophrenia, a mental disease. In order to substantiate such fact, the victim was not examined by the expert/Doctor/Psychiatrist. There is no medical evidence on record to support the case of prosecution. It is mere on the basis of surmises and conjectures on the basis of history given to the Doctor who examined the victim. The prosecution is claiming that victim is suffering from schizophrenia. He submitted that evidence of Police Constable-Shinde (PW No.1) speaks that he made enquiry about the incident and she narrated the incident which indicates that victim was in a stable position and fit state mind. As such there was no difficulty for the police to record the FIR at the hands of victim. He submitted that though victim was in a position to tender her evidence, her evidence was given up in a mid way, when her examination-in-chief was in progress. He submitted that medical evidence is not supporting to the prosecution case. No semen was detected in vaginal swab collected by the Doctor. C.A. report to that effect is in the negative. He submitted that the clothes of the victim were not found in torn condition. There is no iota of evidence to show that victim was subjected to sexual assault at the hands of appellant. The appellant-accused has been falsely implicated in a case of rape at the instance of two rickshaw drivers. The prosecution has even not examined mother or grand mother of the victim to corroborate alleged story of rape put forth by the prosecution. He, therefore, urged to allow the appeal.

10. *Per contra*, Mr. Dedhia, learned APP for the State supported the findings recorded by the learned Additional Sessions Judge. He submitted that the prosecution agency has examined all the relevant and material witnesses to prove the charge of rape against the appellant-accused. The victim was a patient of schizophrenia. She was not in a position to lodge the FIR. As such police constable was constrained to lodge the FIR on behalf of the State. The victim was examined by the Medical Officer. The medical evidence though not supporting to the prosecution case, other evidence on record cannot be discarded which focus light on the complicity of the appellant in the commission of crime. He submitted that in a case where victim is deaf and dumb and mentally ill, the charge of rape can be proved by other evidence which is available. He submitted that the appellant-accused was a rickshaw driver. He had taken victim to the guest house and committed rape. The victim disclosed the incident to two rickshaw drivers who had taken the victim girl and accused-appellant to the police Chowki and wherefrom they were brought to Malwani Police Station. This chain of sequence needs to be considered coupled with the evidence.

11. Mr. Dedhia, learned APP submitted that even though victim is not examined in this case, it is not in any way fatal to the prosecution case. He has placed his reliance in the case of *State of Maharashtra v/s. Bandu @ Daulat*¹. Mr. Dedhia then invited our attention to the

1 (SC) Law Finder, Criminal Appeal No.1820/2017

statement of appellant-accused recorded by the Additional Session Judge under Section 313 of Cr.P.C. He submitted that appellant-accused has not offered any explanation about alleged false implication. To support the submissions, Mr.Dedhia placed his reliance in case of *Chaman Lal v/s. State of Himachal Pradesh*². He submitted that there is no merit in the appeal.

12. Having regard to the argument advanced by Mr. Khokhawala, learned Counsel for the appellant-accused and learned APP Dedhia for the State-respondents, we have gone through the R & P of the Sessions trial. We have carefully assessed the oral evidence as well as documentary piece of evidence produced by the prosecution agency.

13. The prosecution agency has examined in all 11 witnesses, which can be described as under.

Sr. No.	Name	Exhibit No.
1	Nitin Vasant Shinde (PW-1) (Police Constable and first informant)	Exhibit 8
2	Tirumal Nambi Konar (PW-2) (Manager of Guest House)	Exhibit 16
3	Khaliluddin Jaffar Hussain (PW-3) (Rickshaw driver)	Exhibit 18

4	Sheetal Devdas Shetty (PW-4) (Panch witness)	Exhibit 20
5	Shabdar Ali Haiderali Sayyad (PW-5) (Panch witness)	Exhibit 25
6	Ayyub Kasam Shaikh (PW-6) (Panch witness)	Exhibit 28
7	Javed Jafar Siddiqui (PW-7) (Panch witness)	Exhibit 31
8	Sushma Raghunath Shirkule (PW-8) (victim)	Exhibit 34
9	Baban Shripati Shinde (PW-9) (Medical officer attached to Nagpada Police Hospital)	Exhibit 37
10	Manohar Ankush Harpude (PW-10) (API attached to Malwani Police Station)	Exhibit 41
11	Vasudev Ramchandra Jamdade(PW-11) (PI attached to Malwani Police Station)	Exhibit 42

14. The appellant-accused was put on trial for the charge of offences punishable under Section 342 and 376 of IPC. The offence of rape is certainly serious and heinous. It is well settled position of law that testimony of a victim in case of sexual offence is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the Courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to her statement before acting upon the same as a rule, in such cases, would

literally amount to adding insult to injury. The deposition of the victim needs to be assessed carefully as a whole. The victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured victim.

15. It is equally well settled position of law that nature of evidence produced in a case of rape play crucial role. If evidence is reliable and inspires the confidence of the Court, the conviction can be based on the sole testimony of the victim. However, evidence of victim can never be taken as a gospel truth as held by the Apex Court in the case of ***Raja v/s. State of Karnataka***³. The Evidence Act, 1872 nowhere says that her evidence cannot be accepted unless it is corroborated with any material particulars. She is undoubtedly a competent witness under Section 118 of the Evidence Act, 1872 and her evidence must receive the same weight as is attached to an injured in case of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured Complainant or witness. The nature of evidence required to lay assurance to her testimony, obviously depends on the facts and circumstances of each case.

16. It is an admitted position that victim lady who was a major at the time of alleged incident is not examined before the trial Court. The criminal law was put in motion about alleged incident of rape on the

3 AIR 2016 SC 4930.

basis of her narration before the police officials. PW No.1-Shinde (Police Constable and first informant), PW No.10-Manohar Harpude and PW No.11-Vasudev Jamdade have stated about mental illness of the victim. The police officers are not expert in order to determine mental condition of the victim. It requires special knowledge and skill and experts. As such it was very much necessary on the part of the investigation agency to get examined the victim from the expert/Doctor/Psychiatrist in order to have a clear picture whether the victim was suffering from schizophrenia, mental disease. Unfortunately, that important task was not performed by the investigation agency. Mere statement of police officer about mental condition of the victim is not any way sufficient to arrive at correct conclusion.

17. It is very much difficult to record a finding that the victim was suffering from schizophrenia, a mental disease at the time of incident in absence of evidence of expert. Moreover, evidence of PW No.1, police Constable-Shinde throws light that he made enquiry with the victim girl and the victim had narrated the incident and the complicity of the appellant-accused in committing heinous act. It indicates that the victim was conscious and in fit stand of mind to put the criminal law in motion by filing FIR. However, FIR seems to have been lodged by police Constable-Shinde (PW No.1). Any person can put the criminal

law in motion but in the present case the scenario which is projected by the prosecution agency about the mental condition of that victim appears to be some how unacceptable and difficult to digest.

18. First, we shall consider the argument advanced by Mr. Khokhawala, learned Counsel for the appellant about crime scene whether it is proved by the prosecution. According to Police Constable-Shinde (PW No.1) the incident of rape had taken place in one guest house at Jogaiwadi. According to PW No.2-Tirumal Konar (Manager of guest house), accused had booked room No.B/2. The prosecution agency has placed on record extract of said guest house vide Exhibit 17. On going through the same very carefully, it is noticed that the name of the guest house is Namdev Anaji Mhatre, Jogaiwadi. Room No. A/10 is shown in the name of appellant. According to PW No.2-Tirumal (Manager of the guest house) accused had booked Room No.B/2 which is falsified by the extract of the guest house vide Exhibit 17 produced by the prosecution agency. In order to clear the position, concerned owner of the lodge/guest house is not examined. The original extract of the guest house/lodge was even not produced before the trial Court. PW No.11, Police Inspector-Jamdade (Investigation Officer) while facing the cross-examination has admitted that he has not obtained any document in order to show that PW No.2-Mr. Tirumal was working as a Manager in the said hotel/guest house. One Mr.Tapa who was

employed as a watchman in the said hotel/guest house according to prosecution, not examined to clear the picture actually where the incident had taken place.

19. Having regard to the above scenario and in view of the careful scrutiny of the panchnama of the scene of offence vide Exhibit 30, we have no hesitation to arrive at conclusion that the prosecution machinery has miserably failed to prove the scene of offence.

20. Now coming to charge of rape, alleged against the appellant-accused, admittedly victim girl is not examined before the trial Court. Mr. Dedhia, learned APP has placed his heavy reliance in case of *State of Maharashtra v/s. Bandu @ Daulat (cited supra)* about non-examination of witnesses in a rape case.

21. We have gone through the decision in *State of Maharashtra v/s. Bandu @ Daulat(cited supra)* relied upon by learned APP. In the cited case victim was deaf and dumb and mentally challenged to some extent. Evidence of the mother of the victim proved that it was the accused who took away the victim. The victim and accused were seen together on the date of commission of crime. The victim immediately after the occurrence narrated the incident to her mother as to what had happened which was confirmed by the medical evidence termed as

rape. The facts of the case in hand are quite distinguishable from the facts of the cited case. In this case mother or grand mother of the victim girl is not even examined by the prosecution before the trial Court. Medical evidence in this case is not supporting to the prosecution. As such decision in the case of *State of Maharashtra v/s. Bandu @ Daulat* is not any way helpful to the prosecution case.

22. We are aware about the legal position that in cases like deaf and dumb and mentally ill victims, it is very much difficult for the investigation agency to record their statements and also extremely difficult to record their evidence before the trial Court. The case of the prosecution for the charge of rape cannot be thrown away only because victim/prosecutrix is not examined, when there is other reliable evidence supported by medical evidence.

23. According to the prosecution case alleged incident of rape had occurred on 7th March 2008 around 3.00 p.m. The victim was examined by Dr. Shinde at Nagpada police hospital on the very next date i.e. on 8th March 2008. Let us examine the evidence of Dr. Shinde (PW No.9) who has examined the victim at Nagpada police hospital, Mumbai. On going through the evidence of Dr.Shinde, it is revealed that history was narrated by grand mother of the victim. She has disclosed about the incident on the basis of information given by the

police that the victim was subjected to sexual assault at the hands of rickshaw driver-appellant. She has no personal knowledge about the incident. It is nowhere stated that victim has narrated the incident to her grand mother. As such how that history can be relied upon.

24. The testimony of PW No.9 Dr. Shinde throws light on the clinical examination of the victim. He found that there were no external injuries on the person of victim. On her local examination, he found that there was no injury to the private part. Hymen was in torn condition. Position of tears was 3,6,9 o'clock position. Age of tears was old healed. Hymen admits two fingers.

25. Dr.Shinde further opined on the basis of ossification test that the victim was more than 21 years old. The medical certificate to that effect is on record vide Exhibit 38. Even though Dr.Shinde on examination of the appellant-accused opined that appellant-accused was not impotent, not any way helpful to the prosecution in view of above quality of medical evidence which is not supporting to the prosecution case. Dr. Shinde further went on admitting that for correct diagnosis of the patient, whether the patient is schizophrenia, expert opinion is required. He has not taken any expert opinion before examining the patient. Simply on the basis of physical examination of the patient, opinion cannot be formed that the victim was patient of

schizophrenia. As such it is difficult to accept that victim was a patient of schizophrenia, a mental disease in absence of expert evidence/opinion. Schizophrenia is a chronic, severe mental disorder that affects the way a person thinks, acts, expresses emotions, perceives reality and relates to others. Though schizophrenia is not common as other major mental illnesses, it can be the most chronic and disabling. Schizophrenia involves a psychosis, a type of mental illness, For correct diagnosis, patient's examination by expert is very much necessary with a expert report.

26. C.A. report pertaining to vaginal swab of the victim is produced vide Exhibit 49-A. We have gone through the same very carefully. Results of the analysis are important which are produced as under:

“ No semen is detected on Exhibit No.1 ”

27. Having regard to the medical evidence, it is very much clear that medical evidence is not supporting to the prosecution case. The C.A. report about vaginal swab of the victim is also not supporting. The clinical examination of the victim revealed no external injuries, no marks of struggle. Her clothes were not found torn which have been seized in this case under panchnama. If this stock of evidence is taken into consideration, it is very much difficult to accept the case of the prosecution agency.

28. So far as seizure of bedsheet and towel from the room in question, again that exercise is found to be worthless in view of negative C.A. reports.

29. We have also gone through the citation in case of *Chiman Lal vs. State of Himachal Pradesh* (supra). In the cited case prosecutrix was found pregnant as a result of rape and victim gave birth to a child. It was confirmed by the D.N.A. test. The accused was found to be biological father of that baby. In that background, the Apex Court has held the defence of accused of total denial without offering any explanation strengthens the prosecution case. The facts of the case in hand are distinguishable and not in any way supporting the case of the prosecution.

30. Having regard to the careful scrutiny of oral and documentary stock of evidence produced by the prosecution agency, it is very much clear that there is no expert evidence on record to establish that victim was suffering from schizophrenia, a mental disease at the time of alleged offence of rape. Secondly, though victim was in a position to lodge FIR, same was not recorded. Even though victim was in a position to tender her evidence, her evidence was given up in a midway when her examination-in-chief was in progress. As such there is no

evidence of victim on record. The prosecution agency has even not examined the grand mother of the victim. Medical evidence is not supporting to the charge of rape. C.A. report about vaginal swab of the victim found to be in the negative form. We are, therefore, not in agreement with the findings recorded by the Additional Sessions Judge thereby convicting the appellant-accused for the offences of rape and wrongful confinement. The Additional Sessions Judge seems to have not appreciated the evidence carefully and arrived at incorrect conclusion. Certainly, the findings recorded by the learned Additional Sessions Judge are liable to be upset. The impugned order of conviction and sentence is liable to be struck down. The prosecution agency has failed to prove the charge of offence of rape and wrongful confinement against the appellant-accused for want of cogent and sufficient evidence. Resultantly, the appeal must succeed.

31. As per office record, the appellant-accused has not deposited amount of fine imposed by the Additional Sessions Judge. As a result, no payment of compensation to the victim. It is, therefore, not necessary to pass any order regarding refund of fine amount to the appellant-accused.

ORDER

i) The Appeal stands allowed.

ii) The impugned judgment and order of conviction passed in Sessions Case No.77/2008 by Additional Sessions Judge, Greater Mumbai (Sessions Division, Dindoshi) is hereby quashed and set aside.

iii) The appellant-accused is hereby acquitted of the offences punishable under Sections 376 and 342 of the Indian Penal Code and he is set at free.

iv) The appellant-accused shall be released on furnishing PR Bond of Rs.15,000/- with one or two sureties of the like amount to appear before the Higher Court as and when such Court issues notice in respect of any appeal or petition filed against the judgment of this Court and such Bail Bonds shall remain in force for six months, in view of Section 437 A of the Code of Criminal Procedure Code, 1973.

v) The Registry to take necessary steps accordingly.

vi) R & P be sent back to the concerned Sessions Court.

vii) The Appeal is accordingly disposed of.

(viii) The Secretary, High Court Legal Services Committee, Mumbai is hereby directed to make payment of professional fees of Mr.V.V.Phatate, who is on the panel of Legal Aid Advocates, according to the rules.

(SHRIKANT D. KULKARNI, J)

(PRASANNA B. VARALE, J)

L.S. Panjwani, P.S.