

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

**CRIMINAL APPEAL NO. 1772 OF 2019
WITH
INTERIM APPLICATION NO. 3269 OF 2022**

Parvindar Savarna Singh ..Appellant

Versus

The State of Maharashtra & Anr. ..Respondents

Mr. Satyam H. Nimbalkar a/w. Abhishek Arote a/w. Ashish Kachole
for Appellant.

Smt. M. R. Tidke, APP for State/Respondent No.1.

Mr. Ratnesh M. Dube (Appointed Advocate) for Respondent No.2.

**CORAM : SARANG V. KOTWAL, J.
DATE : 25th NOVEMBER 2022**

JUDGMENT :

1. The Appellant has challenged the Judgment and order dated 24/06/2019 passed by learned Additional Sessions Judge, Pune in Sessions Case No.544 of 2015. There were two accused in the case. The Appellant was the accused No.1. Both accused were convicted for commission of offence punishable under sections

452, 392, 342, 354 and 506 r/w. 34 of the I.P.C. So far as the Appellant is concerned, he was convicted and sentenced for following offences.

- i) He was convicted for commission of offence punishable under section 376 of the I.P.C. and was sentenced to suffer R.I. for 10 years and to pay a fine of Rs.5000/- and in default of payment of fine to suffer S.I. for 6 months.
- ii) He was convicted for commission of offence punishable under section 452 of the I.P.C. and was sentenced to suffer R.I. for 3 years and to pay a fine of Rs.2000/- and in default of payment of fine to suffer S.I. for 1 month.
- iii) He was convicted for commission of offence punishable under section 354 of the I.P.C. and was sentenced to suffer R.I. for 3 years and to pay a fine of Rs.2000/- and in default of payment of fine to suffer S.I. for 1 month.

iv) He was convicted for commission of offence punishable under section 392 of the I.P.C. and was sentenced to suffer R.I. for 4 years and to pay a fine of Rs.2000/- and in default of payment of fine to suffer S.I. for 1 month.

v) He was convicted for commission of offence punishable under section 506 of the I.P.C. and was sentenced to suffer R.I. for 2 years.

The Accused No.2 was acquitted from the Charges of commission of offence punishable under section 376 of the I.P.C.

All the substantive sentences were directed to run concurrently. The Appellant was granted set off U/s.428 of the Cr.p.c. Out of the fine amount, Rs.15000/- were directed to be paid to the victim as compensation.

2. The prosecution case is that the incident took place on 19/04/2015 in the flat of PW-1 and PW-2. PW-2 was husband of PW-1-the victim. In the night time, at around 10.00p.m, she was alone in the flat. Both the accused entered the flat and initially

robbed her ornaments and cash. Thereafter the appellant committed rape on her. The accused No.2 also took part in the incident. While they were committing the offence, PW-2-husband of PW-1 returned home from his work by opening the door with his latch key. He found the appellant was without clothes. PW-1-victim was in her bed-room. She was also without clothes. Both the accused including the Appellant ran away from her flat with her two mobile phones. PW-2 went out of the flat and raised shouts. The neighbours gathered there. The accused No.2 was successful in getting away. The Appellant ran away to the 12th floor and hid himself in one room there. Some neighbour called the police. In the meantime, PW-1 the victim went to bathroom and raised shouts for help from her neighbours. The police officers came to their flat. Somebody told that the appellant was hiding himself on the 12th floor. The police officers went there and apprehended him. On the next day morning, PW-1 and PW-2 went to Hadapsar police station. PW-1 gave her F.I.R. The offence was registered and the case was investigated. PW-1 was sent for medical examination. The Appellant was formally put under arrest.

The spot panchanama was conducted. The appellant's two wheeler parked in the same society was recovered at his instance. Subsequently, the accused No.2 was arrested. Two mobile phones were recovered from him. The investigation was carried out. The test identification parade was held on 12/05/2015 wherein PW-1 and PW-2 identified both the accused. At the conclusion of the investigation, the Charge-sheet was filed. The case was committed to the Court of sessions.

3. During trial, the prosecution examined eight witnesses including the victim, her husband, panchas, Medical officers and the Investigating Officer. The defence of the Appellant was of total denial. At the conclusion of the trial, learned trial Judge convicted and sentenced the Appellant, as mentioned earlier.

4. The evidence of PW-1 and PW-2 is important in this case. The victim was examined as PW-1. She has deposed that, at the relevant time, she was residing with her husband and his parents. In April 2015, she was not doing any job. Her husband was working in a food mall as Assistant Manager. The incident had

taken place on 19/04/2015. That time, she was in her house. At about 9.15p.m., from her kitchen window, she could notice two persons moving around in the common passage outside the flat. One of them had worn yellow shirt and other was in a blue shirt. At 9.55p.m. they rang the door bell. She opened the door. The person wearing yellow shirt asked her whether one Ms. Sharma stayed there. PW-1 replied in the negative. That was just a pretext for entering the flat. The other person pushed the door and entered the flat. PW-1 got scared and came out of the flat. The person who was wearing yellow shirt apologized and both of them went out of the flat. The prosecution case is that the Appellant was the person who was wearing yellow shirt and the other accused was wearing the blue shirt. After both of them went out, PW-1 came inside her flat and closed the door. After about 5 to 10 minutes, she again heard the door bell. From the peep-hole she saw that the Appellant was standing in front of the door. She opened the door partially by using chain of the door. The Appellant again apologized. When PW-1 was about to close the door, that time, both the accused pushed the door and entered the flat. She

shouted. She got scared. Both of them over-powered her. The accused No.2 gagged her mouth. The Appellant asked for money. She was taken to smaller bed-room. They put a cello tape on her mouth. They tied both her hands on her back side by using cello-tape. They removed Rs.450/- from her purse. The appellant removed gold *Mangalsutra* which she was wearing. Then they dragged her to master bed-room. It is her case that, then the Appellant removed her clothes. He removed his own clothes and committed rape on her. The co-accused then wanted to take his turn. He removed the cello-tape used for tying her hands. He also removed the cello-tape put on her mouth. Around that time, the husband of PW-1 returned home. He rang the door bell. But since there was no response, he used his latch key to open the door. He came inside. He saw the situation. Both accused rushed towards him. He started shouting and went outside the flat. They chased PW-2. In the meantime, PW-1 went to bathroom and started shouting for help. She wore other clothes which were in the bathroom. Their neighbours came to their flat. Somebody informed the police station. Both accused had taken her Blackberry

cell phone and another phone of Samsung company with them. They also took the wrist watches of PW-1 and PW-2. After some time, police came at the spot. It is her case that, she went to Hadapsar police station along with police. The police came back to their society. Somebody informed them that they heard some voice on the 12th floor of the building. When the police and other society members went to the 12th floor, the Appellant was caught there. The police took him to the police station. PW-1 also went to the police station. Her family was tensed. The police officer Gore told them that a lady police officer would be available on the next day morning. PW-1 and others then went to Hadapsar police station on the next day morning and lodged the F.I.R. The F.I.R. was recorded by PW-7- P.S.I. Varsharani Patil. The F.I.R. is produced on record at Exhibit 41. PW-1 was then referred to Sassoon Hospital for medical treatment and examination. On 12/05/2015, she was called to Yerwada Central Prison for identification of the accused in the test identification parade. She identified both the accused. She identified the Blackberry phone in the Court; produced as Article 'A'. She did not identify other phone of Samsung company;

produced in the court. She identified the yellow T-shirt worn by the appellant. She identified the other articles, as well. PW-1 identified both the accused before the Court.

In the cross-examination, she deposed that there was CCTV camera installed on the ground floor. There were 6 flats on her 8th floor besides the refugee area. She denied that she knew one Payal Gupta. Her husband's parents were not in the house at the time of incident. This fact was known to others. At about 9.47p.m. on that day, she had talked with her husband on her phone. She emphasized that, on the second occasion, she opened the door by putting the safety chain, but she removed it while closing the door. While she was doing so, both the accused forcibly entered her flat. There was no scuffle between her and the accused. She explained that, she was frightened and those two persons pushed her on the floor. After the accused had entered, her husband came after 20 to 25 minutes. She also deposed that the accused threatened to commit her murder if she resisted. The accused ran away after her husband came home. At the first instance, she had gone to Hadapsar police station but had not

lodged the report. She denied the suggestion that, there was a quarrel between herself and her husband after he returned from work and in that quarrel her husband beat her. She further deposed that, after arrest of the appellant, police had shown him in the society. The other accused was shown at the time of test identification parade. She admitted that, it was possible that age of the persons standing in the queue at test identification parade could differ. She admitted that, she had made a complaint against PW-7. She also accepted that, according to PW-7 no such incident could have happened and PW-7 suspected that PW-1 was having some relations with a third person. The F.I.R. produced on record at Exhibit 41 substantially corroborates her evidence.

5. PW-2 is the husband of PW-1. He has deposed that, his duty hours were from 10.00a.m. to 10.00p.m. On that day, he had left his house at 12.30p.m. At 9.47p.m. he had made a phone call to his wife informing that he was returning home. He returned home within 20 minutes. At the first instance, he rang the bell. There was no response and, therefore, he used his latch key and opened the door. He saw one helmet in the first room. He went

towards the master bedroom. He saw one person in half naked condition and other one in complete naked condition. He saw PW-1 sleeping on the floor without clothes. One cello-tape was stuck to her mouth and hand. One of those two persons raised a metal fighter on him. PW-1, in the meantime, ran towards the bathroom. PW-2 came outside the flat and gave shouts for help. Both the accused then ran outside the flat. They went towards the terrace. According to him, when he entered the flat and removed the cello-tape on the mouth of PW-1, she narrated the incident to him. In the meantime, one of the neighbours had called the police. Police came there and on their advise he met API Shri. Gore at Hadapsar police station. After that, PW-1, PW-2 and API Shri. Gore came back to the flat. They were accompanied by 4 to 5 other police. The neighbours informed that, someone was there on the terrace. Therefore, PW-2, API Shri. Gore and other police constables went to the terrace. They saw the Appellant hiding himself on the 12th floor in one gallery of a flat. He was wearing yellow shirt. He was the one who was completely naked when PW-2 had entered the flat. The appellant was then taken to the police station. At that

point, PW-1 and PW-2 had not lodged their report in the police station. They discussed the matter with other relatives. On the next day at about 9.00a.m. they went to Hadapsar police station and lodged the F.I.R. He came to know the name of the appellant from the police. Then spot panchanama was conducted. He could not identify the mobile phone produced in the Court. On 12/05/2015, he went to Yerwada Central Prison and identified both the accused in the test identification parade.

In the cross-examination, he accepted that his statement was not recorded on 20/04/2015. He also accepted that, PW-7 told him that PW-1 was involved in some racket. He deposed that he did not recollect whether police told him that his wife was having affair with one Shetty. He further stated that, they had made complaints against PW-7 complaining that she was not co-operating with them. He could not assign any reason as to why it was not mentioned in his police statement that he saw his wife in naked condition on the floor. He denied the suggestion that, his wife was involved in a racket and to save her from defamation, they falsely implicated the appellant.

6. PW-3 Ashok Dhotre was a pancha for panchanama for seizure of clothes of the appellant and recovery of his two wheeler. These panchanamas were produced on record at Exhibit 51 and 52.

7. PW-4 Ayub Saiyyad was a pancha for spot panchanama which was carried out at around 10.00a.m. on 20/04/2015.

In his deposition, apart from description of the spot panchanama, he made a statement that he had found two choppers in the room. This particular statement is not mentioned in the spot panchanama. The spot panchanama is produced on record at Exhibit 54. It mentions that, one sharp weapon i.e. *Katyar* having 17cm. long blade was found in the bed-room. Besides clothes, other significant articles i.e. cello-tape having some hair stuck to it, one black helmet and one blue coloured bag were found. That bag is important because there were two iron fighters, identity cards, the Appellant's Aadhar Card, his identity card of one company and one black coloured mask in that bag. These articles were incriminating.

His cross-examination was hardly of any consequence and no material in support of the defence is elicited from his cross-examination.

8. PW-5 Chandrakant Ahiwale was a pancha for arrest of the accused No.2. On 22/04/2015, two mobile phones were recovered from his person when he was arrested.

9. PW-6 Dr. Shailendra Pawar was attached to Sassoon hospital in Gynecology department. He had examined the victim medically. He described the injuries found on PW-1 as follows:

i) Contusion over dorsum of right hand of the size 3 x 3 reddish blue.

ii) Contusion over back of lower 1/3rd of left forearm and dorsum of left wrist, reddish blue, age of injury was within 24 hours.

iii) Abrasion over left side of anterior aspect of neck, dark red colour. It was 1 to 2 days old.

This examination was conducted on 20/04/2015. He

deposed that, these injuries were possible during struggle made by the victim. The medical reports are produced on record at Exhibit 73.

10. PW-7 P. I. Varsharani Patil was attached to Hadapsar police station on 20/04/2015. At 9.00a.m., PW-1, PW-2 and their relatives came to Hadapsar police station. PW-1 lodged her report. This witness had taken it down. She then sent PW-1 for medical examination. She sent P.S.I. Doiphode to record the spot panchanama. The Appellant's two wheeler was recovered at his instance from the parking of the building where PW-1 and PW-2 were residing. Subsequently, accused No.2 was arrested and two mobile phones were recovered from him.

In the cross-examination, she stated that, in the night of 19/04/2015 PW-1 had not visited the police station in her presence. According to her, API Gore was in-charge in the night duty. The entry in station diary was taken down by API Gore regarding theft in the apartment of PW-1. According to her, PW-2 and his relatives interfered in the investigation. She also admitted

that, during her investigation she found that PW-1 was often communicating with one Shetty. She deposed that, after 4 to 5 days the investigation was transferred to Mundhwa police station. During those days she had not recorded the statements of relatives and neighbours of PW-1. She deposed that, she arrested the Appellant at Hadapsar police station. She registered the F.I.R. against two unknown persons.

11. PW-8 P.I. Surekha Garge was attached to Mundhwa police station. She was handed over the investigation of C.R.No.178 of 2015 registered at Hadapsar police station. She took over the investigation on 23/04/2015. That time she could not make any inquiry with PW-1 as she was not feeling well. She then carried further investigation, recorded statements of various witnesses, sent the clothes and articles for chemical analysis. On 12/05/2015, test identification parade was conducted. She received the memorandum of parade submitted by the Special Executive Magistrate. It is produced on record at Exhibit 94.

In his answer to a specific question put by the defence,

she stated that, there was no telephonic conversation between the accused and the victim. Except this fact, she did not know with whom the victim was having telephonic conversation. She deposed that, PW-2 had stated that, his wife was lying in naked condition.

12. The memo of test identification parade was produced on record at Exhibit 94. This witness also produced a copy of F.I.R. in respect of crime registered at Chatushrunji police station U/s.302 and 364 of I.P.C. in which the Appellant was shown as one of the accused.

This is the evidence led by the prosecution. Defence of the appellant was of total denial.

13. Learned counsel for the Appellant made following submissions:

The conduct of both PW-1 and PW-2 is unnatural. Both accused were unarmed and it was unnatural that PW-1 would allow them to enter the flat on the second occasion, though, on the first occasion she had got scared after they had entered her flat and had left.

The prosecution has not explained anything about the helmet which was recovered during spot panchanama, which PW-2 had seen while entering the flat. PW-4 has deposed in his examination that, there were two choppers, however, PW-2 has not spoken about any chopper and, therefore, it is a clear attempt on the part of the investigating agency and the witnesses to implicate the accused falsely. The F.I.R. was not lodged immediately. There was no reason for not lodging the F.I.R. in the night itself. There is a contradiction regarding state in which PW-2 saw his wife-PW-1 after neighbours had gathered to help them. He has deposed that, when he subsequently entered the flat, he had seen the cellotape on the mouth of his wife-PW-1, as well as, on her hand which he removed. Whereas, PW-1 in her deposition has stated that, the accused No.2 had removed those tapes and she had gone to bathroom and had shouted for help. According to Shri. Nimbalkar, this is a serious contradiction. He further submitted that the prosecution case is not clear. On one hand, it is alleged that the accused had entered the flat with an intention to commit robbery and on the other hand, allegations are made of commission of

rape. The ornaments taken away are not recovered. The Blackberry phone which PW-1 has identified was allegedly recovered from the accused No.2, but the IMEI number was not confirmed and, therefore, this identification is not positive enough.

According to Shri. Nimbalkar, robbery is not proved and, hence, subsequent incident of rape is also not proved. None of the neighbours is examined. This is important, because the neighbours had gathered immediately and some of them had called the police. A.P.I. Gore is not examined who had played main part in apprehending the accused in the same building. Identification of the Appellant and co-accused is rather meaningless because PW-1 admitted that, she had seen the appellant when her statement was recorded. The injuries on her person could have been caused by her husband.

In the alternative, Shri. Nimbalkar submitted that, it could be a case of consensual intercourse. Her conduct is completely unnatural and only because, since her husband saw the incident, she had defended herself. There were no injuries to her

private parts and, there were no signs of struggle. It was not her case that, she was over-powered on the show of some weapon or that the accused had used any weapon.

He further submitted that, finding of Aadhar card, identity card and ATM cards on the next day at the time of conducting spot panchanama itself is doubtful, because, according to the prosecution case, the appellant was in their custody right from the night itself and the spot panchanama was conducted on the next day at around 10.00a.m.

14. Learned APP, as well as, learned counsel for the Respondent No.2 submitted that, the appellant has not taken a specific case of consent. Under Section 114A of the Indian Evidence Act there was a presumption against the appellant. When the victim stated in her evidence before the Court that, she had not consented, the court is required to presume that there was no consent. The burden shifted on the appellant, which he has not discharged in any manner. They submitted that, there was nothing contrary on material particulars in the evidence of PW-1 and PW-2.

According to learned APP, as well as, learned counsel for the Respondent No.2, PW-1 was over-powered by two persons and, therefore, she could not have resisted. In any case, the medical evidence does show that there was struggle on her part which is supported by injuries; one on hand and one near her neck. The appellant was found on the 12th floor of the building and there was no explanation offered. The Appellant has not explained anything in his statement recorded U/s.313 of the Cr.p.c. The evidence of PW-1 and PW-2 is consistent enough. The contradictions or omissions did not go to the root of the matter. They have also explained the delay in lodging of F.I.R. Both of them submitted that the police officer Gore had told PW-1 that a lady police officer would be present on the next day morning and, therefore, the F.I.R. was lodged on the next day morning. There was no delay in lodging the F.I.R.

15. I have considered these submissions. So far as evidence of PW-1 and PW-2 is concerned, it is consistent on material aspect. PW-1's evidence is very important. She has deposed how the incident had taken place. The Appellant and the co-accused at the

first instance had made forcible entry in her flat and then they had gone outside. They again forcibly entered the flat. At that time, PW-1 had taken precaution to partially open the door by putting safety chain, but while closing the door she had removed it and the accused had entered the flat forcibly. After that, she was completely overpowered by both the accused and they had committed this offence. There is nothing unusual in her conduct, because she could not seek help of others. Her mouth was covered with cello-tape, her hands were tied on the back. From that point, she was completely helpless till her husband entered the flat. Therefore, there was nothing unusual in her conduct. The fact that, her hands were tied and her mouth was covered by the cello-tape is supported by medical evidence given by PW-6. He has deposed that, the injuries on PW-1's hands were suggestive of the struggle on her part. Thus, her ocular evidence is also supported by medical evidence. She was a married lady. She was completely overpowered by both the accused and, therefore, not finding injuries on her private parts will not come in the way of prosecution and will not help the defence.

16. Another important submission made by Shri. Nimbalkar was regarding finding of Aadhar card, other identity card and ATM card belonging to the appellant in the flat of PW-1 and 2. He has submitted that the appellant was with the police and was under their control since the night itself and the spot panchanama was conducted on the next day. Therefore, according to him, those articles were planted in the flat. However, there is no explanation offered as to how the police could get those articles. If they had taken them forcibly from the appellant and had planted those articles in the flat, the Appellant himself has not stated so in his statement recorded U/s.313 of Cr.p.c. or even such suggestions are not given. Therefore, this submission and this theory of planting of those articles in the flat of PW-1 and PW-2 is not supported by any material whatsoever on record. While it is true, according to PW-1 and PW-2, the appellant was already arrested in the night itself, his arrest panchanama was conducted at about 3.30p.m. on the next day. The Investigating officer P. I. Patil has deposed about this arrest panchanama, however, there was no cross-examination on this point regarding presence of the appellant in their custody

since before registration of F.I.R. In any case, the F.I.R. was lodged only in the morning and, therefore, investigation formally commenced after 9.00a.m. and thereafter the arrest panchanama was conducted. The investigating agency had arrested the appellant formally at the time of conducting arrest panchanama.

The identification of the appellant is also proved beyond doubt, because he was arrested in the night itself from the 12th floor of the building. PW-1 had lodged F.I.R. in the morning. PW-1 has categorically deposed that the police were informed about the appellant being on the 12th floor of the society and police had taken him to police station. PW-1 and her family members had also gone to Hadapsar police station in the night, therefore, PW-1 had already seen him when he was actually apprehended by the police was taken to the police station. Therefore, appellant's identification in the test identification parade and any infirmity in such parade loses significance because she had seen the appellant in the meantime after the incident. The appellant was caught in the same building soon after the incident before he could escape.

17. As rightly submitted by learned counsel for the Respondent No.2 and learned APP, even the theory of consent will not help the Appellant in this case; firstly, because PW-1 has sufficiently established that she was subjected to forceful rape without her consent and consequently, the Appellant has not discharged his burden U/s.114A of the Indian Evidence Act. The Appellant has also not given any explanation or any suggestion as to when he was apprehended and how the arrest panchanama was conducted in the afternoon on the next day. Since the evidence of PW-1 and PW-2 was sufficient enough, the neighbour's evidence in this case was not necessary because all the necessary facts are proved through the evidence of PW-1 and PW-2. PW-1 has already explained as to why F.I.R. was lodged on the next day. She has deposed that, A.P.I. Gore had told them that a lady police officer would be available in the morning shift. Thereafter PW-1 had gone to the police station in the morning and had lodged the F.I.R. Thus, there is no delay in lodging the F.I.R. Looking at the case from all angles, the prosecution has proved its case beyond reasonable doubt. The offence is serious. Learned trial Judge has given proper

reasons for arriving at the conclusion of guilt of the accused. Proper reasons are given in awarding the sentence. I do not see any reason to interfere with the Judgment and order of conviction and sentence.

18. Hence, the Appeal is dismissed.

19. With disposal of this Appeal, nothing survives in the interim application, hence, the Interim Application No.3269 of 2022 is also disposed of.

(SARANG V. KOTWAL, J.)