

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

CRIMINAL APPEAL NO.435 OF 2013

APPELLANT : Pintu @ Rameshwar S/o Manohar Bakal,
Aged about 30 years, R/o Dighi, P.S.
Manora, District – Washim

VERSUS

RESPONDENT : The State of Maharashtra,
Through Police Station Officer, Police
Station Manora, District – Washim

WITH

CRIMINAL APPEAL NO.470 OF 2013

APPELLANT : Haridas S/o Rama Manwar,
Aged about 22 years, R/o Dighi, P. S.
Manora, District – Washim

VERSUS

RESPONDENT : The State of Maharashtra,
Through Police Station Officer, Police
Station Manora, District – Washim

WITH

CRIMINAL APPEAL NO.536 OF 2013

APPELLANT : Sukhdeo Shrawan Acharkate,
Aged 22 years, Occ: Nil, R/o Dighi, P. S.
Manora, District – Washim

VERSUS

RESPONDENT : The State of Maharashtra,
Through Police Station Officer, Police
Station Manora, District – Washim

*Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders.*

Court's or Judge's order

Shri Amit Band, Advocate for Appellant in Criminal Appeal No.536 of 2013.
Shri R. M. Daga, Advocate for Appellant in Cri. Appeal No.435 of 2013.
Shri Dhumale, Advocate for Appellant in Cri. Appeal No.470 of 2013.
Shri S. M. Ghodeswar, APP for the Respondent/State in all appeals

CORAM : AVINASH G. GHAROTE, J.

DATE : 1st JULY, 2022.

ORAL JUDGMENT

. Heard Shri Band, learned Counsel for the Appellant in Criminal Appeal no.536 of 2013, Shri R. M. Daga, learned Counsel for the Appellant in Criminal Appeal no.435 of 2013 and Shri Dhumale, learned Counsel for the Appellant in Criminal Appeal No.470 of 2013.

2. The Appeals challenge the judgment dated 23.07.2013 rendered by the District Judge-II and Additional Sessions Judge, Washim, whereby the Appellants, who are the original Accused persons have been convicted for the offence punishable under Section 376 (2) (g) of the Indian Penal Code (IPC) and sentenced to suffer rigorous imprisonment for ten years and to pay a fine of Rs.500/- (Five Hundred Only) each, and in default to suffer further simple imprisonment for one month and also convicted for the offence punishable under Section 363 read with Section 34 of the IPC and sentenced to suffer rigorous imprisonment for two years and to pay a fine of Rs.500/- (Five Hundred Only) each, and in default to suffer further simple imprisonment of one month and further convicted for the offence punishable under Section 366 read with Section 34 of the

IPC and sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs.500/- (Five Hundred Only) each, and in default to suffer further simple imprisonment for one month.

3. The main argument has been advanced by Shri Amit Band, learned Counsel for the Appellant in Criminal Appeal No.536 of 2013.

4. It is contended by Shri Band, learned Counsel for the Appellant that the impugned judgment, convicts the Appellants merely on the basis of conjecture and surmises, by ignoring material admissions on record and so also the medical evidence. By taking me through the evidence of PW-5 the prosecutrix, (Page 89) he submits, that it is the only evidence based upon which, the learned Trial Court has decided the matter in ignorance of the medical evidence on record. He further points out, that even PW-3 Tulshiram Ramji Bhagat the father of the prosecutrix, had turned hostile and the basic story spun by the prosecutrix has lost credibility. It is further submitted, that since PW-7 Rameshwar Maroti Bakal, who is claimed to have reached the prosecutrix to her residence on the next day, had also turned hostile, it was necessary to have examined the other person, who was claimed to be with them, namely, Ramkrushna Lokhande, however, he has also not been examined. Various other material witnesses have not been examined for the

reason, that they would have indicated that no such incident had taken place. Shri S. M. Ghodeswar, learned Additional Public Prosecutor for the Respondent/State supports the impugned judgment and submits, that the material on record justifies the conviction.

5. The incident as spelt out from the evidence of PW-5 the prosecutrix is as under :

She alleges that on 04.11.2007 at about 5.00 p.m. when she had gone to answer nature's call on the road adjacent to the field of one Subhash Lokhande, the Accused no.1 Sukhdeo Shrawan Acharkate came near her and gagged her mouth and threatened to kill her. Then Accused no.2 Haridas Rama Manwar and Accused no.3 Pintu are also alleged to have come near her and threatened to kill her. All the Accused persons thereafter had lifted her and carried her in the agricultural field belonging to Subhash Lokhande, which was adjacent to the road, in which, a crop of Tur was standing. It is further alleged, that the Accused no.1 Sukhdeo and Accused no.2 Haridas thereafter cleaned the place, removed the clothes of the prosecutrix, who, at that time, was wearing Salwar Kamij. Accused no.1 Sukhdeo had pressed her breasts. Accused no.2 Haridas also pressed her breasts. Accused no.3 Pintu @ Rameshwar also pressed her breasts. The Accused no.1 Sukhdeo committed forcible sexual intercourse with her.

Thereafter, Accused no.2 Haridas also committed forcible sexual intercourse with her. Thereafter, Accused no.3 Pintu also committed sexual intercourse with her. Thereafter, Accused no.2 Haridas went to village Dighi and came on the spot of the incident on a motorcycle. At that time, Accused no.1 Sukhdeo and Accused no.3 Pintu were present on the spot. They have gagged her mouth. Thereafter, Accused no.3 Pintu also went to the village and came on the spot of incident along with the motorcycle. The Accused no.1 Sukhdeo and Accused no.3 Pintu compelled her to sit on the bike of Accused no.3 Pintu. The Accused no.2 Haridas was sitting on the motorcycle behind her. The Accused no.3 Pintu has driven the motorcycle. Then, she was forcibly taken by the motorcycle to 'Mahadeo' temple situated at Somthana. The Accused No.1 Sukhdeo also came near 'Mahadeo' temple. The Accused persons, there also after removing her clothes, are claimed to have committed forcible sexual intercourse, one after another upon the victim. She and Accused persons were in the 'Mahadeo' temple till 01.00 A.M. in the night. It is alleged, that thereafter all the Accused persons left her alone at about 1.00 A.M. of 05.11.2007 in the 'Mahadeo' temple and went away. The prosecutrix is thereafter alleged to have stayed in the temple till the morning, when her uncle Shashwasan Yashwant Dhale (PW- 8 - Page 112) had come there and upon seeing her, had enquired as to why,

was she was present in the temple in the early morning, whereupon the aforesaid incident is claimed to have been narrated by the PW-5 prosecutrix to her uncle Shashwasan Dhale. PW-8 Shashwasan Dhale thereafter asked her to go to home, whereupon the PW-5 told him that she intended to end her life. It is further alleged, that thereafter Ramkrushna Lokhande (not examined) and Rameshwar Maroti Bakal (PW- 7 – Page – 110) came to the Mahadeo temple and took her to her residence on their motorcycle. It is further claimed, that when she reached her residence, she narrated the incident to her mother Ushabai Tulshiram Bhagat PW-6, who thereupon called her maternal uncle Jagjiwan Dere (not examined) as at the relevant time, her father Tulshiram (PW- 3 – Page – 54) was not present, as he was at Nagpur. It is further alleged that PW-5 had also narrated the incident to her brother Sudhakar (not examined); uncle Anna Bhagat (not examined) and maternal uncle Jagjiwan Dere (not examined). It is then alleged, that on 06.11.2007, PW-5 along with her brother Sudhakar, Anna Bhagat and Jagjiwan Dere had been to the Police Station, Manora for lodging a report, where a Lady police constable had made enquiry with her about the alleged incident, which she could not narrate as she was frightened, and therefore, it is claimed that they all returned back. PW-3 Tulshiram Bgagat the father of the prosecutrix thereafter returned and lodged the report on

12.11.2007, after which, Police Station Officer, Manora had referred PW-5 the prosecutrix to the Government Hospital for medical examination, which was conducted. It is further claimed, that at the time of the incident, the age of the prosecutrix PW-5 was about 15 years and she was taking education in Zilla Parishad School, Umbarda Bazar having passed Std. 4th from Zilla Parishad School, Dighi. (Mark Sheet Exh-46). It is further claimed, that the prosecutrix PW-5 belongs to Bouddha community, whereas the Accused no.1 Sukhdeo belongs to Mali community, Accused no.2 Haridas belongs to Bouddha community and the Accused no.3 Pintu belongs to Kunbi community. The original caste certificate of PW- 5 is at Exh-70.

6. A perusal of the evidence of PW-5, would indicate that there are material omissions in her statement before the Police and the Executive Magistrate as under:

- a) All the three accused persons have lifted her,
- b) Accused no.1 Sukhdeo has lifted her,
- c) Accused no.1 Sukhdeo has pressed her breasts,
- d) Accused no.1 Sukhdeo compelled her to sit on the motorcycle of Accused no.3 Pintu,

e) Accused no.1 Sukhdeo has removed her clothes at Mahadeo temple.

f) That she has narrated the alleged incident to her brother Sudhakar, uncle Anna Bhagat and maternal uncle Jagjiwan Dere.

7. In order to support the prosecution story, as many as 14 witnesses have been examined as under:

P. W. No.	Pg No.	Name of Witness	Exb. No.
1	34-35	Naresh Dinkarrao Deshmukh (Teacher)- Date of Birth	44
2	37-38	Dnyaneshwar Pundalik Dhale (Panch Witness)	47
3	54-56	Tulsiram Ramji Bhagat (Father of Victim)	52
4	68	Tulshiram Namdeorao Ingole (Panch Witness)	56
5	89-100	Aparna Tulshiram Bhagat (prosecutrix) [hostile]	68
6	105-109	Ushabai Tulshiram Bhagat (Mother of prosecutrix)	74
7	110-111	Rameshwar Maroti Bakal [hostile]	75
8	112-113	Shashwasan Yashwant Dhale [hostile]	77
9	114-116	Dr. Kailash Mahadeo Ramteke	79
10	119-121	Dr. Sharwari Shankarrao Patil	84
11	127-128	Narayan Devsingh Pawar	89
12	129-135	Keshav Pandurang Dobade (I.O.)	91
13	163-165	Sahebrao Bhagwanji Harne	104
14	182-183	Panjabrao Himmatrao Deshmukh	112

8. The above narration of the incident alleged, would indicate that it has happened in two parts, the first part being on 04.11.2007 in the field of Subhash Lokhande at about 5.00 p.m. and the second in the Mahadeo temple in the night time on the same date. PW-8 Shashwasan Dhale, who is claimed by the PW-5, to have seen her in the morning of 05.11.2007 at Mahadeo temple and to whom, PW-5 claims to have narrated the incident for the first time, has turned hostile and has denied any information regarding the same. PW-7 Rameshwar Maroti Bakal, who had carried her along with Ramkrushna Lokhande on his motorcycle and had reached PW - 5 to her residence has also turned hostile and claims ignorance about the same. Ramkrushna Lokhande, who is claimed to have accompanied PW-7 Rameshwar Bakal on the motorcycle and instrumental in reaching PW-5 to her residence, has not been examined.

9. PW-5 in her evidence further states, that the incident was narrated by her on 05.11.2007 to (a) Ushabai Tulshiram Bhagat her mother pw6; (b) Sudhakar her brother; (c) Anna Bhagat her uncle and (d) Jagjiwan Dere her maternal uncle. However, neither Sudhakar, Anna Bhagat nor Jagjiwan Dere have been examined. She further narrates, that she along with the aforesaid persons had been to the Police Station, Manora on 06.11.2007 for the purpose of lodging a complaint, however, as she was frightened, she was unable to

narrate the incident, and therefore, all of them are claimed to have returned back. This however, is falsified by Exh-71/101 (Page 159), which is an information given by Sudhakar Tulshiram Bhagat, brother of PW-5/prosecutrix to the PSI, Manora (K. P. Dobade – PW-12), which is under the signature of Sudhakar, in which, it has been categorically stated that prior to lodging report with Police Station when the Lady police constable, enquired with his sister/PW-5 in presence of all of them i.e. Sudhakar, Anna Bhagat and Jagjiwan Dere, PW-5 the prosecutrix, told the Lady police constable that no such incident had taken place and she did not know the Accused persons.

10. It is further recorded in Exh-71/101, that with a view that injustice should not be caused to anybody for no reason and unrest should not be spread in the village when there was peace in the village, all the above named persons again and again enquired with PW-5 and confirmed for themselves that no such incident had taken place, and hence, they returned without lodging any report with Police Station, even after coming to the Police Station. PW-12 PSI K. P. Dobade, who has recorded the aforesaid information on 06.11.2007 at Police Station, Manora has proved the aforesaid in his evidence at Exh-101. That apart, PW-5 in her cross-examination has admitted of having gone to the Police Station, Manora on 06.11.2007 with her maternal uncle Jagjiwan Dere and

Anna Bhagat, at which time, Sudhakar had given oral information to the Police, who had reduced it into writing, whereupon the signatures of Sudhakar as well as that of PW-5 the prosecutrix were also taken. She further admits, her signature appearing on the information, which was so recorded, at Exh-71 (Page 160). Though, in her cross-examination she states, that it was not true that Police had read over to her, the contents of information dated 06.11.2007, however, the fact remains that she has admitted the information being given to the Police by Sudhakar and the same being reduced into writing and so also her signature and that of Sudhakar upon the same, which is at Exh-71/101 (Page-159). PW-12 K. P. Dobade (Page-129), who was stationed at Police Station, Manora on 06.11.2007, in his cross-examination (Para-7/133) categorically admits, that on 06.11.2007 at about 5.30 p.m. when he was present in the Police Station, Manora, Sudhakar the brother of PW-5 had stated the information about the alleged offence, which was reduced into writing by him and which was also signed by Sudhakar; Anna Bhagat; Jagjiwan Dere and also one S. B. Athawale and proved the contents of the said information in Exh-71/101. He further categorically states, that he also had made an enquiry on 06.11.2007 with PW-5 through the Lady police constable, who had disclosed that no such incident had happened.

11. PW-3 Tulshiram is the father of the prosecutrix PW-5. It is claimed that PW-3 Tulshiram was informed about the alleged incident on 12.11.2007, when he returned back from Nagpur, whereupon he has lodged the complaint. This is reflected from the evidence of PW-5 (Para 2 Page 91). A perusal of the evidence of PW-3 Tulshiram at Exh-52 (Page 54) indicates, that PW-5 had never informed him about the alleged incident. In fact, in his chief, he states that one Balu Manohar Bakal had informed him that the Accused persons had committed rape upon his daughter/PW5. Even one written report was brought by the said Balu Manohar Bakal, upon which, he claims to have put his signature (Exh-53). He, however, in his chief itself states, that he does not know the contents of the report and so also that Balu Bakal did not tell him the name of the person, who had committed rape upon his daughter. He was therefore declared hostile and cross-examined. In his cross-examination, he denies any knowledge about PW-5 having informed him of the alleged incident, when he returned back from Nagpur on 12.011.2007. He further denies that his wife had ever informed him about the alleged incident. It is therefore apparent that his testimony does not carry any meaning whatsoever. His testimony, however, puts a dent upon the testimony of PW-5/prosecutrix, who claims that Tulshiram her father (PW-3) was informed by her about

the said incident, when he returned back from Nagpur (Para 2 Page 91).

12. The testimony of PW-6 Ushabai the mother of the prosecutrix/PW-5 (Page 105) only states, that the PW-5 had informed her about the incident on 05.11.2007. On the other hand, Exh-71/page 101 further gains credence as PW-6 in her chief itself admits that PW-5, Sudhakar her son, Jagjiwan Dere her brother had been to the Police Station, Manora for lodging a report. She further states, that PW-3 Tulshiram Bhagat had returned on 11.07.2007, on which date PW-5 is claimed to have narrated the incident to him, which is not what PW-3 Tulshiram says. It is thus apparent, that the testimony of PW-5 is the sole testimony regarding the alleged incident as PW-3 (Tulshiram) her father, PW-7 Rameshwar Bakal and PW-8 Shashwasan Dhale had turned hostile.

13. What is also material to note, is that PW-6 Ushabai, in her statement before the Police dated 12.11.2007, (Exh-103 Page 162) had also categorically stated, that on 06.11.2007 at 6.00 'O' clock in the evening, her son Sudhakar told her that he along with his uncle Anna, Jagjiwan Dere and a person from Lohara had gone to Police Station, Manora to lodge the report, where PW-5 had told them that no such incident had taken place and similarly, when Lady police constable also had

softly enquired her, PW-5 had told her that nothing had happened and that she did not know anybody, and therefore, they returned without giving any report. Though, in her cross-examination she has stated, that portion mark "A" in her statement (Exh-103 Page 162) was not correct, however, PW-12 K. P. Dobade, PSI in his evidence has categorically stated, that he had recorded the statement of PW-6 as per her say and she had narrated portion mark "A" while recording her statement, which was marked as Exh-103 (Para 12 Page 134).

14. That takes me to the medical evidence. Before considering the medical evidence, it is necessary to note, that PW-5 in her evidence states that she was raped by all the three accused persons, firstly on 04.11.2007 in the field of Subhash Lokhande, and thereafter, in the same night, at Mahadeo temple by all the accused persons, considering which, it is obvious that multiple injuries ought to be present indicating this.

15. PW-10 Dr. Sharwari Shankarrao Patil/Exh-84, who was working as a medical officer attached to the District Women Hospital, Akola, on 13.11.2007 when PW-5 was referred to her consequent to the lodging of the complaint on 12.11.2007 was the person, who has examined PW-5, and issued the certificate at Exh-85. A perusal of Exh-85, which would indicate that the examination was with consent of PW-6 Ushabai (mother

of PW-5) and records, that except for two small healed abrasions of about 1 cm x 0.5 cm seen just below the right ear, there were no injuries whatsoever upon the body of the prosecutrix/ PW 5. Even in a pelvic sonography (PS) examination no injury is indicated, though it is stated that there was a tear in the hymen. A PV examination indicated insertion of two fingers easily possible. PW-10, therefore, opined that there were no injuries seen over the private parts. In her evidence, PW-10 has proved the medical certificate dated 13.11.2007 at Exh-85. In her examination-in-chief, she has specifically stated as under :

“I have done the local examination of the prosecutrix. No injuries were seen over inner side of the thighs or external genitalia. I had seen hymen was teared. I had seen o/s slit, cervica vagina healthy. Bleeding was present due to fourth day of menses. I had done per vaginal PV easily possible. No injuries seen over the private part of the body. Exact opinion cannot be given about forceful (intercourse) penetration. Exact opinion cannot be given about the date. No injuries were seen over private part, inner side of thighs and vulva.”

It is further brought on record in her evidence that PW-5 was re-examined on 22.11.2007 in respect of which, a medical certificate was also issued by PW-10 (Exh-87 Page 126), in which, she reiterated her opinion, which was given by her earlier (Exh-85). Thus, the

medical evidence, rules out forcible penetrative sexual assault multiple times by multiple persons, as is claimed by PW-5 the prosecutrix, for had it been so, there certainly would have been some or the other injury, on the private parts of PW-5, which was totally absent.

16. What is also further material to note is, that even though the incident is claimed to have taken place on 04.11.2007, the complaint has not been lodged till 12.11.2007, when the First Information Report (FIR) came to be registered (Exh-54). Even the manner of registering the FIR, on the basis of the oral report becomes suspect, for the reason that PW-3 Tulshiram claims ignorance of the report at Exh-53 and merely admits his signature on the printed FIR (Exh-54) and does not say anything about its contents. Though he states that the police had recorded his statement, the same was never put up to him as is indicated from his examination-in-chief. Moreover, PW-6 Ushabai states that on 11.11.2007 when PW-3 Tulshiram had returned, PW-5 had narrated the incident to him, which is denied by PW-3 Tulshiram.

17. It is equally apparent from record that the medical examination of PW-5 was conducted for the first time on 13.11.2007, whereas the incident is of 04.11.2007, which delay, in my considered opinion, in

the present circumstances would clearly be fatal to the case of the prosecution.

18. The evidence of PW-9 Dr. Kailash Mahadeo Ramteke, who has examined PW-5 on 14.11.2007 and has done pelvic sonography upon her and issued certificate at Exh-80 is only in relation to the determination of the approximate age of PW-5, which according to his opinion was above 14 years and below 16 ^{1/5} years and considering the fact, the learned Counsels appearing for the Appellant do not dispute the age of PW-5 at the time of the incident is not germane for the purpose of rendering a finding as to whether the incident had actually happened.

19. Naresh Dinkarrao Deshmukh (PW-1) has been examined at Exh-44 in respect of the date of birth of the prosecutrix, which he claims to be 10.06.1992 as per the admission register of Zilla Parishad Primary School, Dighi (Exh-45) and also as per the mark-sheet (Exh-46). He, in the cross-examination, is unable to tell on what basis, the said date of birth was entered in the admission register.

20. PW-11 Narayan Devsingh Pawar (Exh-89 Page 127) was working as an SDPO, Karanja from July 2008 to July 2011 and was the person, who has arrested the Accused persons and recorded the statements and

filed the supplementary charge-sheet. PW-13 Sahebrao Bhagwanji Harne (Exh-104 Page 163) who was the SDPO, Karanja is the person, who is instrumental in seizing the motorcycles from the Accused Pintu and Haridas under seizure panchanama at Exh-60 and Exh-61 and has also sent PW-5 to the Hospital for medical examination on 15.11.2007 under the requisition at Exh-86 and is also the person, who has written the requisition to the Tahsil, Karanja for drawing a sketch map of the spot (Exh-105) and has also recorded the statement of some of the witnesses. PW-14 Panjabrao Himmatrao Deshmukh, SDPO, Manglurpir, who was holding additional charge of SDPO, Karanja has recorded the supplementary statement of complainants Tulshiram Bhagat and Usha Bhagat at Exh-113 and Exh-114 (Page 184) of which, portion mark "A" and portion mark "B" are material omissions, as indicated therein.

21. Thus, an analysis of the evidence, which has come on record as well as the medical evidence would indicate that the claim made by PW-5, is not supported by the medical evidence, as also the statement of her brother Sudhakar at Exh-103.

22. It is also necessary to note, that the Appellants had examined Subhash Lokhande as DW-1 (Exh-121/Page 186) the owner of the field, in which,

PW-5, is alleged to have been dragged and raped, who categorically states that on 04.11.2007 he was in his field till 7.00 pm.

23. A conspectus, of the facts in light of the aforesaid evidence, would indicate that there are material contradictions, in the evidence of PW-5, who, in her evidence even admits the recording of the statement of Sudhakar at Exh-71/Page-103 and so also admits her signature thereupon, wherein it has been categorically stated, that the incident had never taken place and she did not know the Accused persons, which statement has been proved by PW-12 in his evidence.

24. A perusal of the impugned judgment would indicate that the learned Sessions Court, has based its judgment solely on the oral testimony of PW-5 ignoring Exh-71/Page 103 as well as the evidence of PW-10 and the medical reports given by her, holding that since there was delay in the examination, one cannot expect semen dots, blood stains on the clothes of the prosecutrix and Accused persons and only because the hymen was teared and there was an opinion of a possibility of sexual intercourse expressed by PW-10, the conviction had been rendered. The impugned judgment also is based upon conjecture as the learned Sessions Court expresses that a possibility cannot be ruled out that PW-3 might have compromised the matter with the

Accused persons out of the Court, and therefore, had retracted from his statement before the Police and Executive Magistrate. Similar conjecture is made by the learned Sessions Court in respect of all the witnesses, who have turned hostile, which is not permissible in law. It is, therefore, apparent that the material on record has not been properly appreciated, by the learned Sessions Court, which has resulted in a miscarriage of justice, considering which, the impugned judgment cannot be sustained and the same is hereby quashed and set aside and the Appellants are acquitted of the offence punishable under Sections 376 (2)(g), 363 and 366 read with Section 34 of the Indian Penal Code in Crime No.137 of 2007.

25. The Criminal Appeals are **allowed** in the aforesaid terms and disposed of accordingly. The bail bonds of the Appellants stand cancelled and they be released forthwith, if not required in any other offence.

JUDGE

TAMBE.