

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 15 OF 2020

XYZ

... Appellant
(Informant)

Versus

1. Mahesh Subhsh Tambe,
Age : 30 Years, Occu. ; Agriculture,
R/o. Nagamthan,
Taluka Vaijapur, District Aurangabad.
2. The State of Maharashtra,
Through Police Station Officer,
Veergaon, Veergaon Police Station,
Taluka Vaijapur, District Aurangabad.

... Respondents

...

Mrs. A. N. Ansari, Advocate for Appellant.
Mrs. V. S. Chaudhari, APP for Respondent No.2-State.

...

CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.

DATE : 3rd FEBRUARY 2023

JUDGEMENT (ABHAY S. WAGHWASE, J.) :

1. By invoking provisions under section 378 of the Code of Criminal Procedure, original informant is seeking quashment and setting aside of the judgment and order of acquittal passed by the learned Additional Sessions Judge Vaijapur, District Aurangabad in Sessions Case No. 25 of 2016.

2. Prosecution was launched against present respondent No.1 alleging that respondent No.1 was residing in appellant- informant's locality. By issuing threats to kill her brother and expressing his desire to marry her, respondent no.1 raped her on several occasions. That, prosecutrix succumbed to the threat and pressure and did not promptly inform to anyone. However, finally she mustered courage and approached police on 31.01.2015, alleging commission of offence under section 376(2)(n) and 506 of Indian Penal Code.

In above backdrop, accused-respondent No.1 was arrested and after completing investigation, he was charge-sheeted and he was made to face trial. After hearing both, prosecution as well as defence, learned trial Judge by judgment and order dated 28.11.2019, acquitted accused and hence present appeal by informant.

SUBMISSIONS

3. Learned counsel for appellant would point out that prosecution had gone for trial with full-proof evidence i.e. there was testimony of prosecutrix herself which was inspiring confidence. The same has not been properly considered and appreciated by the learned trial Judge. There was corroboration also in the form of testimony of PW-2 mother of informant. That, it was established by prosecution that in January 2015, by issuing threats accused had forcible sexual intercourse against her will. There is medical evidence in that regard. But, the same has not been considered by the

trial court. Learned counsel for appellant pointed out that it is settled law that sole testimony of prosecutrix, if inspires confidence, is sufficient to bring home the charges. The facts in the case in hand were also identical and here prosecutrix had deposed about the act committed against her will by accused. Therefore, conviction ought to have been recorded and the same had not been done by the learned trial Judge. It is submitted that the said judgment and order is required to be set aside by allowing the appeal.

4. In the light of above submissions, we have undertaken the scrutiny of entire record before us which was placed before the trial Judge. Testimony of prosecutrix victim is at **Exhibit-24**. Testimony of her mother is at **Exhibit-33**. Panch to the spot has examined as **PW-3** at **Exhibit-35**. **PW-4** is an acquaintance of **PW-1** and **PW-2** and she had accompanied prosecutrix when they had approached Women Vigilance Cell. **PW-5** is the Doctor who undertook the medical examination of prosecutrix and **PW-6** is the Investigating Officer.

ANALYSIS OF EVIDENCE

5. Here, testimony of PW-1 informant is of relevance and significance. On visiting her evidence, it seems that, she is 23 years of age and residing with her family. In her deposition she has stated that, accused was residing in her lane and she was on talking terms with him. She stated that by

threatening to kill her brother, he used to insist her to marry him and he also suggested fleeing and performing marriage. She deposed that, prior to lodging the report accused had forcible sexual intercourse with her two to three times and only being under pressure of threat, she did not narrate it to anyone. She stated that on 03.05.2013, when she had been to the fair, that time also accused caught hold her hands and expressed his love and therefore such occurrence was reported to police and crime was registered for outraging modesty. It is her further version that accused thereafter started approaching her and threatened her that he would broadcast about the incident which had taken place in the fair and threatened to defame her and would also create obstacles in her marriage. She further deposed that, on 20.01.2015, while she was sleeping with her siblings in the kitchen and her parents were sleeping in the hall, at that time, accused came and by pelting the stone on her person signaled her to come near the window and thereafter called her out of the house and behind the house he had forcible sexual intercourse against her wish. Because of the said incident, she had stopped taking meals and this prompted her mother to question her and thereupon she narrated the incident at the instance of accused and thereafter report was lodged.

6. Above witness is subjected to cross by defence counsel. While answering cross, she has admitted that her report is silent about accused expressing love, intending to marry her and threatening to kill her brother and

having sexual intercourse twice-thrice with her, about incident of 03.05.2013 regarding accused outraging her modesty in the fair and thereafter her mother taking her in confidence and she disclosing the acts of accused. She is unable to state as to why, whatever is stated in her deposition is not finding place in the FIR. She admitted that, regarding the incident of 03.05.2013, her father had not lodged report or any N.C., but the same being confronted to her, she has denied knowing about it. She admitted that infact regarding occurrence dated 03.05.2013 she had lodged report at police station on 23.05.2013 i.e. after 20 days. She has admitted that after lodgment of above FIR, she and accused never met or talked. She is questioned whether marriage of accused was solemnized with another girl in 2015, to which she merely answered that marriage was solemnized, but she did not know about other facts and admitted that accused is having a child. She has admitted that she has not raised hue and cry whenever accused had alleged sexual intercourse with her. She was also not in a position to narrate exact dates regarding alleged threat issued by accused prior to incident dated 03.05.2013 and admitted that prior to report regarding occurrence of 03.05.2013 reported on 23.5.2013, she had not narrated about the threats to anyone. Regarding the occurrence dated 20.01.2015 she has answered that she herself, her sister and brother were all sleeping on the same bed, but nobody woke up. She answered that after pelting stones from western side accused had talked with her from the window which was barely five feet away from the bed and her parents were sleeping

ten feet away and she candidly admitted that after observing accused she did not raise hue and cry. Rest of the cross is not on the aspect of forcible rape and therefore we refrain from taking the same into consideration.

7. Let us see whether there is corroboration to the testimony of prosecutrix. PW-2 mother speaks about her family and she stated that on 20.01.2015, they all went to sleep and on 21.1.2015, she realized that her daughter - prosecutrix was not speaking to anyone and therefore she questioned her and that time she disclosed that she was not willing to live any more and thereafter she disclosed that on the intervening night of 20.01.2015 and 21.01.2015 accused sexually assaulted her by giving threats and therefore report was lodged on 31.01.2015.

8. While facing cross, following omissions are brought in her cross examination, i.e. on the point of her daughter studying in Vinayakrao Patil College, about she waking up, but was not speaking to anyone about threats given by accused on the intervening night of 20.01.2015 and 21.01.2015. She has admitted about occurrence of 03.05.2013 in the festival and her daughter lodging report to that extent on 23.5.2013. She admitted that relations between accused and them were not cordial. She shown ignorance about marriage proposal of accused or his marriage to be performed on 26.01.2015. She has admitted that their house comprised of two rooms and that if door of

the house is opened or closed there is sound of opening and closing. She admitted that before lodging FIR there was discussion in the family for almost one and half hour.

9. The another witness who is examined by prosecution is **PW-4** Alka Naik. She has stated that she was the member of Women Vigilance Cell in 2015 and on 31.01.2015, she was called by police at police station where a girl was sitting. However, she is unable to give the name of girl and she claims that the girl stated that she was sexually exploited and whatever narrated was reduced into writing.

10. **PW-5** Dr. Sunil Rathod is the Medical Officer who had occasion to physically examined prosecutrix. This witness stated that on 31.01.2015 prosecutrix approached their hospital and gave history about knowing accused since last four years and about accused threatening to kill her brother if she denies sexual intercourse. That, she stated that there was sexual intercourse for about seven to eight times since last four years and last intercourse was on 20.01.2015.

On clinical examination Doctor claims to have found that there was evidence of old hymeneal tears and in his opinion deceased was subjected to sexual intercourse.

11. **PW-6** Investigating Officer has narrated about all steps taken by him during investigation till filing charge-sheet.

CONCLUSION

12. From the above evidence, it is emerging that deceased is a full-grown woman. She and accused are residents of same locality. Her evidence discussed above clearly shows that she is well acquainted with accused. It is emerging that, on 21.01.2015 there is disclosure about forcible sexual intercourse. However, in her own testimony she admits that, prior to lodging the report accused had committed forcible sexual intercourse with her two to three times. According to her, accused used to threat to kill her brother and thereafter ravish her. Then, she states about incident of outraging her modesty in the intervening night of 20.01.2015 and 21.01.2015. It seems that there were multiple sexual intercourse in the year 2015 itself, but there was no report either to parents or to police.

13. Regarding the occurrence dated 20.01.2015, on carefully examining her testimony to that extent, it is surprising to find that, her parents and other siblings are very much in the house and in her close proximity. It is a house of two rooms. However, still she claims that accused came and signaled her by throwing stone upon her, as a result of which she woke up. Even this time, she does not speak that there was any threat by him, rather it

seems that she goes out of the house and she had sexual intercourse behind her own house, while her parents and siblings were sleeping at a short distance of 15 feet in the house. It is difficult to accept such version that a full-grown woman of around 23 years could be ravished without her submission and consent in the vicinity of her house. It has already come on record that there were sexual intercourse since last two to three years, but there was no disclosure to anyone. Medical expert has also confirmed about she giving history of having sexual intercourse more than seven to eight times.

14. With such material on record that too from the deposition of prosecutrix, it is difficult to accept that there was forcible sexual intercourse against her wish. The answers given by her in cross itself has damaged the prosecution case. Her evidence is full of material omissions, contradictions and improvements. Her testimony does not inspire confidence to that extent that there was threat to kill her brother and in that backdrop against her will and wish, accused raped her.

For all above reasons, we are of the considered opinion that, guilt cannot be fasten against accused.

15. Therefore, in our opinion, the above evidence has been correctly appreciated by the learned trial Judge. With such quality of evidence the only

view that could emerge is that case of prosecution about forcible sexual relation has not at all been established. Therefore, no error seems to have committed by the learned trial Judge in acquitting the accused. No case is made out in appeal so as to consider and grant prayers made herein. Resultantly, appellant fails and we accordingly pass following order : -

ORDER

The criminal appeal stands rejected.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)