

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

912 CRIMINAL APPEAL NO.93 OF 2020

X.Y.Z.

... Appellant

... **Versus** ...

- 1 The State of Maharashtra,
Through Police Inspector,
Gondi Police Station,
Tq. Ambad, Dist. Jalna.
- 2 Arjun Shrihari Rajguru,
Age 42 yrs., Occ. not known,
- 3 Vijay Shrihari Rajguru,
Age 40 yrs., Occ. not known,

Both respondent Nos.2 and 3 are r/o Rui,
Tq. Ambad, Dist. Jalna.

... Respondents

...

Mr. S.V. Suryawanshi, Advocate for appellant

Mr. A.M. Phule, APP for respondent No.1

Mr. P.A. Bhosale, Advocate for respondent Nos.2 and 3 - **absent**

...

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

DATE : 19th JANUARY, 2023

JUDGMENT : (PER : SMT. VIBHA KANKANWADI, J.)

1 Present appeal has been filed under Section 372 of the Code of Criminal Procedure, 1973 by the informant/victim challenging the acquittal of respondent Nos.2 and 3 (original accused Nos.1 and 2) by learned Additional Sessions Judge, Jalna on 27.12.2019 from the offence punishable under Section 376(1), 324, 452, 504, 506 read with Section 34 of the Indian Penal Code, 1860.

2 Heard learned Advocate Mr. S.V. Suryawanshi for the appellant and learned APP Mr. A.M. Phule for respondent No.1. Perused the Record and Proceedings. It will not be out of place to mention here that the learned Advocate Mr. P.A. Bhosale for respondent Nos.2 and 3 was absent.

3 It has been vehemently submitted on behalf of the appellant/informant that the learned Trial Judge has not appreciated the evidence properly. She is the victim of the crime and she has been disbelieved. Her husband, who was also examined in the matter as PW 3, has also been disbelieved. It was the prosecution story that on the day of incident i.e. 24.04.2015 at about 02.00 a.m. the informant and her husband were sleeping on the cot in the courtyard. Their children were also sleeping by the side on the ground. In the darkness by gagging her mouth the

informant was taken inside the house. When she started raising voice, at that time, she was threatened to kill. She was made to lie on the ground and then one person by again gagging her mouth had forcible sexual intercourse with her. When the said person was going out of the house by opening the latch, her husband put on the light which was outside the house and at that point it was seen that the said person was their neighbour i.e. present respondent No.2 (original accused No.1). Accused No.1 assaulted the husband of the informant by stick on his nose and head. Accused No.2, who is brother of accused No.1, had also assaulted the husband of the prosecutrix. When they started raising voice, the neighbours gathered and even in their presence the husband of the prosecutrix was assaulted. Thereafter they fled away. She then went to Police Station with husband and lodged the report.

4 The learned Advocate appearing for the informant further submitted that the learned Trial Judge has not given proper reasons to disbelieve the testimony of the prosecutrix and her husband. Further, the neighbouring witnesses were also examined, who admit the presence of the accused persons at the spot at night time. Further unnecessary remark has been made that it is a case of consensual sex. The prosecutrix is a married lady and, therefore, such observations ought to have been avoided. The matter deserves re-appreciation of evidence and, therefore, it needs

admission.

5 With the able assistance of the learned Advocate for the appellant as well as learned APP we have gone through the Record and Proceedings. It is not in dispute that the prosecutrix is a married lady, whose marriage had taken place about 20 years prior to the incident. She has two sons and one daughter. In her cross-examination, it has come on record that her elder son was aged 13 to 14 on the day of incident and the other two are younger by two years each. Therefore, she knows the consequences and how to react. The first and the foremost fact that the prosecution witnesses viz. PW 1 prosecutrix and PW 3 her husband state that they were sleeping in the courtyard. The husband and wife were occupying a cot, whereas the children were sleeping on the mattress on the ground. Definitely, the prosecutrix and others would have been in deep sleep, still, she says that some person had put on the light. It is not explained, where the switch and the light was. That means, whether inside the house or outside, and even the spot panchnama does not throw any kind of light on the same. She thereafter states that she was picked up in the darkness and by gagging her mouth she was taken inside the house. But then she raised the voice after going in the house. This itself is unbelievable. The resistance could be when it would be realized even in the sleep that somebody is picking the lady. As per her

testimony, accused No.1 was the only person, who had committed rape on her. She also states that after the rape was committed he had opened the latch. That means, for opening the latch he should have in fact put the latch. When she was allegedly taken inside the house, at that moment, he would not have held her and there was sufficient time for her to raise the voice. How the husband and children had not woke up, would be a question. It is then stated that when accused No.1 came outside the house and in the light which was put on by her husband his identity was disclosed, accused No.1 had assaulted her husband but accused No.2 was there. This co-incidence is also surprising that too at 2.00 a.m. Another contrary fact which is coming through the testimony of her husband is that somebody had taken his wife inside the house and thereafter she raised voice, he put on the light and at that time he found accused No.1 running. He says that he had caught hold of accused No.1 and then the accused No.1 had assaulted him with stick. The first and the foremost fact is, how he realized that the wife had taken inside the house, is a question. But then he says that after his wife had raised voice and he had put on the light, he found accused No.1 running. How much time was spent in between has not been clarified. The said time whether was sufficient for the sexual intercourse and what was the conduct after the voice was raised by the wife has also not been told by him. Their cross-examination consists of the bringing on record the improvements and

omissions.

6 Some of the other witnesses, who are the neighbours and even the spot panchas, have turned hostile and some of them have halfheartedly supported. Those who have supported have also stated that they had seen the husband of the prosecutrix assaulting accused No.1 and prosecutrix also. Therefore, taking into consideration the testimony of these witnesses the Trial Court has rightly disbelieved the story put by the prosecutrix and her husband. As regards the observations in respect of the consensual sex is concerned, it appears that it is the inference i.e. drawn in view of the fact that two of the witnesses have stated that even the husband of the prosecutrix had assaulted the prosecutrix and accused No.1. PW 8 Kailas in his cross-examination has admitted that husband of the prosecutrix had suspicion that his wife i.e. prosecutrix had illicit relations with the accused No.1. That defence has also been taken by accused Nos.1 and 2 in their statements under Section 313 of the Code of Criminal Procedure.

7 Another fact to be noted is that in the cross-examination of the prosecutrix it has been brought on record that in the past she had lodged First Information Reports against some other persons also and, therefore, the possibility of the false implication cannot be ruled out.

8 Another fact to be noted is that the children of prosecutrix were sufficiently grown up. The elder son was around 13-14 years. What was the reaction of the children has not come out.

9 Reliance can be placed on the decision in **Amar Bahadur Singh vs. State of Uttar Pradesh, 2022 Cri.L.J. 1921 (Supreme Court)**, in which case also almost similar facts involved. In this case the facts were that on 02.04.1989 at about 11.45 p.m. the prosecutrix, the daughter-in-law of Santu, was sleeping in her in-laws' house along with her daughter and other family members. Her husband was, however, away to the Punjab in connection with his employment. On an alarm raised by the prosecutrix all those at home woke up and saw that the appellant was committing rape on the prosecutrix. The appellant was accordingly apprehended on the spot. The Hon'ble Supreme Court held that such story itself is unbelievable and appears to be cooked up and it resulted in the acquittal of the accused. We also take the same recourse in this case.

10 The scanning of the evidence has therefore led to the learned Trial Court to arrive at a conclusion that the testimony of the prosecutix and her husband is not trustworthy and, therefore, the accused persons have been acquitted. We do not find any illegality or error. The learned Advocate for

the appellant failed to show the perversity. Therefore, no case is made out for interference. Appeal stands dismissed.

(Abhay S. Waghwase, J.)

(Smt. Vibha Kankanwadi, J.)

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