

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.485 OF 2018

Shaikh Rasul s/o Shaikh Amir
Age: 30 years, Occu.: Nil,
R/o. Maheboobnagar, Nanded,
Dist. Nanded.
(At Present is in Nanded Jail)

.. Appellant

Versus

1. The State of Maharashtra
2. X.Y.Z.

.. Respondents

...

WITH
CRIMINAL APPEAL NO.484 OF 2018

Pankaj Suresh Dabhade
Age: 34 years, Occu.: Labour,
R/o. Shivaji Nagar, Maitekdi Bypass,
Nanded, Dist. Nanded.

.. Appellant

Versus

1. The State of Maharashtra
Through, Police Station Officer,
Vimantal (Airport) Police Station,
Nanded, Dist. Nanded.
2. X.Y.Z.

.. Respondents

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Mr. R. N. Dhorde, Senior Counsel i/b Mr. S. B. Jadhav, Advocate for the appellant in Criminal Appeal No.485 of 2018.
Mr. R. N. Temkar, Advocate h/f Mr. Sanket N. Suryawanshi, Advocate for appellant in Criminal Appeal No.484 of 2018.
Mr. A. M. Phule, APP for respondent No.1 – State in both the matters.
Mr. M. D. Gitte, Advocate for respondent No.2 in both the matters.

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

DATE : 26th October, 2023

JUDGMENT [Per Smt. Vibha Kankanwadi, J.] :-

. The appellants are the original accused Nos.1 and 3 in Sessions Case No.103 of 2013, who came to be convicted by learned Additional Sessions Judge-1, Nanded on 05.07.2018 for the offence punishable under Section 376(2)(g), 323, 506 read with Section 34 of Indian Penal Code. They have filed the present appeals under Section 374 of the Code of Criminal Procedure to challenge the legality of the said conviction. In view of the fact that the nature of the offence and provisions under Section 228-A of Indian Penal Code as well as various decisions of this Court as well as Hon'ble Apex Court, the identity of the informant – prosecutrix and the relatives, who has been examined in this case, is not disclosed.

2. Informant – prosecutrix lodged FIR with Vimantal Police Station, Nanded on 26.01.2013. The prosecutrix has stated that about 8 days prior to the incident, she had taken a room on rent in Laxminagar area of Nanded, where she was residing with her son aged 12 years and daughter aged 10 years and her husband. She as well as her husband were doing labour work. She has stated that all of them had gone to her uncle's place on the earlier day, but on the next day i.e. 26.01.2013, her husband went to

bring grocery articles around 12.00 p.m and then she went to her house i.e. from the house of her uncle along with her children to her own house which was taken on rent. Thereafter, she had gone to Maltekdi from the same lane for collecting grains near Railway Station go-down and returned around 7.00 p.m. She was hungry and, therefore, she went to neighbour's place i.e. Sarika to demand bread/*Roti*. She found person aged 30 years in the room of the neighbour. Prosecutrix asked the neighbour lady as to who is the said person and she got reply that he is Pankaj Dabhade, whom she knows as he was visiting her occasionally to meet her children. Prosecutrix went to sleep around 10.00 p.m. and could realize that somebody is peeping through window around 12.00 p.m. She asked as to who is there and the person replied that he is Pankaj. He has some work with her and, therefore, she should open the door. When she told that she will not open the door, he threatened to open it by breaking open. Due to fear, she opened the door, at that time, Pankaj had gagged her mouth by pulling her hair and dragged her on the road. Another person wearing coat aged between 30 to 35 years was present and then he told prosecutrix that she should allow them to have sex. Then said Pankaj made her to lie on the ground and had forcible sexual intercourse with her, though she was resisting. She was given threat to kill. Thereafter, the person wearing coat called two persons on his mobile, one was aged 20 years and another was younger than that. Person wearing coat called the name of one accused as

Sanjay Ghorpade and asked him to have sex with the prosecutrix. One by one they had sexual intercourse with her when she was resisting and in the meantime, her children had come there, who were threatened to kill and asked to go home and sleep. As she was threatened to kill, she went home and did not disclose the fact to anybody. In the morning, she disclosed the said fact to her another neighbour and then went to police station and lodged the report.

3. After the offence was registered vide Crime No.11 of 2023, investigation was carried out. She was sent for medical examination. Her supplementary statement came to be recorded on 30.01.2013. Accused came to be arrested. Panchanama of the spot was carried out. Statements of witnesses were recorded. After the completion of the investigation, charge-sheet was filed against four persons. Prosecution has examined in all eleven witnesses to bring home the guilt of the accused after they have pleaded not guilty. Taking into consideration the evidence on record and hearing both sides, the learned Trial Judge has convicted accused Nos.1 and 3 only. They have been sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.50,000/- in default to suffer rigorous imprisonment for one year each, for the offence punishable under Section 376(2)(g) of the Indian Penal Code. They were further sentenced to suffer simple imprisonment for one year and to pay fine of Rs.1,000/- each in

default to undergo simple imprisonment for 15 days each for the offence punishable under Section 323 read with Section 34 of Indian Penal Code. They have been further sentenced to suffer simple imprisonment for one year and to pay fine of Rs.1,000/- each in default to suffer simple imprisonment for 15 days each for the offence punishable under Section 506 read with Section 34 of Indian Penal Code. All the sentences to run concurrently and set off has been granted, as they were never released on bail. Original accused Nos.2 and 4 were acquitted of all the offences. The fine amount was directed to be given to the victim as per Section 357(1) of the Code of Criminal Procedure as compensation.

4. Heard learned Senior Counsel Mr. R. N. Dhorde instructed by learned Advocate Mr. S. B. Jadhav for the appellant in Criminal Appeal No.485 of 2018, learned Advocate Mr. R. N. Temkar holding for learned Advocate Mr. Sanket N. Suryawanshi for the appellant in Criminal Appeal No.484 of 2018, learned APP Mr. A. M. Phule for respondent No.1 – State in both the matters and learned Advocate Mr. M. D. Gitte for respondent No.2 in both the matters.

5. It has been vehemently submitted on behalf of both the appellants that the learned Trial Judge has totally failed in appreciating the evidence. Except the prosecutrix and her son and investigating officer, none of the witnesses have supported the prosecution. Even the testimony of the

medical officer does not support the prosecution story. P.W.9 Dr. Nitin had examined the prosecutrix, but in clear terms, he has stated that even after going through the C.A. report, he cannot give definite opinion as to whether the victim was subjected to sexual intercourse prior to her medical examination or not. If the prosecution story is to be believed, then the prosecutrix was raped by four persons and according to her she resisted each one of them, yet there were no resistance marks. Further, the testimony of P.W.1 would show that she has suppressed the fact that she was deserted by her husband prior to the incident. In other words, on the date of incident or just prior to that her husband was not residing with her. Still, in the FIR, she has tried to pose that her husband was with her. Another glaring fact is that she has admitted that she was not knowing any of the accused persons prior to the incident. She has stated that she got acquaintance with P.W.1 Pankaj on the very day in the house of her neighbour, however, the said neighbour P.W.3 has turned hostile. The age of her son was 12 years. It is hard to believe that he could not have resisted or called people for help, if he would have been watching the alleged incident. Testimony of P.W.7 – son of the prosecutrix is also not supporting her. He has stated that accused No.1 had outraged the modesty of his mother when he was sitting outside the house. The story told by him is totally different and in spite of all these glaring shortcomings, the learned Trial Judge has convicted accused Nos.1 and 3. On the same set of evidence, he has

acquitted accused Nos.2 and 4, therefore, such conviction cannot be allowed to sustain. It deserves to be set aside.

6. Per contra, the learned APP has supported the reasons given by the learned Trial Judge. He submitted that the testimony of the prosecutrix is inspiring confidence. She is the sufferer and, therefore, weightage is required to be given to her testimony. Learned Advocate appearing for the prosecutrix, to whom the compensation has been given under Section 357(1) of the Code of Criminal Procedure and he can defend the said order in view of **Emperor Vs. Chunilal Bhagwanji, AIR (29) 1942 Bombay 205 (1)**, submitted that the learned Trial Judge has arrived at the conclusion that the testimony of the prosecutrix is trustworthy. She was raped by four persons and, therefore, she deserves to be compensated. He, therefore, submitted that the said order granting compensation to the prosecutrix be maintained.

7. Here before scrutinizing the testimony of the prosecutrix, a fact can be placed on record that testimony of PW.9 Dr. Nitin, who examined prosecutrix on the same day of FIR i.e. around 6.00 p.m. on 26.01.2013, would show that there was no such evidence which he could find would give the result that victim was subjected to sexual intercourse prior to her examination. In other words, the medical evidence is not supporting the prosecution story. PW.2 Govind Singh – panch to the spot panchanama,

PW.3 Sarika – neighbour, who allegedly introduced accused No.1 to the prosecutrix, PW.4 Radhabai, who was knowing the informant and had gone to Parbhani along with the prosecutrix and also was knowing accused No.1, PW.5 Suresh Panpatte – panch to the seizure of articles, especially the clothes of the accused and PW.6 Kunal, have turned hostile. Except PW.4 Radhabai, all have totally denied the prosecution story. PW.4 Radhabai admits that she was knowing the victim and accused No.1, but then she has denied the suggestion that one Vijay Pawar had come to her house and was with them while coming back from Parbhani. This fact, i.e. regarding hostility of all these witnesses, will have to be borne in mind while assessing the testimony of P.W.1 prosecutrix. The examination-in-chief of the prosecutrix is as per the FIR, which is already narrated and, therefore, we are not reproducing the same. However, it is to be noted that even at the time of her substantial evidence, she maintained that the room was taken on rent and her husband as well as daughter and son were residing with her on that day. She then says that from the house of her uncle, her husband went to his village and she came to house with children. In her examination-in chief she has stated that on the date of incident, accused had assaulted Vijay Pawar. This statement is not reflected in her FIR and why she wanted to introduce Vijay Pawar has not been gathered or got explained by learned APP conducting the matter. In her cross-examination, she has categorically stated that she was not knowing the accused persons

prior to the incident. She was not even knowing their names on 25.01.2013. Even when she allegedly went to Sarika's house, even at that time, she was not knowing the name of accused No.1. She had not taken meal in the house of Sarika, nor demanded anything from her prior to the incident. On that day, she says that she had gone to Sarika's house to demand *Roti*. If her FIR is to be considered, then around 12.00 noon her husband had gone to purchase grocery. The FIR is silent when her husband returned. It is hard to believe that till 7.00 p.m., the husband would not returned by purchasing grocery. Definitely, she could have prepared the *Roti* in her house. She has not come with the case that entire ration was empty and, therefore, she had no option, but to demand *Roti* from Sarika. Therefore, her alleged entry in the house of Sarika itself is doubtful.

8. PW.1 has admitted in her cross-examination that her husband has deserted her prior to the incident. But if we consider her examination-in-chief and the FIR, the said fact is not disclosed. Rather, the FIR as well as her examination-in-chief does not explain where the husband was at night time. The sequence that has been told is unbelievable. She says that she went to sleep at 10.00 p.m. and then says that somebody peeped through the window around 12.00 midnight. If she was sleeping, then how she was able to know that somebody was peeping in from the window is a question. She then says that when she asked who is there, accused No.1 gave his

name. The way it is said that she opened the door is unbelievable. At one place she says that she told that she is not ready to open the door and the person that is accused No.1, who was outside, giving threat to break open the door and then going into the fear, she says that she opened the door. In fact, her children were inside the house. How they could not have got up has not been answered by her. She then says that accused No.1 dragged her and then at a place on road, accused No.3 met. Accused No.3 is stated to be wearing coat at that time. She just say that she made hue and cry, then question arises why people had not gathered including her children. Her testimony is totally silent on the point, as to where she was exactly taken i.e. what was the distance between the place where she was taken from her house, has not come on record. At one place, i.e. in the FIR, she says that when accused were allegedly committing the crime, her children came there searching mother, but accused No.3 threatened them to kill and asked them to go and sleep. If that is so, the reaction of the children would have been different. She gives the names of other accused also at the time of supplementary statement and in the examination-in-chief, but then she has not explained as to how she came to know about their names.

9. PW.7 the son of P.W.1 has given a different story. He says that his mother had gone to neighbour to fetch vegetable, where accused No.1 was present. He doesn't give the time when his mother had gone to the house

of neighbour, but then he says that at night time he was sitting outside the house. That means he gives up a prosecution story that they went to sleep around 10.00 p.m. and then his mother woke up around 12.00 midnight and there were dialogues between accused No.1 and his mother, after accused No.1 allegedly forced her to open the door. When P.W.7 was sitting outside the house, where was the question for accused No.1 to force P.W.1 to open the door. P.W.7 then says that a person wearing coat had nabbed him and restrained him from going to his mother by giving threat to kill. He says that there were 4-5 persons and then he has tried to identify the accused before the Court as the same persons. Important point to be noted is that even this witness has not stated at any point of time that he was knowing the accused persons. He is totally silent that his mother was dragged to another place and all the four accused persons had committed rape on his mother. Thus, the testimony of P.W.7 is absolutely not corroborating to the testimony of P.W.1 prosecutrix, though she has tried to pose the son as eye witness. The prosecution has not examined the daughter of the prosecutrix.

10. With the heavy heart we are constrained to say that the learned Trial Judge utterly failed in appreciating the evidence and following the legal principles. A conviction in a rape case can be awarded, if the testimony of prosecutrix/victim inspires confidence and we cannot insist for

corroboration. Here, the prosecution itself had come with the case that there is corroborating evidence. Under the said circumstance, if there is no corroboration to the testimony of the prosecutrix, the learned Trial Court ought to have rejected the story. There was absolutely no evidence which can be said to be proving the guilt of the accused persons beyond reasonable doubt. On the same evidence, the learned Trial Judge has acquitted accused Nos.2 and 4 and, therefore, the conviction awarded to the appellants will have to be branded as perverse and illegal. The Trial Courts are not supposed to award moral convictions when there is no evidence within the legal framework. We are also constrained to observe that such convictions would raise doubts over the judiciary when the Courts are there to protect the rights and liberties of every citizens. The Trial Courts should meticulously study the prosecution case, scrutinize the evidence and by applying the legal principles and provisions, should decide the matters. Unfortunately, when such conviction is awarded, the appellants were required to languish in jail and, therefore, for the above-said reasons, the appeals deserve to be allowed. Hence, the following order :-

ORDER

(I) Both Criminal Appeals i.e. Criminal Appeal No.485 of 2018 and Criminal Appeal No.484 of 2018 stand allowed.

(II) The conviction awarded to both the appellants i.e. appellant – Shaikh Rasul S/o Shaikh Amir and appellant – Pankaj Suresh Dabhade in Sessions Case No.103 of 2013 by the learned Additional Sessions Judge-1, Nanded on 5th July 2018 for the offence punishable under Section 376(2)(g), 323, 506 read with Section 34 of the Indian Penal Code stands quashed and set aside.

(III) Appellant – Shaikh Rasul S/o Shaikh Amir and appellant – Pankaj Suresh Dabhade stands acquitted for the offence punishable under Section 376(2)(g), 323, 506 read with Section 34 of the Indian Penal Code.

(IV) We clarify that the order regarding payment of compensation awarded to the victim under Section 357(1) of the Code of Criminal Procedure also stands set aside.

(V) Both the appellants be set at liberty, if not required in any other case.

(VI) The fine amount deposited, if any, be refunded to the appellants after the statutory period.

(VII) The order as regards disposal of Muddemal is concerned,
we propose no change in the same.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm