

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 319 OF 2017

Hakim s/o Hamid Shaikh,
Age 26 years, Occu: Labour,
R/o: At present C/o Superintendent,
Nashik Road Central Prison, Nashik.

... Appellant
[Orig. accused]

Versus

1. The State of Maharashtra
Through Police Station, Renapur,
Taluka Renapur, District Latur.

2. XYZ

... Respondents

.....

Mr. Vithal P. Kadam, Advocate for the Appellant.
Mrs. V. S. Choudhary, APP for Respondent No.1-State.
Mr. Suraj R. Bagal, Advocate for Respondent No.2 (appointed).

.....

**WITH
CRIMINAL APPEAL NO. 792 OF 2014
WITH
CRIMINAL APPLICATION NO. 262 OF 2015
IN
CRIMINAL APPEAL NO. 792 OF 2014**

Hamid Bashumiya Shaikh,
Aged : 71 years, Occ: Busniess,
R/o Masjid Road, Bhokramba,
Taluka Renapur, District Latur.

... Appellant
[Orig.Accused no.1]

Versus

1. The State of Maharashtra
Through the Police Station Officer,
Police Station, Renapur,
District Latur.
2. XYZ [Father of victim]

.....

Mrs. Rekha Choudhari, Advocate h/f Mr. S. S. Choudhari, Advocate
for the Appellant.

Mrs. V. S. Choudhari, APP for Respondent No.1-State.

Mr. Mr. Suraj R. Bagal, Advocate for Respondent No.2 (appointed).

.....

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

DATED : 20.10.2023

JUDGMENT [ABHAY S. WAGHWASE, J.] :

1. The appellants in both appeals, since being aggrieved due to their conviction recorded by learned Additional Sessions Judge, Latur in Sessions Case No. 08 of 2014 dated 06.12.2014 for commission of offence under Sections 376(2)(g), 506 r/w 34 of the Indian Penal Code [IPC], have separately preferred appeals.

However, both appeal being heard simultaneously and on the same day and answered by learned APP on the same day, both appeals are decided by way of common judgment.

2. Shorn of details, story of prosecution as is emanating from FIR is that prosecutrix-victim was put up with her grand-mother at village Bhokarmba. Her parents and other siblings were residing at Vadvani,

District Beed. Grand-mother of victim used to supply lunch box to accused Hamid by levying monthly charges. On relevant day, victim was asked to hand over tiffin to accused Hamid and so she went to his shop in the neighbourhood. It is story of prosecution that accused Hamid asked her to keep the lunch box inside the house which was nearby the shop, and when she went inside, it is alleged that accused Hamid closed door of the shop. He embraced her from behind and made her fall on the ground. Accused no.2 Hakim gagged her, rendered her disabled. Threats to kill were issued and thereafter both raped her by taking turns.

When victim narrated the occurrence to her grand-mother, she advised her to inform her parents when they come. Her father came after two-three months. By that time she was pregnant. She informed her parents and her father took her to police station and crime was registered on her report.

Crime was duly investigated and accused were chargesheeted. They were made to face trial before learned Additional Sessions Judge, Beed, who, on appreciating the evidence, held charges to be proved and convicted both accused as spelt out in the operative part of the impugned order.

This judgment is now taken exception to by both the convicts before this court.

SUBMISSIONS

3. Learned counsel Mr. Kadam representing **accused Hakim** would submit that apparently it is a false implication. According to him, in the case in hand, informant has not given details of day, month and time of alleged occurrence. He would point out that FIR is after almost 8 to 9 months. That, had there being any truth, it is his submission that, there would have been prompt lodgement. But here it is not so. He further submitted that it is not possible to commit rape in day time in the residential area. Victim has not raised hue and cry and that she admitted to that extent. Learned counsel took us through the cross of victim and would submit that answers given by victim in cross clearly show that there was previous acquaintance between victim and his client. Therefore, there is no forceful sexual intercourse as alleged, however, according to him, admissions of victim are not considered by trial court. Consequently, according to him, there is improper appreciation of evidence resulting into miscarriage of justice and hence, according to him, interference is called for in the findings reached at by learned trial court by allowing the appeal.

4. On behalf of **accused Hamid**, learned counsel Mrs. Choudhari would submit that her client has been falsely framed. According to her, he was 70 years of age at the time of incidence and as such old and infirm. She would submit that there is no independent evidence about victim visiting shop or house. There is no corroboration to the testimony of prosecutrix. Learned counsel would submit that apart from huge delay in lodging FIR, evidence of prosecutrix does not inspire confidence about forceful rape as no hue and cry was raised. She pointed out that in fact, on medical examination of her client, medical expert had opined that he was incapable of performing sexual intercourse. That said medical expert is examined by prosecution itself. There is opinion in black and white regarding incapability of her client to perform sex and hence she would strenuously submit that such evidence completely rules out occurrence of rape by her client or his involvement in the said incident. She pointed out that such crucial evidence has been lost sight of by learned trial Judge and he is also dragged and convicted solely on the evidence of victim. According to her, even victim was reported to be mentally retarded and therefore ought not to have been relied.

5. While answering above submissions, learned APP would submit that evidence of victim has remained intact and unshaken regarding

act of accused persons. APP pointed out that victim had visited shop of accused to merely deliver tiffin, but both accused, whom she had identified, had forced themselves on her by issuing threats. That she has named both of them. Because of said incident, she had become pregnant and so, it is her submission that, there is no further requirement of corroboration as claimed by defence. It is pointed out that grand-mother with whom victim stayed has also lend support to her. As parents of victim were labours and out of the village for earning livelihood, only on their return, matter was reported. Therefore, there is plausible explanation for the delay. However, according to learned APP, in cases involving such offences, delay is even otherwise insignificant. While summing up, it is her submission that learned trial court has rightly believed and accepted the testimony of prosecutrix and in the light of positive medical evidence, guilt has been recorded and therefore no fault could be found in the findings and so she prayed to dismiss the appeal.

EVIDENCE BEFORE THE TRIAL COURT

6. In order to bring home the charge, prosecution seems to have examined in all 13 witnesses. Their role and status can be summarized as under:

- PW1** victim prosecutrix.
- PW2** is father of victim.
- PW3** is grand-mother of victim.
- PW4** Dr. Amjadkhan Pathan is the medical officer who examined both accused and issued certificates Exhibits 34 and 35. He identified the same as well as accused in court.
- PW5** Ankush Nadapure is the Head Master of Zilla Parishad Primary School at Bhokramba. Who deposed, on the basis of school record, about date of birth of victim to be 20.01.2000.
- PW6** Dr. Kranti Kapse, is the doctor who medically examined the victim, referred her to Government Hospital for sonography, opinion of psychiatrist and age verification and issued certificate on the basis of radiological examination about age of victim determined as 14 to 16 years. She identified the said certificate to be at Exhibit 55.
- PW7** Dr. Milind Potdar, a medical officer at psychiatric department, GMC, Latur, issued certificate regarding mental retardation of the victim. He identified the same to be at Exhibit 57.
- PW9** PHC Dashrath Ghadge, who recorded statement of victim and registered crime.

PW10 Dr. Punam Londhe is the medical officer who clinically examined victim at Government Medical College and Hospital. This witness claims to have found victim carrying 32 weeks pregnancy and to have recorded history as narrated by victim's mother. She has identified the certificate issued by her to be at Exhibit 68 and the victim's case papers to be at Exhibit 69.

PW8 PCB Santosh Sathe
and

PW11 PC Ganpat Alapure have acted as carrier.

PW12 Nanasaheb Bhise, pancha to spot panchanama, has not supported prosecution.

PW13 API Amol Pawar is the Investigation Officer [IO]

7. After hearing submissions of both sides, we have noticed that learned counsel representing each of the appellants have raised common grounds which are reproduced as under:

Firstly, there is no reliable trustworthy evidence on record.

Secondly, there is no independent witness and no corroboration to the testimony of prosecutrix.

Thirdly, FIR is after hopelessly inordinate delay for which there is no proper explanation.

Fourthly, evidence of victim, her father and grand-mother is full of material omissions and contradictions.

8. In the light of above grounds and case of prosecution, we have re-analyzed and re-appreciated the prosecution evidence with due care.

In our opinion, evidence of victim PW1 followed by that of her grand-mother PW3 and father PW2 and medical evidence of PW6 Dr. Kapse and PW10 Dr. Londhe are only of significance. Accordingly we have navigated and carefully sifted their testimonies with complete circumspection.

9. As regards to stay of **PW1 victim** with her grand-mother PW3 is concerned, it is noticed that there is no dispute at all. In her evidence, PW1 victim has stated that she resided with her grand-mother and her parents resided at Vadvani and they used to sell tamarind. She knew both accused. Accused appellant Hamid is owner of grocery shop and Hakim is working as labour for Hamid. She has deposed that she used to carry tiffin of Hamid at his grocery shop. On the date

of incident, when she had carried tiffin to the grocery shop that time both accused were present in the shop. That, accused Hamid instructed her to keep tiffin box in his house which is situated nearby his shop. According to her, when she went inside, accused Hamid closed the door of the shop, caught hold of her from behind. Thereafter, accused Hakim caught hold of her both hands and pressed her mouth. Initially Hamid raped her and thereafter Hamid caught hold of her both hands and then Hakim raped her. Hamid threatened to kill her as well as her parents if she discloses it to her parents. She returned home and informed her grand-mother, who told her that she would intimate it to her parents as and when they come to Bhokaramba. After two three months, her parents came. Her grand-mother intimated her parents and she was taken to hospital, examined and declared pregnant. She accompanied her father to the police station, narrated the incidence and police recorded her complaint which she identified at Exhibit 26.

10. While under cross at the hands of learned counsel for both the accused, PW1 victim has given following admissions:

- i. Nearby *nai wasti*, there are residential houses.

- ii. Residential house of daughter of Hamid is at a distance of 40 to 50 feet.
- iii. Tiffin of Hamid was provided by his daughter.
- iv. Several customers used to visit the shop daily during day time.
- v. There is a mosque near the house of accused Hamid.
- vi. She gave the age of her parents and siblings as suggested and that she is the youngest of all.
- vii. That her other two sisters are married and brother works as a labour.
- viii. She admitted that from the house of Hamid, shouts can be heard at her house.
- ix. On the date of incident grand-mother was at home.
- x. She admitted that she often used to meet Hakim.
- xi. She admitted that she has no knowledge regarding the contents of complaint.

Rest are all denials.

11. On going through the evidence of **grand-mother PW3**, it is emerging that she used to provide tiffin to accused Hamid on monthly charges basis. She stated that sometimes she herself and sometimes grand-daughter delivered the tiffin. She deposed that grand-daughter informed her that when she went to deliver tiffin, accused turn by turn caught hold of her while the other one raped and they threatened to kill her if she discloses the incidence to her parents. She deposed that when victim intimated the incident to her, she asked the victim to narrate the same to her parents as and when they come. Her son came after three months. She narrated the incident to him and her son took grand-daughter to hospital where her pregnancy was revealed.

Above witness is also subjected to detailed cross. Initial cross is confined to details about parents, their stay. Then she answered that she is aware that it is necessary to report untoward incident to police. She admitted that she did not disclose it to neighbours. Rest all suggestions are denied.

12. **PW2 father**, stated about stay of his victim daughter with his mother and he and his family staying at Vadvani and he visiting his daughter and mother only once or twice in two-three months. He also

stated about Hamid served with tiffin by his mother at the rate of 200/- per month. He deposed that incident in question took place one and half year back. When he visited Bhokaramba after gap of three months, his mother intimated him about the incident with his daughter, about both accused raping her when she went to deliver tiffin in the shop. There were threats to kill his daughter. When he inquired with his daughter, she told him about the entire incident. He took her to doctor and thereafter to police station where his daughter lodged complaint.

In his cross, it has come that his mother is aged. He admitted that he did not get information of the day and date of the incident and he learnt about it after two months. He admitted that he took her to the hospital for abortion. He admitted that after deliberation with his mother and other family members he decided to lodge complaint. Rest all suggestions are denied.

13. On carefully analyzing evidence of victim PW1, her grandmother PW3 and her father PW2, it is emerging that victim was put up with her grand mother PW3 whereas her father and mother with her other siblings were staying at Vadvani for earning livelihood. Evidence of PW3 grand mother and that of PW2 father is consistent

about PW3 supplying tiffin to accused Hamid on monthly basis. So much part of their evidence has virtually remained untouched and thus intact.

Evidence of victim about both accused raping her forcibly, is not shaken or rendered doubtful. Here, on medical examination, victim was reported to be pregnant. Therefore, medical evidence establishes sexual intercourse. Victim has herself deposed about she being forcibly raped by issuing threats. There is no reason to disbelieve her testimony to that extent. Neither of the accused brought any material to show false implication.

14. No doubt, occurrence is reported at a very belated stage. However, facts and circumstances in the case in hand seem to be responsible for the same. After victim faced the ordeal, she seems to have reported her grand-mother, but she is admittedly very old aged. It is this grand mother who had told her that she would report her parents when they come. Father in his evidence has deposed that he used to visit once in two-three months as he was away for earning livelihood in different village.

Consequently, girl has waited till arrival of her father. They are not only rustic villagers, but also seem to be barely surviving by earnings made on sale of tamarind. Therefore, it is only on arrival of father, victim has reported occurrence. By that time, unfortunately, victim was already reported to be pregnant. Above is the reason for delayed reporting.

15. The two points which are heavily stressed upon by both the learned counsels are that **firstly**, there is no corroboration to the testimony of prosecutrix and **secondly**, there is immense delay in lodging FIR.

16. We propose to answer the above grounds by taking recourse to the landmark decision of Hon'ble Apex Court in the case of ***State of Punjab v. Gurmit Singh and others*** ; (1996) 2 SCC 384, in which both above aspects are squarely dealt, wherein it has been held that conviction can safely be based even solely on the testimony of prosecutrix if it inspires confidence and that law does not insist for corroboration and secondly, in cases involving sexual assault, delay, if any, if properly explained, can definitely be condoned as delayed lodgement of FIR can be due to variety of reasons, particularly like reluctance of prosecutrix to report, courage of family members to

approach police with concerns of future and reputation of victim as well as the family and sometimes even for the honour of the family.

Only the relevant observations on above aspects, of which we are concerned here, are borrowed from para 8 and 21 the judgment and quoted as under:

“The testimony of victim of sexual assault is vital and unless there are compelling reasons, which necessitates looking for corroboration for her statement, court should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration for her statement before relying upon the same, as a rule, in such cases amounts to adding insult to the injury.....

Evidence of a victim of sexual assault stands almost on a par of evidence of an injured witness and to an extent is even more reliable.

corroborative evidence is not an imperative component of judicial credence in every case of rape.....

*The courts cannot over-look the fact that in sexual offences **delay** in the lodging of the FIR can be due to*

variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged.....”

“21. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her

statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.”

17. In view of above observations, here, in the case in hand, also the victim is residing in a village. She is away from her parents and is being looked upon by old aged grand-mother. In spite of she reporting occurrence to grand mother, the old lady seems to have advised her to wait till her parents come. She has therefore followed such advice given to her and seems to have waited till arrival of her father. Thus, though there is delay, the same is due to plausible explanation. Her evidence when inspiring confidence and same not being rendered suspicious or doubtful, there is no hesitation to rely on the same. She has named both for taking turns in raping her. There is nothing the disbelieve her testimony. There is no other cohesive assertion or specific defence raised by accused either in trial court or before us to doubt the case of prosecution. Medical evidence confirms liability.

Resultantly, there is no escape from the only conclusion that appellants are perpetrators of the crime of sexual assault.

18. Learned counsel for appellant Hamid would try to dissuade us from accepting the case of prosecution as regards to involvement of her client is concerned, by vehemently submitting that her client is not only 70 years old but is also medically opined to be unfit to perform sexual act. No doubt there is medical evidence suggesting that on examination he was found to be dysfunctional but only as regards to erection is concerned. However, record so relied shows that he was examined on 14.09.2012. Therefore, the findings and opinion are only confined to the date of examination and he has not been medically declared to be impotent or suffering from erectile dysfunction permanently. No test to that regard seems to be conducted and therefore, mere observation of medical expert regarding this accused to be unable to have erection, that too in the presence medical expert, would not by itself be sufficient to hold that he was completely incapable performing sexual act at all. Victim has named him for raping her that day. There is nothing on record to show that there is reason for false implication.

19. As regards to DNA examination is concerned, paternity of accused Hakim is already established. In cases of gang rape resulting into pregnancy, obviously, paternity of only one would be determined but on such count, other perpetrators would not get absolved once victim is categorical about she being raped by another also.

20. For above reasons the ground raised by this appellant holds no water and he cannot succeed in seeking acquittal on such medical ground.

21. The second ground which is pressed by learned counsel for this appellant is that victim was mentally retarded and therefore, her evidence ought not to have been relied. We discard this argument in toto for the simple reason that, very FIR is at the instance of victim, father and grand-mother who are witnesses in this case have not uttered any such disability of victim. Moreover when defence, who participated in trial, has subjected victim to extensive cross, now it does not lie in the mouth of appellant to raise the above ground. There is nothing on record except a medical paper regarding mother reporting victim to be mentally retarded. Neither mother nor the doctor who penned the said note is examined by prosecution or

defence. Resultantly, even above objection and ground is liable to be discarded.

22. We have gone through the judgment under challenge. Learned trial court has committed no error in accepting and relying on the evidence of prosecutrix and returning the guilt. No perversity is brought to our notice so as to interfere in the findings which are supported by reasons.

23. We are informed that appellant Hamid was on bail by virtue of order dated 26.02.2015. Counsel representing him informs that he has grown more old now. Therefore, under such circumstances, some latitude is required to be extended to enable him to surrender himself. Hence, we proceed to pass following order :

ORDER

- I. Both appeals are hereby dismissed.
- II. The conviction awarded by learned Additional Sessions Judge, Latur in Sessions Case No. 08 of 2014 dated 06.12.2014 for commission of offence under Sections 376(2)(g) r/w 34 of the Indian Penal Code [IPC] is maintained.

III. The bail bonds furnished by appellant in Criminal Appeal No. 792 of 2014, i.e. original accused no. 1 Hamid Bashumiya Shaikh, in terms of order dated 26.02.2015 passed by this Court while releasing him on bail, stands cancelled.

IV. The appellant/accused no. 1 Hamid Bashumiya Shaikh shall surrender himself before learned trial court, district Latur, up to 31.10.2023 to undergo remaining part of his sentence.

V. On failure of appellant to surrender, concerned court to take steps to secure his presence for undergoing further sentence.

VI. Registry to inform trial court accordingly.

VII. In view of dismissal of main appeal, Criminal Application No. 262 of 2015 also stands disposed of.

[ABHAY S. WAGHWASE, J.]

[SMT. VIBHA KANKANWADI, J.]