

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.223 OF 2003

Najar Mohammad Shaikh

Age : 30 years, Occ. Service

R/o : Darga Vasahat, Khadki Bazar,
Pune.

(At present in Yerwada Prison)

.... Appellant

versus

State of Maharashtra

(Through Bund Garden Police Station)

.... Respondent

.....

- Smt. Anita Agarwal a/w Ashwini Jadhav, Advocate for Appellant.
- Mr. S. R. Agarkar, APP for the State/Respondent.

CORAM : SARANG V. KOTWAL, J.

DATE : 21st FEBRUARY, 2023

JUDGMENT :

1. The Appellant has challenged the Judgment and Order dated 30/01/2003 passed by the 3rd Ad-Hoc Additional Sessions Judge, Pune, in Sessions Case No.492 of 2001. The Appellant was the original accused No.1. By the impugned Judgment and Order, the Appellant was convicted and sentenced as follows ;

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- (a) He was convicted for commission of the offence punishable u/s 342 of the Indian Penal Code and was sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs.1,000/- and in default of payment of fine to suffer rigorous imprisonment for three months.
- (b) He was also convicted for commission of the offence punishable u/s 376 r/w 109 of the Indian Penal Code and was sentenced to suffer rigorous imprisonment for four years and to pay a fine of Rs.2,000/- and in default of payment of fine to suffer rigorous imprisonment for one year.

The other accused i.e. accused No.2 was convicted for commission of offence punishable u/s 376, 392, 506-II of the Indian Penal Code and the major sentence imposed on him was for seven years.

2. Heard Smt. Anita Agarwal, learned counsel for the Appellant, and Mr. S. R. Agarkar, learned APP for the State.

3. Learned counsel Smt. Anita Agarwal states that the accused No.2 has passed away on 04/06/2019. She submitted a copy of the death certificate. It is taken on record. In any case, there is nothing to show as to whether he had preferred any Appeal challenging his conviction and sentence. Therefore, I have decided this Appeal on the basis of record of this case and after hearing both the sides.

4. The prosecution case is that, the Appellant was working as a ward boy in Sassoon hospital. The prosecutrix had worked at Sassoon hospital for quite some time. Her job was not continued. She was in search of a job. About 10-15 days before 24/05/2001 she had gone to Sassoon hospital for making enquiries about her GPF. At that time, she met the accused No.2. He told her that he could help her in securing a job. On 24/05/2001, the prosecutrix went to Sassoon hospital and met the accused No.2. It is alleged that the accused No.2 had a discussion with the Appellant. Both of them asked to her wait outside the ward. They went away for some time to meet the

superior of the Appellant. But he was not available. The prosecutrix was asked to wait in the corridor. It is the prosecution case that the Appellant then went away after locking the gates of the ward. The allegations are that he did it deliberately to help the accused No.2. The accused No.2 took advantage of the situation and committed rape on the prosecutrix during the night. In the early hours, the prosecutrix came near the gate of that ward and raised shouts seeking help. A lady was sleeping outside that ward. She informed a ward boy who in turn informed the resident medical officer. The door was opened. The prosecutrix was not wearing her clothes. The accused No.2 ran away. The employees of the hospital took search of that ward. The prosecutrix's clothes were found concealed. She was given her clothes. The police person in the chowky of Sassoon hospital was informed. The prosecutrix was taken to Bund Garden police station. There, her FIR was registered vide C.R. No.134/2001. The Appellant was arrested on 25/05/2001, when he came to attend his duty. The accused No.2 was absconding for a few months. But he was arrested

subsequently. In the mean time, the medical examination of the prosecutrix was conducted. Her clothes were seized. The articles were sent for chemical analysis. Statements of witnesses were recorded and finally the charge-sheet and the supplementary charge-sheet were filed.

5. During trial, the prosecution examined nine witnesses including the prosecutrix, the Panchas, the nurse and the ward boy who had helped the victim, the resident medical officer and the police officers.

6. The defence of the Appellant was of total denial. According to him on 24/05/2001 he was attached to Dr. Dighikar as a peon. Dr. Dighikar was Head of Orthopedic Department of Sassoon Hospital. On that day at, 05.15 p.m. Dr. Dighikar was about to leave. The Appellant followed him with his brief case. At that time, the prosecutrix was sitting in front of the Physiotherapy Department. Dr. Dighikar told the Appellant to make enquiry with her. Dr. Dighikar left in his car. The

Appellant returned back and questioned her. She told him that she was waiting for her relatives and that she would leave with them. The Appellant told her that it was the time to close the department and asked her to go away. Then she went away in his presence. After that he went upstairs and closed the office and ward No.36. After closing the office of Dr. Dighikar, he came back to the ground floor and gave calls to ascertain whether anybody was present. After that, he put the lock on the door of Ward No.35 and kept the keys on the cupboard by telling the CMO. Then, he went home. He did not know what happened afterwards.

The defence of the accused No.2 is that he knew the prosecutrix prior to the date of incident. They were meeting in the past. Some officers of the Sassoon hospital had compelled the prosecutrix to lodge a false complaint. In effect, his defence was that it was a case of consent.

7. The main witness in this case is the prosecutrix herself. She is examined as P.W.1. She has deposed as follows:

She was married in the year 1995. She had a son from her marriage. Her husband was unemployed. She was residing with her parents since past four years. Her husband was addicted to liquor and because of his illtreatment she started residing with her parents. She was working at Shrivatsa Balkendra, Sassoon hospital for about six months. About 1 ½ month prior to the date of incident, she had left her job. About 15 days prior to 24/05/2001. She had gone to Sassoon hospital to claim amount of her GPF. After making enquiries, she was returning home. At that time, the accused No.2 called her by her name. He introduced himself. She identified the accused No.2 in the Court. He asked P.W.1 whether she had left her job. He told her that he was an influential person and he had given employment to many persons in Sassoon hospital and that he himself was working in Sassoon hospital. He told her that he could get her a job. He asked her to give her school certificates. After 7-8 days she gave her certificates to the accused. He called her again on some other day, as his officer was not present. On 24/05/2001, she went to Sassoon hospital at about 03.30 p.m.

to make enquiry about the work. She has deposed that Ward No.35 was situated in front of the medical store. She contacted the accused No.2 in the corridor of Ward No.35. He told her that he had spoken to his superior. In the meantime, the Appellant came there. The accused No.2 told the Appellant that he had promised to give job to PW.1. It is her case that the Appellant and the accused No.2 had some discussion. After about 20 minutes they came back to her. They took her to the first floor of the hospital. She was asked to sit on a bench in the Veranda on the first floor. Then they went on the upper floor. After about 1 ½ hour both of them came back and told her that their officer was busy and that he would be coming down. After that, the accused No.2 asked the Appellant to leave. PW.1 and accused No.2 waited in the Veranda. The Appellant then went away. PW.1 and the accused No.2 were waiting in the Veranda of the ward No.35. At around 08.30 p.m., the accused No.2 took out a liquor bottle from the pocket. He offered her liquor. She refused. The accused No.2 drank liquor. There was no one else in the Veranda. PW.1 too was about to leave, but the accused No.2

threatened her that he would kill her, if she tried to leave. The accused No.2 raised bottle in a gesture to hit her. The accused No.2 told her that he had instructed the Appellant to close the door and accordingly the Appellant had closed the doors. It is her case that the accused No.2 compelled her to drink liquor. Then he removed her clothes and committed rape on her. It was around 01.00 a.m. at that time. After some time, the accused No.2 went to sleep. She searched for her clothes. She could not find them. She came down on the ground floor. The grill of the ground floor was locked from outside. One woman was sleeping outside the main gate. P.W.1 shouted and woke her up. P.W.1 then told the incident to that woman and requested for help. After that, the Doctor and the Nurses and the Ward Boy were called. They got key of the door. They offered her bedsheet. The door was opened from outside and then she was taken out. The accused No.2 was sleeping on the first floor in the Veranda. The staff members went there. But he escaped and ran away. Her clothes were found. She put on her clothes. It was around 05.00 to 06.00 a.m. The police were called and then she was taken to

Bund Garden police station. She has deposed that police from Bund Garden police station are on duty of Sassoon hospital during night time. They took her to the police station. The accused No.2 had taken away amount of Rs.1340/- from her. The police recorded her complaint. The FIR is produced on record at Ex.13. The police seized one big empty liquor bottle and one quarter size empty liquor bottle, stainless steel plate and two glasses from the spot. She was sent for medical examination in Sassoon hospital. She was there for 8 days. She identified both the accused before the Court.

In the cross-examination, she stated that there was a medical store run by Sassoon hospital in front of Ward No.35 of that hospital. The medical store remained open for 24 hours. There was a distance of 10 feet between the Ward No.35 and the medical store. There was a cycle and scooter stand adjoining the Ward No.35. There was a mess for Doctors above Ward No.36. There was Orthopedic OPD in Ward No.35. She could not explain why it was not mentioned in the FIR that after initial

talks with the accused No.2, both the accused approached her after about 20 minutes or as to why she had not mentioned in her FIR that both the accused came back after 1 ½ hour after leaving her to intimate their boss.

During cross-examination she made a very important statement which has significant bearing on this case. She stated that, at around midnight, the accused No.2 procured liquor bottle from one person. She did not raise shouts when that person delivered the liquor bottle to the accused No.2. It is her case that the accused No.2 compelled her to drink liquor and she drank about 3-4 glasses of liquor. She further admitted that there was a police chowky in the premises of Sassoon hospital. The accused No.2 had brought some snacks to eat while drinking the liquor.

8. P.W.2, Dilip Parde, was a Pancha in whose presence the victim's clothes were seized under the Panchanama at Ex.26.

9. P.W.3 Dr. Gauri Deogaonkar was on duty as the Blood Bank Officer at Sassoon hospital from 09.00 p.m. to 07.00 a.m. on 24/05/2001. On 25/05/2001 at around 03.30 a.m., one Nikalje approached her and told her that one woman was shouting in Ward No.35 and that she did not have clothes on her person and she required to be rescued immediately. Her permission was sought to break open the lock of Ward No.35. She gave permission. After that, Dr. Chabukswar and Nikalje broke the lock of the ward and brought that lady to casualty department. On taking further search, Dr. Chabukswar found that door on the upper floor of Ward No.36 was locked from outside. The victim's clothes were found on the floor of Ward No.35. The liquor bottles, match box, Cigarette butts were found in Ward No.36. She further deposed that during night time, one police constable is always on duty. On that night, P.C. Gaikwad was on duty. She requested constable Gaikwad to take that woman in police custody. She gave her report to PI through PC Gaikwad. That report is taken on record at Ex.31. It is mentioned in that report that one patient informed that a

woman was shouting in Orthopedic ward. That woman had mentioned about accused No.2 who had ran away from the spot. P.W.3 then requested for taking action in that behalf. There was no reference to the Appellant in that report.

10. P.W.4 Elizabeth Gaikwad was the staff Nurse on duty on that day. She narrated about the patient telling them about the woman shouting in the Orthopedic department. P.W.4 and others went to Ward No.35. There was a lock on the collapsible door from outside. She has deposed that they opened the door of Ward No.35 with the help of the key. She deposed that the Appellant was working in the Orthopedic department and it was his duty to close the door of Orthopedic department. That department was open from 07.00 a.m. to 05.00 p.m. After closing the doors of Orthopedic department, the person on duty was required to keep the keys of Orthopedic department in OPD section.

In the cross-examination, she admitted that after Dr. Dighikar used to leave, the Appellant used to close the

Orthopedic section by putting the lock on the ground floor of Ward No.35 and used to keep the keys in the OPD section. There was a common key board cupboard in OPD section. For taking a key, permission of CMO and RMO was required. On that day, Dr. Chabukswar obtained the key after seeking permission from RMO and then opened the lock put on Ward No.35. She further deposed that there was a scooter stand behind the OPD section and ward No.35. There were separate watchmen on the scooter stand. It remained open for 24 hours. Ward No.35 and 36 were in the same building. Above Ward No.36, there were residential quarters of medical officers. They were 100 to 150 in number. There was a police chowky at Sassoon hospital. She added that it was not visible from Ward No.35.

11. P.W.5 Dipak Kamble was a Ward Boy. He has narrated the incident in the same manner as was narrated by P.W.4 Gaikwad. He had noticed the stainless steel plate and liquor bottle in Ward No.36. He had also seen the clothes of P.W.1 kept below a bench.

In the cross-examination, he admitted that on the southern side of Ward No.35, there was a lift going up to the third floor. After 05.00 p.m. nobody remained in Ward No.35 and 36. Sassoon Hospital remained opened for 24 hours and there used to be regular visits of patients.

12. The Spot Panchanama is produced on record at Ex.34. It describes the location of Ward No.35 and 36, the cycle stand and the medical store. The Spot Panchanama mentions seizure of beer bottle, another small bottle of liquor. Both were empty. There were two glasses, a steel plate, cigarette packet and the match box at the spot.
13. The C.A. report mentions that semen was found on the underwears of the accused No.2 and the prosecutrix.
14. P.W.6 PSI Dattatraya Chavan was the first Investigation Officer. He had recorded the FIR and had proved the omissions from her FIR, which were not mentioned in her deposition. He had carried out the Spot Panchanama. The Appellant was

arrested at about 01.00 p.m. on 25/05/2001. The accused No.2 was arrested on 19/10/2001. He has stated that the accused No.2 was not working in Sassoon hospital.

In the cross-examination he admitted that the Appellant was arrested from Sassoon hospital itself.

15. P.W.7 PSI Prasad Gokule had conducted the investigation from 25/05/2001. He had recorded statements of P.W.3, P.W.4 and P.W.5.

16. P.W.8 WPSI Surekha Patil had conducted the investigation from 27/08/2001. She had filed the charge-sheet against the Appellant.

17. P.W.9 API Ajay Chandkhede was another Investigating Officer. He had deposed about the arrest of accused No.2 on 19/10/2001. He had filed the supplementary charge-sheet against the accused No.2.

This, in short, is the evidence led by the prosecution.

18. Learned counsel for the Appellant submitted that the entire evidence shows that P.W.1 was a consenting party. It was not possible that the incident would have taken place without her active consent and participation. She was an adult lady, who had worked in Sassoon hospital. She was aware of the topography and the timings of different wards of Sassoon hospital. She knew the accused No.2 prior to the incident. The Appellant had nothing to do with her. It was also difficult to believe that she waited silently in the same ward from 03.30 p.m. onwards even after closing of the ward at around 05.30 p.m.

19. Learned counsel emphasized on the fact that she had admitted that one person had come around midnight with liquor bottle and had given that bottle to the accused No.2. Even at that time, she had not sought any help from him. She further submitted that presence of the third person in that ward at around midnight shows that there was a gate to enter and exit. Therefore, it cannot be said that P.W.1 was confined in that particular ward or that the Appellant had helped the accused

No.2 in commission of any act. She submitted that the conduct of the P.W.1 was very peculiar. She had consumed 3 to 4 glasses of liquor. It has been admitted by herself. She had not raised any shouts. She had not sought any help. The medical store was just 10 feet away from the Ward No.35. It was open for 24 hours. Besides that, there was a scooter stand and it was open for 24 hours and it was looked after by separate watchmen. She had not sought help from any of these watchmen or any other staff. There was a police chowky in the Sassoon hospital premises. She had not raised shouts at all. She submitted that, thus, it was a clear case of consent. No offence of rape is made out. There was no question of abetting accused No.2 in committing that act. Since the evidence shows that there was no confinement, no offence u/s 342 of IPC was proved.

20. Learned APP opposed these submissions. According to him, there was no reason to disbelieve the evidence of P.W.1 the prosecutrix. She has described the role played by the Appellant. The Appellant was hand in glove with the accused No.2 and

without his active help, this incident could not have taken place. He submitted that, the fact that the P.W.1 had sought help at around 03.30 a.m. and that she was not wearing clothes, shows that there was no consent at all. Therefore, the offence of rape was committed. He emphasized on the fact that the FIR mentions the name of the Appellant and describes the role of the Appellant. It is the prosecution case that the Appellant had asked her to wait in the Veranda and thereafter locked the gate and had gone away. He was aware that the prosecutrix and the accused No.2 were inside. Even then he locked the door, facilitating the commission of offence.

21. I have considered these submissions. The accused No.2's case is materially different from that of the present Appellant. Today, the only Appeal before me is of the Appellant. Therefore, from that point of view, I have examined the evidence in the light of submissions made by both the sides. Even as per the prosecution case, the main offence was committed by the accused No.2.

22. The allegations against the Appellant are that he facilitated commission of this offence and helped the accused No.2 by locking the door of Ward No.35 from outside. In this regard, cross-examination of P.W.1 is very material. As rightly submitted by learned counsel for Appellant, P.W.1 has admitted that around midnight, a third person had come inside that ward with a liquor bottle. He had handed over the liquor bottle to P.W.2 which clearly means that there was a exit point and an entry point from where that third person had entered that ward. Therefore, it cannot be said that the prosecutrix was confined by the Appellant or that he had locked the gate so that no one could enter that ward. Thus, it cannot be said that the Appellant had helped the accused No.2 in taking advantage of the helpless situation of P.W.1.

23. There is important discrepancy in the evidence of P.W.3 Dr. Deogaonkar and other witnesses P.W.4 and P.W.5. P.W.3 has stated that in the morning the lock was broken open. However,

P.W.4 and P.W.5 have deposed that key was brought and then the lock was opened. There was no reason for this discrepancy to occur, though all of them were present together at the same time in the morning for rescuing the victim.

24. Even otherwise, the conduct of the prosecutrix does not appear to be natural. She was present in the ward right from 03.30 p.m. Thereafter in the evening the Appellant had gone away after closing and locking the door. Even thereafter, she did not raise any shouts at all. Even after 05.30 p.m. till 08.30 p.m., which is a long period, she did not do anything in trying to go out. By that time, everybody from that ward had already left. It is impossible to believe that she did not know that she was alone in the ward with the accused No.2 and yet she has not raised any shouts. The evidence shows that the medical store was just across Ward No.35. She has admitted that it was only 10 feet away from that ward and yet she had not sought any help from the staff of the medical store. It was open for 24 hours. Apart from that, there was a scooter stand behind Ward No.35, which

was looked after by other watchmen. She did not seek help from these watchmen at all. There was no weapon in the ward. Accused No.2 did not use any weapon. It is difficult to believe that only because of his oral threats, she had kept quiet and had not tried to save herself. There was a police chowky within the premises of Sassoon hospital, though it was not visible from that ward, but she could have sought help. Sassoon hospital was open for 24 hours. There were regular visits of patients and the relatives. It is also important to note that she has admitted that the accused No.2 had not used any weapon to threaten her. Therefore, there is substance in the arguments of learned counsel for the Appellant that it can be a case of consent. However, I am refraining from making any observations regarding the absence of consent because the Appeal of accused No.2 is not before me. But it is quite obvious that sufficient doubt is raised about the prosecution theory. The main allegation against the Appellant is about locking the door from outside when the accused No.2 was with the prosecutrix in the ward, so that the accused could commit rape on her. However,

the prosecution case is destroyed by her admission that the third person had entered the ward at around midnight and had left around that time. Therefore, it cannot be said that the prosecutrix was confined to that ward and that she could not escape because the Appellant had closed the door from outside. The evidence shows that it was his regular duty to close the door and lock it before leaving as he was working with the Doctor in the Orthopedic department, which was situated in that particular ward. He has raised defence that he had acted in performance of his duty and that he was not aware that any such incident would take place inside that ward. This defence is quite probable.

25. Considering this discussion, it is clear that the serious doubt is created about the prosecution case against the Appellant and the benefit of doubt must necessarily go to the Appellant. Therefore, the Appeal deserves to succeed.

26. Hence, the following order :

ORDER

- (i) The Appeal is allowed.
- (ii) The Judgment and Order dated 30/01/2003 passed by the 3rd Ad-Hoc Additional Sessions Judge, Pune, in Sessions Case No.492 of 2001, is set aside.
- (iii) The Appellant is acquitted of all the charges, which he faced in Sessions Case No.492 of 2001, before 3rd Ad-Hoc Additional Sessions Judge, Pune.
- (iv) The Appellant's bail bonds stand discharged. The fine amount, if paid, shall be refunded back to him.
- (v) The Appeal is disposed of.

(SARANG V. KOTWAL, J.)