



Judgment

112 apeal422.20

1

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR**

CRIMINAL APPEAL NO.422 OF 2020

1. Nikhil s/o Nalini Mandal (in jail),
age 24 years, occupation : labourer.
2. Rajesh s/o Rakhal Dakwa (in jail),
age 28 years, occupation : cultivator.
3. Mahadeo s/o Ravi Barai (in jail),
age 26 years, occupation : labourer.
4. Swarup s/o Anil Mistri (in jail),
age 37 years, occupation : labourer.

All r/o Krishna Nagar,
tahsil Chamorshi, district Gadchiroli. **Appellants.**

:: V E R S U S ::

State of Maharashtra,
through its Police Station Officer,
Police Station Chamorshi,
tahsil Chamorshi, district Gadchiroli. **Respondent.**

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Shri R.H.Rawlani, Counsel for Appellants.
Shri A.M.Kadukar, Additional Public Prosecutor for the
Respondent/State.

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CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 21/07/2023

PRONOUNCED ON : 29/09/2023

JUDGMENT

1. By this appeal, the appellants (the accused persons) have challenged judgment and order of conviction and sentence dated 7.10.2020 passed by

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2

learned Additional Sessions Judge, Gadchiroli (learned Judge of the trial court) passed in Session Case No.153/2018 whereby the accused persons are convicted for offences punishable under Sections 323; 384; 341; 376-D, and 506 read with 34 of the Indian Penal Code.

For the offence punishable under Section 323, they were sentenced to suffer rigorous imprisonment for one year.

For the offence punishable under Section 384, they were sentenced to suffer rigorous imprisonment for three years and to pay fine Rs.4000/-, in default, to suffer simple imprisonment for two months

For the offence punishable under Section 341, they were sentenced to suffer rigorous imprisonment for one month, and

For the offence punishable under Section 376-D, they were sentenced to suffer rigorous imprisonment for twenty years and to pay fine Rs.50,000/- by each of

3

them, in default, to suffer simple imprisonment for 6 months by each of them.

For the offence punishable under Section 506, they were sentenced to suffer rigorous imprisonment for two years and to pay fine Rs.1000/-, in default, to suffer simple imprisonment for fifteen days.

Learned Judge of the trial court directed that all the sentences shall run concurrently.

2. The case of the prosecution, as emerges from police papers and recorded evidence, in brief, can be summarized as follows:

Victim (due to the mandate of Section 228-A of the Indian Penal Code, name of the victim is not mentioned) approached Chamorshi Police Station, district Gadchiroli and lodged a report. As per her report, she is residing along with her family members at Chamorshi and her marriage was settled to Uttam Nitai Suwarnakar. On 29.8.2018, at about 9:15 am, she received a telephonic call of her fiance Uttam who requested her to accompany

4

him as he has to proceed to Hospital at Amgaon and, therefore, she left her house at 9:30 am. Her fiance was waiting near Krishna Nagar Bus Stand. She proceeded on two-wheeler of Uttam by Bhiwapur-Amgaon-Road. On the way, on kaccha road, they were chit-chatting, at the relevant time, the accused persons came on their two-wheeler and enquired her what she is doing. She disclosed them that her marriage is settled with Uttam and they were chit-chatting. However, the accused persons started assaulting Uttam and her also. At the relevant time, accused Rajesh obtained photographs of Uttam and the victim and threatened that they will post it on social media. The accused persons also snatched vehicle' key and mobile. When accused Mahadeo demanded Rs.4000/- from them, Uttam told them that he is not having so much of amount and he will bring from his home. On that, accused Nikhil and Swaroop took Uttam on their motorcycle. In the meantime, accused Rajesh and Mahadeo hold her hands and dragged her in forest and subjected her for sexual assault. On the basis

5

of the said report, the police have registered the crime against the accused persons.

3. After registration of the crime, wheels of the investigation started rotating. During investigation, investigating officer visited the alleged spot of the incident and drawn spot panchanama. The accused persons are arrested. On the basis of their memorandum statements, their clothes were recovered. All the accused persons are referred for medical examination and their medical certificates are obtained. The victim was also referred for medical examination and her medical certificate was obtained. The clothes of the victim, which were on her person, at the time of the incident, were also seized. The medical officer obtained blood samples and other samples of the victim as well as the accused persons and forwarded the same to Chemical Analyzer. The statements of the victim and her fiancé Uttam were recorded under Section 164 of the Code of Criminal Procedure. After completion of the investigation,

6

chargesheet was submitted before the court of law against the accused persons.

4. Learned Judge of the trial court framed charge vide Exhibit-4 and contents of the charge are explained to the accused persons and the accused persons pleaded not guilty and claimed to be tried.

5. In support of the prosecution case, the prosecution examined four witnesses; victim (PW1) vide Exhibit-9; Uttam Nitai Suwarnakar (PW2) vide Exhibit-16; Mahesh Kumar Waman Madavi (PW3) vide Exhibit-22; pancha on seizure of the clothes of the accused persons, and Nisha Jiwadas Khobragade (PW4) vide Exhibit-29, the investigating officer.

6. Besides the oral evidence, the prosecution placed reliance on following documents:

1. statement of the victim under Section 164 of the Code of Criminal Procedure, Exhibit-11;
2. spot panchanama, Exhibit-12;
3. details of spot, Exhibit-13;
4. discharge card, Exhibit-14;
5. discovery panchanama, Exhibits-23 to 27;
6. report, Exhibit-30;

7

7. FIR, Exhibit-31;
8. seizure memos, Exhibits-32 to 34;
9. letter to medical officer, Exhibit-35;
10. letter to chemical analyzer, Exhibits-36 and 37;
11. arrest panchanamas, Exhibits-41 to 44;
12. medical certificates of the accused persons, Exhibits-51 to 56;
13. letter to the medical officer, Exhibit-58, and
14. chemical analyzer reports.

7. All the incriminating evidence is put to the accused persons to obtain their explanations regarding the evidence appearing against them. The defence of the accused persons is of false implication.

8. Learned Judge of the trial court, after appreciation the evidence adduced, by relying upon the statement of the victim under Section 164 of the Code of Criminal Procedure, convicted the accused persons. Being aggrieved with the same, the present appeal is preferred by the accused persons on the ground that they were convicted when there is absolutely no evidence against them, only on the basis of surmises and conjectures. The victim and PW2 Uttam have not supported the prosecution case and there is no medical

8

evidence or any circumstantial evidence to connect the accused persons with the alleged offence. Thus, the judgment passed by learned Judge of the trial court is erroneous and liable to be set aside.

9. Heard learned counsel Shri R.H.Rawlani for the accused persons and learned Additional Public Prosecutor Shri A.M.Kadukar for the State.

10. Learned counsel for the accused persons reiterated the contentions and submitted that to substantiate the allegations that the victim was subjected for sexual assault, no evidence is adduced by the prosecution to prove the charges. In fact, both, the victim and PW2 Uttam, have not supported the prosecution case. The medical certificates on record also not substantiate the contention that the victim was subjected for sexual assault by accused Nos.2 and 3. The chemical analyzer's reports are also in negative form. Learned Judge of the trial court held that the defence has admitted medico legal examination report wherein the

9

victim has stated the names of the accused persons. The accused persons are examined and medical opinion shows that there is nothing to suggest that they are incapable of performing sexual intercourse. The history narrated by the victim shows that the victim has disclosed the names of the accused persons. Her statement under Section 164 of the Code of Criminal Procedure also discloses involvement of the accused persons. In fact, no injury is found on her person though, as per the allegations, she was subjected for forceful sexual assault on hard and rough surface. The alleged incident occurred on 29.8.2018 and she was examined on 1.9.2018 and the injury noted by the medical officer is old heal injury. The samples of the victim and the accused persons are forwarded chemical analyzer and neither semen nor blood was found on the incriminating articles. Thus, there is no direct or circumstantial evidence to connect the accused persons with the crime in question.

11. Whereas, learned Additional Public Prosecutor for the State supported the judgment passed by learned

10

Judge of the trial court and submitted that though the victim and PW2 Uttam have not supported the prosecution case, the circumstantial evidence on record is sufficient to warrant the conviction of the accused person and prayed for dismissal of the appeal.

12. The accused persons are facing the charge on an allegation that they have subjected the victim for sexual assault and committed the offence punishable under Section 376-D of the Indian Penal Code. They are also facing the charge that they have assaulted and extorted money from the victim and her fiance.

13. To substantiate the charge, the prosecution mainly placed reliance on the evidence of the victim examined vide Exhibit-9 and her fiance PW2 Uttam, examined vide Exhibit-16.

Though the victim has narrated that on 29.8.2018 she had been with PW2 Uttam to accompany him to the hospital at Amgaon, she has not supported the allegation as to the sexual assault. She only stated that

11

the accused met her and enquired her what she is doing there and there was altercation of words. Rest of the allegations, that the accused persons have obtained photographs, demanded money from, took Uttam along with them, and extorted amount Rs.4000/-, are not supported by her. Though she is cross examined at length by learned APP, nothing incriminating came on record. During her cross examination, she stated that it was Uttam who lodged report with the police station and only her signature was obtained. She is not aware about the contents of the report.

PW2 Uttam, has also not supported the prosecution and left the loyalty towards the prosecution. His evidence is only to the extent that there was a quarrel between him and the accused persons and the accused persons left the place.

Thus, PW2 Uttam has also not supported whatever alleged by the prosecution.

12

14. Besides the oral evidence, the prosecution placed reliance on the circumstantial evidence i.e. spot panchanama.

Admittedly, the said panchanama was admitted by the defence.

Perusal of the panchanama, reveals that nothing incriminating was found at the spot. The victim was referred for medical examination. She was examined after 2-3 days of the incident. She has narrated the history that she was subjected for sexual assault by the accused persons. However, the victim has not supported the contention of sexual assault and the medical officer is not examined to prove that it was the victim who has narrated the said incident.

15. Perusal of the medical examination report shows that no external injury is found on the person of the victim. Admittedly, the victim was examined after 2 days and the medical officer noted old healed hymeneal tear. No fresh injury is found on the person of the victim.

13

The medical officer has not given any final opinion as to the sexual assault on the victim.

16. Admittedly, the alleged incident has occurred in a forest on Bhiwapur-Laldongri Kaccha Road. It was hard and rough surface. As per the allegation, two accused persons subjected her for sexual assault by disrobing and assaulting her and surprisingly not a single injury or even an abrasion is found on her person.

17. During the investigation, memorandum statement of all the accused persons is recorded. At the instance of the accused persons, their clothes were seized by drawing separate seizure memos. The said seizure memos are at Exhibits-32, 33, and 34.

18. PW3 Mahesh Kumar Waman Madavi, was examined vide Exhibit-22. As per his evidence, accused Nikhil made a memorandum statement and at his instance his clothes are recovered from his house. His evidence further shows that other accused Rajesh, Mahadeo, and Swaroop all made their memorandum

14

statements and at their instance their clothes, cash amount, and mobile phone were recovered. Accordingly, memorandum panchanama was drawn, which are at Exhibits-23 to 27.

During his cross examination, it came on record that he is not aware about the exact location of the house of the accused persons as he is unable to tell the boundaries of the house. Perusal of the memorandum statement reveals that consolidated statement one by one is recorded and one memorandum panchanama was drawn by which the articles are shown to be recovered.

19. The incriminating articles, i.e. clothes of the victim and the accused persons, were forwarded to chemical analyzer. The chemical analyzer reports are on record which show that neither semen nor blood is detected on the articles. Only blood is detected on nicker of the victim and the blood group of the same was not determined. After receipt of the chemical analyzer's reports, final opinion of the medical officer was not

15

obtained as to the fact that whether the victim was subjected for sexual assault or not.

20. The evidence of investigating officer PW4 Nisha Khobragade, narrates about the investigation carried out by her.

21. On the basis of the evidence adduced, learned Judge of the trial court held the accused persons guilty. Perusal of the judgment impugned reveals that learned Judge of the trial placed reliance on documents i.e Exhibits-51 53 and 55 and 56 wherein the accused persons gave a history to the medical officer that they had acts of penetration on 29.8.2018. Learned Judge of the trial court held that in view of Section 58 of the Evidence Act, the admitted facts need not proved. Learned Judge of the trial court further considered the history narrated by the victim to the medical officer and her statement under Section 164 of the Code of Criminal Procedure and convicted the accused persons. Insofar as documents Exhibits-51, 53, 54, and 55 show that one line

16

history is mentioned that the accused persons had penetrative sexual assault. Admittedly, the victim has not narrated about the sexual assault by the accused persons. The accused persons have not stated that they had an penetrative sexual assault on the victim before the medical officer.

22. Section 58 of the Evidence Act states the facts that need not be proved in any proceedings which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleadings in force at the time they are deemed to have admitted by their pleadings.

23. Admitted facts which are not to be proved under Section 58 of the Evidence Act which run thus are:

58. Facts admitted need not be proved.- No fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the

17

time they are deemed to have admitted by their pleadings:

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

The facts not required to be proved would, therefore, be the facts mentioned in the pleadings of the parties or in the documents of the parties or specifically which were agreed to be admitted at or before the hearing in writing. They may be facts which are specifically admitted in the oral evidence of the parties. Merely because a fact has not been disputed by cross-examination of a party would not make it an admitted fact such as not requiring it to be proved under Section 58 of the Evidence Act. There need be no cross-examination of unproved facts.

24. Admittedly, the documents are not written either by the accused persons or by the victim.

25. It is well settled that mere exhibition of documents is not sufficient to prove the contents. The

18

contents are to be proved by adducing admissible evidence.

26. The medical officer is not examined and the victim has not narrated about the history she had stated before the medical officer and, therefore, observation of learned Judge of the trial court, that the admitted facts need not be proved, is based upon misconception of the legal provision.

27. Learned Judge of the trial court further placed reliance on the statement recorded under Section 164 of the Code of Criminal Procedure. The victim has not supported the prosecution case as far as the allegation as to sexual assault is concerned. Learned Magistrate, who recorded statement under Section 164 of the Code of Criminal Procedure, is not examined. Learned Judge of the trial court has taken into consideration the statement recorded under Section 164 of the Code of Criminal Procedure to hold the accused persons guilty.

19

28. The statement recorded under Section 164 of the Code of Criminal Procedure can never be used as substantive evidence of truth of facts, but it may be used for contradictions and corroborations of a witness who made it. The statement made under Section 164 of the Code of Criminal Procedure can be used to cross-examine the maker of it and the result may be to show that the evidence of the witness is false. It can be used to impeach the credibility of the prosecution witnesses. The law regarding statements under Section 164 of the Code of Criminal Procedure is well settled that the said statements can be used only for the purpose of contradictions under Section 145 or for corroboration under Section 157 of the Indian Evidence Act.

29. In the case of Gurjant Singh vs. State of Rajasthan reported in (AIR 1970 SC 1305) wherein the Honourable Apex Court has held that statements, recorded under Section 164 of the Code of Criminal Procedure, could not be considered as evidence, but were

20

corroborative of what was stated earlier in the committal Court.

30. In the case of Ram Kishan Singh vs. Harmit Kaur and another reported in (AIR 1972 SC 468) wherein the Honourable Apex Court has reiterated that the statement under Section 164 of the Code of Criminal Procedure is not a substantive evidence and it can be used only to corroborate or to contradict the witnesses. The Honourable Apex Court had an occasion to deal with this aspect in the case of George and others vs. State of Kerala and another, reported in (1998)4 SCC 605 and in paragraph No.36, after reproducing the evidence recorded in the trial court, observed that from the judgment of the trial court we notice that the substantial parts of the comments are based on the statements recorded under Section 164 of the Code of Criminal Procedure and not his evidence in Court.

It is further observed that the trial court has ignored the fundamental rule of criminal jurisprudence

21

that a statement of a witness recorded under Section 164 of the Code of Criminal Procedure cannot be used as substantive evidence and can be used only for the purpose of contradicting or corroborating him.

31. In view of the settled position of law, it is not permissible to use statements recorded under Section 164 of the Code of Criminal Procedure and such statements cannot be used as substantive evidence.

32. In the case of **Utpal Das and another vs. State Of West Bengal**, reported in **AIR 2010 SC 1894** also the Honourable Apex Court held that the statement recorded under Section 164 of the Code of Criminal Procedure can never be used as substantive evidence of truth of facts and may be used for contradictions and corroborations of witnesses who made it. The statement made under Section 164 of the Code of Criminal Procedure can be used to cross-examine the maker of it.

33. In the light of the above well settled legal position, it is not permissible to use statements recorded

22

under Section 164 of the Code of Criminal Procedure as substantive evidence. Learned Judge of the trial court ignored the above said legal position and used the statement recorded under Section 164 of the Code of Criminal Procedure as a substantive evidence which is not permissible.

34. Thus, the statements under Section 164 of the Code of Criminal Procedure is not substantive evidence. Learned Judge of the trial court ignored the said legal position and used the said statement as a substantive evidence which is not permissible.

35. It is well settled that even in case where there is some material to show that the victim was subjected for sexual assault and supported by some evidence, the accused can be convicted. The courts, while trying accused persons, expect to deal with cases with utmost sensitivity examining the broader probabilities of case. Even, in case of sexual assault, onus is always on the prosecution to prove, affirmatively each ingredient of the

23

offence. It seeks to establish and such onus never shifts. It is not the duty of the defence to explain as to how and why in a rape case the victim and the other witness have falsely implicated the accused persons. The prosecution has to stand on its own legs and cannot take support from weakness of the defence. However, great the suspicion against accused and strong moral belief, however unless the offence of accused is established beyond reasonable doubt on the basis of legal evidence and material on record, he cannot be convicted for an offence. There is an initial presumption of innocence of accused and the prosecution has to bring home the offence against the accused by reliable evidence. It is well settled that sole testimony of victim is also sufficient to warrant conviction if it inspires confidence.

36. In the present case, the victim has not supported the prosecution case and left the loyalty towards the prosecution. The circumstantial evidence on which the prosecution relied upon is also not supportive as though it is alleged that two accused persons dragged

24

the victim in the forest and subjected her for forcible sexual assault, she had not sustained even an abrasion on her person and the same is difficult to accept. The clothes of the victim and the accused persons are seized and the chemical analyzer's reports show that nothing incriminating is found after examination of the said clothes during chemical analyzer's analysis. The clothes of the accused persons are recovered by recording their statement under Section 27 of the Indian Evidence Act.

37. The evidence of PW3 Mahesh Kumar Waman Madavi, pancha on seizure of the clothes of the accused persons, shows that the accused persons made a statement, but his evidence nowhere discloses that the accused persons made a voluntary statement and disclosed about the concealment of the clothes.

38. Investigating officer PW4 Nisha Khobragade, is also silent about the same.

39. The discovery panchanama, as contemplated under Section 27 of the Evidence Act, that mere

25

statement that the accused persons led the police and witnesses to the place, is not indicative of the information given.

40. In another judgment Subramanya vs. State of Karnataka, reported in 2022 LiveLaw (SC) 887. The Honourable Apex Court considered the aspect that how the law expects the investigating officer to draw the discovery panchnama as contemplated under Section 27 and held that mere discovery cannot be interpreted as sufficient to infer authorship of concealment by the person who discovered the weapon. In para Nos.78 to 87 the Honourable Apex Court has discussed the legal position regarding Section 27 of the Indian Evidence Act and held that mere statement that the accused led the police and the witnesses to the place where he had concealed the articles is not indicative of the information given. But, what is admissible being the information, the same has to be proved and not the opinion formed on it by the police officer. In other words, the exact information given by the accused while in custody which led to discovery of the

26

articles has to be proved. It is, therefore, necessary for the benefit of both the accused and the prosecution that information given should be recorded and proved and if not so recorded, the exact information must be adduced through evidence. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true.

41. Thus, the discovery of facts regarding the concealment of the clothes is not proved by the prosecution.

42. Applying the well settled principles and appreciating the evidence of the victim, it reveals that the victim has not supported the prosecution case. The prevaricating statement of the prosecutrix before the investigating officer, which is not supported before the

27

court and there was no injury on her persons, though she was subjected for forcible sexual intercourse, it is hard to believe that such incident has occurred. On the face value, the evidence is found to be defective. The attending circumstances and the other evidence have to be necessarily examined which do not support the allegation of gang rape. I find that the allegations levelled against the accused persons cannot be accepted as gospel truth in absence of any evidence and hence there is no scope to sustain the conviction and sentence imposed and, therefore, I hold that the prosecution failed to establish the guilty of gang rape falling under Section 376D of the Indian Penal Code . The prosecution also failed to prove that the victim and PW2 Uttam were restrained, assaulted, and money was extorted from them. There is no explanation as to the delayed First Information Report by the victim as the alleged incident occurred on 29.8.2018 and the First Information Report was lodged on 31.8.2018. I am fully conscious about the well settled legal position that the delay is not fatal to the

28

prosecution in a sexual assault cases if the delay is properly explained. However, in the present case there is no explanation as to the delayed First Information Report also.

43. The impugned judgment and order of conviction and sentence is, therefore, not in accordance with the settled principles of law. The prosecution failed to prove the guilt of the accused persons. As such, the appeal deserves to be allowed, as per the order below:

ORDER

(1) The criminal appeal is **allowed**.

(2) The judgment and order of conviction and sentence dated 7.10.2020 passed by learned Additional Sessions Judge, Gadchiroli in Session Case No.153/2018 is hereby quashed and set aside.

(3) The accused persons are acquitted of the offences for which they are charged and convicted.

Judgment

112 apeal422.20

29

(4) The accused persons be released from the jail forthwith.

The criminal appeal stands disposed of.

(URMILA JOSHI-PHALKE, J.)

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