



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 673 OF 2002

. Bhaulal S/o. Dokraji Reswal
Age: 50 years, Occu.: Labour,
R/o: Indirangar Jhopadpatti,
Garkheda, Aurangabad.Appellant
(Ori. Accused)

Versus

1] The State of Maharashtra

2] Bapurao S/o. Kashinath Vibhute
Age: 46 years, Occu.: Labourer,
R/o. Jyoti Nagar, Plot No.119,
Aurangabad. Dist. Aurangabad. ...Respondents

.....
Advocate for Appellant : Ms.Harsha Lomte h/f. Mr. V.D.Salunke
APP for Respondent no.1 : Mr.S.M.Ganachari
Advocate for Respondent no.2 : Mr.Kalyan Patil h/f. Mr. S.R.Barlinge

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CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 28 FEBRUARY, 2024
PRONOUNCED ON : 06 MARCH, 2024

JUDGMENT :-

1. Convict for offence under Section 376 of the Indian Penal Code (IPC) is hereby questioning the judgment and order dated 21-10-2002 passed by II Additional Adhoc Sessions Judge, Aurangabad in Sessions Case No.103 of 2001.

FACTS IN BRIEF LEADING TO TRIAL

2. Six years old daughter of informant was unwell. She was taken to Doctor, who prescribed medicines, but there was no improvement. Informant called his brother, who advised bringing an occultist as he suggested that deceased daughter was possessed by evil force. Informant conceded and his brother brought accused, who claimed himself to be a Mantrik and he assured to treat deceased upon charging Rs.250/-. He directed informant to purchase necessary material and under the pretext of exorcising and driving out spirit, he committed rape on the minor. Her condition worsened and while being taken to the native, in the journey itself, she breath her last. Parents performed last rituals and later on informant came back to Aurangabad and lodged report, which was made the basis of registering crime bearing no.24 of 2001 for offence under Sections 302 and 376 of the IPC.

PW8 Nikam (PSI) and PW9 Muthe (PI), both Police Officers conducted and concluded investigation at respective times and finally accused was chargesheeted and made to face trial before learned II Additional Adhoc Sessions Judge, Aurangabad, who on appreciating oral and documentary evidence adduced by prosecution, held charge under Section 376 of the IPC to be proved but acquitted accused

from offence under Section 302 of the IPC.

It is the above judgment and order of conviction under Section 376 of the IPC, which is now taken exception to.

SUBMISSIONS

On behalf of appellant :

3. Learned Counsel for the appellant would submit that conviction is challenged primarily on following grounds :

GROUND

Firstly, there is inordinate delay in lodging the FIR.

Secondly, there is no medical evidence in support of charge of rape.

Thirdly, false implication at the behest of a Corporator.

Fourthly, inconsistency, material omissions and contradictions in the versions of parents of victim and PW7.

Emphasizing the above grounds, learned Counsel for the appellant would vehemently submit that there is no convincing evidence in support of the case of prosecution. That prosecution infact had failed to establish case beyond reasonable doubt. Learned Counsel took this Court through the charge and pointed out that apart from allegation of rape, there was also charge of committing murder, but on the same set of evidence, learned trial Court has

already acquitted appellant from charge of murder, however, unfortunately guilt is fastened for offence under Section 376 of the IPC. Learned Counsel would point out that apart from inordinate delay of almost a month in implicating accused, there is no supporting medical evidence suggesting evidence of rape. She further pointed out that prosecution is merely relying on evidence of parents i.e. PW3 father of victim and PW4 mother of victim, but according to her, they both are not lending support to each other and are rather giving inconsistent versions and that their evidence is full of material omissions and contradictions.

4. She further pointed out that it has come in the evidence of parents about presence of other independent 10-15 persons at the time of alleged occurrence, but none of them is examined. Consequently, it is her submission that there is no convincing evidence but still learned trial Judge has accepted the case of prosecution as proved and so she prays to allow the appeal by setting aside the impugned judgment.

On behalf of State :

5. Per contra, learned APP strongly opposed pointing out that complainant parents are residents of Latur and they have shifted to

Aurangabad. That informant father is illiterate and was working as a Watchman for livelihood of his family. That moreover he belongs to Latur and had shifted to Aurangabad to earn. Being illiterate, after death of his daughter, instead of reporting to Police Station, he spent time at his native and subsequently he returned Aurangabad and lodged report and hence, there is delay and according to him, in cases of such nature, delay is insignificant.

He further pointed out that, out of their two daughters, deceased daughter was unwell and was running fever and therefore, on suggestion of informant's brother, accused was brought, who claimed himself to be possessed with supernatural powers to drive away the evil. He charged for treating victim. He conducted some process of pooja, but after making father leave the room, he satisfied his sexual urge by victimizing the child. Both parents and independent witness had seen the acts of accused through the gaps of walls and doors of loosely erected temporary house. Their versions are consistent about victim being disrobed and raped. Resultantly, learned trial Court has accepted the direct evidence and committed no error in recording the guilt. Consequently, supporting the judgment of conviction, learned APP prays to dismiss the appeal for want of merits.

6. This Court, being first appellate Court and last fact finding Court is expected to re-appreciate, re-analyze and re-examine the entire oral and documentary evidence adduced by prosecution.

In support of its case, prosecution has examined following nine witnesses. In brief, sum and substance of their evidence is as under :

PROSECUTION EVIDENCE

7. **PW1** Dr.Prakash s/o. Rangnath Kulkarni is the Autopsy Doctor and he in his evidence at exh.7 deposed about Tahsildar requesting him to remain present at the time of exhumation of dead body of victim. According to him, after exhumation, father identified dead body. According to him, there were only skeletal remains and therefore, no cause of death could be opined.

PW2 Kishor Madhavrao Rahatkar is Pancha to spot panchanama exh.11 as well as pancha to seizure of clothes of accused exh.12.

PW3 is the father of victim. He deposed at exh.13 and sum and substance of his evidence is that his victim daughter fell ill, inspite of being treated, there was no improvement and on suggestion of his brother, services of accused, who claimed himself to

be occultist were engaged to treat victim child on paying Rs.250/-. Regarding occurrence, he has deposed that accused made him leave the room and while victim was alone in his company, he committed rape on her. All this was seen by him, his wife and others through the gaps of the door. Accused was given thrashing but he fled. After burial of dead body, he came back to Aurangabad and lodged complaint.

PW4 is the mother of victim and she also deposed on similar lines like her husband PW3.

PW5 is another daughter of PW3 and sister of deceased. Her evidence is that while she was sleeping, she heard shouts of her sister and so she woke up and saw accused placing his mouth in the mouth of her sister and thereafter, she was made to go out of the room.

PW6 Dr.Harish Chaparwal, another Doctor, who had examined deceased on being brought by her parents PW3 and PW4 and treated her for fever by prescribing medicines.

PW7 Kalimbhai Yashinbhai also stated that he was a mason and he was on a construction site near the room of informant. He deposed about illness of daughter of informant, accused being called

and accused performing some pooja and uttering Mantras by closing door and about hearing shouts of victim girl and therefore, he and others peeping through the gap of the door and seeing accused committing rape and he be given beating.

PW8 Raghunath Ambuji Nikam (PSI) and **PW9** Balasaheb Sakharam Muthe (PI) are Police Officers, who carried out respective investigation.

ANALYSIS

8. On carefully sifting the evidence of PW3 father of victim, PW4 mother of victim, they are both categorical about victim daughter falling ill. That brother of PW3 suggested calling accused and also bringing him to treat victim. That accused charged Rs.250/- for treatment and asked some material to be brought for some rituals. They both speak that around 3 p.m. to 5.30 p.m. accused was performing pooja and chanting mantras. But there was no improvement and so accused went out asking informant to lay his daughter on the cot and to leave the room and he would treat her alone, went out of house and returned after short time. He closed the door. At that time, PW5 another daughter of PW3, who was sleeping in the room, was made to leave the room. After short while,

shouts of deceased victim were heard. They both claim that they peeped through the gap of the door and saw that accused had removed the undergarment of victim, removed his own clothes and he raped victim. In spite of knocking the door, accused was not responding and therefore, boys on the construction site came there, accused was forced to open the door and thereafter being beaten. When they went inside, they found victim lying on the cot with her frock pulled upwards and she lying in naked condition.

9. Though both parents are subjected to extensive cross-examination, their testimony about what they saw through the gap of the door and narrated in the witness box has virtually remained intact. Omissions about tablets prescribed by previous Doctor, victim running fever and sleeping without eating, inducing the accused to open the door, which are not material, are brought on record. Likewise, there is some exaggeration by PW4 mother, but her testimony about accused alone in the room on the pretext of treating, disrobing victim, himself getting undressed and committing rape, has remained unchallenged.

On the contrary, in paragraph 11, occurrence narrated by informant and his wife gets fortified. The manner of cross-examination shows that there is no denial about visit of accused to

treat victim. Therefore, both parents are lending support to each other.

10. **PW5** sister of victim and a child witness deposed about waking up on hearing shouts of her sister and seeing accused placing his mouth in the mouth of her sister and she was made to go out of the room.

11. **PW7** Kalimbhai Yashinbhai is an independent witness. He too as like PW3 father of victim and PW4 mother of victim, has narrated about accused being brought to treat child, who was ill, he closing the door of the room while treating, victim was heard shouting and therefore, they all peeping inside the room and seeing accused committing the act. He is an independent witness. His testimony about act of accused has also not being rendered doubtful. He had no reasons to falsely implicate accused.

Consequently, in the considered opinion of this Court, even on re-appreciation of evidence, act of raping victim has been cogently established through ocular account of PW3 father of victim, PW4 mother of victim and PW7 Kalimbhai.

12. It is true that unfortunately there is no medical examination as PW3 father of victim, who was an illiterate person hailing from

another District, seems to have left with the victim to reach to his native and on the way, he has realized that she was no more alive. Thereafter, he had performed last rituals. Consequently, there is no supportive medical evidence. However, merely absence of medical evidence, is no good ground to discard the direct and ocular evidence of parents coupled with evidence of an independent witness regarding rape. Law does not make it imperative for prosecution to corroborate its case by adducing medical evidence. When direct evidence inspires confidence, case of prosecution can still be accepted. Here is a case of such nature where parents and independent witness, who have seen the incident, have narrated the occurrence while in witness box. Their testimonies have not been rendered doubtful. Hence, even in absence of medical evidence, case of prosecution can safely said to be inspiring confidence and can be readily accepted.

13. Learned Counsel for appellant made much hue and cry on the point of delayed FIR.

It is true that there is delay, but in the light of peculiar circumstances involved in this case that informant is from another District and is an illiterate person working as Watchman, he may be unaware of the importance of prompt complaint. Rather his evidence

shows that he was keen in taking his daughter back to native and on the way while in journey he lost her. Instead of reporting to anyone, he seems to have performed last rituals and thereafter, had come back to Aurangabad and set law into motion.

Therefore, there are reasons for not lodging prompt complaint. In cases of such nature, if there are circumstances, which itself provides plausible explanation, delay should not come in the way of prosecution.

14. Here evidence of **PW3** father of victim, **PW4** mother of victim, **PW7** Kalimbhai confirms rape by accused on victim. Taking the nature of spot i.e. temporary house erected for Watchman by use of bricks to erect walls, there is scope of viewing. Parents of victim i.e. **PW3** and **PW4**, and **PW7** Kalimbhai in unison speak about peeping through the gaps of door and walls and seeing the act of accused. Therefore, direct evidence needs to be accepted as truthful one and inspiring confidence.

15. Likewise, non-examination of brother of informant, also is not fatal because there is no challenge to aspect of accused being called to treat in the capacity of occultist. He has been given thrashing by the mob. Parents of victim and independent witness **PW7** Kalimbhai,

who are party to the incident, have remained unflinched on the aspect of visit of accused for treatment but ravishing child. Therefore, non-examination of brother of PW3 father of victim would not affect prosecution version.

SUMMATION

16. To sum up, prosecution has established the charge of rape. No perversity or illegality is brought to the notice in the findings arrived at by the learned trial Judge. No case on merits being made out, this Court proceeds to pass following order :

ORDER

Criminal Appeal No.673 of 2002 stands dismissed.

(ABHAY S. WAGHWASE)
JUDGE