



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 19 OF 2004

Abasaheb s/o Baburao Bhagwat,
Age: 55 years, Occ: Agri.,
R/o: Dadegaon, Tq. Ambad,
Dist. Jalna.

... Appellant
[Orig. Accused]

Versus

The State of Maharashtra

... Respondent

.....
Mr. Rahul B. Temak, Advocate for the Appellant.
Mr. Rajdeep D. Raut, APP for the Respondent-State.
.....

CORAM : ABHAY S. WAGHWASE, J.

Reserved on : 02.07.2024

Pronounced on : 05.07.2024

JUDGMENT :

1. Instant appeal is the offshoot of judgment and order of conviction passed by IVth Adhoc Additional Sessions Judge, Aurangabad dated 11.08.2003 in Sessions Case No. 266 of 1999 recording guilt of the appellant for offence punishable under Section 376(1) r/w 511 of the Indian Penal Code [IPC].

2. Wife of appellant was undergoing treatment in Government Hospital, Aurangabad (Ghati) having diagnosed of cancer. The appellant and victim daughter (PW3) were providing necessary care

by staying in the premises of Ghati hospital. PW2 Dashrath, who was serving as a security guard in the hospital, was taking round in the premises around 7.45 p.m. Cries of a girl coming from the garden side attracted his attention. So he rushed there and saw a girl lying on ground and accused sleeping over her. Her petticoat was pulled upwards and he saw accused in only undergarment. His trousers were found lying nearby. The girl disclosed to the guard that accused is her father and he had brought her there on the pretext of massaging his legs, and further informed that he threatened her and raped her.

3. Therefore, PW2 took accused as well as the girl to police chowki in the premises. Statement of the girl was recorded and on her such report Exhibit 41, crime was registered bearing crime no. 41 of 1992 for offence punishable under Section 376 of IPC and it was investigated by PW7 and PW8 at respective times and accused was made to face trial before learned 4th Adhoc Additional Sessions Judge, Aurangabad, who, on appreciating the evidence, held that prosecution has established the charge for commission of offence under Section 376(1) r/w 511 of IPC and sentenced appellant to suffer imprisonment for five years and to pay fine and such judgment is now questioned by filing instant appeal.

SUBMISSIONS

On behalf of the appellant :

4. Learned counsel for the appellant would submit that there is false implication. That, there is no convincing evidence as very prosecutrix has not supported prosecution. That, however, accepting testimony of PW2 and PW4, who were security guards, trial court has returned the guilt. That, there is no supportive medical evidence, nor there is independent eye witness account. He would question as to whether it is possible to commit rape at a public place like hospital, that too, in open area. Moreover, according to him, when prosecutrix victim herself having denied any such incidence with her, the conviction recorded by trial court is in absence of trustworthy evidence. There is improper appreciation and so learned counsel submits that such judgment cannot be allowed to be sustained and he prays to allow the appeal.

On behalf of the State:

5. Per contra, learned APP strongly supported the judgment by submitting that serious offence is committed, that too, by father on his own daughter. That, the girl raised alarm and cries and independent witness PW2, a security guard, rushed to the scene. He spotted accused half dressed, sleeping over the victim. That, victim

immediately reported said witness that accused was her father and he had called her on the pretext of giving massage to his legs, but he indulged in forcing himself on her. According to learned APP, subsequently, victim has retracted due to fear and pressure of father. That, apart from testimony of PW2, there is testimony of PW4, another watchman. They had apprehended and accosted victim and accused to police chowki. That, on statement of victim, complaint and crime was registered. It was investigated and on gathering sufficient evidence, charges have been proved. That, medical expert, who examined victim, has also stepped into the witness box. Therefore, according to learned APP, there is full-proof evidence in support of charges and so learned trial court rightly convicted accused and hence, he prays to dismiss the appeal.

STATUS OF THE PROSECUTION WITNESSES AND BRIEF ACCOUNT OF THEIR EVIDENCE

6. Prosecution has adduced evidence of following 8 witnesses in support of its case :

PW1 Dr. Wakale at Exhibit 30 deposed that he was on duty on 31.01.1992 up to 01.02.1992. Around 3.30 a.m., Police Constable attached to City Chowk Police Station brought

accused for examination on the history of committing rape on his own daughter. He noticed evidence of violence on his person. There was abrasion on his right elbow. He collected necessary samples and issued certificate Exhibit 31.

PW2 Dashrath stated that he was serving as security guard in Government Medical College and Hospital, Aurangabad since 22 years. According to him, on the day of incident, he was on duty. While he was taking round at 7.30 to 7.45 p.m. near garden in the hospital premises, he heard cries of a girl coming from garden side. He rushed there and happened to see one girl lying on the ground, upon her accused was also found lying. The girl's petticoat was pulled upwards and accused was spotted only with undergarment and his pant lying nearby. He deposed that girl disclosed to him that she was raped by accused i.e. her father.

PW3 Victim stated that her mother was admitted due to cancer. Victim and her father were taking her care. Watchman of the hospital called her and informed that he was shifting her mother to another hospital and obtained her thumb impression on a paper. She denied that on 31.01.1992, accused raped her forcibly, or about informing anything to watchman Dashrath, who came to her rescue.

PW4 Bhagwan, another watchman, stated that clothes of victim and accused were seized in his presence by police vide panchanama Exhibit 39.

PW5 Gautam, Head Constable, stated that he was on duty in Ghati Hospital. On that day, PW2 informed him about rape committed by accused on his daughter. Witness stated that he made inquiries with the victim and she disclosed before him that her mother was admitted in ward no. 12 due to cancer. In the Ghati premises, her father called her to sleep near a neem tree and press his legs. She disclosed that initially her modesty was outraged and thereafter, he undressed her and after making her sleep in supine position, he raped her and therefore she raised shouts, upon which PW2 Dashrath came and brought accused and victim to the chowki. PSI recorded statement of the victim and she signed complaint Exhibit 41.

PW6 Dr. Bhavthankar, a medical officer from gynecology department, identified signature over MLC record Exhibit 52.

PW7 PSI Waghvale		
and		are the Investigating Officers.
PW8 PI Hirwe		

ANALYSIS

7. Scrutinized the evidence adduced by prosecution. This is apparently a case of *flagrante delicto*, as **PW2** Dashrath claims to have personally seen accused sleeping over his own daughter in half naked condition. On carefully going through his testimony at Exhibit 33, which is already dealt above, it is emerging that around 7.30 to 7.45 p.m., this witness, a watchman, was in the vicinity of the garden of

Government Hospital premises and hearing cries of a girl, he deposed that, he rushed there and he narrated whatever he saw. According to him, petticoat of the girl was pulled upwards and pant of the accused was lying nearby. He was found to be only in underwear. According to him, the girl herself told that accused was her father and he called her for pressing his legs, and then she stated that, he threatened and raped her. Therefore, he brought both of them to police chowki with the help of PW4 Bhagwan. He further stated that he handed both of them to the police.

In cross, he has denied that he had objected accused for carrying bed in the hospital and that it was stolen by somebody. He also had flatly denied that he had prevented accused from going towards ward no.12 where wife of accused was admitted and that accused was scolded and driven out of the ward and therefore accused threatened to make complaint against him to the superiors. Regarding the occurrence, there is cross in para 3 and witness answered that at the time of incident, no other person was present in the vicinity of incident except accused and his daughter. He denied that relatives of other patients were taking rest in the garden. Omission is brought to the extent that he and PW4 Bhagwan had reached accused and his daughter to chowki. Rest is all denial.

8. **PW5** Gautam Gangawane is the Police Head Constable to whom victim gave statement and he, in his evidence at Exhibit 40, categorically stated that while he was on duty on 31.01.1992, PW2 Dashrath spotted accused with his daughter aged 14 to 15 years. On inquiry, the girl disclosed her name, father's name and further disclosed that her mother was admitted in ward no.12 and that she was undergoing treatment for cancer. She also stated that accused had asked her to accompany him to the open space in the premises for sleeping and had brought the carpet and had asked her to sleep under neem tree and to press his legs. She further disclosed that while she was obliging him by pressing his legs, he pressed her breasts and removed her undergarment. She further disclosed that thereafter he made her lie in supine condition and thereafter raped her. He further stated that she made hue and cry and hearing her cries, watchman reached there and he brought them to police chowki. That the girl was taken to her mother in ward no. 12 and she narrated the occurrence to her mother also. PSI Waghware recorded her complaint. He deposed that after the girl admitted the contents to be true, she caused signature in his presence. He identified the accused in the court.

While under cross, he is unable to remember whether he had stated before the PSI that victim signed the complaint in his presence.

Rest is all denial except his inability to tell whether victim was able to read and write, but he volunteered that she signed the complaint Exhibit 41 in his presence.

9. Here, unfortunately, victim has retracted while she was in the witness box. She merely deposed that her mother was admitted in the hospital and she and her father were taking her care. According to her, watchman of the hospital had informed her that he was shifting her mother to another hospital and obtained her thumb impression on a paper. She denied that on 31.01.1992 accused raped her in Ghati hospital premises forcibly. She also denied lodging complaint against her father and about she raising any hue and cry or PW2 coming to her rescue and bringing them to police chowki.

While under cross at the hands of prosecutor, she denied the contents of complaint, including signature over it. While under cross at the hands of defence counsel, she answered that there was quarrel between her father and watchman PW2 when her mother was undergoing treatment, but she is unable to state the reason of quarrel. She stated that PW2 was not allowing herself and her father to see her mother in the hospital.

Consequently, victim resiled and denied the occurrence and lodgement of complaint Exhibit 41.

10. It is to be noted that this is an unfortunate and shocking incidence wherein father is accused of raping his own daughter. Victim has deposed almost a decade after the occurrence. It is further worth noting that PW2 Dashrath, who is a watchman, has rushed to the spot on hearing cries of the girl and he has given account of whatever he saw. Promptly he had taken victim and accused father to police chowki. PW7 IO, who noted the complaint Exhibit 41 and got crime registered, has also deposed that PW5, who was on duty in police chowki, brought victim and he recorded her complaint wherein she disclosed that her father had forcibly raped her.

11. **PW6** Dr. Bhavthankar, a medical officer from gynecology department, had identified Exhibit 52 i.e. MLC record, which was noted by the then Doctor Smita Nilange and who, at the time of evidence, had shifted to USA and was not available. This witness has also identified her signature. It is a public document.

12. Except retracted testimony of victim, testimonies of PW2, PW4, PW5, PW6 and PW7 categorically point out that on 31.01.1992,

victim lodged complaint against her own father. Considering the relationship and accused to be her own father, subsequently, at the time of evidence, victim has protected her father. At the time of lodging complaint, she had not only reported the act to PW2, but also has in verbatim narrated the occurrence noted by PW7 IO in presence of PW5. They are all independent witnesses. They had not axe to grind to falsely implicate accused. PW3 has already deposed that her mother was admitted in the hospital due to cancer and she and her father were in the hospital along with her to take her care. In witness box, she has, in her examination-in-chief, stated that for shifting her mother to another hospital, watchman obtained her thumb impression. This version is not acceptable because watchman, who is posted outside the hospital building and ward, is not authorized to obtain any consent for transfer, rather it is the treating Doctor on duty who, if at all need arises, takes such step of seeking consent for transfer of patient to another hospital. Signature or thumb impressions are never obtained by hospital authorities, more particularly when it is Government Hospital and Medical College, on a blank paper and that too of a minor girl when father is admittedly available in the hospital. Therefore, her version in the witness box is apparently afterthought and concocted version, merely to save father from punishment.

13. Considering the testimonies of PW2 and PW4 to PW7, occurrence can be said to be proved by prosecution. No case is made out to interfere. Hence, I proceed to pass the following order :

ORDER

The appeal is dismissed.

[ABHAY S. WAGHWASE, J.]

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