



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

CRIMINAL APPEAL NO. 793 OF 2003

1. Dilip s/o Sandipan Patil
Age: 38 years, Occu.: Agri.,
R/o. Mandwa, Taluka Kallam,
District Osmanabad.

2. Sarjerao s/o Tukaram Patil
Age: 38 years, Occu.: Agri.,
R/o. Mandwa, Taluka Kallam,
District Osmanabad.

....Appellants
(Ori. Accused)

Versus

1. The State of Maharashtra

2. Tolabai Bhima Shinde
Age: 41 yrs., R/o. Mandwa,
Ta.Kallam, Dist.Osmanabad.

.....Respondents

.....
Advocate for Appellants : Mr.Mayur Salunke h/f. Mr. V.D.Salune
APP for Respondent : Mrs.Uma S.Bhosale
.....

CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 27 JUNE, 2024

PRONOUNCED ON : 04 JULY, 2024

JUDGMENT :-

1. Convicts in Sessions Case No.72 of 1999 are hereby taking exception to judgment and order dated 31-10-2003 passed by learned Ad-hoc Additional Sessions Judge, Osmanabad by which

present appellants were held guilty for offence under Sections 376(2) (g) of the Indian Penal Code (IPC).

FACTS LEADING TO THE TRIAL

2. Prosecutrix PW2 Tolabai, mother of five daughters, had been to her own land to collect grass on 07-09-1998. At around 12:00 Noon, while she was carrying a bundle of grass over her head and proceeding towards home, at that time, near the land of one Gaffar, accused Dilip Patil and accused Sarjerao Patil approached her. Accused Sarjerao caught hold of her hands and dragged her in the corner of a hybrid crop. They made her lie on the ground. Accused Sarjerao got undressed and he raped her while accused Dilip kept his leg on her left knee. She shouted but no one was present around. According to her, Sarjerao committed rape on her. After the incident, at around 7:00 p.m., her husband came and they approached Kallam Police Station and lodged report, on the strength of which crime bearing no.227 of 1998 was registered and on gathering sufficient evidence, accused persons were chargesheeted for offence u/s 376(2) (g), 354, 506 r/w 34 of IPC and finally tried by Ad-hoc Additional Sessions Judge, Osmanabad vide Sessions Case No.72 of 1999.

In support of its case, prosecution had adduced evidence of

four witnesses. After appreciating evidence, learned trial Court convicted both accused, but only for offence under Section 376(2)(g) of the IPC and sentenced them to suffer rigorous imprisonment for seven years and to pay fine of Rs.2000/- each and in default to suffer rigorous imprisonment for six months each.

It is the above judgment that is now questioned before this Court by filing appeal under Section 374 of the Code of Criminal Procedure.

SUBMISSIONS

On behalf of appellant :

3. Learned Counsel for the appellants pointed out that at present main accused no.2 - Sarjerao Tukaram Patil has expired.

Death certificate of accused no.2 Sarjerao Tukaram Patil is placed on record and therefore, as against him, appeal stands abated.

4. As regards to remaining sole accused no.1 Dilip Sandipan Patil is concerned, learned Counsel for appellants would submit that he is falsely implicated on mere allegation of putting leg on the knee of prosecutrix. He did not commit offence of rape. That there is no corroboration to the testimony of prosecutrix, who is already a

married lady.

5. It is his further submission that here charge was framed under Sections 354, 376(2)(g) and 506 of the IPC. He pointed out that infact learned trial Judge has acquitted both accused from offence under Sections 354 and 506 read with Section 34 of the IPC. That charge remained was only of Section 376(2)(g), but according to him, said provisions ought not to have been attracted as offence was not committed during communal or sectarian violence.

6. He further submitted that going by the accusations of prosecutrix, the only offence that could be made out is of Section 354 of the IPC, but appellant no.1 is already acquitted from the said charge by the learned trial Court. That while recording statement of appellant no.1 under Section 313 of the Code of Criminal Procedure, there was no specific question to him regarding commission of offence under Section 376(2)(g) of the IPC and so he cannot be convicted for the said offence. Learned Counsel seeks reliance on decision in the case of *Raj Kumar v. State (NCT of Delhi)*, 2023 SCC OnLine SC 609.

On behalf of State :

7. Opposing the above submissions, learned APP pointed out that

serious offence is committed. Prosecutrix has named both accused and while narrating forceful rape by Sarjerao, specifically appellant Dilip is named for keeping his leg on her knee and thereby facilitating the rape. Therefore, learned trial Court committed no error in convicting both of them. There is medical evidence supporting prosecutrix's version. Therefore, impugned judgment is the correct view and the same need not be disturbed.

EVIDENCE ON BEHALF OF PROSECUTION IN TRIAL COURT

8. In support of its case, prosecution has examined three witnesses. Sum and substance of their evidence is as under :

PW1 Dr.Sunanda Vishnupanth Gore, Medical Officer at exh.18 deposed that on 08-09-1998, Kallam Police referred victim of rape for examination. History was of alleged rape dated 07-09-1998 at 12:30 Noon.

On external examination, she noticed following marks of violence.

- (i) Abrasion, scratches present over left forearm, supinator aspect (3 in nos. admeasuring 7 cm. x $\frac{1}{4}$ cm. in size).
- (ii) Abrasion over left clavical $\frac{1}{2}$ x 3 cm.
- (iii) Abrasion over lumber region of back 5 x 1 cm. and 2 x $\frac{1}{2}$ cm.

She further opined that patient was habituated to intercourse. She issued certificate exh.19 after collecting swab for CA and also noted identification marks of victim.

According to her, injury nos.1 and 2 are possible when person resists at the time of rape. Injury no.3 is possible if person is dragged.

In **cross-examination**, Medical Officer answered that she did not note age of injuries in the certificate and admitted that injury nos.1 and 2 to be possible due to fall and 3 to be possible by slipping. She identified exh.19.

PW2 Tolabai w/o Bhima Shinde, who is examined at exh.24 deposed that she has three sons and five daughters. She cultivates land, which is adjacent to land of Dilip. That on 07-09-1998, she had been to the land to collect grass. That while she was carrying bundle of grass over her head and proceeding towards her house, at 12:00 Noon, when she reached near land of one Gaffar, Dilip Patil and Sarjerao Patil asked her where she was proceeding. That Sarjerao held her both hands, dragged her in hybrid crop. That they made her lie on the ground. She deposed that Sarjerao was wearing white pant, which he removed and thereafter, removed his red underwear and inserted his private part in her private part. That Dilip put his

leg on her left knee. That Sarjerao committed rape on her. That she shouted but no one was present there. That her husband returned home at 7 p.m. That she narrated him the occurrence and thereafter, they went to Police Station and she lodged report exh.25. On second day, she was medically examined.

PW3 Chaturabai w/o Saheba Shinde Stated that after she returned from land at 6 p.m., she went to Kallam alongwith PW2 Tolabai, who lodged report in Police Station. She denied that PW2 Tolabai produced clothes in her presence and thereby finding her not supporting, she was declared hostile.

PW4 Bhimrao, husband of victim, at exh.27 stated that when he returned home from Washi on 07-09-1998, his wife came home weeping and told that Sarjerao committed rape on her and Dilip kept his leg on her left knee. They went to Kallam Police Station and his wife lodged report.

ANALYSIS

9. Admittedly, in view of death certificate of appellant no.2 Sarjerao Tukaram Patil placed on record, and he is reported to be dead, therefore, appeal to his extent is abated.

Both accused are convicted by learned trial Court for offence

under Section 376(2)(g) of the IPC.

In the light of objection raised by learned Counsel for appellants, it is necessary to ascertain whether charge was properly framed and explained.

Charge at exh.10 for proper comprehension is reproduced as under :

“C h a r g e

Exh.No.10

I, L.A.Borde, Adhoc Add. Sessions Judge, Osmanabad hereby charge you :

1. Dilip Sandipan Patil, age 35 yrs., r/o Mandwa, Tq.Kallam.
2. Sargerao Tukaram Patil, age 35 yrs., r/o as above,

as follows :-

That on 7-9-98 at about 12-30 p.m. in Gat no.581 situated at Mandwa, Tq.Kallam, Dist.Osmanabad you accused no.2 i.e. Sarjerao Tukaram Patil committed rape on Tolabai w/o Bhima Shinde against her will and without her consent and there by committed an offence punishable under section 376 of I.P.C.

Secondly, on same date, time and place you accused no.1 Dilip Sandipan Patil Assaulted Tolabai Bhima Shinde and used criminal force intending to outrage or knowing it to be likely that, you would there by outraged her modesty and there by committed an offence punishable under sec. 354 of I.P.C.

Thirdly, on the same date, time and place, you accused in furtherance of your common intention criminal intimidation by threatening Tolabai with injury to his person reputation property and with intent to cause alarm to Tolabai and thereby committed an offence punishable under sec.506 r.w. 34 of I.P.C.

And I hereby direct you that you be tried by me for the above said charge.

dt. 14-1-2002

(L.A.Borde)
Adhoc Addl. Sessions Judge,
Osmanabad.”

Therefore, what is emerging from above charge is that in trial Court, sole surviving appellant Dilip was tried for commission of offence under Section 354, 506 read with 34 of the IPC and not for offence under Section 376(2)(g). However, operative part of the impugned judgment and order shows that both accused are already acquitted by learned trial Judge for offence under Sections 354, 506 read with 34 of the IPC. Surprisingly, State has not challenged the above judgment by filing distinct appeal. Therefore, as against appellant no.1 Dilip Sandipan Patil, nothing has remained to be dealt.

10. Even though appellant Dilip was convicted by learned trial Judge alongwith deceased Sarjerao for commission of offence under Section 376(2)(g) of the IPC, said charge is misplaced, as this penal section gets attracted when rape is committed during communal or sectarian violence. Prosecution has not put-forth any case about commission of rape during communal or sectarian violence.

Even as pointed out by learned Counsel for appellants, on visiting questions faced by present appellant Dilip under Section 313 of the Code of Criminal Procedure, by way of question no.20, he is merely asked what he has to say regarding the version of prosecutrix that he put his leg on the knee of prosecutrix, to which appellant Dilip has answered it to be false. There is no specific question to him under Section 313 of the Code of Criminal Procedure about committing offence of rape and therefore, as rightly pointed out by learned Counsel for appellants, in absence of specific question and explanation for the charge for which he is held guilty, definitely prejudice has been caused to appellant no.1.

SUMMATION

11. To sum up, here firstly charge is misplaced. Improper charge has been framed and explained as regards to surviving appellant Dilip is concerned. Therefore, the charge for which he was tried, he is already acquitted, and for the charge which was not explained to him, he cannot be held guilty. Consequently, appellant no.1 Dilip succeeds. Accordingly, I proceed to pass following order :

ORDER

I) Criminal Appeal No.793 of 2003 stands abated to the extent of Appellant no.2 - Sarjerao s/o Tukaram Patil.

II) Criminal Appeal No.793 of 2003 is allowed to the extent of Appellant no.1 – Dilip s/o Sandipan Patil.

III) The conviction awarded to appellant no.1 – Dilip s/o Sandipan Patil in Sessions Case No.72 of 1999 by the learned Ad-hoc Additional Sessions Judge, Osmanabad on 31-10-2003 for the offence punishable under Section 376(2)(g) of the Indian Penal Code, stands quashed and set aside.

IV) The appellant stands acquitted of the offence punishable under Section 376(2)(g) of the Indian Penal Code.

V) **The bail bonds of appellant no.1 – Dilip s/o Sandipan Patil stands cancelled.**

VI) The fine amount deposited, if any, be refunded to appellant no.1 - Dilip s/o Sandipan Patil after the statutory period.

VII) It is clarified that there is no change as regards the order in respect of disposal of muddemal.

(ABHAY S. WAGHWASE)
JUDGE