

(2018) 01 BOM CK 0183
In the Bombay High Court
Case No : 163 of 2016

Amar s/o Shrawan Patil

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 30-01-2018

Acts Referred:

[Indian Penal Code, 1860](#), [Section 376](#),
[Section 323](#), [Section 452](#) -
Punishment for rape - Punishment for voluntarily causing hurt - House -trespass after
preparation for hurt, assault or wrongful restraint

Citation : (2018) 01 BOM CK 0183

Hon'ble Judges : Rohit B. Deo

Bench : Single Bench

Advocate : D.A. Sonwane, H.R. Dhumale

Final Decision : Allowed

Judgement

1. The appellant is aggrieved by the judgment and order dated 27.01.2016 passed by the learned Additional Sessions Judge, Warora in Sessions Case 1/2014, by and under which, the appellant is convicted for offence punishable under Section 376 of the Indian Penal Code (" IPC " for short) and is sentenced to suffer rigorous imprisonment for ten years and to payment of fine of Rs.500/- and is further convicted for offence punishable under Section 452 of the IPC and is sentenced to suffer rigorous imprisonment for three years and to payment of fine of Rs.500/-. The appellant (hereinafter referred to as the "accused") is acquitted of offence punishable under Section 323 of

the IPC.

2. Heard Shri D.A. Sonwane, learned Advocate appointed for the appellant and Shri H.R. Dhumale, learned Additional Public Prosecutor for the respondent-State.

3. Shri D.A. Sonwane, learned Advocate for the accused submits that the evidence on record would suggest that the sexual intercourse was consensual and that the prosecutrix cried foul only because her husband came to know of the incident from the villagers. Per contra, Shri H.R. Dhumale, learned Additional Public Prosecutor for the respondent-State contends that consent, if at all, was given when the prosecutrix was not in a position to understand the nature and consequences of the act due to intoxication and the prosecution has established offence punishable under Section 375 of the IPC in view of the provisions of Section 375 fifthly.

4. The prosecutrix lodged report at Police Station Warora on 04.11.2013, the gist of which was that she was residing with her husband in village Mahadoli. She and her husband earn livelihood by doing labour work. Her husband had gone to Madhya Pradesh on 02.11.2013 along with the father of one Bhujade who was to receive some medical treatment. The prosecutrix was alone in the house. She was having meals when at 10:00 p.m. or thereabout, the accused came to her house to give her the labour charges payable to her husband. The accused made himself comfortable. He had brought liquor which he poured in a glass and forcibly made the prosecutrix to consume liquor. The accused undressed the prosecutrix and subjected her to sexual intercourse. The prosecutrix resisted and the accused assaulted her. The prosecutrix started shouting and the accused pressed her mouth. In the morning on 03.11.2013 at

07:00 a.m. the mother of one Birkha came to the house, the prosecutrix was not wearing any clothe, the prosecutrix narrated the incident to the mother of Birkha. Birkha's mother helped the prosecutrix to wear clothes and left. The husband of the prosecutrix returned at 08:30 p.m. on 03.11.2013 to whom the prosecutrix narrated the incident. The prosecutrix's husband and the prosecutrix went to the police patil to whom the incident was narrated. The police patil advised the prosecutrix to lodge report. The police report was lodged.

5. P.W.4 Manorama Bhujade to whom, according to the prosecutrix, the incident was narrated in the morning of 03.11.2003, has not supported the prosecution on material aspects. However, P.W.4 has not been declared hostile. P.W.4 has deposed that the prosecutrix was residing in the cattle shed of one Raju Vaidya. P.W.4 had gone to fetch cow-dung from the cattle shed of Raju Vaidya at 08:00 a.m. The prosecutrix was weeping. P.W.4 asked the prosecutrix as to what happened. The prosecutrix was wrapping clothes. The prosecutrix asked P.W.4 for tea which was provided to her. She denies that the prosecutrix was not able to stand and that there were no clothes on her person. She states that the prosecutrix did tell her that she was beaten by one Sherya.

In the cross-examination, P.W.4 admits that the prosecutrix and she did not understand each others language and that the prosecutrix conveyed that she needed tea by sign. She admits that other than asking for tea the prosecutrix did not tell her anything. She admits that the prosecutrix and her husband are habituated to consume of liquor. She admits that she did not ask the prosecutrix as to why she was crying. She admits that the incident occurred in winter and that the prosecutrix had a blanket

wrapped on her person when P.W.4 saw her. She admits that the prosecutrix was weeping due to cold.

6. The evidence of P.W.4 would reveal that she has not supported the prosecution inasmuch as she has denied that the prosecutrix narrated the incident of forcible sexual intercourse to which she was subjected by the accused. She has gone out of the way to support the accused by admitting that the prosecutrix was weeping due to cold. However, she does admit that the prosecutrix conveyed to her that one Sherya assaulted the prosecutrix.

7. The husband of the prosecutrix Virendra is examined as P.W.2. He has deposed that when he returned from Madhya Pradesh, the prosecutrix narrated the incident. The suggestions given to the said witness would reveal that the defence is that the sexual intercourse, if any, is consensual. It is brought out in the cross-examination that he came to know of the incident from the villagers. He denies the suggestion that the accused is falsely implicated to avoid defamation of the prosecutrix.

8. P.W.6 Dr. Vishal Pise, who examined the prosecutrix and issued medical certificate Exh.29 has deposed that he noticed abrasion of size 1 x 1 cm on left side of temporal bone caused by hard and blunt object. It is elicited in the cross-examination that the prosecutrix had no injuries on her internal parts.

9. In response to question 22 in the statement recorded under Section 313 of the Criminal Procedure Code, the accused states that he is falsely implicated since the accused had an altercation with the employer of the prosecutrix. However, the trend and tenor of the cross-examination would suggest that the defence is not disputing that the accused established sexual relationship with the prosecutrix. The defence is also not disputing

that the prosecutrix consumed liquor. The bone of contention is that according to the prosecutrix she was forced to consume liquor and the sexual intercourse was against her will while according to the accused after consuming liquor, the sexual intercourse which followed was consensual. P.W.4 Manorama Bhujade, despite her attempt to support the defence, corroborates the evidence of P.W.1 to the extent that it was narrated to her by P.W.1 prosecutrix that the accused assaulted her. P.W.4 further states that when she went to the cattle shed, the prosecutrix was weeping. In response to a suggestion in the cross-examination, P.W.4 agrees that Laxmibai was weeping due to cold.

The evidence of P.W.4 Manorama is partly reliable and partly unreliable. The court must separate the grain from the chaff. What can be gathered from the evidence of P.W.4 is that the part of testimony that the prosecutrix narrated the assault by accused and that she was weeping corroborates the evidence of the prosecutrix.

10. The evidence of the prosecutrix is also corroborated by the medical evidence. The prosecutrix is a married woman and the sexual contact was established when she had concededly consumed alcohol. The absence of any visible sign of injury on the private parts of the prosecutrix is of little significance. The injury noticed in the medical examination corroborates the evidence of the prosecutrix that she was beaten by the accused.

11. The defence is that the sexual intercourse was consensual. The trend and tenor of the cross-examination would suggest that the endeavour of the accused was to bring on record that since the husband of the prosecutrix (P.W.2) came to know of the incident from villagers, the prosecutrix falsely claimed that she was raped. The defence is not probablized even on the touchstone

of preponderance of probabilities. Concededly, there was no witness to the accused coming to the house of the prosecutrix or leaving the house. There was no reason for the prosecutrix to nurture an apprehension that the sexual intercourse with the accused would be in public domain. P.W.2 Virendra, who is the husband of the prosecutrix has deposed that the incident was disclosed to him by the prosecutrix. The admission that he came to know from the villagers that P.W.4 Manorama Bhujade saw the prosecutrix in naked condition is not inconsistent with the testimony that when he returned home from Madhya Pradesh the prosecutrix disclosed the incident to him.

12. Even if it is assumed that the defence of the accused deserves serious consideration, the obstacle in the way of the defence is that the consent, if at all, is not valid since the evidence would suggest that due to intoxication the prosecutrix was not in a position to understand the consequences and implications of her actions. The suggestion given by the defence is that the prosecutrix was seen in naked condition by P.W.4 Manorama. The fact that the prosecutrix was not in a position to wear her clothes and was found naked in the morning would suggest that she was intoxicated. The consent, under such circumstances, is no consent in the eyes of law and the finding to that effect recorded by the learned Sessions Judge, is unexceptionable.

13. It is well settled that conviction can be based even on the uncorroborated testimony of the prosecutrix. In the present case, the testimony of the prosecutrix is corroborated by medical evidence of assault and to a certain extent by the testimony of P.W.4 who saw the prosecutrix in naked condition and weeping.

14. On a holistic appreciation of evidence on record, I do not find any serious infirmity in the judgment and order

impugned. The conscious of the court is satisfied that the prosecution has established offence punishable under Section 376 of the Indian Penal Code beyond reasonable doubt. However, the prosecution has not established the ingredient of Section 452 of IPC in as much as there is no cogent evidence on record to show that the accused committed house trespass intending to commit any offence.

15. In the result, while acquitting the accused offence punishable under Section 452 of IPC, I maintain the conviction and sentence of the accused under Section 376 of the Indian Penal Code.

16. The judgment and order impugned is set aside to the extent the accused is convicted for offence punishable under Section 452 of IPC. The conviction and sentence of the accused under Section 376 of IPC is affirmed.

17. The appeal is partly allowed and disposed of in the above terms.