
(2010) 11 BOM CK 0010
In the Bombay High Court
Case No : Criminal Appeal No. 135 of 1991

Anand Tatyaba Kadam

APPELLANT

Vs

State of Maharashtra and Another

RESPONDENT

Date of Decision : 26-11-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 294, 428
Evidence Act, 1872 — Section 114
Penal Code, 1860 (IPC) — Section 376, 376(2)

Citation : (2011) CriLJ 1130

Hon'ble Judges : P.B. Majmudar, J; Mridula Bhatkar, J

Bench : Division Bench

Advocate : Nitin Pradhan, Ameeta Kuttikushan and Mahalakshmi G., instructed by S.D. Khot, for the Appellant; J.P. Kharge, APP, for the Respondent

Final Decision : Dismissed

Judgement

Mridula Bhatkar, J.—This appeal is preferred by the Appellant/accused against the judgment and order dated 24.1.1991 passed by the Additional Sessions Judge of Greater Bombay, by which the learned Additional Sessions Judge, convicted the Appellant/accused for the offence punishable u/s 376 of Indian Penal Code and sentenced him to suffer rigorous imprisonment for 10 years and to pay a fine of Rs. 2,000/, in default of payment of fine, the accused shall suffer rigorous imprisonment for six months. It was also directed that the amount of fine, if paid by the accused, be paid to the prosecutrix after prescribed period of appeal.

2. The facts of the case in brief are as follows:

The offence was committed on 26.7.1988 in the municipal hospital at Dahisar. A prosecutrix is a married woman and mother of two children. She was operated for family planning, few years prior to 1988. On 22.7.1988, she visited to the dispensary run by Municipal Corporation at Dahisar as she was suffering from urinary problem. She met one lady doctor who kept her on medication and

advised her to visit after two days. Thereafter the lady visited the said hospital on 24.7.1986 on which she was asked to bring urine sample. So on 26.7.1986 she went to the hospital along with her urine sample. She met Doctor and thereafter as per her direction, she handed over the bottle of urine sample to the hospital staff who were sitting at the counter. The accused at the relevant time, was working as a Clerk in the hospital, asked her few questions regarding her marital status and children and told her to go to the 1st floor. The prosecutrix went to the 1st floor and accused and one Peon followed her in one room. The said room was an examination room where the accused asked a lady to lie on the table and he directed the Peon to keep equipments ready and wait outside. The accused then asked lady to remove her saree and petticoat as he wanted to check up her private part internally. The lady therefore, initially allowed him to check up internally but she felt uncomfortable so she tried to go out of the room. The accused did not allow her and used physical force and despite her resistance he had forcible intercourse with the prosecutrix. The prosecutrix immediately rushed to her home. She was scared. Her husband was not at home. Her husband returned home at night and she told him about the incident at night on the same day. Both of them kept quiet on the night and thereafter they went to the hospital on Monday i.e on 28.7.1986. However, they could not meet the doctor and as they wanted to inquire about the accused, they did not go to the police station. There, they inquired with the lady doctor on the said day i.e. 28-07-1996, who had attended the prosecutrix earlier. From the lady doctor, they found the name of the accused as Kadam and they were informed that on the aforesaid date, he was absent from duty. Prosecutrix and her husband reported the incident to the lady doctor and thereafter doctor told them to give a complaint in writing about the incident and therefore, they went home. Her husband wrote down the complaint in writing and on the next day they went to the hospital and handed over the complaint to that lady doctor. Doctor advised them to go to the police station and lodged a complaint and therefore, on 29.7.1986 the prosecutrix lodged the complaint against the accused. The FIR was registered against the accused by Dahisar police station u/s 376 of the Indian Penal Code. On the same day, she was sent for medical examination and subsequently accused was arrested. After completion of investigation, police submitted charge-sheet. The accused was committed to the court of sessions. Accordingly, a charge u/s 376 of the Indian Penal Code was framed against the accused, to which the accused did not plead guilty and the trial was commenced against him. The learned Additional Sessions Judge recorded the evidence adduced by the prosecution and on conclusion of the trial, passed an order of conviction as stated hereinabove, which order is challenged by the Appellant/accused in the above appeal.

3. The learned Senior Advocate Mr. Pradhan appearing for the accused has submitted that the judgment of conviction of the Sessions Court is based on weak and uncorroborated evidence of the prosecutrix. The learned Advocate advanced four major points by way of defence while challenging the judgment of

the Sessions Court. He submitted that the evidence of PW1 the prosecutrix is without corroboration. The so called corroboration of the testimony of PW6 Balaram Shivram Waghmare cannot be believed as the said witness was declared hostile and he has not at all supported the evidence of PW1 prosecutrix. Learned Advocate pointed out that the evidence of PW6 Balaram Waghmare about the movements of the prosecutrix, accused and himself is not consistent with the evidence of the prosecutrix. He did not support the evidence of the prosecutrix on a vital point especially where he was standing outside the examination room when the incident has taken place and the accused and the prosecutrix were left alone in the examination room.

4. Learned Advocate while assailing the medical evidence, has submitted that though the incident had happened on 26.7.1988, she was sent for the medical examination on 29.7.1988. No injuries were found on her body which discloses that she did not resist the accused at the time of incident. Learned Advocate for the Appellant further pointed out the 3rd lacuna that the medical examination of the accused was carried out and the report of the medical examination of the accused though is taken on record and exhibited as Exhibit I5, it does not reveal that accused was capable to do sexual intercourse but the doctor has only stated that examination "found apparently potent". While elaborating his submissions he relied on Modi's Medical Jurisprudence and Toxicology, Twenty Second Edition, page 508 and emphasised that it was necessary for the medical officer to opine specifically as to whether the accused was capable of performing the sexual act or not. "Apparently potent" does not clearly lead the only inference that the accused is physically capable of having sexual intercourse. He relied upon the judgment in the case of Ujjagar Singh v. State of Punjab reported in 2007 DGLS 1299.

5. Delay in filing the FIR is the 4th point advanced by the learned Advocate. The incident has taken place on 26.7.1988 and the FIR was lodged on 29.7.1988. The prosecution, according to the learned Advocate, has failed to explain the delay in lodging the FIR and due to delay, no medical evidence was collected and therefore, all lacunae are detrimental to the case of the prosecution. He further submitted that the evidence of the prosecutrix is to be considered as evidence of accomplice and her evidence is to be appreciated in view of Section 114(b) of the Evidence Act which shows that the evidence of accomplice is worthy of belief only if it is corroborated. In support of his submission, he relied upon the judgment in the case of Aman Kumar and Another Vs. State of Haryana, The learned Advocate for the Appellant further submitted that in the absence of corroboration and sufficient evidence, the accused deserves benefit of doubt and the case in hand falls in the said category and therefore, the judgment of the Sessions Court be set aside and the accused be acquitted.

6. Learned APP for the State while opposing, has submitted that there is no error or illegality found in the judgment and the learned Judge has rightly appreciated the evidence of the prosecutrix and all other witnesses.

7. It is true that FIR was lodged, three days after the incident. So, as per the prosecution case, there is a delay of three days. Whether the delay is explained or not and whether such delay really goes to the root of the matter or not, depends on the facts and circumstances of each case especially if the offence is of the rape. In rape case, evidence of the prosecutrix is a vital piece of evidence. If that evidence stands then the entire edifice of the prosecution is well founded. In the present case the prosecutrix was an illiterate woman who has passed the 2nd standard. In her evidence she has deposed about her visits to the hospital and medical check up by PW2 Dr. Mrs. Shailaja Bhurake. Case papers about her medical examination are also produced before the trial Judge i.e. Exhibit 8 and so there was reason for her visits on 22nd, 24th and 26th July 1988. She has given evidence in respect of the incident which has occurred on 26.7.1986. She has stated that she did not know accused prior to the incident and she identified him before Dr. Bhurake on 29.7.1986. She has stated about the queries made by the accused when he was sitting with the dresser and the peon at the counter and then she went with the accused upstairs as directed by him. In the matter of rape, no eye-witness is expected. So, such case mostly stands on the circumstantial evidence. In the present case, evidence of PW6 Balaram Waghmare and PW7 Sahadev Naik who was a dresser and who was sitting with the accused, corroborated with the evidence of the prosecutrix. PW7 Sahadev Naik has stated that accused told lady to go to 1 st floor. He also asked her question whether she was married and how many children she had and thereafter the lady went to 1st floor and accused also followed her. PW7 Sahadev Naik has further stated that PW6 Balaram Waghmare, peon also went upstairs as directed by the accused. After going through the evidence of PW6 and PW7, we cannot accept the submission of learned Advocate for the accused that the evidence of PW6 Balaram Waghmare does not corroborate the evidence of prosecutrix. We found that the learned Sessions Judge has rightly appreciated the evidence of PW6 Balaram Waghmare and PW7 Sahadev Naik. Though PW6 Balaram Waghmare is declared as hostile, the Court can read, look into and also accept the evidence of hostile witness before he declared hostile, which supports to the prosecution. PW6 Balaram Waghmare has supported the evidence of PW1 prosecutrix Mrs. Shakuntala Gavali and it is doubly assured by evidence of PW7 Sahadev Naik. The evidence of these two witnesses confirmed that accused No. 1 intended to take lady on the 1st floor when there was no any such medical requirement. This fact itself clearly throws light on the motive and the intention of the accused. On the point of conduct, the learned Judge has rightly pointed out that she being illiterate lady, she was scared due to the incident and she could hardly resist accused at the time of incident and straightway went home. It hardly can be expected from the lady from low status to go to the police station and lodge a complaint. On the contrary her conduct of disclosing the act to the husband as soon as he came, is natural and cogent and hence believable. If she would not have disclosed it on the same day to her husband and if she would not have told for 2 to 3 days, that might have been the point of argument for defence but as she told about the incident to her husband on the same day as

soon as he returned, it is to be said as immediate disclosure of the incident to the husband. Thus there was no delay in disclosure.

8. The prosecution has also examined PW3 Manohar Gavali who is the husband of the prosecutrix. He has corroborated in all aspects to the evidence of his wife after she narrated him the incident. The evidence of PW2 Dr. Mrs. Shailaja Bhurake, Medical Officer and PW3 Manohar Gavali, her husband, have confirmed the fact that the accused was absent on 28.7.1986 when they went to the hospital and immediately on the same day as directed by PW2 Dr. Bhurake, PW3 Manohar Gavali gave complaint in writing which is produced before the Court as Exhibit 7. Learned Counsel while pointing out the deficiencies in the case of the prosecution, highlighted the evidence of PW1 prosecutrix Mrs. Shakuntala Gavali. This is regarding PW2 Dr. Shailaja Bhurake telling prosecutrix to collect the urine sample. However such omission is not fatal to the prosecution case and it cannot be said to be a material omission. This omission does not dislodge the testimony of the prosecutrix when she has already deposed that she was asked to hand over bottle of urine sample to the hospital staff. The medical evidence of the prosecutrix in the present case does not give any support. However, it does not damage the case of the prosecution. It is not the case of the prosecution that the prosecutrix had a scuffle or she vigorously resisted the accused at the time of incident and also injuries were caused on her body. In her evidence, she has stated that she was weak due to her sickness and as she was scared, she could not physically resist the accused. Thus absence of such resistance does not amount to consent. Helpless and meek surrender of a woman at the time of incident is no consent it does amount to rape and in this case prosecutrix has deposed that she tried to resist a little; moreover, she was medically examined after three days. She has admitted in her cross-examination that she washed her private part, she washed her clothes and therefore, medical evidence of semen or injuries or blood was not available. If the evidence would have been available and it would not have been collected by the police then that would have been considered as lacuna in the case of the prosecution. However, in the present case she was married woman, she was having 2 children and so she was habitual to sexual intercourse and therefore, medical evidence though cannot take the case of the prosecution further, it does not damage it.

9. The accused was medically examined by the Doctor. The medical certificate with his opinion was produced before the Court. The said certificate was admitted u/s 294 of Code of Criminal Procedure and hence it was exhibited at Exhibit 15. It is true that the medical officer after examination of the accused did not mention specifically that "accused was capable of performing sexual intercourse" instead he wrote that accused was "apparently potent". The submission of the learned Counsel that the medical officer should have used the same specific terminology is not correct and has no support in law. Modi's Medical Jurisprudence directs how accused should be examined and it should reflect in the certificate. It is not to be read that the words should be ditto. Medical officer is expected to use the terminology which is generally used and which can be understood while giving

opinion. Sometimes peculiar medical or scientific terminology is required to be used, then the same words should be written. However, while giving opinion about the physical examination of the prosecutrix or the accused the Doctors are not expected to go strictly by the ditto words used in the reference books. The opinion given should be such that it should be in a position to convey the exact result of the examination. Terminology is "apparently potent" and "accused was capable of having sexual intercourse" convey one and the same meaning. It is a matter of expression that it should not be tested artificially or mathematically which defeats the very purpose of such medical examination. In our opinion, normality is a rule of the nature. So also the abnormality is! However, if normality is challenged then defence should be in a position to create some doubt in the mind of the Judge, so that a Judge may think it is safe not to rely on the case of the prosecution. Challenge to normality can not be imaginary and it should reflect in the evidence. Moreover in the judgment of the learned Sessions Judge, in paragraph 41 while hearing accused on the point of sentence, his lawyer pleaded mercy and leniency on the ground that accused is married man with two children.

10. The learned Sessions Judge has rightly dealt with all the circumstances and the evidence tendered by the prosecution. The learned defence Counsel could not point out any relevant fact which makes the fact in issue doubtful or inconsistent. Thus the circumstances have a cumulative effect in favour of the prosecution. Lastly, he has contended that the Sessions Judge has not considered the defence of the accused that PW2 Dr. Mrs. Shailaja Bhurake had animus in the mind against the accused and therefore, she set up such a plot to frame the accused in charge of rape. The Sessions Judge has rightly discarded such defence. We are of the opinion that the evidence of the prosecutrix is truthful, consistent and creditworthy. On her sole evidence, conviction is sustainable. On the point of appreciation of evidence of the prosecutrix, we reject the submissions made by the defence Advocate that the prosecutrix is an accomplice and hence Section 114 of the Evidence Act is applicable for the purpose of corroboration. We placed reliance on the judgments in the case of Rajendra and Another Vs. State of Uttar Pradesh, , in the case of State of Punjab Vs. Gurmit Singh and Others, and in the case of Santhosh Moolya and Another Vs. State of Karnataka, . In the case of Santhosh Moolya AIR 2010 SC 2247 (supra) the Hon"ble Supreme Court in paragraph 8 has observed as under:

Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of

rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable.

11. It is necessary to mention that the incident has taken place in the year 1988 when Section 376 was already amended in 1983. Accused was working as a hospital staff in the hospital run by Municipal Corporation and therefore, his offence falls u/s 376(2)(d) of the IPC. The said Section prescribed the punishment shall not be less than 10 years. In the present case the accused is punished for 10 years u/s 376 of IPC. The offence has been committed in the year 1988. He was convicted on 24.1.1991. During the pendency of the appeal, the accused was released on bail on 26-02-1991. During the trial also, he was on bail. Considering the said fact, the order of conviction and sentence passed by the learned Additional Sessions Judge, Greater Bombay, dated 24-01-1991 is hereby confirmed and the appeal is dismissed. The accused shall surrender to his bail and shall be taken in custody forthwith to undergo the remaining sentence. Set off u/s 428 of Code of Criminal Procedure, if any, shall be available to the accused.

12. At this stage, learned Counsel appearing for the Appellant/accused seeks six weeks time to surrender before the concerned police station. Six weeks time is granted by which the Appellant/accused No. 3 shall surrender to the concerned police station to suffer remaining sentence.