

(2014) 07 BOM CK 0021

In the Bombay High Court

Case No : Criminal Appeal Nos. 371 and 376 of 1993

Anil Dhondiba Rawade

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 24-07-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 34, 376(2)(g), 451

Citation : (2014) ALLMR(Cri) 3842

Hon'ble Judges : P.V. Hardas, J; Anuja Prabhudesai, J

Bench : Division Bench

Advocate : H.J. Dedhia, A.P.P, Advocate for the Respondent

Judgement

Anuja Prabhudesai, J.—These appeals are directed against judgment dated 21st May 1993 passed by the Addl. Sessions Judge, Pune, in Sessions Case No. 636 of 1991. By this judgment, the appellants, who shall be herein after referred to as the accused, have been held guilty of the offences under Section 376(2)(g) and 451 r/w 34 of Indian Penal Code. Accordingly, they have been convicted and sentenced to undergo imprisonment for three years and to pay fine of Rs. 500/- each, in default to undergo simple imprisonment for six months in respect of offence under section 376(2)(g) and further to undergo imprisonment for 6 months and to pay fine of Rs. 200/- each in default simple imprisonment for one month in respect of offence under Section 451 r/w. 34 of Indian Penal Code. The case of prosecution in brief is as under:

The prosecutrix (PW 1), her husband, and daughter were residing near Dandekar Bridge, Pune. The husband of the prosecutrix was working as a wireman during daytime and plying a rickshaw during evening time. On 22.07.1991 at about 11 p.m. while the prosecutrix was sleeping in her house with her daughter, she heard a knock on the door. She opened the door presuming that her husband had returned, however, as soon as she opened the door, both the accused entered the house, latched the door from inside, and thereafter raped her one

after the other. The next morning, the prosecutrix (PW 1) narrated the incident to her neighbor Shevantabai, who disclosed the incident to the husband of the prosecutrix (PW 1) on 24.07.1991. On the same day at about 5.00 p.m. PW 1 and her husband went to Swar Gate Police Station and lodged the FIR at Exhibit 34. Based on the said FIR PW 5 PSI Ganpat Pawar registered Crime No. 526 of 1991 under Section 376(2)(g) and 451 of Indian Penal Code.

2. PW 1 was referred for medical examination and she was examined by PW 2 Dr. Ashok Kamble. The medical certificate is at Exhibit 27. PW 5 visited the scene of offence and conducted the scene of offence panchanama at Exhibit 14. The accused were arrested under arrest panchanama at Exhibit 32. The clothes of the accused and that of PW 1 were seized and were forwarded to CFSL for examination. PW 5 recorded the statements of the witnesses and on completion of the investigation; he filed the charge sheet against the accused before the Judicial Magistrate First Class, Pune.

3. On committal of the case, the learned Addl. Sessions Judge framed charge against the accused for offence under section 376(2)(g) and 451 r/w. 34 of Indian Penal Code. The accused pleaded not guilty to the charge and claimed to be tried. The prosecution in support of its case examined five witnesses. Statement of accused was recorded under Section 313 of Cr.P.C. Defence of the accused was of total denial. After considering the evidence on record and relying mainly on the testimony of prosecutrix and P.W. 3 Shevantabai, the learned Addl. Sessions Judge held the appellants guilty of the offence under Section 376(2)(g) and 451 r/w. 34 of Indian Penal Code and sentenced as aforesaid. Aggrieved by the conviction and sentence the appellants have preferred the Appeal No. 371 of 1993 whereas in Appeal No. 376 of 1993, the State has challenged the adequacy of the sentence.

4. We have considered the arguments advanced by the learned APP and perused the record placed before us. The evidence of the prosecutrix (PW1) indicates that she along with her husband and daughter was residing near Dandekar Bridge, Pune. She has deposed that on 22.07.1991 at about 11.00 p.m. while she and her daughter were sleeping in the house, she heard a knock on the door. She opened the door presuming that her husband had returned. As soon as she opened the door, both the accused entered her house, the accused No. 2 Chiva latched the door from inside and closed her mouth, while the accused No. 1 Anil pushed her on the bed, and raped her, followed by accused No. 2 Chiva. PW 1 has stated that thereafter both the accused left, threatening her not to disclose the incident. Her husband returned some time later but she did not disclose the incident to him. The next morning she narrated the incident to her neighbour PW 3 Shevantabai More, whom she considers as her mother-in-law. PW 1 has stated that Shevantabai told her that since her son was sick, she could not accompany her to the police station, nonetheless, she assured to disclose the incident to her husband. She has stated that on the next day, Shevantabai informed her husband and thereafter she along with her husband visited the Swar Gate Police

Station and lodged the FIR at Exhibit 18.

5. The testimony of PW 1 as well as the scene of offence panchanama at Exhibit 14 indicates that the prosecutrix was residing in a crowded slum area. The adjoining room on the western side which was separated by a plywood partition was occupied by one Gadhe whereas the room towards the eastern side was occupied by Dahibhate. The evidence of P.W. 1 indicates that though she was residing in a crowded locality she had not raised an alarm, on the contrary, she has stated that after the accused left, she closed the door and went to sleep. It is also to be noted that even though her husband had returned home immediately after the incident, the prosecutrix had not disclosed the incident to him and he too did not suspect anything to be amiss. PW 1 claims that she had revealed the incident to her neighbor PW 3 Shevantabai the next morning, but said Shevantabai had expressed her inability to accompany her to the police station, as her son was sick. The testimony of PW 1 indicates that even after PW 3 Shevantabai had expressed her inability to accompany her to the police station, she had not disclosed the incident to her husband or to any other neighbor or relative but had continued with her household work. The overall conduct of the prosecutrix is highly unnatural.

6. It is also pertinent to note that PW 1 had not stated in the FIR at Exhibit 18 that the accused No. 1 had closed her mouth and further that on the next day PW 3 Shevantabai had expressed her inability to accompany her to the police station since her son was sick. Such an omission has also been elicited in the evidence of PW 3 and the same has been duly proved through the Investigating Officer PW 5 Ganpat Pawar. Though PW 3 Shevantabai was allegedly told about the incident on 23.07.1991, she had not disclosed the incident either to the husband of the prosecutrix or to any other neighbor. PW 3 has stated that she had disclosed the incident to the husband of the prosecutrix on 24.07.1991 at about 10.00 a.m. She has not assigned any reason for the delay in conveying the said information to the husband of the prosecutrix. Even though the husband of the prosecutrix was told about the incident on 24.7.1991 at about 10.00 a.m. The FIR at Exhibit 18 was lodged on 24.07.1991 at 5.00 p.m. The prosecution has neither examined the husband of the prosecutrix nor tendered any explanation for the delay in lodging the FIR.

7. It is also pertinent to note that PW 1 has deposed that she had sustained bleeding injuries and that she was sent to Sasoon Hospital for medical examination. She claims that she was admitted in the hospital for three weeks. The evidence of PW 2 Dr. Ashok Kamble, the lecturer in Sasoon Hospital indicates that he had examined the prosecutrix on 25.7.1991. He has deposed that the prosecutrix was habituated to the intercourse and old hymeneal tears were noticed. The prosecutrix being a married woman, these findings are inconsequential. What is relevant is that the testimony of PW 2 does not indicate that there was any recent hymeneal tear. His testimony further indicates that no visible injuries were found on the genitals or any other part of her body. The

medical evidence therefore does not prove that the prosecutrix was subjected to force or coercion. Consequently, the medical evidence does not support the allegations of gang rape. Further, the prosecutrix has stated that her clothes were stained with semen, however the CA Report at Exhibit 39 indicates that no semen was detected on the clothes of the prosecutrix. Thus, the CA report also does not corroborate the testimony of the prosecutrix. The testimony of the prosecutrix therefore suffers from basic infirmities and is not reliable.

8. Having considered the medical evidence on record, unusual conduct of the prosecutrix coupled with the inordinate delay in lodging the FIR, and the infirmities in the testimony of the prosecutrix we are unable to persuade ourselves to place implicit reliance on the testimony of the prosecutrix. Under the circumstances, we are of the opinion that the trial court has erred in holding the accused guilty of the offences under Sections 376(2)(g) and 451 r/w 34 of Indian Penal Code.

9. The net result of the foregoing is that the impugned judgment cannot be sustained. Hence, Criminal Appeal No. 371 of 1993 is allowed and the conviction and sentence of the appellants is hereby quashed and set aside, and they are acquitted of the offence for which they were charged and convicted. Fine, if paid by them, be refunded to them. Their bail bonds stand canceled. Criminal Appeal No. 376 of 1993 filed by the State for enhancement of sentence is dismissed.