
(1982) 09 BOM CK 0023

In the Bombay High Court

Case No : Criminal Revision Application No. 283 of 1982

Baban Chhagan Mali

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 02-09-1982

Acts Referred:

Evidence Act, 1872 — Section 145

Penal Code, 1860 (IPC) — Section 109, 325, 342, 366, 376

Citation : (1982) 1 BomCR 894

Hon'ble Judges : R.A. Jahagirdar, J

Bench : Single Bench

Advocate : S.R. Chitnis, for the Appellant; S.B. Patil, Public Prosecutor, for the Respondent

Judgement

R.A. Jahagirdar, J.—The petitioners, hereinafter referred to as " the accused" are challenging their conviction and sentence recorded by the learned Assistant Sessions Judge of Dhule in Sessions Case No. 129 of 1974 and confirmed by the learned Sessions Judge of Dhule in Criminal Appeal No. 1 of 1976. Both the accused were prosecuted for offences punishable under sections 366 read with 109, 376, 376 read with 109, 325 and 342 of the Indian Penal Code. The prosecution case was that the prosecutrix, one Ramila, examined as P.W. No. 2, who is an unmarried girl, was working in a Khandsari sugar factory, which is about one and half miles away from a place called Budhaval to which she belongs. Budhaval itself is about three miles away from Taloda, which is the Tahsil headquarters in the District of Dhule.

2. Accused No. 1 hails from Taloda where he runs a hotel and from what has come on record he seems to be a somewhat prosperous farmer owning a garden land and a jeep bearing No. MSC 244. The Khandsari sugar factory is at Taloda and one person, who is referred to by the prosecution witnesses as Kisan Shet, was the Manager of the factory at the relevant time. On 5th of February, 1974, says the prosecution, accused No. 1 went to the factory in his jeep driven by

accused No. 2 at about 9 p.m. Thereafter accused No. 1, who was in an inebriated State, started catching some of the female labourers working in the factory. He failed in his two attempts and succeeded in the third by catching hold of Ramila, whom he forcibly lifted and put in the back side of the jeep. From there he drove to the garden land where there was a hut. Defence witness No. 2 Narsi was the watchman of that garden land. It is alleged by the prosecution that after taking Ramila in the hut accused No. 1 forcibly committed sexual intercourse with her. This he did twice in that night.

3. The prosecution then alleges that in the morning of 6th February, 1974 accused No. 1 allowed her to go away in the company of Narsi who accompanied her upto the factory at Taloda from where she went on her own to her house. Before she did that, however, she went to the house of one Kusumbai who, as the evidence shows, is the mistress of accused No. 1. There she disclosed what has happened to her in the previous night. It is only thereafter that she went to her house. It is alleged by the prosecution that she first disclosed this incident to her grandmother who, however, has not been examined. Her mother was not in the house and it is only at about 4 p.m. on 6 February, 1974 that her father returned to her house from his own land. At this time one Kochari, who was a co-worker of Ramila and who had witnessed the kidnapping that had taken place on the night of 5th, come to the house of Ramila and informed her father about the incident. Thereafter all of them went to the police at Taloda and lodged the first information report, whereafter investigation followed.

4. On these facts accused No. 1 and 2 were prosecuted as mentioned above. The defence of the accused was that accused No. 1 was having illicit relationship with Ramila for some months before the day of the incident. On the night in question Ramila accompanied him voluntarily. Accused No. 1 admits that he did have sexual intercourse with her on the night of 5th February, 1974. He, however, contended that on the morning of 6th February, 1974 he sent Ramila in his own jeep to her house.

5. The learned Assistant Sessions Judge of Dhule by his judgment and order dated 2nd January, 1976 convicted accused No. 1 of the offences punishable under sections 366, 376 and 342 of the Indian Penal Code, and sentenced him to several terms of imprisonment, the details of which need not be repeated here. Accused No. 1 was, however, acquitted of the offence punishable u/s 325 of the Indian Penal Code. Accused No. 2 was convicted for the offences punishable u/s 366 read with sections 109 and 376 of the Indian Penal Code. He was sentenced to varying terms of imprisonment as mentioned in the order, the details of which need not again be repeated here.

6. Both the accused preferred an appeal, being Criminal Appeal No. 1 of 1976, which was heard and dismissed by the learned Additional Sessions Judge of Dhule by his judgment and order dated 30th of June, 1982. It may be mentioned at this stage that during the pendency of the appeal before the learned Additional Sessions Judge, a revision application had been filed in this Court with

a prayer that the defence should be permitted to cross-examine the prosecutrix again for the purpose of bringing additional evidence on record. This prayer of the defence was granted by Shah, J., by his judgement and order dated 15th September, 1980. Accordingly the prosecutrix Ramila was examined again and cross-examined before the learned Additional Sessions Judge before the disposal of the appeal. After going through the material which has been brought on record in appeal, I notice that practically no fresh evidence has been brought on record. The defence has only succeeded in bringing out on record that the prosecutrix Ramila had made certain statements in another sessions case being Sessions Case No. 87 of 1977, in which the present accused No. 1 and two others were prosecuted for offences punishable under sections 365, 366, 342 read with 34 and 376 of the Indian Penal Code. The truth of the statements proved to have been made by Ramila in that sessions case has, however, not been established. It may briefly be stated that the other sessions case, namely Sessions Case No. 87 of 1977, had been instituted against the present accused No. 1 and two others on the allegation that Ramila has been abducted and confined by accused No. 1 and two others from 8th of February, 1974 to 10th of February, 1974. Under the provisions of the Indian Evidence Act or any other provisions of law I do not find that this particular evidence is relevant and hence I refrain from referring to the same in the judgement.

7. The order of the learned Additional Sessions Judge dismissing the appeal of the accused has been challenged in this revision application supported before me by the learned Advocate Mr. S.R. Chitnis. A legitimate grievance has been made by Mr. Chitnis that the learned Additional Sessions Judge has very summarily disposed of the appeal when the evidence which was to be reviewed by him was considerably large. The brevity of a judgement is not always its drawback, but considering the facts and circumstances of this case and considering the massive evidence which has been brought on record I regret that I have to agree with Mr. Chitnis that 10 or 11 pages of the judgment of the Additional Sessions Judge has not done full justice to the evidence on record. This is a revision application and in the normal circumstances it would not have been permissible for me to re-appreciate the evidence, but Mr. Chitnis has pointed out, as mentioned above the unsatisfactory nature in which the learned Additional Sessions Judge has dealt with the massive evidence on record. He has also pointed out a patently misreading of parts of the evidence. Mr. Chitnis has further shown, and I agree with him in that regard, that several contradictions and omissions amounting to contradictions in the deposition of Ramila, the architect of the prosecution case, have been just brushed aside by the learned Sessions Judge by a single stroke of the pen. Mr. Chitnis accepts the position, as propounded by the Supreme Court in several cases, that corroboration to the testimony of a prosecutrix in a rape case is not legally mandatory but according to him, as a rule of prudence, corroboration must be insisted upon, especially in a case of this type where the evidence of the prosecutrix bristles with several improbabilities and contradictions. I am, therefore, constrained to go through the entire evidence.

This would not have become necessary if the learned Additional Sessions Judge, as a final Court of facts, had properly addressed himself to the task which was legally imposed upon him.

8. In support of its case the prosecution examined, apart from Ramila, her father who went to lodge the first information report to the Police Station. Kochari, the co-worker of Ramila, also has been examined as P.W. No. 8. Another co-worker, Jamuna, was also examined but she did not support the prosecution case and the findings of the two courts below are not based upon the evidence of the said Jamuna examined as P.W. No. 10. One Dr. Mahajan was examined as P.W. No. 6. One Surendra Arjun Pawar Taluka Executive Magistrate, who recorded the statement of Jamuna, Ramila and Kochari u/s 164 of the Criminal Procedure Code was examined as P.W. No. 12. I have already mentioned the defence taken by the accused. Besides their statements u/s 313 of the Criminal Procedure Code, the accused examined two defence witnesses. One Nura Jaising Valvi was examined as defence witness No. 1. She claimed to be co-worker of Ramila in the Khandsari sugar factory. Narsi, the watchman of the garden land of accused No. 1, was examined as defence witness No. 2. It is not necessary to refer to the defence evidence if it is found that on the prosecution evidence itself the order of conviction is not sustainable.

9. Ramila examined as P.W. No. 2, has in her examination-in-chief deposed in terms of the prosecution case which I have summarised above. If this evidence has remained unshaken either in the cross-examination or inherently on its own probabilities, the conviction must become inevitable. At this stage I must refer to the observation of the learned Additional Sessions Judge which is to be found in paragraph 8 of his judgment. It is in the following terms :---

"The evidence of both Kochari and Ramila has not been shattered in cross-examination though some contradictions here and there have been brought on record. The story deposed by these two witnesses tends to negative the defence of the accused that Ramila has voluntarily come to the land in his jeep in that particular night."

After going through the evidence of Ramila with the assistance of the learned Advocates appearing before me I find that the contradictions which have been brought on record are not few or insignificant.

10. It was the case of Ramila that after the watchman of accused No. 1 brought her to the factory on the next day morning, before she went to Budhaval she went to the house of one Kusumbai at Budhaval. She has mentioned that she narrated the incident to Kusumbai who told her to stay in her house and that she would convey the incident to her father in the morning. According to Ramila, she reached the house of Kusumbai a little after 5 a.m. when the siren of the factory was heard. However, Kusumbai later told Ramila that her child is crying and, therefore, she alone should go to her house and that Kusumbai would follow her after some time. In other words, in the early hours of the morning after the

incident, it is the case of Ramila, that Narsi fetched her upto the factory and that she had also gone to the house of Kusumbai. In the cross-examination it has been brought out that she was not knowing Kusumbai prior to the morning of 6th February, 1974. She had never gone to the house of Kusumbai previous to that time. She refuted the suggestion that she was knowing Kusumbai as the mistress of accused No. 1 and insisted that she would not have gone to the house of Kusumbai had she known that she was the mistress of accused No. 1.

11. Apart from the hopelessly improbable conduct of Ramila going to the house of an unknown woman and disclosing to her of all the persons that she had been ravished by accused No. 1 only few hours earlier, there are contradictions relating to her deposition. The following is to be found in paragraph 23 of her deposition, which is in the cross-examination:---

"It did not happen that Kusumbai spoke nothing with me. I cannot tell as to why it is written in my F.I.R. that Kusumbai spoke nothing when I narrated incident to her."

This is in headlong collision with what she had mentioned earlier, namely that she spoke to Kusumbai and that Kusumbai told her that she would narrate the incident to her father. In her statement before the Executive Magistrate also she has not mentioned that she went to the house of Kusumbai. In other words, the story of her meeting Kusumbai in the morning of 6th February, 1974 must be rejected out of hand. It is for the purpose of showing that she was an unwilling victim in the incident of the previous night and for the purpose of showing that she disclosed this incident at the earliest to somebody that she has brought out the story of having met Kusumbai and of having narrated the incident to her. That she went to the house of Kusumbai and that he narrated the incident to her are, therefore, not proved at all. Worse still is her admission in paragraph 24 of her deposition, which is in the following terms:---

"I left the land of accused No. 1 and directly went to my house and slept there."

I cannot see how the learned Additional Sessions Judge could have ignored these contradictions as minor contradictions. In a case of this type whether there was consent or not has to be judged from the conduct of the alleged victim of the incident immediately before the incident, during the incident and after the incident. As far as her conduct during the incident is concerned, it is likely that it would be shrouded in secrecy because the incident itself takes place in secrecy. But one could easily infer as to what conduct she displayed during the incident if one can look to her conduct immediately before the incident and after the incident.

12. It has come on record in the evidence of Ramila herself that the road from the factory to the land of the accused passes through Taloda town. She has further narrated that the jeep of accused No. 1 at the time of the incident passed by the road through Taloda town. The Taloda town itself has a square called Samarak square and the jeep passed through the said square. Assuming that the

accused is a powerful person judging from the name by which he is known Baban Pahelwan even then one does not find sufficient reason as to how the girl kept quite for a distance of one and half miles. The Khandsari sugar factory has admittedly a labour force of 40 to 50 persons. According to her she shouted but none of the persons came to her rescue. It must be mentioned that apart from Kochari no other worker from the factory has been examined. I will make my comments on Kochari a little later. The failure of the prosecution to examine any other independent witness, not for the purpose of proving the offence in question, but at least for the purpose of laying the foundation for the kidnapping prior to the alleged rape, is rather surprising. If, therefore, it cannot be inferred from the inadequate evidence which was on record that Ramila was kidnapped, then the subsequent conduct of Ramila can be easily inferred. I have no hesitation in mind in holding that the prosecution has failed to prove that there was a kidnapping as alleged by it at the Khandsari sugar factory. Once it is held that there was no kidnapping and, therefore, as a consequence if it is further held that Ramila accompanied accused No. 1 voluntarily then the rest of the prosecution case must naturally fail.

13. Before I proceed to give a finding in that regard, I must again recall what I have already mentioned about the subsequent conduct of Ramila. That conduct shows that she was not the unwilling victim of the unfortunate incident on the night in question. For several hours after she returned to her house she did not disclose the incident to anyone. It is her case that she mentioned the incident to her grandmother, but the grandmother has not been examined. Her further conduct in keeping silent till the evening of 6th February, 1974 is inconsistent with the case of rape because if she had been subjected to that indignity then she would have gone to some person or other and would have disclosed the incident. The incident of kidnapping at least had, according to her, taken place openly. Several workers from her own village were working in the factory and they had witnessed the incident of kidnapping. Still none of them has been examined by the prosecution for the purpose of proving the kidnapping. To none of them did she go in the morning of 6th to confide or to tell about the indignity to which she had been subjected the previous night. None of them went to her house in the morning to inquire as to what happened after she was kidnapped in the previous night. It is highly improbable that all the workers in the Khandsari sugar factory from her own village were so heartless and callous as not to make even an ordinary inquiry about her safety in the morning after the kidnapping in the previous night, even if one excuses them from doing nothing in the night because they were concerned with earning their living rather than with anything else.

14. At this stage I must digress to the conduct of the prosecutrix during the incident itself. Here I find a very gross error in the statement of facts committed by the learned Additional Sessions Judge. He has, while summarising the prosecution case, mentioned in paragraph 4 of the judgment as follows :--

"Govinda Patil, Ex. 13, is also a Panch for the Panchanama of the scene of offence, Ex. 12, conducted on 7-2-1974 under which the broken pieces of bangles, Article No. 1 before the Court came to be attached."

I thought that an Additional Sessions Judge, who was normally large experience in the trial of cases, could not have committed this mistake because if a particular witness has been given Exhibit No. 13, a document got proved through that witness would be Exhibit No. 14 and not Exhibit No. 12. Worse, however, is the mistake which the learned Additional Sessions Judge has committed at the end of the same paragraph. The statement is in the following terms :---

"The C.A. Certificate is produced at Ex. 30, which states that Articles Nos. 1, 2, a small cloth piece and quantity of cotton were having stains of human semen."

Article No. 1, which are broken pieces of bangles, were never sent to the Chemical Analyser for his opinion. The question of the Chemical Analyser's certificate mentioning anything about Article No. 1 would not, therefore, arise at all. It is here that the trial Court must be very careful before recording finding of fact. They must examine the evidence first hand, read the documents first hand, satisfy themselves that the arguments based upon the contents of the documents are supportable by the contents of the document themselves. Unfortunately, the learned Additional Sessions Judge has not done this in the instant case. The learned Additional Sessions Judge persuaded himself into believing that the bleeding injuries which were allegedly caused on the right hand of Ramila were caused when her bangles were broken. This may or may not be true, but while examining the incident of rape, in paragraph 8 of his judgment, the learned Judge has proceeded in the belief that the bangles were broken during the course of the forcible sexual intercourse. The following finding is noticed in paragraph 8 of his judgment :---

" She quite positively deposed that before this incident nobody had taken sexual intercourse with her and by this intercourse her vagina had swollen and there was bleeding from it. There were scratches caused on her right breast due to the nails of accused No. 1. Bleeding injuries were also caused on her right hand when her bangles were broken. Accused No. 1 had this intercourse against her will and consent. She was obstructing accused No. 1 while he was committing the said intercourse and thereafter, she goes on to say how she was sent back by accused No. 1 towards her house with his watchman Narsi."

It is patent that the learned Additional Sessions Judge thought that the bleeding injuries on account of the breaking of the bangles were caused at the time of the forcible intercourse. The broken bangles were attached not from the hut of the accused but from the place near the factory. Obviously, therefore, the finding given by the learned Additional Sessions Judge in the belief that the bangles were broken at the time of the intercourse, which must necessarily indicate that force was used, is wholly unsupportable.

15. I have said sufficient on the conduct of Ramila prior to the incident, during

the incident and after the incident which goes to show that the act of kidnapping did not take place and that sexual intercourse with her was not the result of any force or threat of force. It may be noted that in her first information report she has not mentioned that her bangles were broken and thereby she sustained any injury. She has also not stated before the Executive Magistrate that her bangles were broken and thereby she sustained injuries. It has also been proved that in her statement before the police and in her statement before the Executive Magistrate she has not stated that she sustained injury on her breast. These omissions are material and they amount to contradictions which must necessarily vitiate the story given by her in her examination-in-chief.

16. To cap the improbability of the case unfolded by Ramila in her examination-in-chief is the following statement to be found in paragraph 30 of her deposition :---

"I have gone in the land of accused No. 1 when the piece of the bed was taken. After that I had gone in the land of accused No. 1. I stayed in that land at that time for 5 days."

In other words, after the incident of rape had taken place she still went to the land of accused No. 1 to stay there as long as a period of five days. But the learned Public Prosecutor was not impressed by this statement. He wanted to get it clarified and in the re-examination by the learned Public Prosecutor the following has been brought out :---

"I have stated that I was in the land of accused No. 1 for five days after the Panchanama of the piece of the bed because at that time the accused No. 1 and Kusumbai had taken me there by force."

I am not quite satisfied that the Public Prosecutor should have been allowed to re-examine Ramila on the admission which she has given in paragraph 30 of her deposition. But rightly the learned trial Judge allowed the defence to put further questions to her on the answers brought out in the re-examination. In reply to those questions Ramila has mentioned that at the time of her second stay in the land of accused No. 1 she was sitting with Lila and Kochari on the Ota of Kusumbai when her mother came fetch her. She has further admitted that Lila, Kochari, Kamu and Kusumbai were in the bullock cart along with her and that bullock cart passed through Taloda town at about 10 in the morning when she was taken to the land of accused No. 1 from Budhaval. In other words, at the time of the second "kidnapping" she was taken almost in a sort of procession in the company of several persons including her own friend Kochari and another fellow-worker in broad day light through the market place of Taloda. I do not see why the learned Additional Sessions Judge has not even cared to take note of this piece of evidence which practically totally destroys the case of Ramila unfolded by her in her examination-in-chief. With this state of prosecution evidence I do not think that the findings of the courts below that the offences with which the accused were charged have been proved are sustainable.

17. Mr. Patil, the learned Public Prosecutor, however, insisted that the prosecution

case unfolded by Ramila is not inherently improbable and if corroboration for the same could be found by other evidence the order of conviction and sentence can be supported. With the object of showing that there is corroboration Mr. Patil has invited my attention to the deposition of Kochari (P.W. 8) and Dr. Madhavrao Mahajan (P.W. 6). I have already made a reference to the deposition of Kochari and to the unnatural conduct followed by her. I do not think that the inherently improbable case of Ramila can be strengthened by the so-called corroboration to be found in the deposition of Kochari. Before I proceed to consider the evidence of Dr. Mahajan I cannot help commenting upon the failure of the prosecution to examine Kisan Shet, who was the Manager of the Khandsari sugar factory and who was according to the prosecution, an eye-witness to the kidnapping that took place. The Investigating Officer has in categorical terms mentioned that Kisan Shet has not been kept back on the ground that he would not have supported the prosecution. Then why is it that he was kept back? No explanation has been offered by the prosecution. I have already made comments upon the failure of the prosecution to examine some independent worker from the village of Budhaval itself to which the prosecutrix Ramila belongs. It is unnecessary to offer any more comments upon the same.

18. Dr. Mahajan, examined as P.W. 6, has in his examination-in-chief deposed to the injuries which he found on the person of Ramila when he examined her at 1.45 p.m. on 6th February, 1974. This was nearly twenty four hours after the alleged incident of rape had taken place. He found abrasion on right wrist (minor) linear dorsolaterally about one inch in length. There was simple diffused contusion over the lower 1/3rd of the right forearm. He also found minor abrasion on the right breast on the medial and upper quadrant of the breast obliquely and upwards. He noticed as injury No. 4 tear of the hymen. He also noticed laceration of the posterior vaginal wall. He did not detect any semen or blood on the clothes of Ramila. He gave the opinion that injuries Nos. 1 and 3, namely abrasion on the right wrist and abrasion on the right breast might have been caused by any hard and rough substance. According to him, injury No. 2, namely diffused contusion of the right forearm, could have been caused by some hard and blunt substance. Injuries No. 4 and 5 might have been caused while being raped. He gave the opinion that he upheld the possibility of Ramila having been raped. In the cross-examination he admitted that injury No. 2, namely diffused contusion of the right forearm, could not be caused if that portion is pressed by means of hand even with force. He also mentioned that there were no multiple abrasions on the right wrist of Ramila. This ruled out the possibility of the injuries having been caused by the broken bangles. While admitting that an abrasion caused by breaking of the bangle due to forceful pressure may show prominence, he mentioned that such a prominence was not noticed in injury No. 1. Injury No. 3, namely abrasion on the right breast, could be caused by pointed substance like pointed stones etc.

19. While deciding the significance of injury No. 3, one must not forget that it is an admitted fact that accused No. 1 did have sexual intercourse with Ramila at

the time and on the day in question. Therefore, injury No. 3 could not be ruled out as one due to the act of accused No. 1. That itself is no proof that there was rape in the legal sense. What is significant is that in paragraph 21 of his deposition the doctor has specifically mentioned that a speculum was also easily inserted in Ramila's vagina. The diameter of the speculum used was of two fingers. The answers indicate a possibility that Ramila might have been accustomed to sexual intercourse. These statements, which have been elicited in the cross-examination of the doctor, are capable of an inference that Ramila had a voluntary sexual intercourse with accused No. 1 and that she was accustomed to sexual intercourse. If two inference are possible from a proved fact, that the inference which is favourable to the accused must necessarily be drawn. It is unfortunate that the learned Additional Sessions Judge has cast certain aspersions on the Medical Officer saying that the Medical Officer favoured the accused to some extent by his evidence. Some of the observations made by the learned Additional Sessions Judge on the nature of the injuries in the vagina and the nature of the tear of the hymen are not supportable by the evidence on record and to me, as to any other person, they should appear to be somewhat unwarranted.

20. Mr. Chitnis wanted to rely upon what he regards as several contradictions which have been brought on record after the defence was permitted to lead additional evidence during the pendency of the appeal. I have already mentioned above that in another sessions case accused No. 1 and two others were tried for an offence alleged to have been committed by them between 8th and 10th of February, 1974. Prosecutrix Ramila has given deposition in that case. In the appeal, during the course of bringing additional evidence on record, it has been established that she has made several statements in that sessions case. However, Mr. Chitnis cannot be allowed to exploit the fact of her having made those statements because the contents of those statements cannot be read as part of evidence in this case. It has not been established in this case by suggesting to Ramila that what she has stated in the statements which have been brought on record is true. So, the advantage, if any, of those statements is not available to the accused in the present case. It is also a moot point as to whether those statements are really admissible in evidence because they were not previous statements within the meaning of section 145 of the Indian Evidence Act. It is, however, not necessary for me to express any opinion on the said question.

21. In the result, this revision must succeed. The order of conviction and sentence recorded by the learned Assistant Judge of Dhule in Sessions Case No. 129 of 1974 and upheld by the learned Additional Sessions Judge of Dhule in Criminal Appeal No. 1 of 1976 is set aside. The accused are acquitted of the offences with which they are charged.

Bail bonds of the accused stand cancelled.