

(2008) 04 BOM CK 0168
In the Bombay High Court
Case No : Criminal Appeal No. 282 of 2007

Balaji Itkar and Suresh Pawar

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 08-04-2008

Acts Referred:

Evidence Act, 1872 — Section 157
Penal Code, 1860 (IPC) — Section 376(2)

Citation : (2008) CriLJ 3224

Hon'ble Judges : V.R. Kingaonkar, J

Bench : Single Bench

Advocate : S.S. Jadhav, for the Appellant; B.R. Khekale, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

V.R. Kingaonkar, J.—Challenge in this appeal is to Judgment rendered by learned Ad-hoc Additional Sessions Judge, Osmanabad, in Sessions Case No. 4/2007. By the impugned Judgment, both appellants have been convicted for offence punishable u/s 376(2)(g) of the Indian Penal Code and sentenced to suffer rigorous imprisonment for 10 (ten) years each and to pay fine of Rs. 5,000/- (Rs. Five thousand) each, in default, to suffer rigorous imprisonment for two years.

2. Background facts of the prosecution case may be briefly stated as follows:

The prosecutrix (PW-3 Lalita) was aged around eighteen years and is member of "Wadar" community. Both the appellants are young lads belonging to same community. In the noon of August 27th, 2006, the prosecutrix was returning from "Gairan" (Pasture land) after answering call of nature. While she was passing from near a dilapidated house of one Gujare, appellant No. 1 -Balaji called her towards that house. She saw that appellant No. 2 - Suresh was also near that dilapidated house. They pulled her towards the dilapidated house by holding both her hands and hair. They fell her to the ground after reaching the dilapidated house. Appellant No. 1 - Balaji held her hands whereas, appellant No.

2 - Suresh lifted her saree and forcibly took out the nicker. He thereafter ravished her. She raised hue and cry while appellant No. 2 - Suresh committed forcible intercourse with her. Her aunt's son, by name Somnath and cousin, by name Bhima Pawar came to her rescue. They beaten up both the appellants. The appellants fled away from the place. Thereafter, Bhima Pawar reached her to the parent's house. She narrated the incident to her parents in the evening after they returned home. A meeting of relatives was called at her parents' house. It was decided thereafter to lodge report with the Police. On next day, (28.6.2006), she narrated the incident to the Police. The P.S.O., at Rural Police Station, Osmanabad reduced her complaint into writing and registered offence vide Crime No. 120/2006, u/s 376(2)(g) of the Indian Penal Code. The prosecutrix was referred to Civil Hospital for clinical examination. Her undergarments and other clothes were seized. The lady Medical Officer, who examined the prosecutrix, collected vaginal swab and sample of the pubic hair etc. The Police arrested the appellants. Consequent upon material gathered during course of investigation, both the appellants were charge-sheeted for offence of gang rape.

3. A charge (Exh.6) was framed against them. They pleaded "not guilty" to the charge. Their defence was of simple denial. It was suggested, however, that there was love affair between the prosecutrix and appellant No. 2 - Suresh. It was suggested that appellant No. 1 -Balaji was the intermiddler, who used to help these lovers in exchanging their letters and arranging for their meetings. It is also suggested that in the relevant noon, the prosecutrix went to the dilapidated house of Gujare, on her own accord and as per the signals exchanged between her and the appellant No. 2 Suresh, so as to meet him clandestinely. According to the defence, appellant No. 2 -Suresh and the prosecutrix were to marry but the proposal was not approved by their parents and when her relatives saw them together at the dilapidated house of Gujare, a false report of alleged rape was given to the Police. Hence, both the appellants urged for acquittal from the charge.

4. At trial, the prosecution examined 7 (seven) witnesses in support of its case. The learned Sessions Judge believed the prosecution story and held that the prosecutrix was ravished by appellant No. 2 -Suresh with active assistance of appellant No. 1 - Balaji. The learned Sessions Judge discarded the defence version as regards love affair between the prosecutrix and appellant No. 2 - Suresh and her having gone to meet him at the dilapidated house in the relevant noon due to such an affair. The learned Sessions Judge held both the appellants guilty, for the offence punishable u/s 376(2)(g) of the Indian Penal Code and sentenced them, as stated at the outset.

5. Mrs. Jadhav, learned Advocate for the appellants would submit that version of the prosecutrix cannot be relied upon in view of absence of any injury found on her person during the medical examination. It is argued that version of PW-Somnath is not properly appreciated by the trial Court. It is pointed out from his version that he had seen the prosecutrix and appellant No. 2 -Suresh while

standing in the dilapidated house. It is argued, therefore, that in all probability because they were seen together by relatives of the prosecutrix, a false story was hatched up against the appellants in respect of the alleged rape committed by appellant No. 2 - Suresh. Mrs. Jadhav would submit further that deliberations were made at residence of father of the prosecutrix, and thereafter false criminal complaint was lodged when the issue regarding marriage between the prosecutrix and appellant No. 2 -Suresh was discussed and dropped. It is contended that both the appellants deserve benefit of reasonable doubt. Hence, Mrs. Jadhav urged to allow the appeal and acquit the appellants. As against this, learned A.P.P. Mrs. Khekale supports the impugned Judgment.

6. Before I embark upon scrutiny of the prosecution evidence, it may be mentioned that the prosecutrix is rustic, illiterate and inexperienced girl from rural area. She belongs to lower strata of the society. The village Shindewadi comprises majority of 'Wadar' community members. The members of 'Wadar' community, in the rural area, mostly toil for braking of stones and do hard physical work to earn livelihood. The small village - Shindewadi is at a distance of approximately 10/12 Kms. from Osmanabad, which is a district place.

7. Close scrutiny of evidence of the prosecutrix reveals that she was called by appellant No. 1 Balaji at about 1.30 p.m while she was returning home after answering call of nature. He was standing near the dilapidated house of Gujare. She knew him, as he is distinctly related to her. So, she went near that house. He (appellant No. 1-Balaji) held her hands and hair. Her version purports to show that appellant No. 2 -Suresh was already inside that dilapidated house, which was unoccupied. The version of the prosecutrix (PW-3 Lalita) further purports to show that appellant No. 2 -Suresh got removed her undergarment (nicker) whereas, appellant No. 1 Balaji held her hands. She states that appellant No. 2 - Suresh thereafter forcibly committed sexual intercourse with her. Her bangles were broken during the course of such incident. She raised hue and cry. Her version purports to show that PW-Somnath and one Bhima Pawar reached the place of incident on hearing her cries. She narrated the incident to them and, therefore, both the witnesses beaten up the appellants. She returned home thereafter and narrated the incident to her parents in the evening after they returned to the house from day's work. She corroborated recitals of the F.I.R. (Exh.21). Her version reveals that the Police referred her for medical examination on the next day after the F.I.R. was lodged. She identified the underwear (nicker), pieces of bangles and petticoat as her articles.

8. Cross-examination of the prosecutrix reveals that witness Bhima Pawar, who had come to rescue her, visited her house after her parents had returned home. She admits that members of her "Bhavki" (brotherhood) came to her parents' house and there was discussion amongst them as to what was to be done. She admits that it was also discussed that her marriage should be performed with the appellant No. 2 -Suresh. She further admits that father of the appellant No. 2 was not ready and, therefore, the marriage proposal was dropped. She admits

that after thinking over about the incident, the report was lodged in the next morning. She gave her birth date as 13.6.1988. She denied categorically that she had developed love affair with appellant No. 2 -Suresh. She denied further that PW-Somnath and Bhima Pawar went to the dilapidated house and beaten up appellant No. 2 - Suresh on account of such love affair.

9. Though it was suggested that there was love affair between appellant No. 2 - Suresh and the prosecutrix, yet there is absolutely no tangible evidence to infer existence of previous affair between them. The appellants did not adduce any evidence in this behalf. There is no scintilla of evidence, barring stray suggestion given to the prosecutrix, that there was love affair between appellant No. 2 - Suresh and herself. At one place, PW-5 Somnath admitted that he had seen the prosecutrix and the appellants standing in that dilapidated house. This admission would not indicate that they were having love affair. The learned Advocate for the appellants would submit that such admission of PW-Somnath reveals that the prosecution story is unreliable. I find it difficult to countenance such argument. His testimony shows that he was at the dilapidated house in order to ease himself and then heard moaning of the girl, viz., "Aai". Thereafter, he went and saw them together. She narrated to him as to what had occurred inside the dilapidated house. By that time, another witness -Bhima Pawar came there and both of them beaten up the appellants. It is true that he does not subscribe to the story of forcible sexual intercourse by the appellant No. 2 - Suresh with the prosecutrix. What emerges from his version is that soon after the ravishment of the prosecutrix, he went to the spot.

10. Mrs. Jadhav, learned Advocate, would submit that admission of PW-Somnath reveals the fact that appellant - Suresh and the prosecutrix were standing together in the dilapidated house and, therefore, suspicion arose in the mind of PW-Somnath regarding their love affair. It is argued that due to such admission, it can be inferred that there is grain of truth in the defence about love affair between the prosecutrix and appellant No. 2 - Suresh and also it can be gathered that the appellants were beaten up for such a reason. I am of the opinion that such stray admission of PW-Somnath can not be blown out of proportion.

11. As stated before, version of the prosecutrix indicates that she immediately narrated the incident to PW-Somnath and Bhima Pawar, who came there subsequently. The conduct of the prosecutrix is relevant. Her immediate disclosure to the witnesses about ravishment by appellant No. 2 - Suresh and act of appellant No. 1 - Balaji in holding her firmly, would be admissible u/s 157 of the Evidence Act. The Apex Court, in State of Karnataka Vs. Manjanna, observed:

The narration of the incident to so many independent witnesses without any discrepancy soon after the incident was also, in our view correctly, admitted by the trial Court u/s 157 of the Evidence Act as corroborative of prosecutrix's testimony.

12. Considering the ratio mentioned above, it will have to be said that version of

PW-Somnath can be accepted as a corroborative piece of evidence. His version reveals that he and Bhima Pawar slapped the appellants. He told his maternal uncle, i.e. father of the prosecutrix as regards the incident. He admits that after hearing hue and cry, Bhima Pawar had reached the spot. It is suggested to this witness that both of them had beaten up appellant No. 2 -Suresh by means of stones. He denied this fact. Two things are conspicuous from his version. First, his presence soon after the incident is corroborated by the suggestions given to him by the defence. Secondly, his angry reaction to have slapped the appellants would show that the prosecutrix must have narrated the incident to him and Bhima Pawar.

13. Mrs. Jadhav, learned Advocate, would point out that there were no visible injuries found on person of the prosecutrix when she was examined by PW-4 Dr. Lalita. It is argued that if the bangles had broken during course of the alleged rape, then at least some minor injuries could be found on the wrists of the prosecutrix. It is further argued that if she was made to fall down, then also some minor injuries could have appeared on her person. The version of the prosecutrix shows that appellant Balaji held both her hands and she was forcibly made to lie down. She was not lifted and dropped on the ground. There is nothing on record to show that the surface in the dilapidated house was rough. It is not always necessary that due to forcible pushing of a young girl to the ground, there would occur injuries on her person.

14. The testimony of PW-4 Dr. Lalita reveals that she examined the prosecutrix on 28.8.2006 while working as lady Medical Officer, attached to Civil Hospital, Osmanabad. She corroborates the findings scribed in the medical certificate (Exh.24). Her version shows that the hymen of the prosecutrix was found ruptured. She collected vaginal swab and sent it to the office of Chemical Analyser. She states that there was possibility of sexual intercourse with the prosecutrix because the hymen was found ruptured. The vagina could admit one finger. The clinical age of the prosecutrix was found to be 16 to 17 years as indicated in the medical certificate (Exh.23). There is corroboration available from the medical evidence, tendered by PW-Dr. Lalita. The version of the prosecutrix stands corroborated inasmuch as the hymen was found ruptured. Nowhere it is suggested by the defence that the prosecutrix was habituated to sexual intercourse. The medical evidence and version of the prosecutrix show, therefore, that she was virgin before the incident in question. It is most unlikely that in the scorching heat, the young girl could have gone to the dilapidated house on her own accord. The version of the prosecutrix bears ring of truth. It is true, no doubt, that a meeting of relatives and her father took place in the evening. The father of the prosecutrix consulted other members of the brotherhood because the subject concerned the prestige of the family and marital prospects of the prosecutrix. The delay of few hours in lodging the report, under such circumstances is, therefore, not fatal to the case of prosecution. In *State of Rajasthan v. N.K. (Accused)* AIR 2000 SC 1812, the Apex Court held that mere delay in lodging the F.I.R. cannot be a ground by itself for throwing the

entire prosecution case overboard. It was observed that when the complainant was prevented from lodging F.I.R. by community fellows of accused and such facts found mentioned in F.I.R., then the delay could be regarded as due to village panchayat, insult and social disrepute. As mentioned earlier, most of the members of said village - Shindewadi belong to "Wadar" community. Both the appellants are also members of the same community. It is but natural that one of the way out was to explore possibility of marriage between the prosecutrix and the appellant Suresh, which was also discussed by the members of the brotherhood. The meeting of such kind does not give rise to the inference that the F.I.R. was falsely prepared.

15. From version of PW-6 Hamnant, it transpires that spot panchnama (Exh.27) was drawn on next day of the incident, i.e. 28.8.2006. The Police collected bangle pieces under the same panchnama. The Police also collected undergarment (nicker) and other clothes of the prosecutrix under a separate panchnama (Exh.28) in presence of PW-Hanmant. The version of PW-7 P.I. Mohan shows that the nicker and other clothes were sent to office of Chemical Analyser. The report of Chemical Analyser (Exh.34) shows that the Jangya (underwear) was found to bear blood stains in the middle and few semen stains. The nicker, however, was not found to bear stains of blood or semen. The vaginal swab also did not show presence of semen. It cannot be overlooked that the vaginal swab was collected on next day and hence, the finding of the Chemical Analyser cannot be of much significance.

16. Once it is found that version of the prosecutrix is worth reliance, then it goes without saying that the offence of rape is duly proved. The Apex Court, in State of Punjab Vs. Gurmit Singh and Others, observed:

Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - It is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend

assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.

17. Considering totality of the circumstances and the evidence on record, I have no hesitation in holding that the findings recorded by the learned Sessions Judge do not require interference. The appeal is destitute of substance. Hence, the appeal is dismissed. The impugned Judgment rendered in Sessions Case No. 4 of 2007, and the order of conviction and sentence is maintained.