
(2018) 02 BOM CK 0062
In the Bombay High Court
Case No : 53 of 2006

Bashir Beg s/o. Akbar Beg

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 15-02-2018

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 428](#) - Period of detention undergone by the accused to be set off against the sentence of imprisonment
[Indian Penal Code, 1860](#), [Section 354](#), [Section 452](#) - Assault or criminal force to woman with intent to outrage her modesty - House -trespass after preparation for hurt, assault or wrongful restraint
[Scheduled Castes and Scheduled Tribes \(Prevention of Atrocities\) Act, 1989](#), [Section 3\(1\)\(XI\)](#) - Punishments for offences of atrocities

Citation : (2018) 02 BOM CK 0062

Hon'ble Judges : Rohit B. Deo

Bench : Single Bench

Advocate : A.S. Mardikar, V. P. Maldhure

Judgement

1. Challenge is to the judgment and order dated 29.12.2005 rendered by the 2nd Adhoc Additional Sessions Judge, Amravati, in Special Case 2 of 2005, by and under which, the appellant - accused is convicted for offence punishable under section 452 of the Indian Penal Code (" IPC ") and is sentenced to suffer rigorous imprisonment for one year and to payment of fine of Rs. 500/- and is further convicted for offence punishable under section 354 of the IPC and is sentenced to suffer rigorous imprisonment for one year and to payment of fine of

Rs. 500/-.

2. Heard Shri Anil Mardikar, the learned senior counsel for the accused and Shri V.P. Maldhure, the learned Addl. Public Prosecutor for the respondent / State.

3. The genesis of the prosecution lies in oral report lodged by the prosecutrix (PW 1) at Police Station Tivsa on 25.6.2004 at 8.45 a.m., alleging that on 24.6.2004 at 1.00 p.m. the accused entered her house and outraged her modesty. The prosecutrix, who then was aged 14 years states that she resided with her father. Her mother and two younger brothers reside separately due to a matrimonial dispute between her mother and father. She was sleeping in the house after having meals and her father had gone to graze cows. She felt some weight on her person, opened her eyes and saw the accused lying on her person. The accused was holding her by shoulders. She shouted, the accused did not get up from her person, on hearing her shouts, her paternal uncle's wife who is a neighbour arrived at the scene. The accused was pulled away by her aunt by the collar. The accused fled and was seen by Mandabai Ghorpade and Sunandabai Khadsare fleeing. Her father returned home in the evening, the prosecutrix disclosed the incident to her father and the next day morning the report was lodged.

4. The printed First Information Report is Exh. 11 on the record of the trial court. On the basis of the report offence punishable under section 452 and 354 of the IPC was registered against the accused. Subsequently, the accused was also charged under section 3(1)(xi) of Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act (Atrocities Act). Investigation ensued, upon completion of which, charge sheet was submitted in the Court of Judicial Magistrate First Class, Chandur Railway, who committed the case to the Sessions Court. The learned Sessions Judge framed charge (Exh 2)

under section 354, 452 of the IPC and under section 3(1)(xi) of the Atrocities Act. The accused abjured guilt and claimed to be tried. The defence is of total denial and false implication. In response to question 24 in statement recorded under section 313 of the Code of Criminal Procedure, the accused states thus:

"Question 24 : Why the prosecution witnesses are deposing against You?

Answer : I use to sell vegetables. Rs. 144/- was due towards Padmabai as she purchased vegetable on credit. I made demand of Rs. 144/- to her. She refused to give the same. I use to go at the house of Prakash Nagle. There was disputed terms between Padmabai and Prakash. Hence she lodged false report through Savita and deposing false".

The accused examined DW 1 Prakash Nagale in defence.

5. The learned senior counsel Shri Anil Mardikar submits that the delay in lodging the First Information Report is destructive of the credibility of the prosecution case. Sunandabai and Mandabai, who according to the prosecutrix saw the accused fleeing, were not examined. The failure of the prosecution to examine material witnesses casts a shadow of doubt on the reliability of the evidence of the prosecution witnesses, is the submission. The defence of false implication, is more than probabalized on the touchstone of preponderance of probabilities, is the further submission.

Per contra, the learned Additional Public Prosecutor

Shri V.P. Maldhure submit that the defence that some amount was due and payable by PW 2 Padmabai to the accused and the resultant dispute is the cause of false implication, is not even put to the prosecution witnesses. The defence, as is discernible from the cross-examination of the prosecution witnesses that PW 1 and PW 2 were not on good terms with DW 1 Prakash and the accused is falsely implicated since he used to frequent the house of Prakash, is highly improbable, is the submission. The evidence of PW 1 and PW 2 is implicitly reliable and the non examination of Sunandabai and

Mandabai does not dent the credibility of the prosecution case, is the submission. The learned APP would submit that in the final analysis, the evidence must be weighed and not counted. The prosecution has established the offence beyond reasonable doubt, is the submission.

6. The two material witnesses from the perspective of the prosecution are PW 1 and PW 2 Padmabai. The deposition of PW 1 broadly consistent with the contents of the First Information Report. The only omission, which is of a little significance, brought on record is that PW 1 did not state before the police that there was possibility of rape, if PW 2 Padmabai would not have arrived at the scene.

The testimony of PW 1 is reliable, trustworthy and confidence inspiring, and is not shaken in the cross-examination. The suggestion given to PW 1 in the cross-examination is that PW 1 falsely implicated the accused as he used to frequent the house of Prakash Nagale. The suggestion is given in the backdrop of the admission that there are disputed terms between the prosecutrix and Prakash Nagale. In my opinion, the defence, as is rightly submitted by the learned APP, is not probalilized even on the touchstone of preponderance of probabilities. It is inconceivable why the accused would be falsely implicated by the prosecutrix only because he frequented the house of DW 1 Prakash with whom the prosecutrix did not have cordial relations. Indeed, it is the defence which has brought out in the cross-examination of PW 1 Padmabai that accused was only one of the several youth of dubious character ("loafer" is the word used) who frequented the house of DW 1 Prakash. The relevant portion in the cross-examination of PW 2 Padmabai reads thus:

"The house of Prakash Nagale is nearer to my house. It is correct to say said Prakash Nagale is involved in illegal activities. The villagers are having complaint with him as he used to deal with Ganja. It is correct to say that the boys of loafer nature used to gather at his house. It is correct to say that out of that loafer boys accused Bashir also used to stay there".

The conscious of this Court is satisfied, that the testimony of the prosecutrix that the accused entered her house, held her shoulders and sat on her person is implicitly reliable.

7. The testimony of the prosecutrix is corroborated by PW 2 Padmabai. She has deposed that she heard the prosecutrix shouting and went to her house. The prosecutrix was weeping and the accused was sitting on her person. She caught hold of the collar of the accused and pulled him away. The accused fled. In the cross-examination, not a single omission is brought on record much less a significant omission tantamounting to contradiction. The cross-examination is substantially directed at bringing on record the strained relationship between the witness and DW 1 Prakash to buttress the defence of false implication.

8. DW 1 is Prakash Nagale. However, his evidence does not take the case of the defence any further. He has deposed that there was a dispute between him and PW 2 Padmabai. He states that the accused had supported him when there was a quarrel on the issue of cattle and the accused was threatened by PW 2 Padmabai. Be it noted, that this is not even a suggestion given to PW 2 Padmabai. The prosecution has elicited in the cross-examination of DW 1 that the accused was facing prosecution under section 302 of the IPC. The presence of the accused at the scene is brought on record in the cross-examination of DW 1. The evidence of DW 1 is of no assistance to the defence.

9. The learned senior counsel then submits that even if the prosecution evidence is taken at face value, offence punishable under section 452 of IPC is not made out. Outraging modesty would not amount to assault, is the submission. Assault is defined in section 351 of the IPC thus:

351 - Assault - Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.

Force and criminal force are defined in sections 349 and 350 of the IPC, respectively, which reads thus:

349. Force. -- A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling: Provided that the person causing the motion, or change of motion, or cessation of motion, causes that motion, change of motion, or cessation of motion in one of the three ways hereinafter described:

First. -- By his own bodily power.

Secondly.-- By disposing any substance in such a manner that the motion or change or cessation of motion takes place without any further act on his part, or on the part of any other person.

Thirdly. -- By inducing any animal to move, to change its motion, or to cease to move.

350. Criminal force. -- Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other.

10. It is difficult to accept the submission of the learned senior counsel that sitting on the person of a 14 year old girl and holding her by the shoulders does not involve use of criminal force. The submission that offence punishable under section 352 of the IPC is not made out, is noted only for rejection.

11. The prosecution has established offence punishable under section 452 and 354 of the IPC beyond reasonable doubt. The learned counsel would submit that since the incident occurred more than 14 years ago and the accused was aged 22 years or thereabout, the sentence of one year rigorous imprisonment may be reduced. I do not see any compelling reason to do so. The prosecutrix was aged 14 years when her modesty was outraged. The defence has brought on record that the accused was facing criminal prosecution under section 302 of

the IPC and was even otherwise a person of dubious character.

(i) The appeal is sans substance and is rejected.

(ii) The bail bond of the accused shall stand discharged and he shall be taken in custody forthwith to serve the sentence.

(iii) The accused shall be entitled to the benefit under section 428 of the Code of Criminal Procedure.

(iv) Police Station Officer, Police Station Tivsa, District Amravati is directed to file a compliance report in the Registry of this Court within two weeks.