
(2007) 04 BOM CK 0091
In the Bombay High Court
Case No : Criminal Appeal No. 73 of 2006

Mahadeo Damduji Dayare	Vs	APPELLANT
The State of Maharashtra		RESPONDENT

Date of Decision : 11-04-2007

Acts Referred:

Penal Code, 1860 (IPC) — Section 376, 451, 506

Citation : (2007) 04 BOM CK 0091

Hon'ble Judges : C.L. Pangarkar, J

Bench : Single Bench

Advocate : Anjan De, for the Appellant; D.B. Yengal, APP, for the Respondent

Final Decision : Allowed

Judgement

C.L. Pangarkar, J.—This is an appeal by accused who was convicted for having committed offences punishable u/s 376, 451 and 506 of Indian Penal Code. He has been sentenced to undergo imprisonment of 7 years for offence u/s 376, 6 months for offence u/s 451 and 2 years for offence u/s 506 Indian Penal Code.

2. The facts giving rise to the prosecution are as under:

On 09.11.1996 prosecutrix Kalavati had gone to village Takli at the house of elder brother of her husband for Diwali Festival. On 16.11.1996 she came back home around 3 P. M. She came alone and her husband stayed at Takli. On 16.11.1996 complainant was breast feeding her child Nitish in the evening. Accused came to her house around 8 O'clock and demanded water for drinking. She gave the water to the accused, when accused caught hold of her, fell her down and gagged her mouth. Accused forcibly had sexual intercourse with Kalawati. Kalawati raised shouts when her neighbours Shobha, Pandurang and Vithal rushed there. Accused Mahadeo therefore, started running away. He was caught hold by the people. After sometime the mother and wife of the accused came there and asked Mahadeo to come for dinner. Mahadeo went running towards his house. On the next day Kalawati lodged report with the police after

her husband came back to her village. Prosecutrix Kalawati was referred to Medical Officer. The statements of witnesses were recorded and Panchanama of spot was drawn. After completion of the investigation charge sheet came to be filed against the accused.

3. The Judicial Magistrate First Class committed the case to the Court of Sessions. Court of Sessions after framing charge recorded the evidence and upon consideration of the evidence found the accused guilty of offences as stated above.

4. I have heard the learned Counsel for appellant and the State.

5. The prosecution has examined only three witnesses whom include P.W. 1 Kalawati the prosecutrix, P.W. 2 Laxman is the neighbour and her brother-in-law and P.W. 3 P.S.I. Deshmukh. The accused also examined two defence witnesses namely Waman and Baban. P.W. 1 Kalawati deposes that on the day of the incident she was alone at home and she was breastfeeding her child. She states that accused came in the house and demanded water to drink and after she gave the water he caught her, fell her down, gagged her mouth and raped her. She states that when she shouted her neighbours i.e. her brother-in-law, his wife, Pandurang and Vithal and others came and caught the accused. She also states that in the meanwhile the mother of the accused came to call him for taking meals and he ran away under the pretext of taking meals. She goes on to depose that next day she lodged report which was written by the Petition Writer. This evidence of the prosecutrix does not at all inspire confidence. Incident had allegedly taken place at 8 p.m. on 16.11.96 and the F.I.R. was lodged on 17.11.1996 at 4 p.m. There is no explanation for the delay. There is every possibility of the report being given a colour. In fact there was no need to go to a Petition Writer to get such report drafted and written. An oral report would have been lodged with the police. There is no explanation as to why the necessity of getting the report drafted and written by the Petition Writer was felt. The report has, therefore, lost spontaneity. In cross examination the witness says that she suffered injury during the resistance and bangles were broken. The spot panchanama Ex. 14 does not show that any pieces of bangles were found on the spot. Although the Medical Officer is not examined the certificate issued by her is exhibited since it is admitted by the accused. It shows that no injury was found on the person of the prosecutrix. Thus on both these material aspects she is proved to be a liar. It appears that Medical Officer had asked the prosecutrix the history. The Medical Officer Dr. Mrs. Kiran Bhopale writes that the patient gave no history of sexual intercourse. The Medical officer certifies that no definite opinion can be given about the sexual intercourse. The prosecutrix was examined on 19.11.96 at 2 p.m. The fact that prosecutrix refused to give history of sexual assault itself is sufficient to discard her testimony totally. Further more the prosecutrix states that accused was apprehended on the spot. If he was so apprehended on the spot, it is rather strange that so many people who had gathered there allowed him to go away. This suggests that the defence of the

accused that he had gone to call the complainant to report for the work next day is probable.

6. P.W. 2 Laxman the neighbour and brother-in-law of prosecutrix claimed to have seen accused in the act but his evidence does not inspire confidence. The answers given in the cross examination would suggest that he is not telling the truth. He states that he and his wife Shobha broke the door. The panchanama does not show that the door was broken at all or that the chain of the door was broken. It is admitted by the witness that relations between Kalawati and his wife are strained. It is, therefore, obvious that this gave opportunity to Shobha to settle the score. Finally, had the accused really committed rape on Kalawati the witness would not have allowed the accused to go away from the spot. The fact that accused was let go when his mother came there, shows that there was no such incident.

7. The accused has examined defence witnesses. D.W. 2 is Baban. P.W. 2 Laxman admits presence of Baban on the spot. He states that Shobha wife of Laxman shouted and therefore they went there. He states that it was Shobha who chained the door from outside and they went there. The door was opened and Kalawati and accused came out. He also states that when he asked Kalawati, she told that accused had come to remind her for reporting for labour work. He states that due to the dispute between Shobha and Kalawati, Shobha had chained the door from outside. This lends support to the theory of accused that he had merely come to call Kalawati for the work on the next day. Similar is the statement of D.W. 1 waman. Since both these witnesses were admittedly present on the spot there should not be any difficulty in putting reliance on the testimony of these two witnesses. It is an established principle of law that even testimony of a defence witness carries the same weight as that of the prosecution witness. Their evidence suggests that Shobha took the disadvantage of accused going to the house of prosecutrix for requesting her to report for the work on the next day. Had the rape really been committed on the prosecutrix, prosecutrix would not have failed to disclose it to the Medical Officer and she would have instantly lodged the report and so many people would not have allowed the accused to go away from the spot so casually. All these circumstances are enough to hold that it is doubtful if such incident had at all taken place. P.W. 1 does not say a word that she was given any threat by the accused and the conduct of the prosecutrix in not telling the Medical Officer the history of sexual assault is enough to discard the entire theory of prosecutrix being subjected to sexual intercourse. It is admitted by P.W. 2 Laxman in cross examination that accused used to go to the house of the prosecutrix to request her to report for labour work and this admission also lends support to the defence of the accused that on that day he had gone for that purpose only. I find that the learned Sessions Judge had not properly appreciated the evidence and had come to the wrong conclusion. The appeal, therefore, must succeed. The appeal is allowed. The conviction of the accused u/s 376, 451 and 506 of Indian Penal Code is set aside. Accused stands acquitted of the offences punishable u/s 376, 451 and 506 of the Indian Penal

Code, if he is in jail he be set at liberty forthwith.