

(2017) 08 BOM CK 0130
In the Bombay High Court
Case No : 361 of 2003

Manohar Dudharam Chouke, & Anr.

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 22-08-2017

Acts Referred:

[Indian Penal Code, 1860](#), [Section 376](#),
[Section 34](#), [Section 109](#), [Section 341](#) - Punishment for rape - Acts done by several persons in furtherance of commo

Citation : (2017) 08 BOM CK 0130

Hon'ble Judges : Swapna Joshi

Bench : SINGLE BENCH

Advocate : K.S. Narwade, S.B. Bissa

Judgement

1. This appeal has been preferred against the judgment and order delivered by the 2nd Adhoc Additional Sessions Judge, Gadchiroli on 30-01-2003 in Sessions Case No.33 of 1996, thereby appellant/accused no.1Manohar Chouke was convicted for the offences punishable under Section 341 r/w Section 34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for one month and to pay a fine of Rs. 200/, in default, to suffer further simple imprisonment for seven days. Appellant/accused no.1Manohar Chouke was further convicted for the offence punishable under Section 376 of the Indian Penal Code and was sentenced to suffer rigorous imprisonment for seven years and to pay a fine of Rs.1000/, in default, to suffer further rigorous imprisonment for three months.

Appellant/accused no.2Sataywan Dadmal was convicted for the offence punishable under Section 376 r/w Section 109 of the Indian Penal Code and he was sentenced to suffer rigorous imprisonment for seven years and to pay a fine of Rs.1000/, in default, to suffer further rigorous imprisonment for three months. The learned trial Judge further directed that the punishment awarded in above sections shall run concurrently.

2. I have heard Mr. K.S. Narwade, the learned Counsel for the appellants and Mr. S.B. Bissa, the learned Additional Public Prosecutor for the respondent State. I have carefully gone through the record of the case.

3. The prosecution case, in nutshell, as under : The complainant who is the alleged victim of rape is the resident of village Potgaon. Both the appellants are also the residents of the same village. On the date of incident i.e. on 18-10-1995, at about 11.00 am, the prosecutrix had gone to the stream which was situated near the village Potgaon in order to wash clothes. After washing the clothes at about 12 hours, the prosecutrix was returning towards her village by taking the washed clothes. When she was on the way, near the bushes the appellant no.2 Satywan suddenly came on the road from the bushes and he returned back to the forest area. Thereafter, the appellant no.1 came on the road and said "give me". At that time, the prosecutrix shouted and said that she would inform her brother. The appellant threw the clothes which the prosecutrix was carrying and gagged her mouth by thrusting a towel in her mouth and he lifted her and took her in the bushes. The appellant no.1 removed the Saree of the prosecutrix and committed forcible sexual intercourse with her. At that time, the appellant no.2 caught hold the legs of the prosecutrix. During the said incident, the bangles which were in the hands of the prosecutrix and her necklace "Garsoli" were broken. The beads from her necklace were also scattered at the place of incident. The blouse of the prosecutrix was also torn during the said incident. After committing the forcible sexual intercourse on the prosecutrix, both the appellants fled away from that place. The prosecutrix returned to her house and disclosed the said incident to her brothers Bali and Raju Raut (PW3). PW2 proceeded towards the spot in order to search the appellants, however, they were not traced. The prosecutrix then proceeded to the Police Station and lodged her complaint (Exhibit24). On the basis of the said complaint, PSI Bapuji Goirsavale (PW6) registered the offence. PW6 carried out the investigation. He recorded the spot panchanama (Exhibit27). He referred the prosecutrix for medical examination. He also referred the appellant no.1 for medical examination. The clothes of the prosecutrix were taken charge under seizure panchanama so also the clothes of the appellant/accused no.1 were also taken charge under separate panchanama. From the place of incident, the broken bangles and the beads of necklace were collected by the investigating agency. The clothes of the victim as well as the appellant/accused no.1 were referred to the Chemical Analyzer for its analysis (C.A. report at Ex36). After completion of the investigation the chargesheet was filed. The charge was framed by the learned trial Judge. After appreciating & analyzing the evidence before the Court, the learned trial Judge has convicted both the accused appellants as aforesaid.

4. The learned Counsel for the appellants/accused vehemently argued that the judgment passed by the learned trial judge is illegal and perverse inasmuch as the learned trial Judge has overlooked the discrepancies in the testimony of the witnesses and the fact that medical evidence does not support the prosecution case. He further submitted that the sole testimony of the prosecutrix need not be

believed as it is not corroborated by any other evidence. He submitted that as there was rivalry between the brother of the prosecutrix and the appellants, a false case has been foisted by the prosecutrix against the appellants/accused.

5. The learned Additional Public Prosecutor for the respondentState submitted that the learned trial Judge has rightly convicted the accused as there is no rule of law that the sole testimony of the prosecutrix could not be relied upon.

6. In order to appreciate the rival contentions of both the sides, it would be necessary to go through the testimony of the prosecution witnesses.

7. The prosecution has placed heavy reliance upon the testimony of prosecutrix (PW2). PW2 deposed that she had gone for washing the clothes near the stream situated near her village. While returning back, at about 12 o'clock in the afternoon, she noticed both the accused on the way. Appellant/accused no.1Manohar restrained her. He lifted her and took her behind the bushes. Appellants/accused nos. 1 and 2 asked her to allow him for to commit sexual intercourse. She refused for the same and raised an alarm. On this, accused no.1 gagged her mouth by means of towel. Appellant/accused no.1 made her to fall down into the bushes. Appellant/accused no.2Satyawar caught hold of her legs and then the appellant/accused no.1 raped her. Due to the said act of the appellant/accused no.2, her necklace (Garsoli) was broken and the beads of the said necklace were scattered on the ground. Her blouse was also torn. After the said act was over, both the appellants/accused fled away from that place. After the incident, by taking washed clothes, the prosecutrix proceeded to her house. As she was weeping, one Balu Raut met her near the house and she disclosed the incident to him. Thereafter, the prosecutrix returned to her house. She narrated the episode of the unfortunate incident to her brother Raju Raut (PW3). Raju proceeded to the place of incident to search the accused persons, however, they were not found there. Thereafter, the prosecutrix proceeded to the Police Station and lodged her complaint (Exhibit22). During the cross examination it was suggested to the prosecutrix that, on the date of incident, in the evening, there was quarrel between appellant/accused no.1Manohar and her brother Raju. The said suggestion was denied by the prosecutrix and she further denied that due to the said quarrel she had lodged a false complaint against the accused persons. It was also further suggested to the prosecutrix that she lodged the complaint as per the instructions of Girsavale Saheb. The prosecutrix also denied the same. The testimony of the prosecutrix is not shaken in cross examination. The contents in the FIR Ex.24 were in consonance with the testimony of PW4. Her testimony was found to be trustworthy and not shrouded with any doubt. The testimony of the prosecutrix is supported by the evidence of her brother Raju Raut (PW3).

8. PW3 deposed that, on 18-10-1995, his sister returned home from the stream with washed clothes. At that time, the prosecutrix informed to him that appellant/accused no.1Manohar had forcibly committed sexual intercourse with her and at that time accused no.2 caught hold of her. On hearing this, PW3 along with

Baliram proceeded to the place of incident. They went to the bushes in the forest, which was at a distance of half kilometer from their village. His sister (prosecutrix) also accompanied them. They noticed the articles i.e bangles and beads of necklace at that place. Appellant/accused no.1 Manohar and appellant/accused no.2 Satyawar were present in another field. As soon as they saw PW3 and Baliram they fled away from that place. Thereafter, PW3 along with prosecutrix proceeded to the Police Station. Prosecutrix lodged complaint against the appellant/accused persons. It was suggested to PW3 during the cross examination that on the date of incident quarrel took place between him and appellant/accused no.1 Manohar and appellant/accused no.2 Satyawar. However, PW3 denied the said suggestion. It was further suggested to PW3 that appellant/accused no.1 Manohar had gone to the Police Station for lodging report against them however as they came to know about the said fact, a false report was lodged by them against the appellant/accused due to fear of the prosecution against him. The testimony of PW3 corroborates with the testimony of PW2 on material aspect and nothing adverse is elicited during his cross examination. PW1 has narrated the incident to her brother immediately after the incident.

9. The prosecution further examined panch witness Dayaram (PW4) in whose presence the spot panchanama was drawn. He stated that the place of incident was at a distance of about 500 to 700 feet from the stream. PW4 has categorically stated that the broken pieces of bangles and a broken necklace were found on the spot. Those were taken charge by the Police under panchanama (Exhibit27).

10. As far as the medical evidence is concerned, the prosecution has relied upon the medical certificate dated 21-10-1995 of PW2 (Exhibit19). The medical certificate (Exhibit19) depicts that the hymen of the prosecutrix admitted 2/ 3 fingers and the vaginal canal was roomy. As per the opinion of the medical officer, the girl was habituated to sexual intercourse as there were no injuries on her body. No doubt the medical certificate does not throw any light on the aspect of forcible sexual intercourse as such. However in this regard it may be mentioned here that even assuming that PW1 was habituated to sexual intercourse, however that does not give any licence to the appellants to commit rape on her.

11. The Medical certificate (Exhibit20) dated 21-10-1995 of the accused indicates that the appellant/accused was capable of performing sexual intercourse. Smegma was present on corona glands. The Medical Officer noticed that abrasion over infra scapular region was present, oblique in direction scar present, size 2x 1/4 inch and the age of injury was 72 hours old. The presence of injuries on his body indicate that appellant/accuse no.1 had received injuries during the course of forcible sexual intercourse.

12. On careful scrutiny of the testimony of prosecution witnesses, it is observed that the testimony of all the witnesses is not shaken and remained unshattered in cross examination on vital aspect. The suggestion given by the defence about

the quarrel between appellant/accused no.1 Manohar and PW2 and PW3 does not find to be any way related to the lodging of complaint against the accused persons, as per the suggestion and even as per the testimony of Keshao (DW1). The quarrel had taken place on the date of incident in the evening hours whereas the alleged incident of rape had taken place in the afternoon at about 12 o'clock in the noon. Apart from the suggestion that there was a quarrel between PW2 and PW3 and accused no.1, there is absolutely no evidence on record to show that there was convincing reason for the said quarrel. Under normal circumstances, a victim of rape would not level false accusation of rape, by putting her reputation at stake. Moreover, there was no reason for the prosecutrix to level a false allegation of abetment to commit rape against the appellant/accused no.2.

13. So far as the lodging of the complaint is concerned, in my opinion, there was no delay as such in lodging complaint as the alleged incident had taken place around 12 o'clock in the noon, thereafter, the prosecutrix returned to her house which is situated at a distance of about half a kilometer from the place of incident. She immediately disclosed the incident to her brother (PW3). Thereafter, they came back to the place of incident. As soon as the prosecutrix has pointed out the place of incident to her brother, they saw both the appellants/accused near the place of incident. The moment the appellant/accused saw PW3 and prosecutrix, they fled away from that place. Thereafter, during the same night the prosecutrix along with her brother proceeded to the Police Station and the complaint came to be lodged.

14. In case of *Tulsidas Kanolkar vs. State of Goa*, reported in (2003) 8 SCC 590. it is held by the Hon'ble apex Court that the delay in lodging of the first information report cannot be used as a ritualistic formula for discarding the prosecution case and doubting its authenticity.

15. In case of *State of Punjab vs. Gurmit Singh and others*, reported in (1996) 2 SCC 384, it was observed by the Hon'ble apex Court that, the Courts cannot overlook the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police station and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged.

16. As far as the medical evidence is concerned no doubt the medical evidence does not in any manner indicate that the prosecutrix was raped. However, only because the medical evidence does not support the prosecution case, it cannot be construed that no sexual intercourse had taken place with the prosecutrix at that point of time, as alleged by her. It is well settled that even the sole testimony of the prosecutrix without any corroboration of medical evidence can be relied upon if it is found to be cogent, clear and trustworthy.

17. It is significant to note that the medical certificate of the accused (Exhibit20) indicates that the accused was capable of performing sexual intercourse. Abrasion over infra scapular region was present, oblique in direction scar present, size 2x 1/4 inch and the age of injury was 72 hours old. The accused failed to explain as to how he had received such abrasion on his body. It appears that at the time of incident, the accused received such injuries on his body. So far as the finding of Smegma on corona glands, it is of less important as it loses its importance after 24 hours of the performance of sexual act.

18. In case of Aman Kumar and another vs. State of Haryana, reported in (2004) 4 SCC 379, Hon"ble apex Court has held as under :

" 5. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands on a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice, would suffice."

19. In the instant case also, when the prosecutrix, after washing the clothes was returning towards her village by taking the washed clothes, the accused found her alone on the street. Taking disadvantage of the said fact, the appellant/accused persons committed rape on her. So far as the appellant/accused no.2 is concerned, he has abetted the said offence, by facilitating the commission of rape, by catching the legs of the prosecutrix. In view of the facts and circumstances, it can be safely said that the prosecution has proved its case beyond reasonable doubt. The State has not preferred any appeal for enhancement of punishment. The learned trial Judge has rightly convicted the accused no.1 for the offence punishable under Section 341 r/w Section 34 and Section 376 of IPC and appellant/accused no.2 for the offence punishable under Section 376 r/w Section 109 of the IPC.

20. At this stage, Mr. Narwade the learned Counsel for the appellants, requested for four weeks time for surrendering the appellants before the trial Court. The request made by the learned Counsel for the appellants is granted, as the appeal is pending in this Court since long.

21. In view of the facts and circumstances, the following order is passed:

O r d e r

(a) Criminal Appeal No. 361 of 2003 is dismissed.

(b) The judgment and order dated 30/12/2003 delivered by learned 2nd Adhoc Additional Sessions Judge, Gadchiroli in Sessions Case No.33 of 1996 stands

confirmed.

(c) The sentence of appellant/accused no.1 Manohar Chouke for the offence punishable under Section 341 read with Section 34 and Section 376 of IPC and the sentence of appellant/accused no.2 Satyawar Dadmal for the offence punishable under Section 376 read with Section 109 of the IPC is maintained.

(d) The appellants are on bail. Their bail bonds stand cancelled. They are directed to surrender before the learned Adhoc Sessions Judge, Gadchiroli to undergo the remaining period of sentence. If they do not surrender within a period of four weeks from today, the learned trial Court is directed to take appropriate action in accordance with law.

(e) Muddamal property be dealt with as directed by trial Court after the appeal period is over.