

(1997) 09 BOM CK 0069

In the Bombay High Court

Case No : Criminal Appeal No. 422 of 1994 with 152 of 1995

Milind Ambadas Mhaske and etc.

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 04-09-1997

Acts Referred:

Bombay Police Act, 1951 — Section 135
Penal Code, 1860 (IPC) — Section 34, 375, 376, 506

Citation : (1998) CriLJ 1357 : (1998) 2 MhLj 64

Hon'ble Judges : Vishnu Sahai, J;T.K. Chandrashekhara Das, J

Bench : Division Bench

Advocate : M.R. Deshpande, for the Appellant; R.S. Deshpande, Assistant Public Prosecutor, for the Respondent

Judgement

T.K. Chandrashekhara Das, J.—In these Appeals, the appellants impugned the Judgment and Order, dated 13-9-1993 passed by the Additional Sessions Judge for Greater Bombay in Sessions Case No. 153/92 whereby they were convicted and sentenced for the offence u/s 376 read with Section 34 of the I.P.C. to undergo R.I. for 10 years and to pay a fine of Rs. 1000/- each, in default to undergo further R.I. for one year each. They were also convicted by the impugned judgment u/s 506 (Part II) of the I.P.C. and sentenced to undergo R.I. for six months and to pay a fine of Rs. 200 each, in default to undergo further R.I. for one month. They were further found guilty of the offence punishable u/s 135 of the Bombay Police Act, 1951 but no separate sentence is passed. Against the said conviction and sentence, Original accused No. 1, Milind Dharma Babar filed Appeal No. 152/95 and Milind Ambadas Mhaske Original accused No. 2 filed Appeal No. 422 of 1994. Since these two Appeals arise out of common judgment we propose to dispose of these Appeals by this common judgment.

2. The charge against the two accused was that they along with the absconding accused Anil Ambadas Mhaske on 19-10-1991, between 1.00 a.m. and 3.15 a.m. at Khadi Machine Hut, and ground floor of Lokmala Apartments at Ajit Baug,

Chembur, Bombay 74, in furtherance of their common intention committed gang-rape on one Mrs. Saira Salim Shaikh PW-1 and thereby, committed an offence punishable u/s 376 read with Section 34 of the I.P.C. and also on the same date, and place the appellants along with the absconding accused while committing the aforesaid act, did impart threats to the life of said Mrs. Saira Salim Shaikh, that she will be finished if she will raise the cry against the said act and thereby the appellants committed an offence punishable u/s 506(II) of the I.P.C. The Charge also contained that while committing the aforesaid offences they were possessing deadly weapons like swords and knives and used the same and thereby committed an offence punishable u/s 135 of the Bombay Police Act, 1951.

3. According to the prosecution, on 19th Oct., 1991 between 1.00 a.m. and 3.15 a.m. at Khadi Machine Hut and ground floor of Lokmala Apartments, Ajit Baug, Chembur, Bombay 74, the accused No. 1 i.e., appellant in Criminal Appeal No. 152 of 1995 and accused No. 2 Milind Ambadas Mhaske, the appellant in Criminal Appeal No. 422 of 1994 and the absconding accused Anil Mhaske whose whereabouts are not known have committed the aforesaid offence. According to the prosecution on 18th/19th October, 1991, the prosecutrix Saira Salim Shaikh PW-1 was returning from her duties at about 12 O'clock at midnight. She had her place of service in a Beer Bar at Kurla as a waitress. After finishing her work on that day i.e., night of 18th October, 1991, she got down from the Bus and was proceeding towards her residence. She has two sons. Her husband is a tempo Driver who visits the house only in fortnights. After getting down from the bus, the prosecutrix, Saira, was proceeding towards her residence through a lonely way. There was nobody in the night but the street lights were on. After walking some distance, according to the case of the prosecutrix, she felt that someone was coming behind her and when she looked back, she found that one person was following her. That person came near her and put his hand on her right shoulder. She raised objections for such act. On her opposition, the said man showed a knife to her and at the point of knife, he directed the prosecutrix to go along with him silently. Against her will, at the point of knife, since she had no other option but to be silent, that man forcibly took her to one hut which was in a dilapidated condition. Nobody was staying in the hut. After taking the prosecutrix into the hut, the said man pointed a knife at her neck and forcibly made her to sit on a chair and he threatened that she would be killed if she made any shouts. She was also threatened that she will not be allowed to reside in the area in case she opposed him and he forcibly fell her down on the ground. He moved her saree upward and he also removed his underwear and had sex with her. The prosecutrix was murmuring throughout. At the time of sexual intercourse, he was threatening her that if she disclosed to anybody she would not be left free and she would be killed. This is the act she alleged against accused No. 2 Milind Ambadas Mhaske.

4. It is further the case of the prosecutrix that after this incident she started to walk towards her residence. Walking for a while about 20-25 feet Anil, the absconding accused took her to Lokmala Apartments by pointing her a sword

which he was carrying. He took her to one room in Lokmala Apartments, and he warned his friend to see that nobody would come towards that side. After taking the prosecutrix in the room with sword in his hand, he fell her down, he removed his pant and underwear, pulled her saree up and he also indulged in the act of sexual intercourse. After the act is over, he threatened her that she and her sons would be killed in case she discloses the incident to anybody. Thereafter, she came back to her residence weeping.

5. After reaching her house, on seeing her crying, her elder son asked her as to what had happened. However, she did not say anything. She changed her dress and wore a maxi and was going to bed. There was no lock to the door of the room. Therefore, she used to put a grinding stone inside the room so that it should not open from outside.

6. Then accused No. 1 Milind Dharma Babar came there and forcibly opened the door. He asked her to come out just to have a talk. She declined to go out but he had a weapon in his hand and warned that in case she did not accompany, she would be subjected to beating and thereby forcibly took her to Lokmala Apartments to the very same room where the earlier man had enjoyed her. Though her elder son also followed them weeping, he was threatened on the way by Accused No. 2 and, therefore, he came back. After taking the prosecutrix inside the room of Lokmala Apartment, he opened the chain of his pant, pushed her on earth, made her maxi upwards, inserted his penis in her private part and committed sexual intercourse. After the discharge of the semen, she was freed and even after finishing the sexual act, he threatened her that in case of disclosure of the incident to anyone, the matter would be for her remembrance and she would not live. Thereafter, she returned to her house. After some time when she was going to the Police Station for filing a complaint, in the midst of the way she came across the said three accused and was threatened with weapons. Ultimately, she had to go back to her home.

7. In the next morning at about 10.00 O'clock, she approached the Police Station for lodging the complaint; she narrated entire story to the Police and PSI Jagtap recorded the statement. PSI Jagtap was on station house duty and registered the FIR as No. 258/90 at R.C.F. Police Station PI Jedia (PW 7) was also on duty. PI Jedia who carried out the investigation of Crime No. 258/90, on that day, along with the prosecutrix and two panchas, went to the spot of offence, the first spot i.e., the hut and thereafter to Lokmala Apartment. He was seized in the presence of Panchas i.e. saree, petticoat, blouse and maxi (Exh. 1 collectively.) Clothes covered with the dots of semen like were encircled. At the very same place, the Panchanama was written and clothes were tied in a bundle. Afterwards, prosecutrix was sent for medical examination. Saira's son's statement was recorded. PW-7 then sent his staff to arrest the accused. The appellants except the absconding accused, were arrested in the night on 20-10-1991 and they were brought to the Police Station. After seizure Panchanama one full pant and underwear from accused Milind Dharma Babar and

from accused Milind Ambadas Mhaske were seized. The accused were produced before the Magistrate and they were remanded. At the remand of the accused, the knife which was used before committing offence was recovered at the instance of the accused. The accused were sent for medical examination. Their clothes were also sent to the Chemical Analyser. After completing the investigation, charge-sheet has been filed before the trial Court. The case of the accused was of total denial. The learned Sessions Judge mainly relying upon the statement of the prosecutrix, found that the accused are guilty and awarded the sentence as mentioned above.

8. The learned Counsel for the appellants strenuously argued and tried to establish that the prosecutrix is one not having a good moral character and tried to demonstrate her conduct of going to work at midnight in a Bar. Her husband was also doubtful about her moral conduct; he very often teased her on that account. The learned Counsel also pointed out that from the evidence it is clear that she was not wearing underwear, but wearing only saree at the time of incident. The learned Counsel was trying to establish her bad character and was implicitly by her own will present at the place of occurrence. The Counsel argues, therefore, that no offence of rape is committed by the appellants. We are not inclined to accept the contention.

9. Assuming that the factors pointed out by the Counsel are indicative of bad character of prosecutrix but it is not alone sufficient for the accused to escape from the culpability. Offence of rape is proved when sexual act is committed on a woman without her consent. In all the three instances, there has been sufficient evidence that force has been used by the accused. They were holding lethal weapons. Accused was also threatening her that she will be killed if she resisted or cried out. The time of the offence, place of the offence, state of mind of a helpless lady, all these circumstances mitigate against theory of consent. In this position, we do not find any infraction in evidence adduced by the prosecutrix except one aspect which will be dealt with separately in latter part of our judgment. Her evidence inspires confidence about offences committed by the accused. Evidence of her son, aged 10 years also inspires confidence who in his statement narrated what happened in the night when accused No. 2 went to her house. He categorically stated that his mother was threatened. He was holding a knife. His mother was pulled out of the hut. His evidence fully corroborates the prosecution and shows that the prosecution has established the offences committed by the accused, supported by the medical evidence.

10. The learned Counsel for the appellant further submits that the medical evidence and also results of Chemical Analyser do not prove that under any circumstances the accused having sexual intercourse with the prosecutrix. He relied upon the observations of the Doctor having found no injury in the private part of the prosecutrix and this will go a long way in establishing that she was a consenting partner. We cannot give much credence to this argument. The Doctor opined in this case, she being a married woman and being the mother of two

sons, injuries are not necessarily to be seen even if she showed resistance. When a grown up woman is threatened by a man using force by showing weapon and subjected to sexual intercourse, absence of any injury in private part cannot be a mitigating circumstance to infer consent of the woman. In this case, force has been used and she was threatened and, therefore, it can safely be inferred that sexual intercourse, was done against her will as contained in the first description of Section 375 of IPC. In the light of the circumstances provided in this case, we have no hesitation to hold that the prosecution has established that the appellants having committed the offence punishable u/s 376, IPC and the trial Court was fully justified in holding them guilty.

11. As pointed earlier the trial Court framed charge against the accused for gang rape and in the FIR it appears that she has made out the case of gang rape. In substantial evidence before the Court, prosecution did not prove gang rape. We do not find any circumstances in this case that rape was committed after concerted meeting of mind of the three accused. Evidence does not spell out a common intention either to commit rape on the prosecutrix by all three accused. In the evidence before the Court, she says that accused has approached her one by one, independent of the other, whereas in the FIR she says that all three accused committed gang rape on her. However, that is not the case before the Court. Their combined obstruction, restraining her from proceeding to Police Station after the offence having been committed, cannot be held to be sufficient circumstance to infer a common intention to commit gang rape. Therefore, the trial Court was not justified to bring the offence under the hotchpot of Section 376(g) and awarding of sentence on that basis. Therefore, we find that charge u/s 376(g) has not been made out. However, as we discussed earlier, the offence u/s 376 has been established against the accused.

12. In view of this, the minimum 10 years" sentence awarded by the Court below has to be set aside. The accused are only liable for offence u/s 376. They are entitled for reduction in their sentences. We reduce the sentence to 7 years" R.I. On all other aspects, the Judgment of the trial Court is confirmed.

13. In the result, Appeal is partly allowed; the conviction and sentence awarded by the Court below under Clause (g) of Section 376 is set aside and the Appellants are acquitted u/s 376(g), IPC. However, they are convicted u/s 376, IPC and sentenced to RI for seven years with fine of Rs. 1,000/- and in default, appellants to undergo R.I. for one year. Conviction and sentence and fine by the trial Court u/s 506(Part II) is maintained. Sentences on both the above counts are to run concurrently.

14. Appeal partly allowed.