
(2010) 07 BOM CK 0077
In the Bombay High Court
Case No : Criminal Appeal No. 259 of 2005

Mohammed Shakur Javed Ali Shaikh	Vs	APPELLANT
The State of Maharashtra		RESPONDENT

Date of Decision : 21-07-2010

Acts Referred:

Penal Code, 1860 (IPC) — Section 34, 376, 452

Citation : (2010) 4 Crimes 1

Hon'ble Judges : J.H. Bhatia, J

Bench : Single Bench

Advocate : V.R. Bhosale, APP, for the Respondent

Final Decision : Allowed

Judgement

J.H. Bhatia, J.—The appeal is filed by the original accused No. 2 from jail challenging the conviction and sentence for the offences punishable u/s 376(g) and Section 452 r/w. Section 34 of I.P.C. by the learned Additional Sessions Judge, Greater Bombay in Sessions Case Nos. 669/2000 a/w. 1053/2001. For the first charge, he was sentenced to undergo R.I. for 10 years and to pay fine of Rs. 1,000/- and for second charge, he was sentenced to undergo R.I. for 7 years and to pay fine of Rs. 1,000/-.

2. Accused No. 1-Torikul Ijhar Mulla was also convicted for the same charges and was awarded similar sentence. He had also preferred an Criminal Appeal No. 1388/2004, but that appeal came to be disposed of as in fructuous by order dated 16th February 2010 passed by the learned Single Judge of this Court on the ground that he has already undergone the entire sentence and also paid the fine amount.

3. To state in brief, the prosecution case is that the prosecutrix was living with her husband-Shariful, as a tenant of one Zubeda. Her husband used to work at Bhau's Dhakka. The accused persons were known to her. Prior to the incident, accused No. 1-Torikul used to come to meet Mohd. Shakur-accused No. 2.

Accused No. 2-Shakur had arranged her marriage with Shariful, when she came from Bengal. During the night, between 21-03-2001 and 22-03-2001, she was alone at her house and her husband had gone to his duty. At about 2 or 2.30 a.m. two persons entered into the room, where she was sleeping and accused No. 2-Shakur closed her mouth and pressed her legs. Thereafter, accused No. 1-Torikul committed rape on her. After him, accused No. 2-Shakur also committed rape on her. When they had completed the act, she switched on the light and saw them and identified them. At about 5.00 a.m., her husband came back and she told him about the incident. But her husband abused her and thereafter, went back to his work. In the evening, he came back and thereafter in the following night at about 10.00-11.00 p.m. she went to the police station and lodged a report -Exh.9. Meanwhile, she had told to some of the neighbours about the incident. Police recorded spot panchnama and seized her cloths. She was also referred for medical examination. Firstly, accused No. 1 was arrested and he was referred for medical examination. Clothes of accused No. 1 were also seized. After the investigation, firstly, the charge sheet was filed against accused No. 1 only as at that time accused No. 2 was absconding. Later on, accused No. 2 came to be arrested. After his medical examination and other investigation, chargesheet was also filed against accused No. 2. Both the cases were committed to the Court of Sessions and were tried together.

4. Charges were framed. Accused pleaded not guilty. On behalf of the prosecution, in all 11 witnesses were examined and several documents were placed on record. Relying on the testimony of the prosecutrix and C.A. report, the Trial Court convicted both the accused and sentenced them as stated above.

5. Heard the learned APP. None appears for the accused. Perused the record and proceedings of the lower court. I have gone through the prosecution evidence and the impugned judgment carefully. It may be noted at the outset that the learned APP makes a statement that accused No. 2-Shakur is also released from Kolhapur Jail on 28-11-2009 after he had undergone the entire sentence awarded by the Trial Court.

6. The prosecution evidence reveals that the prosecutrix was firstly married at the age of 12 years in Bengal with an old person. That marriage did not succeed. Then she left Bengal and came to Bombay. Accused No. 2-Shakur, who is related to Zubeda, was a friend of Shariful the husband of the prosecutrix. He arranged marriage of the prosecutrix and Shariful. The prosecutrix had also a child, aged about 15 years at the time of incident. The evidence shows that she was living with her husband as a tenant in the loft portion of house of Zubeda, while Zubeda, herself was living in the lower portion of the house. The entrance for the loft portion was separate and different from entrance of the house of Zubeda.

7. Her evidence shows that during the relevant time, at about 2 or 2.30 a.m., two persons entered in prosecutrix house. One person caught her mouth and also pressed her legs, while the other committed rape. After, first person has completed the act, the second person, i.e. accused No. 2, committed rape on her.

She saw their faces after she switched on the light. She could immediately identify them because both of them were known to her prior to the incident. Her evidence shows that she could not shout or resist because her mouth was shut and her legs were pressed by one of the accused. She only tried to save herself by keeping the clothes intact but she could not succeed. In view of this, at the time of incident, nobody from the neighbourhood came there nor she told anybody about the incident during the night. However, she disclosed this incident to her husband when he came back from duty at about 5.00 a.m. According to her, her husband scolded and abused her because he was under the influence of accused No. 2, because of friendship and because he had arranged his marriage. After that, in the morning, her husband again went to his duty and came back in the evening. PW-4-Mohammed Jakir Khan, PW-5-Zubeda Shaikh, PW-8 Babu Khan and PW-9-Taiyyab Shaikh supported the prosecution case and deposed that the prosecutrix had told about this incident to the neighbours and they had advised her to go to the police. Therefore, with the help of those persons, she lodged the report in the police station. PW-9-Taiyyab Shaikh deposed that the application was written by one PW-8 Babu Khan. All the persons, who were present at that time signed it. It appears that at the police station, her statement and report were again recorded by the police and it was treated as F.I.R.-Exh.9.

8. The evidence of PW-3-Dr.Baburao Damawale, who examined the prosecutrix, found no injuries on her person and as per his evidence and report, she being a married lady, having a son aged 15 years, was habituated to sexual intercourse. In view of this, there was no injury mark on her body and private part and accordingly he issued a certificate in this respect. The evidence of PW-7-Dr.Rajaram Marathe, who examined accused No. 2 on 22-9-2001 i.e. almost six months after the incident, reported that accused No. 2 was fit to have sexual inter course.

9. Evidence of PW-2-Afsarali Malik shows that a spot panchnama was prepared and clothes of the prosecutrix and godhadi were seized from the spot under panchnama Exh.30. These articles as well as vaginal smear were referred to the C.A. The C.A. report reveals that the blood group of both the accused was "B" while that of the prosecutrix was "A". No semen was detected in her vaginal smear. However, in the centre of the petticoat, few semen stains were found and they were of group "B" which could be related to the accused persons. It appears that the Investigating Officer had not collected the blood sample of the husband of the prosecutrix to find out his blood group. The prosecutrix, being a married women, merely presence of semen stains on her petticoat could not be sufficient to indicate that the semen stains came on her cloths from the accused. Therefore, it was necessary for the prosecution to collect the blood sample of her husband also to rule out the possibility that the semen stains could be from her husband.

10. In view of the given circumstances, the evidence of the prosecutrix does not get any corroboration or support from the medical evidence. The C.A. report also

does not provide much support to her. But it is well settled position in law that when the prosecutrix in a rape case, deposes on oath that she was raped by the accused, the conviction can be based on the sole testimony of the prosecutrix also, if her evidence is found trustworthy. It is not necessary that the evidence of the prosecutrix in such case should be corroborated by any independent evidence. Because the prosecutrix is victim of the offence, she is not likely to implicate a person falsely, unless there are special reasons for the same. If necessary, the Court may look for the medical evidence or C.A. report, just as an assurance that the evidence of the prosecutrix is trustworthy. In the present case, in view of the fact that she is a married women, having a son of 15 years and also living with her husband, the possibility of any injuries on her person were very meager. The C.A. report, in the circumstances noted above, is not of a great help. However, there is no reason to disbelieve the evidence of the prosecutrix. The incident of the case took place at about 2 or 2.30 a.m. in the night. As per her evidence, as her mouth was shut and her legs were pressed, she was unable to shout or to offer any resistance. Therefore, nobody from the locality could know the incident in the night. The learned Trial Court noted that it was hutment area, where most of the people are from the labour class. After the hard work of the day, the people in such area go to the deep sleep and they are not likely to wake up with small sound. She informed her husband about the incident when he came back at 5.00 a.m. in the morning, but her husband did not bother because he did not believe her, possibly because he was under the influence of friendship with accused No. 2-Shakur. During the day, she herself approached the neighbours and told them about the incident, this part of her evidence is supported by the evidence of at least four witnesses. Further, no reason has come on record due to which she would be inclined to make a false allegation of rape against both or any of the accused persons. It is no body's case that she was a consenting party. If she would be consenting party, she would not tell anybody about the incident as nobody has seen or heard anything about the incident. In that case, if she would not disclose about the incident before her husband and her neighbours, nobody would have come to know about the case. The fact that she suo-motto approached the neighbours and told them about the incident and with their help, she went to the police station and finally lodged the report indicates that she wanted justice for the offence committed against her. Therefore, she appears to be trustworthy witness.

11. As far as delay of about 20 hours in lodging the report, there appears sufficient explanation. It appears that, she is a women from Bengal and she was not well conversant with Hindi or other languages. It also appears from her evidence that she came from a very poor family and she is illiterate woman. Her father had performed her marriage with a very old person when she was of 15 years age. That marriage did not succeed and she came to Bombay, where she married Shariful. She was totally dependent on her husband. She did not have any close relative except her husband who was also not willing to support her. Therefore, she could not dare to go to the police alone. In fact, when in the

evening her husband came back, she went to police with her husband and with two others and lodged the report.

12. Taking into consideration, all this material, I find that the Trial Court was justified in passing the impugned order of conviction and sentence.

13. For the aforesaid reasons, the appeal stands dismissed.