

(2018) 01 BOM CK 0163
In the Bombay High Court
Case No : 724 of 2004

Mohan s/o Jayram Ghanbahadur

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 25-01-2018

Acts Referred:

[Indian Penal Code, 1860](#), [Section 376](#),
[Section 323](#), [Section 506](#), [Section 354](#) - Punishment for rape - Punishment for voluntarily causing hurt - Punishment for criminal intimidation - Assault or criminal force to woman with intent to outrage her modesty

Citation : (2018) 01 BOM CK 0163

Hon'ble Judges : Rohit B. Deo

Bench : Division Bench

Advocate : N.D. Khamborkar, ?Ritu Kalia

Final Decision : Allowed

Judgement

1. The appellant-Mohan Jayram Ghanbahadur is convicted for offence punishable under section 376 of the Indian Penal Code (" IPC " for short) and is sentenced to undergo rigorous imprisonment for three years and to payment of fine of Rs.300/-, and is convicted for offence punishable under section 354 of IPC and is sentenced to suffer rigorous imprisonment for one year and to payment of fine of Rs.100/- and is convicted for offence punishable under section 506 of IPC and is sentenced to suffer simple imprisonment for one year and to payment of fine of Rs.50/- and is further convicted of offence punishable under

section 323 of IPC and is sentenced to suffer simple imprisonment for six months and to payment of fine of Rs.50/-. This judgment and order dated 01.11.2004 passed by 2 nd Ad-hoc Additional Sessions Judge, Akola in Sessions Trial 17/2004 is assailed in the appeal.

2. Heard Shri N.D. Khamborkar, the learned Counsel for the appellant and Ms. Ritu Kalia, the learned Additional Public Prosecutor for the respondent-State.

3. The case of the prosecution as is unfolded during the trial is thus:

The prosecutrix (P.W.1) was residing at Akot with her sister Savita. Accused was in relationship with Savita who was estranged from her husband. Accused and Savita were in relationship since 5 to 6 years.

4. The incident occurred on 05.12.2003. The prosecutrix was alone and Savita had gone to village Pardi to meet a relative. The prosecutrix was sleeping, at 11:00 p.m. or thereabout she heard noise of somebody thumping the door. She called out and the accused answered. The prosecutrix opened the door, the accused entered the house and asked her the whereabouts of Savita. The prosecutrix told the accused that Savita had gone to village Pardi and the accused said she was lying. The accused pulled her hair and started assaulting her on cheeks with hands and fists. The accused made her lie on a mattress (wakal). The accused removed her knicker and subjected to her to sexual intercourse for 3 to 4 minutes. The accused threatened the prosecutrix not to create a commotion else he would dislocate her teeth or kill her brother. The accused stayed in the house till 05:00 a.m. On the next day Savita returned to Akot at 10:00 a.m. and the prosecutrix narrated the incident to her. The prosecutrix

and Savita lodged report Exh.17 at Akot Police Station on 06.12.2003 on the basis of which offence punishable under sections 376, 354, 506 and 323 of the IPC was registered against the accused. The prosecutrix was referred for medical examination. The accused was arrested and his undergarments were seized. The accused was also referred for medical examination. Spot panchnama was recorded. Samples of pubic hairs, blood and vaginal swab were collected and sent to the Chemical Analyzer. The C.A. Report was obtained and upon completion of the investigation charge-sheet was submitted in the court of Judicial Magistrate First Class, Akot who committed the proceedings to the Sessions Court. The learned Sessions Judge framed charge under sections 376, 354, 506 and 323 of the IPC. The accused abjured guilt and claimed to be tried in accordance with law.

The text and tenor of the cross-examination is that since one year prior to the incident, the accused and the prosecutrix were in consensual sexual relationship.

The prosecutrix conceived and underwent termination of pregnancy procedure at the hospital of one Dr. Agrawal.

The accused committed sexual intercourse with Sangita with her consent, twice, on the date of the incident. The defence is also that Savita was demanding money, which demand the accused could not fulfill and was falsely implicated by Savita and the prosecutrix.

5. The prosecution examined as many as four witnesses to bring home the charge. P.W.1 is the prosecutrix, P.W.2 is Pandurang Solanke the witness to spot panchnama Exh.20, P.W.3 is Dr. Vandana Vasu who examined Sangita and issued certificate Exh.28 and P.W.4 is the Investigating Officer. In view of the trend

and tenor of the cross-examination, it is irrefutable that the accused subjected the prosecutrix to sexual intercourse on 05.12.2003. The pivotal question is whether the sexual contact was consensual, as is suggested by the defence, or the prosecutrix was ravished against her will and without her consent. It is axiomatic that the most material witness from the perspective of the prosecution is the prosecutrix herself. For reasons best known to the prosecution, the sister of the prosecutrix Savita is not examined as witness though cited in the charge-sheet.

6. Before the evidence of P.W.1 prosecutrix is discussed, it would be appropriate to consider the medical evidence on record. The evidence of the prosecutrix is that she was assaulted on cheeks by fist blows. The medical examination report does not notice any visible sign of injury on the person of the prosecutrix. No scratch marks or abrasions or lacerations are noticed in the medical examination of the prosecutrix. P.W.3 Dr. Vasu does state that the prosecutrix was complaining about the trauma to back and left cheek. However, P.W.3 has deposed that she did not find swelling on cheek or back. The hymen was found ruptured, and there was swelling around the hymen. The opinion is that the hymen was ruptured within 24 to 48 hours of the medical examination.

A suggestion is given to her that a grown up woman will offer stiffest possible resistance to the molester. The response of Doctor is that she agrees with the proposition, however, if the woman is threatened or is disabled such resistance may not be possible. Concededly, the prosecutrix is physically challenged and one leg is polio affected.

7. The prosecutrix-P.W.1 has deposed that the accused and her sister Savita were in relationship. At 11:00 p.m. on

05.12.2003 the accused entered the house, asked whereabouts of Savita and when the prosecutrix told him that Savita had gone to village Pardi to meet maternal aunt, she was accused of lying. The accused pulled her hair and started assaulting her with fists on the cheeks. The accused removed her knicker forcibly and ravished her for 3 to 4 minuets. The accused threatened the prosecutrix not to create a commotion else her teeth would be dislocated and brother killed. The accused left the house at 05:00 a.m. and the prosecutrix narrated the incident to her sister Savita when she returned to Akot at 10:00 a.m. on 06.12.2003. The prosecutrix has proved the report Exh.17 and the printed F.I.R. Exh.18.

The proseuctrix is subjected to a lengthy cross-examination. The defence has brought on record the relationship between the accused and Savita and that Savita has two children from two husbands. The prosecutrix admits that both the husbands deserted Savita and volunteers that Savita is estranged from her husbands due to the relationship with the accused. She admits that the relationship between the accused and Savita was like husband and wife. An endeavour is made to bring on record that since the accused was not in a position to fulfill the monetary demand of the two sisters, he is falsely implicated. The prosecutrix has denied the suggestion that she and the accused established sexual relationship one year prior to the incident and that she conceived and the pregnancy was medically terminated. She admits that 4 to 5 days prior to the incident the accused came to her house. The prosecutrix does not remember whether as on the date of the incident two months rent was due and her sister Savita demanded Rs.1000/- from the accused to pay the rent. She states that she has no personal

knowledge about such demand. It is brought on record that several houses are situated in close proximity and the attempt was to suggest that a woman who is ravished against her will or without her consent had ample opportunity to alert the neighbours by raising an alarm.

The prosecutrix has obviously exaggerated when she deposes in the cross-examination that she was assaulted not only in the front room, but also in the bed room. The house comprises three rooms. The version of the prosecutrix, as has come on record in the cross-examination, is that the accused assaulted her in the front room, then followed her when she went in the inner room, she suffered injury when the accused pulled her down, she suffered injury to head and hand. The accused assaulted her on forehead and cheeks till the cheeks were swollen. She speaks of a forcible and violent sexual intercourse. At one point in the cross-examination the prosecutrix states that after the sexual intercourse she went to sleep and was asleep throughout the night and so was the accused. In the next breath, the prosecutrix states that the accused did not take a nap on that night and she was also not sleeping. The prosecutrix then comes out with a version which is inconsistent with the F.I.R. and the examination-in-chief and states that in the same night the accused subjected her to sexual intercourse for the second time. She denies the suggestion that the accused had tea in the morning and then left. She however, admits that she did not disclose about the incident to any of the neighbours nor did she inform her parents. She denies the suggestion that the sexual relationship was consensual.

8. The learned A.P.P. strenuously urged that the prosecutrix is not an accomplice. Conviction can rest on the sole testimony of the prosecutrix and corroboration is not necessary, is

the submission. This court is conscious of the settled position of law that uncorroborated testimony of the prosecutrix, if found implicitly reliable, can be the basis of conviction and the court is not obligated to seek corroboration which would be adding insult to the injury. However, the burning question is whether the testimony of the prosecutrix is implicitly reliable, credit worthy and confidence inspiring. Be it noted, that since it is not disputed by the accused that he did establish sexual contact with the prosecutrix, the only question to be answered is whether the accused has probablized the defence that the sexual intercourse was consensual.

9. The medical evidence is not decisive, either way.

The fact that the Doctor did not detect any visible sign of injury suffered due to resistance pales into insignificance since the prosecutrix is physically challenged. The medical evidence is however, inconsistent with the defence that since one year prior to the incident the accused and the prosecutrix were in physical relationship. The finding is that the rupture of the hymen is 24 to 48 hours old. The medical evidence is also inconsistent with the version of the prosecutrix that she was violently assaulted on forehead and cheek not only when the accused entered the house, but again in the inner room before she was ravished. The ocular evidence of the prosecutrix that she suffered head injury and swelling on cheeks is again not consistent with the medical evidence. In so far as sexual intercourse is concerned, it is already noted that the defence is not disputing sexual intercourse.

10. The evidence of the prosecutrix is not implicitly reliable and it is more than apparent that she is vacillating in her versions. Over exaggeration, over implication and embellishment is discernible from the evidence. The prosecutrix is indeed

physically challenged and one leg is affected by polio.

However, notwithstanding the handicap, the conscious of the court is not satisfied that she did not have an opportunity to either raise an alarm or alert the neighbours. The prosecutrix at one point in the evidence states that she went to sleep after the intercourse and at a subsequent stage comes out with a totally different version, which is that neither she nor the accused slept and she was subjected to sexual intercourse for the second time. It is in view of the fragile testimony that this court was impelled to seek corroboration.

11. The prosecution has not examined the elder sister of the prosecutrix Savita though she cited as a witness.

Concededly, the disclosure was made by the prosecutrix for the first time only to Savita. Whom to examine as a witness is ordinarily the discretion of the prosecution. Ultimately the evidence must be weighed and not counted. However, when a material witness who is cited and not examined, the court must be on guard. The failure of the prosecution to examine a witness who could have unfolded the narrative and corroborated the testimony of the prosecutrix assumes significance, particularly as the witness is the elder sister of the prosecutrix. I have already noted, that the medical evidence does not take the case of the prosecution any further as since the rupture of hymen with swelling around, is not per se decisive of the indication of forcible intercourse.

The medical evidence, is to certain extent incompatible with the version of the prosecutrix that she was subjected to violent assault not only in the front room when the accused entered the house, but again in the inner room before she was sexually ravished.

12. Shri Khamborkar, the learned counsel for the appellant invites my attention to the observations of the Apex

Court in Narendra Singh and another v. State of M.P . reported in (2004) 10 SCC 699 in paragraph 30 which reads thus:

30. It is now well settled that benefit of doubt belonged to the accused. It is further trite that suspicion, however grave may be, cannot take place of a proof. It is equally well settled that there is a long distance between "may be" and "must be".

The learned counsel would submit that the defence has succeeded in creating sufficient doubt about the veracity of the prosecution case and the benefit of the doubt must necessarily go to the accused. The submission is well merited. The golden thread which runs through the web of the criminal justice dispensation system is that the offence must be proved beyond reasonable doubt and the benefit of any reasonable hypothesis incompatible with the guilt of the accused must be given to the accused.

13. I am not persuaded to hold that the offence is proved beyond reasonable doubt.

14. The judgment and order impugned is set aside.

15. The accused is acquitted of offence punishable under sections 376, 354, 506 and 323 of the IPC.

16. Fine paid by the accused, if any, be refunded.

17. The bail bond of the accused shall stand discharged.

18. The appeal is allowed.