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**(2014) 06 BOM CK 0216**

**In the Bombay High Court**

**Case No :** Criminal Appeal Nos. 801, 685 of 2006 and 456 of 2008

Noor Mohd. Mohmmmed Salim Shaikh

APPELLANT

Vs

State of Maharashtra

RESPONDENT

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**Date of Decision :** 19-06-2014

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 428 — Penal Code, 1860 (IPC) -  
Section 34, 376(2)(g), 506(2)

**Citation :** (2015) ALLMR(Cri) 1725

**Hon'ble Judges :** P.V. Hardas, J; Anuja Prabhudesai, J.

**Bench :** Division Bench

**Advocate :** Ganesh Gole and Murtuja Najami, Advs., for the Appellant; U.V. Kejriwal, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

P.V. Hardas, J.?Criminal Appeal No. 801 of 2006 has been filed by original accused No. 3, while Criminal Appeal No. 456 of 2008 has been filed by original accused No. 4. Criminal Appeal No. 685 of 2006 has been filed by the State seeking enhancement of the sentence awarded to the appellants-accused. By these appeals, the appellants have questioned the correctness of judgment dated 25th May, 2006 passed by the Addl. Sessions Judge, in Sessions Case No. 470 of 2005 whereby the accused have been convicted for offences punishable under Section 376(2)(g), 506(2) r/w. 34 of Indian Penal Code and sentenced to rigorous imprisonment for 10 years and to pay fine of Rs. 1000/- each i.d. of which to undergo for one month and for the offence punishable under Section 376(2)(g) further to undergo rigorous imprisonment for one year and each accused to pay fine of Rs. 500/- i.d. to undergo imprisonment for 15 days for offence under Section 506(2), with a direction that the substantive sentences shall run concurrently. Criminal Appeal 685 of 2006 has been filed by the State being aggrieved by the sentence of imprisonment imposed on the appellants by the trial court. The other two accused, namely original accused No. 1 and original accused No. 2 have chosen not to file any appeal.

2. Facts in brief as are necessary for the decision of this appeal may briefly be stated thus:

P.W. 12 P.S.I. Vijay Bichkar, who was attached to Shivaji Nagar Police Station on 4.3.2005, recorded the complaint of P.W. 1 victim (whose name is deliberately withheld) at about 6.40 p.m. The victim in a report had complained of being ravished by the accused. Report of the victim was scribed at Exhibit 11 and on the basis of the said report, an offence vide Crime No. 70 of 2005 was registered. The investigation of the said crime was entrusted to P.W. 12 P.S.I. Bichkar. He accordingly proceeded to the scene of incident and drew the scene of incident panchanama, in the presence of panchas at Exh. 43. He had noticed that the scene of the offence was an isolated place which was used usually for dumping rubbish. The scene of the incident was a cement pipe which had diameter of 3 1/2 feet. From the scene of incident, one glass piece, a white napkin and mattress were seized in the presence of the panchas in the panchanama. Steps were initiated for tracing the whereabouts of the accused who were missing. The accused came to be arrested by P.W. 10, API Narayan Sankpal, who was also attached to Shivaji Nagar Police Station. On 7.3.2005 he arrested accused Noor Mohd. under the arrest panchanama at Exh. 37. On the next day, during custodial interrogation, the clothes of accused Noor Mohd. were seized under the seizure memo. The memorandum of accused Noor Mohd. was recorded in the presence of panchas at Exh. 25. Clothes of the victim were seized under seizure memo at Exh. 38. Statements of the witnesses were recorded.

3. On 5.3.2005 accused Abdul Gani and original accused No. 4 were arrested under arrest panchanama at Exhibit 34 and under the same panchanama their clothes were seized. After the arrest of the accused, test identification parade was held on 18.3.2005. The test identification parade was conducted by P.W. 5 Prabhakar Yashwante, who was a Special Executive Officer.

4. The accused were examined by P.W. 3 Dr. Patil and the certificates of examination of accused are at Exh. 14, 15, 16 and 17. The victim was examined by Dr. Ashwini Maldekar and Dr. Kulkarni. The certificate in respect of examination of victim is at Exh. 32. The report of the Chemical Analyser discloses that on the clothes of the victim semen stains were noticed. The blood group found on the clothes of the victim were A+, O+, AB and O+, while the blood group of the victim was B. The blood group of the accused was also determined as A+, O+, AB and O+. Further to the completion of investigation, the chargesheet against the accused was filed.

5. On committal of the case to Court of sessions, the trial court framed charge against the accused. The accused abjured their guilt and claimed to be tried. The prosecution, in support of its case examined 12 witnesses. The defence of the accused was of denial and of false implication. The trial Judge, after appreciating the evidence of prosecution witnesses convicted and sentenced the appellants-accused as aforesaid.

6. We have heard Shri Ganesh Gole, learned Counsel for the Appellant, Mr. Murtuja Najami learned Counsel for the appellant in Appeal No. 456 of 2008, and learned APP Smt. Kejriwal in support of the various contentions urged by the learned Counsel. In order to effectively deal with the submissions, it would be useful to refer to the evidence of prosecution witnesses.

7. The prosecution has examined P.W. 1, the victim, who deposed that in March 2005, she was working as a rag picker. She has identified all the accused and has claimed that she was acquainted with the accused. In respect of the incident, she deposes that on 4.3.2005, she was working as a rag picker at Deonar Dumping Ground. At about 3.30 p.m. the accused came there and called her. She did not suspect any foul play as she was treating the accused No. 1 as her brother and was also addressing him as her brother. The accused No. 1 then enticed her to a small hut and made sexual advances towards her. All the accused then took her to the cement pipe situated near the hut and after denuding her forcibly, committed sexual intercourse on her. The accused had also threatened her not to disclose the incident to anyone. The victim, thereafter went away from the scene of the incident. The victim met P.W. 2 Sagira and others to whom she narrated the incident. The victim wanted to lodge the report immediately, but the other ladies who were accompanying the victim advised her against lodging the report as lodging of the report would defame the victim. The victim, however, stoutly maintained that the offenders should be brought to book and accordingly mustered sufficient courage and went to the police station, accompanied with others and lodged a report. On basis of the report of the victim further investigation was carried out.

8. In cross examination, the victim was questioned in respect of the incident and, she has denied the suggestion that she was not fully clothed. Though the victim has been cross examined at length, nothing of substance has been elicited in the cross examination. We thus find that the testimony of the victim is implicitly reliable. There is nothing in the evidence of P.W. 1 victim, which shall in any manner discredit or affect her credibility.

9. The prosecution has examined other witness namely P.W. 2 Sagira, and others to whom an immediate disclosure was made by the victim. This witness corroborated the testimony of P.W. 1 victim. The medical evidence also to a large extent corroborates the testimony of P.W. 1 victim.

10. The evidence of the Chemical Analysis in respect of finding semen stains, and of the blood group matching that of the accused is also a circumstance which corroborates the testimony of P.W. 1 victim. The accused have been identified in the Test Identification parade conducted by P.W. 5 Prabhakar Yashwante. No infirmity or flaws have been doubted in the cross examination regarding holding of the Test Identification parade.

11. We thus find that the prosecution has proved the offence against the appellants beyond reasonable doubt. Learned Counsel for the accused have

urged before us that the testimony of P.W. 1 victim is not corroborated in material particulars by the evidence of the witnesses examined by the prosecution, and the accused, therefore, are entitled to be given benefit of doubt. It is also urged before us by the learned Counsel for the appellants that the victim was a consenting party and thus the sexual intercourse was a consensual intercourse. The learned APP has opposed the submission and has urged for dismissal of the appeal.

12. The victim of sexual assault cannot be equated with the accomplice. The testimony of a victim of sexual abuse need not be corroborated in material particulars. To insist of corroboration to the testimony of a victim of sexual assault is to add insult to the injury. The Supreme Court in *State of Maharashtra Vs. Chandraprakash Kewalchand Jain*, has held that law does not require that the testimony of a victim of sexual assault should be corroborated. To insist on such a corroboration would be adding insult to injury. The Supreme Court further held that if the court finds that the testimony of victim to be testimony of witness which inspires confidence of the court, the Court may pass conviction of the accused on the sole testimony of the victim. In the present case, we find that the testimony of P.W. 1 not only inspires confidence, but also is corroborated by the other evidence of the witnesses examined by the prosecution. We, therefore, cannot fault the trial Judge for recording conviction of the appellants. In respect of the other submissions of the learned counsel for the appellants, that the sexual intercourse with the victim was consensual sexual intercourse, we find that there is no evidence at all to suggest that the victim had consented. The victim has clearly maintained that she was dragged to the cement pipe and was forcibly denuded and thereafter the accused had committed forcible sexual intercourse with her. Thus, the plea of consensual sexual intercourse, according to us has no merit.

13. Thus, upon considering the submissions of the learned Counsel for the appellants and on perusing the evidence of the prosecution witnesses, according to us, the trial Judge has rightly convicted the accused and the finding of guilt arrived at by the trial court needs no interference.

14. In support of the appeal filed by the State i.e. Criminal Appeal No. 625 of 2006, the learned APP has urged before us for enhancing the sentence of the trial court. The trial court, on finding the accused guilty for offence punishable under Section 376(2)(g) of Indian Penal Code has convicted them for a sentence of rigorous imprisonment for 10 years and also the sentence of fine. Sentencing, primarily, is within the jurisdiction of the trial court. The sentence which the trial court has awarded is rigorous imprisonment for 10 years. Minimum sentence which is contemplated is rigorous imprisonment for 10 years. The statute provides that the court may convict the accused to maximum term of imprisonment for life. Since the trial court has convicted the accused for the minimum term of imprisonment, we do not find that the sentence of imprisonment awarded to the accused is grossly disproportionate to the offence

which is alleged or the sentence is a flea bite sentence. According to us, no interference in the discretion of the trial court is warranted in the appeal for enhancing of sentence. We, thus, dismiss the appeal filed by the State seeking enhancement of the sentence.

15. We are informed by the learned Counsel for the appellants that the appellants-accused are in jail during the trial and during the pendency of the appeal also. According to the learned Counsel for the appellants, the accused have undergone their sentences.

16. We, accordingly, dismiss the appeals and confirm the conviction and sentence of the appellants. The substantive sentences shall run concurrently and the accused shall be entitled for set off under Section 428 of the Code of Criminal Procedure.

17. We quantify the fees payable to Shri Murtuja Najami, learned Counsel appointed in Criminal Appeal No. 456 of 2008 at Rs. 5000/- (Rupees Five Thousand Only). Accordingly, Criminal Appeal Nos. 801 of 2006, 685 of 2006 and 456 of 2008 are dismissed.