
(2015) 06 BOM CK 0201

In the Bombay High Court

Case No : Criminal Appeal Nos. 52 and 103 of 2013

Shaikh Saifulla and Others

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 16-06-2015

Acts Referred:

Evidence Act, 1872 — Section 119

Penal Code, 1860 (IPC) — Section 354, 376, 452

Citation : (2015) 06 BOM CK 0201

Hon'ble Judges : P.V. Hardas, J;N.W. Sambre, J

Bench : Division Bench

Advocate : R.G. Hange, for the Appellant; N.B. Patil, APP, Advocates for the Respondent

Judgement

N.W. Sambre, J—The appellant has preferred Criminal Appeal No. 52 of 2013 having been convicted by questioning the legality and validity of conviction for an offence punishable under Section 452 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs. 2000/-, in default to suffer further rigorous imprisonment for two month and for an offence punishable under Section 354 of the Indian Penal Code to suffer rigorous imprisonment for two years and to pay fine of Rs. 2000/-, in default to suffer further rigorous imprisonment for two months by learned Sessions Judge, Beed in Sessions Case No. 80 of 2012 on 29/01/2013. Both the sentences were ordered to run concurrently.

2. Criminal Appeal No. 103 of 2014 has been filed by the State questioning the acquittal of original accused for the offence punishable under Sections 376 of the Indian Penal Code. Since both the appeals arise out of the same judgment of the trial Court, these appeals are being decided by this common judgment.

3. The facts, as are necessary for filing of present appeal, are as under.

On 30/01/2012 PW-1 Bismillabi approached PW-10 Syed Ali Syed Umar, who at

the relevant time was working as P.S.I. at Chaklamba police station. PW-10 PSI at that time was working at Umapur chowky under the said police station, wherein PW-1 Bismillabi, her daughter and other relatives came to police chowky and lodged oral complaint at Exhibit-15 alleging therein that the appellant-accused committed rape on the daughter of said Bismillabi namely Shamimbi, who is deaf and dumb girl. She alleged that as she was working in the field, at that time Shamimbi was alone at home and taking advantage of physical deformity of her daughter Shamimbi, the appellant-accused has committed an offence punishable under Sections 376 and 452 of the Indian Penal Code. The alleged incident took place at around 12-30 p.m.

4. PW-10 PSI Syed Ali Syed Umar as such registered offence vide Crime No. 4 of 2012 punishable under Section 376 read with Section 452 of the Indian Penal Code and set the investigation in motion.

5. PW-10 the Investigating Officer thereafter started investigation in the matter and seized clothes on the person of victim by drawing seizure panchnama at Exhibit-16 and referred victim to the District Hospital, Beed. The spot panchnama at Exhibit-19 was effected by him and he further seized broken pieces of bangles, stained soil, normal soil and recorded the statement of various witnesses.

6. On 01/02/2012 one PSI Pawar arrested the accused and seized the clothes of the accused vide Exhibit-17 and the appellant-accused was subjected to medical examination. He also referred the entire muddemal articles for chemical analysis, which report is at Exhibit-34. In the investigation, having found present appellant has committed an offence in question, charge sheeted him.

7. Learned Sessions Court, Beed vide Exhibit-6/C framed charge against present appellant on 22/08/2012 charging the appellant for an offence punishable under Sections 376, 452 of the Indian Penal Code.

8. So as to establish the guilt, the prosecution has examined 10 witnesses i.e. complainant Bismillabi PW-1 at Exhibit-14, PW-2 Shaikh Javed at Exhibit-18 panch witness, PW-3 Shaikh Rahemunissa seems to be eye witness at Exhibit-20, PW-4 Ayesha at Exhibit-24, PW-5 Shaikh Safdar, spot panch at Exhibit-25, PW-6 Medical Officer Dr. Tonde, who examined prosecutrix at Exhibit-26, PW-7 Dr. Bahir, who examined appellant-accused at Exhibit-28.

9. Having regard to physical deformity of prosecutrix, special teacher PW-8 Suresh Bhagwat was examined at Exhibit-31, who at the relevant time was working with Aayurmangalam Deaf and Dumb School, Beed. With the help of PW-8, testimony of prosecutrix Shamimbi-PW9 was recorded at Exhibit-32 and PW-10 PSI Syed Ali Syed Umar is examined at Exhibit-33.

10. Learned Sessions Court, while dealing with the Sessions Case No. 80 of 2012 having appreciated the evidence of above referred witnesses, reached to a conclusion that the guilt of the appellant-accused was established and sentenced him for imprisonment as observed herein above, however, acquitted him of

offence punishable under Section 376 of the Indian Penal Code. As such, present appeals.

11. Learned Sessions Court having regard to the provisions of Section 119 of the Indian Evidence Act permitted the prosecutrix to give evidence in other manner by taking aid of Suresh Bhagwat, PW-8, as she was unable to speak. Learned Sessions Court that on close scrutiny of reports of Chemical Analyzer at Exhibits-35, 36 and 37 observed that no blood or semen is detected on the clothes of prosecutrix as well as of the accused, which were seized during investigation. The Sessions Court also noticed that no semen were detected on pubic hair or vaginal swab of the prosecutrix. It is also noted by the Sessions Court that no pubic hair were detected on the clothes of the prosecutrix or accused, so also no semen was detected on the pubic hair of the accused.

The Sessions Court, however, noted that report of Chemical Analyzer in regard to earth wrapped in the paper i.e. Article-9 noticed stains of semen and as such, concluded that the accused-appellant had not performed forcible sexual intercourse with the prosecutrix. He has also observed that the medical evidence does not point finger of guilt towards the present appellant as possibility of recent sexual intercourse being committed by the accused on prosecutrix Shamimbi was also ruled out.

12. However, the Sessions Court proceeded to convict the present appellant for an offence punishable under Sections 354 and 452 of the Indian Penal Code.

13. Having heard Mr. Hange, learned Counsel for the appellant-accused and learned A.P.P. for the State, Mr. Hange, learned Counsel for the appellant would urge that conviction of the present appellant for an offence punishable under Sections 354 and 452 of the Indian Penal Code is completely unwarranted, as according to him, there is at all no evidence on record to connect the guilt of the present appellant to that of offence to outrage modesty of the prosecutrix and that of house trespass after preparation for hurt, assault or wrongful restraint. So as to canvass the submissions, he has pointed out version of prosecutrix herself and the complainant.

14. Learned A.P.P., while opposing the above referred submissions, would urge that the acquittal of the appellant-accused for an offence punishable under Section 376 of the Indian Penal Code is wholly misconceived, as according to him, the requirements of corroboration of testimony is uncalled for, as the evidence of prosecutrix herself is reliable. According to him, the appeal of the State is liable to be allowed.

15. In the light of above referred submissions made by respective parties, we have proceeded to analyze the evidence of concerned witnesses.

16. Pw-1 Bismillabi, who was examined at Exhibit-14 was not present at her home i.e. scene of incident when the alleged incident took place. However, she has narrated that she received intimation about the incident from daughter of

her sister namely Fatema and upon reaching home, she noticed prosecutrix Shamimbi was weeping and frightened. She further narrated that the prosecutrix by signs informed her that the appellant-accused Saifulla entered the house, closed door from inside and pushed her, removed her clothes from her person and committed sexual intercourse.

17. PW-1 Bismillabi while admitting her thumb impression on F.I.R. at Exhibit-15 in her examination in chief deposed that the prosecutrix Shamim is her daughter and she is residing in the house of Baby Ayesha, who is her sister. She further deposed that the incident in question occurred on 30/01/2012. She and her sister Baby Ayesha went to field for work at 10-00 a.m. and the daughter of Baby Ayesha, who returned from the school by name Fatema came to field and narrated that the prosecutrix Shamim was weeping in the house, in response to which, both of them returned to the house. She noticed gathering of people outside her house and also noticed presence of Shamim in the house. She also noticed Shamim was frightened and adjoining neighbour Rahemunissa narrated her about the incident. According to her, PW-3 Rahemunissa narrated that she heard shouts of Shamim and then came to the house of Bismillabi and knocked the door of the house and as the door was not opened, she went to another part of the house and noticed that accused Saifulla was coming out from front door wearing his full pant and having his chappals in the hand. She further narrated that upon inquiry with Shamim by signs, she narrated that accused Saifulla entered the house, closed the door from inside, pushed her, removed her clothes from her person and committed sexual intercourse. She further narrated that she went to police chowky along with her brother and Shamim for lodging First Information Report. She further narrated that the clothes on the person of Shamim were seized by the police and she was taken to Civil Hospital, Beed for medical examination, when her sister Baby Ayesha accompanied Shamim. She further stated that the clothes were seized by the police, which were on the body of Shamim, so also on next day, the police has drawn spot panchnama recovering broken pieces of bangles, simple soil, soil stained with semen. She identified Article-1 scarf, Article-2 salwar and Article-3 shirt.

18. In her cross examination, she stated that she started residing in the house of Baby Ayesha, her sister after the death of her husband and age of her daughter Shamim is 40 years. Shamim is deaf and dumb girl and as such, she never tried to perform her marriage. She further stated that before entering her house she talked with Rahemunissa PW-3 in front of house for 5 to 10 minutes and then inquired with Shamim, who narrated her about occurrence of incident of rape by the appellant. She also noticed injury on the neck and hands of Shamim and did not see any stains on clothes.

19. PW-4 Baby Ayesha, real sister of PW-1 Bismillabi, narrated on the similar line. She admitted residence of Bismillabi and Shamim in her house. She further stated about receipt of intimation in the field about weeping of Shamim at house and return back to home from the field with Bismillabi. She also re-iterated

narration/discussion with PW-3 Rahemunissa and mentioned in her chief that Rahemunissa told her that accused ran away from the house of Bismillabi from back door with full pant in his hand. She also narrated about Shamim by signs and gestures narrating story of accused entering the house, closing the door, removing her clothes and committing forcible sexual intercourse. In her cross examination, she stated that it is PW-3 Raheminussa who told her and her sister Bismillabi about the incident and then she herself and Bismillabi inquired with Shamim about the incident and upon understanding the same, they went to police station for lodging F.I.R.

20. PW-3 Shaikh Rahemunissa in her extensive examination in chief narrated that she is residing opposite to the house of Baby Ayesha in the house alongwith her two sons, which is about 70 ft. away from the house of Baby Ayesha. She is residing on the first floor along with her son. She further stated that at around 12-00 to 12-30 in the noon, she heard shouts of Shamim and came out of her room in the gallery of first floor house, at which point she was signaled by Abdul Wahab to come down. She further stated that she stepped down from first floor and then knocked the door of the house of Baby Ayesha and noticed the door was closed. Then she went towards southern side door, which was open on Masjid side and when she tried to knock that door, she noticed that the accused-appellant coming out of house of Baby Ayesha, trying to wear his pant and was holding chappals in his hands, who later on ran away from the lane. She further stated that she went inside the house and saw Shamim, who was putting salwar on her person. According to her, Shamim narrated her by signs that appellant Saifulla pressed her neck and committed sexual intercourse. She also stated narration of the incident by her to Baby Ayesha and Bismillabi, upon inquiry made by them. In her cross examination, she stated that before deposing she met PSI Syed Ali, who told her as to what should depose in the Court.

21. In her cross-examination she stated that in between her house and house of Baby Ayesha, there is road of about 70 ft., width and she is residing on the first floor of her house, where two rooms are constructed along with her son. She further stated that she know Shamim since childhood, who is deaf and dumb. According to her, at the relevant time, upon hearing shouts of Shamim, she was in the inner room of first floor of the house, came in the gallery and noticed Abdul Wahab and Ashok Dhotare near the house of Bismillabi. According to her, she inquired with Abdul Wahab about shouts of Shamim, when Abdul Wahab asked her to come down by signs. According to her, then she came down and went to the door of the house of Baby Ayesha and when she knocked the door for the first time, she has not received any response. According to her, when she knocked the door for the first time, Abdul Wahab and Ashok Dhotare were standing in the lane and when she went near second door, she saw the appellant coming out of the house, when she suspected about the appellant. She also admitted that, neither she raised any shout nor any of them tried to stop or chess the appellant. She further stated that, Shamim narrated her mother about giving fist and kick blows by her to the appellant and also about tearing of his

shirt by Shamim while resisting the rape.

22. The prosecutrix was examined at Exh. 32 as PW-9. Having regard to her physical condition being deaf and dumb in compliance of Section 119 of the Indian Evidence Act. PW-8 Suresh Bhagwat, Special Teacher in Ayurmangalam Niwasi Muka-Bhadheer Vidyalaya, Beed was summoned so as to assist the Court in recording the evidence of said witness. PW-9 prosecutrix in her examination-in-chief identified the accused before the Court and stated that on the day of incident she was alone in the house. She further deposed that the accused opened the door and entered the house. She further deposed that accused was in drunk condition and after entering the house, he pulled prosecutrix down on the ground and removed her clothes and performed sexual intercourse forcibly. According to her, she then raised shouts resulting into the accused running away from the spot and people gathered at the spot. She in her cross-examination deposed that the door of the house was closed without bolting from inside. She further deposed that she tried to resist the accused when accused pulled her down on the floor. She was unable to mention as to how much time accused was inside her house. She further deposed that the accused has caused abrasions on her hands and legs. She further deposed that her statement was recorded by the Police in presence of her mother.

23. It is required to be noted that the testimony of the prosecutrix does not repose confidence since she has not given details as to from which door out of two, accused entered in her house; when he entered the house, why she had not raised shouts; and when she having resisted the act of the accused of performing sexual intercourse, why after the incident she could not raise shouts again when PW-3 Shaikh Rahemunnisa knocked the door. She has not mentioned that the accused has pressed her neck and performed sexual intercourse. Apart from above, she has also not mentioned about injury caused by the accused on her neck in addition to abrasion on hands and legs. She has not mentioned about injury on her private part.

24. Upon cumulative reading of evidence of these witnesses i.e. PW-1 Bismillabi, PW-3 Shaikh Rahemunnisa, PW-4 Baby Ayesha and PW-9 Shamimbi, it is required to be noted that, same does not inspire the confidence so as to accept their testimonies for establishing the guilt of accused particularly for the offence with which the appellant herein was punished. PW-3 Shaikh Rahemunnisa, in her evidence, has in clear terms stated that, she knows the victim since her childhood. Apart from above, she stated that, between her house and house of victim, there is road and distance between two house is about 60 to 70 ft. She further deposed that, upon signal by Abdul Wahab, she came down from first floor gallery of her house to that house of prosecutrix, when Abdul Wahab and Ashok Dhotare were present, however, none of them tried to stop the accused at the spot or chased him. Rather, prosecutrix in her own evidence has stated that, the door was not bolted from inside, as such, the door was just closed without any support. Apart from above, neither Abdul Wahab nor Ashok Dhotare were

examined by the prosecution.

25. The conduct of PW-3 Shaikh Rahemunissa that in response to the earlier shout of Shamim, in response to signal of Abdul Wahab knocked the door of house of Shamim and saw the appellant coming out of the home and she or Abdul or Ashok have not confronted the appellant at that point of time or even did not chase him, particularly in the background of her statement that, the appellant herein left premises by holding chappals in his hands, so also pant, is required to be disbelieved, as same does not appear to be natural conduct. The said witness PW-3 Shaikh Rahemunissa rather in a cross-examination, though suspected the conduct of appellant, however, when he came out of the house of Bismillabi, has not taken any steps, so as to stop the appellant either herself or through Abdul or Ashok.

26. PW-6 Dr. Tonde, who was examined PW-9 Shamim deposed that, he noticed age of girl as about 40 years with moderate built and 60 Kg. weight. He noticed 1 X 1 cm abrasion on neck. Apart from that, he has not noticed single injury on the body of prosecutrix Shamim. In his examination in chief, he stated that, the presence of seminal and blood stains on genitals were absent and tear to the hymen was old which was found ruptured. Menstrual history was two months amenorrhoea and cycle was irregular. On examination of the victim, he noticed no fresh blood or semen. In his cross-examination, he stated that, he did not notice injury mark on genitals of victim, so also neither any abrasion on the breast, lower part of abdomen and forearms were noticed. He has also noticed none of the nails of the prosecutrix were broken and gait of victim was normal. No injury was noticed to labia and as such, could not form definite opinion about forcible sexual intercourse and wanted to get it confirmed after getting CA report. He has also noticed having regard to weight of the victim she has every capacity to resist sexual assault. Apart from above, he has not noticed any injury on the back of victim. He has also not noticed foreign hair and victim was noticed to be habituated to sexual intercourse.

27. The evidence of PW-1 Bismillabi and that of PW-4 Baby Ayesha is based on hearsay evidence of Shaikh Rahemunissa and narration of prosecutrix PW-9. Necessary ingredients in the matter of awarding sentence under Section 354 of IPC is, use of criminal force or assault against woman for outraging her modesty. The culpable intention is an essential ingredients and same should be established by clear and unimpeachable evidence. Support can be drawn from the judgment of Apex Court in the matter of Ram Das Vs. State of West Bengal, AIR 1954 SC 711 for requirement of above referred ingredients so as to establish intention of accused to outrage modesty of woman, knowledge of the accused that such act would result in outrage is must. In the present case, the necessary ingredients of Section 354 of IPC, in our opinion, are absent, as it can not be concluded that, criminal force was used on the prosecutrix Shamim with intention to outrage her modesty. At least, no such evidence could be gathered and concluded from the testimonies of PW-1 Bismillabi, PW-3 Shaikh Rahemunissa, PW-4 Baby Ayesha

and PW-9 Shamimbi. The intentional assault, as is required under the Section 354 of IPC on the prosecutrix is at all not established from the version of above referred witnesses, as evidence of PW-9 Shamim is completely untrustworthy in the background of her conduct and medical evidence. Once, the appellant herein is acquitted of the charge of rape, the evidence as is brought on record, even if proves presence of appellant, the criminal force or assault on the prosecutrix is not proved. As such, the appellant herein, in our opinion, is entitled for quashing of conviction under Section 354 of IPC.

28. The next Section with which the appellant is charged i.e. 452 of IPC i.e. house trespass after preparation for hurt, assault or wrongful restraint.

29. As discussed here above, the evidence that is brought on record, does not disclose any preparation on the part of appellant for committing house trespass. At least, no such evidence is brought on record about preparation of the accused. The Section also provides that such trespass having been made for causing hurt to any person, is punished with imprisonment for term of 7 years. Once it is not established from the medical evidence in the present case that, the prosecutrix PW-9 Shamim has received any injury from the present appellant, it is really hard to sustain conviction of the appellant under Section 452 of IPC. Pre-requisite of Section 452 of IPC is conspicuously absent in the present case. Proof of preparation to commit offence under the Section is required to be established.

30. From the above referred evidence of PW-1 Bismillabi, PW-3 Shaikh Rahemunissa, PW-4 Baby Ayesha and PW-9 Shamim, it is required to be observed by this Court that the medical evidence at all does not support their case of rape. The material contradiction as are noted herein above from the evidence of PW-1 Bismillabi, PW-3 Shaikh Rahemunissa, PW-4 Baby Ayesha and that of PW-9 Shamim are also required to be taken note of. The conduct of prosecutrix PW-9 Shamim does not appear to be natural as she has not raised alarm the moment accused-appellant left her. Apart from the fact that, neither Raheminussa nor Abdul Wahab or Ashok Dhotare tried to stop him. As such, the case of alleged rape by the present appellant is at all not established, particularly in the light of evidence of PW-6 Dr. Tonde.

31. In view of above, the conviction of the present appellant-accused in Criminal Appeal No. 52 of 2013 is liable to be quashed and set aside.

32. For the reasons stated herein above, Criminal Appeal No. 52 of 2013 is allowed. The conviction and sentence of the appellant is quashed and set aside and the appellant is acquitted of the offence with which he was charged and convicted. Fine amount be refunded to the appellant.

33. Criminal Appeal No. 103 of 2014 filed by the State questioning the acquittal of respondent-accused is hereby dismissed.