
(1999) 06 BOM CK 0022

In the Bombay High Court

Case No : Criminal Appeal No. 276 of 1995

Undarya Narayan Dokaphode and another

APPELLANT

Vs

The State of Maharashtra and another

RESPONDENT

Date of Decision : 23-06-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 161

Evidence Act, 1872 — Section 3, 45, 61, 8, 9

Penal Code, 1860 (IPC) — Section 376(2)

Citation : (2000) 5 BomCR 152 : (2000) 1 MhLj 122

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

Bench : Division Bench

Advocate : A. V. S. Paradkar, for the Appellant; Mrs. Usha Kejariwal, for the Respondent

Judgement

Vishnu Sahai, J.—Through this appeal the appellants challenge the judgment and order dated 29-3-1995 passed by the Assistant Sessions Judge, Thane, in Sessions Case No. 359 of 1988, whereby they have been convicted and sentenced to undergo 10 years R.I. and to pay a fine of Rs. 3000/- each, in default to undergo 4 months R.I. for the offence u/s 376(2)(g) of the Indian Penal Code.

2. In short the prosecution case runs as under :

The informant victim Bayobai Dabhade P.W.3 is the wife of Mangal Dabhade P.W.5. At the time of the incident she was residing in her field in a hut, with her husband and her six children. On 20th April 1998 at about 9 p.m. while she was in her hut situate in Bhoyachapada, Dist. Thane, Mangal Dabhade, her husband asked her to call her mother. While she was on her way to her mother's place the appellants caught hold of her. When she tried to raise cries the appellant Parashuram Ladakya Sambare kept his hand on her mouth and thwarted her endeavour to do so. Parashuram also threatened to kill her in case she raised cries. Thereafter both the appellants committed rape on her in the field of

Katekar. When she escaped from their clutches she went to the house of her mother Gangubai. She did not inform her about the incident but returned with her to her hut. When she informed Mangal about the incident he slapped her and sent her away the next morning to her mother's house. Five days later Mangal asked her to prove that the appellants had raped her and threatened that if she failed to do so he would not keep her.

3. On 26-4-1988 Bayobai went to the house of Pandharinath Patil, P.W.4, Police Patil, and informed him that the appellants had raped her on 20-4-1988 at about 9 p.m. The same day Pandharinath Patil brought her to Bhiwandi Taluka Police Station, where her F.I.R. was recorded by P.S.I. Shantaram Ravale P.W.6.

4. After recording the F.I.R. P.S.I. Ravale P.W.6 sent victim Bayobai for medical examination. She was medically examined on 27-4-1988 at 11 a.m. at Municipal Dispensary, Bhiwandi. Her medical report shows absence of injuries over her body and vagina admitting two fingers. The opinion of the doctor was that there was no evidence that Bayobai had undergone sexual intercourse.

5. The investigation of the case was conducted in the usual manner. Thereafter the appellants were charge-sheeted and put up for trial. They were charged for the offence u/s 376(2)(g) of the Indian Penal Code to which they pleaded not guilty and claimed to be tired.

During trial in all the prosecution examined 7 witnesses, out of which the informant victim Bayobai rendered ocular account.

The defence of the appellants was denial but they examined no witness to substantiate it. The teamed trial Judge believed the evidence adduced by the prosecution and convicted and sentenced the appellants in the manner stated in para 1.

Hence this appeal.

6. We have heard Mr. A.V.S. Paradkar for the appellants and Mrs. Usha Kejariwal for A.P.P., the respondents. In our view this appeal deserves to be allowed for the evidence on record does not warrant that it would be safe to act on the solitary statement of the informant victim Bayobai Dabhade P.W.3.

7. In para 2 we have set out the prosecution story on the basis of the recitals contained in the statement of Bayobai Dabhade P.W.3. In short she stated that on the date of the incident, at about 9 p.m., her husband Mangal asked her to call her mother and while she was on her way, the appellants met her; caught hold of her; appellant Parashuram Ladakya Sambare pressed her mouth and threatened to kill her if she raised cries; and thereafter the appellants raped her. She stated that after the incident she went to her mother but did not inform her about the incident. She further stated that when she returned with her mother, she informed her husband Mangal about the incident who slapped her and sent to her mother's place. After five days he came and asked her to prove that she had been raped and threatened her that in case she did not do so he would not

keep her.

8. It is pertinent to point out that during cross-examination a suggestion was made to Bayobai that she was on visiting terms with appellant Undarya Narayan Dokaphode. In this connection it would be pertinent to advert to her cross examination. It was suggested to her that when she left for her mother's house the appellants were sitting at her place and she replied that she did not know about it. In para 9 she admitted that she had not visited the house of appellant Undarya Narayan Dokaphode, after the incident.

It would also be pertinent to mention here that Bayobai's husband Mangal in cross examination was suggested that on the evening on which the incident took place his daughter Kalpana was sent to call appellant Undarya Narayan Dokaphode to which he replied that he did not know whether she had been to the house of Undarya Narayan Dokaphode.

9. In our view it would not be safe to accept the solitary statement of Bayobai Dabhade P.W.3. She stated that her husband Mangal had sent her to call her mother when the incident took place. On the converse Mangal stated that she had gone to her mother's place to enquire about her health. We have our grave doubts that Mangal sent her to call her mother. Her cross examination reveals that she had a son aged about 16 years at the time of the incident. Cross examination of the Investigating Officer Shantaram Ravale P.W.6 shows that her son was aged about 18 years at that time. In our view had Mangal wanted to call Bayobai's mother he would have sent his son and not her.

10. Apart from this we find that Bayobai's conduct in not informing her mother about the incident was very unnatural.

Again the conduct of her husband Mangal in beating her after she informed him that the appellants had raped her and telling her that unless she proved her allegations against the appellants he would not keep her also shows that Mangal found some thing fishy in the story of rape which she gave for the first time in her F.I.R. six days after the incident.

Another circumstance which shows that the story of her being raped by the appellants was not above board is that in her cross examination Bayobai admitted that if her husband had not asked her to prove that she had been raped she would not have filed the F.I.R.

11. In our view, the conduct of Bayobai's husband Mangal slapping her on learning about the incident and telling her that if she proved her allegations against the appellants of being raped by them he would then only keep her shows that Mangal himself was not convinced about the genuineness of the story of rape by the appellants unfurled by Bayobai. Bayobai's admission that if her husband had not asked her to prove her innocence she would not have lodged F.I.R. also creates some doubt on the genuineness of the case unfurled by her.

12. We further find that in Bayobai's statement u/s 161 Cr.P.C. there is an

omission about appellant Parshuram keeping a hand on her mouth, restraining her from crying and threatening to kill her if she cried. When confronted with the said omissions all that she could answer was that she had mentioned the said facts and could not assign any reason why the said facts were not mentioned in statement u/s 161 Cr.P.C. We refuse to accept this explanation of hers. It is pertinent to point out that the said omissions have been proved by P.S.I. Shantaram P.W.6, the Investigating Officer.

13. Another circumstance which renders it unsafe to sustain the conviction of the appellants on the solitary testimony of the informant is that the F.I.R. was lodged 6 days after the incident.

We have earlier seen that the incident took place on 20-4-1988 but the F.I.R. was lodged six days later, on 26-4-1988 and the important thing to bear in mind is that it was lodged because of the threat of Bayobai's husband Mangal Dabhade P.W.5 that if she failed to prove her allegations he would not keep her.

14. Ms. Usha Kejariwal learned Counsel for the State strenuously urged that there was no reason for the informant victim to have falsely nominated the appellants in the F.I.R. and therefore the prosecution case as unfurled by her in the F.I.R. and deposed by her in the trial Court should be accepted by us.

We have reflected over the said submission. Merely because the appellants have not been able to give any reasons for their false implication would not mean that the infirmities in the statement of Bayobai referred to above, would stand cured.

15. It should always be borne in mind that the evidence of a witness who does not have any reason to falsely implicate is not ipso facto accepted by courts. It is only accepted by them if it is in tune with probabilities and inspires confidence. Although we hasten to add that the circumstance that a witness has no animus to falsely implicate would ordinarily make the Court slow to reject his/her testimony. But here since the evidence of Bayobai is not in conformity with probabilities and does not sound credible we do not think that it would be safe to accept it without corroboration.

16. For the said reasons in our view it would not be safe to sustain the conviction of the appellants on the solitary statement of the victim Bayobai Dabhade. We feel it in a fit case wherein the appellants deserve the benefit of doubt.

17. In the result this appeal is allowed. The convictions and sentences of the appellants for the offence punishable u/s 376(2)(g) I.P.C. are set aside. They are acquitted of the said offence. In case they have paid the fine it shall stand refunded to them. The appellants are in jail and shall be released forthwith unless wanted in some other case.

Appeal allowed.