

(2014) 07 BOM CK 0123
In the Bombay High Court
Case No : Criminal Appeal No. 268 of 1998

Vijay Prahlad Warankar

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 10-07-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311, 313
Penal Code, 1860 (IPC) — Section 342, 376, 376(2)(f)

Citation : (2014) ALLMR(Cri) 3310 : (2014) 3 BomCR(Cri) 760

Hon'ble Judges : M.L. Tahaliyani, J

Bench : Single Bench

Advocate : R.M. Daga, Advocate for the Appellant; T.A. Mirza, Addl. P.P,
Advocate for the Respondent

Final Decision : Disposed Off

Judgement

M.L. Tahaliyani, J.—The appellant has been convicted by the Additional Sessions Judge, Khamgaon by his judgment dated 24th July, 1998, for the offences punishable under Sections 342 and 376(2)(f) of Indian Penal Code. He has been sentenced to suffer R.I. for one year and to pay fine of Rs. 500/-, in default to suffer further R.I. for two months for the former offence and R.I. for 10 years and fine of Rs. 5000/-, in default to suffer R.I. for one year for the later offence.

2. The appellant was resident of village Tunki Bk., within the jurisdiction of Tamgaon Police Station, District Buldhana. He was staying with his family members in the said village. Bhaskar Namdeorao Lokhandkar (PW-2), father of the victim girl, was staying with his family members in the neighbouring house. He had two daughters viz., Prabhawati and Urmila. His younger daughter Urmila was about 8 years old at time of alleged incident of wrongful confinement and rape. Her date of birth is 23rd April, 1985.

3. The alleged incident had occurred on 20th July, 1993 at about 6.30 or 7 p.m. at the house of the appellant. The younger daughter of Bhaskar (PW-2) Ms. Urmila was called by the appellant in his house and he had inserted his penis in

vagina of Urmila. Thus, forcible penetration had resulted into bleeding. The appellant thereafter asked Ms. Urmila (PW-1) to wear her underwear and go home. However, her underwear was soaked with blood, the same was washed by the appellant and she was again asked to wear the same and go home. She was directed by the appellant that she should not disclose any of the facts to her family members as the police report may result into arrest of the appellant and PW-1. PW-1 went home and did not disclose anything to her family members. She was, however, crying and ultimately she had disclosed the true facts and narrated the incident to her sister and mother. The matter was reported to the Police at about 7.30 a.m. On 21st July, 1993. At this stage, it may be noted here that the Police Station was about 18 kms., away from the Village. First Information Report No. 123 of 1993 was registered u/s 376 of Indian Penal Code against the appellant on the complaint given by PW-2. Statement of PW-1 was recorded. Statements of her family members were also recorded and she was referred to Medical Officer of Sonala. The Medical Officer, however, was of the view that she needed to be shifted to General Hospital, Khamgaon. Accordingly, she was taken to General Hospital, Khamgaon on the next day at about 8 a.m. She was examined by the Medical Officer. The Medical Officer had taken vaginal swabs and had handed over to the Police.

4. During the course of investigation, clothes of the appellant and PW-1 were seized by the Police. Spot Panchnama was drawn. A gunny bag on which the PW-1 was made to lie down by the appellant was also seized, as it was found to have blood stains. After receipt of Chemical Analyzer's Report and completion of investigation, charge sheet was filed against the appellant.

5. A charge under Sections 342 and 376(2)(f) of Indian Penal Code was framed against the appellant by the learned Additional Sessions Judge, Khamgaon. The appellant pleaded not guilty and claimed to be tried.

6. The prosecution had examined in all 15 witnesses in support of its case. The statement of the appellant u/s 313 of Cr.P.C. was recorded after completion of evidence of prosecution. The appellant had examined DW-1 Digambar Patil to establish that he was not at home at the time of the alleged incident.

7. The learned trial Court after evaluating the evidence of prosecution witnesses and after considering the evidence of DW-1 had come to the conclusion that the defence taken by the appellant was false and that PW-1 was absolutely reliable witness. He, therefore, convicted the appellant for the above stated two offences.

8. The learned counsel Mr. Daga appearing on behalf of the appellant has submitted that the evidence of PW-1 and her family members appears to be doubtful, as Smt. Bhagirathibai, maternal aunt of PW-1, to whom the incident in question was disclosed by PW-1 first of all has not been examined as prosecution witness. It is further contended that the Medical Officer who had initially examined the PW-1 has also not been examined as prosecution witness. Apart from this, the learned counsel has submitted that the conduct of PW-1 indicates

that she has been tutored by her parents to implicate the appellant in a false case. Though the appellant in his statement u/s 313 of Cr.P.C. has not taken any specific defence in this regard except to show his willingness that he wanted to examine the defence witness, the prosecution witnesses were cross examined to demonstrate that there was discord between PW-2 and the father of the appellant and therefore, appellant has been implicated in a false case.

9. Before I consider the arguments of the learned counsel, let me discuss the facts in brief. PW-1 is the prosecutrix/victim. PW-2 is her father-Bhaskar Lokhandkar. PW-3 is the elder sister of PW-1. PW-4 is the mother of PW-1. PW-5 Narayan Nimbolkar is resident of Tunki, who was present at the house of PW-1 when the incident was narrated by PW-1 to her family members. PW-6 is a Panch Witness. PW-7 was on duty as Home-Guard in whose presence a blood sample bottle brought by Police Constable Samadhan from Hospital was seized under Panchnama by the Police. PW-8 is the Panch Witness in whose presence clothes of the appellant were seized by the Police. PW-9 Head Constable Buckle No. 308 had noted down the complaint of PW-1 and had made entry in the Occurrence Register. PW-10 is the Police Constable Buckle No. 910 who had carried seized articles to the office of Forensic Science Laboratory. PW-11 Head Constable Buckle No. 398 had escorted the PW-1 to General Hospital, Khamgaon. PW-12 is a Medical Officer who had examined PW-1 at General Hospital, Khamgaon. PW-13 is a Panch Witness in whose presence Spot Panchnama was drawn and gunny bag having blood stains was seized from the house of the appellant. PW-14 was attached to Tamgaon Police Station on the date of incident and had registered F.I.R. No. 123/1993 against the appellant. He had recorded the statements of various witnesses during the course of investigation and had also prepared Spot Panchnama (Exh. 40). He had also seized clothes of PW-1 under the Panchnama (Exh. 20). The gunny bag was seized under the Panchnama (Exh. 41 and 42). He had collected the blood sample of PW-1 and vaginal slides prepared by the Medical Officer from Police Constable Buckle No. 398 and had drawn Panchnama (Exh. 27). The appellant was arrested on 29th July, 1993 and was referred to the Medical Officer. Chemical Analyzer's Reports were received by this witness. They have been exhibited as Exh. 46. PW-15 was working as Gram Sewak at village Tunki and has produced Birth and Death Register maintained by Gram Panchayat of the Village. According to this witness, the date of birth of PW-1 was 23rd April, 1985.

10. PW-1 Urmila had stated that on the date of incident, she was called by the appellant at his house and the appellant had inserted his penis in her vagina, which resulted in heavy bleeding. The appellant had laid PW-1 on a gunny bag on the ground. After completion of the act, the appellant had worn underwear to the PW-1. However, due to heavy bleeding, her underwear was soaked with blood and therefore, it was washed by the appellant and asked the PW-1 to wear the same. PW-1 was told by the appellant that she should not disclose the incident to any body as the Police might arrest the appellant and the PW-1 both. PW-1, therefore, did not disclose the incident to any body for some time. However, she

was continuously crying. Ultimately she narrated the incident to her sister and later on to the mother. She was taken to the Hospital by her maternal aunt Smt. Bhagirathibai. The Doctor told them that it was a police case and she needed to be referred to Sonala Hospital. In the meantime, PW-2, father of PW-1, reached there. He came to know about the incident and took the PW-1 to Sonala Police Out Post. First Information Report of PW-2 Bhaskar was recorded and PW-1 was referred to Sonala Hospital. She was later on sent to General Hospital, Khamgaon, for treatment. It is stated by the PW-1 that her skirt, shirt and underwear were seized by the Police. Spot Panchnama was drawn in her presence.

11. I have gone through the cross examination of this witness. It has come in the cross examination of this witness that father of the appellant was at home. This in fact is the story of the prosecution also. However, the prosecution story is that, the incident had occurred after the father of the appellant had gone out. A searching cross examination of the witness was made. However, the witness had stuck to her examination-in-chief and there is nothing in the cross examination which can create doubt about the genuineness of evidence of this witness. The witness was about 8 years old at the time of the incident and there was no reason for the witness to tell lies against the appellant. PW-2 Bhaskar has more or less supported the evidence of PW-1. He has identified his signature on the report Exh. 19. He has stated that his daughter PW-1 was referred to Sonala Hospital and from there, she was taken to General Hospital, Khamgaon. The clothes of PW-1 were handed over to the Police by this witness under Panchnama Exh. 20. The PW-1 was examined by a male Doctor. PW-2 (father) was asked as to whether he was insisting for examination by a female Doctor, which he replied in negative. He had admitted that he had not gone to the house of the appellant before going to the Police Station. He has denied that appellant was not present in the village on the date of incident. He has denied that PW-1 had told him that she had fallen down on a stone and therefore, she had sustained the injury. At this stage, it may be noted here that PW-1 had earlier stated to her sister and mother that she had fallen down on a stone and therefore, she had sustained injury. I do not think that the statement made by the PW-1 to that effect to PW-3 and PW-4 in any manner creates doubt about the correctness of the prosecution case as she was directed by the appellant to say that she had fallen on stone. PW-3 Prabhawati, daughter of PW-2 and sister of PW-1, and PW-4 Nirmalabai, mother of PW-1 and wife of PW-2, have also stuck to the prosecution case. They have given evidence as to how the incident was narrated to them by the PW-1. Their cross examination is also on the peripheral issues and does not in any manner create any dent in the prosecution case. PW-5 Narayan who was present at the house of PW-1 at the time when the PW-1 narrated the incident to PW-3 and PW-4 and to her maternal aunt Smt. Bhagirathibai. This witness was also cross examined to demonstrate that he was not present. But, there is nothing in the cross examination to doubt his credentials.

12. PW-6 is the Panch Witness in whose presence blood sample bottle was

collected from the Police Constable by the Police Officer under Panchnama Exh. 25. Similarly, PW-7 had also stated that he had handed over one blood bottle to the Investigating Officer under Panchnama Exh. 27. PW-8 in whose presence the clothes of the accused/appellant were seized, has not been cross examined at all. PW-9 was attached to Police Station Tamgaon. He was incharge of Sonala Police Out Post. PW-2 had visited Police Out Post in the night intervening 20th July and 21st July of 1993 at about 1.45 a.m. His complaint was recorded at Exh. 18 and entry was taken in Occurrence Register at Sr. No. 47 of 93 on 21st July, 1993. He had identified the occurrence entry at Exh. 19. PW-2 was accompanying PW-1. P.W. 1 was referred to Sonala Hospital through Police Constable Buckle No. 864 under a requisition letter to the Medical Officer. The requisition letter is at Exh. 31. Since no lady Doctor was available, PW-1 was referred to the General Hospital, Khamgaon. PW-9 thereafter visited village Tunki to apprehend the appellant. The appellant was not available at home. He, therefore, handed over the occurrence report to A.P.I. Mr. Palandurkar, who registered the offence vide F.I.R. No. 123/1993. The appellant was arrested on 29th July, 1993. His clothes were seized by PW-9 under the Panchnama Exh. 29 as directed by A.P.I. Mr. Palandurkar. It is admitted position that the offence was not registered by this witness at Tamgaon Police Station. It is admitted by this witness that the crime number was mentioned in the requisition letter later on by him. This, however, does not damage the prosecution case in any manner as the story is absolutely clear to the extent that the matter was reported at Sonala Out Post and later on F.I.R. was registered at Tamgaon. The admission of this witness that he did not search the appellant/accused at village Tunki at places other than the house of the appellant, to my mind, does not in any manner damage the prosecution case. The witness was not under obligation to search nearby villages on the same night. He had also not visited the house of the other residents of the village. To my mind this was also not obligatory on the part of this witness.

13. PW-10 had carried the seized articles to Forensic Science Laboratory and deposited the same on 29th July, 1993. He had obtained the acknowledgment of the clerk from the Laboratory. He was deputed under valid duty-pass Exh. 33. A copy of requisition letter is produced at Exh. 34. There is no cross examination of this witness worth mentioning in the present judgment. PW-11 had escorted PW-1 to Khamgaon General Hospital. A blood sample bottle handed over to him by the Medical Officer was seized by A.P.I. Shri Palandurkar under Panchnama Exh. 27. This part of evidence of PW-11 is corroborated by the panch witness PW-7 Vishnu.

14. PW-12 is one of the most important witnesses of this case. He had examined the victim girl. He found that the girl was conscious, but finding difficulty in walking. Her underwear was found soaked with blood. There were no external injuries on her person. The local examination revealed that-

[i] hymen was torn irregularly with blood oozing from torn side of hymen.

[ii] there was a tear fourchette above $1/2 \times 1/2 \times 1/4$ cm.

Urethral slide and vaginal smear were collected and were handed over to the Police Constable Samadhan. Police Constable Samadhan has been examined as PW-11. He has stated that a blood sample bottle and slides were given to him by the Medical Officer and they were seized by A.P.I. Shri Palandurkar under Panchnama Exh. 27. I do not find it necessary to examine the rest of the evidence of this witness pertaining to age of PW-1 as there is a concrete evidence in the form of testimony of PW-15 regarding age of the victim girl. In any event, this witness has also stated that PW-1 was below 14 years of her age.

15. PW-13 was present when the spot panchnama was drawn. He had seen blood stains in the second room of the house of the appellant. Panchnama was drawn at Exh. 40. Police had seized one gunny bag, which was seized under Panchnama Exh. 41. House search of accused was taken under panchnama Exh. 42. Clothes of PW-1 were seized in presence of this witness under Panchnama Exh. 20. This witness has denied the suggestion that he had not visited the house of the appellant and that he was taken to the house of PW-2 and that his signatures were taken at the house of PW-2. He has also denied the suggestion that there was discord between father of the appellant and PW-2 (father of P.W.-1).

16. PW-14 Mr. Sudhakar Palandurkar is the investigating officer of this case. He had received Occurrence Report from Head Constable PW-9 Shri Namdeo Sawle and had registered F.I.R. No. 123 of 93. The printed F.I.R. is at Exh. 44. He had recorded the statements of PW-3, PW-4 and PW-5. He prepared the spot panchnama Exh. 40, seizure panchnama Exh. 41 and search panchnama Exh. 42. It may be noted here that gunny bag was seized under the seizure panchnama Exh. 41. He had also recorded the statements of PW-1 and PW-2 and other witnesses. This witness had forwarded the seized articles to the Forensic Science Laboratory through Police Constable Buckle No. 910 (PW-10). The appellant was arrested on 29th July, 1993 and was referred to Medical Officer for examination. During the course of cross examination, this witness has admitted that he did not remember whether he had recorded the statement of Dr. Mahale of village Tunki. He has denied the suggestion that Panchnama was drawn near the temple and that blood stains were found on a stone. There is nothing more in the cross examination of this witness which needs to be mentioned in the present judgment. PW-15 was working as Gram Sewak. He has produced the original Birth and Death Register of the Gram Panchayat. The entry of birth of PW-1 was available in the said register. Certificate Exh. 51 was issued by this witness on the basis of the entry in the Birth and Death Register. According to this witness, the date of birth of PW-1 was 23rd April, 1985.

17. As such, it is established beyond all reasonable doubts that PW-1 was 8 years 2 months old at the time of incident. This part of the prosecution story, in fact, is not challenged by the defence. The defence counsel mainly argued that in the absence of examination of Medical Officer of village Tunki and Smt. Bhagirathibai who was present at the house of PW-1, PW-2 and PW-3 when the incident was narrated by PW-1 to her parents and sister, have not been examined. It is

submitted that there were several possibilities of concocting a false story against the appellant. It is further submitted that the prosecution was under obligation to examine the Medical Officer of village Tunki who had occasion to see the PW-1 first in time after the incident. I do not find any substance in this argument inasmuch as it has come on record in so many words that the Medical Officer of village Tunki directed the PW-2 to go to Sonala as it was a police case. As such, examination of Medical Officer of village Tunki would not have added or deducted anything from the prosecution case. Similarly, non examination of Smt. Bhagirathibai, to my mind, was also not fatal to the prosecution case. It may be noted here that Smt. Bhagirathibai was maternal aunt of PW-1. It is not that she has been withheld intentionally by the prosecution. Unless it is brought on record that there was some ulterior motive behind withholding the witness, non examination of particular witness will not necessarily be fatal to the prosecution case. It need not be stated here that it is very well settled that the prosecution is not under obligation to examine almost all witnesses cited in the charge sheet. It is the prerogative of the prosecutor to decide the number and order of examination of witnesses. No doubt, the court in a given case may call any witness u/s 311 of Cr.P.C., if the examination of the said witness is necessary for just and proper decision of the case. In the present case, there was no occasion for the learned trial Judge to exercise his power u/s 311 of Cr.P.C. I do not think that there is anything on record to show that the non examination of Smt. Bhagirathibai has proved to be fatal to the prosecution case.

18. The discussion of the evidence of prosecution witnesses herein above clearly shows that the cross-examination of none of the witnesses has created any doubt in the mind of the trial Court about correctness of the prosecution case. The incident had occurred on 20th July, 1993. After that the victim girl, accompanied by her father, had approached Sonala Police Chowki on the night intervening 20th July and 21st July, 1993. As such there was no delay at all in lodging the Report. The victim was referred to Tunki Hospital immediately after the occurrence report. She was referred to Sonala Hospital as the Medical Officer of Tunki Hospital had refused to entertain the case being a medico legal case. She was further referred to General Hospital, Khamgaon, immediately on the next day. The injuries found on the person of PW-1 were so deep that the Medical Officer at Khamgaon could also observe the injuries. The Medical Officer has specifically stated that the underwear of PW-1 was found soaked with blood.

19. It is thus clear that the appellant had acted violently at the time of incident and had caused severe injuries to the private part of the PW-1. The initial version given by PW-1 to her sister and mother regarding her fall on stone was obviously at the instance of the appellant. It is well known that children victims of sexual abuse are prone to the dictates of their molesters. The abusers use number of tactics to ensure the victim's silence. Giving gifts, encouraging the child to keep secrets and extending threats are the common tactics. The abusers may also make a child afraid of being hurt physically. PW-1 was told by the appellant that she should not disclose the facts to any body and that she should tell her parents

that she had a fall on a stone. She was also told that disclosure may result into arrest of PW-1 and the appellant. It is because of this reason that the PW-1 initially tried to suppress the facts. However, the facts were revealed within a short time and police was approached immediately after the disclosure. There is no reason to disbelieve P.W. 1. Her evidence is corroborated by the evidence of Medical Officer (P.W. 12).

20. The trial Court has rightly rejected the evidence of DW-1 through whose evidence an attempt was made to establish that the appellant was not at home in his village at Tunki at the time of alleged incident. The incident had occurred in the evening of 20th July, 1993. DW-1 has given the evidence that the appellant had visited his house on 17th July, 1993 and had stayed with him for about 10-12 days. After about first 4-5 days of his stay, father of the appellant had come and he had informed the appellant that an offence had been registered against the appellant by the Police and that appellant was required for bail. The appellant had been apprehended from the house of DW-1. DW-1 has admitted in his cross examination that he had not enquired from the father of the appellant as to why it was necessary to take the appellant for bail. He had also not enquired as to what type of offence was registered against the appellant. The conduct of DW-1 to this extent appears to be highly doubtful inasmuch as the appellant was son of his wife's elder sister. In the normal course, it was expected that he would have made enquiries from the father of the appellant. The evidence of this witness appears to be false and the witness seems to have been introduced to create a false alibi. His evidence has been rightly rejected by the trial Court.

21. There was no scope for doubting the prosecution case. The trial Court has rightly come to the conclusion that the appellant had taken the girl to his house, closed the door, confined her in the room and committed rape on her. Since the girl was below 14 years of age, the appellant has been convicted for the offence punishable u/s 376(2)(f) of Indian Penal Code. In my opinion, the appellant has been rightly convicted for the offence of wrongful confinement and rape of girl below 12 years of age. The conviction and sentence imposed on him is absolutely beyond the scope of interference. The appeal deserves to be dismissed and is accordingly dismissed.

The appellant shall surrender before the trial Court within a period of two weeks from today. If he fails to surrender in accordance with the order passed by this Court, the trial Court shall take necessary steps to get him arrested and send him to prison for serving out the sentence.

Appeal accordingly stands disposed of.