

(2012) 04 BOM CK 0081

In the Bombay High Court

Case No : Criminal Appeal No. 1041 of 2005

Yogesh Janardhan Shinde

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 11-04-2012

Acts Referred:

Constitution of India, 1950 — Article 12

Penal Code, 1860 (IPC) — Section 376, 450, 451, 506

Citation : (2013) BomCR(Cri) 259

Hon'ble Judges : A.M. Thipsay, J

Bench : Single Bench

Advocate : None, for the Appellant; R.M. Gadhvi, APP for the State, for the Respondent

Final Decision : Allowed

Judgement

A.M. Thipsay

1. The appellant was prosecuted on the allegations of having committed offences punishable under Sections 450, 376 and 506 of Indian Penal Code (IPC). The Learned 1st Adhoc Additional Sessions Judge, Kalyan, who tried him, found him guilty of offences punishable under Sections 451 and 376 of IPC. The Learned 1st Adhoc Additional Sessions Judge, sentenced the appellant to undergo Rigorous Imprisonment for six months and to pay a fine of Rs. 500/, with respect to the offence punishable u/s 451 of the IPC and to undergo Rigorous Imprisonment for five years and to pay a fine of Rs. 2,000/, with respect to the offence punishable u/s 376 of IPC. There was another accused who was also prosecuted in the said case along with the appellant, but the Learned 1st Adhoc Additional Sessions Judge, found him not guilty and acquitted him. The appellant, being aggrieved by his conviction and the sentences imposed on him, has approached this Court by filing the present appeal. When the appeal came up for hearing, it was revealed that the appellant was released from prison after having served the sentences imposed upon him. Nevertheless, the appeal having been admitted, was required

to be decided on merits.

2. When the appeal appeared on board for hearing on 2.4.2012, nobody appeared for the appellant. On 9.4.2012, to which date the matter was adjourned, also, nobody appeared for the appellant. The matter was then kept on 10.4.2012, when also, nobody appeared and then ultimately, when it appeared on board today, though nobody appeared for the appellant, it was decided to dispose of the appeal, after hearing Smt. R.M. Gadhvi, the learned APP for the Sate.

3. With the assistance of the learned APP, I have gone through the entire evidence adduced during trial and perused the record of the case. I have gone through the impugned judgment and order.

4. The prosecution case, as was put forth before the trial court, was in brief as follows :

The victim (name not mentioned to avoid disclosure of identity) is a married woman. She used to reside at Ulhas Nagar with her husband, in front of the house of one Smt. Rambhadevi (PW1). The appellant and the other accused were also residing in the same locality and near the room, where the victim was residing with her husband.

That on 2.6.1999, in the night, the victim was sleeping in her room. Her husband was also sleeping in the room. That at about 2.00 a.m., the appellant entered in her room. He caught the victim and pressed her mouth. Thereafter, the appellant and the original accused No. 2 Raju, lifted her and took her out of the house. The victim was taken to the back side of her house, where she was raped by the appellant. The victim started weeping and returned to her room, after the act was over. The appellant and the other accused had already run away towards their respective houses. The victim informed whatever had happened to her husband. It is thereafter, that the matter was reported to the police, in the morning. The statement of the victim was treated as First Information Report (FIR) (Exhibit 45), on the basis of which investigation commenced. The appellant and the other accused came to be arrested and prosecuted as aforesaid.

5. The prosecution examined seven witnesses during the trial. The first witness is Smt. Rambhadevi, neighbour of the appellant as well as the victim. The second witness is the victim herself. The third witness Satish Chandra is a panch, in respect of the arrest panchnama (Exhibit 47), but he did not support the case of the prosecution and was declared hostile. His evidence is of no assistance to the prosecution. The fourth witness, Dr. Sunita, is the one who had examined the victim on 2.6.1999. The fifth witness Shaligram Sonawane is a panch in respect of the panchnama (Exhibit 55), which relates to the recovery of a knife (Article 12), pursuant to the information disclosed by the appellant. The sixth witness witness Dr. Rajan Pore is the Medical Officer, who had examined the appellant on 2.6.1999. The seventh witness Mallikarjun Hajare, Sub Inspector of Police, attached to Ulhas Nagar Police Station at the material time, is the Investigating

Officer.

6. It is clear that the case of the prosecution basically rests on the testimony of the victim. Her husband, though a witness, was not examined, during the trial.

7. Before considering the testimony of the victim, the other evidence adduced against the appellant, may be discussed in brief :

Smt. Rambhadevi (PW1) was expected to say that she had seen the appellant having a knife and entering in the house of the victim, with the other accused present outside the house. She was also expected to say that the appellant had taken the victim out of her house. However, Smt. Rambhadevi did not support the case of the prosecution. She was declared hostile and the APP's efforts, to secure some evidence in favour of the prosecution from her by putting leading questions to her, have not been successful.

8. The evidence of Dr. Sunita (PW4) shows that an abrasion (scratch) on "right iliac crest" measuring 3 cm. x 2 cm. was found on the body of the victim. No other injuries on her body were noticed. This witness was unable to give an opinion that the victim had been subjected to any forcible sexual intercourse.

9. The evidence of Shaligram Sonawane (PW5) shows that on 6.6.1999, he had been to Ulhas Nagar Police Station, for his own work, when "Hazare Saheb" (PW7) called him and showed him two persons, one of whom was the appellant and asked him, whether they were from his Ward. This witness claimed that he knew the appellant. He then states that there were some writings made at the Police station and that the appellant disclosed certain information to P.S.I. Hazare, pursuant to which, the police and the panchas were led to the house of the appellant, from where a knife was recovered. In the cross examination, he admitted that he had no talk with the appellant at that time, in the police station. He also admitted that the appellant did not talk anything to any Police Officer or policeman. He also admitted that the Memorandum Panchnama (Exhibit 54) had already been written, when he went to the Police station. He also admitted that he did not go with the appellant on the back side of his house, from where the knife was supposedly recovered.

10. In his evidence, Dr. Rajan (PW6) said that on examination of the appellant, he did not find any external injuries on his body. He found the appellant capable of performing sexual intercourse.

11. The evidence of P.S.I. Hazare (PW7) speaks about all steps taken by him during investigation. It shows that the appellant was arrested on 2.6.1999 itself. P.S.I. Hazare also states about seizure of certain incriminating articles and of sending them to the Director of Forensic Science Laboratory, Mumbai, for analysis and opinion. He speaks about the seizure of the knife on 6.6.1999.

12. Thus, the evidence makes the following clear. First, that except a scratch, the victim had not sustained any injuries, whatsoever. Secondly, even the appellant had not sustained any injuries, whatsoever.

13. The evidence of the victim/prosecutrix may now be examined. According to the prosecutrix, the appellant had entered inside her room at 2.00 a.m., when her husband was also sleeping in the said room; and that, the appellant had caught her, pressed her mouth, lifted her with the help of the other accused and had taken her out of the room. Then, she was taken to the backside of her house, where she was raped. In her evidence, she did not make any mention about the appellant having a knife with him, or having threatened her by using a knife. From this, the recovery of the knife, allegedly at the instance of the appellant, is rendered meaningless. It may, however, be observed, that even otherwise the evidence in that regard, cannot be considered as satisfactory.

14. In the cross examination, it was brought on record that certain matters spoken about her in her evidence, had not been mentioned by her in the FIR (Exhibit 45). However, it is unnecessary to discuss those aspects. What needs to be discussed is the probability of the version of the victim/prosecutrix being true and in that context, certain admissions elicited from her in the cross examination, need to be kept in mind.

15. The victim admitted in the cross examination that at the material time, she and her husband had slept on a "khat" in the house. Though she denied the suggestion, that her evidence that the appellant and the other accused had lifted her and taken her out of the house was false, the fact remains, that it would be extremely difficult to accept that the victim could be taken away forcibly from her room, when her husband was sleeping besides her. In the cross examination, the victim said that the appellant made her sleep on the ground and also admitted that there were stones at the place of occurrence. If this would be so, then the prosecutrix was expected to have, atleast some more scratches on her person. But, as aforesaid, the medical evidence does not show the presence of any injuries, except a scratch on right iliac crest.

16. The victim also admitted in the cross examination that when she returned back to her house, her husband was standing and waiting for her at the house. She also admitted that as seen as she saw her husband, she started weeping. She also admitted that she wept for the first time at the time of the incident, on seeing her husband. She also admitted that one could hear the shouts made at the place of occurrence, at her house. She also admitted that there were other houses, adjoining her house, and there were hutments adjoining the place of occurrence and that people were residing in those hutments. It also becomes clear from the cross examination that the victim knows the appellant very well, in as much as, she has said that the appellant was, at the material time, residing in his house along with his parents, brothers and sisters.

17. Considering the entire evidence, though it is not possible to hold that nothing had happened in the night in question and that the victim has invented a false and got up story, the possibility of the victim being a consenting party to the act of sexual intercourse, which might have taken place between the appellant and her, cannot be overlooked. The story put forth by the victim is improbable in

several respects. First of all, it is difficult to accept that the victim could be picked up against her wish, while she was sleeping by the side of her husband on a khat. It is difficult to imagine that someone would dare to enter the room in which the victim was sleeping with her husband and would dare to pick her up from the side of her husband and successfully take her away to a nearby place, which again was surrendered by several hutments with people living there. The story that because her mouth was pressed, she could not shout, cannot be accepted easily, as certainly the prosecutrix could have drawn the attention of her husband, when she was allegedly being picked up and certainly all the adjoining neighbours and hutment dwellers, when she was taken to the backside of her house. It would not be easy for any person to rape a grown up and married woman under these circumstances and if the woman would offer resistance. There are also no marks of any injuries on the body of the victim, showing any attempt of resistance on her part.

18. The significant aspect of the matter however is, when the victim came home, her husband was awake and had been waiting for her. This is an admitted position. The victim naturally owed an explanation to her husband, as to where she had gone in those night hours, without informing him. Once the victim sensed the likelihood of her husband questioning her on this aspect and detecting that she had gone out with the appellant or for the purpose of meeting him, it was quite natural for her to allege rape, so that the husband might not take her as a consenting party.

19. Though, in the ordinary circumstances, a woman is not likely to make a false allegation of rape, when she is caught or is suspected of having had sexual intercourse with someone outside the wedlock, she is quite likely to try to protect her character, by claiming that what was done, was without her consent. Such a possibility is quite clear in the facts and circumstances of the present case, where the story of the victim when judged by the ordinary yardstick, appears to be quite improbable.

20. Thus, even if it is assumed that sexual intercourse had indeed taken place between the appellant and the victim, as alleged by her, the possibility of the victim being a consenting party to the said act, cannot be overruled. Certainly, atleast a doubt that the sexual intercourse, if any, between the appellant and the victim was consensual, arises upon a consideration of the entire evidence. The appellant was entitled for the benefit of such reasonable doubt and should have been acquitted. The appreciation of evidence, as done by the trial court, is not proper or legal. The impugned order therefore needs to be interfered with, in the interest of justice. The appeal is allowed.

The impugned judgment and the order of conviction is set aside.

The appellant stands acquitted.

Fine if paid, to be refunded to him.

The appeal stands disposed of in aforesaid terms.