

Bombay High Court

Ayub Babu Irani vs The State Of Maharashtra on 8 August, 2017

Bench: A.M. Badar

207-APPEAL-44-2012-J.doc

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.44 OF 2012

AYUB BABU IRANI

)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA

)...RESPONDENT

Ms.Nasreen Ayubi, Appointed Advocate for the Appellant.

Ms.Pallavi N. Dabholkar, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 7th & 8th AUGUST 2017

ORAL JUDGMENT :

1 By this appeal, the appellant / accused no.1 is

challenging the judgment and order dated 28 th November 2011 passed by the learned Additional Sessions Judge, Pune, in Sessions Case No.410 of 2010 thereby convicting him of offences punishable under Sections 376, 366A and 506(2) of the Indian Penal Code (IPC) and sentencing him rigorous imprisonment for 7 years, 1 year and 1 year respectively, on each count. Apart from avk 1/24 207-APPEAL-44-2012-J.doc this, for the offence punishable under Section 366A of the IPC, the appellant / accused no.1 is also sentenced to pay fine of Rs.1,000/- and in default, to undergo further rigorous imprisonment for 2 years. Co-accused i.e. accused no.2 Rupesh Mhaske, whose appeal is not before this court, is also found guilty of the offence punishable under Section 366A of the IPC and he is sentenced to suffer rigorous imprisonment for 1 year, apart from direction to pay fine of Rs.5,000/- and in default, to undergo further rigorous imprisonment for 1 month. Accused no.3 Imran Jafari came to be acquitted by the impugned judgment and order. For the sake of convenience, the appellant / accused hereinafter be referred to in his original capacity as accused no.1. 2 Facts leading to the institution of the present appeal can be summarized thus :

(a) According to the prosecution case, the prosecutrix, who is examined as PW1 is a minor daughter of PW3 Mangal. They were residing at Patel Estate Slum at Pune. The prosecutrix was working with

a caterer and was having a boyfriend named Rahul avk 2/24 207-APPEAL-44-2012-J.doc Borade (PW8). The incident in question, according to the prosecution case, took place in night hours on 11th February 2010. In the evening of that day, the prosecutrix and her friend PW8 Rahul Borade, indulged in chitchatting in the cycle parking area of Shivaji Nagar Railway Station at Pune. At that time, reportedly, all accused persons were staring at the prosecutrix. At about 8.30 p.m., the prosecutrix left company of PW8 Rahul Borade and started returning to her house. As her footwear was broken, she was unable to walk properly. One of the accused persons then came towards her and offered to give fevicol for mending her footwear. The prosecutrix accompanied him towards the direction of Khadki Railway Station. During that journey, at public water tap, she attempted to drink water. At that time, another accused namely accused no.2 Rupesh Mhaske came. These both accused persons accompanied by the appellant /accused no.1 Ayub Irani dragged her towards Maruti Service Centre and while accused no.2 Rupesh Mhaske and accused no.3 Imran Jafari waited nearby, accused no.1 Ayub Irani committed rape on her, in the secluded area behind Shivaji Nagar S.T. stand. Apprehending that other avk 3/24 207-APPEAL-44-2012-J.doc accused persons may commit rape on her, the prosecutrix ran away in nude condition.

(b) According to the prosecution case, PW2 Rahul Kamble and PW6 Sandeep Raut helped the prosecutrix and their family members provided clothes to her. Friends of the prosecutrix were then contacted telephonically, so also her parents. The prosecutrix was then taken to Police Station Shivaji Nagar, where her report (Exhibit 70) came to be recorded by PW11 A.P.I. Milind Chavan. She was then sent to Sassoon Hospital where PW9 Dr.Archana Sankpal, Gynecologist, conducted her medical examination. The prosecutrix was also subjected to the ossification test, the report of which is at Exhibit 6.

(c) During course of investigation, the spot came to be inspected on 12th February 2010. Articles found on the spot of the incident including clothes of the prosecutrix came to be seized vide seizure panchnama Exhibit 79. Statement of witness came to be recorded. Routine investigation followed. Seized articles were avk 4/24 207-APPEAL-44-2012-J.doc sent for chemical analysis and after completion of investigation, all three accused persons including appellant / accused no.1 came to be charge-sheeted. Charge for the offence punishable under Sections 376, 366A read with 34 and 506(2) read with 34 of the IPC came to be framed and explained to the appellant / accused no.1 by the learned trial court. Charge for the offence punishable under Section 366A read with 34 of the IPC and Section 506(2) read with 34 of the IPC came to be framed and explained to other accused persons also.

(d) As accused persons abjured the guilt, the prosecution has examined in all eleven witnesses to bring home the guilt to accused persons. The prosecutrix came to be examined as PW1. The report lodged by her is at Exhibit 70. PW2 Rahul Kamble and PW6 Sandeep Raut are stated to be the persons, who had witnessed the prosecutrix in nude condition and who helped her in getting clothes. Mangal - wife of Mohan, is mother of the prosecutrix and she is examined as PW3. In order to prove age of the prosecutrix, the prosecution has examined Jayashree Lembhe, avk 5/24 207-APPEAL-44-2012-J.doc Head Mistress of Dr.Babasaheb Ambedkar Primary School, as PW4. Sanjay Divekar, a person who allegedly saw accused no.1 Ayub Irani at Ration shop by the side of Shivaji Nagar Railway Station at the time of the incident is examined as PW5. PW7 Rajesh Shinde is

a panch witness to the spot panchnama which is at Exhibit 79. PW8 Rahul Borade is the boyfriend of the victim girl. He is declared hostile by the prosecution. PW9 Dr.Archana Sankpal is the Medical Officer of Sassoon Hospital, who examined the prosecutrix soon after the incident. PW10 P.I. Ms.Maya Bankar is the Investigating Officer where as PW11 Milind Chavan A.P.I, is the Police Officer who recorded the First Information Report (FIR) and who send the prosecutrix for medical examination.

(e) The defence of the appellant / accused no.1 Ayub Irani, as seen from the line of the cross-examination of prosecution witnesses is that of total denial. According to him, he had seen the prosecutrix indulged in sexual intercourse with her boyfriend PW8 Rahul Borade and therefore, he reported the matter to police, and therefore, he is falsely implicated in the crime in avk 6/24 207-APPEAL-44-2012-J.doc question.

(f) After hearing the parties, the learned trial court by the impugned judgment and order was pleased to convict the appellant / accused no.1, as indicated in the opening paragraph of this judgment.

3 I have heard Ms.Nasreen Ayubi, the learned advocate appearing for the appellant / accused. By taking me through the evidence of PW1 i.e. the prosecutrix, as well as through the evidence of PW9 Dr.Archana Sankpal, the learned advocate vehemently argued that the prosecutrix is not a witness of truth as on the first occasion, she had reported to the Medical Officer that she was kidnapped by fifteen unknown persons and was taken to an unknown place where she was raped by one Ayub. The learned advocate further argued that cross-examination of the prosecutrix, so also the history narrated by her to PW9 Dr.Archana Sankpal, shows that she was habitual to sexual intercourse. It is further argued that as per version of the prosecutrix, she ran away from the spot in a naked condition and avk 7/24 207-APPEAL-44-2012-J.doc subsequently she was provided with clothes by PW2 Rahul Kamble and PW6 Sandeep Raut. However, those clothes were not seized by police. According to the learned advocate appearing for the appellant / accused no.1, the spot of the incident, according to the prosecution case, is a public place and it is improbable that accused persons or any of them, would have been in a position to kidnap her for committing rape. Though according to the prosecution case, the prosecutrix was raped at a rough surface, she had not suffered any external injury and therefore, the appellant / accused no.1 is entitled for benefit of doubt. 4 I have also heard the learned APP appearing for the State. She supported the impugned judgment and order. 5 Now let us examine whether the appellant / accused is proved to have committed offences punishable under Sections 376, 366A and 506(2) of the IPC, as held by the learned trial court, by re-appreciating the evidence adduced by the prosecution on record. One may argue that the prosecutrix was a consenting avk 8/24 207-APPEAL-44-2012-J.doc party to the alleged act and therefore, conviction of the appellant / accused for the offence punishable under Section 376 of the IPC cannot be sustained. However, according to the prosecution case, the prosecutrix was minor at the time of commission of the alleged offence, she being below 16 years of age at the relevant time. Let us, therefore, at the outset, ascertain whether the prosecutrix was a minor female child being below 16 years of age, at the time of commission of alleged offence. The offence allegedly took place on 11th February 2010 near Shivaji Nagar Railway Station and Shivaji Nagar Bus Stand of Pune. So far as her age is concerned, it has been elicited from cross-examination of PW1 i.e. the prosecutrix

that prior to the incident, she was studying in Dr.Babasaheb Ambedkar Primary School, a Municipal School of Pune. Her date of birth is also elicited from her cross-examination by the defence and in paragraph 15 of her cross-examination it is brought on record that date of birth of prosecutrix is 19th November 1995. PW3 Mangal is mother of the prosecutrix. She has deposed the date of birth of the prosecutrix as 19th November 1995. Here again, during cross-examination, the defence has brought on record that the prosecutrix was taking education in Dr.Babasaheb Ambedkar Primary School in Pune, where her birth certificate avk 9/24 207-APPEAL-44-2012-J.doc issued by the Municipal Corporation of Pune, was submitted at the time of her admission. This is what the oral evidence regarding the age of date of birth of the prosecutrix / PW1 is. However, it is well settled that for determining age of a person, oral evidence is hardly of any assistance. At this juncture, it needs to be noted that as seen from her evidence, the prosecutrix / PW1 is having rustic background and she used to work as labourer with a caterer. Her mother PW3 Mangal is also labourer by occupation and they both were residing in the slum area of Shivaji Nagar, Pune. Therefore, no overbearing importance can be given to the fact that the prosecutrix / PW1 and her mother PW3 Mangal has stated incorrect date of birth of the prosecutrix / PW1 as 19 th November 1995. The prosecution is also relying on documentary evidence in order to prove age as well as date of birth of the prosecutrix / PW1. When compared with contemporaneous documentary evidence, it is seen that the prosecutrix was born in the year 1995 itself and she as well as her mother had just incorrectly stated the month of her birth. I am of the view that discrepancy regarding incorrect month of birth stated by the prosecutrix and her mother PW3 Mangal is immaterial.

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In order to prove age of the prosecutrix, the prosecution has

examined PW4 Jayashree Lembhe, Head Mistress of Dr.Babasaheb Ambedkar Primary School, Pune, run by the Pune Municipal Corporation. It is in her evidence that the prosecutrix was admitted in the school on 19th June 2001 and at the time of her admission, her parents had produced her date of birth certificate issued by Sassoon Hospital, Pune. PW4 Jayashree Lembhe had brought General Register of the school where entry in respect of date of birth of the prosecutrix was taken on the basis of the birth certificate issued by Sassoon Hospital. Not only that, evidence of PW4 Jayashree Lembhe shows that she had also brought original date of birth certificate issued by the Sassoon Hospital, Pune, while deposing before the court. As per version of PW4 Jayashree Lembhe, recorded date of birth of the prosecutrix is 19th October 1995 and this witness has duly proved the School Leaving Certificate of the prosecutrix issued by her school reflecting the date of birth of the prosecutrix as 19 th October 1995. This certificate is at Exhibit 75. At this juncture, it is apposite to

note that Section 35 of the Evidence Act deals with relevancy of entry in public record made in performance of duty. An entry in public record stating a fact in issue or avk 11/24 207-APPEAL-44-2012-J.doc relevant fact and made by a public servant in discharge of his official duty is a relevant fact. This section is based upon the principle that the law reposes confidence in public officers entrusted with public duties. In the case in hand, evidence of PW4 Jayashree Lembhe, Head Mistress, shows that entry of date of birth of the prosecutrix was made in the official record maintained by the Municipal School on the basis of birth certificate issued by Sassoon Hospital, Pune, a government hospital. As such, this documentary evidence corroborates version of the prosecutrix so also that of her mother PW3 Mangal regarding age of the prosecutrix, and therefore, I hold that prosecution has proved that the date of birth of the prosecutrix is 19th October 1995. The incident in question allegedly took place on 11 th February 2010 and as such, on the date of incident, the prosecutrix was below 15 years of age. As such, her consent, if any, becomes irrelevant as she had not attained the consenting age.

7 Now let us examine whether it is proved by the prosecution that the appellant / accused has committed sexual intercourse with the prosecutrix falling under any of the categories enumerated in Section 375 of the IPC. On this aspect, fate of the prosecution case to a large extent hinges on the testimony of the prosecutrix i.e. PW1. It is in her evidence avk 12/24 207-APPEAL-44-2012-J.doc that on 11th February 2010, at about 7.00 p.m., she had been to the cycle stand area of Shivaji Nagar Railway Station and had indulged in chitchatting with her friend PW8 Rahul Borade. As per her version, the appellant / accused along with his to friends i.e. co- accused was also present there and they were watching her. She further deposed that at about 8.00 - 8.30 p.m. she started returning back to her home. But during that journey her footwear was broken and co-accused Imran offered to give fevicol for mending her footwear and therefore she accompanied him. The prosecutrix deposed that when she bent down to drink water from the water tap, during that journey, accused no.2 Rupesh, so also appellant / accused no.1 Ayub came. The appellant / accused caught hold of her hair and he along with co-accused dragged her below the tree. While other two accused persons were standing at some distance, the appellant / accused denuded her and committed rape on her. Thereafter, the prosecutrix was threatened by him. In a frightened condition, she started running away in naked condition. As per her version, two persons then helped her. She was taken to police station, where she lodged the avk 13/24 207-APPEAL-44-2012-J.doc FIR, Exhibit 70.

8 In her cross-examination, it is brought on record by the defence that she was medically examined by PW9 Dr.Archana Sankpal and at that time, she had reported to PW9 Dr.Archana Sankpal that she was kidnapped by fifteen unknown persons. The prosecutrix further stated in her cross-examination that out of those fifteen unknown persons, nobody is present in the court. It is further elicited from her cross-examination that she had disclosed to PW9 Dr.Archana Sankpal that she had, on earlier occasions, sexual intercourse with persons named Rahul and Pappy. The prosecutrix denied the suggestion that she was indulging in sexual intercourse with her friend PW8 Rahul Borade at the time of the incident, and then accused persons saw and reported the fact to police and therefore, she had falsely implicated them. With this material on record, the defence is attempting to demonstrate that the prosecutrix is habitual to sexual intercourse and she had come up with a different version before the Medical Officer and the benefit of this fact goes to the avk 14/24 207-APPEAL-44-2012-J.doc appellant / accused.

9 In order to consider the defence that the prosecutrix had disclosed to the Medical Officer that she was kidnapped by fifteen unknown persons, none of which is the accused before the court, one will have to consider the evidence adduced by the prosecution in entirety. The prosecutrix, prior to her medical examination by PW9 Dr.Archana Sankpal, had been to Shivaji Nagar Police Station where she lodged her report Exhibit 70. This report is duly proved by her in her evidence. Her substantive evidence is duly corroborating this FIR Exhibit 70 wherein she has stated that she was dragged by accused persons including the appellant / accused and thereafter, the appellant / accused had committed rape on her.

10 PW9 Dr.Archana Sankpal subsequently conducted medical examination of the prosecutrix. As per version of PW9 Dr.Archana Sankpal, the prosecutrix had given the history that fifteen unknown persons took her to unknown place at Shivaji avk 15/24 207-APPEAL-44-2012-J.doc Nagar and then a person named Ayub had committed rape on her. The same history is found to be incorporated in report of medical examination of the prosecutrix at Exhibit 88 proved by PW9 Dr.Archana Sankpal. This contemporaneous document coupled with evidence of PW9 Dr.Archana Sankpal goes to show that according to the prosecutrix she was kidnapped by fifteen unknown persons and raped by a person named Ayub. It is interesting to note that the appellant / accused is Ayub Irani. Thus, the prosecutrix is consistent in stating the name of the appellant / accused as a person who had committed rape on her. Only exaggeration which she made before the Medical Officer is that she was kidnapped by fifteen unknown persons. The question will be whether on this count, the entire version of the prosecutrix needs to be jettison as she had improved her version before the Medical Officer who had conducted medical examination. It is an experience in life that witnesses go on adding embellishments to their version, perhaps with a fear that otherwise their testimony might be rejected by the court. However, it is duty of the court to separate nuggets of truth from avk 16/24 207-APPEAL-44-2012-J.doc the version of the witness by discarding the embellishments. It is well settled that improvements or variations made by witnesses in their earlier and later versions alone are not sufficient to reject their testimony. The court has duty to sift truth from falsehood. If there is general agreement and consistency with regard to the substratum of the prosecution case, then collateral discrepancies are not material. Therefore, one will have to go to other evidence of the prosecution in order to determine whether evidence of the prosecutrix is gaining corroboration in material particulars even though she has deposed that she had disclosed to the Medical Officer that she was kidnapped by fifteen unknown persons. 11 Evidence of the prosecutrix is to the effect that after she was subjected to rape, in a frightened condition, she started running from accused persons in nude condition. She has further stated that then two persons helped her. The prosecution has examined those two persons who are PW2 Rahul Kamble and PW6 Sandeep Raut. Their version is consistent and corroborating the version of each other. Both these witnesses deposed that in avk 17/24 207-APPEAL-44-2012-J.doc the night hours of 11th February 2010, they heard shouts of a girl "brother save me." Both these witnesses further deposed that then one girl came towards them in a nude condition. She was then provided with clothes by them. Additionally, PW2 Rahul has deposed that upon being asked, the said girl disclosed that when she was proceeding from Shivaji Nagar Railway Station, her footwear broke and thereafter three persons apprehended her. Evidence of both these witnesses show that then help of police was sought and acquaintances of that girl were called and the said girl was sent to police station. There is nothing in cross- examination of both these witnesses to doubt their version. Evidence of both these witnesses

establishes that soon after the incident, the prosecutrix approached both of them for help in nude condition. Version of both these witnesses as such, is corroborating the testimony of the victim girl in material particulars. Her former statement made soon after the incident and heard by PW2 Rahul does not show that she was kidnapped by fifteen persons, as alleged. Similarly, the FIR lodged by her with promptitude does not contain the theory that she was avk 18/24 207-APPEAL-44-2012-J.doc kidnapped by fifteen unknown persons. Thus, there is general agreement and consistency with regard to the substantive evidence of the prosecutrix that she was taken to a secluded place where she was raped by the appellant / accused. As such, the history given by her to the Medical Officer to the effect that she she was kidnapped by fifteen unknown persons needs to be discarded in order to sift truth from the falsehood.

12 Now let us examine whether version of the prosecutrix, who is habitual to sexual intercourse, as seen from her evidence, is corroborated by the medical evidence on record. The prosecutrix may be habitual to sexual intercourse but she had not attained the consenting age and therefore, sexual intercourse with her amounts to rape, as her consent, if any, is immaterial. PW9 Dr.Archana Sankpal, a gynecologist, working with Sassoon Hospital, in her evidence has deposed that she conducted medical examination on the prosecutrix at about 9.00 am. of 12 th February 2010. The incident took place in night hours of 11 th February 2010. As such, the medical examination of the prosecutrix was avk 19/24 207-APPEAL-44-2012-J.doc conducted with promptitude. Evidence of PW9 Dr.Archana Sankpal corroborated by contemporaneous report of medical examination at Exhibit 88 reveals that upon medical examination of the prosecutrix it was seen that the prosecutrix had suffered blunt injury of size $\frac{1}{2}$ cm x 4 cm just above left eyebrow and small superficial injury just below left eyebrow. The Medical Officer also found linear superficial skin abrasion on lower back of the prosecutrix and it was of recent origin. That linear superficial skin abrasion was of size 5 x $\frac{1}{2}$ cm. Apart from this, PW9 Dr.Archana Sankpal further deposed that though hymen of the prosecutrix was having multiple old tear, she noticed recent tear of hymen of 1 cm on the posterior hymenal ring 1 cm in length and 2 cm in depth in mid-line. The Medical Officer further noticed occasional oozing from this mucosa tear. The Medical Officer further noticed that there was posterior Fanchette in the mid-line $\frac{1}{2}$ cm with raw margins. Perineum and inguinal area of the prosecutrix was noticed to be stained with dark colored dried blood. With these injuries, the Medical Officer opined that the prosecutrix was subjected to forceful penetrative avk 20/24 207-APPEAL-44-2012-J.doc sexual intercourse recently. Thus, this medical evidence shows that there were external injuries on person of the victim, so also the victim had suffered internal injuries demonstrating forceful penetrative sexual intercourse on her. This medical evidence on record fully corroborates version of the prosecutrix so far as offence of rape on her is concerned.

13 The prosecutrix had shown the spot of incident to the police on 12th February 2010 itself. PW7 Rajesh Shinde is panch witness to the spot panchnama which was conducted in his presence by PW10 P.I. Maya Bankar. Evidence of PW7 Rajesh Shinde and PW10 Maya Bankar shows that the spot of the incident was at a secluded place between Shivaji Nagar Railway Station and Shivaji Nagar Bus Stop. During spot inspection, the Investigating Officer found blood stained clothes, blood stained earth as well as blood stained stones. Similarly, condoms were also found on the spot of the incident. Evidence of panch witness as well as that of PW10 P.I. Maya Bankar shows that articles found on the spot came to be seized by preparing spot panchnama avk 21/24

207-APPEAL-44-2012-J.doc Exhibit 79. Panch witness PW7 Rajesh deposed that articles were sealed by police. Exhibit 80 - sketch map of the spot of the incident is also proved by panch witness PW7 Rajesh. 14 Evidence of the Investigating Officer PW10 P.I. Maya Bankar shows that seized articles were sent for chemical analysis. Report of the Chemical Analyses at Exhibit 61 shows that blood of the prosecutrix is that of "B" group. Similarly, blood group of the appellant / accused, as seen from Report Exhibit 60 is of "B" group. C.A. Report at Exhibit 57 shows that blood of "B" group was found on seized articles, stones as well as clothes of the prosecutrix seized from the spot of the incident. Kurta of the prosecutrix was having stains of semen of "B" group. Thus, forensic evidence also corroborates version of the prosecutrix that she was subjected to rape by the appellant / accused. The argument that clothes supplied to the prosecutrix subsequently by PW2 Rahul and PW6 Sandeep were not seized by the Investigating Officer for subjecting them to chemical analysis, is wholly unmerited because what is required is proof beyond avk 22/24 207-APPEAL-44-2012-J.doc reasonable doubt and not the proof of mathematical precision. 15 Evidence of the prosecutrix is further gaining corroboration from evidence of PW5 Sanjay Divekar, who had seen the appellant / accused near Shivaji Nagar Railway Station soon before the incident. Though this witness is declared hostile, it is well settled that, that part of the evidence of the hostile witness which supports the prosecution and is found to be trustworthy can be accepted.

16 Thus, evidence on record shows that the appellant / accused had procured the minor prosecutrix by dragging her to a secluded place and thereafter committed sexual intercourse by criminally intimidating her.

17 In the result, no infirmity can be found in the impugned judgment and order of conviction of the appellant / accused. Appropriate sentence is imposed by the learned trial court. As such, the appeal is devoid of merits. The same is, therefore, dismissed.

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(A. M. BADAR, J.)

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