

Bombay High Court

Pandurang Dhanu Patavi (In Jail) vs State Of Maharashtra Thr. Police ... on 22 September, 2017

Bench: Swapna Joshi

1

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT NAGPUR, NAGPUR.

...

CRIMINAL APPEAL NO.159/ 2017

Pandurang Dhanu Potavi
Aged about 57 years, occu: cultivation
R/o Darpanguda Tq. Chamorshi
Dist.Gadchiroli. (Presently in Central Prison,Nagpur)..

versus

The State of Maharashtra
Through Police Station: Chamorshi
Tq. Chamorshi, Dist. Gadchiroli

.....
Mrs. Sonali Saware, Advocate (appointed) for the appellant
Mr. N.H. Joshi, Additional Public Prosecutor for respondent -State
.....

CORAM: MRS.SWAPNA JOSHI

DATED: 22nd September, 2017 ORAL JUDGMENT:

Being aggrieved by the judgment and order dated 02.05.2016 in Sessions Case No.33/2014 delivered by the learned Additional Sessions Judge, Gadchiroli, convicting the appellant (hereinafter referred to as 'the accused') for the offence punishable under section 376 of the Indian Penal Code and sentencing him to suffer R.I. for ten years and to pay a fine of Rs.2000/-, in default, to suffer R.I. for six months; so also u/s 506-II of the IPC and sentencing him to suffer R.I. for five years and to pay a fine of Rs. 1000/- in default to suffer R.I. for three months, the present Appeal is filed.

CRI.APPEAL.159.17

2. I have heard Mrs.Sonali Saware, learned counsel (appointed) for the appellant, and Mr. N.H.Joshi, learned Additional Public prosecutor for the Respondent- State. With their assistance, I have gone through the record and proceedings of the case, minutely.

3. Brief facts giving rise to the instant Appeal may be summarized as under:-

The prosecutrix is a rustic lady, resident of Darpanguda, Tq.Chamorshi, Dist. Gadhiroli and at the relevant time, she was aged about 60-years. She understands only 'Gondi' language. The prosecutrix is a widow having two children. Her elder son Madhukar Kowase (PW 4), his wife, PW2-Shaila Kowase and the younger son-Ramesh used to stay together in the village. Accused too is the resident of the same area where the prosecutrix used to reside, aged about 57 years. On the date of the incident i.e. 27.1.2014, between 3.30 p.m. and 4.00 pm, the prosecutrix had gone to answer the nature's call, in an open space on Peth village Road. Suddenly, the accused came there from behind, caught hold of hands of prosecutrix, pressed her mouth and made her to lie down. The accused threatened her that if she shouts, he would kill her. The accused then removed the saree of the prosecutrix and committed sexual intercourse with her. While the accused was committing forcible sexual intercourse, the prosecutrix tried to shout. At that time, PW3-Urmila Kando, PW2-Shaila, her daughter- in-law, PW8 Tarabai Potavi and PW4 Madhukar, her son, removed the prosecutrix from the clutches of the accused. They brought the prosecutrix to her house and later on they took her to the outpost Ghot. The occurrence was registered vide No.05/2014.

CRI.APPEAL.159.17 The prosecutrix was then sent to General Hospital, Gadchiroli. On the next day, the offence was registered at Chamorshi Police Station vide Crime No.006/2014.

4. At the relevant time, the PSI Narayan Misal (PW12) was attached to Police Help Centre, Ghot. He registered the offence. He visited the place of incident and conducted the spot panchnama (Exh.22). PW12 arrested the accused. He took charge of the clothes of the accused in the presence of Panchas under seizure Panchnama (Exh.39). He collected the blood samples of the accused. The further investigation was carried out by PW12-Narayan Misal. All the seized articles were sent for analysis. After completion of investigation, charge-sheet was filed in the court of learned JMFC , Chamorshi. The case was committed to the court of Sessions. The learned Additional Sessions Judge framed the charge. On analysis of the evidence and after hearing both sides, the learned trial Judge has convicted the accused, as aforesaid, Hence this Appeal.

5. Mrs. Sonali Saware, learned counsel for the accused vehemently argued that the learned trial Judge has not considered the testimony of the relevant witnesses in the right perspective and has erroneously convicted the accused. She contended that no such incident of rape had taken place and if at all it had taken place it may be a consensual sex. She pointed out that the testimony of the prosecutrix is not supported by the medical evidence. She therefore prays for setting aside the judgment of the trial court.

6. Mr. N.H.Joshi, learned Additional Public Prosecutor, on the contrary, contended that the learned trial Judge has assessed the entire evidence of the CRI.APPEAL.159.17 prosecution and rightly convicted the accused.

7. In order to assess the rival contentions of both sides, it would be beneficial to go through the testimony of the prosecution witnesses. The prosecution has heavily relied upon the testimony of the prosecutrix PW1, the alleged eye witness PW-2 Shaila and PW3-Urmila, PW10-Dr. Pravin Kilnake, the Medical Officer and PW12-Narayan Misal, the Investigating Officer.

8. The testimony of PW1-prosecutrix shows that at the relevant time, she was aged about 60-years. In the afternoon, she had gone out of the village to attend the nature's call. While she was answering nature's call, the accused came from behind, caught hold of her, made to lie down and committed forcible sexual intercourse on her. PW1 stated that as she did not realise the intention of the accused and as she was afraid that the accused would kill her, she did not resist the act of the accused. At that time, Kando (PW3), her son and her daughter-in-law came to that place. They rescued her from the clutches of the accused. Thereafter the prosecutrix proceeded to outpost Ghoti and lodged her complaint (Exh.15). PW1 categorically stated that she narrated the incident in Gondi language to her daughter-in-law Shaila (PW 2) who, in turn, translated it into Marathi while lodging the report.

9. During the cross-examination, a case was put up to the prosecutrix that there were disputes between her son Madhukar and the accused, on account of hens, to which she denied. It was also put up to the prosecutrix that her brother-in-law Marotrao Kowase was also in dispute with the accused and there was a dispute between them a day prior to the incident. The prosecutrix denied the said suggestion.

CRI.APPEAL.159.17 The testimony of PW1 is not shattered in cross-examination on material aspects.

10. The testimony of PW3- Urmila Kando shows that at 3.30 p.m. she was proceeding to village Peth. On the way, she heard shouts of the prosecutrix. She then went to see her. She saw the accused lying over the prosecutrix. She then went to the house of Madhukar, who is the son of the prosecutrix, and narrated the incident to him. Thereafter PW3-Urmila, PW4-Madhukar and his wife PW2-Shaila went to the place of the incident. PW3-Urmila noticed that the accused was lying on the body of the prosecutrix and he was indulging in sexual intercourse with the prosecutrix. On seeing them, the accused fled away. The prosecutrix was then taken to her house.

11. It was suggested to the PW3, during her cross-examination that, she had an old dispute with the accused, which she denied. The testimony of PW3, who is a cultivator, indicates that at the time of incident she was passing by village Peth road and when she heard shouts of prosecutrix she went there and saw the accused lying on the person of the prosecutrix. Her testimony further suggests she informed to son and daughter-in-law of the prosecutrix about the incident after going to their house and when all came to the place of incident, they saw the accused lying on the person of the prosecutrix. No doubt, PW3-Urmila has admitted in the cross-examination that they reached at the place of incident after one hour. It appears that PW3 being a rustic lady of village had answered in her cross-examination about the time as one hour. It appears that the prosecutrix being a lady from remote village, used to go for attending nature's call outside the village in remote place. However, it does not appear that she would go for a long distance so that it took one hour for PW3 to go to her house and CRI.APPEAL.159.17 bring her son and daughter-in-law at the place of the incident. From the testimony of PW3, it is seen that the accused was lying on the prosecutrix, when PW3 along with the son of prosecutrix and daughter-in-law, reached to the place of incident. From the testimony of PW3, it is noticed that she had not rushed to the place of incident to rescue the prosecutrix from the clutches of the accused. In this regard it can be said that different people react in different manner. In view thereof, it cannot be said that she had not witnessed the incident.

12. At this juncture, the spot map i.e. Exh.45 reveals that there was a heap of dry grass and besides the said grass, there was an open space which can also be seen from the photographs Exhs. 46 and 47. From the said photographs, it appears that the place of incident was an isolated place where people from the village used to attend nature's call.

13. Now coming to the testimony of PW2-Shaila, according to her, on the date of incident she was at home, her mother-in-law had gone to answer's natural call. Urmila came to her house and informed that she saw the accused lying on her mother-in-law. Therefore, along with her husband-Madhukar and Urmila, rushed to the place of the incident. She noticed the accused lying over her mother-in-law and was performing sexual intercourse with her. On seeing them, the accused fled away. They then brought her mother-in-law to their house. From there they proceeded to Ghot Police outpost, where the complaint of her mother-in-law was lodged. PW2 specifically stated that her mother-in-law does not understand Marathi and therefore she translated the narration of her mother-in-law to the police, while lodging the report. It CRI.APPEAL.159.17 was suggested to PW2 that their terms with the accused were not good due to the disputes. The testimony of PW2 is not shaken in the cross-examination at all and her testimony clearly indicates that she had witnessed the incident of rape.

14. So far as the medical evidence is concerned, the testimony of Medical Officer Dr. Pravin Kilnake (PW10) shows that on 27.1.2014 he was attached to General Hospital, Gadchiroli as Gynecologist. He examined the victim who was produced by LPC Mohurle. She was produced within six hours of the alleged incident. On examination of private part of the prosecutrix, he was not in a position to opine whether sexual intercourse was committed or not. Significantly, the testimony of PW 10 is not of much assistance to the prosecution case.

15. On careful scrutiny of testimony of the entire evidence on record and particularly the prosecutrix, it is noticed that the prosecutrix was a lady, aged about 60 to 65 years and she was not knowing Marathi language. It appears that she was only well-versed to 'Gondi' language. The testimony of prosecutrix makes amply clear that she had not tried to exaggerate the version. There are absolutely no discrepancies in her testimony. Her testimony is fully corroborated with the F.I.R. which is lodged by her on the same day. The suggestion given to the prosecutrix that there was some rivalry with the accused and therefore she has falsely implicated the accused does not appear to be convincing. Under normal circumstances there was no reason for the prosecutrix to falsely implicate the accused at her mature age of 60 to 65 years. No doubt, the prosecutrix has not given any details of the incident, however, that does not mean that she was not a truthful witness. The incident had taken place in a broad daylight. The CRI.APPEAL.159.17 place of incident particularly the spot map and the photographs clearly indicate that it was an isolated place and an open ground where behind the heap of dry grass the prosecutrix had gone to answer nature's call in the afternoon. It is not at all the case of the accused that the place of incident was near to the road from where the villagers were passing by. It appears that the accused had taken undue advantage of the situation and committed rape on the prosecutrix. He must be aware that the villagers are attending nature's call outside the village behind the heap of dry grass. It appears that the accused must be watchful and accordingly he took opportunity and committed rape on the prosecutrix. It has come in the evidence of the prosecutrix that she was afraid of the accused and she did not realise the intention of the accused.

Hence she did not resist the act of the accused. Thus, there is nothing to doubt the testimony of the prosecutrix and she is found to be reliable and trustworthy witness.

16. Thus, the testimony of the prosecutrix is natural one. She is a rustic lady. Due to language problem it appears that she could not express much. However there is no reason for her to falsely implicate the accused in such a heinous offence by putting the reputation of her family at stake.

17. So far as the reactions of the witnesses after the incident are concerned, an useful reference can be made to the judgment of the Hon'ble Apex Court in the case of State of Orissa vs. Dibakar Naik and others, reported in (2002) 5 SCC 323. In that case, there was a rape and murder of the wife of the witness. There was failure on the part of the eye witness, being the victim's husband, to disclose the names of the accused persons to others, whom he met after occurrence as they CRI.APPEAL.159.17 did not ask him about the names. The Hon'ble Apex Court held in para 21, as under :-

"21.Post-event conduct of a witness cannot be predicted on specified lines. It varies from person to person as different people react differently under different situations. PW1 had lost his wife in a most ghastly crime committed by the culprits. He apprehended danger to his life and was under shock. PWs 10 and 13 did not ask him about the names of the persons involved in crime nor did he think it proper to disclose such names. Under such circumstances no adverse inference could be drawn against PW1 making his testimony doubtful."

18. In case of State of H.P. v. Sanjay Kumar alias Sunny reported in 2017(3) Mh.L.J. (Cri.)(S.C.) 68, the Hon'ble apex Court has held in paragraph 31 as under :-

"31. By now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the Courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury.

The deposition of the prosecutrix has, thus, to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice and her CRI.APPEAL.159.17 evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured witness does. If the Court finds it difficult to accept her version, it may seek corroboration from some evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases, is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars, as in the case of an accomplice to crime. Why should the evidence of the girl or the woman

who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance."

19. In (1996) 2 SCC 384 in case of State of Punjab v. Gurmit Singh and others, the Hon'ble Apex Court has observed thus:

".....The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not a fatal nature, to throw out an otherwise reliable prosecution CRI.APPEAL.159.17 case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars."

The Courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-

respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix, should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which are the courts should not overlook."

"Even in cases, unlike the present case, where there is some acceptable material on the record to show that the victim was habituated to sexual intercourse, no such inference like the victim being a girl of "loose moral character" is permissible to be drawn from that circumstance alone. Even if the prosecutrix, in a given case, has been promiscuous in her sexual behaviour earlier, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone."

CRI.APPEAL.159.17

20. In case of Aman Kumar and another v. State of Haryana, reported in (2004) 4 SCC 379, the Hon'ble apex Court has held as under :-

"It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands on a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional."

21. In the instant case the prosecutrix is found to be a trustworthy witness. She had no reason to falsely implicate the accused in a false case of rape. However, considering that the accused is not

having any antecedents and also considering his ripe age the the ends of justice would be met if the sentence is reduced from ten years to seven years.

22. There is no evidence on record that the accused threatened the prosecutrix in any manner. Hence, he is liable to be acquitted from the charge. Hence the order:-

ORDER I) Criminal Appeal No. 159/2017 is partly allowed.

CRI.APPEAL.159.17

ii) The judgment and order dated 02.05.2016 in Sessions Case No.33/2014 delivered by the learned Additional Sessions Judge, Gadchiroli, convicting the appellant for the offence punishable under section 376 of the Indian Penal Code is hereby modified. Instead of sentencing the appellant to suffer R.I. for ten years, he is sentenced to suffer R.I. for seven years and to pay a fine of Rs.2000/-, in default, to suffer R.I. for six months.

iii) So far as the conviction and sentence of the appellant for offence punishable u/s. 506-II of the IPC is concerned, the same is hereby set aside and he is acquitted of the said offence.

iv) Professional fees of Mrs.Sonali Saware, Advocate (appointed) for appellant are quantified at Rs.5,000/-.

JUDGE sahare