

Bombay High Court

The State Of Maharashtra vs Arvind Kashinath Bondekarr on 6 October, 2017

Bench: T.V. Nalawade

1 Appeal 400 of 2002

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

Criminal Appeal No. 400 of 2002

The State of Maharashtra
Through the Police Station Officer
Jamner Police Station,
District Jalgaon. .. Appellant.

Versus

Arvind Kashinath Bondekar
Age 52 years,
Occupation : Medical Practitioner
R/o Jamner, Pachora Road,
Taluka Jamner, District Jalgaon. .. Respondent.

Shri. S.D. Ghayal, Additional Public Prosecutor, for
appellant.

Shri. R.N. Dhorde, Senior Counsel, instructed by Shri. V.D.
Gunale, Advocate, for the respondent.

Coram: T.V. NALAWADE &
A.M. DHAVAL, JJ.

Date: 6 October 2017

JUDGMENT (Per T.V. Nalawade, J.):

1) The appeal is filed against the judgment and order of Sessions Case No.96/1997 which was pending in the Court of the learned Additional Sessions Judge, 2 Appeal 400 of 2002 Jalgaon. The respondent-accused is acquitted of the offences punishable under sections 376, 354, 509, 506 of the Indian Penal Code and so the decision is challenged by the State. Both the sides are heard.

2) In short, the facts leading to the institution of the appeal can be stated as under :

The prosecutrix is a married woman and she was 28 years of age at the relevant time. She and her husband are residents of Pimparkheda, Tahsil Jamner. She has three issues. In the past she had received treatment in the hospital of the accused which is situated at Jamner. Wife of the accused is

also practising as doctor in the same hospital.

3) The prosecutrix was suffering from abdominal pain and so in the past she along with her husband had visited the hospital of the accused. For few days the treatment was taken by taking medicines prescribed by the wife of the accused but there was no relief to the prosecutrix. She and her husband went to the hospital of 3 Appeal 400 of 2002 the accused on 30-1-1997. This time the accused examined the prosecutrix. As the accused is a renowned practitioner the prosecutrix had decided to take treatment from him. After clinical examination and after giving some medicines, the accused advised the prosecutrix to remain in the hospital for few days as indoor patient for receiving treatment. She was admitted and she was kept in special room where there were three cots but she was the only patient in the said room. Saline was used for giving treatment and intermittently the accused and his wife kept on checking the prosecutrix. The husband of the prosecutrix kept on visiting the hospital and visited the hospital till night 2 to 3 times and ultimately at 10 to 10.30 p.m. the husband left the hospital.

4) After leaving of the husband, the prosecutrix complained to the staff of the hospital that she had again pains in abdomen. The staff informed that the accused and his wife had left for village Pahur to attend one function. After some time, the accused and his wife returned from Pahur and then it was disclosed to the doctors that the prosecutrix had pains in abdomen. Both the accused and 4 Appeal 400 of 2002 his wife examined the prosecutrix and prescribed some medicines.

5) After some time, the accused alone returned to the aforesaid room. One staff member was present near the prosecutrix and to her the accused gave direction to leave the room. After some time, the accused again returned and he was alone. The other patients were sleeping at that time and the main door of the hospital was also closed by putting lock on it. The accused all of a sudden fell on the prosecutrix to have sexual intercourse with her. When the prosecutrix attempted to resist he gave threat and then after removing the blouse of the prosecutrix and taking the saree to upward direction he took sexual intercourse with the prosecutrix forcibly. During the incident, he said that he had developed liking for the prosecutrix. There was ejaculation and due to that the petticoat of the prosecutrix became wet. After that the accused again gave threat and he also promised to transfer a plot in her name and left the place. The prosecutrix became frightened and she remained inside of the room as her husband was not there.

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6) Husband of the prosecutrix came to the

hospital at 1.30 a.m. on 31-1-1997. The prosecutrix narrated the incident to the husband. The husband said that he would bring his friend Dattu and he left the hospital. At about 6.00 a.m. the husband of the prosecutrix and said Dattu came to the hospital and they took the prosecutrix to police station. The prosecutrix gave report to police and the crime came to be registered at 6.30 a.m. of 31-1-1997 for the aforesaid offences. The prosecutrix was referred for medical examination. Her clothes were taken over under panchanama.

7) The accused came to be arrested on the same day. His clothes like banyan and underpant were first taken over and he was referred for medical examination. During the course of investigation the other clothes like pajama and shirt came to be recovered and they were seized under panchanama. Spot panchanama was prepared on the same day and the articles like bedding and blanket which were on the cot of the prosecutrix from the aforesaid room were taken over.

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8) During the course of investigation police

recorded statements of the staff members of the hospital and also of some patients who were admitted as indoor patient and of their relatives. Statements of friends of the accused and the husband of the prosecutrix to whom the incident was disclosed were also recorded. As the accused disclosed that he was at Pahur, statements of some doctors who had attended the function at Pahur came to be recorded. After completion of the investigation charge- sheet came to be filed for the aforesaid offences. Charge was framed and plea was recorded. The accused pleaded not guilty.

9) The prosecution examined in all 11 witnesses to prove the offences. Defence examined two witnesses. In the statement under section 313 of the Code of Criminal Procedure the accused admitted that the prosecutrix was indoor patient on the night between 30 and 31 January 1997 in his hospital. He denied the allegations and he contended that he had left for Pahur at 8.30 p.m. on that date and he had returned at about 11.30 p.m. He contended that he had not come down from the first floor 7 Appeal 400 of 2002 where he was living in that hospital and false allegations are made against him.

10) Evidence of the prosecutrix shows that the accused and his wife were known to her and in the past she had received treatment from the wife of the accused. She has deposed that on the day of the incident she had come to the hospital along with her husband and she had received the treatment from the doctor. She has given evidence that she was examined by the accused and then she was admitted in the hospital and she was kept in the aforesaid room where there was only the prosecutrix as patient.

11) The prosecutrix has given evidence that on that night at 10 to 10.30 p.m. the accused returned from Pahur along with his wife. She has deposed that saline was already removed from her body and one female servant was attending her. She has deposed that the female servant was asked to remain out of the room by the doctor and then the accused entered the room and he slept on her. She has deposed that the accused then said 8 Appeal 400 of 2002 that he had developed liking for her and even when she resisted he took sexual intercourse with her. She has deposed that threat was given by the accused not to disclose the incident to anybody and promise was given to transfer a plot in her name.

12) The prosecution has given evidence that her husband was not present in the hospital as he had gone to attend a programme and he returned to the hospital at 1.30 a.m. on 31-1-1997. She has deposed that she narrated the incident to her husband and then the husband left to bring his friend

Dattu and after arrival of the husband and Dattu in the morning they left the hospital for police station where she gave report which is at Exhibit 23. She has deposed that her clothes like saree, petticoat, blouse, brassiere were taken over by police. She has deposed that at that time the accused was wearing clothes like pant and half shirt.

13) To corroborate the testimony of the prosecutrix, the prosecution has examined Dr. Jaju (PW 10). He has given evidence that he examined the prosecutrix at 1.00 9 Appeal 400 of 2002 p.m. on 31-1-1997. He has deposed that he did not notice any external injury on the body of the prosecutrix including on breast and thighs or genital region. He did not notice injury to vulva. He has deposed that he collected vaginal swab and pubic hair and also blood sample for sending them to C.A. office. Exhibit 51, a certificate issued by this witness is duly proved in his evidence and it is consistent with his oral evidence. In the examination-in-chief itself he gave evidence on the basis of clinical examination and the C.A. report which is at Exhibit 52 that he did not notice any circumstance in support of rape (sexual intercourse). As the doctor did not support the prosecution he was not cross-examined at length by the Advocate of the accused. In the cross- examination, he has deposed that he had no occasion to see the sperms, if any, on the petticoat of the prosecutrix as he had not noticed and examined the clothes of the prosecutrix. This evidence is relevant at least to some extent as it is the version of the prosecutrix that there was ejaculation. No semen was detected on her body and pubic hair.

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14) Dr. Sampat (PW 7) examined the accused on

the same day but at about 4.00 p.m. He has given evidence that on examination he found that there was no external injury all over the body of the accused and there was no injury on penis. However, he has deposed that smegma was absent. His evidence shows that the accused can take sexual intercourse. His evidence shows that the accused could not produce semen at that time so saline swab from his penis was taken. The age of the accused was 48 years at the relevant time. The certificate issued by this witness is duly proved in his evidence at Exhibit

43. The aforesaid things collected by the doctor were sent to C.A. office including the blood sample. The C.A. report shows that on pubic hair no sperm or blood was detected. Thus there is one circumstance like absence of smegma on which argument is advanced by the learned APP against the accused.

15) It is true that it takes about 24 hours to develop smegma after sexual intercourse. If the incident had taken place at 10.30 p.m. or between 10.30 and 11.00 p.m. on 30-1-1997, after that there was the possibility of accused 11 Appeal 400 of 2002 having sexual intercourse with his wife as he is a married man and there was also possibility of washing and taking bath by the accused in the morning of 31-1-1997. In any case the circumstance like absence of smegma was not specifically put to the accused in the statement of the accused recorded under section 313 of the Cr.P.C. When the prosecution intends to use such circumstance it is necessary to put that circumstance to the accused. In any case, due to the period which had elapsed from the alleged time of the incident and the other

possibilities already quoted, no weight at all can be given to the circumstance of absence of smegma.

16) There is evidence of panch witness on seizure of the clothes of the accused, the clothes of the prosecutrix, the seizure of articles from the room, the spot panchanama, and also on sending of the articles to the C.A. office. There are C.A. reports in respect of the articles which were sent to C.A. office. The C.A. reports show that the prosecutrix was having blood of "A" group. However, no sperms were detected on pubic hair collected by the doctor when the prosecutrix was examined. The 12 Appeal 400 of 2002 blood of the accused was of "O" group. Human blood and semen of blood group of "A" was detected on the petticoat of the prosecutrix. No blood or semen was detected on any of the clothes of the accused. Thus the blood group of the accused was "O" and semen of "A" group was detected on the petticoat of the prosecutrix. Blood group of the husband of the prosecutrix is not available. The forensic evidence is not corroborating the version of the prosecutrix and on the contrary it has created one inconsistent circumstance.

17) It is true that for convicting the accused for offence of rape, it is not necessary to prove that there was ejaculation or there was complete penetration of penis into private part of the prosecutrix. However, specific case of the prosecutrix on that cannot be ignored. It is true that evidence of the prosecutrix needs to be treated as the evidence of injured witness. On this point, learned Additional Public Prosecutor has placed reliance on some reported cases which are being discussed subsequently. There is no dispute over the proposition. Due to the aforesaid circumstances like inconsistent circumstance 13 Appeal 400 of 2002 mentioned in the C.A. report and due to other circumstances which have also created some suspicion, the close scrutiny of the evidence of the prosecutrix is required.

18) In support of the evidence of the prosecutrix there is evidence of her husband and of Dattu. These two witnesses have given evidence on the so called disclosures made by the prosecutrix to them. The incident is described in the F.I.R. and the contents of the F.I.R. so far as the incident is concerned are consistent with the oral version of the prosecutrix.

19) The spot panchanama is proved in the evidence of panch witness Pandurang (PW 6). This evidence is not seriously disputed by defence. This evidence and some admissions given by prosecutrix show that adjacent to the room where the incident allegedly took place there is general ward. This general ward has no door. One lady was due to deliver a child and so more than ten relatives of that lady were present near the general ward. Some ladies were there as delivery was to take place. Further, 14 Appeal 400 of 2002 the staff members of the hospital were also present as they were expected to remain present near the general ward and also the special ward. In the cross-examination, the prosecutrix has deposed that she shouted for help when the accused started using force to have sexual intercourse. In ordinary course also if the prosecutrix wanted assistance she would have shouted for help and anybody would have rushed to the room even by presuming that she was suffering from something and she wanted help.

20) The investigating agency did record statements of some patients who were there in the general ward and the relatives of the patients. Even statements of the staff members of the hospital were recorded who were deputed to do duty on that night. The evidence of the prosecutrix itself shows

that one female servant was there in her room who was virtually driven out by the doctor before committing the offence. Nobody from these persons is examined by the prosecution. No explanation is there for withholding that evidence from the prosecution and in view of the facts and circumstances of this case, this 15 Appeal 400 of 2002 Court holds that adverse inference needs to be drawn against the prosecution.

21) In the cross-examination, the prosecutrix (PW

1) has deposed that after the incident was over, she came out of the room and she sat near the cabin of the accused where one staff member, Chandrabhaga was sleeping. She has deposed that she had talk with Chandrabhaga and also a lady relative of the patient who was there in the general ward for delivery. Her evidence shows that it was casual talk and she did not disclose the incident to them on that night. It can be said that this conduct of the prosecutrix of having a casual talk with others after the incident cannot be ignored and it itself creates improbability about the incident.

22) The prosecutrix (PW 1) has deposed that her husband came to hospital at 1.30 a.m. on 31-1-1997 and then she narrated the incident to him. In the cross- examination the husband of the prosecutrix, Pandhari (PW

4) has admitted that main door of the hospital was closed and lock was put on it and he kept standing in front of the 16 Appeal 400 of 2002 hospital. Though he has deposed that he had come to the hospital and then he had talk with the prosecutrix during which she disclosed the incident, there is no corroboration to such version of both the prosecutrix and her husband. Staff members could have been examined or at least other patients or relatives of other patients could have been examined to prove that the husband had entered the hospital on that night at 1.30 a.m. and the main door of the hospital was opened.

23) The prosecutrix has given evidence that when she narrated the incident to her husband, the husband said that he would bring his friend Dattu and then her husband left the hospital. She has deposed that her husband then returned to the hospital with his friend Dattu and they left for police station at about 6.00 a.m. Cross-examination of the prosecutrix and her husband shows that they did not try to enquire with the doctor and the husband of the prosecutrix did not try to enquire with others as to how and why they did not intervene. The report of the prosecutrix was registered at 6.30 a.m. on 31-1-1997 and this circumstance shows that the report 17 Appeal 400 of 2002 was not given immediately when there was opportunity and the report was given late at least by 7 hours. This conduct of the prosecutrix and her husband was not natural. Their evidence does not show that they were afraid of the doctor. Due to these circumstances and the circumstance of giving the F.I.R. late cannot be ignored in this case and that itself has created more suspicion about the case of the prosecution.

24) The aforesaid circumstances have created probability that the prosecutrix did not shout on that night. It creates probability that the prosecutrix had not offered resistance. These circumstances create probability that no incident at all had taken place as described by the prosecutrix.

25) The accused has given evidence to prove the defence of alibi by examining two witnesses like Dr. Ramdas (DW 1) and Dr. Vijay (DW 2). They have given evidence that on 30-1-1997 all of them including the accused and his wife had gone to Pahur to attend birthday ceremony of Dr. Somkuwar. They have deposed that they 18 Appeal 400 of 2002 reached Pahur after about half an hour and they were at Pahur till 11.00 p.m. They have deposed that they returned from Pahur and they reached Jamner at 11.30 or at 11.15 p.m. Their evidence shows that the distance between Jamner and Pahur is about 15 kilometers. It needs to be mentioned here that the prosecution is not disputing that the accused and his wife had gone to Pahur on that night. The evidence of the prosecutrix shows that when her husband had left the hospital at 10.30 p.m., at that time neither the accused nor his wife was present in the hospital. The evidence of the prosecutrix shows that she complained that she had pains in abdomen but it was informed to her that the accused and his wife had gone to Pahur. These circumstances and further evidence of the prosecutrix that the accused and his wife had returned together and they had taken round of all the wards on that night create probability that the incident had not taken place at the time of 10.30 p.m. as described by the prosecutrix. These circumstances along with other circumstances already discussed give strength to the defence of alibi also. Though the burden to prove alibi is on the accused as provided in section 11 read with section 19 Appeal 400 of 2002 103 of the Evidence Act, in view of the aforesaid circumstances this Court has no hesitation to hold that the required probability is created in the present matter.

26) The learned Additional Public Prosecutor has placed reliance on some observations made by Delhi High Court in the judgment of Appeal No.792/2001 (Suresh v. State of Delhi). In this case the High Court has discussed a circumstance like absence of smegma. This circumstance is already discussed by this Court. On this point learned Senior Counsel for the respondent accused has placed reliance on AIR 2009 SC 1966 (State of Punjab v. Hari Singh). The relevant facts and circumstances of the present case are already discussed and this Court has already held that absence of smegma in this case is not a circumstance which can be used in corroboration to the version of the prosecutrix.

27) The learned Additional Public Prosecutor has placed reliance on the observations made by the Apex Court in the cases reported as (1) (2009) 16 SCC 69 (Rajinder v. State of H.P.); and, (2) (1996) 2 SCC 384 20 Appeal 400 of 2002 (State of Punjab v. Gurmit Singh) . Facts and circumstances of each and every criminal case are always different. In the cases cited by the learned APP, the Apex Court has laid down that the evidence of the prosecutrix stands almost at par with that of the evidence of injured witness and to some extent it is more reliable. The Apex Court has further laid down that in such cases the evidence as a whole needs to be considered and it is necessary for the Court to ascertain whether the version given by the prosecutrix is probable in nature. There is no dispute over the proposition. Relevant facts and circumstances are already discussed. It is true that conviction can be based on uncorroborated testimony of the prosecutrix but such testimony should inspire confidence in judicial mind and it should be of such a nature that the Court must certify that the testimony is wholly reliable. If the Court finds that it is difficult to accept the truthfulness of the version of the prosecutrix, due to the circumstances like contradictions in her evidence and inconsistencies with other circumstances including medical evidence and the report of forensic science laboratory the Court may find that the version of 21 Appeal 400 of 2002 the prosecutrix is not truthful and in that case benefit of doubt can be given to the accused [reliance is placed on (1) 2001 (3) Crimes 393 (SC) (Surjan & Ors v. State of M.P.); and, (2) 2001(4) Crimes 105 (SC) (Dilip &

Anr. v. State of M.P.].

28) Learned Senior Counsel for the respondent - accused has placed reliance on the cases reported as (1) 2015 ALL MR (Cri) 4511 (S.C.) (Ram Sunder Sen Vs. Narender @ Bode Singh Patel); and, (2) (2016) 10 SCC 506 (Raja vs. State of Karnataka) . It is already observed that facts and circumstances of each and every criminal case are always different. The law laid down by the Apex Court on the evidentiary value of the evidence of prosecutrix in such a case is already quoted and there is no dispute over the propositions quoted. In view of the facts and circumstances of the present matter this Court holds that it cannot be said that the version of the prosecutrix is truthful. So conviction cannot be based in such a serious case on such version. This Court holds that the trial Court has not committed any error in not believing the prosecutrix and giving benefit of doubt to 22 Appeal 400 of 2002 the accused-respondent. No case is made for interference in the appeal. In the result, the appeal stands dismissed. The bail bonds of the accused shall remain in force for a period of three months for giving opportunity to the State to challenge the decision of this Court.

Sd/-
(A.M. DHAVALA J.)

Sd/-
(T.V. NALAWADE, J.)

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