IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.146 OF 2014

The State of Maharashtra,
Through P.I. Police Station, Kopargoan,
Dist. Ahmednagar ..APPELLANT

VERSUS

Mahadu Dagdu Shinde,
Age: 45 years, R/o. Warshinde,
Tq. Rahuri, Dist. Ahmednagar ..RESPONDENT

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Mr R. V. Dasalkar, A.P.P. for appellant/State;
Smt. Yogita S. Thorat - Kshirsagar, Advocate (appointed) for respondent

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CORAM : RAVINDRA V. GHUGE
AND
B. U. DEBADWAR, JJ.

DATE : 1st March, 2021

JUDGMENT (Per Ravindra V. Ghuge, J.)

1. By this appeal, the State has challenged the judgment dated 14/08/2012, delivered by the learned Additional Sessions Judge, Kopargaon, in Sessions Case No.19 of 2010. The respondent accused was acquitted of the charge of having committed an offence punishable under Sections 376 and 506 of the Indian Penal Code. The Trial Court has wrongly mentioned Section 34 of the Indian Penal Code in the opening paragraph of the judgment. Neither in the FIR, nor in the charge framed, Section 34 of the Indian Penal Code, has been attracted.

2. We have considered the strenuous submissions of the learned Prosecutor, who has taken us through the appeal paper book and the original record & proceedings, threadbare. He has analyzed the testimonies of all 9 witnesses. He has strenuously contended that the version of the prosecutrix has to be properly appreciated and, in the absence of any ulterior or oblique motive on the part of the prosecutrix in framing the accused, the Court has to consider such testimonies in the light of the entire oral and documentary evidence available.

3. At the very outset, we need to record our strong displeasure about the choice of a particular word, which has been repeatedly used by the learned Additional Sessions Judge, Kopargaon (Coram : Shri. S. V. Ranpise) while recording the testimony of the prosecutrix, the PW1 and the testimony of the I.O., P.W.9 and also in the body of the judgment. The Trial Court has used the words 'F*****' and "F******". These words are used in slang language, are treated to be foul words and are utterly disrespectful to women. We have also noticed that though the Marathi version of the testimony of the prosecutrix indicates certain Marathi words used by her like "वाईट कृत्य केले, वाईट काम करुन माझी इज्जत लुटली" etc., yet the Trial Court has repeatedly used the above mentioned objectionable words, while recording the English version of her testimony.

4. The complaint of the prosecutrix was that the accused, who is her cousin father-in-law, has committed an offence punishable under Section 376 of the Indian Penal Code. On the night prior to 25/03/2010, she had served dinner to the accused as her mother-in-law (PW7), the wife of the accused and the son of the accused had gone outstation to Vadner for a religious function. On 25/03/2010, at around 10.30 a.m., while she was drawing water from a jar, the accused grabbed her from behind. She questioned him as to what was he doing and he allegedly said that she should not worry. It was the third day of her menstrual cycle. He forcibly pushed her and laid her on the ground. He then lifted her sari and committed an offence. She stated that since she was partially affected by paralysis, she was unable to push him away. He took advantage of her weak condition. After committing intercourse for 4 to 5 minutes, he threatened her with death if she narrated the incident to anybody. She was frightened and weeping. After her mother-in-law came back, she narrated the incident to her. After her father-in-law returned from work, she narrated the incident to him as well. Her husband had started from Pune and after he returned in the evening, there was a consultation and it was decided to lodge the police complaint. Hence, the FIR was registered at about 9.00 p.m. on 25/03/2010.

5. In the examination-in-chief at Exh.11, the prosecutrix (PW1), has stated that she was residing in a hut which had no door, adjacent to the hut of the accused. She had given him kick blows, because she was suffering from paralysis to her left hand. In Cross-examination, she admitted that her husband has two wives. The second wife has given birth to two children. The prosecutrix is childless as her first child died and she suffered abortion during the second pregnancy. Her husband is living at Pune along with his second wife and children and does not financially support the prosecutrix.

6. In her lengthy cross-examination, she claimed to have suffered injuries on her head and on her back. There was a swelling (bump) on her head. There were abrasions on her hand and her back. The bangles that she had worn were broken and injuries were caused to both her hands. The children of her husband's brother were playing in the courtyard outside her hut. Both, the girl child and the male child are between 10 to 15 years of age. She had suffered an injury of about 3 to 4 inches on her back which was not a bleeding injury. The injuries caused due to the breaking of the bangles were also not bleeding injuries. There was a swelling to her right hand and abrasions on the wrist. She had slapped the accused on his face and had kicked him with her legs.

7. In paragraph Nos.7 and 8 of her cross-examination, she had stated that many statements appearing in her examination-in-chief were told to the police and she cannot assign any reason why the said statements do not appear in the FIR. She has also stated that she has suffered a bleeding injury to her private part due to the violent act of the accused and three to four stitches had to be administered.

8. We have perused the medical report Exh.13. Her medical examination reveals no external injury. She was found to be habituated to sexual intercourse. There were no injuries to her back or her head. There were no injuries on her legs, thighs or on her private part and there were no stitches thereon.

9. PW6 is the lady medical officer, who examined both, the prosecutrix as well as the accused on 26/03/2010. He was medically examined at 10.30 a.m. and she was examined at 11.00 a.m. She noticed that the prosecutrix had a history of loss of strength in her left forearm after the delivery of her first baby, which died after five months. She noticed no external injuries. She noticed menstrual bleeding. She found that the prosecutrix was habituated to sexual intercourse. She had not administered stitches on the private part of the prosecutrix as she did not notice any such injuries which would require 3 to 4 stitches. She opined that, if a lot of force is used by a

male while committing sexual intercourse with a woman, there is every possibility of an injury to her private part. She also did not notice any injury on the private part of the male, who was examined within 24 hours of the alleged incident. She did not find any injuries on the head or the bump on her head or on her back. She did not find any abrasion on her back or her hands which would have normally happened with the breaking of the bangles.

10. PW7 is the mother-in-law of the prosecutrix. She has stated that the prosecutrix had narrated her ordeal after PW7 had returned from Vadner. The prosecutrix had then narrated the same to her father-in-law who returned home after work. Thereafter, they proceeded to Loni Police Station for lodging the FIR.

11. In cross-examination, PW7 had no explanation as to why she has not stated in her statement that the prosecutrix had told her that the accused had committed rape. There is no significant piece of evidence emerging from the testimony of PW7.

12. PW8 is the son of PW7, who had travelled to Vadner. He corroborated the version of PW7 that when they reached home at about 12.00 noon on 25/03/2010, the prosecutrix, who is the wife of the brother of PW8, had told PW7 that the accused had committed rape.

In his cross-examination, he stated that he had told the police to record his statement on the same day that the prosecutrix had told PW7 about the said incident. The testimony of PW8 is insignificant.

13. PW9 is the Investigating Officer. He stated the manner in which the investigation was carried out. He has mentioned about the medical examination of the prosecutrix and the accused. The clothes of both the persons were seized and were sent for anaylsis to the Regional Forensic Science laboratory. He referred to the statements that were recorded by him during investigation. He has supported the spot panchnama, the arrest panchnama and the preparation of the sketch map at the place of the crime.

14. In cross-examination, he has stated that the prosecutrix did not tell him that the accused grabbed her from behind and told her that she should not worry. He further stated that she did not tell him regarding any injury caused to her on her body or on her private part. She did not tell him that she had questioned the accused as to what was he doing, when he grabbed her. He further stated that she did not tell him that while the accused was committing the unlawful act, she had slapped him on the face, he had pressed her nose and then had gagged her by putting a cloth in her mouth. She did not tell him that stitches were administered on her private part due to injuries suffered by her.

15. The Honourable Apex Court (three Judges Bench) in the matter of **Shivaji Sahebrao Bobade & anr. Vs. State of Maharashtra, AIR 1973 Supreme Court 2622,** has held that this Court has to be extremely cautious while dealing with an appeal against acquittal. This Court cannot get swayed by the gravity of the offence. The principles settled by the Honourable Apex Court would indicate that the High Court should assess the evidence in proper perspective for avoiding, both, the exploitation of every plausible suspicion as militating against the certitude of guilt and the unjust loading of dice against the accused. There are no fetters on the plenary power of the Appellate Court to review the whole evidence on which the order of acquittal is founded and it has a duty to scrutinize the probative material de nova.

16. We deem it apposite to reproduce paragraph Nos.5 to 9 from Shivaji S. Bobade (supra), as under :-

> *"5. Before dealing with the merits of the contentions, we may perhaps make a few preliminary remarks provoked by the situation presented by this case. An appellant aggrieved by the overturning of his acquittal deserves the final court's deeper concern on fundamental principles of criminal justice. The present accused, who have suffered such a fate, have hopefully appealed to us for a loaded approach against guilt in consonance with the initial innocence presumed in their favour fortified by the acquittal that followed. We are clearly in agreement*

with this noble proposition, stated in American Jurisprudence at, one time (not now, though) as implied in the rule against double jeopardy, in the British system as a branch of the benefit of reasonable doubt doctrine and in our own on the more logical, socially relevant and modern basis, that an acquitted accused should not be put in peril of conviction on appeal save where substantial and compelling grounds exist for such a course. In India it is not a jurisdictional limitation on the appellate court but a judge-made guideline of circumspection. But we hasten to add even here that, although the learned judges of the High Court have not expressly stated so, they have been at pains to dwell at length on all the pointed relied on by the trial court as favourable to the prisoners for the good reason that they wanted to be satisfied in their conscience whether there was credible testimony warranting, on a fair consideration, a reversal of the acquittal registered by the court below. In law there are no fetters on the plenary power of the Appellate Court to review the whole evidence on which the order of acquittal is founded and, indeed, it has a duty to scrutinise the probative material de novo, informed, however, by the weighty thought that the rebuttable innocence, attributed to the accused having been converted into an acquittal the homage our jurisprudence owes to individual liberty constrains the higher court not to upset the holding without very convincing reasons and comprehensive consideration. In our view the High Court's judgment survives this exacting standard.

6. Even at this stage we may remind ourselves of a necessary social perspective in criminal cases which suffers from insufficient forensic appreciation. The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand especial emphasis in the contemporary context of escalating crime and escape. The judicial instrument has

a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs tho: the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community. The evil of acquitting a guilty person light-heartedly as a learned author has sapiently observed, goes much beyond the simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicated 'persons' and more severe punishment of those who are found guilty. Thus too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless. For all these reasons it is true to say, with Viscount Simon, that "a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent. .." In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing enhance possibilities as good enough to set the delinquent free arid chopping the logic of preponderant probability to, punish marginal innocents. We have adopted these cautious in analysing the evidence and appraising the soundness of the contrary conclusions reached by the courts below. Certainly, in the last analysis reasonable doubts must operate to the advantage of the appellant. In India the law has been laid down on these lines long ago.

7. This Court had ever since its inception considered the correct principle to be applied by the Court in an appeal against an order of acquittal and held that the High Court has full power to review at large I the

evidence upon which the order of acquittal was founded and to reach the conclusion that upon that evidence the order of acquittal should be reversed. The, Privy, Council in Sheo Swarup v. King Emperor negatived the legal basis for the limitation which the several decisions of the High Courts had placed on the right of the State to appeal under Section 417 of the Code. Lord Russel delivering the judgment of the Board pointed out that there was "no indication in the Code of any limitation or restriction on the High Court in the exercise of its powers as an appellate tribunal," that no distinction was drawn "between an appeal from an order of acquittal and an appeal from a conviction", and that "no limitation should be placed upon that power unless it be found expressly stated in the Code". He further pointed out at p. 404 that, "the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been, acquitted at his trial, (3) the right of the accused lo the benefit of any doubt, and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses". In Sanwat Singh & Others v. Sate of Rajasthan after an exhaustive review of cases decided by the Privy Council as well as by this Court, this Court considered the principles laid down in Sheo Swarup's case and held that they afforded a correct guide for the appellate court's approach to a case against an order of acquittal. It was again pointed out by Das Gupta, J. delivering the judgment of five Judges in Harbans Singh and Another v. State of Pubjab.

"In many cases, especially the earlier ones the Court has in laying down such principles emphasised the necessity of interference with an order of acquittal being based only on "compelling and substantial reasons' and has expressed the view that unless such reasons are present an Appeal Court should not interfere with an order of

acquittal (vide Suraj Pal Singh v. The State, (1952) S.C.R. 193; Ajmer Singh v. State of Punjab, (1953) S.C.R. 418; Puran v. State of punjab A.I.R. 1953 S.C. 459). The use of the, words 'compelling reasons' embarrassed some of the High Courts in exercising their jurisdiction in appeals against acquittals and difficulties occasionally arose as to what this Court had meant by the words 'compelling reasons'. In later years the Court has often avoided emphasis on 'compelling reasons' but nonetheless adhered to the view expressed earlier that before interfering in appeal with an order of acquittal a Court must examine not only questions of law and fact in all their aspects but must also closely and carefully examine the reasons which impelled the lower courts to acquit the accused and should interfere only if satisfied after such examination that the conclusion reached by the lower court that the guilt of the person has not been proved is unreasonable. (Vide Chinta v. The State of Madhya Pradesh, Criminal Appeal No. 178 of 1959 decided on 18-11-1960 (SC); Ashrafkha Haibatkha Pathan v. The State of Bombay, Criminal Appeal No. 38 of 1960 decided on 14-12-1960 (SC).)

"..... On close analysis, it is clear that the principles laid down by the Court in this matter have remained the same. What may be called the golden thread running through all these decisions is the rule that in deciding appeals against acquittal the Court of Appeal must examine the evidence with particular care, must examine also the reason on which the order of acquittal was based and should interfere with, the order only when satisfied that the view taken by the acquitting Judge is clearly unreasonable. Once the appellate court comes to the conclusion that the view taken by the lower court is clearly an unreasonable one that itself is a "compelling reason" for interference. For, it is a court's duty to convict a guilty person when the guilt is established beyond reasonable doubt, no less than it is its duty to acquit the accused when such guilt is not so established."

8. Now to the facts. The scene of murder is rural, the witnesses to the case are rustics and so their behavioural pattern and perceptive habits have to be judged as such. The too sophisticated approaches familiar in courts based on unreal assumptions about human conduct cannot obviously be applied to those given to the lethargic ways of our villages. When scanning the evidence of the various witnesses we have to inform ourselves that variances on the fringes, discrepancies in details, contradictions in narrations and embellishments in inessential parts cannot militate against the veracity of the core of the testimony provided there is the impress of truth and conformity to probability in the substantial fabric of testimony delivered. The learned Sessions Judge as at some length dissected the evidence, spun out contradictions and unnatural conduct, and tested with precision the time and sequence of the events connected with the crime, all on the touchstone of the medical evidence and the postmortem certificate. Certainly, the court which has seen the witnesses depose, has a great advantage over the appellate judge who reads the recorded evidence in cold print, and regard must be had to this advantage enjoyed by the trial judge of observing the demeanour and delivery, of reading the straightforwardness and doubtful candour, rustic naivete and clever equivocation, manipulated conformity and ingenious unveracity, of persons who swear to the facts before him. Nevertheless, where a judge draws his conclusions not so much on the directness or dubiety of the witness while on oath but upon general probabilities and on expert evidence, the court of appeal is in as good a position to assess or arrive at legitimate conclusions as the court of first instance. Nor can we make a fetish of the trial judge's psychic insight.

9. Let us now sift the evidence from the proper perspective outlined above avoiding both the exploitation of every plausible suspicion as militating against the

certitude of guilt and the unjust loading of the dice against the accused merely because of a conviction rendered by the High Court."

17. In the case before us, the admissible evidence, after ignoring the omissions, relevant to our conclusions, is as under :-

a) The version of the prosecutrix of having suffered injuries due to the breaking of the bangles is found to be false in view of there being no medical evidence and no bangle pieces found at the spot of the crime;

b) No injury or bump was found on the head of the prosecutrix;

c) No abrasions, much less injuries, were found on the back of the prosecutrix;

d) No semen stains were found on the petticoat of the prosecutrix;

e) No injuries were found on her thighs or legs;

f) No injury was found on her private part and the story of her vagina suffering injuries because of the forceful offensive act of the accused, requiring 3 to 4 stitches, is also false;

g) Her story of having slapped the accused was not supported by medical evidence as there was no slap imprint on his face or abrasions;

h) No injuries were noticed on the body of the accused or on his private parts in the backdrop of the version of the prosecutrix that she forcefully resisted the accused by kicking him with her legs.

18. The report of the Regional Forensic Science Laboratory indicates that human semen was found on the underwear of the accused and human blood was found on the petticoat of the prosecutrix. PW6, Doctor has explained that as the prosecutrix was having the third day of her menstrual cycle, such blood stains appear on the under garments. Though the accused was medically examined around 10.15 a.m. on 26/03/2010, there was not an abrasion on his body or any injury to his private part, and, therefore, there was no evidence of any violence in the alleged intercourse episode between the accused and the prosecutrix. We are not giving any weightage to the particular statement of PW6 – Doctor, that the prosecutrix, though deserted by her husband, after his remarriage, several years ago, was habituated to sexual intercourse, for the reason that it is immaterial whether she voluntarily has intercourse with anybody else. It is important for the law to record that, if the prosecutrix has opposed a sexual intercourse by any person, her disinclination or her refusal will tantamount to the male counterpart offending her physically and such intercourse committed against the will and the desire of the

prosecutrix, would constitute an offence punishable under Section 376 of the IPC.

19. Despite the strenuous submissions of the learned Prosecutor, he is unable to convince us that though the prosecutrix does not have a single abrasion on her body and her entire narration of several injuries as noted above, have been proved to be false, we could still arrive at a conclusion that the accused and the accused alone, had committed the offence. The learned Prosecutor is also unable to convince us that the absence of even an abrasion or any 'tell tale' sign of sexual assault, there was evidence before us to convict the accused.

20. It is well settled that, when an appellate Court deals with an appeal against acquittal, the presumption of 'innocent until proven guilty', would be even stronger. If the appellate Court has to arrive at a contradictory finding, it should be absolutely sure on the basis of the entire evidence available, that, firstly the Trial Court committed a patent error in delivering a finding of acquittal and secondly, the evidence available does not leave an iota of doubt in the mind of the appellate Court that the guilt of the accused is proved beyond any doubt and that the accused alone and no one else has committed the crime.

21. The question before us is as to whether, the prosecution has been able to fully convince us, in the light of the law laid down in ***Chandran @ Surendran and another vs. State of Kerala, 1991 Supp (1) SCC 39***, so as to safely draw a conclusion that the appellant and the appellant alone and none other, has committed the murder. We may develop a strong suspicion by the evidence before us. However, the Honourable Apex Court has recently held on 12.02.2021 in the case of ***The State of Odisha vs. Banabihari Mohapatra and another, Special Leave Petition (Crl) No.1156/2021***, that suspicion, however strong it may be, cannot be a substitute for substantive evidence. Suspicion can never take place of proof and the court cannot base it's order of conviction on the basis of suspicion.

22. In ***Chandran @ Surendran (supra)***, the Honourable Supreme Court has held in paragraphs 12 and 13 as under:-

> "*12. Admittedly, there is no direct evidence connecting the appellants with the offence. No identification parade seems to have been conducted although PW 33 has deposed that he requested for an identification parade. Further, there is no evidence about the movement of these appellants near the scene either before or after the occurrence. Therefore, the inference of guilt of the appellants is to be drawn from circumstantial evidence only. It is needless to emphasise that those circumstances should be of definite tendency pointing towards the guilt of the appellants and in their totality must unerringly lead to the conclusion that the offence was committed by the appellants and none else. The circumstantial evidence adduced by the prosecution in the instant case is two fold:*
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> *(1) The recovery of MOs 1 to 3 said to have been*

made in pursuance of the statement of the first accused to the police.

(2) The evidence of PW 30, the Fingerprint Expert to the effect that the finger impressions found on the two glass pieces seized from the scene of the occurrence were found on comparison and examination as those of appellants 1 and 2.

13. *As the appellants are awarded the extreme penalty of law only on the above two pieces of evidence, we have to scrutinise these two circumstantial pieces of evidence in a very careful, cautious and meticulous way and see whether this evidence can be accepted and acted upon to mulct these appellants with this dastardly crime. The fact that these two murders which are cruel and revolting had been perpetrated in a very shocking nature should not be allowed in any way to influence the mind of the court while examining the alleged involvement of the appellants. It is worthwhile to recall an observation of this Court in Datar Singh v. State of Punjab, [(1975) 4 SCC 272] articulating that (SCC p. 275, para 3) "Courts of justice cannot be swayed by sentiment or prejudice against a person accused of the very reprehensible crime …."*"

23. In view of the above, this appeal fails and is, therefore, dismissed.

24. The R & P. be returned to the Trial Court. Muddemal property may be destroyed after the appeal period is over.

25. Since the learned Advocate for the respondent accused was appointed through the High Court Legal Services Sub-Committee, Aurangabad, her fees are quantified at Rs.10,000/-.

(B. U. DEBADWAR, J.) **(RAVINDRA V. GHUGE, J.)**

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