

Sessions Case No. 219/2016

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Judgment

MHCC050022842016



Presented on : 15-06-2016

Registered on : 15-06-2016

Decided on : 01-04-2023

Duration : 6years, 9months, 17days

Exhibit- 218

IN THE COURT OF SESSIONS, AT DINDOSHI
(BORIVALI DIVISION), GOREGAON, MUMBAI
SESSIONS CASE NO. 219 OF 2016
(C.R.NO. 124 OF 2016)
(CNR NO.MHCC05-002284-2016)

The State of Maharashtra

(at the instance of Sakinaka Police Station,
Mumbai C. R. No. 124/2016)

.. Prosecution

V/s.

1. Mehaboob Babu Malik Khan

Age : 22 years, Occ : Rickshaw Driver,
Residing at : Parsi Chawl, Room No. 02, Subhash Nagar,
Jarimari, Andheri Kurla Road, Sakinaka, Mumbai – 72.

2. Mohammed Muzammil Mohammed Tanvir Shaikh

Age : 25 years, Occ : Rickshaw Driver,
Residing at : Parsi Chawl, Room No. 02, Subhash Nagar,
Jarimari, Andheri Kurla Road, Sakinaka, Mumbai – 72.

3. Wasim Ahmed Jalil Ahmed Ansari

Age : 20 years, Occ : Rickshaw Driver,
Residing at : Parsi Chawl, Room No. 02, Subhash Nagar,
Jarimari, Andheri Kurla Road, Sakinaka, Mumbai – 72.

4. Nadim Mohammed Sarfaraj Shaikh

Age : 21 years, Occ : Rickshaw Driver,
Residing at : Parsi Chawl, Room No. 02, Subhash Nagar, Jarimari,
Andheri Kurla Road, Sakinaka, Mumbai – 72. **.. Accused**

**CHARGES : FOR THE OFFENCE PUNISHABLE UNDER SECTIONS
323, 342, 366, 376(D), 377, 506(2) OF THE INDIAN PENAL CODE,
1860.**

Ld. APP Mr. R. C. Savle for the State/Prosecution.

Ld. Advocate Mr. Wahab Khan for Accused.

**CORAM: H. H. The Additional Sessions Judge
Shri. Shrikant Y. Bhosale
(C.R.No.9)**

DATE : 1st April, 2023

**JUDGMENT
(Delivered on 01.04.2023)**

The accused are facing charges for the offence punishable under sections 323, 342, 366, 376(d), 377, 506(2) r/w 34 of The IPC.

2. The case of the prosecution in short is that the victim P.W. No. 7 was maid servant, serving in one house at Malad (West). On the day of incidence i.e. on 02.03.2016 the victim was engaged in household work till late night. Since there was birthday of child of her employer. Around 1.30 a.m. on 02.03.2016 she finished the work and left the house of the employer and proceeded to her house. On some distance she got auto rickshaw, but after crossing half of the way, the auto rickshaw driver refused to go ahead on the ground that he do not know the further road. The victim paid fare & left the auto rickshaw started proceeding ahead. When she reached near Jarimari, Sakinaka, one auto rickshaw came from back side, hence, she stopped it. When she was about to talk with that auto rickshaw driver, two person came from her back side, caught her mouth and forcibly made her to sit in the

rickshaw. The person then took her towards one room. The persons beat her and also threatened her by saying that there is no use of shouting since no one will come here. The said person also threatened to kill her. The victim was taken inside the room. The persons removed her clothes and snatched her mobile phone. One person beat her by hammer, one person showed her knife and threatened to kill her if she raised shout. Two or three persons had caught her hands and legs, two or three persons entered their penis in her mouth and she was gangraped. The episode was continued for about one and half hour. Meanwhile, hearing her shouts, someone came out of the chawl and started saying, “where is the girl who is shouting” ? Thereafter, the person ran away. Thereafter, two girls came in the room and they put some clothes on her, since the victim was not in a position to wear the clothes by herself. One of the girl had already dialed 100 number for calling the police. The girls took the victim outside the room, at that time police came on the spot and they took the victim to the police station where she lodge the first information Exh. 14 at about 7.30 a.m.

3. During the investigation the investigation officer took prompt steps and on same day succeed to arrest four person in between 2.30 p.m. to 4.30 p.m. The victim was sent for medical examination, so also the accused. The clothes of the victim were seized since some semen stained were appearing on it. The blood of the accused was taken for DNA examination and was sent to Forensic Laboratory alongwith the clothes of the victim. During the investigation it was transpired that Mehtab and Irshad are the absconding accused. In the first information the victim had stated that the persons were unknown to her but one of them was referred by other accused as Salman.

4. After completion of the investigation charge-sheet was filed and the concerned Magistrate in due course committed the case to this Court. Accused nos. 1 and 4 could not released on bail. However, accused nos. 2 & 3 succeeded for bail. The charge was framed vide Exh. 51. The accused pleaded not guilty and claimed to be tried. The prosecution accordingly examined ten witnesses including the victim as P. W. No. 7. The statement of the accused under section 313 of Cr.P.C. have been recorded vide Exh. Nos. 197, 198, 199 & 201 respectively. Their defence appears to be of total denial. However, from the trend of cross-examination specially the cross-examination of investigation officer, the defence of the accused appears to be that the victim is prostitute and the accused had hired her services. However, there was dispute for payment and hence, the victim lodged false case against them.

5. In light of the available evidence on record I heard Ld. APP R. C. Savle for the State and Ld. Advocate Wahab Khan for the accused. Following points arise for my determination and I have answered the said for the reasons recorded below therein.

Sr. No.	POINTS	FINDINGS
1.	Does the prosecution prove that on 02.03.2016 in between 4.00 a.m. to 5.00 a.m., in one lane, in one room at Jarimari, Sakinaka, Mumbai the accused had beaten the victim/complainant voluntarily caused hurt to her and thereby committed an offence punishable under Section 323 of The Indian Penal Code, 1860 ?	In the Negative

2.	Does the prosecution prove that on the above date, time and place, the accused had wrongfully confined the victim/complainant in one room and thereby committed an offence punishable under Section 342 of The Indian Penal Code, 1860 ?	In the Negative
3.	Does the prosecution prove that on the above date, time and place, the accused had kidnapped the victim/complainant in order that they might forced or seduced her to illicit intercourse and thereby committed an offence punishable under Section 366 of The Indian Penal Code, 1860 ?	In the Negative
4.	Does the prosecution prove that on the above date, time and place, the accused had gang raped the victim/complainant by constituting the group in furtherance of common intention and thereby committed an offence punishable under Section 376(D) of The Indian Penal Code, 1860 ?	In the Negative
5.	Does the prosecution prove that on the above date, time and place, the accused had committed unnatural sexual intercourse with the victim/complainant and thereby committed an offence punishable under Section 377 of The Indian Penal Code, 1860 ?	In the Negative
6.	Does the prosecution prove that on the above date, time and place, the accused had threatened the victim/complainant of killing and	

	thereby committed an offence punishable under Section 506(2) of The Indian Penal Code, 1860 ?	In the Negative
7.	What Order ?	The accused stands acquitted.

Evidence of Prosecution :-

6. The first witness of prosecution is owner of the room where the incidence allegedly took place. According to P. W. No. 1 the room was standing in the name of his mother and in January, 2016 the concerned room was leased out to accused No. 1 Mehaboob Malik and accused No. 4 Nadeem. According to him on 02.03.2016 i.e. on the day of incidence his mother told him that Mohd Malik and Nadeem had brought one girl and had done improper work with her. The police came and his mother assisted the police in search and arrest of accused Mehboob Babu Malik and accused Nadeem who were at the shop of accused No. 2 Muzammil.

7. P. W. No. 2 is WPC Smt. Jyoti Bhog who took the victim and the accused to Sion hospital on 10.03.2016 for medical examination and for collecting samples. After collecting samples she carried the said to the Forensic Laboratory, Kalina and obtained the acknowledgment on the office copy Exh. 101 to 105.

8. P. W. No. 3 WPC Smt. Varsha Ugale has deposed that at morning hours of 02.03.2016 she was on patrolling duty. When the patrolling van came near Jarimari area, they saw mobile van no. 1 of Sakinaka police station parked near Harimasjid. PSI Ashok Shinde stopped their patrolling van. One woman was in his custody and as per

the instruction of PSI Ashok Shinde the witness brought the said woman i.e. the victim to Sakinaka police station and produced the victim before duty officer PSI Kamble. Thereafter, mobile van no. 1 also came to the police station along with two women. ASI Shinde narrated the facts to PSI Kamble.

9. P. W. No. 4 PSI Yashwant Gundaal has deposed that on 10.03.2016 PI Nalawade i.e. P. W. No. 10 asked him to carry some sealed articles to Forensic Laboratory. Accordingly he carried the sealed articles in C. R. No. 124/2016 to Forensic Laboratory and produced the acknowledgment Exh. 115 before PI Nalawade.

10. P. W. No. 5 is panch on the seizure of wearing of the victim i.e. legging, jacket, T-shirt, brassier and nicker i.e Articles A to E. According to witness the clothes were shown to him by woman police constable of Sakinaka police station. P. W. No. 6 Bharati Gujar was the another panch of seizure of above articles. She has identified Articles A to E before the Court.

11. P. W. No. 7 is the victim and she has narrated almost similar story as appearing in the first information Exh. 144.

12. P. W. No. 8 is panch for identification parade carried out in Arthur Road jail on 18.05.2016. According to witness at first instance two accused were arranged along with the dummy accused in two rows but the victim could not identify the accused standing in the row. Then the informant was asked to go away and thereafter, two other accused were brought and were arranged in two rows along with the other dummy accused. At that time the victim identified accused Mehboob

Babu Khan and accused Nadeem. The panchnama to that effect was prepared, it is at Exh. 152.

13. P. W. No. 9 is police inspector Dattatray Deshmukh. He has deposed that C. R. No. 124/2016 was registered with Sakinaka police station on 02.03.2016. On that day itself he received secret information that four accused in the above crime are in the vicinity of Jarimari. The witness accordingly rushed towards Jarimari along with staff and took the search of the suspect. Accused nos. 1 to 4 were found near compound wall of Airport, accordingly he apprehended the accused and brought to the police station. Vide panchnama Exh. 173 the accused were arrested, prior to that the witness seized the wearings of the accused. In personal search of accused nos. 1 and 2 their PAN Card, Aadhar Card were found and said were seized. Two mobile phones from accused no. 2, one mobile phone from accused no. 3 and one mobile phone from accused no. 4 were also seized.

14. P. W. No. 10 Sr. Police Inspector Nalawade is the investigation officer and has narrated that on 02.03.2016 the investigation of C. R. No. 124/2016 was handed over to him. He has narrated the manner in which the investigation was carried out by him and lastly he submits that as there was sufficient evidence available against the accused, the charge-sheet was submitted.

Arguments of Ld. APP :-

15. Ld. APP vehemently submitted that all the ten witnesses of prosecution have supported the case as narrated in the first information. The victim has deposed in the Court in what manner she was gang raped, and how inhumane behavior she was treated by the accused.

According to victim all the accused simultaneously assaulted the victim sexually. There was unnatural intercourse also. In such circumstances, her testimony can not be disbelieved.

16. In light of the statement of the victim under section 164 of Cr.P.C. and admission of investigation officer regarding keeping the three girls in Mahila Sudhar Gruh, the Ld. APP submits that even if it is admitted that victim prostitute, still no one has right to establish sexual intercourse with her against her consent and wish. Therefore, if the other part of the evidence of the victim is excluded for sake of argument still, her statement of forcible rape by the accused is corroborated by her both the statements i.e. her statement before the Court and her statement under section 164 of Cr.P.C. It is therefore submitted that offence against the accused is proved and they deserves conviction.

Arguments of Defence :-

17. The Ld. Adv for the accused pointed out that as per the first information all the culprits were unknown to the victim. However, she has made reference of one of suspect as “Salman” stating that the other persons were calling that person by name Salman, but none of the four accused before the Court is by name Salman nor anyone from the absconding accused is shown by name Salman. According to him the prosecution has allegedly conducted the identification parade on 18.05.2016, but the informant could identify accused no. 1 and accused no. 4 only. The said identification parade and evidence of the informant to that effect is also not reliable, since the victim has admitted in her cross-examination that on the day of incidence itself, the police arrested four accused and they were shown to her in the police station. Thus, no sanctity remains regarding the identification of

accused and accused no. 4 by the informant.

18. It is further pointed out that the statement of the victim and her two friends were recorded under section 164 of Cr.P.C. The said statement Exh. Nos. 203, 204 & 205, if considered, it is seen that the victim has admitted that she is prostitute and had gone to the room of the accused on the call of her madam. She also admitted that there was dispute for the payment. Thus, the statement of the victim under section 164 of Cr.P.C. supports the case of the defence. It is also pointed out that the two girls who allegedly came on the spot and rescued the victim, made their statement before the Magistrate under section 164 of Cr.P.C. Those two girls are not examined by the prosecution to corroborate the story of the informant. It is further pointed out that the investigation officer has admitted that the victim and those two girls were not disclosing their identity and their residential address and therefore, he got doubt about them and hence all three girls kept in Mahila Sudhar Gruh, Chembur. If the said fact is considered alongwith the fact that when the victim was recalled, prosecution could not trace her. These circumstances are doubtful.

19. The Ld. Adv for the defence further submitted that when the 80% of the story of the victim that she was maid servant, she had worked at late night at the house of her employer and was proceeding towards her house by auto rickshaw etc is proved to be false. On such circumstances the remaining statement of the victim is not free from doubt and therefore, her entire evidence needs to be rejected.

20. It is further submitted that the statement of the victim under section 164 of Cr.P.C. was not opened till statement of the

accused under section 313 of Cr.P.C. were recorded and therefore, the defence could not get the opportunity to cross-examine the victim in light of her statement under section 164 of Cr.P.C. Thus, it can not be said that the accused had a fair opportunity to cross-examine the witnesses to establish their defence fully.

21. It is further pointed out that the notice was given to the prosecution for production of all the necessary documents, at that time the prosecution refused the fact of having any documents other than charge-sheet. However, subsequently the prosecution produced the medical certificate of victim, and of accused no. 2 that too after completion of the cross-examination of the victim. The medical certificate of accused no. 2 states that according to the accused no. 2 the services of the victim were higher and she had voluntarily come to the room. According to the defence producing such document at late stage has caused prejudice to the defence. It is further pointed out that the report of Forensic Science Laboratory expert (which was admitted at the time of argument), the FSL report has made observation regarding matching of DNA of accused no. 4 but again it is observed that DNA of accused no. 4 is not matching. Thus, the report of FSL is self contradictory.

22. Ld. Counsel for the defence therefore submits that the story of the prosecution is not inspiring any confidence. The statements of the victim before the Court and before the Magistrate under section 164 are contradictory and therefore, her statement that she was forcibly raped by the accused is not at all believable and therefore, the accused are entitled for acquittal.

As to Point Nos. 1 to 6 together :-

23. Considering the evidence on record and the arguments, I thought it fit to discuss all the points simultaneously. The defence has disputed the genuineness of the allegation of the victim about the forceful intercourse, so also that the victim was abused, assaulted and threatened. The victim in the first information and in her deposition before the Court has stated that at relevant time she was serving as maid for 24 hours in one house at Malad (West). Her husband, three children and her uncle and aunt were residing in one slum near Juhu Tara Road. On the day of incidence there was birthday of the daughter of her employer. The victim therefore was required to work till 1.30 a.m. Her employer asked the victim to stay there, since it was odd time to proceed to the house. However, the victim told the employer that she will go to her house. After coming out of the house, she was searching for rickshaw. After crossing two buildings, she got the rickshaw, but after crossing half of the way, the rickshaw driver started saying that he does not know the road in the area. The victim paid the fare and started proceeding ahead by walk. Subsequently, one auto rickshaw came there from her back side and stopped near her. When she was about to ask the auto rickshaw driver, two person came from the back side and caught her mouth and forcibly made her to sit in the auto rickshaw and she was taken to one room where the subsequent event of forcible rape was occurred.

24. The defence has raised a serious question about the said version of the victim. In this regard, the cross-examination of the investigation officer i.e. P. W. No. 10 Chandrakant Nalawade if considered, it is seen that according to him the residential address given by the victim and the two girls i.e. 'KDS' and 'AHK' who allegedly

rescued the victim were subsequently proved to be false. According to investigation officer he had doubt that the victim and 'KDS' and 'AHK' could not be traced out subsequently and therefore, he kept them in Mahila Sudhar Gruh vide his letter dated 04.03.2016 Exh. 183.

25. Further, the statement of the victim recorded by Metropolitan Magistrate under section 164 of Cr.P.C. (Exh. 203) shows that the victim had called one madam, who asked her to go to one room for work. At about 3.00 p.m. the said madam asked her to go to Juhu Metro Station where she met two boys in one auto rickshaw. Out of these two persons, one was auto rickshaw driver. They told the victim that they have made payment to madam. The victim told them that madam has asked her to go to the hotel. The said persons were asking her to come to their house. Subsequently, said person told the victim that they will take her to hotel, but in fact they took her to one house. The victim asked them whether they both are coming. However, the said person replied that only one will come. They further told the victim that they have one room. The victim went to the room where five persons were present. The victim therefore told those persons that she wants to go back, but the person showed her the knife and made forceful act. She shouted but no one come. Thereafter, her madam sent two girls towards the room. Thereafter, police came and the concerned persons ran away.

26. The statement of witness 'KDS' and 'AHK' recorded by Metropolitan Magistrate under section 164 of Cr.P.C. (Exh. 204 and 205 respectively) states that the victim had gone with one boy where six persons were present. They forcibly made sexual assault, hence, the victim called them on phone. When the said witnesses reached on the

spot, the concerned persons ran away by giving push, then they called the police.

27. The above statements of victim Exh. 203 and the witnesses Exh. 204 and 205, referred above have destroyed the story of the prosecution that the victim was maid servant and at late night hours when she was proceeding towards her house, she was forcibly abducted and was taken to one room. On the contrary, the story of the defence that the victim was prostitute and her services were hired by the accused and that victim had voluntarily come to the room appears to be correct. The history narrated to the medical officer by accused Mohammed Muzammil Mohammed Tanvir Shaikh Exh. 184 appears to be consistent with the defence version. Thus, the basic version of the prosecution story is destroyed by the statements Exh. 203, 204 and 205 respectively.

28. It is true that even though a woman is prostitute, no one has right to commit forceful intercourse with her. Therefore, it is necessary to ascertain whether the further statements of the victim that she was sexually assaulted can be accepted. In this regard it is seen that the victim in her deposition Exh. 138 has narrated that the accused have forcibly made intercourse with her. They threatened her and the intercourse was in inhumane manner or it was cruel manner. However, in her statement under section 164 of Cr.P.C. Exh. 203 she has just stated “*tyani sarvani mazhyavar jabardasti keli*” (They all made forcible sexual assault on her). Except, the said statement there is no other statement giving details how the force was used, which accused did which act etc. Apart from the said, the medical report of the examination of victim Exh. 188 shows that there was no injury found on

Labia majora, Labia minora and on clitoris. It is further observed that there was no bleeding, Ledema, Urethra Intact, no evidence of injury on anus, no evidence of injury on oral cavity. The report further states that no external surface injury was present over the body of the victim. The report further states that no evidence of injury suggestive of application of force was noticed. On the basis of observation the medical officer made final opinion that “over all finding is consistent with old sexual intercourse”.

29. Thus, the medical evidence as referred above is not supportive to the version of the victim that there was forcible intercourse or that there was any physical assault on her, specially in light of the contention of the victim that someone from the accused was beating her by hammer. It is also seen that according to victim the knife was used to threaten her. However, no knife was recovered from any of the accused.

30. The prosecution has relied on the report of FSL expert. According to which the semen found on the legging (Article B) was of accused No. 4. In this regard when the medical report Exh. 188, para IV (d) is perused, it is seen that the medical officer noticed that the legging of the victim was torn. However, it is seen that no stain of blood, mud, semen was mentioned in the report.

31. Apart from the above, there are other several discrepancies regarding the identification parade. The victim could identify only two accused in the test identification parade and it has further come in the evidence that when the accused were brought to the police station, the victim was present there and she had seen the accused, who were

caught by the police. Thus, the victim had already seen the accused before the test identification parade and this fact is sufficient to discard the identification of the accused.

32. From the above discussion, it is clear that there is several room for doubt about the prosecution story regarding forcible sexual intercourse as narrated by the victim. The victim does not appear to be trustworthy and reliable in light of her statement in the first information, before the Court and before the Metropolitan Magistrate while recording statement under section 164 of Cr.P.C. and thus, there is reasonable doubt about the forcible sexual assault by the accused. The story of physical assault to attract section 223, of wrongful confinement to attract section 342, abduction to attract section 266, causing threat to attract section 506(ii) are also not believable along with the allegation of gang rape to attract section 376(d) and unnatural intercourse to attract section 377 of the IPC. Accordingly all the points under consideration are answered in the negative and following order is passed.

ORDER

- 1. Accused Nos. 1 Mehaboob Babu Malik Khan, Accused No. 2 Mohammed Muzammil Mohammed Tanvir Shaikh, Accused No. 3 Wasim Ahmed Jalil Ahmed Ansari and Accused No. 4 Nadim Mohammed Sarfaraj Shaikh** stands acquitted of the offence punishable U/Sections 323, 342, 366, 376(D), 377 and 506 (2) of The Indian Penal Code, 1860.
- 2. Accused Nos. 1 to 4** are directed to execute P. R. Bond of Rs. 15,000/- (Rupees Fifteen Thousand Only) each and one surety each or cash bail of Rs. 15,000/- (Rupees Fifteen Thousand Only)

each to comply the provision of Section 437(A) of Cr.P.C. Time to furnish surety or cash bail is granted for next six weeks from today.

3. Accused Nos. 1, 2 and 4 are in jail, they shall be released forthwith, if not required in any other case.
4. **The Muddemal as per the list of articles** i.e. **Article A** – Chocolate colour Jacket, **Article B** – Biscuit colour Legging, **Article C** – T-shirt of Reddish Maroon colour, **Article D** – Pink colour Nicker, **Article E** – Black bracier are worth less, be destroyed after period of six months if no intimation of Appeal against this Judgment is received from The Hon'ble High Court.
5. **Unmarked muddemal (VPR and MPR) as per list of articles** being worthless, be destroyed after appeal period is over.
6. The Judgment and order is dictated and thereby declared in open Court.

(Dictated & pronounced in presence of Ld. APP, Accused and Ld. Advocate for accused)

Date: 01.04.2023

(Shrikant Y. Bhosale)
The Addl. Sessions Judge
City Civil & Sessions Court,
Borivali Division, Dindoshi.

Dictated on : 01.04.2023
Transcribed on : 01.04.2023
Checked & corrected on : 03.04.2023
Signed on : 03.04.2023

CERTIFIED TO BE TRUE AND CORRECT COPY OF THE ORIGINAL SIGNED JUDGMENT/ORDER”

Date : 03/04/2023

Time : 6.18 P.M.

UPLOAD DATE AND TIME

Ms. Tejal C. Rane

(Stenographer Grade-I)

NAME OF STENOGRAPHER

Name of the Judge (with Court room no.)

**HHJ Shrikant Y. Bhosale
(Court Room No.9)**

Date of Pronouncement of JUDGMENT/ORDER

01.04.2023

JUDGMENT/ORDER signed by P.O. on

03.04.2023

JUDGMENT/ORDER uploaded on

03.04.2023