

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1551 OF 2018

Yogesh Pandurang Kupekar ..Appellant

V/s.

The State of Maharashtra ..Respondent

Mr. Kuldeep Patil a/w Ms. Saili Dhuru i/b Mr. Prashant M. Patil
for the Appellant.

Mr. R.M. Pethe, APP for the Respondent/State.

CORAM : C.V. BHADANG, J.

RESERVED ON : 22 NOVEMBER 2021

PRONOUNCED ON : 04 DECEMBER 2021

JUDGMENT

1. By this Appeal, the Appellant-accused is challenging the Judgment and Order dated 23.10.2018 passed by the learned Sessions Judge at Thane in Sessions Case No. 423 of 2016. By the impugned Judgment, the learned Sessions Judge has convicted the Appellant for the offence punishable under Section 376 and 354 of IPC and Section 3(2) of the Maharashtra Prevention and Eradication Human Sacrifice and Other Inhuman, Evil and *Aghori* Practices and Black Magic Act, 2013 ('the said Act'). For offence under Section 376 of IPC, the Appellant has been sentenced to suffer rigorous imprisonment for ten years and with fine. For offence under Section 354 of IPC and under Section

3(2) of the said Act, the Appellant has been sentenced to suffer rigorous imprisonment for three years and fine on each count. The substantive sentences have been directed to run concurrently.

2. The prosecution case may be briefly stated thus:

(PW-7) was married to (PW-8) in the year 2013 and even after two years of marriage, they were issueless. An acquaintance of her husband had introduced them to the Appellant stating that the Appellant is a devotee of *Macchindranath* and several devotees were benefited by his grace. PW-7 along with her husband Shailesh PW-8 went to *Math* of the Appellant at Goregaon and the Appellant is alleged to have promised PW-7 and PW-8 that they would be blessed with a child. The duo was regularly visiting the Appellant on each Thursday, when the Appellant used to give *vibhuti* (holi ash) and chant certain *mantras*.

3. In May 2015, the Appellant advised PW-7 and PW-8 to have a 'Reiki procedure', in which both of them were required to have physical relations in the presence of the Appellant. Although PW-7 had reservations for the same, as PW-8 had full faith and devotion on the Appellant on his insistence PW-7 and PW-8 had physical relations in the presence of Appellant, when the Appellant was allegedly chanting certain *mantras*. Such episodes in which PW-7 and PW-8 had physical relations in the

presence of the Appellant were undergone by PW-7 and PW-8 for five times.

4. On 24.07.2016, the Appellant came to the house of PW-7 and PW-8 and PW-7 and PW-8 had a similar episode. After this, according to PW-7, her husband Shailesh PW-8 was asked to go out of the room as the Appellant insisted that he would have some procedure conducted on PW-7. After PW-8 went on the terrace, the Appellant is alleged to have sexually abused PW-7. Upon a complaint being lodged to the concerned police station, the matter was investigated and upon completion of the investigation, a chargesheet was filed.

5. The learned Sessions Judge framed a charge for the offence punishable under Section 376 and 354 of IPC and Section 3(2) of the said Act. The Appellant pleaded not guilty to the charge and claimed to be tried. The defence of the Appellant is one of total denial and false implication.

6. At the trial, the prosecution examined in all ten witnesses and produced the record of investigation. The Appellant did not lead any evidence in defence.

7. The learned Special Judge has found the Appellant guilty. Hence, this Appeal.

8. I have heard Mr. Patil, the learned counsel for the Appellant and Mr. Pethe, the learned APP for the Respondent/State. With the assistance of the learned counsel for the parties, I have gone through the record.

9. It is submitted by the learned counsel for the Appellant that PW-7 and PW-8 are well educated and were allegedly visiting the Appellant on every Thursday, when there were several other devotees, who were attending the session on Thursday. It is submitted that the Appellant was residing along with his wife and family members. He, therefore, submitted that it is highly improbable that the Appellant could suggest or insist for any such procedure which PW-7 and PW-8 have referred to as Reiki. It is submitted that even the incident dated 24.07.2016 is highly improbable. It is submitted that even after PW-7 and PW-8 allegedly had physical relations in presence of the Appellant, PW-8 is alleged to have gone on the terrace which is hardly 10 to 15 steps away. He therefore, pointed out that it is highly improbable with the close proximity of PW-8, the Appellant could sexually abuse PW-7. It is submitted that on some occasions the episode was done in the third floor room, which was found in possession of a stranger. It is submitted that the entire incident is highly improbable and unacceptable. It is submitted that it was the second marriage of PW-7 as she was previously married and there is also evidence that she had earlier conceived and therefore, it is

unlikely that for begetting a child PW-7 and PW-8 could visit the Appellant. It is submitted that there is delay in lodging the FIR and there is evidence that the same was premeditated. He submitted that learned Sessions Judge was in error in convicting the Appellant.

10. The learned APP has supported the impugned Judgment. It is submitted that the evidence of PW-7 and PW-8 is consistent and one inspiring confidence. It is submitted that there is circumstantial evidence in the form of spot panchnama and recovery of articles which would show that the Appellant was professing to be the devotee of *Macchindranath* and there were devotees who were assembling at the house of the Appellant on every Thursday. It is submitted that the incident of present nature are a result of blind faith kept by so called devotees who out of their personal or family problems, seek such advice from the persons claiming to have super natural powers. It is submitted that it is in this context that the prosecution evidence has to be appreciated. It is submitted that the complainant and her husband had no reason to falsely implicate the Appellant. He submitted that the appeal deserves to be dismissed.

11. I have considered the circumstances and the submissions made. It has come on record that the Appellant was selling herbal products and claimed to be a devotee of *Macchindranath*. It has come on record from the evidence of PW-1, PW-2 and PW-3 who

are the neighbours of the Appellant as well as the evidence of PW-7 and PW-8 that the Appellant used to perform *puja* on every Thursday and used to take out a Sai baba palanquin (palakhi). It has also come in the prosecution evidence that some persons used to visit the house of the Appellant at Goregaon on every Thursday where the Appellant used to give *vibhuti* and used to chant *mantras*, professing to transfer the super natural powers into his devotees. The wife of the Appellant was a teacher in an international school at Malad and used to conduct classes, after the school hours at her house. It has also come on record that the Appellant was residing with his wife and a daughter.

12. PW-9 Ashok Devrukhkar was serving in Mumbai Municipal Corporation as a Watchman and had taken voluntary retirement in the year 2008. He claimed to be a disciple of Nikam Guruji and was running Ambika Yog Kutir. He claims that he was teaching Yoga. He was acquainted with Swapnil Jagushte, who is the brother-in-law of victim and elder brother of PW-8.

13. Coming to the victim and her husband, PW-8 Shailesh Jagushte is the husband of the victim and he was working as an LIC agent, while PW-7 who is the victim was initially assisting Ms. Ashwini Shirsat PW-4 and thereafter Mr. Fernandes both of whom are the Development Officers in LIC. PW-7 was married to PW-8 in the year 2013 and even after 2 years of their marriage,

they were not blessed with a child. This is the reason as to why PW-7 and PW-8, were visiting the house of the Appellant, who was professing to help such needy persons, who were suffering problems in their personal/family life. This precisely the prosecution case. It has come in the evidence of PW-7 and PW-8 that Appellant used to give them *vibhuti* and chant *mantras*. There were other devotees who used to visit on Thursday. It has come in the evidence of PW-7 that they had visited the house of the Appellant at Goregaon which was on the ground floor about 20 to 25 times. It is only in May 2015 that the Appellant is alleged to have suggested to PW-7 and PW-8 that both of them will be required to have physical relations in his presence. It has come in the evidence of PW-7 that although initially she had reservations on account of the faith of her husband on the Appellant and on his insistence, she agreed for the same. It has come in the evidence that PW-7 and PW-8 had physical relations in the presence of the Appellant (who used to chant *mantras*) about 5 times, out of which the first one was at the house of the Appellant on the ground floor and on the other occasions in the third floor room.

14. On 24.07.2016, the Appellant informed PW-7 and PW-8 that he would be visiting their house at Tapasya Co-op. Housing Savarkar Nagar, Thane and accordingly the Appellant visited their house at about 8.00 p.m. after which there was the usual episode in which PW-7 and PW-8 had physical relations, in the

presence of the Appellant. After this, the Appellant allegedly asked PW-8 to stay outside as the Appellant wanted to have some procedure with PW-7. Accordingly PW-8 went to the terrace and it is thereafter, that PW-7 claims that the Appellant had sexually abused her. The relevant portion of the evidence of PW-7 may be reproduced thus:

“ The accused asked me and my husband to have sexual intercourse in naked position. He was observing our sexual intercourse and was chanting mantras. After sexual intercourse accused asked my husband to wait outside of our house. He had told my husband that he want to perform some REKI procedure through me and during said period my husband should remain out of the house. My husband was having faith upon the accused. As per advise of the accused my husband left home and proceeded towards terrace. After my husband left home, accused asked me to stand up in front of him. He asked me to put my both hands on his chest. I obeyed him and put my hands on his chest. Thereafter, the accused hold my hand tight and moved it over his body. The accused moved my hand downwards on his body. Thereafter the accused removed his penis out of his pant and asked me to hold it in my hand. While I was taking away my hand, the accused hold my hand and jerk his penis up and down. The accused pressed my breast by his another hand. The accused pulled down my legin. The accused was rubbing lemon on my vagina forcefully. He inserted his fingers in my vagina and moved it in and out. I tried to restrain the accused. There upon accused said to me that he was transferring his powers in my body. He further said that if I did not obey him I would not have issue and

I would remain issueless as well as the entire procedure of REKI will be futile. Due to the faith as well as fear I kept quiet. The said act was going on for about 10 to 15 minutes. When the accused realised that my husband was returning from terrace, he pushed me away. He put his penis inside his pant. After my husband returned home accused sprinkled water on our body and chanted mantras. The accused handed over the lemon rubbed on my vagina to my husband and asked him to move it over my body and throw away. The accused left out home at about 10.30 p.m.”

It can thus be seen that PW-7 has narrated the act of the Appellant in sufficient particulars. There is corroboration to the part of the evidence of PW-7 from PW-8 also except the evidence of sexual abuse which had taken place in the absence of PW-8 when he had gone to the terrace. However, that part of the act was narrated by PW-7 to PW-8.

15. I have carefully gone through the cross-examination of PW-7 and PW-8 and there is nothing in the cross examination so as to strike at the veracity of their evidence. The evidence of PW-7 and PW-8 on the point of the various instances at the house of the Appellant at Goregaon and the subsequent incident dated 24.07.2016 at the house of PW-7 and PW-8 followed by the act of sexual abuse by the Appellant of PW-7 is natural, cogent and one inspiring confidence.

16. The evidence of PW-7 and PW-8 is criticised on the ground that it is improbable and therefore, unacceptable, which in my considered view cannot be accepted. The learned counsel for the Appellant urged that at no point of time the incident was disclosed to the near relations including Swapnil Jagushte, who is the elder brother-in-law of PW-7. He submitted that the evidence would show that Swapnil was a man of confidence. However, the alleged insistence of the Appellant for the couple to have physical relations in his presence, was never disclosed to him or any other relatives. The learned Counsel pointed out that the matter was reported to the police after 3 days i.e. on 27.07.2016 and there is no explanation forthcoming for the delay. The learned counsel also pointed out from the evidence of PW-9 Ashish Devrukhkar that there was a meeting held at the house of PW-9 on 26.07.2016 wherein Appellant along with his wife, PW-7 and PW-8 and Swapnil Jagusthe were all present and there were some talks to sort out the issues which was followed by the complaint on the following day. The learned Counsel also pointed out that there is a complaint lodged by the wife of the Appellant against PW-8 and PW-9 and in respect of which they had sought anticipatory bail. He, therefore, submitted that the possibility of the present complaint being lodged by way of counter blast, cannot be ruled out.

17. It is true that the evidence of PW-9 would show that there was a meeting arranged at his house which was attended by the Appellant and his wife and there were talks to sort out the issues. It has also come on record that there is a complaint lodged by the wife of the Appellant alleging molestation against PW-8. However, this in my considered view is not sufficient to displace the consistent evidence of PW-7 and PW-8 on the point of their visits to the house of the Appellant on every Thursday and the subsequent incidents and episodes as suggested by the Appellant, which was followed by the incident dated 24.07.2016. It is necessary to note that it has come in the evidence that otherwise the relations between PW-7 and PW-8 and the Appellant were cordial and they used to have *prasad* at the house of the Appellant and had also gone together for a picnic. There is no reason why PW-7 and PW-8 would suddenly turn hostile to the Appellant and lodge a complaint of the present nature. Coming to the aspect of delay, the nature of allegations and the possible stigma, which it may invite, at times forces the parties to reflect on the issue of the matter being taken to police. Although there is a delay of 3 days, the circumstances looking to the nature of the allegations and the episode, there is nothing unusual if PW-7 and PW-8 had reflected on the issue of lodging of the complaint, before finally deciding to act.

18. I have given my anxious consideration to the criticism raised against the evidence of PW-7 and PW-8 including the matter of delay and I am unable to find that the delay would be material so as to discard their evidence.

19. The learned counsel for the Appellant also strenuously urged that according to PW-7 on 24.07.2016, after PW-8 was asked to go out, PW-8 had gone to the terrace which was nearby and it is highly improbable that the Appellant would indulge into the act narrated by PW-7 during the period of absence of PW-8 when PW-8 was at a short distance. The said contention also does not impress me. The evidence in this regard has to be appreciated on broad human probabilities. It has sufficiently come on record that PW-8 had deep faith on the Appellant and it is only on account of such faith that he and his wife had undergone the various episodes of having physical relations in the presence of the Appellant which could otherwise be quite embarrassing. PW-7 was also aware of the faith of her husband on the Appellant and therefore, it is probable that she might not have found anything unusual and might not have objected when PW-8, was asked to go out. It is significant to note that the blind faith of the parties/victim on the accused is the real driver in such cases. The evidence in such cases has to be appreciated in the context of these peculiar circumstances.

20. Broadly speaking there are three spots of incident in the present case. The first is the house of the Appellant on the ground floor and the second on the third floor room in the same building at Goregaon, Mumbai where PW-7 and PW-8 had physical relations in the presence of the Appellant. The third spot is at the house of PW-7 and PW-8 at Thane. There is a spot panchnama (Exh.25) drawn of these spots during the course of investigation which was referred to while claiming that the terrace is just nearby the room where the incident dated 24.07.2016 had allegedly taken place. I have already adverted to the contention raised in this regard. The learned counsel for the Appellant pointed out from the panchnama Exh.25 that the ground floor flat was shown to be occupied by one Pramod Sopekar while on the third floor one Avinash Gaikwad was found to be present. Therefore, in the submission of the learned counsel for the Appellant, it is improbable that the incident as claimed could be there in the room on the third floor. The contention in my view cannot be accepted, only because at the time of the spot panchnama, somebody else had opened the door in the said room that is not sufficient to displace the evidence of PW-7 and PW-8 which is otherwise found to be cogent and acceptable.

21. It is necessary to note that after 2013 amendment, Section 375 of IPC which is relevant for the purpose defines rape, as under:-

“375. Rape – A man is said to commit “rape” if he-
(a) penetrates his penis, to any extent, into the vagina, mouth urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:-

First – Against her will.

Secondly – Without her consent.

Thirdly – With her consent when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly – With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly – with her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly – With or without her consent, when she is under eighteen years of age.

Seventhly – when she is unable to communicate consent.”

22. It can thus be seen that the act of the Appellant as stated by PW-7 in her evidence would come within the ambit of Section 375(b) of IPC.

23. I have carefully gone through the impugned judgment and so far as the finding of the Appellant being found guilty under Section 376, 354 and 3(2) of the said Act, no exception can be taken to said finding.

24. This takes me to the question of sentence. A perusal of Paragraph 44 of the impugned judgment would show that learned Sessions Judge appears to be under impression that 10 years of imprisonment is the minimum sentence for the offence punishable under Section 376 of IPC. However, Section 376(1) was amended by Act No. 22 of 2018 w.e.f. 21.04.2018. The incident in the present case being dated 24.07.2016 would be governed by Section 376(1) as it stood prior to the amendment by Act No. 22 of 2018. Sub-Section 1 of Section 376 as it stood then prescribed a minimum sentence of 7 years. In my considered view the sentence of 10 years awarded to the Appellant deserves to be modified to 7 years under Section 376 of IPC. The rest of the conviction and the sentence deserves to be maintained.

25. In the circumstances, the following order is passed:

ORDER

(i) The Appeal is partly allowed to the extent of modification of the sentence.

(ii) The conviction of the Appellant for the offence punishable under Section 376, 354 of IPC and Section 3(2) of the Maharashtra Prevention and Eradication of Human Sacrifice and other Inhuman, Evil and *Aghori* Practices and Black Magic Act, 2013 is hereby confirmed.

(iii) For the offence punishable under Section 376 of IPC, the Appellant shall undergo Rigorous Imprisonment for seven years and shall pay fine of Rs.25,000/- and in default, shall undergo further Simple Imprisonment for three months.

(iv) The sentence awarded to the Appellant under Section 354 of IPC and Section 3(2) of the said Act is maintained.

(v) The substantive sentences shall run concurrently.

(vi) The rest of the judgment stands confirmed.

(C.V. BHADANG, J.)