

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 566 OF 2014

Kisan @ Krushna Barku Panker
Age: 42 years, R/o Dahigaon-ne
Tq. Shevgaon, Dist. Ahmednagar

..APPELLANT

VERSUS

State of Maharashtra,
Through: A.P.I. Police Station,
Shevgaon, Tq. Shevgaon,
Dist. Ahmednagar

..RESPONDENT

....
Mr. N.C. Garud, Advocate for appellant.
Mr. N.T. Bhagat, A.P.P. for respondent-State.

....

CORAM : M.T. JOSHI, J.
DATED : 24th NOVEMBER, 2015

ORAL JUDGMENT :

Heard both sides.

2. Aggrieved by the judgment and order dated 8th July, 2014 passed by the Additional Sessions Judge, Ahmednagar in Sessions Case No. 206/2013 thereby convicting the appellant for

the offences punishable under Section 376(2)(i)(j) of Indian Penal Code and under Section 4 of Protection of Children from Sexual Offences Act, 2012 and sentencing him to suffer rigorous imprisonment for 10 years for each of these offences and to pay fine of Rs.1,000/-, for the offence under Section 4 of the Protection of Children from Sexual Offences Act, the appellant has preferred the present appeal. Both the sentences awarded to the appellant are directed to run concurrently.

3. The prosecution case in short is as under:

P.W.2-victim is a mentally challenged girl. She was 13 years and 2 months old at the time of incident. In the month of January 2013, in the last week she had gone outside the house to answer nature's call. She did not return to the home during the expected period. When she returned to home, the victim was looking frightened and her hairs were disturbed. Therefore, her mother, P.W.5 questioned her. Upon questioning, the victim told her that the present appellant met her on the road and said that he would give her some fruits and by holding her hand, took her away

and therefore she came late. The mother of the victim accepted the explanation at that time. However, for about 2 to 3 months victim's menstrual cycle period missed and therefore P.W.5-the mother started making detailed enquiry with the victim about the said incident. She specifically asked as to whether the present appellant has done any mischief. Upon that, the victim told her that during that incident, the appellant not only took her away by holding her hand but he had forcible sexual intercourse with her. In the circumstances, P.W.5 filed a complaint (Exhibit-38) against the present appellant in Shevgaon Police Station on 8th May, 2015.

4. The regular investigation in the case was started. The victim was sent to Civil Hospital, Ahmednagar where she went through medical examination. She was also referred to Gynaecologist. The Gynaecologist also conducted her medical examination and gave a report that the minor victim was subjected to sexual assault. Police visited the spot of the incident and panchanama was prepared. The clothes of the victim were seized. Birth certificate as well as school leaving certificate of the victim

were obtained from the concerned institute. It was found that the victim was born on 25th April, 2000. Ultimately charge-sheet was filed.

5. Defence of the appellant was that father of the victim had filed one civil suit against one Ohale and one Gunjal. The appellant is the relative of said Ohale. Further, the father of the victim was removed from the job of performing pooja at the temple of Lord Shiva and in his place, the appellant was accommodated. Therefore, family of the victim had a grudge against the appellant.

6. The learned Additional Sessions Judge, Ahmednagar took into consideration the material on record. He found the testimony of P.W.2-the victim and P.W.5-Kalpana as straight forward. The defence was not believed and hence the conviction as detailed supra came to be recorded.

7. Mr. Garud, the learned Counsel for appellant submits that the deposition of P.W.8-Karbhari Najan coupled with the

Attendance Register/Muster filed by him on record at Exhibit 54 would show that the victim was present in the school for all the school days in the month of January, 2013. In the circumstances, the case of the prosecution that in the last week of January, 2013, the present incident has occurred, is improbable. He further submits that the learned Additional Sessions Judge, Ahmednagar has not taken into consideration the defence and has wrongly convicted the appellant.

8. On the other hand, learned A.P.P. submits that the defence is not at all probable. Only admitted fact from the defence is that the victim's father has filed a civil suit against one Mr. Ohale. There is nothing to show that the present appellant is anyway connected to said Mr. Ohale. Further, there is no material to show that the father of the victim was removed from service of performing pooja in a temple. He submits that school record would show that the victim was present during the school days. However very record would show that there were holidays on 26th and 27th January, 2013 and the prosecution case is that in the last week of

January, 2013 the incident has occurred. He also submitted that normally, a family would not involve the honour of the family by making a false accusation of such a nature unless a dire necessity is there. Therefore, according to him, there is no reason to interfere in the order of conviction, recorded by the learned Additional Sessions Judge, Ahmednagar.

9. On the basis of this material, following points arise for my determination :

(I) Whether the prosecution has proved that on a day in the last week of January, 2013, between 2 p.m. and 2.30 p.m. at village Dahigaon, the present appellant near a temple had committed forcible sexual intercourse with the minor victim-P.W.2 without her consent?

(II) Whether it was an aggravated form of sexual assault?

My findings to the above points are in affirmative. The appeal is therefore dismissed for the following reasons.

R E A S O N S

10. There is no doubt that the F.I.R. is belated one. However, the facts and circumstances of filing of belated F.I.R. as given in it would show that the victim who was 13 years and 2 months old at the time of offence, was mentally challenged girl. In view of the fact that she returned late after answering the nature's call, when her mother had questioned her, she merely told about the manhandling by the appellant and did not tell anything further. However, due to missing of menstrual cycle period (may be due to medical reasons) the mother of the victim became apprehensive and therefore, after further probe, she got the facts from the victim and ultimately filed the complaint. If these facts are taken into consideration, the belated filing of F.I.R. would not be hindrance to the prosecution.

11. Before the learned Sessions Judge, in all ten witnesses were examined. P.W.1 Dr. Vijay Sardesai, the Gynaecologist deposed that during the urinal pregnancy test, the victim was found negative for the pregnancy. Her hymen was however found torn.

He agreed in cross examination with the proposition that in case of a girl less than 14 years, the distensibility of the vaginal orifice has to be taken in view. If penetration takes place in the case of girl of such an age, then it can be expected to be wide spread damage of the fourchette, hymen, labia majora, labia minora, vulva and the vaginal canal. But the Medical Officer did not notice any such injury to the victim. The incident however according to prosecution had occurred about 4 months preceding this examination. Thus medical evidence in the case is not conclusive either way. Though the menstrual cycle period missed, there was no pregnancy. Hymen was torn. But it is common knowledge that there can be number of reasons for the same. The case therefore rests on the statement of P.W.2-victim and P.W.5-her mother.

. Both these witnesses deposed on the line of the prosecution case. No variance in the statement is found. The cross examination from the side of the appellant would show that the victim was all the way present in the school during the last week of January, 2013 and therefore, she could not have been ravished in

the afternoon. The school record however would show that there were public holidays on 26th ad 27th January, 2013. Thus, the defence that the victim could not have at all remained present in the village outside the school fails.

12. As regard the enmity, P.W. 5- the mother of the victim was cross-examined. During the cross examination, she admitted that there is a civil dispute between her husband on one hand and one Ohale and Gunjal on the other hand regarding an agricultural land. She however deposed that she did not know as to whether the appellant is relative either of Ohalne and/or friend of Gunjal. There is no material on record to show that the appellant is any way connected with these two persons i.e. Ohalne and Gunjal. As regards the next of the defence i.e. removal of the victim's father from priesthood of certain temple, suggestions were given to P.W.5 which she denied. Thus, there is nothing on record to probabalies any of the defences.

13. Normally, an honour of a family would not be involved by using a minor girl by putting her forward with allegations of

rape unless there is serious circumstance to that effect. Here, in the present case, we find that defence is not at all probabalised. The statements of P.W. 2-the victim and P.W.5-her mother are consistently straight forward and therefore, reliable as found by the learned Additional Sessions Judge. Further, the learned Additional Sessions Judge had an occasion to note the demeanor of these witnesses and therefore unless the circumstances strongly require, no interference in the appreciation of the evidence of these witnesses is called for.

14. This takes me to the issue of quantum of sentence. Learned Counsel for appellant relies on the decision in the case of Nana Ramchandra Jadhav Vs. State of Maharashtra reported in 1984 (1) Bom.C.R. 453. It is to be noted that the said judgment was delivered in the year 1984 and presently we are dealing with the provisions of Section 4 of the Protection of Children from Sexual Offences Act, 2012.

15. The learned Additional Sessions Judge has awarded sentence of rigorous imprisonment for 10 years for each of the

offences to the appellant and directed that both the sentences shall run concurrently. The learned Additional Sessions Judge observed that the victim was less than 14 years and the appellant was mature and had taken undue advantage of his acquaintance with her. At the same time, it was observed that it was not a fit case in which maximum sentence of life can be awarded and therefore minimum sentence as per law was awarded. Considering all these facts, no interference in the quantum of sentence is possible. The appeal is therefore liable to be dismissed. Hence, the following order.

16. The appeal is hereby dismissed.

(M.T. JOSHI, J.)