

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 619 OF 2014

Sk. Mustafa @ Pappi S/o. Sk. Shammu
Age : 27 years, Occu.: Mason work,
R/o. Subhash Nangar, Kinwat,
Tq. Kinwat, Dist. Nanded .. Appellant

Vs.

The State of Maharashtra .. Respondent

Mr. M.A. Tandale, Advocate (appointed) for the appellant
Mr. V.P. Kadam, A.P.P. for the respondent/State

CORAM : M.T. JOSHI, J.
RESERVED ON : 03/08/2015
PRONOUNCED ON: 12/08/2015

JUDGMENT :

. Heard both sides.

2. Aggrieved by the recording of conviction by the learned Additional Sessions Judge-2, Nanded vide judgment and order dated 20/04/2012 passed in Special (Atrocity) Case No. 10 of 2010, for the offences punishable under section 366, 376(2)(f), 506-I, 341 and 363 of the Indian Penal Code and the consequent sentences, the present appeal is preferred by the original accused.

. Appellant was sentenced to suffer rigorous imprisonment for 3 years and to pay fine of Rs.1,000/- for the offence punishable under section 366 of the Indian Penal Code.

. He was sentenced to suffer rigorous imprisonment for 10 years and to pay fine of Rs.1,000/- for the offence punishable under section 376(2)(f) of the Indian Penal Code.

. He was sentenced to suffer simple imprisonment for 6 months and to pay fine of Rs.500/- for the offence punishable under section 506-I of the Indian Penal Code.

. He was sentenced to suffer simple imprisonment for 1 month and to pay fine of Rs.500/- for the offence punishable under section 341 of the Indian Penal Code.

. No separate punishment was awarded for the offence punishable under section 363 of the Indian Penal Code and he was acquitted of the offence punishable under section 3(2)(v) of the Scheduled

Castes and Scheduled Tribes (Prevention of Atrocities) Act.

. All the substantive sentences were directed to run concurrently.

3. The prosecution case, in short, is as under:-

. On 05/12/2009, P.W. 2 – Bhimabai, the mother of the victim had filed the complaint regarding the forcible sexual intercourse with her 7 year's old daughter. According to her, when she and her family members returned from the field to home, on 05/12/2009 in the evening, this young daughter, who was kept in the house alone in the home, narrated that one unknown person had attempted to entice her by saying that he would collect honey for her. When she refused, he forcibly took her in the cotton plantation near the house and under the point of knife, has committed sexual intercourse with her. Thereafter, he tied both her hands and fled away. The victim daughter has given the details of the incident and has also described the unknown person as a blackish and tall, wearing black

trouser and maroon shirt and further that the daughter would be able to identify him. On the basis of this complaint, the offence came to be registered on the very same day.

. Initially, the investigation was conducted by one A.P.I. Dhabale while P.I. Pardhi had arrested the appellant on 08/12/2009. A.P.I. Dhabale had conducted the panchanama of the spot of occurrence and seizure panchanama so far as the clothes of the prosecutrix are concerned. The prosecutrix was already admitted on the very same day of the incident in the Sub District Hospital, Gokunda, Tq. Kinwat. Her detailed statement was recorded on 7/12/2009.

. Upon arrest of the accused, since it was revealed that the prosecutrix was a member of the Scheduled Tribe and the present appellant was not a member of the Scheduled Caste or Scheduled Tribe, the offence punishable under section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act was added.

. P.W. 9 – S.D.P.O. Nanded Mr. Shankar Kengar took over the investigation on 09/12/2009. He has caused the medical examination of the appellant on 10/12/2009. Thereafter, on 12/12/2009, the appellant made a voluntary statement leading to the recovery of his clothes worn at the time of the incident. Thereafter, caste certificate of the complainant was obtained. Statement of the relevant witnesses were recorded. The medical certificates were collected. Seized articles were sent for chemical analysis and the Chemical Analyzer's report was obtained.

. The Investigating Officer continuously persuaded the Tashilder for conducting the test identification parade from 23/12/2009 till 07/01/2010 by sending three letters. Finally, test identification parade was held by the Naib Tahsildar – P.W. 5 – Bankat Wavle on 12/01/2010, wherein the victim girl has identified the appellant. Thereupon, the statement of two panch witnesses and the supplementary statement of the victim was recorded and the chargesheet came to be filed.

4. In all 9 witnesses were examined before the learned Additional Sessions Judge-2, Nanded, including complainant as P.W. 2, the victim – girl as P.W. 3, the Naib Tahsildar as P.W. 5, the Medical Officer Dr. Santosh Guntapalliwar as P.W. 7 and other witnesses like panch witness to the spot panchanama, to the recovery made by accused, to the test identification parade were examined alongwith the peripheral witnesses i.e. P.W. 4 - Eknath Gawale to show that he being the colleague of the appellant, found that on the day of the incident, the appellant was missing from the work of masonry.

5. The learned Sessions Judge found that the prosecution case has been proved beyond reasonable doubt except the case of committing rape against the member of scheduled caste or scheduled tribe, therefore, the conviction and sentence, as detailed supra, came to be recorded. Hence the present appeal.

6. Mr. Tandale, learned counsel for the appellant

submitted that the medical evidence is not in dispute. Statement of P.W. 7 – Dr. Santosh Guntapalliwar coupled with his report of medical examination of the victim at Exhibit 35 would show that the victim was around 7 years old at the time of the occurrence. The vagina was not admitting one finger. There was tear to the posterior wall of vagina admeasuring 1 cm X 1 cm. Therefore, in the opinion of the Medical Officer, intercourse had occurred with the victim within 24 hours of the examination, which was carried on 05/12/2009 at around 8.00 p.m.

7. Mr. Tandale fairly submitted that the medical evidence regarding the age of the victim and injuries found on her person are sufficiently proved. The issue, however, is whether the unknown youth who had carried the acts, is the present appellant.

. He further submitted that P.W. 2 – the mother of the victim had deposed about the narration made by her daughter to her in the evening of the date of the incident. She further deposed that therefore, she took

her to the Sub District Hospital, Gokunda, Tq. Kinwat, however, there, the victim was not admitted. Therefore, she took her to the Police Station. There, she herself gave the full information about the incident and lodged the report at Exhibit 22. During her cross-examination, however, she deposed that when the Medical Officer had directed them to the Police Station, the Police thereat enquired with the daughter. They recorded her statement and obtained her thumb impression. On the strength of this statement, Mr. Tandale submits that the F.I.R. of the victim herself is thus suppressed by the prosecution.

8. Mr. Tandale further submitted before me that though the evidence would show that the 7 years old girl was forced to have sexual intercourse by an unknown person, the prosecution failed to prove that the said unknown person is, in-fact, the present appellant. He submitted that the evidence would show that since the victim belongs to the scheduled tribe, demonstrations were held by the leaders of her tribe,

finding that the criminal was not detected. Therefore, the present appellant, who is a poor daily wager, a mason, is made the scapegoat by the Investigating Officer and more particularly, the P.I. Pardhi and poor mother of the victim as well as her young daughter are made to depose against the present appellant.

. He further submitted that P.W. 1 the panch witness to the alleged memorandum and recovery of the clothes by the present appellant has turned hostile. Further, the statement of the victim would show that the unknown person had masked his face by a handkerchief. The test identification parade is conducted by the Naib Tahsildar and not the Tahsildar, who was the Taluka Executive Magistrate. The dummies were not of the same physique and age like that of the appellant. Even the prosecution is not firm as to at what serial number the present appellant was made to stand in the row. There was delay in conducting the test identification parade. The evidence of the victim would show that at the time of forcibly taking the victim away, some children were playing in the nearby

lane. Even the victim has admitted that during the test identification parade, the Police and the Naib Tahsildar showed her the present appellant.

. Further no injuries on the private part of the appellant were found though the prosecution case is that the appellant being 25 years old, had forcibly penetrated the vagina of the 7 years old girl, causing tear to the posterior wall of the same.

. He further submitted that P.I. Pardhi who had arrested the appellant, is not examined to show as to how he detected that the unknown culprit is none other than the present appellant.

. In the circumstances, he submitted that since the prosecution has failed to prove the case beyond reasonable doubt, merely because a heinous offence has been committed by an unknown person, the present appellant cannot be convicted and he be acquitted of all the offences by allowing the appeal.

9. In support of his above submissions, Mr.

Tandale relied on the ratio laid down in the following authorities :

- i) **"Sharad Kashiram Rathod @ Babu Vs. The State of Maharashtra" 2014 ALL MR (Cri.) 2356**
- ii) **"Sadashiv Ramrao Hadb V. State of Maharashtra" SCC- 2006-10-92**
- iii) **"Bibhishan V. State of Maharashtra" 2008 CRI. L.J. 721.**

10. On the other hand, the learned A.P.P. submitted that certain inadvertent mistakes were committed by 7 years old victim during her cross-examination. It should be borne in mind that she is a daughter of rural labour, who was facing the challenge of cross-examination in the Court after facing the ghastly act committed by the appellant. There was no motive either for the victim or her mother to make a false accusation that the present appellant is in-fact the perpetrator of the crime, thereby leaving the real culprit scotfree. In the circumstances, the learned A.P.P. submitted that the appeal be dismissed.

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

I) Whether the prosecution has proved that on 5/12/2009 at around 3:00 pm, the present appellant forcibly took away the minor victim from the lawful custody of her guardian at Bellori, Tq. Kinwat, Dist. Nanded ?

II) Whether the prosecution has further proved that on the given date, time and place, the present appellant forcibly made her to go from her house to the cotton plantation with intention to have illicit intercourse with her ?

III) Whether the prosecution has further proved that on the given date, time and place, the present appellant has committed forcible sexual intercourse with the victim?

IV) Whether the prosecution has further proved that on the given date, time and place, the appellant has committed criminal intimidation by threatening her to kill at the point of knife ?

V) Whether the prosecution has further proved that on the given date, time and place, the present appellant tied the legs and hands of the victim by piece of his nicker and wrongfully restrained her ?

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

R E A S O N S

12. It should be noted that not only P.W. 2 the mother of the victim is an illiterate villager but even the (allegedly later-on filed) F.I.R. at Exhibit 22 is also against an unknown person. Therefore, there is no scope for manipulation in this F.I.R. for implication of the present appellant since by that time also, the perpetrator of the crime was not disclosed and hence it was filed against an unknown accused.

13. P.W. 3 the victim in her cross-examination has

deposed that at the time of the incident, some children from the lane were playing and, therefore, it was argued that these independent witnesses were not examined. The panchanama of the spot of occurrence at Exhibit 17 as proved by P.W. 1 Santosh and not contested during the cross-examination, would throw light on this aspect.

. The spot of occurrence i.e. cotton plantation is surrounded by fields from all the sides. The house was situated about 425 meter away from the spot of occurrence. It was built on the western bandh of the field and there no other house is located. In the circumstances, the statement of the victim that "some children from the lane were playing", cannot be taken as playing in her neighbourhood.

14. As regards the statement of the victim during cross-examination that the unknown person had tied his handkerchief on his face when he visited the house, will have to be appreciated in the background of the other details of the incident. Firstly, it cannot be

interpreted as masking of the face but simply tying a handkerchief on the face. Further, according to the prosecutrix, the said unidentified person, upon reaching the house, has first drawn the water from the well and drank the same. Thereafter, he sat on the cot and later, the whole of the incident has occurred. The learned Additional Sessions Judge, therefore, has rightly observed that even if the face is masked, for drinking the water, one has to remove the said mask first.

15. It has come from the mouth of the Investigating Officer – P.W. 9 – Mr. Shankar Kengar, the S.D.P.O. that the appellant was arrested by P.I. Pardhi on 8/12/2009 and during the period from the date of the incident till the arrest, demonstrations were performed by the members of the Scheduled Tribe for proper investigation in the crime. In the situation, the prosecution ought to have examined P.I. Pardhi who had arrested the appellant on 8/12/2009. He would have thrown light on the issue as to how the present appellant was detected to be the perpetrator of the

crime.

. This lacuna, however, would not detain us as the victim has identified the appellant as the same perpetrator of the crime during the test identification parade though held after five weeks from the date of the crime.

16. The statement of P.W. 9 – the Investigating Officer would show that he was persuading the Tahsildar to conduct the test identification parade by shooting one after another. Three letters are sent and ultimately, the test identification parade was held on 12/1/2010. This test identification parade was not held by the Tahsildar cum Taluka Executive Magistrate but by the Naib Tahsildar of Kinwat, who has clarified in cross-examination that though the test identification parade ought to have been held by the Tahsildar cum Taluka Executive Magistrate, since the Taluka Executive Magistrate was on tour, he was required to conduct the test identification parade. It would thus show that due to the pre-occupation of the

Taluka Executive Magistrate, the test identification parade could not be held immediately. The deficiencies in the test identification parade, as highlighted by Mr. Tandale, are in-fact the minor contradictions made by the 7 years old victim of the offence.

17. Though the unknown perpetrator of the crime is described as of blackish complexion either by the victim or by her mother, the victim has deposed that 7 persons, who were made to stand in the test identification parade, were of black complexion.

18. Further, though the appellant is admitted to be 25 years old, the Naib Tahsildar had admitted that three of the dummies were aged 38 years, 42 years and 36 years, respectively. The issue, however is not regarding the actual age but the appearance of the dummies.

. The cross-examination would not show that the appearances of the dummies was not similar to that of the appellant. Some gaffe was made by the Naib

Tahsildar in cross-examination when he deposed that the victim girl had identified the accused by touching her fingers at serial number 3, adjacent to serial number 2, while during cross-examination itself he later-on clarified that as per the panchanama shown to him, the accused was made to stand at serial number 1. However, this is merely the misunderstanding. The panchanama at Exhibit 29 in-fact would show that the appellant accused had taken upon to stand in the row after dummy number 2 i.e. at the third place and in the next paragraph, the appellant is described as accused no. 1 – Shaikh Mustafa. Not only this, the panchanama further described that the victim has identified the accused, who was standing nearby the dummy no. 2. Thus, this minor misunderstanding would not cause doubt on the entire test identification parade itself.

19. The issue of competency of the Naib Tahsildar to hold the test identification parade need not detain us as in my view, in the present case, even the test identification parade was not required as the incident had occurred in broad day light for a considerable

period. Further, we have the substantive evidence of the victim, who had identified the appellant in the Court.

20. Though Mr. Tandale, learned counsel for the appellant has vociferously argued about the test identification parade, the sum and substance of the evidence would show that the Police or other personnel were not present during the test identification parade. Though the victim girl answered in the affirmative to the leading question, that the Tahsildar and the Police accompanying her showed her the appellant at the time of identification, she immediately clarified the same by saying that she had pointed out the appellant.

. Considering the fact that 7 years old innocent, rustic girl was made to face the cross-examination in the Court, her slip in saying 'yes' to the leading question would not lead us to cast a doubt on the entire prosecution case.

21. It is no doubt true that injuries were not found on the person of the appellant at the time of medical examination. It should however be noted that the crime was detected after three days of the incident and, thereafter, his medical examination was carried again after three days. Thus, one week had passed from the date of commission of the offence.

22. Though argument of Mr. Tandale, learned counsel for the appellant that due to the demonstrations held by the member of the scheduled tribe, there was pressure on the Police to detect the crime and, therefore, the present appellant is made a scapegoat, appears to be plausible one, there was no reason for the victim girl and her family members to let the real culprit go unscathed, by pointing out an innocent person.

23. So far as the reliance placed by Mr. Tandale on the authorities cited supra is concerned, the present case stands on its own facts. Therefore,

though there is no dispute regarding the principle reiterated in the authorities cited supra and relied on by Mr. Tandale, in my view, the statement of the prosecutrix inspires confidence for the reasons already forwarded.

24. In view of the above discussion, the reasoning of the learned Additional Sessions Judge-2, Nanded needs no interference. In the result, the following order :-

25. Criminal Appeal is hereby dismissed.

26. Since Mr. M.A. Tandale, Advocate was appointed to defend the case of the appellant, through High Court Legal Services Sub-Committee at Aurangabad, his fees is quantified at Rs.10,000/- (Rs. Ten Thousand) be paid to him.

[M.T. JOSHI]
JUDGE

arp/