

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 1186 OF 2013

Hari Ganu Ingale
Aged 61 years, at present
undergoing sentence
at Kolhapur Central Prison,
Kalamba, as convict prisoner
No.C-5709

.. Appellant

v/s.

The State of Maharashtra .

..Respondents

Ms. Pooja Bhojane for the Appellant.
Mrs.M.M.Deshmukh, APP for the Respondent/State.

**CORAM : SMT. ANUJA PRABHUDESSAI,J.
DATED : 14th JULY, 2015.**

JUDGMENT.

1. The appellant stands convicted for the offence punishable under Section 376(2)(f) of the Indian Penal Code and sentenced to undergo rigorous imprisonment for 10 years and to pay fine of Rs.10,000/- in default to undergo simple imprisonment for one year.

2. The victim (PW1) is a minor girl aged about 9 years, who as per the prosecution case was subjected to rape by the appellant. PW2

Sunita is the mother of the victim (PW1), born from her first marriage. Having divorced her first husband, PW2 married Sanjay Ingle, son of the appellant. Since her second marriage, PW2 has been residing in her new matrimonial house at Mankhurd along with the victim.

3. The Appellant is a resident of Bodhna, Buldhana. At the relevant time, the appellant had visited his son at Mankhurd. On 6.1.2012, PW2 and her husband had gone to work while the victim and the appellant were at home. At about 11 am, PW2 made a phone call at her residence to remind the victim to go to school. The appellant received the call and told her that the victim had gone out and that she had latched the door from outside. PW2 therefore called her sister who was residing in the neighborhood. She told PW2 that the victim was sitting in her room, whereupon PW2 instructed her sister to send the victim to school. Later in the day when PW2 returned home, she enquired with the victim why she had locked the door from outside, the victim told her that the appellant herein had sexually abused her about 15 days ago and that she was having pain

in her private parts. She further told that on 6.1.2012 when she was preparing to go to school the appellant once again closed the door and told her to sleep with him. Alarmed by this disclosure, PW2 and her husband took the victim to the hospital on 7th January 2012. PW3 Dr. Piyush who was on duty in Shatabdi hospital, examined the victim. He noticed hymenal tags as well as swelling, redness, and tenderness on the vaginal region of the victim. He opined that there was possibility of sexual assault. PW2 therefore went to the police station on 8.1.2012 and lodged the report at Exhibit 11.

4. PW5 Sarika Thorat, who was on duty at Trombay Police Station, recorded the said report at Exh.11. She registered crime No.3/12 under Section 376 of IPC against the appellant. She proceeded to the place of the incident and recorded the statement of the victim. She conducted the spot panchanama at Exhibit 23 and seized the quilt from the scene of offence. She handed over further investigation to PW4 Arum Ramdas Dhandar. PW4 seized clothes of the victim and the accused under panchanama at Exhibit 20 and 21 respectively and forwarded the said clothes and other material for chemical analysis.

Upon receipt of the medical and CA report, he filed the charge sheet against the accused for offence under Section 376 of IPC.

5. The Learned Addl. Sessions Judge, Gr. Mumbai framed charge against the accused for committing offence under Section 376(2)(f) of IPC. The accused pleaded not guilty to the charge and claimed to be tried.

6. The prosecution, in support of its case examined the victim (PW1) as well as her mother PW2 Sunita Ingale, and the Medical Officer PW3 Dr.Piyush Kulkarni. The prosecution also examined both the Investigating Officers namely PW4 Arun Dhandar and PW5 Sarika Thorat. The statement of accused was recorded under Section 313 of Cr.PC. wherein he denied the case of the prosecution. He alleged that PW2 had implicated him in a false rape case as he had refused to transfer a MHADA room in her name.

7. The learned trial Judge, upon considering the evidence on record and hearing the respective parties, vide judgment dated 17th

December, 2012 held the appellant guilty of offence under Section 376(2)(f) of IPC and sentenced him as stated above. Aggrieved by this conviction and sentence the appellant has preferred the present appeal.

8. Ms. Pooja Bhojane, learned Counsel for the appellant has submitted that the material witness, viz, PW2 who was the first informant and to whom the victim had allegedly disclosed the incident, has not supported the case of the prosecution. She has further submitted that the victim who is a child witness had narrated the incident to her mother almost after a month. She contends that the testimony of PW1 does not inspire confidence and hence cannot be relied upon. Referring to the medical evidence, she has submitted that PW3 Dr. Piyush who had examined the victim has admitted in the cross-examination that the injuries on the genital of the victim could have been caused due to infection. She therefore contends that the medical evidence does not support the prosecution case. She has further submitted that there is delay in seizure of the clothes. She has submitted that the testimony of PW2 has admitted that the

appellant had refused to transfer the MHADA room in her name hence she had falsely implicated him in this case with the help of the victim. She therefore contends that PW1 is a tutored witness and her testimony is unreliable. It is finally submitted that the prosecution has not been able to prove the charge beyond reasonable doubt and under the circumstances the appellant is entitled for acquittal.

9. Rebutting the submissions, Mrs. Deshmukh, Learned APP submitted that the testimony of PW1 who is a victim of the crime establishes beyond reasonable doubt that the appellant herein had sexually abused her. She has further submitted that testimony of the victim is substantially corroborated by the medical evidence. She has submitted that there is no delay in lodging the FIR as PW2 had lodged the FIR immediately after the doctor had opined that the victim was sexually abused. She has further stated that even otherwise, in such cases delay *per se* is not fatal. PW2, who is the daughter in law of the accused, has not supported the case of the prosecution in a vain attempt to save the appellant. Even otherwise, the defence set up by the accused is not probable and cannot be

believed. Under the circumstances, it was submitted that the appeal has no merits and the same deserves to be dismissed.

10. I have perused the records and considered the submissions advanced by the respective counsels.

11. It is not in dispute that PW1 who is alleged to be the victim of the crime is the daughter of PW2, born from her first marriage. Having divorced her first husband, PW2 had married the son of the appellant herein and since her marriage; she, her husband, and the victim were residing at Mankhurd. The appellant was residing at his native place at Bodhan, Buldhana. He occasionally visited his son at Mankhurd and on one such visit; he is alleged to have raped PW1, his step granddaughter.

12. In this regard, PW1 has deposed that the appellant is her paternal grandfather. She has deposed that her parents used to go to work in the morning and return in the evening and that she and her grand father i.e. appellant herein used to be in the house. She has

deposed that once her grandfather had asked her to remove her underwear and had inserted his private part in her vagina and that blood had oozed out of her vagina. PW1 has further deposed that the appellant had told her not to narrate the incident to her mother.

13. PW1 has deposed that at the time of incident she was studying in 4th Standard. The school timings were from 12 p.m. to 5 p.m. On the relevant date as she was getting ready to go to school, the appellant who was under the influence of alcohol, told her to sleep with him. She has deposed that she had subsequently narrated the incident to her mother and her maternal aunt. She has further stated that her mother had taken her to the hospital and thereafter to the police station and that she had narrated the incident to the police. She has identified the appellant as her grandfather.

14. PW1 has stated in her cross-examination that she does not recollect the date, month or the year of the incident. She had also stated that she did not narrate the incident to her father. She has stated that she had not narrated the incident to her mother on the

same day as her grandfather had asked her not to narrate the incident. She has stated that she had pain in her private part for about three days and that she had informed her mother about the incident after several days. She has denied the suggestion that her grandfather was not involved in any such incident. She has also denied the suggestion that she had no pain on her private parts on the date she was taken to the hospital.

15. Undisputedly PW1 is a child witness. In the case of ***State of M.P. Vs. Ramesh & Anr. Reported in (2011) Vol. 4 SCC 786*** the Apex Court while dealing with the evidence of child witness has summarized the law as under:

6. In Rameshwar S/o Kalyan Singh v. The State of Rajasthan, AIR 1952 SC 54, this Court examined the provisions of [Section 5](#) of Indian Oaths Act, 1873 and [Section 118](#) of Evidence Act, 1872 and held that every witness is competent to depose unless the court considers that he is prevented from understanding the question put to him, or from giving rational answers by reason of tender age, extreme old age, disease whether of body or mind or any other cause of the same kind. There is always competency in fact unless the Court considers otherwise. The Court further held as under:

".....It is desirable that Judges and magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. But whether the Magistrate or Judge really was of that opinion can, I think, be

gathered from the circumstances when there is no formal certificate...."

7. [In Mangoo & Anr. v. State of Madhya Pradesh](#), AIR 1995 SC 959, this Court while dealing with the evidence of a child witness observed that there was always scope to tutor the child, however, it cannot alone be a ground to come to the conclusion that the child witness must have been tutored. The Court must determine as to whether the child has been tutored or not. It can be ascertained by examining the evidence and from the contents thereof as to whether there are any traces of tutoring.

8. [In Panchhi & Ors. v. State of U.P.](#), AIR 1998 SC 2726, this Court while placing reliance upon a large number of its earlier judgments observed that the testimony of a child witness must find adequate corroboration before it is relied on. However, it is more a rule of practical wisdom than of law. It cannot be held that "the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring."

9. [In Nivrutti Pandurang Kokate & Ors. v. State of Maharashtra](#), AIR 2008 SC 1460, this Court dealing with the child witness has observed as under:

"The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

10. The evidence of a child must reveal that he was able to discern between right and wrong and the court may find out from the cross-examination whether the defence lawyer could bring anything to

indicate that the child could not differentiate between right and wrong.

The court may ascertain his suitability as a witness by putting questions to him and even if no such questions had been put, it may be gathered from his evidence as to whether he fully understood the implications of what he was saying and whether he stood discredited in facing a stiff cross-examination. A child witness must be able to understand the sanctity of giving evidence on a oath and the import of the questions that were being put to him. (Vide: [Himmat Sukhdeo Wahurwagh & Ors. v. State of Maharashtra](#), AIR 2009 SC 2292).

11. [In State of U.P. v. Krishna Master & Ors.](#), AIR 2010 SC 3071, this Court held that there is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in the future. In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the Court, his deposition does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill will against any person. Therefore, there must be something on record to satisfy the Court that something had gone wrong between the date of incident and recording evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of a serious nature.

12. Part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from untutored part, in case such remaining untutored part inspires confidence. In such an eventuality the untutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of a hostile witness. (Vide: [Gagan Kanojia & Anr. v. State of Punjab](#), (2006) 13 SCC 516).

13. In view of the above, the law on the issue can be summarized to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the Court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition.

16. The testimony of PW1 needs to be scrutinized and evaluated in the light of these legal principles. Undisputedly, as on the date of the incident PW1 was a student of 4th standard and was 9 years of age. The records reveal that the learned trial Judge had made a note that some introductory questions were asked to the victim and that she had given proper answers. The learned trial Judge has also recorded that the witness knows the sanctity of oath. The testimony of the child witness (PW1) also reveals that she was able to understand the import of questions put to her and could give rational answers. There can be thus no doubt that PW1 was competent to testify.

17. The evidence of PW1 does not suffer from material embellishments, contradictions, omissions, or improvements. It is true that the witness was unable to give the exact date, month or time of the incident or the date on which the doctor examined her. It has to be borne in mind that a child due to his tender age often does not have a proper notion of time. Hence, such natural demeanor would not be sufficient to dent her credibility, on the contrary the

same would fortify that the child was not tutored.

18. A careful and in-depth scrutiny of the testimony of PW1 reveals that PW1 has emerged as a trustworthy and reliable witness. The testimony of this witness amply proves that the appellant herein had earlier sexually abused her and had threatened her not to narrate the incident to her mother. The appellant had once again attempted to induce her into satisfying his lust, and it was only then that she had narrated the incident to her mother and her mother had taken her to the hospital. Under the circumstances, the delay in reporting the incident does not affect her credibility.

19. It is pertinent to note that PW2 Sunita Ingale, mother of the victim, who had lodged the FIR Exh.11 has not supported the case of the prosecution. She has denied that any such incident as narrated in the FIR had actually taken place. Nonetheless, she has admitted that her in-laws who were residing at Bodhan, Buldhana, used to visit them intermittently. She has further stated that while her daughter was schooling in 4th standard, her school timings were from 12 a.m.

to 5 p.m. PW2 has deposed that at the relevant time her mother-in-law was in the village whereas her father-in-law i.e. the appellant herein was residing with them. She has deposed that her husband is a painter and used to return home at night, and that she used to work in STD booth and return home at about 8 p.m. PW2 has stated that her daughter used to be at home and that she used to phone her daughter and remind her to go to school. She has deposed that on the date of the alleged incident, her father-in-law had gone to work and that no incident as alleged in the FIR had occurred.

20. PW2, the mother of the victim and first informant, having resiled from her statement, was cross-examined by APP. She has denied that she had questioned her daughter as to why she had locked the door and that her daughter had told her that the appellant had attempted to rape her. She has denied that she was deposing falsely under the pressure of her husband and father-in-law. PW2 was also cross-examined by the accused. She has admitted that the accused was allotted a MHADA room admeasuring 225 sq. ft. She has admitted that there used to be quarrel between her and her

father-in-law over the said room. She has stated that she had lodged a false complaint against her father in law with the help of her daughter.

21. It is indeed most unfortunate and reprehensible that PW2, the mother of the victim has turned hostile. Nevertheless, the fact that PW2 has turned hostile does not per se lead to an inference that the FIR lodged by PW2 is false or fabricated or that her statement that she has lodged a false complaint against the appellant is an absolute truth. It is well known that the witnesses in criminal trials often turn hostile due to host of reasons, including pressure, fear, threat, inducement etc. In the instant case, the learned APP through deft cross-examination of PW2 has brought on record that the brother and sister of PW2 are not in talking terms with her because of her second marriage. PW2 has also admitted that she has no other support except her in laws. She has also admitted that she is illiterate and does not have independent source of income. She has further admitted that she runs the house solely on the income of her husband.

22. The evidence as elucidated in the cross-examination reveals that PW2 was solely dependent on her husband for financial as well as emotional support. It is thus evident that this helplessness and dependence, which was the crux of the hostility, had compelled PW2 to protect the appellant or oblige her husband at the cost of endangering the welfare of her daughter.

23. Be that as it may, it is a well-settled legal principle that the evidence of a hostile witness cannot be discarded in toto but it can be subjected to close scrutiny and the portion of the evidence, which is consistent with the case of the prosecution, or defence can be relied upon. In the case of Paulmeli & Anr. Vs. State of Tamil Nadu Traffic Inspector of Police, reported in (2014) Cri.Law Journal 3240, the Apex Court has held as under:-

“16. This Court in Ramesh Harijan v. State of U.P., AIR 2012 SC 1979 while dealing with the issue held:

“It is a settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross examine him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof.(Vide:

Bhagwan Singh v. The State of Haryana, AIR 1976 SC 202; Rabindra Kumar Dey v. State of Orissa, AIR 1977 SC 170; Syad Akbar v. State of Karnataka, AIR 1979 SC 1848; and Khujji @ Surendra Tiwari v. State of Madhya Pradesh, AIR 1991 SC 1853).”

17. *In State of U.P. v. Ramesh Prasad Misra & Anr., AIR 1996 SC 2766, this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Sarvesh Narain Shukla v. Daroga Singh & Ors., AIR 2008 SC 320; Subbu Singh v. State by Public Prosecutor, (2009) 6 SCC 462; C. Muniappan & Ors. v. State of Tamil Nadu, AIR 2010 SC 3718; and Himanshu @ Chintu v. State (NCT of Delhi), (2011) 2 SCC 36).*

Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence.”

24. In the instant case, PW2 has admitted in her cross-examination that she had lodged the FIR at Exh.11 against the appellant. She has further admitted that she had narrated the incident to the police as told to her by her daughter. She has admitted having signed the first information report. She has also admitted that on the relevant date she had phoned her sister and told her to send the victim to the school. She has admitted that her sister had informed her that the appellant had left for Bhandup by keeping the door open. She has also admitted that she had told her husband to return home. She

has admitted that on the relevant date her father-in-law had abused her. She has admitted having taken the victim to the hospital on 7.1.2012.

25. PW2 has not assigned any reasons for taking the victim to the hospital before proceeding to the police station. Certainly, PW2 had no tangible reasons to subject her minor daughter to medical examination if the intention was only to implicate the applicant in a false case. The conduct as well as the evidence of this witness, read in its entirety, sufficiently proves the presence of the appellant at her residence at Mankhurd. Furthermore, her evidence establishes that the victim had indeed narrated the incident to her upon which she had taken the victim to the doctor and later gone to the police station and narrated the incident to the police as told to her by the victim.

26. The testimony of PW3 Dr. Piyush Anand Kulkarni, gynecologist attached to Shatabdi Hospital, as well as the MLC records at Exh. 17 also corroborate that PW2 had taken the victim to the hospital on 7.1.2012 and had given the history of sexual assault on the victim by

her father-in-law. The conduct of PW2 in taking the victim to the hospital, giving history of sexual assault by the appellant and thereafter going to the police station clearly indicates that the victim had told her that the appellant had subjected her to rape.

27. In the backdrop of this evidence, her statement that she had lodged a false complaint against the appellant in view of a dispute over MHADA room, does not commend acceptance. Furthermore, the said statement, which is in tune with the defence raised by the appellant, is very vague, spacious, improbable, and devoid of any credence. It is very rare that in the Indian society a mother would trade upon the reputation, honour, dignity, and future of her daughter over trivial issues such as quarrel over transfer of a room. Therefore the inescapable conclusion is that PW2 had made a vain attempt to support the defence and to help the appellant to wriggle out of the penal consequences of his sordid act.

28. This is further fortified by the fact that the testimony of PW3 Dr. Piyush Kulkarni reveals that he had examined the victim and had

noticed that the victim had swelling, redness and tenderness over vulval region. He had also noticed hymenal tags. He had therefore opined that there was a possibility of sexual assault. The medical evidence therefore substantially corroborates the testimony of the victim.

29. It is pertinent to note that though PW3 has stated in his cross-examination that the injuries recorded in MLC at Exh 17 could be caused due to infection, significantly no evidence was elucidated to suggest that the victim had indeed suffered any such infection. Hence, no much credence can be given to a hypothetical answer given by the doctor to a hypothetical question. Furthermore, such hypothetical answer or the improbable defence cannot corrode the credibility of the victim. Similarly, non-detection of semen or blood on the clothes of the appellant and the victim, which were attached several days after the incident, is hardly a relevant fact to doubt the testimony of the victim.

30. The victim (PW1) though is a child witness, has emerged as a

credible and trustworthy witness. The testimony of PW1 sufficiently brings home the guilt of the appellant. In view of the settled legal position, the conviction can be based on uncorroborated testimony of the prosecutrix. However, in the instant case, the testimony of the victim also finds corroboration in medical evidence and to some extent the evidence of PW2. Under the circumstances, the prosecution has proved beyond reasonable doubt that the appellant herein had raped his step grand-daughter, who was barely 9 years old. The learned Sessions judge was therefore perfectly justified in holding the appellant guilty of offence under section 376 (2)(f) IPC. The learned Sessions judge has awarded the minimum sentence of 10 years and as such, there is no question of imposing a lesser punishment, which on the facts of the case is otherwise unwarranted.

31. Under the circumstances, and in view of discussion supra there is no merit in the appeal, hence the appeal is dismissed, confirming the conviction and sentence of the appellant.

(ANUJA PRABHUDESSAI, J.)