

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

**CRIMINAL APPEAL NO.468 OF 2013**

|                                       |   |                 |
|---------------------------------------|---|-----------------|
| Rajkumar Rakesh Sahani (Through Jail) | ] | .... Appellant  |
| <b><i>Versus</i></b>                  |   |                 |
| The State of Maharashtra,             | ] |                 |
| Through Wadala Police Station, Mumbai | ] | .... Respondent |

Ms. Sarojini Upadhyay (Appointed Advocate)  
for the Appellant.

Smt. V.R. Bhosale, A.P.P., for the Respondent-State.

**CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.**

**DATE : 10<sup>TH</sup> APRIL, 2015.**

**ORAL JUDGMENT :**

1. The Appellant, who stands convicted for the offence punishable under Section 376(2)(f) of the IPC and sentenced to suffer R.I. for ten years and to pay fine of Rs.1,000/-, in default to suffer S.I. for three months, by the 5<sup>th</sup> Ad-Hoc Additional Sessions Judge, Sewree, Mumbai by Judgment dated 5<sup>th</sup> April, 2010 in Sessions Case No.04 of 2009, by this Appeal challenges his conviction and sentence.

2. Facts, as are necessary, for deciding this Appeal can briefly be stated thus :-

On the night intervening between 2<sup>nd</sup> and 3<sup>rd</sup> October, 2008, at

about 00:05 hrs., while PW-9 PSI Gavkar was on PSO duty at Wadala Police Station, PW-2 Amina Shaikh came to the Police Station along with her small daughter of four years PW-3 victim, (name deliberately withheld to protect her identity), and her mother PW-6 Julekhabi Chaus. They had also brought with them the Appellant herein. PW-2 Amina lodged complaint against the Appellant that he has sexually assaulted her daughter PW-3. PW-9 PSI Gavkar recorded her complaint (Exhibit-19) as per her say and on the said complaint, he registered C.R. No.180 of 2008. He arrested the Appellant under Panchanama and referred, both, the Appellant and the victim girl for their medical examination to Nagpada Police Hospital and J.J. Hospital, respectively. As PW-2 Amina has brought the blood stained clothes of the victim with her, he seized them under the Panchanama (Exhibit-24). Those clothes are Salwar (Article-1) and Kurta (Article-2), which were having blood stains thereon.

3. During the police custody of the Appellant, he expressed his willingness to show the spot of incident. Accordingly, the Memorandum Panchanama of his statement was made vide Exhibit-25 in the presence of the Panch and then Appellant guided the Police and Panch to the spot, which was an open space, in between the BPT railway line and near to compound wall of the said line. From the spot, the blood stained mud and

simple mud was collected and sealed under Panchanama (Exhibit-26). PW-9 PSI Gavkar then seized the clothes of the Appellant under Panchanama (Exhibit-50). He also recorded the statement of the victim girl, in question and answer form, as she was hardly of the age of four years at the time of incident. He further recorded the statement of the grand-mother of the victim girl PW-6 Julekhabhi.

4. During interrogation with the Appellant, on 5<sup>th</sup> October, 2008, the Appellant expressed his willingness to produce the shirt, which he was wearing at the time of incident. The Memorandum Panchanama of the said statement was made vide Exhibit-28. The Appellant thereafter led the Panch and PW-9 PSI Gavkar to the Mani Tailoring Shop and from the mezzanine floor of the said shop, he produced the shirt (Article-3), which came to be seized under Panchanama (Exhibit-29). The said shirt was having blood stains thereon.

5. Further investigation of the case was taken over by PW-8 PI Keshav Kharat, who after being entrusted with the investigation of the case, again visited the spot of incident, made enquiry with the Appellant and also recorded the statements of some of the witnesses. He sent all the seized muddemal articles to Chemical Analyzer. Four C.A. Reports are produced on record at Exhibits "43" to "46". He collected the medical certificates of,

both, the Appellant and the victim girl, and further to completion of investigation of the case, filed Charge-Sheet in the Court against the Appellant.

6. On case being committed to the Sessions Court, the Trial Court framed charge against the Appellant vide Exhibit-8. The Appellant pleaded not guilty and claimed to be tried, raising the defence of false implication.

7. In support of its case, Prosecution examined in all 10 witnesses, including PW-3 the minor victim, her mother PW-2 Amina and her grandmother PW-6 Julekhabi. Prosecution also led the evidence of PW-7 Dr. Abasaheb Chavan, who has examined the Appellant, and PW-10 Dr. Gayatri Shirsikar, who has examined PW-3 the minor victim. On appreciation of their evidence, Trial Court relied upon the same and held the guilt of the Appellant to be proved beyond reasonable doubt and convicted and sentenced him, as aforesaid.

8. In this Appeal, I have heard learned appointed Counsel for the Appellant, Smt. Sarojini Upadhyay and learned A.P.P. for the Respondent-State Smt. Bhosale. In order to effectively deal with their rival submissions, in my considered opinion, it would be useful to refer to the evidence on record.

9. This being a case of sexual assault on a minor girl of four years, more than her testimony, the evidence of her mother, her grand-mother and the Medical Officers, who examined her and the Appellant, assumes more significance. PW-3 victim was a small child of four years at the time of incident. While recording evidence in the Court, she was hardly of five years age. Hence, she was not administered the oath. In her evidence in the Court, she has stated as to how on the day of incident, when she was playing outside the house in the evening time, one boy gave her the chocolate. She was knowing the said boy, but not his name. Then the said boy took her at railway track. There he laid her on the ground and sat on her body, after removing her salwar. The said boy was with her for ten minutes. Then he left her there and went away. She sat there crying. Then her mother came, made enquiry with her. She narrated the incident to her mother. In evidence before the Court, she has identified the Appellant as the said boy who has laid her on the ground and lied on her body for ten minutes, after removing her salwar. In her cross-examination, it is brought on record that she took her mother to the house of the said boy. She was knowing his house, which was at a distance from her house. Prior to the incident, she had gone to his house twice along with her mother.

10. Then there is evidence of her mother, PW-2 Amina, who has

deposed that on the day of incident, her daughter-the victim girl had gone out of the house at about 8 pm to 8:30 pm as there was Dandia. As her daughter did not return to house for some time, she took search and found her weeping by the side of the common latrine, near to Sangam Building. She found that her dress was blood stained. She made enquiry with her daughter and her daughter told her that when she was standing by the Godess of Garba, one uncle came there, gave her chocolate and took her on the railway track, which was to the back side of the said area, by the side of the wall. There, the uncle removed his pant and made her sleep on the floor. The uncle slept over her and sexually assaulted her. As there was bleeding, the uncle went away. As per evidence of PW-2 Amina, when her daughter disclosed about this incident to her, her mother PW-6 Julekhabi was also present in the house.

11. PW-6 Julekhabi has also deposed as to what her granddaughter/the victim had stated about the incident. As per the evidence of, both, PW-2 Amina and PW-6 Julekhabi, on the disclosure by the victim about this incident, three of them went to take search of the Accused. Victim took them to the house of the Accused. They went there. Initially the Accused was not present there. After some time, the master of the Accused,the Tailor, with whom the Accused was working, brought the

Accused to the house of PW-2 Amina. Then all of them went to the Police Station, after victim identified the Appellant to be the same uncle, who has sexually assaulted her.

12. This evidence of the victim, her mother and grand-mother is fortified and completely supported by the complaint, which is lodged immediately after the incident, when the Appellant was taken to the Police Station, where he was arrested and referred for medical examination. The evidence relating to medical examination of the Appellant in this case is of crucial significance. PW-7 Dr. Abasaheb Chavan has examined the Appellant on the same day in the early morning, at about 5 am, at Nagpada Police Hospital, where he was brought by Police Constable Buckle No.30198 of Wadala Police Station. On clinical examination of the Appellant, he found that the injuries were present on glans penis, frenum was cut and it was bleeding on touch. Tenderness was also present and it was a fresh injury. He has opined that the injury of glans penis is possible if a man commits sexual intercourse with small child of 4 years old. On further examination, he also found that the smegma was absent on Appellant's penis and, according to him, if a man commits sexual intercourse, smegma disappears and it takes two to three days to develop again. Accordingly, he has issued Medical Certificate (Exhibit-34), in which

all these findings of his clinical examination have been stated.

13. In evidence before the Court, PW-7 Dr. Chavan has also identified the Appellant on the basis of the identification mark. In his cross-examination, a suggestion was put to him that this injury may be possible if person falls or when he is using the zip of the pant. This suggestion is outrightly denied by him and he remained confirmed in his opinion about the injury found on the genitals of the Appellant to be possible only due to sexual intercourse with a small child of four years age. The clinical finding of absence of smegma on the penis further goes to clinchingly prove that the Appellant has just committed the sexual intercourse and that too with a minor girl.

14. The evidence of PW-10 Dr. Gayatri Shirsikar is again of a very crucial importance. She has examined the victim girl at 7:30 am. on 3<sup>rd</sup> October, 2008. The victim has given before her also, the history of sexual assault. On her examination, she found that hymen was torn and patulous and hymenal orifice was admitting one little finger. She has, therefore, opined that the possibility of sexual intercourse cannot be ruled out. The Medical Certificate issued by her to that effect is at Exhibit-53. In her cross-examination, a suggestion was put to her that no such incident of sexual assault had taken place and she has issued the certificate at the

instance of Police, which suggestion she has denied. Though she has stated that, in rare condition hymen can be torn due to fall on pointed object, no such evidence is brought on record to show that the victim girl had such fall and that too on the pointed object. No suggestion was given either to the victim or even to her mother or grand-mother to that effect.

15. Therefore, if the evidence of these two Doctors; PW-7 Dr. Abasaheb Chavan, who has examined the Appellant, and PW-10 Dr. Gayatri Shirsikar, who has examined the victim, is taken together, coupled with the evidence of the victim, her mother and grand-mother, then it leads to no other inference except that of the involvement and complicity of the Appellant in the incident of sexual assault on the victim.

16. Submission of the learned Counsel for the Appellant is that PW-3, the victim, has admitted in her cross-examination that the said boy has not done anything to her. It is also urged by the learned Counsel for the Appellant that the victim girl has not stated anything about the Appellant inserting his private organ in her private part. However, this submission is devoid of merits, if one considers the tender age of the victim girl. As she was hardly of four years, it is but natural that she was not even in a position to understand the nature of the act which Appellant had committed with her or even the implications of the said act. That is why

the medical evidence in the present case assumes significance. Especially, the medical evidence of the Appellant, which categorically goes to prove the recent sexual intercourse committed by him with a minor girl. This medical evidence is also clinching to prove the identity of the Appellant to be the same person, who has committed the sexual intercourse with the victim. Though it may be true that the victim girl was not knowing his name, but her evidence has remained unchallenged on record that she was knowing the Appellant and also his house. She has taken her mother to the house of the Appellant. There, initially, he was not found, but, subsequently, he was brought and identified by her. The evidence of PW-1 Mani Naidu goes to prove that the Appellant was staying in the mezzanine floor of his house.

17. Prosecution has also relied upon the C.A. Reports, the Seizure Panchanama of the clothes of the Appellant and the victim, which proves that the blood stains of the blood group of the Appellant were found on the clothes of the victim. The Prosecution has further relied on the evidence of the Panch PW-4 Subhas Bidla and the Investigating Officer PW-8 Keshav Kharat to show that the spot of incident was discovered at the instance of the Appellant, of which the Panchanama was also made.

18. It may be true that there may be some inconsistencies in the

evidence of PW-2 Amina and PW-6 Julekhabi. As per PW-2 Amina, when she went in search of her daughter, she found her crying near common latrine, whereas, as per the evidence of PW-6 Julekhabi, victim came to the house crying. She has denied the suggestion that the victim was found weeping near public latrine. However, this inconsistency in the evidence is not affecting the credibility of other evidence on record. Here in the case, the medical evidence prevails even over the ocular account of the incident. In the instant case, even if the evidence of the witnesses is left out of consideration, the medical evidence gives the clinching proof of the occurrence of the incident and of involvement of the Appellant in the said incident. The Trial Court has, therefore, rightly held the guilt of the Appellant to be proved beyond reasonable doubt for the offence punishable under Section 376(2)(f) of the IPC. The Appeal is without merit and hence deserves to be dismissed.

19. At this stage, a submission is advanced by the learned Counsel for the Appellant that the Appellant is in Jail since the date of incident i.e. 3<sup>rd</sup> October, 2008. He has already undergone about seven years of punishment and hence it is urged that he may be released from Jail on the basis of punishment already undergone by him. However, if one considers the serious nature of the offence, which provides for the minimum

punishment of ten years imprisonment, unless the special and adequate reasons are made out for imposing punishment less than ten years. In the present case, as no such special and adequate reasons are pointed out by the learned Counsel for the Appellant to reduce the punishment to less than minimum, I am not inclined to accept the said submission. Hence, the sentence imposed by the Trial Court, being minimum punishment, on this score also, the Appeal fails.

20. Consequently, this Criminal Appeal stands dismissed, confirming the conviction and sentence of the Appellant, as imposed by the Trial Court.

21. Fees to be paid to the learned Counsel for the Appellant, appointed from Legal Aid Panel, is quantified at Rs.5,000/-.

**[DR. SHALINI PHANSALKAR-JOSHI, J.]**