

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 364 OF 2015

Irfan @ Afroz S/o Sannaulla Farooque,
Age: 34 years, Occ. Painter,
R.o. Parbhani.

... Appellant

Versus

The State of Maharashtra,
Through Police Station Officer,
Nanalpeth Police Station,
Parbhani, Taluka & District Parbhani.

... Respondent

Mr. P.S. Paranjape, Advocate for the Appellant.
Mr. Priti Diggikar, APP for respondent-state.

**CORAM : A.V. NIRGUDE &
V.L. ACHLIYA, JJ.**

DATE OF RESERVING THE JUDGMENT : 28-07-2016.
DATE OF PRONOUNCING THE JUDGMENT : 29-09-2016.

JUDGMENT (PER A.V. NIRGUDE, J.) :-

1. This appeal challenges judgment and order dated 03/03/2015 passed in Special POSCO Case No. 2 of 2014 by the learned Additional Sessions Judge, Parbhani, convicting the appellant for the offences punishable under Sections 376(2)(i) and 302 of the Indian Penal Code (IPC). The appellant was sentenced to suffer life imprisonment with fine of Rs.5,000/- on each count. He was further convicted under Section 4 of the Protection of Children from Sexual Offences Act, 2012 and sentenced to suffer

rigorous imprisonment for seven years with fine of Rs. 5,000/-. In addition to this, the appellant was convicted under Section 6 of the POSCO Act and sentenced to suffer rigorous imprisonment for ten years with fine of Rs. 5,000/-. The appellant was accused of committing rape and murder of fourteen year old girl, during the night between 20/10/2013 and 21/10/2013.

2. In order to prove the case the prosecution examined twelve witnesses. The most important witness is Yasmeen (PW1) the sister of the victim. She stated that Nazmin, the victim was 14 years old at the time of incident and was staying with her, they were residing in the house of one Suvarnabai as tenant. Nazmin was doing cleaning working in one hospital in the morning and, thereafter, she would clean utensils and clothes of some households.

3. On the day of incident Nazmin went to work in the hospital at about 8.00 a.m. and came back at 10.00 a.m., thereafter, she attended her work of washing clothes and utensils, she returned home at 5.00 p.m. At about 8.00 p.m. Nazmin went to Suvarnabai's house for watching T.V. Both of them watched T.V. till 11.00 p.m. After switching off T.V., on one hand, Yasmeen slept in Suvarnabai's house, on the other hand, Nazmin went to her house and slept their alone.

4. In the morning when Yasmeen went to her house she

found Nazmin apparently sleeping under a blanket. When she removed blanket, she saw Nazmin's odhni in her mouth, a white cotton belt of her peticot was found tied around her neck, her shirt was gone up to her neck and on her face and chest bite marks were seen. Yasmeen touched Nazmin's body and found it cold, Yasmeen shouted and neighbours gathered. Someone called Dr. Limbekar who came and checked Nazmin and declared her dead. Dr. Limbekar also indicated that Nazmin was raped before her murder. Soon, Police came there and recorded Yasmeen's statement. They registered an offence at about 9.00 a.m. Yasmeen made another statement to Police, thereafter on the next day. This time she disclosed to the police that the appellant used to make phone calls to her. On 19/10/2013 she had received his call at about 07.00 p.m. during the conversation the appellant asked her as to whether Nazmin reached puberty? to which Yasmeen answered in affirmative. The appellant then asked Yasmeen to hand over the phone to Nazmin. Nazmin had a talk with the appellant but in angry mood she returned the phone to Yasmeen but said nothing. Yasmeen, then, added that during that night she did not permitted Nazmin to watch T.V. at Suvarnabai's house. Yasmeen and Suvarnabai then went outside for buying recharge for Suvarnabai's mobile phone. While coming back, Yasmeen did not see Nazmin in their house. She found Nazmin watching T.V. in a neighbour's house. During the night after switching off the T.V. Yasmeen went

to bathroom when she came back, she met the appellant, she found that he was coming from her room's direction. The appellant gagged Yasmeen's mouth and stopping her from speaking. He, however, told her that he had raped and killed Nazmin and that she should not disclose this fact to anyone. He threatened her that if this is disclosed to anyone the appellant would divorce his wife who is Yasmeen's elder sister. He also threatened that if his name is disclosed he would defame all of them. He then left. Thereafter, Yasmeen went to her room.

5. The next important prosecution witness was Dr. Rodge. who had performed post-mortem examination of Nazmin's body. He described number of injuries which he found on Nazmin's body and he also opined that Nazmin was raped as well as strangulated. Nazmin died due to Asphyxia. The post-mortem report described injuries in detail. The significant injuries which were found on Nazmin's body were various bite marks on her face and on her chest. Then during the post-mortem photographs were taken of the bite marks. These photos were then sent for further forensic examination to K.E.M. Hospital, Mumbai.

6. The prosecution witness no.9, was Dr. Hemlata Pande who was working as Registrar, Department of Forensic, Medicine and Toxicology, Mumbai. Dr. Pande, is a dental surgeon but has studied up to masters level in Forensic Odontology. She received

phone call from Parbhani Police prior to 29/10/2013 seeking her opinion about bite marks found on Nazmin's body. On 29/10/2013, Dr. Pande went to Civil Hospital, Parbhani she took dental impression and photographs of the accused. She made dental model of his teeth. She studied the photographs of bite marks vis a vis the dental model of the appellant. She drew to a conclusion that most of the bite marks on Nazmin's body were most probably caused by teeth of the accused. The summary of the conclusion drawn by her reads as under:

2.1 summary of Conclusion:

The following conclusions are made based on photos submitted by the police and models prepared from teeth of accused:

- > Bite-mark on the left cheek of victim (A), Miss Nazmeen/Munni Shaikh Salim, has been most probably caused by Irfan/Afroz Sannulla Farukhi, as the patter of bite-mark is consistdent with the arrangement of his teeth. However, this cannot be said beyond reasonable doubt, due to absence of a scale in the photo of bite- mark injury.
- > Bite mark on the left breast of victim (B,D,E), Miss Nazmeen/Munni Shaikh Salim, has been possibly caused by Irfan/Afroz Sannulla Farukhi (accused).
- > Bite mark on the right breast of victim (F,G,H, I, J), Miss Nazmeen/Munni Shaikh Salim, has been possibly caused by Irfan/Afroz Sannulla Farukhi (accused).

Other bite-marks could not be analyzed due to poor quality of photos, hence are inconclusive. However, it can be said beyond reasonable doubt that these injuries are human bite-marks caused by an adult.

7. Other witnesses of the prosecution are of less importance. Witness No.3, Revata Raut proved Nazmin's age placing reliance on school leaving certificate. Nazmin's date of birth was 12/04/1994. Prosecution witness no.4 Suvarna Bai, narrated as to what happened in the morning when Nazmin's dead body was

found.

8. Prosecution witness no.6, Mohammed Sarafazuddin stated that, during the fateful evening at about 7.30 p.m., he noticed the appellant was having a quarrel with a beggar. Appellant had in his hand a bottle of 'whitener'.(Intoxicant) He found the appellant under influence of some stupefying substance. He asked the appellant to go to his house. He then noticed the appellant then proceeded towards Bharat Nagar. Other witnesses are not important and, therefore, other evidence is not narrated in this judgment in detail.

9. On the basis of this evidence the learned judge convicted the appellant. The learned counsel for the appellant asserted that, the evidence which came on record was not sufficient to convict the appellant. Upon hearing the submissions at bar following questions arose for our consideration:

Whether the prosecution could prove that victim Nazmin was raped and murdered during the night between 20 and 21/10/2013 at her house?

Whether the prosecution proves that was it the appellant who committed these offences?

Point no.1:- There is practically no dispute about the first part of the prosecution case that Nazmin while she was alone in her house was first sexually attacked, ravished brutally and then

strangled. The prosecution has amply proved this fact.

10. The second question is 'who did it?' the prosecution tried to place reliance on two important pieces of evidence of which the second piece is the forensic expert's opinion. Unfortunately, the expert did not get an opportunity to examine the dead body. Such opportunity ought have given to the expert. She should have come to Parbhani at the time of autopsy. She placed reliance only on photographs of the dead body. This lapse I think is now proving fatal to the prosecution case. The expert has recorded a finding that she was not convinced beyond reasonable doubt that it was the appellant who had caused the bite marks on Nazmin's body. This evidence, thus, is not sufficient.

11. The second and most important piece of evidence is Yasmeen's deposition. She asserted that, during that night she had seen the appellant outside her house. She even asserted that, the appellant admitted his guilt to her and threatened not to disclose it to anyone. The question is whether this part of Yasmeen's deposition is trustworthy? The answer is in negative. The murder was disclosed early in the morning at about 7.00 a.m. According to police record Nazmin's statement was recorded at about 9.30 a.m. on 21/10/2013, on the other hand, Nazmin stated in her deposition that her statement was recorded at about 8.00 p.m. on that date, this difference deserves to be ignored. Whatever may be

the time of recording of Nazmin's complaint, admittedly, she did not disclose to Police in her F.I.R. that she had seen the appellant during the night and that the appellant disclosed to her as to what he did.

12. On the next day, an additional statement was recorded. This time Yasmeen made allegations against the appellant. she admitted that, her disclosure was belated by about one day. There is, thus admitted improvement in the version of this important witness. What Yasmeen stated about the the appellant is even otherwise improbable. Yasmeen was with Suvarnabai during the night. On one occasion during the night, she saw Nazmin at Suvarnabai's house. She also stated that she saw Nazmin watching T.V. sitting in the house of another neighbour Both these statements could be true. A young girl like Nazmin could be glued to TV till late night. Yasmeen, apparently, asked her younger sister to stop watching T.V. and go to bed so that she would be able to attend her duty next morning. Probably because of this snub Nazmin went to sleep alone in her house and did not join her elder sister who preferred to sleep in Suvarnbai's house.

13. If during the night Yasmeen saw the appellant, in the circumstances, that are described above, despite of threats her first reaction would have been to go to her room and see Nazmin. Had she gone there she would have raised alarm by which the entire

neighbourhood would have come to her rescue. Admittedly, despite knowing sexual assault and murder of her sister she did not go to her house to verify as to whether her sister was alive or not. Instead, she said she directly went to the house of Suvarnabai. Even if she had directly went to Suvarnabai, her natural reaction could have been to disclose something to Suvarnabai. She could have taken Suvarnabai with her to go and see the condition of her sister. She could have avoided to disclose the involvement of the appellant presuming she was scared. Even this did not happen. The most important circumstance is despite having an encounter with the appellant during the night, Yasmeen went and could sleep throughout the night. This in our view is most unlikely and untrustworthy. We have no hesitation to discard Yasmeen's deposition to the extent it implicates the appellant. In absence of Yasmeen's deposition, there is practically no substance in the prosecution's case.

14. The appeal deserves to be allowed. The impugned judgment is set aside. The appellant is acquitted on benefit of doubt. He shall be released from custody if not required in any other case.

(V.L. ACHLIYA, J.)

(A.V. NIRGUDE, J.)