

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

CRIMINAL APPEAL NO.474 OF 2015

Rakesh Kisan Nagarale
Age 30 years, Occu. Labour
R/o Chimthane,
Tq. Shindkheda, District Dhule ... APPELLANT

VERSUS

1. The State of Maharashtra
through P.S.I., Shindkheda
Police Station,
District Dhule.
2. Sangita Daga Koli,
Age 35 years, Occu. Agri.,
R/o Chimthane, Tq. Shindkheda
District Dhule ... RESPONDENTS

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Shri P.B. Patil, Advocate for appellant
Shri P.N. Kutti, A.P.P. for respondent No.1/ State
Shri B.S. Deokate, Advocate for respondent No.2
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CORAM: A.I.S. CHEEMA, J.

DATED: 8th June, 2016.

Date of reserving judgment : 28th April 2016
Date of pronouncing judgment : 8th June, 2016.

J U D G M E N T :

1. The appellant - original accused has been convicted
under Section 376(2)(i) of the Indian Penal Code, 1860 (I.P.C. in

brief) and under Section 4 of the Protection of Children from Sexual Offences Act, 2012. Under Section 376 of the I.P.C., he has been sentenced to suffer rigorous imprisonment for 10 years with fine and under Section 4 of the Protection of Children from Sexual Offences Act, he has been sentenced to suffer rigorous imprisonment for 7 years with fine. The sentences have been directed to run concurrently by the Additional Sessions Judge, Dhule vide judgment dated 27.5.2015 passed in Special Case No.55/2014. The present appeal is against the conviction and sentence.

2. The case of prosecution in short is as follows :

- a) On 2.5.2014, complainant (I am not reproducing her name to conceal her identity in the judgment) filed F.I.R. at Sindkheda Police Station in the morning. The complainant is mother of victim girl, who was 5 years old at the time of incident (I am not referring to the name of the victim also). Complainant informed that, she resides at Chimthane, Taluka Sindkheda along with her husband and family. Near their house, the accused Rakesh resides and he had family relations with the family of complainant.

- b) F.I.R. mentions that, on 1.5.2014, at about 8.30 in the evening, the complainant along with her husband and parents-in-law had gone to the place of her sister-in-law Ashabai for dinner. When they were having dinner at the place of Ashabai, the accused came there and told the husband of complainant that he wants mobile charger to charge his mobile, at which time the husband told accused that charger is at home. Thereafter the husband asked the minor victim to go home with uncle Rakesh and give the charger which is kept near T.V. Thereafter accused picked up the victim and she sat on his hip and went away. At about 9.00 p.m., the victim came back alone to the place of Ashabai and she was crying. She had a Rs.10/- note in her hand and when the complainant and other family members enquired from her, she told that, Rakesh uncle had given that Rs.10/- and that he had put her in the bed and removed her underwear and had slept on her person after removing his own underwear and had inserted something in her private part. The complainant and her family members then saw the private part of the victim and found that there was drop of blood coming at the place of private part. Therefore, the complainant along

with her husband got frightened. They put the victim to sleep.

- c) F.I.R. further is that, on 2.5.2014, the victim girl told the complainant that she is having pain in her private part and the complainant was convinced that the victim had been raped. Consequently, the complainant and her family came to the police station along with the victim and were filing the F.I.R.

3. Rajendra Baliram (P.W.5) then Police Inspector, Sindkheda registered the offence at about 9.30 a.m. on 2.5.2014 and investigated the same. The clothes of the victim and the amount of Rs.10/- were seized vide panchanama (Exh.18). The investigating officer prepared the spot panchanama (Exh.21, which was admitted by accused). The clothes of the accused were also seized on the same day vide panchanama Exh.19. The accused as well as the victim were referred for medical examination to the hospital. Statement of the victim was got recorded before Special Court, Dhule under Section 164 of Code of Criminal Procedure. The samples of nail clippings, pubic hair and blood of the accused were collected. The seized articles were sent to Chemical Analyser and Chemical Analyser's report was obtained. After investigation, the charge sheet came to be

filed.

4. Charge was explained to the accused for offences mentioned above. The accused pleaded not guilty. His defence, as can be seen from the cross-examination of witnesses, is that of denial. It is claimed that, father of the victim and the accused were earlier working together at the place of one Namdeo Mistry and they had quarreled and that's why the relations were strained and because of such strained relations false case has been filed.

5. Before the trial Court, the complainant was examined as P.W.1 and the victim deposed as P.W.2. Prosecution examined Dr. Vaishali (P.W.3) to prove the medical certificate of the victim. One Dhanraj Koli (P.W.4) deposed as panch regarding seizure of clothes of victim and Rs.10/-, and proved panchanama Exh.18. He also proved the seizure of clothes of the accused on same date of 2.5.2014 vide panchanama Exh.19. The investigating officer Rajendra deposed as P.W.5.

6. The trial Court considered the evidence of prosecution and the defence, and after considering the same, passed conviction orders as mentioned above, further directing that if

the fine amount is paid, it would be paid as compensation to the complainant.

7. Against the conviction, the present appeal has been filed. It has been argued by the learned counsel for the appellant - accused, and grounds have been raised that the conviction was incorrect and illegal. It is stated that, no prima facie case of offence of rape was made out. The trial Court did not consider that the victim being minor, it was possible to tutor her. The evidence of the minor was required to be scrutinized properly and consciously. According to the accused, the findings recorded are perverse and contradictory. The case was not proved beyond reasonable doubt. That, there was delay in filing of F.I.R. The version of the victim was not corroborated. The medical evidence did not support the version of victim. Nothing was recovered from the accused and he has been falsely implicated without there being any proof. The counsel submitted that, the only evidence regarding the incident was that of the complainant and the victim and no other witness was examined although the evidence showed that in the neighbourhood there were other people residing. It is stated that, in the F.I.R. the name of the accused was referred as Rakesh Uncle, but in evidence, the accused was referred as Bhurya Uncle. The evidence of doctor

should not have been accepted that there was intercourse. According to the counsel, the doctor need not have waited for C.A. Report to give her opinion about intercourse. It is stated that, P.W.1 deposed that they had gone to the police station in the night itself, but the investigating officer deposed that the complainant had come in the morning and then F.I.R. was registered. It is argued that, the accused was only 23 years old at the time of incident and if the conviction is to be maintained, he may be released on probation as he is not hardened criminal.

8. Against this, the learned A.P.P. argued that, the evidence of doctor shows that the hymen of such little girl got torn in the incident. The C.A. report showed that there was blood on the undergarments of the victim and shirt of the accused and there was semen on his undergarments. According to the learned A.P.P., the accused was 30 years old at the time of incident and no case is made out for showing leniency to him for having committed such serious offence against a child. He supported reasons recorded by trial Court.

9. I have heard counsel for both sides and I have gone through the record and proceedings. Regarding the incident, the evidence of P.W.1 complainant and P.W.2 victim needs to be

examined together. The evidence shows that, the victim was about 5-6 years old at the time of incident. The complainant deposed that, she knows the accused, whose name is Rakesh. According to her, the accused is also known as Bhurya. The evidence of these witnesses shows that, on the day of incident, the complainant along with her in-laws and children had gone to the house of her sister-in-law Ashabai for taking dinner, which house was in another lane. The accused went to the said house at about 8.00 -8.30 p.m. and he asked the husband of the complainant for mobile charger. It appears from the evidence that, the husband asked the victim to go along with the accused to give the charger which was kept on the Television. It appears that, the complainant was at that time having her dinner. She saw the accused taking the victim carrying her on his waist (as small children are carried in rural parts).

10. There is evidence of the victim that at the relevant time she had gone to the house of her maternal aunt and from there she was taken by the accused by lifting her on his waist, to their house. The victim, who is a small child, was asked and stated that, at the concerned time her parents and brothers were at the house of maternal aunt. Regarding the incident, the victim was asked in Question - Answer form and she informed that,

when she was so taken at home, the accused removed her undergarment and removed his own undergarments also. He made the victim sleep on the cot and slept on her person. In her way, the victim deposed that, due to the act of the accused, blood started coming out from her private part and sustained pain. Her evidence shows that, the accused gave her a note of Rs.10/-. She deposed that, thereafter she went to where her mother was and that she was weeping. Her evidence is that, she narrated the incident to her mother referring to the accused as Bhurya. The evidence of the victim further shows that, when such act was committed by the accused, he had closed the door of the house from inside. She identified the clothes which she was wearing at the time of incident, in Court. She was asked about the note of Rs.10/- and she stated that it was given to her by Bhurya Uncle.

11. The evidence of complainant then shows that, after the victim was taken by the accused as he wanted the charger, the victim came back after some time having note of Rs.10/- in her hand and she was continuously weeping. When asked, the victim told complainant that, she was having pain in her private part. Victim told complainant that she was made to sleep on the cot and the accused had removed her undergarment and had

slept on her person after removing his own undergarment. She informed that, the accused had given her the note of Rs.10/- so that she does not disclose the incident to anybody.

12. The evidence of complainant then shows that, she had examined the private part of her daughter, when she came to know about the incident and she noticed that blood was oozing from it. According to her, the victim was in pains. Regarding the injury to private part of the victim, the prosecution examined P.W.3 Dr. Vaishali who deposed that the victim was referred to her and she recorded the history of the incident on the basis of what complainant informed her. The doctor was told that the victim was having difficulty in passing urine since the earlier night. Doctor also came to know that, after the incident has happened, the victim had passed urine in the morning, which was whitish in colour. The doctor examined the victim and found that the victim had swelling at labia majora and labia minora and there was swelling and oedema. Doctor found, there was tenderness and oedema at vagina. Even the vulva had oedema. Doctor found that, the hymen was torn. The doctor, in her evidence, gave the opinion that the person concerned must have tried to have sexual intercourse with the victim and must have inserted his penis in her private part. The doctor proved medical

certificate Exh.16 and also took support from C.A. report Exh.31 to state that the person concerned had inserted his penis in the private part of the victim. The evidence of doctor is that, as the victim has passed urine, chances of semen getting washed away were there. As per the doctor, forcible intercourse had been done, because of which she noticed the injuries as mentioned in clause 12 of the medical certificate (which has been referred above). It appears that, the doctor examined the victim at 6.30 p.m. on 2.5.2014.

13. The above evidence shows that the evidence of P.W.1 complainant and P.W.2, the victim, is supported by medical evidence brought on record from the mouth of P.W.3 Dr. Vaishali.

14. To challenge the above evidence of these witnesses, the accused asked the complainant in her cross-examination and she stated that, one can hear the talk in their house by sitting in another house. She admitted that, one Sagunabai Patil resides adjacent to their house and on day of incident, Sagunabai was at her house. No doubt the witness made such statement, but by that itself it cannot be presumed that at the time of actual incident also Sagunabai was in hearing range. The victim girl

was a small child, and mere crying of a child may not attract that attention. The cross-examination of the complainant has shown that they were living in "Beghar Vasti". The house of Ashabai was in another lane. The living conditions can be understood from the fact that complainant deposed in cross-examination that while going to the house of Ashabai, they had closed the door of their house by merely putting latch.

15. In the cross-examination, complainant stated that, she had told while giving report that the name of accused was also Bhurya. The F.I.R. Exh.12 does not mention that the complainant informed that accused Rakesh was also known as Bhurya. The accused brought on record difference in version in this count to say that, in the F.I.R. the accused was referred as Rakesh and it was also stated that the victim told that she had been violated by Rakesh Uncle, but in oral evidence P.W.1 and P.W.2 both referred to the accused as Bhurya Uncle. I find that, this is not material. There is no dispute that name of accused is Rakesh. There is no confusion regarding identity of the accused. The victim was referring to the accused as Bhurya Uncle. At the time of recording evidence of the victim, she was asked and she pointed out towards the accused who had been arrayed before the Court as Rakesh Nagrale to be the same Bhurya. The

accused had been arrested on the same day. The evidence shows that, he was residing just opposite the house of the victim and he was well known to P.W.1 as well as P.W.2.

16. The evidence of the complainant is that, after the incident, in the night itself they had gone to the police station. She deposed that, they went to the police station at about 3.00 Hrs. in the night and halted there. She stated that, she narrated the incident to police. The learned counsel for the accused argued that, the F.I.R. stated that, after the incident, the victim was made to sleep and in the morning they had come to the police station. The counsel referred to the cross-examination of investigating officer P.W.5 where he was asked (in para 5) and he stated that he cannot say whether during that night time the minor girl and her parents and relatives had come to the police station. The investigating officer deposed that, if cognizable offence happens during the night, the Police Station Officer calls them at the police station. In the cross-examination, he accepted that on 2.5.2014 he went to the police station at about 9.00 a.m. He was asked and he stated that, he came to know that the minor girl and her parents and relatives had come to the police station at about 8.30 a.m. According to this investigating officer, at that time, a lady Police Constable was recording the

statement of the complainant when he came to the police station. Although the accused is trying to say that there was delay in recording of the F.I.R. and that the evidence of complainant that they went to the police station in the night itself, does not match with the contents in that regard in the F.I.R., I find that, this is not material. This is matter of honour of a small girl from not only rural background but also who are illiterate as well as poor. The complainant was admittedly residing in what is called as "Beghar Vasti" i.e. residential area of the homeless. It is apparent from the cross-examination of the investigating officer himself that, when he reached the police station, from before that, the victim and her parents were present at the police station. The offence was registered only at 9.30 a.m., which is after this Police Inspector had reached the police station. Overall reading of the evidence of complainant, the F.I.R. as well as the evidence of investigating officer gives the impression that the victim and her parents were made to wait till the investigating officer came and the offence was registered only thereafter and further action started thereafter. It hardly makes difference if complainant reached Police Station in the night itself or early morning. The trial Court also observed that the complainant was illiterate lady, who had no control over police authority while recording her report. Trial Court observed

that, there is fault of the police machinery in not recording the report in the night itself. I am not convinced that the complainant and the victim need to be disbelieved only because the police officials dragged their feet in the night and then in evidence the investigating officer deposed in a vague manner that he came to know that the victim and her parents had come at about 8.30 a.m. It would be hear-say. Again, from whom he came to know is not stated. It could be effort of the subordinate to cover his negligence.

17. It is then the defence of the accused that, the husband of the complainant and the accused were doing Centering work with one Namdeo Mistry and there was quarrel and because of that, there were strained relations. In the cross-examination, the complainant did not accept the suggestion that there had been quarrel and that there were strained relations. There is no material to suggest that the complainant or her husband had any grudge against the accused before the incident took place.

18. In the cross-examination of the victim, she admitted that, in the evening time she used to play in the courtyard along with children. She admitted that, before going to the house of

her maternal aunt on that day, she was playing. She admitted that there is cement-concrete road in their lane. However, she denied that she sustained injury to her private part on account of falling on ground while playing. In this regard, suggestions were made by the accused to P.W.3 Dr. Vaishali also. Doctor denied that the injuries as were found on the person of the victim were possible if she comes in contact with rough surface. Thus, the defence of accidental injuries to the private part has no substance.

19. It has been argued that, the victim was a little girl and it was possible to tutor her. Reference was made to the cross-examination of victim where she stated that her parents told her that she should depose as to what Bhurya Uncle did to her. This does not mean that she was told to say what did not happen. While taking child to Court, she would naturally be required to be told why they are going there. I do not think that such statement of this victim shows that she was tutored. In fact, if she was tutored, she would not have given such statement as it could have been then possible to tutor her that if such question is asked, she should deny the same. The evidence of the victim, when read as a whole, gives a clear picture that the victim although from a poor background and although she was

just six years of age at the time of her evidence, understood as to what is asked to her and what she is answering. In the cross-examination also she has given logical answers although various things were asked to her. The evidence clearly shows that she understands what is being told to her. The trial Court has discussed the evidence of the victim. The trial Court was aware that it is necessary to have close scrutiny of the evidence of such minor witness. The trial Court observed that, going through the material it did not find any material omission or contradiction in the evidence of the victim. According to trial Court, victim stated about the incident in her own language and that the victim was not shaken in cross-examination. According to trial Court, the victim was found to be truthful witness who did not exaggerate her version in the Court. The trial Court, on careful scrutiny of the evidence of the victim, found her to be truthful and inspiring confidence. I have also gone through her evidence minutely and find that the victim is quite clear in her thoughts and her memory. She is a truthful witness who can be relied on. In the cross-examination, the victim was asked and she deposed that, when the accused closed the door from inside, she did not shout. She accepted that, when the accused removed his pant, at that time also she did not shout. Such evidence cannot be interpreted as consent. Apparently, consent of a victim of 5

years of age would also not be material. Such conduct of the victim cannot be doubted also because a child at that age, in such situation where she has been taken in a room and the door is closed and the accused removing his pant, may be more confused than have the ability to understand as to what is likely to happen. The cross-examination of victim shows that, when the accused made her to sleep on the cot, she started weeping. Thus, what appears from the evidence is that, when the accused violated her, the victim started crying, which is a natural conduct of a child of that age. Looking to such evidence, if the neighbours did not get attracted, it would not be surprising. The F.I.R. shows that, the accused had homely relations. It is apparent that, because of this only when accused went asking for charger, the parents sent the little child to go home and give the charge and accused carried the little girl on his hip. The accused coming with the child home in such situation may not have attracted attention of the neighbours.

20. It has been argued that, the articles seized were belatedly sent to Chemical Analyser and once were even returned back by the Chemical Analyser and the same had to be resubmitted. The cross-examination of P.W.5 shows that, the articles seized were sent to Chemical Analyser only on 21.5.2014

with letter Exh.26. The investigating officer was confronted with another letter dated 12.6.2014, which is at Exh.27 and which shows that, the articles were required to be resent after making necessary compliances. The C.A. reports are at Exh.30 and Exh.31. The C.A. report Exh.31 shows that there was blood on the knicker of the victim and there was also blood on the half shirt of the accused and semen was there on undergarment. However, looking to the delay in sending the articles to Chemical Analyser and fact that the articles were sent back and again required to be resent, I would ignore the C.A. reports. However, I find that, even without assistance of the C.A. reports, there is convincing evidence of P.W.1 and P.W.2 regarding the incident and there is corroboration to the complainant P.W.1 and P.W.2 from doctor P.W.3 who had examined private part of the victim on the next day of incident and found the injuries clearly showing that there was penetration into the private part of the victim. Considering the evidence of P.W.1 and P.W.2, it has to be held that the accused did in fact rape the victim.

21. I have gone through the judgment of the trial Court. The trial Court found that there was no dispute regarding the age of the victim. Trial Court also, after discussing the evidence, found that the victim had not acted under influence of her

parents or anybody else while giving evidence. It held that victim understood the questions put to her and was capable of giving rational answers and that the trial court had no hesitation in relying on her testimony showing involvement of the accused in the crime. Trial Court held that there was no material omission or contradiction in the testimony of the victim and that she was truthful witness. Trial Court held that the evidence of the doctor could not be discarded only because at the time of issue of medical certificate Exh.16 she had not drawn her conclusions and concluded about the intercourse only on seeing the C.A. reports (In fact I find after going through the medical certificate Exh.16, the injuries found on the person of victim were such that immediately also it could have been stated that there had been forcible intercourse.) Trial Court held that, even partial penetration would amount to rape. Trial Court found that, the victim was corroborated by the medical evidence. It also held that, there was no material omission or contradiction in the evidence of the complainant and the evidence of complainant also could be relied on. For such reasons, the trial Court found that the offence was proved against the accused.

22. I have also gone through the evidence and having considered the arguments also, I do not find any force in this

appeal against conviction. The judgment of the trial Court in finding the accused guilty and convicting and sentencing the accused does not call for interference. There is no substance in the appeal.

23. The appeal is dismissed.

(A.I.S. CHEEMA, J.)