

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

CRIMINAL APPEAL NO. 544 OF 2002

Sunil Kaduba Sadashive
Age : 31 years, occu.: labourer
R/o Pimpalgaon Kolte,
Taluka Bhokardan,
District Jalna.

Appellant.

Versus

1. The State of Maharashtra
Through Government Pleader,
High Court, Bench at
Aurangabad.
2. Saraswatibai w/o Salikram Ingle
Age : 50 years, occu.: service
R/o Pimpalgaon Kolte
Taluka Bhokardan,
District Jalna.

Respondents.

Mr. P.S. Shinde, Advocate holding for
Mr. S.G. Shinde, Advocate for the appellant.
Mrs. M.A. Deshpande, A.P.P. for the State.

CORAM : SUNIL K. KOTWAL, J.

Reserved on : 15.12.2017.

Pronounced on : 19.12.2017.

JUDGMENT : (PER SUNIL K. KOTWAL,J.)

1. This appeal is directed against the judgment and order of conviction dated 04.09.2002 passed by 3rd Additional Sessions Judge, Jalna in Sessions Case No.105/1998, convicting the appellant/accused under Sections 363 and 354 of the Indian Penal Code (For short "I.P.C.")

2. Respondent No.1 is the State of Maharashtra and respondent No.2 is the informant.

3. The facts leading to institution of this appeal are that the appellant was prosecuted for the offences punishable under Sections 366 and 376 read with Section 511 of I.P.C., in the alternate under Section 354 of I.P.C.

4. The prosecution case, in brief, is that the appellant and the victim belonged to village Pimpalgaon Kolte and they used to reside in one and the same area. Even the residence of the accused was nearby the rented accommodation of the victim where she resided with her mother Smt. Saraswati w/o Shalikrao Ingle and sister. At the relevant time of the incident, the victim was only 4 years old child.

5. On 23.12.1992, when the victim was playing nearby her house at about 3.00p.m., accused lifted and took her to his house and after closing the door, put her on cot and removed her nicker. Accused also unbuttoned the buckles of his pant and lied on the body of the victim. Anyhow the victim managed to rescue herself from the clutches of the accused and went to her house while weeping. The victim disclosed occurrence to her mother. However, at the relevant time the father of the victim used to live at Pimpri Gawli, Taluka Khamgaon to look after his agricultural land. Therefore, by writing a postcard to her husband, Saraswatibai (PW-1), waited for him. After waiting till 27.12.1992, Saraswatibai (PW-1) went to Police Station Hasnabad and lodged F.I.R. (Exh.18) against the accused. In the result, Crime No.80/1992 was registered against the accused under Section 354 of I.P.C. in Police Station Hasnabad. A.P.I. Atamaram Dhote (PW-4) conducted investigation of this crime and drew spot panchanama (Exh.22). Charge-sheet was filed before the Judicial Magistrate, First Class, Bhokardan against the accused for the offence punishable under Section 354 of I.P.C.

6. Later on considering the application filed by the A.P.P, the trial Court committed this case to the Sessions Judge, Jalna as the offence punishable under Section 376 read with Section 511 of I.P.C. exclusively triable by the Court of Sessions, was made out against the accused.

7. The then 3rd Additional Sessions Judge, Jalna framed charge (Exh.15) against the accused for the offence punishable under Sections 366, 376 read with Section 511 and in alternate under Section 354 of I.P.C. Charge was explained to the accused in Marathi. He pleaded not guilty and claimed trial.

8. After considering the evidence placed on record by the prosecution, the learned trial Court pleased to convict the accused for the offence punishable under Sections 363 and 354 of I.P.C. Therefore, the present appeal arises.

9. Heard the strenuous argument submitted by Mr. P.S. Shinde, learned Counsel for the appellant and Smt. M.A. Deshpande, learned A.P.P. for the State.

10. Learned Counsel for the appellant submits that though the offence was alleged to be committed on 23.12.1992, the F.I.R. was lodged on 27.12.1992 without reasonable explanation. He submits that unreasonable delay in lodging F.I.R. creates the possibility of concoction of false evidence against the accused.

11. Learned Counsel for the appellant also assailed the judgment passed by the trial Court on the ground that the trial Court did not consider the material omissions emerged in the testimony of Saraswatibai (PW-1) and the victim (PW-2). His contention is that the testimony of Saraswatabai (PW-1) and the victim (PW-2) is exactly identical and it suggests that the victim was well tutored by her mother Saraswatabi (PW-1). Learned Counsel for the appellant also invited my attention to some variances in between the recitals of F.I.R. (Exh.18) and the oral testimony of Saraswatibai (PW-1) and submitted that neither the testimony of Saraswatabai (PW-1) nor the testimony of victim (PW-2) is trustworthy to convict the accused without corroboration.

12. Learned A.P.P. for the State supported the judgment passed by the trial Court and submitted that the omissions pointed out by the learned defence counsel are not material omissions which go to the root of basic version of both prosecution witnesses. According to the learned A.P.P., minor inconsistencies emerged in the evidence of the witnesses cannot be viewed with suspicion when the informant Saraswatibai (PW-1) had no reason to falsely implicate the accused in such type of serious criminal case.

13. Learned A.P.P. explains the delay in lodging F.I.R. on the ground that as the husband of the informant used to reside at some another village, it was natural by the mother to wait for her husband for reasonable period and thereafter to lodge report with the help of available neighbours. She also submits that when the chastity and character of the female child was at stake, it was natural for a mother to think over for certain period whether to inform the police about the occurrence or not. Learned A.P.P. points out that in F.I.R. (Exh.18) itself the reason for delay in lodging the F.I.R. is specifically given. She placed reliance on the judgments in the cases of **State of U.P**

versus Harban Sahai and others reported in [(1998) 6 SCC 50] and **Hem Raj and another versus State of Punjab** reported in (AIR 2002 SC 4259).

14. In the case at hand, only four witnesses are examined by the prosecution. Saraswatibai (PW-1) is the mother of victim. The victim stepped in witness box as PW-2. Mohan Sadashive (PW-3) is the landlord as well as neighbour of the informant and victim. A.P.I. Atamaram Dhote (PW-4) is the Investigating Officer who has proved omissions emerged in the testimony of prosecution witnesses and who has proved spot panchnama (Exh.22).

15. Defence has not at all disputed the preparation of spot panchanama (Exh.22) as well as the version of Saraswatibai (PW-1) that the house of accused is near the house of this witness. Even the testimony of victim (PW-2) is not disputed that the house of accused is situated near one well. Even the spot panchnama (Exh.22) shows that the spot of the incident i.e. the house of accused is near the Government well

which is described in the four-boundaries of the disputed spot. Thus, the admitted position is that the accused and the victim were nearby residents.

16. After going through the entire testimony of Saraswatibai (PW-1) and victim (PW-2) it also becomes clear that the informant Saraswatibai (PW-1) had no personal grudge against the accused to falsely implicate him in any criminal case. The victim (PW-2) was 4 years old child, and therefore, the question of carrying any grudge against the accused by her does not arise. During the cross-examination of these both important witnesses, defence has not even suggested that these both witnesses have any personal reason to falsely implicate the accused in this case. It was tried to suggest that the landlord of the informant was on inimical terms with the accused and at the instance of landlord Mohan Sadashive (PW-3), the informant Saraswatibai (PW-1) lodged false report against the accused. However, even Mohan Sadashive (PW-3) has specifically denied the inimical terms with the accused. Therefore, absolutely no substance is on record which remotely suggest that Saraswatibai

(PW-1) or the victim (PW-2) had any reason to falsely implicate the accused in the present case. In the peculiar circumstances, I have to examine the testimony of Saraswatibai (PW-1) and victim (PW-2).

17. No doubt, Saraswatibai (PW-1) and victim (PW-2) have categorically reproduced the occurrence in identical manner with slight variance. However, only because the testimony of these two important witnesses is consistent with each other, an inference cannot be drawn that the victim (PW-2) was tutored witness when Saraswatibai (PW-1) had no reason to falsely implicate the accused in any criminal case. Therefore, the testimony of these both witnesses cannot be doubted only on the ground that their evidence before the Court is consistent with each other. On the other hand, such type of consistency also suggests the truthfulness of these both witnesses.

18. During the course of arguments, the learned defence Counsel has taken much pains to point out the omissions emerged in the testimony of Saraswatibai (PW-1) and victim

(PW-2). When the help of the defence Counsel as well as learned A.P.P, I have carefully considered the improvements emerged in the testimony of these both prosecution witnesses.

19. From the evidence of Saraswatibai (PW-1) and the victim (PW-2) it has come on record that on 23.12.1992 at about 3.00 p.m. when the victim was playing outside her house, that time Saraswatibai (PW-1) was taking rest. By taking benefit of this situation, accused lifted the victim and took her inside his nearby house and after closing the door, removed her underwear. Accused also unbuttoned his pant and lied over the body of victim on cot. Anyhow the victim managed to escape from the clutches of accused and while weeping went to her house and informed Saraswatibai (PW-1) about the occurrence. In this testimony the improvement is only the word "latched". However, from the F.I.R (Exh.18), it emerges that only the word "latched" was no used. In the police statement instead of word "latched" the word "closed" was used. Such type of minor variance deserves to be ignored in toto.

20. So also the another improvement in the testimony of Saraswatibai (PW-1) is that, according to her, accused dropped the victim on the cot. However, in F.I.R. (Exh.18) the word "cot" is not mentioned. But in F.I.R. it is mentioned that the accused took the victim inside the house and at that place outraged her modesty. Such variance cannot be views with suspicion because the basic version of the witnesses is regarding outraging modesty of the victim by the accused inside the house of the accused. When both the witnesses did not change the exact place of occurrence i.e. the house of the accused, such type of minor variance in the testimony of both witnesses deserves to be ignored. Even in the testimony of victim (PW2), the variance pointed out by learned defence Counsel is not material which shakes the basic version of this witness. Even in the case of **Bharwada Bhoginbhai Hirjibhai vs. State of Gujrat** reported in (AIR 1983 Supreme Court 753), the Apex Court ruled that,

“Overmuch importance cannot be attached to minor discrepancies emerged in the testimony of prosecution witnesses. The reasons are obvious :-

(1) By and large a witness cannot be expected to possess a photographic memory and to recall

the details of an incident. It is not as if a video tape is replayed on the mental screen.

(2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guesswork on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

(6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which taken place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the Court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes

so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him – perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment”.

21. Learned defence counsel points out certain conflicting versions of Saraswatibai (P.W.1) and victim (P.W.2) regarding occurrence. However, after going through those particular parts of the evidence, it emerges that, P.W.1 and P.W.2 are in conflict with each other regarding the statement as to who opened the door of the house of accused after the occurrence. According to Saraswatibai, when victim wept a lot, accused threw her knicker out of the house and put the victim out of the house. To the contrary, victim (P.W.2) deposes that, she raised shouts and opened the door and went to her mother in weeping condition. Thus, obviously, the conflict in between these two statements is regarding the only manner in which victim came outside the house and about throwing of knicker of the victim. Thus, obviously, the basic version of these witnesses is not changed that accused took the victim inside his house, and by removing her knicker, outraged her modesty. Therefore,

in view of law laid down by Apex Court in above cited authority, such minor variance in testimony of victim and informant, who deposed after lapse of 10 years from the date of incident, deserves to be ignored.

22. Therefore, I do not find material improvement in the testimony of prosecution witnesses which creates doubt about the truthfulness of the version of these witnesses. On the other hand, if the culture of village in India is considered in ordinary course, no mother will level charge of sexual abuse of her own female child, when the chastity of her child is at stake and for scrutiny by public at large.

23. Learned defence Counsel also points out that the prosecution did not record the statements of neighbours of the informant. However, in the cross-examination of prosecution witnesses it has not been brought on record that after the occurrence, on hearing shouts of the victim, the neighbours immediately gathered on the spot. Therefore, when no neighbour reached on the spot immediately after occurrence of

the incident, non examination of any neighbour by Investigating Officer or even by prosecution as a witness cannot be viewed with suspicion. Even the victim (PW-2) has only admitted in her cross-examination that when she came outside the house of the accused, she had seen 2/3 persons there. It does not mean that those 2/3 persons, who were present on road, were the neighbours who rushed on the spot after hearing shouts of the victim. On the other hand, as the incident occurred at about 3.00 p.m., it is not probable that any male member would be present in the house as it was working hours in the village. In the circumstances, I do not find any substance in the objection raised by learned defence Counsel regarding non examination of any independent witness by the prosecution.

24. Learned defence counsel has placed much reliance on admission of the victim (PW-2) that " I had gone to police station after the incident. But I do not remember the date when I had gone to police station". Learned defence Counsel tried to interpret this admission in the manner that though victim had gone to police station on the date of incident, she did not lodge

report. However, this attempt of learned defence Counsel is futile for the simple reason that the victim (PW-2) does not admit that she had gone to police station on the date of the incident. Undisputedly, the victim accompanied her mother when the report was lodged on 27.12.1992. Therefore, the above vague admission cannot be twisted to hold that after the occurrence victim had gone to police station on the date of incident, but did not lodge report.

25. Learned defence Counsel points out that in the F.I.R. (Exh.18), full name of the accused is mentioned with his caste. However, it cannot be ignored that the incident occurred in a small village and the informant, victim and accused used to reside in one and the same area and their houses were also near each other. Therefore addressing the accused by full name with caste in the F.I.R. cannot be doubted. So also addressing the accused by pet name "Sunya" instead of "Sunil" while disclosure of incident to her mother by victim is not unnatural circumstance which creates doubt about the theory of the prosecution.

26. Much reliance was placed by defence Counsel on the delay in lodging F.I.R. No doubt, when the incident occurred on 23.12.1992 and the F.I.R. was lodged on 27.12.1992, there is inordinate delay in lodging the F.I.R. However, after going through the F.I.R. (Exh.18), it becomes clear that the informant has given explanation in the F.I.R. itself that the delay was caused because the informant was waiting for her husband. From the evidence it has also become clear that at the relevant time of occurrence, husband of the informant used to live at another village to look after his agricultural land. Therefore, waiting period spent by the informant for arrival of her husband, atleast for reasonable period of 4 days, is just and natural conduct. So also taking the help of landlord Mohan Sadashive (PW-3), who was also the Sarpanch of the village, is also a natural conduct of the informant Saraswatibai (PW-1) as till lodging the F.I.R. her husband did not reach the village Pimpalgaon Kolte. So also only because Mohan Sadashive 9PW-3) had given lift to the informant and victim for going to Police Station, it cannot be said that the victim and informant deposed

falsely at the instance of Mohan Sadashive (PW-3) when the defence could not bring on record any substance to show that Mohan Sadashive (PW-3) was on inimical terms with the accused.

27. About delay in lodging the F.I.R., in the case of **State of Rajsthan Vs. Om Prakash** reported in [2002 Cri.L.J. 2951 (SC)], the Apex Court observed that when reputation and prestige of family and the career or life of victim is involved, it is not at all unnatural for the family members to wait till arrival of elders in the family, when the offence of this nature is committed, before taking a decision to lodge report with the police.

28. Even recently in the case of **Mukesh and another Vs. State (NCT of Delhi) and others** reported in [(2017) 6 SCC 1], the Apex Court ruled that even a long delay in filing occurred can be condoned if the witnesses on whose the prosecution relies have no motive for implicating the accused. Therefore, considering the overall circumstances of this case

and the explanation given by the informant in the F.I.R. itself, I find that the delay in lodging F.I.R. is properly explained by the prosecution and that cannot be a ground to discard the truthful testimony of the informant and the victim which is corroborated by their landlord Mohan Sadashive (PW-3).

29. Accordingly, after careful examination of the evidence placed on record as well as the scrutiny of the judgment passed by the learned Trial Court, I find that no illegality has been committed by the learned trial Court while convicting the accused for the offence punishable under Sections 363 and 354 of I.P.C.

30. Learned defence Counsel prayed for extending the benefit of the Probation of Offenders Act in favour of the appellant. However, as already considered by the learned trial Court, the offence committed by the accused is a case of child sexual abuse, which cannot be dealt with soft hand. Therefore, considering the overall circumstances of the case, I do not find it proper to extend the benefit of the Probation of Offenders Act in

favour of the appellant/accused.

31. I hold that this appeal being devoid of merit, deserves to be dismissed.

32. In the result, I pass the following order.

ORDER

1. The appeal is dismissed.
2. The appellant/accused shall surrender to his bail bonds before the trial Court immediately to undergo the sentence.

(SUNIL K. KOTWAL)
JUDGE

vdd/