

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

CRIMINAL APPEAL NO. 884 OF 2015

Dasu s/o Kisan Waghmare,
Age : 49 years, Occup.: Labour,
R/o.: Chatgaon,
Tal. Dharur, District Beed

PETITIONER

VERSUS

The State of Maharashtra,
through Public Prosecutor

RESPONDENT

Mr. Satyajit S. Bora, Advocate for the appellant
Mr. G.O. Wattamwar, A.P.P. for respondent/State

CORAM : SANGITRAO S. PATIL, J.

RESERVED ON : 22nd AUGUST, 2017

PRONOUNCED ON: 29th AUGUST, 2017

JUDGMENT :

Heard the learned counsel for the appellant and
the learned A.P.P. for the State/Prosecution.

2. The appellant has challenged the judgment and
order dated 8th May, 2015, passed by the learned Special
Judge, Majalgaon, in Special Case No. 14 of 2014,
whereby he has been convicted for the offences
punishable under Sections 452, 376 (2), 323, 504 and 506

of the Indian Penal Code ("IPC", for short).

3. It is alleged that the appellant entered into the house of the informant namely Parvati Mahadeo Pawar, situate at village Chatgaon, Taluka Dharur District Beed on 17th June, 2014 between 1.00 p.m. and 1.30 p.m. and committed rape on her daughter aged about 17 years, who was a mentally retarded child. On the basis of the FIR lodged by the informant, crime No.53 of 2014 came to be registered against the appellant for the offences punishable under Sections 376(2), 452, 324, 323, 504, 506 of the IPC and also under Sections 6, 7, 11 and 12 of the Protection of Children from Sexual Offences Act, 2012 ("POCSO Act", for short). The investigation followed. After completion of the investigation, the appellant came to be chargehsheeted for the above mentioned offences.

4. The learned Trial Judge framed charges against the appellant for the offences punishable under Sections 452, 376(2), 323, 504 and 506 of the IPC and under Section 7 punishable under Section 8 of the POCSO Act vide Exh-10. The prosecution examined 12 witnesses to establish guilt of the appellant. After evaluating the evidence of the prosecution, the learned Trial Judge

held that the prosecution failed to establish that the victim girl was below 18 years of age at the time of the incident. He, therefore, acquitted the appellant of the offence under Section 7 punishable under Section 8 of the POCSO Act. However, the learned Judge found sufficient evidence on record to establish guilt of the appellant for the above mentioned offences under the IPC. He, therefore, convicted the appellant for the said offences and sentenced him as under :-

Section of IPC	Sentence
452	Rigorous imprisonment for one year and fine of Rs.500/-.
376(2)	Rigorous imprisonment for ten years and fine of Rs.1000/-.
323	Rigorous imprisonment for two months and fine of Rs.200/-.
504	Rigorous imprisonment for four months and fine of Rs.300/-.
506	Rigorous imprisonment for six months and fine of Rs.500/-.

5. The appellant deposited the amount of fine of Rs.2,500/- in the trial Court. The acquittal of the appellant of the offence under Section 7 punishable under Section 8 of the POCSO Act, has not been challenged by the prosecution. As such, the said part of the impugned judgment and order has attained finality.

6. The learned counsel for the appellant submits that there has been unexplained delay in lodging the FIR after the alleged incident, which creates doubt about the case of prosecution. According to him, the evidence of the witnesses and particularly that of the victim and her mother, by itself, would not be sufficient to bring home guilt to the appellant for the above mentioned offences. According to him, the medical evidence does not support the case of the prosecution. The report of the Chemical Analyst also does not connect the appellant with the incident in question. According to him, due to a civil dispute in respect of a house property, the appellant has been falsely implicated in this case. He submits that the learned Trial Judge has not appreciated the evidence on record correctly and properly and has wrongly convicted the appellant.

7. On the other hand, the learned A.P.P. submits that the victim girl, though is mentally retarded could communicate the incident to her mother / informant when she came back home in the evening. The husband of the informant also was not at home. After he came back home, the mother of the victim informed him about the incident. Due to rains and night time, they did not go

to the police station to lodge the report. The mother of the victim went to the house of the appellant on the next day morning to question him as to why he committed rape on the victim girl. At that time, the appellant beat her and threatened her to kill in case any FIR was lodged against him. He submits that the informant then approached the police station and lodged the report. The delay in lodging the report has been duly explained. He submits that the evidence of the victim itself inspires a great confidence. It is supported by the medical evidence. The evidence of the informant also corroborates the testimony of the victim. The subsequent conduct of the informant in questing the appellant about his misdeeds also corroborates the case of the prosecution. He submits that the learned Trial Judge has rightly considered the facts of the case as well as the evidence on record and has rightly convicted the appellant.

8. There is no dispute that the victim girl is a mentally challenged person. Naturally, one cannot expect from her the evidence of that standard which is expected from a normal person. It has come in her evidence at Exh-36 that on the day of the incident at about 2.00

p.m., she alone was sleeping on a cot inside her house. Her parents had gone out of the house for doing labour work. The appellant entered into her house, removed her clothes and pressed her mouth with the help of her odhani. The appellant took bite on her chin. The appellant sat on her stomach. Then he gave jerks to her (in Marathi, "त्याने धक्के दिले"). She sustained injuries on both of her shoulders. Then the appellant ran away. She narrated about that incident to her mother when she came back home in the night. She was cross-examined on behalf of the appellant, but nothing has been elicited therein which would throw any doubt on her version.

9. The informant Parvati (PW3) (Exh-20) states that on the day of the incident, she had gone to the field of one Damodar Sangle for doing labour work. Her husband namely Mahadeo (PW5) (Exh-24) also had gone to village Telgaon for doing labour work. Her son namely Asaram, aged about six years and the victim girl only were present in the house. When she came back home at about 7.30 p.m., the victim started to cry and by gestures, narrated her about the incident. Mahadeo (PW5) came back home at about 8 p.m., when she narrated about the incident to him. The informant also narrated

about that incident to him by gestures. Then on the next morning, she went to the house of the appellant and asked him as to why he committed rape on the victim girl. The appellant started to beat her and also threatened that in case she lodged report against him with the police, he would kill her. She raised shouts whereon one Sheshabai, Suwarna and Sojarbai (PW4) (Exh-23) came there and rescued her from the clutches of the appellant. After that incident, she went to Police Station, Dindrud along with her husband, her minor son and the victim girl. She lodged report (Exh-21) against the appellant.

10. The report (Exh-21) corroborates the version of the informant on all material points. Sojarbai (PW4) also corroborates the version of the informant in respect of the incident that took place in front of the house of the appellant on the next day of the incident at 7 a.m. She specifically states that when the informant questioned the appellant as to why he committed rape on the victim girl, the appellant caught left hand of the informant and twisted it. Due to that, one of the bangles in the hand of the informant was broken. She further states that the appellant threatened

the informant that in case she lodged the report against him, he would kill her. The only omission that has been elicited in her cross-examination about breaking of one of the bangles and causing injury to the hand of the appellant at the time of the incident that took place in front of his house. The said omission is minor one and insignificant.

11. The re-action of the informant of going to the house of the appellant on the next day morning to question him about the misdeeds committed by him as against the victim girl also is a circumstance which corroborates the case of the prosecution about occurrence of the incident that took place inside the house of the informant on the previous day. Had such incident not taken place at all, the informant would not have been gone to the house of the appellant to question him about that incident. There was no reason for the informant to go to the house of the appellant on the next day morning of the incident and question him on the false ground of committing rape on the victim girl.

12. Dr. Priyanka (PW9) (Exh-33) examined the victim girl in the Civil Hospital at Beed on 18th June, 2014 at 7.30 p.m. She states that by showing gestures, the

victim girl was telling that something abnormal had happened with her. She noticed three teeth bite marks over the chin of the victim girl. She found that the hymen of the victim girl was torn and the tears were fresh. She issued certificate (Exh-34) in respect of the victim girl wherein she noted the history of sexual assault at about 2.00 p.m. on 17th June, 2014. Her evidence has remained unshattered in her cross-examination.

13. The evidence of Dr. Priyanka (PW9) supports the version of the victim girl that the appellant had taken bite on her chin at the time of the incident. It further supports her version about sexual assault since there were fresh tears of her hymen.

14. The learned counsel for the appellant submits that the medical certificate (Exh-34) shows that the victim girl was produced for examination on 18th June, 2014 at about 7.30 p.m. Dr. Priyanka (PW9) states that the teeth bite marks over the chin of the victim girl might have been caused within 24 hours. Therefore, according to him, the said teeth bite marks cannot be connected with the incident in question which took place prior to more than 24 hours of examination of the victim

girl. I am not inclined to accept this contention. There is positive evidence of the victim girl and her mother i.e. the informant that there were teeth bite marks on the chin of the victim girl when the victim girl narrated about the incident to the informant on 18th June, 2014 at about 7.30 p.m. The opinion of Dr. Priyanka (PW9) about the approximate time of causing the said teeth bite marks would not throw away the ocular evidence of the victim girl. Thus, the medical evidence supports the evidence of the victim girl that the appellant took bite and due to that, there were teeth bite marks over her chin.

15. The victim girl being mentally challenged, could not narrate in specific words the penetrative sexual assault committed by the appellant with her. However, when she specifically states that the appellant removed her clothes, sat on her stomach and gave jerks to her, it would be sufficient to indicate that the appellant had penetrative sexual intercourse with the victim girl.

16. The appellant was examined by Dr. Deepali (PW8) on 18th June, 2014 at about 6.50 p.m. She found nothing to indicate that the appellant was impotent.

17. Though the garments, which were on the persons of the victim girl and the appellant, were seized and sent to the Chemical Analyst, no semen was detected on the garments of the victim girl. The blood group of the appellant was found to be "A". The blood group of the victim girl could not be determined. The Jangya of the victim was stained with blood in middle portion and appeared to have been washed. The blood group thereof could not be determined. In the circumstances, the C.A. Reports would be of no help to the prosecution to connect the appellant with the incident in question.

18. The defence of the appellant that because there was a civil dispute between the informant and her husband on one hand and himself on the other in respect of a house property, a false report came to be lodged against him, ex facie, is not probable and acceptable. He has not produced anything on record to show that any such dispute in respect of any house, in fact, was in existence.

19. It has come in the cross-examination of the informant that after the victim girl told her about the incident, she immediately did not go to the Police

Station due to rains and night time. It may be noted that in the incident like rape, generally the victim or the relative of the victim are reluctant to make such incident public to save their dignity. In this case, the reaction of the informant in questioning the appellant about the misdeeds committed by him as against the victim girl by approaching his house on the next day morning of the incident itself shows that the informant was very much annoyed by the said misdeeds of the appellant. It is only because of the rains and night time that she could not approach the police immediately after she came to know about the incident. After having questioned the appellant about that incident, she went to the Police Station along with her husband Mahadeo (PW5) and the victim girl. In the circumstances, the delay of few hours in lodging the report cannot be said to be fatal to the prosecution. The said FIR cannot be characterized as an outcome of an afterthought. There was absolutely no reason for the informant to make false allegations of committing rape on her daughter at the cost of the dignity of her family. The delay in lodging the report has been properly explained by the informant.

20. The evidence of the victim girl itself inspires

a great confidence. It is difficult to accept that a mentally challenged girl will make false allegation against any particular person of having committed rape on her. Her evidence is corroborated by the medical evidence. It is further corroborated by the evidence of the informant to whom she had narrated about her ravishment at the earliest possible opportunity.

21. From the evidence of the prosecution, guilt of the appellant for the offence under clause (1) sub-section (2) of Section 376 of the IPC is established beyond reasonable doubt. The evidence further proves that the appellant committed house trespass for committing the offence of rape on the victim girl, which is made punishable under Section 452 of the IPC. The appellant caused injury by taking teeth bite on the chin of the victim girl and as such, committed offence punishable under Section 323 of the IPC. The appellant threatened the informant of death with intent to cause alarm to her so as to deter her from lodging the report against him and as such, committed the offence punishable under Section 506 of the IPC. However, there is no evidence to show as to what abusive words were actually uttered by the appellant so as to constitute

the offence punishable under Section 504 of the IPC. The evidence on record is not sufficient to prove the said offence against the appellant. In the circumstances, the appellant is liable to be acquitted of the offence punishable under Section 504 of the IPC. However, his conviction for the offences punishable under Sections 452, 376 (2), 323 and 506 of the IPC is liable to be upheld. The learned Trial Judge has convicted the appellant for the offence punishable under Section 376 (2) of the IPC with minimum sentence of rigorous imprisonment for ten years. The sentence passed against the appellant in respect of the remaining three offences is rigorous imprisonment for a period of one year and less than that. All the substantive sentences have been ordered to run concurrently. In the circumstances, the minimum sentence of imprisonment passed against the appellant needs no interference.

22. The appeal is liable to be allowed partly to the extent of the conviction and sentence passed against the appellant for the offence punishable under Section 504 of the IPC. His conviction and sentence for the remaining four offences need no interference. In the

result, I pass the following order:-

O R D E R

- (i) The appeal is partly allowed.
- (ii) The conviction and sentence passed against the appellant, vide the impugned judgment and order, for the offences punishable under Sections 452, 376 (2), 323 and 506 of the Indian Penal Code are maintained as they are.
- (iii) The conviction and sentence passed against the appellant, vide the impugned judgment and order, for the offence punishable under Section 504 of the Indian Penal Code are set aside and he is acquitted of the said offence.
- (iv) The fine amount of Rs. 300/- paid by the appellant in connection with the offence punishable under Section 504 of the Indian Penal Code be refunded to him.
- (v) The rest of the directions given by the Trial Court in the impugned order are maintained.
- (vi) The appeal is accordingly disposed of.

[SANGITRAO S. PATIL]

JUDGE

npj/criapl884-2015