

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

**CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.113 OF 2010**

Mohamad Iqlak Mohamad Iqbal Qureshi
Residing at Naupada, Kasam Dudhwala Chawl,
Bandra (E), Mumbai-400051
At present in Nashik Jail **)...Appellant**

V/s.

1) State OF Maharashtra **)...Respondent**
(Nirmal Nagar Police Station CR NO.356/2008)
Notice to be served upon P.P.
High Court, A.S.Mumbai.

2) Amina Noor Islam Shaikh
Indira Nagar Pipeline Zopadpatti,
Room No.14, Near Gate No.18,
Bandra (E).

Smt. Nasreen Ayubi, Advocate Appointed for the Appellant.

Mr. S.V.Gavand, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 19th JANUARY 2017.

ORAL JUDGMENT:

By this appeal, the appellant/accused has challenged the judgment and order dated 25.11.2009 in Sessions Case No.224 of 2009 passed by the learned 5th Ad-hoc Assistant Sessions Judge,

Greater Bombay thereby convicting the appellant/accused for the offences punishable under Sections 363, 366(A) and 376(2)(f) of the Indian Penal Code, 1860. For the offence punishable under Section 363 of IPC, the appellant-accused is sentenced to suffer RI for a period of two years with payment of fine of Rs.1,000/- in default he is directed to undergo further SI for a period of two months. For the offence punishable under Section 366(A) of the IPC, the appellant-accused is sentenced to RI for four years and to pay fine of Rs.2,000/- in default, to undergo further SI for a period of four months. For the offence punishable under Section 376(2)(f) of the IPC, the appellant-accused is sentenced to suffer RI for 10 years and to pay fine of Rs.7,000/- in default, to undergo SI for six months.

2 Briefly stated, facts leading to the initiation of present appeal can be summarised thus:

(a) According to the prosecution case, P.W.2-Amina is resident of Indira Nagar Pipe-line slum. The appellant-accused used to visit neighbouring hut and as such, was acquainted P.W.2-Amina and her children. Victim of the crime is stated to be minor daughter of P.W.2-Amina. It is the case of the prosecution that at the time of alleged incident, she was just 9 years old and was studying in 2nd standard.

(b) On 31.12.2008 victim female child who is examined as P.W.1, returned from the school and after meeting wife of the appellant-accused went to shop for purchasing chana (Gram). The appellant-accused who is also resident of neighbourhood then told the victim girl that his wife is calling her and on that pretext took her to his house at Dawood Baba Chawl where he is stated to have committed rape on her. P.W.1-Victim girl then returned to her house. As she was weeping her mother, P.W.2-Amina asked her as to what happened. Then, P.W.1-Victim female child disclosed the incident to her mother P.W.2-Amina and thereafter, also to her aunt P.W.6-Sabina Shaikh.

(c) P.W.2-Amina along with victim girl and P.W.6-Sabina Shaikh then went to Nirmal Nagar Police Station where P.W.2-Amina lodged FIR Ex.9 against the appellant-accused. This resulted in registration of Crime No.356 of 2008 for the offence punishable under Sections 363, 366(A) and 376(2)(f) of IPC against the appellant-accused.

(d) On registration of the offence, Investigating Officer recorded statements of witnesses, spot panchanama and

clothes of the victim female child came to be seized by drawing seizure panchanama Exhibit 20. The appellant-accused came to be arrested on 7.1.2009. On 9.1.2009, according to the prosecution case, his statement (Ex.23) came to be recorded in presence of pancha witnesses and consequently, jeans pant, underwear and T Shirt allegedly worn by him at the time of incident came to be seized vide panchanama Exhibit 23-A. PW.8-Shiva Makwana acted as pancha witness for effecting this recovery. Seized articles were then sent for forensic examination and on completion of investigation, appellant-accused came to be charge-sheeted.

3 On commital of case, after due trial, he came to be convicted and sentenced by the learned 5th Ad-hoc Assistant Sessions Judge, Greater Bombay, on 25.11.2009 as indicated in opening paragraph of this judgment. Feeling aggrieved by this conviction and sentence, this appeal.

4 I heard Smt. Nasreen Ayubi learned advocate appearing for the appellant-accused. By taking me through the entire evidence adduced by the prosecution, the learned advocate argued that the incident in question is alleged to have happened in the populous

slum. However, prosecution has not examined any witness to demonstrate that victim was kidnapped by the appellant-accused and ultimately, was taken to his house where the alleged incident took place. By taking me through the evidence of P.W.5-Dr. Pratap Anand as well as report of medical examination of accused at Ex.17, the learned advocate argued that it is seen from this evidence that there was no injury on the private part of the appellant-accused and this, goes to show that he is falsely implicated in the crime in question. The learned advocate further argued that report of medical examination of the victim girl at Exhibit 13 only shows presence of old blood stains and it is seen from the cross-examination of Doctor that injury to private part can be caused by nail scratching. With this, it is argued that medical evidence does not support the case of the prosecution. In submission of the learned Advocate for the appellant-accused, statement of victim of the crime was infact recorded after two months of the incident and this is seen from the evidence of P.W.11-Vasant More Police Inspector of Nirmal Nagar Police Station. This caused a shadow of doubt on the prosecution case. It is further argued that vagina smear though came to be collected immediately, no traces of

semen were found on it making the prosecution case suspect. The learned advocate further argued that evidence of victim child -PW.1 and that of her mother PW-2-Amina goes to show that they had been to Nirmal Nagar Police Station at about 6-7 p.m. whereas according to the prosecution case, incident itself took place at about 6-7 p.m. FIR is shown to have been registered at 10.20 p.m. This discrepancy in the prosecution case, according to the learned Advocate for the appellant-accused makes prosecution case doubtful and, therefore, the conviction and sentence imposed by the learned trial Court cannot be sustained.

5 As against this, the learned APP argued that evidence of minor female victim of the incident is duly corroborated by her mother as well as that of her aunt. Medical evidence supports the prosecution case and, therefore, appellant-accused is rightly convicted and accordingly, sentenced by the learned trial Court.

6 I have carefully considered rival submissions and also perused the record and proceedings including the deposition of all 11 witnesses examined by the prosecution. In the case in hand, prosecution is alleging that appellant-accused had committed rape on

minor female child, who at the relevant time was aged about 9 years. By now it is well settled that conviction on a charge of rape on the uncorroborated testimony of prosecutrix can be recorded provided her evidence inspires confidence and the same is truthful. It is apposite to put on record the law laid down by the Hon'ble Apex Court in the matter of **Bharwada Bhoginbhai Hirjibhai v. State of Gujarat AIR 1983 Supreme Court 753(1)**. In paragraph 9 of the said ruling, it is held thus,

“In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion ? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyse the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opinionated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focused on the Indian horizon. We must not be swept off the

feet by the approach made in the western world which has its own social milieu, its own social mores, its own permissible values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the western world. It is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on the Indian Soil regardless of the altogether different atmosphere, attitudes, mores responses of the Indian society, and its profile. The identities of the two worlds are different”.

7 It is, thus, clear that the prosecutrix in a rape case is treated as victim of the offence. However, it is also certain that corroboration is ordinarily required in the case of woman having attained majority and who is habitual to sexual intercourse as there is likelihood of her levelling such an accusation on account of instinct of self-preservation. At this juncture, it is relevant to quote law laid down by the Hon'ble Apex Court in the matter of **Radhu Vs. State of M.P.-2007 CRI.L.J.4704**. In para-5 of this report, it is held thus:-

“5 It is now well settled that a finding of guilt in a case of rape, can be based on the uncorroborated evidence of the prosecutrix. The very nature of offence makes it difficult to get direct corroborating evidence. The evidence of the prosecutrix should not be rejected on the basis of

minor discrepancies and contradictions. If the victim of rape states on oath that she was forcibly subjected to sexual intercourse, her statement will normally be accepted, even if it is uncorroborated, unless the material on record requires drawing of an inference that there was consent or that the entire incident was improbable or imaginary. Even if there is consent, the act will still be a 'rape' if the girl is under 16 years of age. It is also well settled that absence of injuries on the private parts of the victim will not by itself falsify the case of rape, nor construed as evidence of consent. Similarly, the opinion of a doctor that there was no evidence of any sexual intercourse or rape, may not be sufficient to disbelieve the accusation of rape by the victim. Bruises, abrasions and scratches on the victim especially on the forearms, wrist, face, breast, thighs and back are indicative of struggle and will support the allegation of sexual assault."

8 It is thus, clear that while examining the evidence of prosecution in such type of offences, broader probabilities of prosecution case are required to be kept in mind by ignoring minor discrepancies if any. Keeping in mind this position of law in appreciating evidence in case of offence of rape, let us see what P.W.1-Minor female victim of the crime in question says about the incident.

9 Her evidence was recorded by the learned trial Court after putting some preliminary questions to her in order to examine her competency to depose. This female victim of the crime (P.W.1) has stated that at the relevant time, she was 9 years old studying in 2nd standard at Kherwadi Municipal School. As per her version, she was knowing appellant-accused as he was visiting her neighbourer. So far as the incident in question is concerned, P.W.1 minor female victim of the crime deposed that on the day of incident, she had been to the house of the appellant-accused to meet his wife and then went to purchase Chana (Gram) from the shop located nearby the house of the appellant-accused. The appellant-accused was standing near his house. He called her and by holding her hand forcibly took her to his house. It is in the statement of P.W.1 that then appellant-accused closed the door of his house and committed rape on her. She clarified that at that time wife of the appellant-accused was not in the house. As per version of P.W.1, because of the act of the accused-appellant, she started to bleed and her clothes were strained with blood. She returned to her house while weeping and upon being asked disclosed the incident to her mother. As per version of P.W.1, then they went to

the police station and subsequently, to the hospital. PW.1 identified the appellant-accused so also her clothes seized by the police. In cross-examination, this witness has stated that she had been to the police station at about 6-7 p.m. and then to the hospital at about 5 a.m. She further stated in her cross-examination that shop of chanawala is located at short distance from her house and there are huts near the house of the appellant-accused, accepted the fact that customers are always there in the shop of chanawala.

10 PW.2-Amina in her evidence has stated that her daughter, on return from the school went to see the wife of the appellant-accused and returned to the house after sometime. As per version of PW.2-Amina at that time her minor daughter was weeping and upon being asked, she told her that appellant-accused took her to his house and committed rape on her causing bleeding to her. As per version of PW.2-Amina then she took her nine year old daughter to police station and lodged report Exhibit 9 and then as per directions of police took her minor daughter to the hospital. In cross-examination, the informant mother admitted that she went to the police station at about 6-7 p.m. She accepted the fact that police station is at walking

distance of 5 minutes from her house.

11 The report lodged by P.W.2-Amina is at Exhibit 9. It is seen from this that the same was lodged at 22.20 hours (10.20 p.m.) on 31.12.2008. In the FIR, it is averred by the first informant that when her minor daughter returned to her house, she questioned her and then her minor daughter told her that the appellant-accused had committed rape on her.

12 P.W.6-Sabina Shaikh is sister of P.W.2-Amina. Her evidence shows that P.W.1 minor female victim has disclosed that soon after the incident, appellant-accused committed wrong to her.

13 Conjoint reading of these three witnesses goes to show that on return from the school, P.W.1 minor female victim of the crime in question went to the shop of chanawala from where she was taken by the appellant-accused to his house where rape is stated to have been committed on minor female victim by the appellant-accused. This happened, according to the prosecution case in the evening hours of 31.12.2008 and particularly at about 6 p.m. to 7 p.m. as disclosed in the FIR. As per contention of the learned advocate for the appellant-accused if this was the time of the incident then it was not

possible for victim female child as well as her mother and her aunt to go to the police station at the very same time i.e. 6 p.m. to 7 p.m. to report the incident to the police. In other words, discrepancy in the evidence of the prosecution is sought to be pointed out by showing variance in the timing of the incident and timing of going to the police station to report the incident. It needs to note here that victim of the crime, her mother and her aunt are residents of slum and they appears to be rustic uneducated women. As such no overbearing importance can be given to their sluggish chronometric sense in respect of noting the exact time. Even otherwise met with such an horrible situation, it is not expected of a mother to note the timings instead of thinking of what to do next. Therefore, this minor variation in disclosing the time is of no consequence. By evidence of P.W.2 Amina and P.W.6-Sabina Shaikh, former statements of the victim minor girl made to them soon after the incident are proved and those recitals made soon after the incident corroborates the testimony of the P.W.1-Minor female victim of the crime.

14 This is case wherein allegations of rape are on minor female child who at the relevant time was just 9 years old. This fact is

sufficiently established from the evidence of minor female victim as well as that of mother P.W.2-Amina. There is no cross-examination in respect of age of the minor female victim. Similarly, evidence of P.W.5 Dr. Pratap Anand to the effect that clinical age of the minor was about 8-9 years has also went unchallenged. Non-offering of resistance if any to the act of appellant-accused is required to be viewed from this context. Minor female victim of the crime in question was pitted against an adult accused and as such, the fact that she had not made any hue and cry is of no importance. Even otherwise as seen from the evidence of the minor female victim and her mother P.W.2-Amina that minor female victim of the crime was acquainted with the appellant-accused. Evidence of minor female victim shows that appellant-accused allured her by telling that his wife is calling her. In such situation, there was no cause for the minor female victim (P.W.1) to raise a hue and cry upon being taken by the appellant-accused. Then, it is in the evidence of minor female victim that her mouth was gagged by the appellant-accused while committing rape on her. Hence, at that point of time, it was not possible for the minor female victim of the crime in question to make a hue and cry for seeking

attention of persons in the locality. The door of the house of the appellant-accused was closed from inside by the appellant-accused when victim was taken inside his house. Therefore, I do not find any substance in the argument that as the locality was populous, evidence of some other witnesses should have been adduced by the prosecution to prove these facts. Even otherwise, it is well settled proposition of law that when the available evidence is satisfactory and trustworthy then there is no need to examine other witnesses to prove the same fact. Non-examination of witnesses can be given importance only when available evidence is laconic and untrustworthy. Victim of the offence of rape cannot be termed as accomplice but rather she is an injured witness who suffers physical as well as mental trauma. There is no need to seek corroboration to her version and her uncorroborated testimony, if found trustworthy can be accepted. However, in this case, we are having overwhelming corroborative evidence.

15 P.W.1-Minor female victim of the crime in question was initially taken to the Nagpada Police Hospital after lodging of FIR by her mother. At that hospital, P.W.5-Dr. Pratap Daya Anand, medical

officer had examined her. This examination was done at about 4.30 a.m. to 5 a.m. of 1.1.2009, as seen from the evidence of P.W.5 Dr. Pratap Anand as well as that of minor female victim. P.W.5-Dr. Pratap Anand on examination of minor female victim found that hymen of minor female victim was torn at 5 O' clock position and that tear was fresh. Apart from that, P.W.5 Dr. Pratap Anand also found a tear at forchette with active bleeding. Contemporaneous report at Exhibit 16 authored by Dr. Pratap Anand corroborates its version about the medical examination of the minor female victim. There is nothing in cross-examination of this witness to disbelieve his testimony regarding injuries found on the minor female victim of the crime soon after the incident.

16 Evidence of the prosecution shows that thereafter minor female victim was referred to J.J.Hospital, Bombay where she was examined by P.W.4-Dr. Swati Gurav. It is in the evidence of P.W.4-Dr. Swati Gurav that upon examination of the minor female victim (P.W.1) on 1.1.2009, she found stains of blood over both labia majora of the minor female victim (P.W.1) apart from hymenal tear reflecting 5 O' clock position. P.W.4-Dr. Swati has vouched that hymenal tear was

fresh and apart from that there was small superficial tear at posterior forchette of the minor female victim (P.W.1) of the size 0.5 cm. The report at Exhibit 13 prepared by Dr. Swati Gurav also reflected this position. The blood stains found on the private part of the minor female victim are stated to be old blood stains but the fact seen from medical examination of the victim by P.W.4-Dr. Swati Gurav shows that hymenal tear and injury to forchette were fresh. Therefore, this finding indicates that blood stains found on the private part of minor female victim was attributable to these two injuries. It is thus, clear that evidence of both the medical officers who immediately examined minor female victim after the incident fully corroborates her version about commission of rape on her by the appellant-accused.

17 Version of P.W.1-minor female victim is gaining further corroboration from the forensic evidence relied upon by the prosecution in this case. On the day of incident itself, clothes of the minor female victim worn by her at the time of incident were seized by the Investigator vide seizure panchanama Exhibit 20. P.W.7-Ayyub Ahmed and P.W.9-Naeem Anwar Qureshi are panch witnesses to this

seizure. Though P.W.7-Ayyub Ahmed has not supported the prosecution regarding identity of the clothes produced before the Court, evidence of P.W.9-Naeem Qureshi and that of P.W.10-Vishwanath Phatangare, Assistant Police Inspector ,who effected seizure is sufficient to hold that prosecution has proved seizure of clothes of minor female victim immediately after the incident. Those clothes were then sent for chemical analysis. Report of the chemical analyser at Ex.30 shows that human blood of 'A' group was found on 'kameej' of minor female victim. Similarly, blood of 'A' group apart from the semen was also found on the salwar of minor female victim. Thus evidence of minor female victim stands corroborated by forensic evidence placed on record by the prosecution.

18 Clothes of the appellant-accused were seized on the basis of his confessional statement. This confessional statement Ex.23 excluding inadmissible portion thereof is proved by the prosecution through evidence of P.W.8-Shiva Makwana-Panch witness and that of P.W.11-Vasant More, Investigating Officer. Recovery panchanama is at Exhibit 23A. It shows that jeans pant and underwear and T shirt of the appellant-accused came to be seized at his instance on 9.1.2009.

Report of the C.A. at Exhibit 30 shows that blood of 'A' group was found on the T Shirt and jeans pant of the appellant-accused. This is relevant fact which indicates guilt of the appellant-accused in crime in question. What is required in the criminal trial is the proof beyond the reasonable doubt and not the proof of mathematical precision. Therefore, non finding of stains of semens on the vaginal smear of the minor female victim (P.W.1) is of no consequence.

19 In the result, though conviction can be based on uncorroborated testimony of the victim of the rape, in the case in hand, there is overwhelming evidence to corroborate version of the minor female victim (P.W.1) and as such, I see no infirmity in the finding of the guilt of the appellant-accused recorded by the learned trial Court so far as the offence punishable under Sections 376(2)(f) as well as 363 of IPC is concerned. However, the appellant-accused is also found to be guilty of the offence punishable under Section 366A of IPC by the learned trial Court. For holding an accused guilty of the offence punishable under Section 366A of the IPC, it is required to be shown that there was procurement of the minor girl with an intent that such girl may be forced or seduced to illicit intercourse with

another person. There is no such evidence on record to infer guilt of the appellant-accused for this offence. The learned APP has rightly conceded on this aspect. The appellant-accused therefore deserves acquittal for the offence punishable under Section 366A of the IPC.

20 In the result, the following order:

- (1) The appeal is partly allowed. Conviction and sentence of the appellant-accused imposed by the learned trial Court for the offences punishable under Sections 363 and 376(2)(f) of IPC is maintained.
- (2) The Appellant-accused is acquitted of the offence punishable under Section 366A of IPC.
- (3) Fees of the learned advocate appointed to represent appellant-accused at the cost of the state is quantified at Rs.5,000/- and the same be paid to her.

(A. M. BADAR, J.)