

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.426 OF 2012

RAMKESH RAMPYARE KEWAT)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA AND ANR.)...RESPONDENTS

WITH

CRIMINAL APPEAL NO.449 OF 2012

RAJU SHYAMLAL NISHAD)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA AND ANR.)...RESPONDENTS

Ms.Ameeta Kuttikrishnan, Appointed Advocate for the Appellants
in both the Criminal Appeals.

Ms.PN.Dabholkar, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 16th AUGUST 2017

ORAL JUDGMENT :

1 By these appeals, the appellants / accused nos.1 and 2 respectively are challenging the judgment and order dated 10th February 2012 passed by the learned Ad-hoc Additional Sessions Judge, Mumbai, in Sessions Case No.489 of 2010 thereby convicting both of them of the offence punishable under Section 376(f) read with Section 34 of the Indian Penal Code (IPC) and sentencing them to suffer rigorous imprisonment for 10 years, apart from directing payment of fine of Rs.5,000/-, and in default, to undergo further rigorous imprisonment for 3 months, by each of them.

2 Brief facts leading to the institution of present appeals can be summarized thus :

(a) The appellant / accused no.2 Raju Shyamlal Nishad is neighbour of the minor female child, who is reported to be a minor girl aged about 3 years. Appellant / accused no.1 Ramkesh Kewat also resides in the neighbourhood of the victim minor girl. According to the prosecution case, they all were residing at

Kajupada locality of Sakinaka, Mumbai. On 14th April 2010, according to the prosecution case, both the appellants / accused took the victim minor girl to the room of appellant / accused no.2 Raju Nishad and there they committed rape on her.

(b) According to the prosecution case, PW4 Masihuljama Qureshi – a worker in the garment factory came out of the garment factory to have a cup of tea. When he reached near the house of appellant / accused no.2 Raju Nishad, he heard noise of a female child and therefore, he knocked the door of the house of the appellant / accused no.2. On not getting response, he peeped inside the said house from the cement grill of the wall to see the appellant / accused no.1 Ramkesh Kewat committing rape on the victim minor girl and the appellant / accused no.2 Raju Nishad sitting near head of the victim minor girl. People from the locality gathered there and ultimately door of the house came to be opened. The victim came out of the house and was taken by her mother to her house. People from the locality confined both the appellants / accused inside the room.

(c) Shortly thereafter, PW1 Abu Hasan Ali Hasan Qureshi – father of the prosecutrix, returned to his house. He took his minor daughter to the hospital of Dr.Rehman. He was advised to take her to Rajawadi hospital, Mumbai. Accordingly, after lodging the First Information Report (FIR), PW1 Abu Hasan Ali Hasan Qureshi along with mother of the victim minor girl and PW6 Ragini Waghmare, A.P.I. Sakinaka Police Station, went to Rajawadi hospital, where PW5 Dr.Shreeram Ayyar examined the victim minor girl and treated her.

(d) On the basis of the FIR lodged by PW1 Abu Hasan Ali Hasan Qureshi, Crime No.175 of 2010 for the offence punishable under Section 376(f) read with 34 of the IPC came to be registered against the appellants / accused. During the course of investigation, the spot came to be inspected in presence of PW2 Ajijur Rehman Khan by the Investigating Officer. The blood stained towel came to be seized while drawing spot panchnama. Similarly, frock and nicker produced by the father of the prosecutrix also came to be seized. Statement of witnesses came

to be recorded and on completion of routine investigation, the appellants / accused came to be charge-sheeted for the offence punishable under Section 376 read with 34 of the IPC.

(e) The learned trial Judge framed and explained the charge for the offence punishable under Section 376(f) read with 34 of the IPC to both the appellants / accused. They abjured their guilt and claimed trial.

(f) For proving the charge against the appellants / accused, the prosecution has examined in all eight witnesses. PW1 Abu Hasan Ali Hasan Qureshi is the father of the victim minor girl. PW2 Ajijur Rehman Khan is a panch witness who proved spot panchnama Exhibit 19. PW3 Momina Khatun Qureshi is the neighbour of the victim minor girl and appellants / accused persons. PW4 Masihuljama Qureshi is also a neighbour, who had actually witnessed the incident in question. PW5 Dr.Shreeram Ayyar is a gynecologist working with Rajawadi hospital. He had examined the victim minor girl and also proved papers of medical

treatment. PW6 Ragini Waghmare, A.P.I., Sakinaka Police Station, had conducted part of investigation. PW7 Sanjay Pradhan, A.P.I., Sakinaka Police Station has also partly conducted the investigation of the crime in question. Ultimately charge-sheet against the appellants / accused came to be filed by PW8 A.P.I. Nanasahab Gawali.

(g) After hearing the parties, the learned trial court by the impugned judgment and order came to the conclusion that both appellants / accused in furtherance of their common intention, had committed rape on the victim minor girl, who was less than 12 years of age, and accordingly, they came to be convicted of the offence punishable under Section 376(f) read with 34 of the IPC and were sentenced accordingly, as indicated in the opening paragraph of this judgment.

3 I have heard Ms.Kuttikrishnan, the learned advocate appearing for both appellants / accused at sufficient length of time. She contended that appellants / accused could not have

been convicted of the offence punishable under Section 376(f) of the IPC with the aid of Section 34 thereof, as even according to the prosecution, the offence comes under Section 376(2)(g) of the IPC, it being a case of alleged gang rape. Therefore, the entire trial vitiates and benefits thereof goes to appellants / accused. She further argued that mother of the victim minor girl is not examined by the prosecution, and therefore, evidence of the prosecution is lacunic. It is further argued that the prosecution has not examined any disinterested witnesses to prove its case, as even according to the prosecution, lot of people had gathered in front of the house of the appellant / accused no.2 Raju Nishad at the time of the incident in question.

4 As against this, the learned APP supported the impugned judgment and order by contending that the defence has not established that because of mentioning incorrect section while convicting both appellants / accused, there was failure of justice. The learned APP relied on provisions of Section 215 as well as 464 of the Code of Criminal Procedure for contending that as there is

no failure of justice, appellants / accused cannot be heard to say that the trial itself is vitiated. The learned APP placed reliance on judgment of the Hon'ble Apex Court in the matter of **Dalbir Singh vs. State of Uttar Pradesh**¹ for contending that appellants / accused were aware about basic ingredients of the offence and facts constituting the offence were clearly explained to them. The learned APP further argued that as the evidence of the prosecution is sufficient to infer guilt, non-examination of other witnesses which may be available, cannot cause any prejudice to the case of the prosecution.

5 I have carefully considered the rival submissions and also perused the record and proceedings including deposition of witnesses, so also, documentary evidence. By now, it is well settled that in case of sexual assault, and particularly on a minor girl, evidence of the prosecution is required to be considered keeping in mind broader probabilities of the case of the prosecution. If evidence on record points out guilt of the accused in such offence, minor contradictions and inconsistencies are

1 (2004) 5 Supreme Court Cases 334

required to be overlooked. Keeping in mind these principles, let us examine evidence of the prosecution in order to infer whether appellants / accused in furtherance of their common intention, had committed rape on the victim minor girl, who at the relevant time, according to the prosecution case, was aged about 3 years.

6 It is the case of the prosecution that PW4 Masihuljama Qureshi is an eye witness to the incident of sexual assault on the victim minor girl. The prosecution has not examined the minor girl victim of the crime in question, probably because, according to its case, she was just 3 years old, when the incident in question took place. Section 118 of the Evidence Act recognizes infancy and consequent inability to understand the question and give rational answers. The victim minor female, because of her tender age, may not be having sufficient intelligence and capacity to understand the questions and to give rational answers. Non-examination of such infant victim by the prosecution is of no consequence, if ultimately by other trustworthy evidence the prosecution is successful in establishing the offence. The

prosecution is mainly relying on the eye witness account of the incident given by its witness. It is worthwhile to note that evidence of her father – PW1 Abu Hasan Ali Hasan Qureshi, so also evidence of other witnesses namely PW3 Momina Khatun Qureshi – neighbour of the victim minor girl and PW4 Masihuljama Qureshi, who claimed to be acquainted with family of the victim minor girl, is conspicuously silent about age of the victim minor girl. As the incident in question is allegedly witnessed by PW4 Masihuljama Qureshi, let us examine his evidence first.

7 Evidence of PW4 Masihuljama Qureshi shows that at the time of the incident i.e. on 14th April 2010, he was working as a tailor in a garment factory of Shoeb Qureshi. He came out of the said garment factory at about 7 p.m. of that day, for having a cup of tea. As seen from his evidence, he heard noise of children from the locality that the victim minor girl was taken inside the house. PW4 Masihuljama Qureshi deposed that when he reached near the house of the appellant / accused no.2 Raju Nishad, he heard

noise of a girl child and therefore, knocked the door of the house of the appellant / accused no.2 Raju Nishad. Nobody responded and therefore, as per version of this witness, he peeped inside the house from the cement grill window. PW4 Masihuljama Qureshi testified that then he noticed that appellant / accused no.2 Raju Nishad was sitting by the side of head of the victim minor girl and appellant /accused no.1 Ramkesh Kewat was committing sexual intercourse with the victim minor girl. As per version of this witness, then, some people from the locality gathered at the door of the appellant / accused no.2. Subsequently, the door was opened. The victim minor girl came out and mother of the victim minor girl picked her up. PW4 Masihuljama Qureshi was very specific in stating that he had noticed oozing of blood from private part of the victim female girl. As per evidence of this witness, both the appellants / accused were then confined inside the room by people of the locality by locking the door from outside.

8 It needs to be noted that from cross-examination of this witness also, it is brought on record by the defence that PW4

Masihuljama Qureshi had actually seen the appellant / accused no.1 Ramkesh Kewat thrusting his penis inside vagina of the victim minor girl. From cross-examination of this witness, it is further brought on record that this witness himself had seen blood oozing from the private part of the victim minor girl. Apart from this, from the searching cross-examination of PW4 Masihuljama Qureshi, nothing is brought on record to disbelieve his version about the incident or his presence on the scene of the occurrence at the time of the incident. On the contrary, the defence has got confirmed presence of this witness on the spot of the incident by eliciting from this witness that he had actually seen the incident of commission of rape on the victim minor girl. As such, I see no reason to disbelieve version of PW4 Masihuljama Qureshi about the incident in question.

9 One may argue that being an acquaintance of the family of the victim minor girl, this witness is a partisan witness, and therefore, his testimony cannot be relied unless it is corroborated in material particulars by other evidence on record.

Let us, therefore, examine what another prosecution witness, who is resident of the said locality, deposed about the incident. She is PW3 Momina Khatun Qureshi. Her evidence shows that at the relevant time she was residing in front of room of PW1 Abu Hasan Ali Hasan Qureshi – father of the victim minor girl. Her evidence further shows that appellant /accused no.2 Raju Nishad was residing by the side of the room of PW1 Abu Hasan Ali Hasan Qureshi and appellant /accused no.2 Raju Nishad is his friend, who used to visit the house of the appellant / accused no.2 Raju Nishad, frequently. As per evidence of PW3 Momina Khatun Qureshi, at about 5 p.m. to 6 p.m. of 14th April 2010, she heard noise of public and saw PW4 Masihuljama Qureshi as well as wife of PW1 Abu Hasan Ali Hasan Qureshi standing in front of house of appellant / accused no.2 Raju Nishad. PW3 Momina Khatun Qureshi testified that they were knocking the door of the house of appellant / accused no.2 Raju Nishad, and three to four persons were also present there. As seen from evidence of PW3 Momina Khatun Qureshi, then the door came to be opened and daughter of PW1 Abu Hasan Ali Hasan Qureshi came out weeping. At that

time, as stated by PW3 Momina Khatun Qureshi, both appellants / accused persons were present inside the house. This witness further deposed that she had seen blood oozing from the private part of the victim minor girl. In cross-examination of this witness, it is again reaffirmed that PW4 Masihuljama Qureshi was present on the spot at the time of the incident. It is further brought on record that after hearing the noise, mother of the victim minor girl, went to the house of the appellant / accused no.2 Raju Nishad and knocked the door and subsequently, the victim minor girl came out and at that time, she was weeping. Thus, presence of PW4 Masihuljama Qureshi on the scene of occurrence at the time of the incident is again confirmed in the cross-examination of PW3 Momina Khatun Qureshi. Thus, I see no reason to disbelieve version of PW4 Masihuljama Qureshi that upon hearing noise of a girl, he firstly knocked the door of appellant / accused no.2 and subsequently, peeped inside to see that the minor girl - victim of the crime in question, was being raped by appellant / accused no.1 Ramkesh Kewat, while appellant / accused no.2 Raju Nishad sitting nearby. Evidence of PW4 Masihuljama Qureshi is

gaining full corroboration from the testimony of PW3 Momina Khatun Qureshi.

10 PW1 Abu Hasan Ali Hasan Qureshi has stated in his evidence that at about 7.45 p.m. of 14th April 2010, he returned to his home and saw his daughter lying on the floor while blood oozing from her private part. As per his evidence, he took her to the hospital of Dr.Rehman, who told him to take her to Rajawadi hospital, Mumbai. Evidence of PW1 Abu Hasan Ali Hasan Qureshi further shows that while returning from Rajawadi hospital, PW4 Masihuljama Qureshi told him about the incident of sexual assault on his daughter by appellants / accused persons. PW1 Abu Hasan Ali Hasan Qureshi has proved former statement of PW4 Masihuljama Qureshi made to him soon after the incident and precisely while returning from Rajawadi hospital. This duly proved former statement of PW4 Masihuljama Qureshi is to the effect that after hearing noise of a girl emanating from the house of appellant / accused no.2 Raju Nishad, PW4 Masihuljama Qureshi peeped inside the house after knocking the door and saw

appellant / accused no.1 Ramkesh Kewat committing rape on the victim minor girl while appellant /accused no.2 Raju Nishad sitting nearby. This duly proved former statement of PW4 Masihuljama Qureshi corroborates the version of PW4 Masihuljama Qureshi and is admissible under Section 157 of the Evidence Act.

11 The report lodged by PW1 Abu Hasan Ali Hasan Qureshi is at Exhibit 14. The same came to be lodged in the night intervening 14th April 2010 and 15th April 2010 and precisely at 00.10 hours. The FIR lodged with promptitude which is at Exhibit 14 duly corroborates version of PW1 Abu Hasan Ali Hasan Qureshi to the effect that he had noticed his minor daughter bleeding from private part after his return to his house in the evening hours of 14th April 2010.

12 The minor girl victim of the crime in question is examined by PW5 Dr.Shreeram Ayyar, a gynecologist working with Rajawadi hospital, Mumbai, at about 11.50 p.m. of 14th April 2010

i.e. soon after the incident. Version of this witness, to the effect that victim minor girl is a 3 years old child, is not challenged in the cross-examination. As such, there is no reason to disbelieve the version of this witness, who is an expert to conclude that the victim of the crime in question is a minor girl. Thus, the void in evidence of other witnesses regarding age of the minor female victim is cured and it is seen that the minor female victim at the time of the incident was below 12 years of age.

13 Upon examination of the victim minor girl, PW5 Dr.Shreeram Ayyar has noticed following injuries on her private part :

- i) Laceration present bilaterally, labia majora and labia minora. Linear laceration present.
- ii) Fourchette and introitus min. bleeding present from fourchette, laceration present about 1 c.m. and one small blood clot on fourchette at introitus.
- iii) Anus and rectum perianal regions stains present.

Contemporaneous record i.e. medical case papers maintained by

Rajawadi hospital (Exhibit 27) duly corroborates version of PW5 Dr.Shreeram Ayyar regarding signs of sexual violence on person of the victim minor girl. Evidence of PW5 Dr.Shreeram Ayyar is duly corroborated by contemporaneous medical record which shows that there was laceration of labia majora and labia minora of the victim minor daughter of PW1 Abu Hasan Ali Hasan Qureshi and she was bleeding from fourchette and introitus. Stains were seen on her anus and rectum region. This evidence fully corroborates version of PW4 Masihuljama Qureshi to the effect that he had seen appellant / accused no.1 Ramkesh Kewat committing sexual intercourse with the victim minor girl at the house of appellant / accused no.2 Raju Nishad, making his eye witness account trustworthy and reliable.

14 As seen from the evidence of Investigating Officer, seized articles were sent for chemical analysis. Nicker of the victim minor girl was found to be stained with human blood, as seen from the Chemical Analyser's Report placed on record by the prosecution. This evidence further corroborates the version of the

prosecution regarding the offence of rape on the victim minor female child.

15 Evidence adduced by the prosecution and discussed in foregoing paragraphs is sufficient to conclude that the minor girl victim of the crime in question was subjected to sexual violence and rape by appellants / accused persons in furtherance of their common intention. Common intention of appellants / accused can be inferred from surrounding facts and circumstances as has come on record from evidence of PW4 Masihuljama Qureshi. This witness had seen appellant / accused no.1 actually committing rape on the victim minor girl while the appellant / accused no.2 Raju Nishad sitting by the side of head of the victim minor girl. The place of offence was the room of appellant /accused no.2 Raju Nishad. Hence the appellant /accused no.2 Raju Nishad cannot escape the liability under Section 34 of the IPC.

16 It is sought to be made out that the offence was actually that of gang rape, but charge for the offence punishable

under Section 376(2)(g) was not framed and charge for the offence punishable under Section 376(f) read with Section 34 of the IPC was erroneously framed and therefore, the trial vitiates. This submission cannot be said to be having any merit. Liability in terms of Section 376(2)(g) is existence of common intention of accused persons. In the case in hand, instead of applying Section 376(2)(g) of IPC, the learned trial court had framed and explained the charge to both appellants / accused persons under Section 376(f) read with 34 of the IPC as the minor girl victim of the crime in question was less than 12 years of age. The ingredients of common intention is common. Section 376(2)(g) of the IPC implies act done in furtherance of common intention. Therefore, it cannot be said that appellants / accused persons were misled by charge so framed. The charge framed against appellants / accused clearly indicates that they were aware about basic ingredients of the offence alleged against them and that the main acts which were sought to be established against both of them were properly explained to them with an averment that on 14th April 2010 at about 19.00 hours at Room No.3 Kajupada Pipe

line, they both in furtherance of their common intention committed rape on the victim minor girl aged about 3 years. This charge at Exhibit 7 by no stretch of imagination can be said to have misled appellants / accused persons of the acts sought to be established against them.

17 In this view of the matter, it cannot be said that error of charge framed against appellants / accused persons has occasioned in failure of justice. The same is inconsequential.

18 In the result, both appeals fail and as such, the order :

ORDER

Criminal Appeal Nos.426 of 2012 and 449 of 2012 are dismissed.

(A. M. BADAR, J.)