

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

CRIMINAL APPEAL NO. 71 OF 2016

Salim Khan s/o Noor Khan	...	Appellant
Age 47 years, Occu: Business,		
R/o Padegaon, Aurangabad.		

VERSUS

State of Maharashtra ... Respondent

Mr. Rajendra S. Deshmukh, Advocate for the appellant

Mr. A. D. Namde, APP for the State.

CORAM : K. L. WADANE, J.

DATE : 29th August, 2018

JUDGMENT:

1. This Appeal is preferred by the Appellant- original accused challenging the judgment and order dated 08.02.2016, passed by the learned Additional Sessions Judge, Aurangabad, in Special Case No. 06 of 2015, thereby convicting the appellant/original accused for the offence punishable under section 376(2) of the Indian Penal Code (for short “IPC”), and sentenced him to suffer rigorous imprisonment for 10 (ten) years and to pay fine of Rs.5000/-. The accused is further convicted for the offence punishable under section 506 of IPC and sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs.1000/-. The accused is also convicted for the offence punishable under section 323 of IPC and sentenced

to suffer rigorous imprisonment for six months and to pay fine of Rs.500/-. Since the accused is convicted under section 376(2) of IPC, no separate sentence is imposed under section 5 r/w 6 of the Protection of Children from Sexual Offence Act. All the sentences are directed to be run concurrently.

2. Brief facts of the case may be stated as follows:

- i. Appellant/original accused is father of the prosecutrix (Name of the prosecutrix/victim is concealed). Crime came to be registered against the appellant on the information given by the prosecutrix that on 09.03.2014 as her mother was not feeling well, the prosecutrix prepared food and after dinner, her mother, father and her younger sister Aksa slept in their bed room and grandmother and brother slept in the hall. In the night at around 12.30 to 1.00 a.m., her father came near her and was moving his hand on her legs. She opened the eyes and saw her father/accused. She tried to call her mother but her father pressed her mouth, then he removed her salwar and nicker and also removed his trouser and underwear and committed forcible intercourse with her. Thereafter her father threatened her not to disclose the incident to anybody else he will kill her. It is stated that there was bleeding to her private part till noon of the next date. She disclosed the said fact to her friends in the school but did not disclose

the incident in the house due to fear. The prosecutrix alleged that again on 21.03.2014 when the prosecutrix, her sister Aksa and accused father were present in the house in the noon at about 3-00 to 3.30 p.m., the accused father gave Rs.50 to Aksa and sent her to shop and immediately after Akasa went to shop, her father closed the door and committed forcible sexual intercourse with the prosecutrix and threatened that if she will disclose the fact, he will kill her. It is alleged that the accused committed rape upon the prosecutrix on 08.04.2014 and 08.07.2014 also.

- ii. Thereafter again in the night of 06.08.2014, the accused had committed forcible sexual intercourse with the prosecutrix. At that time, the prosecutrix suffered much pains and bleedings. Thereafter, in the same night she wrote a letter to her Teachers Miss Tejinder and Mis Ghadge mentioning all the incidents in the letter and gave the said letter to her sister Aksa and asked her to handover it to her teachers. On 08.08.2014, she disclosed the incident to her younger aunt Neha. Neha disclosed the said fact to another aunt of the prosecutrix and thereafter they both disclosed the said incidents to the mother of the prosecutrix. On 09.08.2014, the prosecutrix was taken by her mother to the hospital as the prosecutrix had no menstruation cycle. At that time, the doctor opined that she was not pregnant but the sexual

intercourse had been committed. Thereafter, the prosecutrix went to the house of her sister at Harsul and stayed there for two months. Then, before one week of Bakri-Idd, she came back to her house and on the next day of Bakri-Idd she disclosed the incidents to her grandmother and her paternal aunts Suhana and Shabana, but they all convinced the prosecutrix so that the matter should not go out of their house. When the accused learnt this fact, he beat the prosecutrix severely on 08.10.2014. Thereafter on 09.10.2014, the prosecutrix left the house and went to Vidyadeep Hostel, Chhavani, Aurangabad and disclosed all the facts to the Superintendent of the Hostel. Then the prosecutrix was taken to the Police Station. Her statement was recorded by the API Patil in presence of Member of Mahila Samiti, in- camera. On the basis of statement of the prosecutrix, an offence came to be registered against the accused father vide CR No.I-278/2014 under sections 376(2)(i)(f)(n), 323 and 506 of the IPC and under sections 3(a) and 5(1) of the Protection of children from Sexual Offences Act, 2012.

- iii. On the basis of the statement of the prosecutrix, crime as aforesaid was registered on 10.10.2014 against the appellant accused. During investigation, PW-7 Miss Archana Sadashiv Patil, API, Special Investigation Team, Crime Branch, Aurangabad (Exhibit 45), who was the investigating officer, had investigated in to the crime. During

investigation, the investigating Officer (PW-7) sent victim girl to Government Medical College and Hospital, Aurangabad for medical examination. Video shooting of statement of victim girl was recorded and DVD of the said shooting was prepared and it was seized by her under the panchanama in presence of Panchas. the Investigating Officer recorded statements of mother and younger sister of the prosecutrix. She also recorded the statement of prosecutrix under section 164 of the Cr.P.C. and then visited the spot of incident and drawn the spot panchanama in presence of panchas at Exh.43. She seized one chit from the sister of victim girl in presence of two panchas under a panchanama. As the victim was not ready to stay in the said house, she was admitted in Vidyadeep Balgruha Girls Hostel. Accused was arrested and sent for medical examination. Samples collected by the Medical officers were sent to Chemical Analyzer. Documents regarding age of the prosecutrix were collected from the Headmistress of Holy Cross English School. On 17.10.2014 the Investigating Officer also recorded supplementary statement of the victim girl and, on 31.12.2014 she collected specimen handwriting of the victim girl under the panchanama. On 03.01.2015 the Investigating officer sent the said chit alongwith specimen handwriting and natural handwriting of the victim girl to handwriting expert. Accordingly,

after carrying out the investigation, Investigating Officer filed charge sheet against the accused for the aforesaid crime.

- iv. Thereafter the case was committed to the Court of Sessions. The contents of the charge were read over and explained to the accused. The accused pleaded not guilty and claimed to be tried. The defence of the accused is of total denial.
- v. After recording of evidence and conducting full-fledged trial, the trial court convicted and sentenced the accused as aforesaid. Hence this appeal is preferred by the accused-appellant challenging his conviction and sentence.

3. I have heard Mr. Deshmukh, learned counsel appearing for the appellant and Mr. Namde, learned APP for the respondent State at length. With their able assistance, I have carefully perused the entire notes of evidence.

4. In order to establish the charges levelled against the appellant accused, the prosecution has examined in all seven witnesses viz.

(1) PW-1 (Exhibit 13) Victim -girl, who turned hostile. She denied that her father had committed rape upon her. She has stated that she had not lodged report with the police nor she had sent any letter to her teacher.

(2) PW-2 (Exhibit No.17) Dr. Diksha Mrutyunjay Bilagi, Medical Officer.

(3) PW-3 (Exhibit 20) Dr. Sadik Majhar Qureshi who has examined the accused and found that there was no evidence to suggest that accused cannot perform sexual intercourse and issued Medical certificate Exh. 21 to that effect.

(4) PW-4 (Exhibit 22) sister Vincentina Costa d/o Inacio Costa, who is serving as Superintendent of Vidyadeep Balgruha. She deposed that on 09.10.2014 victim girl approached her and narrated the incident. The witness PW-4 has stated that victim girl disclosed to her that her father had raped on her for 3-4 times. Victim wanted to file complaint against her father. Then witness called Dr. Neeti Mhaske, Member of Child Welfare Committee. She also enquired with the victim and then lodged complaint with the Chhavani Police station and after the complaint the victim girl was admitted in their Balgruha.

(5) Witness PW-5 (Exh.29) Dr. Neeti w/o Sopanrao Mhaske who is member of Child Welfare Committee, stated that on 09.10.2014 the victim girl narrated the detail incident to her. Victim girl told that her father was sexually assaulting her since March, 2014. Thereafter the victim girl alongwith one lady staff were sent to Chhavani Police

station. However as the lady police constables were not available in the Police Station, the victim stayed in Vidyadeep Balgriha and FIR was recorded on 10.10.2014. Witness PW 5 had also noted down about the injuries seen on the person of victim girl.

(6) PW-6 Sau. Nanda w/o Pandit Khandale (Exhibit 39) was a panch witness to the statement of victim about sexual assault upon her by her father and seizure panchanama of DVD Exh. 40, Note book Exh.41 and Chit written by Victim Girl Exh. 42.

(7) PW-7 Miss Archana Sadashiv Patil, API, Special Investigation Team, Crime Branch, Aurangabad (Exhibit 45), was the investigating officer and she deposed about the manner in which she has carried out the investigation in to the crime.

(8) PW-8 (Exhibit 58) Vinod Ashok Pardeshi, is the handwriting expert.

5. Mr. Deshmukh, learned counsel appearing for the appellant, during his argument submitted that no such incident of rape at all had taken place. There is no witness to the incident. The prosecutrix herself had not stated anything against the appellant accused and therefore the other evidence which is in the form of corroboration is immaterial. Statement recorded by PW-5 Dr. Neeti Mhaske does not bear signature of victim girl. Handwriting on the alleged chit is not proved to be that of the prosecutrix

and the said child was not confronted to the prosecutrix. Evidence on record is in the form of hearsay and there is no substantive evidence to prove the charges levelled against the appellant.

6. As against this, learned APP submits that though the prosecutrix turned hostile, the prosecution has brought on record sufficient other evidence to prove that the accused appellant has committed forcible sexual intercourse with the minor daughter. The prosecutrix was below 16 years. Age of prosecutrix is proved from the school record. Statements of the prosecutrix recorded in presence of independent witnesses is duly proved and therefore the accused is rightly convicted by the trial Court for the charges levelled against him.

7. Admittedly, the accused-appellant is father of the prosecutrix and at the relevant time prosecutrix was studying in 7th standard and she was staying along with her father, mother and other family members. Upon radiological bone assessment test, the doctor has assessed the age of prosecutrix between 14 to 16 years. As per evidence like school record age of prosecutrix, at the relevant time was 12 years and 10 months. Thus, the prosecution has proved beyond all reasonable doubts that at the relevant time the prosecutrix was minor. During evidence, the prosecutrix turned hostile and has denied the alleged incident, however, she has admitted her signature

on the report lodged with the police station on 10.10.2014.

8. Witness PW-2(Exh.17) Diksha Bilagi, Medical Officer, has deposed that she had examined the prosecutrix on 10.10.2014. Witness PW-2 deposed that victim herself narrated the history to her about the series of incidents. She further deposed that on 08.10.2014, after revealing her past incidents, victim was beaten by her father and mother. On general examination of the victim, witness PW-2 found following injuries:

- (1) Contusion on left part of forehead 0.5 x 0.5 cm bluish in colour
- (2) Abrasion over left aspect of neck 2 x 2 cms brownish in colour,
- (3) Contusion over dorsum of left forearm above the wrist of 2 x 1 cms bluish,
- (4) contusion of anterior aspect of middle part of left arm of 3 x 2 cms bluish in colour caused by blunt object,
- (5) Contusion and abrasion of 2 mms on dorsum of right thumb; and
- (6) Contusion over anterior aspect of mid thigh 4 x 1 cms bluish in colour.

. On genital examination of the victim, Witness PW-2 Dr. Diksha Bilagi found that hymen revealed healed old tears at 11 O'clock 10 O'clock and 05 O'clock position. On speculum examination, bleeding was present. After examination PW-2 stated that her final opinion and finding on clinical

examination are suggestive of vaginal penetration. There was evidence of external surface injury marks as mentioned above caused by blunt object and 2-3 days old. Accordingly the witness issued certificate to that effect in Form Annexure- II which is at Exh. 18. The witness further deposed that she has collected the samples of vaginal swab, vaginal smear, blood samples, nail cutting, pubic-hair and handed over to the police.

9. Witness PW-7, API Archana Patil has deposed that on 09.10.2014, she was on Bandobast Duty. She received a phone call of Mr. Basale, P.I. that one girl had been to Chhavani Police Station with a complaint of sexual harassment by her father. API Patil send API Nikam to the Police Station. After Bandobast duty was over, she made enquiry with API Nikam, who informed that girl has made a complaint of sexual harassment by her father but since it was night time, she told that she will give statement on the next day. accordingly, entry was taken in the station diary and the victim girl was sent to Vidyadeep Bal Gruha, Chhavani. PW-7 API Patil further deposed that on 10.10.2014, she alongwith her staff went to Vidyadeep Bal Gruha, met the victim girl. She further deposed that victim girl was prepared to come with them in the police station for giving statement. Accordingly she gave letter Exh. 46 to the Vidyadeep Bal Gruha and brought the victim girl to the Police Station. At that time police called two lady members of Mahila Suraksha Samiti, and a cameraman in the police station. The witness

informed the victim girl that her statement is going to be recorded in presence of the said lady members in video shooting and accordingly recorded the statement of victim girl as per her say. After reading over the contents of the statement to the victim girl, PW-7 obtained signature of the victim girl on the statement, which is at Exh.47. The witness deposed that on the basis of statement of victim girl offence came to be registered and she had carried out further investigation. During investigation, she sent the victim Girl to Ghati Hospital for medical examination. She deposed that she visited the spot of incident, drew the spot panchanama in presence of panchas, and she seized one chit from the possession of sister of the victim girl in presence of panchas as per panchanama Exh.41. She also obtained specimen handwriting of the victim girl Exh.42 in presence of panchas and sent to the handwriting expert as per requisition letter Exh.55.

10. PW-8 Vinod Pardeshi, who is handwriting expert, has deposed that after receiving the documents from the photography section, he carried out scientific examination in different seatings and came to the conclusion that the person who write the red enclosed writing marked as Exh.S-1 to S-6, N-1 to N-10 also wrote the red enclosed writing marked as Exhibit Q-1.

11. The statement of prosecutrix recorded in the police station was treated as first information report. During recording of evidence before the

Court, victim turned hostile and denied the incident of rape. It is to be noted that at the time of recording statement of the victim girl, her mother was present in the Court. It indicates that mother and father were consistently pressurizing the victim and as a result she turned hostile.

12. It has come on record that prosecutrix wrote a letter to her teachers mentioning all the incidents and gave the said letter to her sister to handover the same to the teachers. Contents of the chit reads as follows:

"Please visit my house for me. Please sorry Miss, but I want your help. Please help me please. My mother and brother is also included.

On 6th of August my father rape me at night and he is Blackmailing me.

Your live near police station. Please go and complain the officer.

And onside he is telling me that he will not send me to school. "

The above handwriting is proved to be of the victim. On 08.08.2014, victim disclosed the said incidents of rape to her aunts, who disclosed the said facts to the mother of the victim on 09.08.2014. Thereafter prosecutrix stayed at her elder sister's house. She came back after two months on the occasion of Bakri-Idd and at that time, she again disclosed the incidents to her other family members. When her father came to know about the said facts, he assaulted her on 08.10.2014 and therefore, she left the house on 09.10.2014 and went to Vidyadeep Bal Gruha Hostel and narrated the said

incident to her teacher and her teacher called the Member of the Child Welfare Committee in Balgruha. The prosecutrix narrated the incident to the said members also and thereafter she was sent to the police station and her statement was recorded. This fact is supported by the evidence of PW-4 Sister Vincentia Costa, PW-5 Dr. Neeti Mhaske, Member of Child Welfare Committee and the statement of Investigating Officer PW-7 Patil, API.

13. Statement of the Investigating Officer - PW-7 about narration of the incident by the victim girl is supported by the statements of Medical Officer PW-2 Miss Diksha Bilagi, who examined the victim girl. Witness PW-2, in her statement, has stated in detail the history given by the victim about the incidents of rapes and she further deposed about the injuries etc. caused to the victim girl. Unless the victim discloses to the medical officer about the commission of rape in detail like date and time and the manner in which it is committed, the medical officer could not have mentioned the same in her report. There is no reason for the Doctor to record false history at the time of examination of the Victim.

14. From the circumstances appearing from the record, it appears that it is very unfortunate thing for the prosecutrix that her blood relatives were not supporting her. On the contrary, they were mounting pressure on the prosecutrix. Not only this, the accused, two days before filing of the first

information report, assaulted the prosecutrix and that is clear from the medical evidence as has been deposed by PW-2 Diksha Bilagi.

15. From the circumstances as referred above, it appears that there was no alternative for the prosecutrix but to take shelter of others and therefore she tried to convey and inform the incident to one of her teacher by sending a chit through her sister. She disclosed the heinous offence committed by the accused before PW-2 Dr. Diksha Bilagi and PW-5 Dr. Neeti Mhaske in whose presence, the Investigating Officer PW-7 Archani Patil recorded the statement of the victim. Specimen handwriting is proved by the evidence of witness PW-6 Nanda Khandale, panch witness and PW-8 Vinod Pardeshi, Handwriting Expert. Therefore, even though the prosecutrix turned hostile, the alleged incident is proved by the oral evidence of PW-2 Dr. Diksha Bilagi, PW-4 Vincentina Costa, PW-5 Dr. Neeti Mhaske.

16. Though, the victim girl turned hostile for whatever reason, in view of the other attending circumstances and statement of witnesses like PW-2 Dr. Diksha Bilagi, PW-4 Sister Vincentina Coasta, PW-5 Dr. Neeti Mhaske and the evidence of handwriting expert about the Chit which the victim gave to her sister Aksha for handing over to her teachers, the offence of rape by the accused upon the victim girl is established.

17. The trial Court has properly considered all the evidence brought on

record by the prosecution and observed that, though the prosecutrix turned hostile, but the other evidence on record is otherwise acceptable and reliable and the same is sufficient to prove that the accused, who is father of the prosecutrix has committed the rape repeatedly on the prosecutrix who was under 16 years of age. The trial Court has further observed that the accused has also assaulted the prosecutrix and voluntarily caused injuries to her and also extended threats to her with an intent to cause alarm to her, because of which she did not disclose the alleged incident immediately to anybody. Considering all the evidence brought on record, the trial Court has rightly convicted and sentenced the accused, as aforestated.

18. On independent and in-depth scrutiny of entire evidence, I am of the opinion that the trial Court has considered all the evidence brought on record in its proper perspective and recorded the findings which are in consonance with the evidence on record. There is no perversity as such.

19. In the light of discussion herein above, I am not inclined to cause interference in the impugned Judgment and order. There is no merit in the Appeal. Hence the Appeal stands dismissed.

(K. L. WADANE, J.)

JPC