

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

CRIMINAL APPEAL NO.106 OF 2017

Kishor @ Vadya s/o. Shivdas Koli,
Age : 27 years, Occ. In jail,
R/o. Adgaon, Tq. Yawal,
Dist. Jalgaon

..Appellant

Vs.

1. The State of Maharashtra,
Through Yawal Police Station,
Tq. Yawal, Dist. Jalgaon

..Prosecution

2. Jagruti Eshwar Baviskar,
Age : Minor, Occ. Nil,
Through : Guardian -
Eshwar Ramesh Baviskar,
Age : 40, Occ. Agri.,
r/o. At Post Aadgaon,
Tq. Yawal, Dist. Jalgaon

..Respondents

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Mr.V.B.Patil, Advocate for appellant
Mr.A.A.Jagatkar, APP for respondent no.1
Smt.M.L.Sangeet, Advocate for respondent no.2

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CORAM : SANGITRAO S. PATIL, J.

RESERVED ON : JANUARY 16, 2018

PRONOUNCED ON : JANUARY 23, 2018

JUDGMENT :

The appeal has been preferred against the
judgment dated 06.03.2017 delivered in Sessions

Case No.100 of 2014 by the learned Additional Sessions Judge, Bhusawal, whereby the appellant has been convicted for the offences punishable under Section 376 read with Section 511 and under Section 448 of the Indian Penal Code ("I.P.C.", for short) and has been sentenced to suffer rigorous imprisonment for seven years and six months respectively and to pay a fine of Rs.20,000/- and Rs.500/- respectively, with default clause, on these two counts.

2. Briefly stated, it is the case of the prosecution that the victim girl was aged about nine years at the time of the incident, which took place on 03.01.2011 in the cattle-shed of the informant namely, Ishwar Ramesh Mistri situate at village Adgaon, Tq.Yawal, Dist. Jalgaon. The victim had gone to serve fodder to the cow in that cattle-shed at about 2.00 p.m. to 2.30 p.m. The appellant, who was residing nearby that cattle-shed, went there, caught hold of the victim from

behind, dragged her and made her to lie on a rubber-mat. He removed her pant. He removed his own pant as well. He lied on the person of the victim. She tried to raise shouts. He pressed her mouth. He then committed sexual intercourse with her. The victim started suffering from pains at her private part. Bleeding was oozing therefrom. She shouted due to pains and took bite of the fingers of the appellant. Therefore, the appellant ran away. The victim rushed to her house and informed the said incident to her mother and grand-mother. The informant, i.e. the father of the victim, was in his agricultural land. He was immediately got called back to home through one Ravindra Vasudeo Patil. The informant visited the cattle-shed. The victim narrated the incident to him. He took the victim to Police Station, Yawal and lodged FIR against the appellant.

3. Crime No.2 of 2011 came to be registered against the appellant for the offences punishable

under Sections 376, 448, 323 and 506 of the I.P.C. The investigation followed. The spot panchnama was prepared. The rubber-mat and the stems of Jawar which were stained with blood, came to be seized therefrom. The appellant was arrested. The victim as well as the appellant were subjected to medical examinations. Their blood samples were collected. Vaginal swab of the victim was collected. The baniyan, under-pant and full pant of the appellant came to be seized. The pant of the victim also came to be seized. Statements of witnesses were recorded. All the seized articles were sent for chemical analysis and report.

4. After completion of the investigation, the appellant came to be charge-sheeted for the above-mentioned offences in the Court of the learned Judicial Magistrate First Class. Since the offence punishable under Section 376 of the I.P.C. was triable by the Court of Session, the learned Magistrate committed the case to the Court

of the learned Additional Sessions Judge, Bhusawal.

5. The learned trial Judge, after considering the papers of investigation, framed charges against the appellant for the offences punishable under Sections 376 and 448 of the I.P.C. only and explained the contents thereof to the appellant in vernacular. The appellant pleaded not guilty and claimed to be tried. His defence was that of total denial.

6. The prosecution examined ten witnesses to bring home guilt to the appellant of the above-mentioned two offences. The learned trial Judge scrutinised the said evidence and found it sufficient and dependable to hold the appellant guilty of the offences punishable under Section 376 read with Section 511 and under Section 448 of the I.P.C. Accordingly, he convicted and sentenced the appellant for the said offences, as stated above.

7. The learned Counsel for the appellant submits that the evidence of the victim girl, who was aged about nine years at the time of the incident, is not at all believable. The medical evidence does not support her version about the alleged sexual assault made by the appellant. No injury was found on her person. Her hymen was found intact. Relying on the judgment in the case of **Tukaram Govind Yadav Vs. State of Maharashtra, 2012(1) Bom.C.R.(Cri.) 427**, he submits that the evidence on record is not sufficient to establish that the appellant attempted to commit sexual intercourse with the victim. He, therefore, prays that the appellant may be acquitted of the above-mentioned offences.

8. On the other hand, the learned APP submits that the evidence of the victim is very natural and probable. It inspires a great confidence. She has no reason to make false

allegations against the appellant. He submits that the version of the victim clearly indicates that the appellant had crossed the stage of preparation for committing the offence of rape and had actually attempted to commit rape on her. Therefore, the trial Court rightly appreciated the evidence on record to bring home the guilt of the appellant of the said offence. He supports the the impugned judgment and order and prays that the appeal may be dismissed.

9. Considering the facts of the case as well as the nature of the offence alleged against the appellant, the evidence of the victim girl alone would be relevant in order to see whether the offences alleged against the appellant have been satisfactorily proved or otherwise. The victim girl deposes at Exh.20 that on the day of the incident at about 2.00 p.m. to 2.20 p.m., she had gone to the cattle-shed for serving fodder to the cow. At that time, the appellant came there,

caught her from behind, dragged her and made her to lie on a rubber-mat. He then removed her pant and that of himself and slept on her person. When she tried to raise shouts, he pressed her mouth. The appellant did bad work (i.e. sexual intercourse) with her causing her to feel pains at the place of her urine. She states that blood started oozing from her private part. She then raised shouts due to the pains and took bite of the fingers of the appellant. Therefore, the appellant ran away therefrom. Then she went to her house and told the incident to her mother and grand-mother. Her father had gone to the field. After he came back home, she told the incident to him also. She showed the spot of the incident to her father. This is what is the account of the incident given by the victim.

10. The evidence of the victim has been supported by Vimalbai (PW 3)(Exh.20), who is her grand-mother. She had seen the victim immediately

after the incident. She deposes that the victim was crying. Her clothes and legs were stained with blood and on being asked, she narrated the above-referred incident showing involvement of the appellant. Though the evidence of Vimalbai (PW 3) is hearsay, it is admissible in view of Illustration (j) under Section 8 of the Evidence Act.

11. Dr.Namrata (PW 8)(Exh.36) and Dr.Pravin (PW 5)(Exh.24), who were working as Medical Officers in the Civil Hospital at Jalgaon, examined the victim on 03.01.2011. From their evidence, it is clear that there was no penetrative assault made by the appellant on the victim. Her hymen was found to be intact. Dr.Pravin (PW 5) specifically states that in the case of penetrative assault, hymen always get ruptured. He states that no injury was found on the private part or other part of the body of the victim, except an abrasion on her right elbow.

However, both of these medical witnesses state that the age of the abrasion was more than 72 hours. The victim was examined by these witnesses on the same day on which the incident took place. Therefore, the said abrasion cannot be connected with the incident in question.

12. Dr.Feroz (PW 9)(Exh.38), who examined the appellant on 03.01.2011 in Rural Hospital, Yawal, states that he found three abrasions over the left index finger of the appellant. He states that fresh minimal bleeding was present over these abrasions. The age of the abrasions was within six hours of the examination. Bluish discoloration was found on the nails of the appellant. He specifically states that the said abrasions were possible due to human bite. It has further come in his evidence that after the examination of the appellant, he found him to be competent to perform sexual intercourse.

13. The evidence of Dr.Feroz (PW 9) supports the version of the victim that she took bite of the fingers of the appellant when she started shouting because of the pains at the time of the incident. Dr.Feroz (PW 9) also accepts that the abrasions found on the fingers of the appellant were possible due to daily agricultural work. However, it is not the case of the appellant that he sustained those abrasions because of any agricultural work done by him within six hours of his examination by Dr.Feroz (PW 9). Therefore, this alternative possibility would not be of any help to the appellant. On the contrary, in view of the positive evidence of the victim, the cause of these abrasions given by Dr.Feroz (PW 9), i.e. due to human bite, would strengthen the evidence of the victim showing involvement of the appellant in the incident in question.

14. Machindra (PW 4)(Exh.21) happens to be the panch to the spot panchnama (Exh.22). He specifically states that a rubber-mat and stems of Jawar stained with blood were laying on the spot of the incident and the same were seized under the panchnama (Exh.22). Nothing has been elicited in the cross-examination of this witness so as to create doubt about his evidence.

15. A.P.I. Pawar (PW 10)(Exh.45), who prepared the spot and seizure panchnama also corroborates the version of Machindra (PW 4). A.P.I. Pawar (PW 10) further states that he sent the said rubber-mat and stems of Jawar for chemical analyais with letter (Exh.47) and report thereof is at Exh.48. The said C.A. report shows that the semen having human origin was found on that rubber-mat. Though grouping could not be established conclusively, the fact remains that the human semen was found on the rubber-mat, which was seized from the spot of the incident on the

day of the incident itself between 5.45 p.m. and 6.15 p.m. Finding of the human semen on the rubber-mat clearly indicates that the alleged sexual activity was performed over that mat. The victim has attributed authorship of that act to the appellant.

16. Kailash (PW 6)(Exh.28) deposes that a baniyan, under-pant and full-pant of the appellant were seized in his presence on 03.01.2011 under the panchnama (Exh.29). He then states that the pant of the victim also was seized on 04.01.2011 in his presence vide panchnama (Exh.30). The said articles also were sent to the Chemical Analyser for chemical analysis with letter (Exh.47). The C.A. report in respect of the under-pant of the appellant shows that semen and blood stains were detected thereon. Blood was also found on the pant of the victim. Though grouping was not ascertained, existence of the human semen and human blood on the under-pant of the appellant and

the part of the victim also would corroborate the version of the victim about the occurrence of the alleged incident.

17. There is nothing on record to show that there was any previous rivalry between the informant or his family members on one hand and the appellant or his family members on the other. The victim, who was quite an innocent child at the time of the incident, had no axe to grind against the appellant. There was no reason for her to speak false against the appellant. As stated above, her evidence is corroborated by the above-mentioned circumstantial evidence. Her evidence creates a great confidence. There is absolutely no possibility of her being tutored by anybody else with a view to falsely implicate the appellant.

18. As stated above, the involvement of the appellant in the above-mentioned incident has been proved by the prosecution beyond reasonable doubt.

Only because the medical evidence does not support the version of the victim in respect of penetrative assault, the appellant cannot be held guilty for the offence of committing rape. However, from the facts proved by the prosecution, it is obvious that the appellant had crossed the stage of preparation and attempted to commit rape on victim. In the case of **Tukaram Govind Yadav** (supra) cited on behalf of the appellant, the accused therein, after removing nicker of the victim, was found laying on her person. He was trying to have intercourse with her, however, the grand-mother of the victim reached there. At that time, on seeing her, he fled away. In the circumstances, it was held that the accused therein had not crossed the stage of preparation and there could not have been attempt to commit rape. In the present case, as stated above, the appellant had crossed the stage of preparation as seen from the evidence of the victim and the C.A.

reports. Consequently, the said judgment would not be of any assistance to the appellant.

19. The learned APP relied on the judgment in the case of **Ravi s/o. Shankarrao Kale Vs. State of Maharashtra, 2015 All M.R.(Cri.)4476**, wherein the accused was held guilty for the offence punishable under Section 376(2)(f) read with Section 511 of the I.P.C. on being noticed that he was sleeping naked on a minor girl by removing her nicker and was trying to insert his private part into the private part of that minor girl. The age of the victim girl therein was five years. The medical evidence did not support the prosecution to establish penetrative sexual intercourse. Hymen of the victim was found intact. In the circumstances, the accused was convicted for the offence of attempt to commit rape. Thus, the judgment in the case of **Ravi s/o. Shankarrao Kale** (supra) would be helpful to the prosecution to advance its case.

20. The prosecution has produced sufficient, cogent and dependable evidence on record to establish that the appellant unlawfully entered into the cattle-shed of the informant with an intention to commit rape on the victim girl and attempted to commit rape on her. The guilt of the appellant for the offences punishable under Section 376 read with Section 511 and Section 448 of the I.P.C. has been established beyond the reasonable doubt. The learned trial Judge has rightly appreciated the evidence on record and convicted the appellant for the said offences.

21. The incident has taken place prior to the amendment to Section 376 of the Indian Penal Code. Therefore, the sentence of the appellant would be governed as per the provisions those were prevailing prior to the amendment to this Section. Accordingly, the punishment for the offence of rape was imprisonment of either description, which would not be less than seven years, but might be

for life or for a term which might extend to ten years. A discretion was vested in the Court to impose the sentence of imprisonment for a term of less than seven years for adequate and special reasons to be recorded. For attempt to commit rape, as per Section 511 of the I.P.C., the punishment is for a term which may extend to half of the longest term of imprisonment provided for the offence. In the present case, the learned trial Judge has convicted the appellant for the offence punishable under Section 376 read with 511 of the I.P.C. with rigorous imprisonment for seven years and to pay a fine of Rs.20,000/-. The learned trial Judge observed in paragraph 45 of the judgment that the offence of ravishing the victim aged about nine years, being serious, taking over-sympathetic view in the matter of punishment would give a wrong signal to the persons committing such offence.

22. The appellant was aged about 21 years at the time of the incident. The period of six years has been elapsed after the date of the incident. It seems that the appellant had not attained that maturity to visualize the serious consequences of his act because of his age at the time of the incident. In the circumstances, in my view, the sentence of imprisonment for seven years inflicted on the appellant would be rather harsh. In my view, if the sentence of imprisonment for the said offence is reduced to four years, it would be sufficient to deter the appellant in indulging into any criminal activity in future. The sentence passed against the appellant for the offence punishable under Section 448 of the I.P.C. needs no interference. In my view, the judgment convicting the appellant for the offences punishable under Sections 376 and 448 of the I.P.C. calls for no interference. However, the order of sentence in respect of the offence

punishable under Section 376 read with Section 511 of the I.P.C. will have to be modified and the sentence of imprisonment will have to be reduced to four years. The appeal will have to be allowed partly.

23. In the result, I pass the following order:-

- (1) The appeal is partly allowed.
- (2) The conviction of the appellant for the offences punishable under Section 376 read with Section 511 and under Section 448 of the Indian Penal Code is maintained as it is.
- (3) The sentence passed against the appellant for the offences punishable under Section 376 read with Section 511 is modified and he is sentenced to suffer rigorous imprisonment for 4 (four) years and to

pay a fine of Rs.20,000/- in default to suffer rigorous imprisonment for 6 (six) months.

- (4) The order of sentence in respect of the offence punishable under Section 448 of the I.P.C. is maintained as it is.
- (5) The substantive sentences shall run concurrently.
- (6) Set off shall be given to the appellant for the period from 03.01.2011 to 24.02.2011 and from 06.03.2017 till the date of this judgment vide Section 428 of the Code of Criminal Procedure.
- (7) Rest of the directions given in the impugned order are maintained as they are.
- (8) The appeal is accordingly disposed of.

[SANGITRAO S. PATIL, J.]