

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 395 OF 2003

Amir Nyamatkha Tadv,
Age 35 years, Occu. Labour,
R/o. Loni, Tq. Jamner,
Dist. Jalgaon.

....Appellant.

Versus

The State of Maharashtra
(Through Sanjay Uttam Mhaske
(Vadar) of Loni, Taluka Jamner
in Cr.No. 59/2002 of Jamner PS)

....Respondent.

Mr. A.R. Rathod, Advocate for appellant.

Mr. S.D. Ghayal, APP for respondent/State.

**CORAM : T.V. NALAWADE AND
S.M. GAVHANE, JJ.**

Reserved on : 18/12/2017
Pronounced on : 11/01/2018

JUDGMENT : [PER T.V. NALAWADE, J.]

1) The appeal is filed against judgment and order of Sessions Case No. 92/2002, which was pending in the Court of 3rd Ad-hoc Additional Sessions Judge, Jalgaon. The Trial Court has convicted the appellant for the offence punishable under section 376 (2) (f) of Indian Penal Code (hereinafter referred to as 'IPC' for short) for committing the offence of rape on a girl aged about 5 years and he is sentenced to suffer imprisonment for life. Heard both the sides.

2) In short, the facts leading to the institution of the present proceeding can be stated as follows :-

The F.I.R. was given by father of the victim girl. Sanjay Mhaske (PW 2), the complainant is resident of village Loni, Tahsil Jamner and he was living in the village with his wife, victim girl, other girl aged about 2 years and one son and also with father and mother. He is agricultural labourer. The accused also hails from the same village.

3) The incident took place on 28.5.2002 in the evening time. The complainant was sitting in the courtyard of his house at about 7.00 p.m. and the victim girl was playing in the place situated behind the house of complainant where Samaj Mindir of village is situated. The complainant felt that the victim girl was raising shouts by calling his name as 'Baba, Baba' and so, he, his elder brother and his wife rushed towards Samaj Mindir. After reaching the spot, they noticed that the accused had kept the victim girl on his thighs and in sitting position he was giving jerks for committing rape on the victim girl and the victim girl was crying. After seeing the complainant and others, the accused pushed aside the victim girl and started running away. The elder brother of complainant ran after the accused, but the accused escaped by running through a field.

4) The complainant noticed that from the private part of the victim girl blood was coming. On inquiry, the victim girl disclosed on the spot that when she was playing there, the accused called her, he removed her underwear and made her to sit on his thighs. She then became unconscious. The complainant then collected his relatives and went to police station to give the report. On the basis of report given by complainant, the crime came to be registered for the aforesaid offence on the same day.

5) The victim girl was referred for medical examination by police. The Medical Officer, who examined the victim girl, noticed that there were signs of rape and there was still bleeding from vagina. The accused came to be arrested on the same night. The accused was also referred for medical examination. Blood was noticed on his clothes and there was tenderness on his private part showing the sign of intercourse. The accused was aged about 35 years at the relevant time and he was also working as labour.

6) During the course of investigation, the clothes of victim girl were taken over and the clothes of accused were also taken over under separate panchanamas. The spot panchanama came to be prepared. Statements of aforesaid witnesses came to be recorded. The

clothes were sent to C.A. office along with blood samples of victim girl and accused. Blood group of victim girl is 'B+' and blood group of accused is 'O'. Blood of 'B+' group is found on the clothes of the accused. After completion of investigation, chargesheet came to be filed for aforesaid offence. In the Sessions Court, charge was framed for aforesaid offence against the accused. The accused pleaded not guilty.

7) The prosecution examined in all 9 witnesses. The victim girl was not examined as she was hardly 6-7 years old when the evidence was recorded, in January 2003. The accused took the defence of total denial. During cross examination, it was suggested to some witnesses that there was political rivalry between the complainant's side and the accused and out of that rivalry, accused is falsely implicated. The Trial Court has believed the father of victim girl. The Trial Court has considered the corroboration of circumstantial evidence and conviction is given.

8) Sanjay Mhaske (PW 2), father of victim girl has given evidence that on that day, at about 7.00 p.m. when he was sitting in the courtyard of house, he heard the shouts of the victim girl as 'Baba, Baba' and so, he rushed towards that side. Samaj Mandir, community hall is situated on that side which is backside of the house of the

complainant. He has given evidence that after reaching the spot, he noticed that accused had kept victim girl on his thighs and he was moving her in up and down position and he was giving jerks for having sexual intercourse with her. He has given evidence that the incident was going on in Varanda portion of community hall and not inside of the hall. He has given evidence that after seeing him and others, the accused pushed aside the victim girl, closed the zip of his pant and ran towards the field to escape. He has given evidence that his elder brother Sunil gave chase to accused, but accused escaped. He has given evidence that on the spot when he lifted the victim girl and examined her, he noticed that blood was coming through the genital portion of victim girl and there was blood on the frock and nicker of the victim girl. He has given evidence that the victim girl disclosed the incident to him and then she became giddy. He has given evidence that then he took the victim girl to police where he lodged the report against the accused. The crime was registered in Pahur Police Station and victim girl was referred to Government Hospital. He has given evidence that his daughter was examined in the Government Hospital. The report given by him is proved as Exh. 19.

9) The victim girl was present in the Court hall when evidence of Sanjay Mhaske (PW 2) was recorded and the Court has observed that the victim girl was hardly six years old at that time i.e. on

22.1.2003. It can be said that it was open to the Trial Court to examine the victim girl by using the provision of section 313 of Criminal Procedure Code (hereinafter referred to as 'Cr.P.C.' for short), but considering the age of the victim girl, the Trial Court did not prefer to do so.

10) The cross examination of Sanjay Mhaske (PW 2) is mainly to create probability that it was dark and it was not possible for PW 2 to hear the shouts and also to see the accused. There is some discrepancy in the time given by the complainant to police and the time given to Medical Officer by the complainant when the history of incident was recorded. In police station, the time was recorded as 7.00 p.m. in the F.I.R., when in the hospital, the time was recorded as 5.00 p.m. In any case, due to such inconsistency only close scrutiny of the evidence is required and the evidence cannot be discarded due to such discrepancy. When there is such discrepancy, there are all kinds of probabilities including the mistake committed by the hospital while recording the time given in the hospital. The F.I.R. was given immediately and the accused also came to be arrested on the same night i.e. on the night between 28.5.2002 and 29.5.2002. The incident took place in the month of May and the Trial Court has rightly observed that in the month of May, the sun sets late and so even in the evening, at 7.00 p.m. from some distance the face of the person

can be seen. Further, the accused was known to the complainant and the victim girl and so, even if there was some darkness, it was not difficult for the complainant to identify the accused on that evening. His name was given in F.I.R. and due to these circumstances, this Court holds that no probability is created in the evidence of Sanjay Mhaske (PW 2) by the defence that there was no possibility to see the incident or there was no possibility to identify the person who committed the heinous act.

11) The aforesaid evidence shows that incident did not take place inside of the community hall, but it took place outside of the community hall. The spot panchanama is proved in the evidence of Sanjay Aher (PW 1) and this document at Exh. 17 also shows that incident took place on plat-form situated outside of the portion of Samaj Mandir and not inside of Samaj Mindir, community hall. Though no blood was found there, considering the nature of offence and the circumstance that there was blood on the clothes of the victim girl and also on the clothes of the accused, there was no probability that blood stains could have been found at the place where the incident took place. The evidence is given that the victim girl was kept on thighs by the accused and in sitting position, he was doing the heinous act. The medical evidence shows that blood was found on the thighs of the accused. All these circumstances need to be kept in mind while

considering the defence suggested during cross examination of Sanjay Mhaske (PW 2).

12) There is strong corroboration of medical evidence to the version of Sanjay Mhaske (PW 2). Dr. Vaishali (PW 5) has given evidence that she examined victim girl on the night between 28th and 29th, at about 1.20 a.m. as police had brought the victim girl to her for medical examination. She has given evidence that she noticed blood stains on the clothes of victim girl, which were on both front side and back side of the clothes. She has given evidence that there was dry blood on the thighs and at vulva of the victim girl. She has given evidence that on examination of genital portion, she noticed edema on vulva and there was sign of inflammation and there was also tenderness. She has given evidence that she noticed bleeding through vaginal part. Though hymen was intact, there was redness to hymen and bleeding was through vaginal mucosa. The medical certificate prepared by her is duly proved in her evidence as Exh. 26. Though she had not given specific evidence in respect of sexual intercourse, after going through the record in the Court and also the C.A. report, she gave opinion that the victim girl had suffered sexual intercourse.

13) Dr. Vaishali (PW 5) examined accused also on 29.5.2002 at about 9.30 a.m. She has given evidence that there was dry blood on

his thighs and on pubic hair and she found tenderness over his genital region. The medical certificate prepared by her in respect of accused is duly proved as Exh. 30 in her evidence and after perusal of the record including the C.A. report, she has given opinion that the accused had taken sexual intercourse within 12 hours prior to his examination.

14) It is already observed that there is some inconsistency in time given by Sanjay Mhaske (PW 2) to police in F.I.R. and the time given when the history was given by PW 2 to doctor. Dr. Vaishali (PW 5) is cross examined mainly on that time. There is no need of more discussion on this discrepancy.

15) It was submitted that the time of seizure of clothes of victim girl does not match with the time of examination of victim girl by Dr. Vaishali (PW 5) and so, the version given by doctor that there was blood on the clothes of the victim girl cannot be believed. The Trial Court has observed that there is possibility that due to bleeding even after changing the clothes, the blood had come on the clothes which were put on the person of victim girl after the incident. There are other possibilities also. Many times mistakes are committed in mentioning the time in panchanamas. In any case, this discrepancy cannot affect the evidence of Sanjay Mhaske (PW 2) as there is strong corroboration of the medical evidence.

16) Evidence is given by doctor and Investigating Officer (PW 9) about taking of blood samples of both the victim girl and the accused. The carrier constable, who produced the clothes of victim girl, accused and the blood samples in C.A. office [Sonawane, PW 6, a lady police constable] is examined by prosecution and her evidence shows that articles were produced in C.A. Office on 11.6.2002. Panch witness Pralhad (PW 4) is examined to prove the panchanama of seizure of clothes of accused. Second panch witness Vasant (PW 3) is also examined. There is also the evidence of Investigating Officer (PW 9) on seizure panchanama. The seizure panchanama was prepared on 29.5.2002 between 10.30 a.m. and 10.50 a.m. The panchas had noticed blood stains on front portion of the pant and also on underwear at many places. Though Vasant (PW 3) has not whole heartedly supported the prosecution case by saying that when he went to police station, the clothes were already kept on table, there is evidence of Pralhad (PW 4) and Investigating Officer (PW 9). Further, there is also the evidence of Medical Officer Dr. Vaishali (PW 5). Due to other evidence, this Court holds that Pralhad (PW 4) and Investigating Officer (PW 9) need to be believed and this circumstance needs to be used against the accused.

17) Sanjay Ahere (PW 1), panch witness on panchanama of

seizure of clothes of victim girl is examined by the prosecution and in his evidence, the panchanama at Exh. 16 is duly proved. It was prepared between 22.45 hours and 23.00 hours of 28.5.2002. This document shows that on both the frock and the underwear of victim girl, there were many blood stains. The inconsistency which was argued in respect of time of this panchananama and time of examination of victim girl by Medical Officer is already mentioned. There is no reason to disbelieve Ahere (PW 1). The evidence of Ahere (PW 1) shows that he gave his evidence most fairly and he gave evidence during cross examination to show that complainant's side belongs to political party BJP, who was in power in Village Panchayat and accused belongs to NCP. However, there is nothing on the record to show that this witness had adverse interest against the accused. The spot panchanama at Exh. 17 is also proved in his evidence. This evidence corroborates the case of prosecution.

18) C.A. report at Exh. 27 shows that on the frock of victim girl and on the underwear of accused, blood of group 'B' was found. Similarly semen was found on underwear of victim girl though it's blood group was not detected. No blood was found on the pant of the accused. C.A. report at Exhs. 28 and 29 show that blood group of victim girl is 'B' and blood group of accused is 'O'. This evidence gives corroboration to the case of prosecution. No explanation is offered by

the accused on this circumstance.

19) The only defence which was taken by the accused is so called political rivalry. The party of complainant's side was in power. Even if it is presumed that there was political rivalry, it does not look probable that complainant involved his daughter, who was aged about 5 years at the relevant time in such a serious case to teach lesson to the accused. The accused had never contested the election, though his grandmother had contested the election in the past as a candidate of NCP. This Court holds that there is no possibility of false implication. There is strong corroboration of circumstantial evidence to the version of Sanjay Mhaske (PW 2).

20) The evidence of Sanjay Mhaske (PW 2) is direct evidence and his evidence is also on the conduct of the accused. The evidence is also on the disclosure made by the victim girl immediately after the incident to him. Evidence is given that accused ran away from the place and that is relevant under section 8 of the Evidence Act. The presence of blood stains on the clothes of the accused and presence of semen on the clothes of the victim girl is relevant under section 7 of the Evidence Act. Though the victim girl is not examined in the Court, the evidence given by Mhaske (PW 2) on disclosure made to him immediately after the incident by the victim girl is relevant under

section 6 of the Evidence Act. All these circumstances show that there was no room of false implication. The Trial Court has discussed this evidence and has rightly convicted the accused for the offence of rape.

21) On the point of sentence, it can be said that the accused who was aged about 35 years and working as labour did heinous act of committing offence of rape on a girl aged about 5 years. Such incidents are increasing day by day. Fortunately, in the present matter, the father of victim girl was available in the vicinity and so, he could notice the incident and he could take the action against the accused. The incident took place in the year 2002 and at the relevant time, the punishment provided was imprisonment for not less than 10 years, but which may extent to imprisonment for life. The meaning of 'life imprisonment' is given as 'imprisonment for the remainder period of that person's natural life'. The evidence on record and particularly, the medical evidence shows that history of intoxication was given. There is no record in respect of background of the accused, but during the hearing given on the point of sentence, the accused prayed for lenient view by submitting that he has four daughters and one son and eldest daughter was aged about 11 years. No submission was made that accused had bad antecedents. The Trial Court has given sentence of imprisonment for life due to circumstance that accused committed rape on a girl aged about 5 years and the Trial Court has held that the

accused does not deserve any leniency.

22) Due to other aforesaid circumstances, this Court holds that the minimum penalty provided for the offence needs to be given and sentence of imprisonment of life is harsh. In the result, following order is made.

ORDER

The appeal is partly allowed. The conviction given by the Trial Court to the appellant is maintained, but the sentence given is modified to make it imprisonment for ten years and fine of Rs.1000/- (Rupees one thousand). In default of payment of fine amount, accused is to undergo rigorous imprisonment for one month. Accused is entitled to set off in respect of the period for which he was behind bars in this case.

[S.M. GAVHANE, J.]

[T.V. NALAWADE, J.]

ssc/