

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.97 OF 2015

SAMEER VASANT SHIGWAN

)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA

)...RESPONDENT

Ms.Nasreen Ayubi, Appointed Advocate for the Appellant.

Ms.Anamika Malhotra, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 12th APRIL 2018

ORAL JUDGMENT :

1 The appellant/accused, by this appeal, is challenging the judgment and order dated 7th January 2015 passed by the learned Additional Sessions Judge, Khed, in Sessions Case No.16 of 2012, thereby convicting him of offences punishable under Sections 376 read with 511, 377 and 354 of the Indian Penal Code. On first count, he is sentenced to suffer rigorous

imprisonment for 3½ years apart from payment of fine of Rs.500/- and default sentence of 6 months. On second count, he has been sentenced to suffer rigorous imprisonment for 5 years apart from payment of fine of Rs.500/- and default sentence of 6 months. On third count, the appellant/accused is sentenced to suffer rigorous imprisonment for 1 year apart from payment of fine of Rs.500/- and default sentence of simple imprisonment for 6 months.

2 Facts leading to the prosecution of the appellant/accused can be summarized thus :

(a) PW1 Prachiti is resident of Kalwa in Thane District. She has two daughters. PW3, who is victim of the crime in question is one of her daughters. She, at the relevant time, was a minor girl, aged about 5 years. PW1 Prachiti along with her both daughters had been to Village Kharekond for attending marriage on 18th December 2011.

(b) The incident, allegedly, took place on 20th December 2011. After having lunch, PW1 Prachiti was attending the bride

and her minor daughter the victim/PW3 was playing outside in the pendal. At about 3.00 p.m of 20th December 2011, the victim/PW3 went missing. Villagers and relatives then undertook search of the victim/PW3. PW4 Ajinkya Gudhekar, who had also come for attending the marriage, found the victim/PW3 along with the appellant/accused returning from the forest area. He took the victim/PW3 from him and that is how the victim/PW3 reached her mother PW1 Prachiti. The victim/PW3 then disclosed the incident of her taking by the appellant/accused to her mother PW1 Prachiti. She disclosed that on the pretext of giving cold drink (pepsi) to her, the appellant/accused took her, denuded her, put finger in her vagina and inserted his penis in her mouth. PW1 Prachiti, then, lodged report of the incident to Police Station Guhagar on 21st December 2011 which has resulted in registration of Crime No.80 of 2011 for offences punishable under Sections 376 and 377 of the Indian Penal Code. Wheels of investigation were then set in motion. The victim/PW3 was sent to the Civil Hospital,

Ratnagiri for medical examination. The appellant/accused came to be arrested. Clothes of the victim/PW3 as well as that of the appellant/accused came to be seized. On the basis of disclosure statement of the appellant/accused, the spot was traced out and it was inspected in presence of PW6 Gaurav Vesvikar – panch witness. On completion of investigation, the charge-sheet came to be filed against the appellant/accused.

- (c) The learned trial court framed the Charge for offences punishable under Sections 376 read with 511, 377 and 354 of the Indian Penal Code against the appellant/accused. He pleaded not guilty and claimed trial. In order to bring home the guilt to the appellant/accused, the prosecution has examined in all seven witnesses. PW1 Prachiti is the First Informant and report lodged by her on 21st December 2011 is at Exhibit 18. PW2 Ramdas Palkar is the panch witness to the seizure of clothes of the victim/PW3 vide Seizure Panchnama Exhibit 20. The victim of the crime in question

is examined as PW3 . Ajinkya Gudhekar who traced out the victim/PW3 is examined as PW4. PW5 Ravindra Salvi is a panch witness to the seizure of clothes of the appellant/accused vide Seizure Panchnama Exhibit 26. PW6 Gaurav Vesvikar is the panch witness to the Memorandum Statement and resultant panchnama Exhibits 29 and 30. PW7 Arun Ombase, Police Inspector, is the Investigating Officer of the crime in question.

- (d) The defence of the appellant/accused is that of total denial. He, however, did not enter in the defence.
- (e) Upon hearing the parties, by the impugned judgment and order, the learned trial court was pleased to convict the appellant/accused and sentence him as indicated in the opening paragraph of this judgment.

3 I have heard Ms.Nasreen Ayubi, the learned advocate appointed to represent the appellant/accused at the cost of the

State. By drawing my attention to the cross-examination of PW7 Arun Ombase, Investigating Officer, she argued that clothes of the victim/PW3 and the appellant/accused were seized on 21st December 2011. These remained with the police station for fairly large period. Ultimately, those were delivered to the carrier Constable on 9th December 2012, but those articles were actually received by the forensic laboratory on 15th December 2012. This long gap of time in seizing the clothes and reaching the same to the forensic laboratory indicates possibility of tampering of the said muddemal. The learned advocate further argued that evidence of the prosecution shows that the villagers as well as relatives of the victim/PW3 started her frantic search after 3.00 p.m. of 20th December 2011. However, none of the witnesses are examined except PW4 Ajinkya Gudhekar to show that the victim/PW3 was in the company of the appellant/accused. Infact, the possibility of taking her by PW4 Ajinkya Gudhekar and false implication of the appellant/accused to save the said witness cannot be ruled out.

4 The learned APP supported the impugned judgment and order by contending that evidence of the prosecution is passing the test of appreciation of evidence in such cases as laid down by the Honourable Apex Court in the matter of **State of Punjab vs. Gurmeet Singh**¹. She, further, argued that, the report of Chemical Analyser itself shows that the muddemal was received in a sealed condition by the forensic laboratory.

5 I have carefully considered the rival submissions and also perused the Record and Proceedings including the oral as well documentary evidence. It is case of the prosecution that the appellant/accused had taken the victim/PW3, who was a minor female child, aged about 5 years, to a secluded place in the forest and then attempted to commit rape on her and subsequently, indulged in carnal intercourse with her against the order of nature, by putting his penis in her mouth and ejaculating. Considering this allegation against the appellant/accused, the evidence of the victim girl assumes importance and she being a child witness, prone to the tutoring, her evidence needs to be

1 1996 Cri.L.J. 172

appreciated and evaluated with great care and caution in order to ascertain whether such witness is stating the true facts.

6 The victim/PW3, in her statement before the court has stated that, she had gone for attending marriage of her maternal uncle named Tanu Mama, and at that time, a boy offered her pepsi and took her towards the forest area. She accompanied him. Then, at the forest area, the said boy removed her clothes as well as his clothes, made her to sleep on the ground and put his finger in her vagina. She, further, stated that, he then put his penis in her mouth and ejaculated. She, therefore, slapped him and he also slapped her. Then, as per version of the victim/PW3, some people came there in her search. This witness further deposed that there was bleeding form her vagina and the doctor examined her.

7 During the course of cross-examination of this victim, not a single question was put to her in order to demonstrate that she is a tutored witness, not stating correct facts, but deposing at the instance of some other persons. Her cross-examination

discloses that except some abrasion, she did not suffer any injury and her maternal uncle then gave her in the custody of her grandmother.

8 It is, thus, seen that, there is nothing in the cross-examination of this witness to demonstrate that her evidence regarding sexual assault on her by the appellant/accused, to whom she had duly identified while in the witness box, is in any manner doubtful or untrustworthy of credit. This witness was in company of the appellant/accused, as seen from the evidence of the prosecution, from 3 p.m. of 20th December 2011 to 5 p.m. of that day, and as such, had ample opportunity to see him carefully. Hence, considering the fact that such incidents of sexual assault creates long lasting impression on the mind of the victim, evidence of identification of the appellant/accused by this witness cannot be faulted or doubted.

9 Corroboration, as a condition for judicial reliance on the testimony of the victim of the sexual offence, is not a matter of

law and it is well settled that evidence of such victim, if found truthful and trustworthy, can be accepted even without corroboration and even in absence of injuries on such victim. Still, let us search whether evidence of this witness is gaining corroboration in material particulars from other evidence on record. PW4 Ajinkya Gudhekar is a witness, who had been to the village for attending the marriage. As per his version, upon finding the victim/PW3 missing from the marriage pendal, along with others, he started searching for the victim/PW3 and had found her returning from the forest area with one boy. He ascertained whether she is the same child who went missing and then took her in his custody. PW4 Ajinkya Gudhekar has categorically stated that when he took the victim in his custody, she started crying and then he reached her to her relatives. In cross-examination, it was attempted to demonstrate that it was, infact, this witness, who had taken the victim/PW3 and is falsely implicating the appellant/accused. However, cross-examination of this witness itself shows that he was not even acquainted with the present appellant/accused and there was no reason for him to

falsely implicate the appellant/accused. In the wake of identification of the appellant/accused as the perpetrator of the crime, by the victim/PW3, such denied suggestions to PW4 Ajinkya Gudhekar are of no assistance to the defence to probabalise its version about false implication. Thus, evidence of PW4 Ajinkya Gudhekar is corroborating the version of the victim/PW3 that she was taken by the appellant/accused and then was molested by him.

10 In presence of PW2 Ramdas Palkar, the Investigating Officer had seized frock, knicker and leggings of the victim/PW3 from the child ward at the Civil Hospital, Ratnagiri, vide Seizure Panchnama Exhibit 20. The Seizure Panchnama itself shows that seized clothes were packed in khakhi paper and those packets were wax sealed. Cross-examination of this panch witness contains no material to discredit his version about seizure of clothes of the victim/PW3.

11 Similarly, upon arrest of the appellant/accused on 21st December 2011, at the police station itself, in presence of PW5 Ravindra Salvi, his T-Shirt, Bermuda and half pant came to be seized vide Seizure Panchnama Exhibit 26 prepared on 21st December 2011. This Seizure Panchnama also shows that after wrapping those clothes in khakhi papers, those packets were sealed with lac seal. This witness was also not discredited in the cross-examination.

12 Seized articles, as seen from the Chemical Analyser's Report at Exhibit 37 were received in sealed condition by the forensic laboratory and those were subjected to chemical analysis. Sample of blood collected from the appellant/accused was found to be belonging to "A" group, as seen from Chemical Analyser's Report at Exhibit 35. Similarly, is the blood group of the victim/PW3. Blood of "A" group was found on knicker of the victim/PW3 whereas semen of "A" group was found on her frock, as seen from Chemical Analyser's Report at Exhibit 37. Finding of semen of "A" blood group on frock of the victim/PW3 incriminates

the appellant/accused in the crime in question, as according to the prosecution case, the appellant/accused ejaculated in the mouth of the victim/PW3.

13 To sum up, evidence of the victim of the crime in question does show that she was allured by the appellant/accused on the pretext of giving pepsi to her and was taken in the forest area where she was denuded. The appellant/accused then removed his clothes and inserted his finger in her vagina. He then indulged in carnal intercourse against the order of nature by putting his penis in her mouth. The way in which the things happened and sequence in which the events took place, points out intention of the appellant/accused to commit rape on the victim and his preparation to achieve the intended act by taking the victim/PW3 to a secluded forest area and denuding her. Infact, he had fingered the victim/PW3 which indicates that the action of the appellant/accused was in an attempt to commit rape on the victim/PW3, but that attempt could not be completed.

14 Therefore, conviction of the appellant/accused for the offence punishable under Section 376 read with 511 of the Indian Penal Code cannot be faulted with, so also, his conviction for offences punishable under Section 377 and 354 of the Indian Penal Code.

15 The appellant/accused was sentenced to suffer 3½ years rigorous imprisonment for the offence punishable under Section 376 read with 511 of the Indian Penal Code and that of 5 years for the offence punishable under Section 377 of the Indian Penal Code. Thus, it cannot be said that harsh sentence is imposed on the appellant/accused on these counts. By observing that the appellant/accused had committed the offence of outraging the modesty of the victim/PW3 punishable under Section 354 of the Indian Penal Code, by applying criminal force to her, he was convicted on that count and independently sentenced on that count for 1 year rigorous imprisonment apart from imposition of fine. The learned trial court, while separately sentencing the appellant/accused on this count, has ignored the

provisions of Section 71 of the Indian Penal Code. The offence of Section 376 read with 511 of the Indian Penal Code, in the given circumstances, was made up of parts such as denuding the victim and fingering her. One of such part, by itself, is the offence punishable under Section 354 of the Indian Penal Code. Hence, the learned trial court ought not to have imposed separate punishment for such part when the appellant/accused was ultimately convicted for the offence punishable under Section 376 read with 511 of the Indian Penal Code. To that extent, the appeal succeeds. Therefore the order :

ORDER

- i) The appeal is partly allowed.
- ii) Conviction of the appellant/accused and resultant sentence for offences punishable under Sections 376 read with 511 and 377 of the Indian Penal Code is maintained. His conviction for the offence punishable under Section 354 of the Indian Penal Code is also maintained. But in view of the fact that the learned trial court has sentenced him for the offence punishable under Section 376 read with 511 of the

Indian Penal Code, sentence of 1 year rigorous imprisonment apart from direction to pay fine of Rs.500/- and to undergo default sentence of 6 months for the offence punishable under Section 354 of Indian Penal Code is quashed and set aside.

iii) The appeal stand disposed of accordingly.

(A. M. BADAR, J.)