

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NO.172 OF 2015
WITH
CRIMINAL APPLICATION NO.482 OF 2018
IN
CRIMINAL APPEAL NO.172 OF 2015**

KRISHNA @ CHIVYA KAILAS PAWAR)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Nitesh Mohite a/w. Mr.Jaideep Mane, Advocate for the Appellant.

Mr.S.V.Gavand, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 6th APRIL 2018

ORAL JUDGMENT :

1 The appellant/accused had sent a communication through jail which is registered as Criminal Application bearing No.482 of 2018. By this application, the appellant/accused has contended that he is undergoing jail sentence from 17th May 2012

and has undergone sentence of more than five years. He submitted that his appeal, therefore, be taken up for day to day hearing and be decided in a time bound manner. That is how, this appeal was taken up for final hearing.

2 By this appeal, the appellant/accused is challenging the judgment and order dated 16th October 2014 passed by the learned Special Judge, Solapur, in Sessions Case No.257 of 2012 thereby convicting the appellant/accused of the offences punishable under Sections 376, 323 and 506 of the Indian Penal Code. For the offence punishable under Section 376 of the Indian Penal Code, the appellant/accused is sentenced to suffer rigorous imprisonment for 10 years apart from payment of fine of Rs.20,000/- and in default, to undergo rigorous imprisonment for 6 months. For the offence punishable under Section 323 of the Indian Penal Code, he is sentenced to suffer rigorous imprisonment for 1 year apart from payment of fine of Rs.1,000/- and in default, to undergo rigorous imprisonment for 2 months. For the offence punishable under Section 506 of the Indian Penal

Code, he is sentenced to suffer rigorous imprisonment for 1 year apart from payment of fine of Rs.1,000/- and in default, to undergo rigorous imprisonment for 2 months. On realization of the fine amount, Rs.20,000/- therefrom was directed to be paid to the victim. The substantive sentences are directed to run concurrently.

3 Briefly stated, facts leading to the prosecution of the appellant/accused can be summarized thus :

- (a) First Informant Kavita (PW1) is elder sister of the victim of the crime in question. She used to reside with her family at Mauli Square of Barshi town. Her parents as well as younger sisters used to reside at Phule Plot area of Barshi. Her younger sister (PW7) is the victim of the crime in question. According to the prosecution case, she was 15 years of age at the time of the incident in question, and is mentally retarded and partially deaf and dumb. Their father Bhagwan used to sell eatables from the handcart at Sankeshwar garden of Barshi town.

- (b) It is case of the prosecution that the incident in question took place prior to 8.30 p.m. of 16th May 2012 at the shopping complex of the Municipal Council which was under construction at the Sankeshwar garden. When the victim/PW7 was near the handcart of her father at Sankeshwar garden, the appellant/accused allured her and took her at the shopping complex which was under construction. There, he committed rape on the victim/PW7.
- (c) The victim/PW7 then approached her sister PW1 Kavita and by sign language as well as words, she disclosed the incident of commission of rape on her by the appellant/accused to whom they were calling “mama” (maternal uncle). According to the prosecution, even earlier to the incident, by taking her on his lap, the appellant/accused had indulged in obscene act with the victim/PW7 and this fact was noted by the First Informant PW1 Kavita.

- (d) The report (Exhibit 17) of the incident came to be lodged by PW1 Kavita on the very same day with Police Station Barshi, which resulted in registration of Crime No.92 of 2012 for offences punishable under Sections 376, 323 and 506 of the Indian Penal Code.
- (e) The victim/PW7 was then referred to Civil Hospital, Solapur, for medical examination and PW5 Dr.Pradipkumar Jadhvar examined her and prepared Medico Legal Case papers Exhibit 38. The spot came to be inspected in presence of PW4 Jaiguru Swami and Spot Panchnama Exhibit 32 came to be prepared. The appellant/accused came to be arrested. His clothes came to be seized vide Seizure Panchnama Exhibit 24 on 18th May 2012. Similarly, clothes of the victim/PW7 came to be seized on the same day vide Seizure Panchnama Exhibit 25. These seizures were effected in presence of PW2 Sumit Nagane, panch witness. Seized articles were sent for chemical analysis and on completion of routine investigation, the appellant/accused came to be charge-sheeted.

- (f) The Charge for offences punishable under Sections 373, 323 and 506 of the Indian Penal Code was framed and explained to the appellant/accused. He abjured guilt and claimed trial.
- (g) In order to bring home the guilt to the appellant/accused, the prosecution has examined in all eight witnesses. First Informant PW1 Kavita – sister of the victim/PW7 is examined as PW1 Kavita whereas the First Information Report (FIR) lodged by her is at Exhibit 17. Panch witness Sumit Nagane is examined as PW2 and Exhibits 24 and 25 are Seizure Panchnamas of clothes of the appellant/accused and the victim/PW7 respectively. Head Master of Ratnaprabha Mohite Patil Deaf and Dumb School, Pimpalner, namely, Pandurang Bhosale is examined as PW3. Exhibit 29 is the General Register maintained by the said school where as Exhibit 30 is the Leaving Certificate of the victim/PW7. PW4 Jaiguru Swami, panch witness to the Spot Panchnama, is examined to prove Spot Panchnama Exhibit 32. Dr.Pradipkumar Jadhvar, who examined the

victim/PW7 medically is examined as PW5. Medico Legal Case papers in respect of medical examination of the victim/PW7 are at Exhibit 38. Kalpana Gurav is neighbour of the victim. She is examined as PW6. The victim came to be examined as PW7. Investigating Officer Ramesh Bhosale, Assistant Police Inspector of Barshi Police Station is examined as PW8. Chemical Analysis Report is at Exhibit 58.

- (h) The defence of the appellant/accused is that of total denial. According to him, he has been falsely implicated in the crime in question as he had given hand-loan of Rs.17,000/- to the husband of PW1 Kavita. As he demanded refund of the said hand-loan, he has been implicated falsely in the crime in question. Similarly, according to the defence, an amount of Rs.50,000/- came to be demanded from him in order to favour him, during the course of recording of evidence, by PW1 Kavita.

- (i) After hearing the parties, vide the impugned judgment and order dated 16th October 2014, the appellant/accused came to be convicted for offences punishable under Sections 376, 323 and 506 of the Indian Penal Code, and he came to be sentenced as indicated in the second paragraph of the judgment.

4 I have heard the learned advocate appearing for the appellant/accused at sufficient length of time. He took me through evidence of First Informant PW1 Kavita and argued that this witness is not an expert in understanding sign languages employed by the victim of the crime in question. She has deposed that whatever she heard from the victim/PW7 was through sign languages and as this witness had not taken any specialized training to understand sign languages, evidence of this witness is unworthy of credence. The learned advocate further argued that PW1 Kavita has claimed to have seen the appellant/accused indulged in obscene act with the victim of the crime in question, fifteen days prior to the incident, but still she had not lodged any

report or made any complaint about the same to anybody. This makes her version doubtful. The learned advocate further argued that as per version of this witness, two to three persons were playing cards at the garden where the incident in question took place, but those are not examined by the prosecution, and this makes the prosecution case suspect. PW1 Kavita was unable to tell correct colour of clothes of the victim/PW7 and she has deposed that salwar of the victim/PW7 was white in colour, whereas the Seizure Panchnama shows that the said salwar was blue and yellow in colour. The learned advocate further argued that Section 164(3) of the Code of Criminal Procedure requires that the attending Medical Officer should base his opinion by giving reasons for arriving at the conclusion. In the case in hand, PW5 Dr.Pradipkumar Jadhvar has not given any reason for arriving at the conclusion in respect of forcible sexual intercourse and therefore, his version needs to be discarded. The learned advocate further drew my attention to evidence of Investigating Officer PW8 Ramesh Bhosale, Assistant Police Inspector, and argued that his evidence shows that the investigation was not

properly conducted and the appellant/accused has been falsely implicated in the crime in question. Therefore, the appellant/accused is entitled to acquittal.

5 The learned APP supported the impugned judgment and order by contending that evidence of PW6 Kalpana Gurav, who is neighbour of the victim/PW7, is clinching the issue. The victim/PW7, who is the victim of the crime in question, has stated about the forcible sexual intercourse on her by the appellant/accused. Evidence of this victim is duly corroborated by the Spot Panchnama as well as forensic evidence.

6 I have carefully considered the rival submissions and also perused the Record and Proceedings including oral as well as documentary evidence.

7 As the conviction of the appellant/accused is principally for the offence punishable under Section 376 of the Indian Penal Code, case of the prosecution is primarily resting on

version of the PW7, who is victim of the crime in question, as well as on evidence of PW6 Kalpana Gurav, who is neighbour of the victim of the crime in question. Similarly, evidence of PW1 Kavita is also material, as the same is in respect of former statement made by the victim/PW7 to her soon after the incident and as the same relates to her witnessing the post event happenings including condition of her younger sister, who is the victim of the crime in question.

8 PW3 Pandurang Bhosale is Head Master of the school where the victim of the crime in question had taken special education, she being a special child, having suffered mental retardation as well as deafness and dumbness. From his cross-examination, it is brought on record that Leaving Certificate of earlier school of the victim of the crime in question is not mentioning the fact that the victim of the crime in question is deaf and dumb. The victim/PW7 had appeared before the court after allowing of the application Exhibit 47 moved by the prosecution for examining her as a witness. The learned trial court had an

opportunity to observe her and to understand her competency to depose. The victim of the crime in question was able to speak with broken language and her evidence is recorded ad-verbatim by the learned trial court by observing that the witness is not a complete deaf and dumb. One cannot discard such observation of the learned trial court, who had an opportunity to witness the victim of the crime in question and to interact with her in order to assess her competency to stand as a witness.

9 It is in evidence of the victim of the crime in question, who is examined as PW7 by the prosecution, that she used to live with her father, to whom she was calling as “Tatya”. The victim/PW7 stated that she was calling the appellant/accused as “mama” (maternal uncle). Her evidence, which is recorded in Question and Answer form, shows that the victim of the crime in question has stated that the appellant/accused called her when she was at the stall of her father and took her to the place of the incident, where he committed rape on her. The victim/PW7 has also used gestures to describe the act of the appellant/accused

which are recorded by the learned trial court. The victim/PW7 has stated that she was penetrated by the appellant/accused and pointed out her private part. In cross-examination, the victim/PW7 has denied the suggestion that she was deposing false. From her cross-examination it is elicited that the appellant/accused is her neighbour and is acquainted with her. Thus, evidence of the victim of the crime in question shows that it was the appellant/accused, who had committed rape on her by taking her from the food-stall of her father.

10 Though in sexual offences it is not at all necessary to have corroboration to the version of the victim of the crime in question, if it is ultimately found to be truthful and trustworthy, still in the case in hand, there is enough material to corroborate the version of the victim of the crime in question. PW6 Kalpana Gurav is neighbour of the victim/PW7. She is witness to the post event happenings. She has stated that the shopping complex, which was under construction, is at a distance of 100 feet from her house and she had spotted the victim/PW7 standing on the

platform in front of the shopping complex at about 6 to 6.30 p.m. Hair of the victim/PW7 were seen to be scattered by this witness. Thereafter, as per version of this witness, a boy came out of the shopping complex within fifteen to twenty minutes, and therefore, she told this fact to cousin of the victim/PW7, namely, Samadhan. This witness deposed that then the mob had beaten the appellant/accused. This witness has identified the appellant/accused while in the dock. This witness denied the suggestion that she was not knowing who was that boy and she had identified the appellant/accused only at the instance of the complainant. It is, thus, seen that, version of this witness that the appellant/accused came out of the shopping complex when the victim/PW7 was standing on the platform of that complex, is not at all shattered in the cross-examination. This evidence points out that the victim/PW7 was in company of the appellant/accused at the time of the incident in question.

11 The victim/PW7 was immediately referred to Dr.V.M.Medical College and Hospital at Solapur. The incident

took place at about 6 to 6.30 p.m. of 16th May 2012 and the victim/PW7 came to be examined at 4.30 a.m. of 17th May 2012 by PW5 Dr.Pradipkumar Jadhvar. Upon medical examination of the victim/PW7, this expert witness found hymen of the victim/PW7 in torn condition with presence of minimal bleeding therefrom. Accordingly, this witness had taken a note of this fact in the Medico Legal Case papers maintained by the hospital which are at Exhibit 38. Infact, PW5 Dr.Pradipkumar Jadhvar had not opined about commission of forcible sexual intercourse on the victim/PW7. He had noted condition of the private part of the victim/PW7 in the Medico Legal Case papers maintained by the hospital. He, however, gave his opinion on perusal of the report of Chemical Analysis of clothes of the victim/PW7. Upon perusal of the Chemical Analysis Report, this witness, on finding of blood and semen stains on clothes of the victim/PW7, had opined before the court that the victim/PW7 was subjected to sexual intercourse. In this set of facts, it cannot be said that this medical opinion is contrary to the provisions of Section 164(a)(iii) of the Code of

Criminal Procedure. Section 164(a)(iii) of the Code of Criminal Procedure came to be introduced by amendment to the Code of Criminal Procedure in order to collect proper evidence in respect of sexual offences. This Section makes a provision for having proper report of the registered Medical Practitioner on examining the woman, who is victim of the sexual offence. The object is to have a thorough examination of the victim including her general mental condition, mark of injuries and other material particulars with all reasonable details, for aiding the prosecution. Therefore, the contention of the learned advocate for the appellant/accused that as Medico Legal Case papers are not giving reasons for arriving at the conclusion, evidence of PW5 Dr.Pradipkumar Jadhvar needs to be rejected, is totally unmerited. The Medico Legal Case papers are maintained by the hospital for showing condition of the patient and medical treatment given to the patient. During the course of investigation, PW5 Dr.Pradipkumar Jadhvar had not given his medical opinion in respect of what had happened with the victim/PW7. It was given by him before the court, which are to the effect that, finding of

blood and semen stains on clothes of the victim/PW7 are reasons for concluding that she was subjected to sexual intercourse.

12 From cross-examination of PW5 Dr.Pradipkumar Jadhvar, it is brought on record that there are several causes for breaking of hymen and merely because of absence of hymen or finding of tears on it, one cannot conclusively state that the girl was subjected to rape. One cannot dispute this proposition, but in the case in hand, the victim of the crime in question has specifically deposed that she was subjected to sexual intercourse forcibly by the appellant/accused and thereafter, in medical examination it was found that her hymen was torn. This is unerringly suggesting forcible sexual intercourse on the victim/PW7, and as such, corroborating the version of the victim/PW7.

13 PW1 Kavita is elder sister of the victim/PW7. Her evidence indicates that since childhood she is with the victim/PW7. Even after her marriage, she is residing in the same

town and her matrimonial house is near to the house of her parents, where the victim/PW7 used to reside. This fact is elicited from cross-examination of PW1 Kavita by the defence. Naturally, as such, because of long association of about fifteen years with the victim/PW7, it is, but natural, for PW1 Kavita to understand what the victim/PW7 used to convey to her even by sign language. In such situation, it is not at all necessary to have a specialized training for understanding sign language by PW1 Kavita, in order to understand what is being conveyed to her by her younger sister. PW1 Kavita has stated before the court that her younger sister – the victim/PW7, had stated that the appellant/accused took her from the stall of her father to the area under construction at the garden and then committed rape on her. This previous statement of the victim/PW7 proved by PW1 Kavita is certainly admissible under Section 157 of the Evidence Act and there are no suggestions on this aspect to infer that during the intervening period, mind of the victim/PW7 was polluted by the external forces in order to implicate the appellant/accused falsely in the crime in question.

14 It is sought to be demonstrated that on account of non-refund of the hand-loan advanced by the appellant/accused to the husband of PW1 Kavita, the appellant/accused is falsely implicated in the crime in question, and that, subsequently, an amount of Rs.50,000/- was demanded from him to hush up the matter. The victim of the crime in question was a special child below 16 years of age, as seen from evidence of PW3 Pandurang Bhosale, Head Master, and contemporaneous record of the school showing birth date of the victim/PW7 as 11th October 1994. In such situation, it is hard to believe that chastity of the younger sister was put to stake by her married elder sister, only in order to avoid refund of the hand-loan. Even otherwise, other material on record, which is indicated in the foregoing paragraphs, is sufficient to dislodge this theory of false implication at the instance of elder married sister of the victim/PW7. At this juncture, it is apposite to reproduce paragraph 10 of the celebrated judgment of the Honourable Apex Court in the matter of Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat¹ in which the Honourable Apex Court has stated twelve reasons as to

1 AIR 1983 SC 753(1)

why in Indian setting, such offences are not falsely registered. It reads thus :

“Without the fear of making too wide a statement or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because :-

(1) A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred.

(2) She would be conscious of the danger of being ostracized by the Society or being looked down by the society including by her own family members, relatives, friends, and neighbours.

(3) She would have to brave the whole world.

(4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered.

(5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family.

(6) It would almost inevitably and almost invariably result in mental torture and suffering to herself.

(7) The fear of being taunted by others will always haunt her.

(8) She would feel extremely embarrassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo.

(9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought in to controversy.

(10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman, would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour.

(11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocent.

(12) The reluctance to face interrogation by the investigating agency, to face the Court, to face the cross-examination by counsel for the culprit, and the risk of being disbelieved, act as a deterrent.”

15 Clothes of the appellant/accused as well as the victim/PW7 came to be seized on 18th May 2012 vide Seizure Panchnamas Exhibits 24 and 25 respectively proved by PW2 Sumit Nagane – panch witness. Though this witness was cross-examined minutely, there is nothing to suggest that this witness is deposing a lie. His cross-examination indicates that he read the contents of panchnamas before signing. His cross-examination reflects that he has correctly stated the events which took place in his presence at the police station. PW1 Kavita has deposed that seized salwar was white in colour but the Seizure Panchnama Exhibit 25 shows that it was of blue and yellow colour. PW1 Kavita had entered in the witness box on 11th December 2013 whereas seizure was effected on 18th May 2012. She was not expected to keep in mind the colour of the salwar for such a long period and this discrepancy is trivial in nature.

16 Seized clothes of the appellant/accused as well as the victim/PW7 were sent for chemical analysis.

17 The spot of the incident was inspected in presence of PW4 Jaiguru Swami and Spot Panchnama Exhibit 32 was prepared. It was in the shopping complex at Sankeshwar garden. Evidence of the spot panch shows that apart from broken pieces of bangles in the shopping complex under construction, blood stains were also found. The blood on the floor of the shopping complex was taken on the swab and it came to be seized as seen from evidence of PW4 Jaiguru Swami as well as the Spot Panchnama Exhibit 32. This witness has identified the pieces of bangles found lying on the spot. Evidence of the Investigating Officer PW8 Ramesh Bhosale, Assistant Police Inspector, also shows that the seized swab of blood was sent for chemical analysis.

18 The Chemical Analysis Report at Exhibit 58 shows that kurta, salwar and knicker of the victim/PW7 were stained with human blood and a semen stain of 2 cm in diameter was found in middle of the knicker of the victim/PW7. Similarly, the pant and shirt of the appellant/accused were found to be stained with human blood. The cotton swab containing the blood found on

floor of the spot was also found to be containing human blood. Thus, the forensic evidence also incriminates the appellant/accused in the crime in question and corroborates the version of the victim/PW7.

19 In the result, the prosecution has successfully established offences punishable under Sections 376 and 323 of the Indian Penal Code. The conviction on these counts as well as the resultant sentence is also proper. However, there is no evidence on record to show that the appellant/accused had committed criminal intimidation of the victim/PW7 by threatening her with injury to her person. On the contrary, evidence of PW1 Kavita shows that the victim/PW7 was taken by the appellant/accused at the spot by alluring her by talking sweetly with her. Hence, for want of evidence, conviction of the appellant/accused for the offence punishable under Section 506 of the Indian Penal Code cannot be sustained. Therefore, the following order :

ORDER

- i) The appeal is partly allowed.

- ii) The conviction of the appellant/accused as well as the resultant sentence imposed on him for offences punishable under Sections 376 and 323 of the Indian Penal Code is maintained. However, the appellant/accused is acquitted of the offence punishable under Section 506 of the Indian Penal Code.
- iii) Fine amount, if any paid by him, on account of sentence imposed on him for the offence punishable under Section 506 of the Indian Penal Code, be refunded to him.
- iv) With this modification in the impugned judgment and order dated 16th October 2014 passed by the learned trial court in Sessions Case No.257 of 2012, the appeal stands disposed of.
- v) With disposal of the appeal, Criminal Application No.482 of 2018 stand disposed of.

(A. M. BADAR, J.)