

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.291 OF 2015

Raghuvir Sadharam Chouhan,
Age : 38 years, Occu. Sweeper,
R/o.Ashok Nagar, Room No.70,
Near Pine Line, Valmiki Mandir,
Sakivihar Road, Mumbai – 72. **Appellant**
V/s.

The State of Maharashtra,
Through Powai Police Station,
Dist.Mumbai. ... **Respondent**

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Mr.Ganesh Bhujbal, Appointed Advocate for the Appellant.

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

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CORAM : A.M.BADAR J.

DATED : 5th DECEMBER 2018.

ORAL JUDGMENT :

1 By this appeal, the appellant/accused is challenging the Judgment and Order dated 05/03/2014 passed by the learned Additional Sessions Judge, Sessions Court, Greater Mumbai in Sessions Case No.137 of 2013 thereby convicting him of the offence punishable under Section 376 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for ten years apart from direction to pay fine of Rs.10,000/- and in default to undergo further rigorous imprisonment for six months.

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

- (a) Victim of the crime in question/P.W.No.1 is an eldest daughter of the applicant/accused, who at the relevant year was taking education in 5th Standard in the school at Powai. She was about 12 years of age at the time of the incident in question. She was having two brothers and two sisters. Along with appellant/accused and her mother P.W.No.2 Rekha they all were residing at Ashok Nagar, Powai, Mumbai.
- (b) The incident in question took place on 14/11/2012. On that day, P.W.No.2 Rekha along with her three children went to meet her mother-in-law, who was residing at Aarey Colony, Mumbai. Her eldest daughter i.e. P.W.No.1 along with another daughter named Anu stayed in the house. P.W.No.2 Rekha could not return to her home in the night.
- (c) According to the prosecution case, in the night intervening 14/11/2012 and 15/11/2012, the appellant/accused returned from work at about 11.00 p.m. of 14/11/2012. The minor female victim/P.W.No.1 provided food to him. Then, they all slept in the house. The appellant/accused asked his daughter i.e. the minor female victim/P.W.No.1 to sleep near him. In that night, the appellant/accused committed forcible sexual intercourse with his daughter i.e. the minor female

victim/P.W.No.1 on two-three occasions after threatening her. The appellant/accused had threatened the minor female victim/P.W.No.1 not to disclose the incident to anybody.

(d) At about 8.00 a.m. of 15/11/2012, P.W.No.2 Rekha along with her other children returned to the house. However, as the appellant/accused was very much present in the house, the minor female victim/P.W.No.1 could not muster the courage to disclose the incident to her mother. The appellant/accused out of fear of disclosure of the incident, took the minor female victim/P.W.No.1 to his work place. When the minor female victim/P.W.No.1 returned to the house at about 12.00 noon, she disclosed the incident to her mother P.W.No.2 Rekha, who in turn took her to Police Station, Powai. That is how the FIR (Exhibit 9) came to be lodged by the minor female victim/P.W.No.1 on 15/11/2012, which resulted in registration of Crime No.503 of 2012 against the appellant/accused for the offence punishable under Section 376 of the Indian Penal Code.

(e) The minor female victim/P.W.No.1 was then sent for medical examination to Police Hospital, Nagpada, where she was examined by P.W.No.3 Dr.Baban Shinde. She was then further referred to the J.J.Hospital for treatment, gynecology examination and confirmation of pregnancy by sonography and other tests. The spot came to be inspected in presence of

P.W.No.4 Satpal Chandalia and spot panchanama (Exhibit 20) came to be prepared. Clothes of the minor female victim/P.W.No.1 came to be seized vide panchanama (Exhibit 21) dated 15/11/2012. The appellant/accused was also arrested. On completion of investigation, he was charge-sheeted.

- (f) The learned trial Court framed charge for the offence punishable under Section 376 of the Indian Penal Code against the appellant/accused. He pleaded not guilty and claimed trial.
- (g) In order to bring home the guilt to the appellant/accused, the prosecution has examined in all six witnesses. The minor female victim is examined as P.W.No.1. The report lodged by her is at Exhibit 9. Her mother Rekha is examined as P.W.No.2. Dr.Baban Shinde, Medical Officer of Nagpada Hospital is examined as P.W.No.3. The Medico Legal Certificate issued by this witness is at Exhibit 14. Panch witness to the spot panchanama is examined as P.W.No.4 and the spot panchanama recorded on 15/11/2012 is at Exhibit 20. Investigating Officer Sopan Bandge, API is examined as P.W.No.5. Dr.Archana Kumbhar, Assistant Professor of J.J.Hospital is examined as P.W.No.6. Medico Legal Certificate issued by her is at Exhibit 24.

- (h) The defence of the appellant/accused is that of total denial. As per his version, he used to ill-treat P.W.No.2 Rekha. She was insisting him to shift to the Rohatak, but he was not inclined to go there. There was dispute in respect of property between them and, therefore, he is falsely implicated in the crime in question.
- (i) After hearing the parties, the learned trial Court by the impugned Judgment and Order dated 05/03/2014 was pleased to convict the appellant/accused of the offence punishable under Section 376 of the Indian Penal Code and he was accordingly sentenced as indicated in the opening paragraph of this Judgment.

3 I heard Shri.Bhujbal, the learned Advocate appointed to represent the appellant/accused at the cost of the State. He argued that the minor female victim/P.W.No.1 is a tutored witness and even prior to entering into the witness box, her FIR was read over to her. Her evidence shows that there was dispute over the property between her parents and the appellant/accused used to beat her mother over the matter of purchase of room at Rohatak. Her mother was driven out by the appellant/accused and this has prompted false implication of the appellant/accused. In submission of the learned Advocate for the appellant/accused, cross-examination of P.W.No.2 Rekha also shows that there used to be quarrel between her and the appellant/accused and she was

driven out of the house by the appellant/accused. Thus, possibility of false implication cannot be ruled out. She is also the tutored witness. Hence, the appellant/accused is entitled for benefit of doubt.

4 The learned Additional Public Prosecutor supported the impugned Judgment and Order and resultant sentence by contending that in the Indian setting false implication of minor daughter by her own mother is totally improbable, particularly when the perpetrator of the crime is the biological father of the victim. The learned Additional Public Prosecutor further argued that the medical evidence is fully supporting the case of the prosecution.

5 I have carefully considered the submissions so advanced and also perused the Record and Proceedings including the oral as well as documentary evidence.

6 Evidence of the minor female victim/P.W.No.1 so also that of her mother P.W.No.2 Rekha is to the effect that the minor female victim/P.W.No.1 was born in the year 2000 and at the time of commission of offence, the minor female victim/P.W.No.1 was taking education in 5th standard in the school at Powai. While recording evidence of the minor female victim/P.W.No.1, the learned trial Court had noted the fact that from her appearance the minor female victim/P.W.No.1 seems to be a girl below twelve

years. Even version of P.W.No.3 Dr.Baban Shinde which is gaining corroboration from the report of ossification test to which the minor female victim/P.W.No.1 was subjected to, shows that she was 12 to 13 years of age at the time of the alleged incident. This makes it clear that the minor female victim/P.W.No.1 was a child witness and, therefore, her evidence must find adequate corroboration before it is relied upon as the rule of corroboration is of practical wisdom than of law. At the same time, it is well settled that evidence of the child witness cannot be rejected only on the ground that the witness is a child witness. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because as a child such witness is susceptible to be swayed by what others stated to him or her and such a witness is an easy prey to tutoring by others. However, if found reliable, evidence of such child witness can form sole basis for recording conviction. Let us, test evidence of the minor female victim/P.W.No.1 on these touchstone.

7 Prior to recording evidence of the minor female victim/P.W.No.1, the learned trial Court noticed that she appears to be a child below 12 years of age and, therefore, several questions were asked to her in order to ascertain whether this witness is unable to understand the questions put to her and gave the rational answers thereof. The learned trial Court upon perusal of answers given by the minor female victim/P.W.No.1 that the

witness understand sanctity of oath and that is how after administering oath to the minor female victim/P.W.No.1 her evidence came to be recorded. In her evidence, the minor female victim/P.W.No.1 has stated that at the time of the incident, she was taking education in 5th Standard and her date of birth is 11/09/2000. This evidence virtually remained unshattered and unchallenged in the cross-examination. So far as the incident in question is concerned, the minor female victim/P.W.No.1 has testified that her mother along with her two brothers and one sister had gone to the house of grandmother, whereas she herself and her younger sister stayed at the home. The minor female victim/P.W.No.1 further stated that at about 11.00 p.m. of that day i.e. on 14/11/2012, her father returned home and demanded food. After taking food, her father i.e. appellant/accused slept and while going to sleep, he insisted her to sleep with him. When she refused, the appellant/accused slapped her. Thereafter, he started pressing her breast and then by denuding her had committed rape on her. As per version of this witness, the appellant/accused had raped her twice or thrice in that night.

8 The minor female victim/P.W.No.1 further deposed that on the next day, her mother returned at about 8.00 a.m. and thereafter, her father had taken her to his work place out of fear that she may disclose the incident to her mother. Then on return at about 12.00 noon, she started crying and her mother asked her

as to why she is crying. Then, as per version of the minor female victim/P.W.No.1, she disclosed the incident to her mother P.W.No.2 Rekha, who took her to the Police Station, Powai, where she lodged report (Exhibit 9).

9 Cross-examination of the minor female victim/P.W.No.1 shows that the appellant/accused and her grandmother has purchased a room at Rohatak and there used to be frequent quarrel between her parents on that count. Her cross-examination reveals that the appellant/accused used to beat her mother and on one occasion had driven her out of house for about five to six days. She admitted that before going out with her father i.e. the appellant/accused, she did not disclose the incident to her mother. She further admitted that at the police station her mother was supporting her and police had made inquiries from her. Lastly, the minor female victim/P.W.No.1 admitted that on the date of recording of her evidence, her FIR was read over to her by police.

10 P.W.No.2 Rekha, who is mother of the minor female victim/P.W.No.1 has corroborated the version of the minor female victim/P.W.No.1 that on 14/11/2012, she along with her three children had gone to the place of her mother-in-law, whereas the minor female victim/P.W.No.1 along with another child stayed back at the home. P.W.No.2 Rekha further testified that on the next day she returned to her house and then her husband i.e. appellant/accused had taken her daughter the minor female

victim/P.W.No.1 and one son to his work place. On return, her daughter – the minor female victim/P.W.No.1 started crying and upon being asked she disclosed the fact that the appellant/accused had done wrong act with her. Then, she took the minor female victim/P.W.No.1 to the police station, where the report was lodged.

11 In cross-examination, P.W.No.2 Rekha has stated that she has let out the room and receiving the rent of that room. She further admitted that the appellant/accused used to drink liquor and used to quarrel with her. She was driven out of the house by the appellant/accused. Lastly, she admitted that her statement was read over to her by police.

12 By merely reading the statement or the FIR to the minor female victim/P.W.No.1 or her mother P.W.No.2 Rekha, it cannot be said that both these two witnesses are tutored by police. In the matter of ***Gopal Madhukar Bombatkar v. State of Maharashtra***¹ this Court has held that making the witness aware about the police statement and telling the witness to narrate the incident properly in the Court does not amount to tutoring. Ultimately, it becomes the duty of the Court to segregate nuggets of truth from embellished version of the victim of the crime in question.

1 2014 ALL MR (Cri.) 2390.

13 What is required to be seen is whether these witnesses are really telling the incident as happened or concocting against the appellant/accused.

14 Evidence of the minor female victim/P.W.No.1 as well as her mother P.W.No.2 Rekha is clear on the aspect that victim of the crime is a school going girl of twelve years of age. The appellant/accused is her father whereas P.W.No.2 Rekha is her mother. Even if it is assumed that there was some dispute over property amongst the couple and even if it is assumed that the appellant/accused used to subject his wife P.W.No.2 Rekha to cruelty, considering the background from which the family hails, it is hard to believe that P.W.No.2 Rekha would spoil the future life of her minor unmarried girl for wrecking vengeance against the appellant/accused by his false implication in a serious offence. At this juncture, it is apposite to quote paragraph 10 of the Judgment of the Honourable Apex Court in the matter of ***Bharwada Bhoginbhai Hirjibhai v. State of Gujarat***², wherein it is held thus :

“10.... 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

2 AIR 1983 SC 753.

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 into controversy.
- (10)The parents of an unmarried girl as also the husband and members of the husbands' 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 innocence.

(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 Evidence on record shows that version of the minor female victim/P.W.No.1 to the effect that she was subjected to rape by her own father i.e. the appellant/accused is gaining voluminous corroboration from the evidence of the prosecution witnesses. On the very next day i.e. on 15/11/2012, the minor female victim/P.W.No.1 was taken to the Nagpada Hospital by police. P.W.No.3 Dr.Baban Shinde apart from conducting medical examination on the minor female victim/P.W.No.1 had ascertained history from her. This witness has spoken about history given by the minor female victim/P.W.No.1 to him. As per version of P.W.No.3 Dr.Baban Shinde, the minor female victim/P.W.No.1 had told him that in the last night, her father after threatening to kill her had raped her twice. P.W.No.3 Dr.Baban Shinde is a totally disinterested witness against the appellant/accused. His version shows that on medical examination of the minor female victim/P.W.No.1, he found her hymen torn at 1,3,6,7 and 11 o'clock position, the tears were swollen, tender and reddish in colour. Those were bleeding on touch. P.W.No.3 Dr.Baban Shinde had also conducted ossification test and submitted a composite report which is at Exhibit 14. This contemporaneous medico legal document is

fully corroborating the version of P.W.No.3 Dr.Baban Shinde, which in turn is corroborating the version of the minor female victim/P.W.No.1.

16 On 16/11/2012, the minor female victim/P.W.No.1 was examined by P.W.No.6 Dr.Archana Kumbhar of J.J.Hospital, Mumbai. This Medical Officer had prepared report of medical examination of the minor female victim/P.W.No.1 and had also conducted test of her to determine pregnancy. Evidence of P.W.No.6 Dr.Archana Kumbhar along with the Medico Legal Certificate issued by her shows that upon examination of the minor female victim/P.W.No.1, she found that hymen of the victim was torn and the tears were fresh, healed and caused prior to two or three days.

17 The seizure panchanama at Exhibit 21 is an admitted document. Vide this panchanama, clothes of the minor female victim/P.W.No.1 came to be seized by police. The Chemical Analysis Report shows that knicker of the minor female victim/P.W.No.1 seized by police was having blood stains of 'B' group thereon. This evidence corroborates the version of the minor female victim/P.W.No.1.

18 The cumulative effect of foregoing discussion makes it clear that the prosecution has established its case of

commission of rape on the minor female victim/P.W.No.1 by her own father i.e. appellant/accused. The sentence awarded to him by the learned trial Court is also appropriate and in consonance with the proved offence. No reason for interference, as such, is made out in the impugned Judgment and Order passed by the learned trial Court. The appeal fails and therefore, the Order :

ORDER

The Appeal is dismissed.

(A.M.BADAR J.)