

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

***CRIMINAL APPELLATE JURISDICTION***

**CRIMINAL APPEAL NO.289 OF 2012**

**ALONG WITH**

**CRIMINAL APPLICATION NO.1565 OF 2014**

|                                                |   |                  |
|------------------------------------------------|---|------------------|
| Suresh Premsing Vishwakarma Alias Lohar.       | ] |                  |
| Age - 30 years, Occupation - Labour,           | ] |                  |
| R/at - Wadgaonsheri Pune, Originally           | ] |                  |
| Inhabitant of Ward No.8, Dharampur,            | ] |                  |
| District Kailali, Aanaset, Nepal State.        | ] |                  |
| (At present lodged at Yerawara Central Prison, | ] | ... Appellant    |
| Pune)                                          | ] | Orig. Accd. No.1 |

Versus

|                           |   |                |
|---------------------------|---|----------------|
| The State of Maharashtra. | ] | ... Respondent |
|---------------------------|---|----------------|

Mr. D. G. Khamkar for Appellant.  
Mr. Ajay Patil, APP for State.

**CORAM :- B. R. GAVAI &**  
**SARANG V. KOTWAL, JJ.**  
**DATE :- 13 JULY, 2018**

**JUDGMENT (PER SARANG V. KOTWAL, J.) :-**

1. The Appellant has preferred this Appeal challenging the Judgment and Order dated 13/01/2012 passed by the learned Additional Sessions Judge, Pune, in Sessions Case No.419 of 2009. By

the impugned Judgment and Order, the Appellant was convicted for commission of offence punishable under Sections 363, 366-A, 364, 376(2)(f) and 302 of the IPC.

For the offence punishable under Section 363 of the IPC, the Appellant was sentenced to suffer rigorous imprisonment for seven years and to pay a fine of Rs.500/- and in default of payment of fine, to undergo further rigorous imprisonment for three months.

For the offence punishable under Section 366-A of the IPC, the Appellant was sentenced to suffer rigorous imprisonment for ten years and to pay a fine of Rs.500/- and in default of payment of fine, to undergo further rigorous imprisonment for three months.

For the offence punishable under Section 364 of the IPC, the Appellant was sentenced to suffer rigorous imprisonment for life and to pay a fine of Rs.1,000/- and in default of payment of fine, to undergo further rigorous imprisonment for six months.

For the offence punishable under Section 376(2)(f) of the IPC, the Appellant was sentenced to suffer rigorous imprisonment for life and to pay a fine of Rs.1,000/- and in default of payment of fine, to undergo further rigorous imprisonment for six months.

For the offence punishable under Section 302 of the IPC, the Appellant was sentenced to suffer rigorous imprisonment for life and to pay a fine of Rs.1,000/- and in default of payment of fine, to undergo further rigorous imprisonment for six months.

All the substantive sentences were directed to run concurrently.

2. The prosecution case, in brief, is as follows :

The parents of the victim were knowing the Appellant. The Appellant and the parents of the victim were from Nepal and they were knowing each other. The Appellant had given Rs.1,000/- by way of loan to the father of the victim. The Appellant used to demand his money. According to the prosecution case, on 21/03/2008 at about 5.30 p.m., the Appellant came to the victim's house and demanded money from her mother. The father of the victim had gone to attend his work. The victim's mother told him to contact her husband instead. The Appellant told her that he was hungry and that he would bring eggs which she should could cook and give him. On that pretext, he took the victim with him and thereafter, never returned. When the victim's father returned home, they searched for the victim

and the Appellant. The Appellant's house was found locked. On the next day also they continued the search and finally since the victim was not found, he lodged his FIR at 9.30 p.m. on 22/03/2008. The police arrested the Appellant and it is the prosecution case that the Appellant showed the dead body of the deceased. The dead body was sent for post-mortem examination. The examination revealed that there was sexual assault committed on the victim and she had died due to asphyxia due to throttling and due to head injury. The investigation was carried out. Statements of various witnesses were recorded and at the conclusion of the investigation, charge-sheet was filed. As the case was exclusively triable by the Court of Sessions, it was committed to the Court of Sessions for trial. The case was tried before the learned Additional Sessions Judge, Pune, and at the conclusion of the trial, the learned Judge convicted and sentenced the Appellant as mentioned earlier.

3. During trial, the prosecution examined 7 witnesses. PW 1 Sandeep Temghare was a grocery shop owner. He claims to have seen the Appellant and the deceased together in his shop in the evening of 21/03/2008. PW 2 Vijaysingh Vishwakarma and PW 3 Pavitra

Vishwakarma are the parents of the victim. They deposed about the relationship with the Appellant and about the victim being taken away by the Appellant in the evening of 21/03/2018. PW 4 Dr. Ajay Taware had conducted the post-mortem examination on the dead body of the deceased. PW 5 Geetabai Shinde was a pancha for inquest panchanama. PW 6 Bhagwan Chandere was a pancha in whose presence the Appellant had purportedly showed the place of incident and from there the dead body was recovered. PW 7 Investigating Officer Sr.PI Gautam Deshmukh had conducted the investigation from 23/03/2008 onwards. Before that, PSI S. H. Shinde had conducted the investigation on 22/03/2008. However, he was transferred to Gadchiroli district and his presence could not be secured during trial. This aspect is important because he was the Investigating Officer when the Appellant was arrested and when he had purportedly shown the place from where the dead body was recovered.

4. We have heard Mr. D. G. Khamkar, learned Counsel for the Appellant and Mr. Ajay Patil, learned APP for the State. With their assistance, we have read the evidence and perused the impugned Judgment.

5. Insofar as the injuries suffered by the deceased are concerned, the prosecution has examined PW 4 Dr. Ajay Taware. On his examination, he had noticed that the vaginal walls of the victim were lacerated over lower half region, hymen was torn posteriorly and whitish fluid was seen in vagina. The victim had suffered other injuries as follows :

- (i) Contusion present over left side of neck, laterally 2 cm X 2 cm, 1 cm below left mandibular region, bluish green in colour,
- (ii) Abrasion over left side of neck laterally 3.5 cms X 0.5 cm, 2 cm below left mandibular region,
- (iii) Contusion over left side of neck, 2 cm below left ear, 1cm X 0.5 cm reddish brown,
- (iv) Multiple abrasions seen over back, buttocks of sizes 2 cm - 3 cms and 2 cms - 1 cm reddish brown in colour,
- (v) Vertical linear abrasions seen on both sides of vaginal wall of size 4cms X 0.5 cms each reddish brown in colour.

According to him, the multiple abrasions over back, buttocks and vaginal walls were possible due to sexual assault. He has clearly opined that it was a case of sexual intercourse with the child. From

his evidence, there cannot be any dispute that the victim had suffered gory sexual assault on her and was brutally murdered.

6. It is a case based on circumstantial evidence. The circumstances brought on record by the prosecution are :

- (a) the theory of last seen together,
- (b) the Appellant's taking the victim with him, and
- (c) The Appellant pointing out the place from where the dead body was recovered.

7. To establish that the Appellant was last seen with the victim, the prosecution has examined PW 1 Sandeep Temghare and PW 3 Pavitra Vishwakarma who was the mother of the victim. PW 1 Sandeep has deposed that during the day he used to work in a private company and after 6.00 pm, he used to attend his grocery shop. He has deposed that on 21/03/2008 at about 6.30 p.m. when he was present in his shop, one dwarf Nepali person came to his shop with one girl aged about 9 to 10 years. It seemed to him that, that person had consumed liquor. That person bought a chocolate for girl and a cigarette for himself. After smoking the cigarette for about 10

minutes, he left. He saw that person going towards a mountain near Mahatoba Nagar. He has further deposed that after 2 days of the incident, he came to know through newspapers that the Appellant had committed rape and had murdered one small girl. After about 2 to 3 days, police came to his shop to make inquiries. He accompanied the police to the police station. He has deposed that the Appellant was present in the police station and he identified him at that time. He has further identified the Appellant in Court. In his cross-examination, he has admitted that he has not given description of the person who had come with a small girl in his shop in that evening. He has also admitted that prior to the incident, he had no occasion to see the Appellant or the girl. His evidence shows that prior to the incident, he was not knowing either the victim or the Appellant. He was taken to the police station and was shown the Appellant. He had not given description of the Appellant in his police statement which was recorded prior to that. Since the Appellant was shown to this witness in the police station, his identification in the Court is worthless because he had already seen the Appellant and was aware that the police had arrested the Appellant as the culprit for the present offence. We are not inclined to place reliance on such identification.

It was necessary for the police to have held the identification parade for fixing the identity of the suspect from this witness. Showing the Appellant in the police station as an arrested accused, was not proper. Therefore, the evidence of this witness does not help the prosecution.

8. The evidence of the parents of the victim i.e. PW 2 Vijaysingh Vishwakarma and PW 3 Pavitra Vishwakarma shows that PW 2 Vijaysingh had gone to attend his duty on 21/03/2008. The Appellant was known to them, as in the past, he was also serving as a pest controller like PW 2. There was some money transaction between PW 2 and the Appellant and, admittedly, PW 2 had obtained a loan of Rs.1,000/- from the Appellant which remained to be repaid. The Appellant used to come to the house of PW 2 to demand the said money.

PW 3 Pavitra has deposed that on 21/03/2008 between 4.00 to 4.30 p.m., the Appellant came to their house demanding money. PW 3 has deposed that she told him to ask about the same on return of her husband PW 2. PW 3 has further deposed that the Appellant, thereafter, requested her to prepare food for him and he told her that he would bring eggs. On that pretext, he took the victim

with him who was about 9 years of age. The Appellant, thereafter, never returned. PW 2 returned home at about 6.30 p.m. At that time, PW 3 told him about the Appellant's visit and about the fact that their daughter had gone with the Appellant. Till late evening, the Appellant or the victim did not return and therefore, they searched for them.

9. PW 2 has deposed that on the next day, he went to one Motisingh Vishwakarma and told him about missing of his daughter. It is the case of PW 2 that the said Motisingh informed him that the Appellant had come to his residence along with the victim and had seen the Appellant taking the victim towards the hilly area. Thereafter, PW 2 went to the house of the Appellant in Wadgaon-Sheri but he did not find him. In fact, the Appellant's house was found locked. Then he made inquiries with relatives of the Appellant but still he could not be found. Thereafter, finally, he approached the police and lodged his report against the Appellant at 9.30 p.m. on 22/03/2008. PW 2 has further deposed that after lodging the FIR, he accompanied the police when they searched the Appellant and finally the Appellant was found at the residence of one of his relatives. The

Appellant was brought to Shastrinagar police outpost. On inquiry with the Appellant by the police, he came to know that his daughter was not alive. On the next morning, he was informed by the police that the dead body of the victim was taken to Sassoon Hospital from where he collected the dead body and final rites were performed. His FIR is produced on record at Exh.14.

10. Analyzing their evidence, we find that their conduct is not entirely natural, particularly when it is their case that the Appellant had taken away the victim with him around 5.00 p.m. on 21/03/2008. According to PW 2, he had searched for the Appellant at various places. We fail to understand as to why PW 2 did not inform the police immediately. He has admitted in his cross-examination that police outpost was just about a distance of  $\frac{1}{2}$  kms from his residence in Kothrud, Pune. If the parents were aware that the victim was taken away by the Appellant at about 5.00 p.m. and had not returned till late night, the natural reaction would be to inform the police and seek their assistance and help. Even on the next day, the police were not informed till 9.30 p.m. According to PW 2, he had gone to his relative one Motisingh who had also informed him that the Appellant had

taken the victim towards hilly area. Even on this information, PW 2 had not carried any search in that area neither had he informed the police regarding the same immediately. For the reasons best known to them, the prosecution has chosen not to examine Motisingh who could have lent corroboration to the version of PW 2. He would have been the main person who had seen the victim and the Appellant together. Thus, he would have been the best witness to establish the theory of 'last seen together'. Admittedly, this person Motisingh was a distant relative of PW 3. Therefore, it was all the more necessary for the prosecution to examine this witness. It is also seen that for more than 24 hours, the Appellant was not found and suddenly after lodging the FIR, within a short time, the Appellant could be found at the residence of one of his relatives. In the light of this evidence, we agree with the submission of Mr. Khamkar that the Appellant was arrested on suspicion and thereafter the FIR was registered by recording the statement of PW 2 which was based more on suspicion than on facts. If the Appellant was in contact with PW 2, the prosecution should have examined somebody from the neighbourhood who had seen the Appellant taking away the victim. That would have lent corroboration to the version of PW 2 and PW 3. In these

circumstances, we do not find it safe to rely on the evidence of PW 2 and PW 3 without corroboration from other circumstances. Such corroborating evidence is not before the Court.

11. The prosecution has examined PW 6 Bhagwan as the pancha in whose presence the Appellant had shown the place from where the dead body was discovered. He has deposed that on 23/03/2008 when he was proceeding on Paud Road, he was called by the officers of Kothrud Police Station. He has further deposed that the Appellant made a disclosure regarding the incident and showed his willingness to point out the place of occurrence. The statement was recorded and is produced on record of the trial at Exh.P-25. He has further deposed that after recording of the statement, the pancha witness, the police and the Appellant together went towards Mahatoba Hills. The route was shown by the Appellant and then panchas and the police were led to the spot where the dead body of the girl was lying. The panchanama is produced on record at Exh.26. The panchanama was conducted between 11.55 p.m. to 11.45 p.m. During evidence, the learned trial Judge has noted that this witness put a question to the Appellant himself as to whose name was Suresh.

This witness also could not point out his signature on Exh.P-25. He placed his finger on the signature of the Appellant and signature of the police officer and asserted that it was his signature. The learned trial Judge himself has discarded his evidence in paragraph 92 of the impugned Judgment. To that extent, we concur with the view expressed by the learned trial Judge in that behalf and we also express that this witness is not credit-worthy.

12. The prosecution could have examined PSI S. H. Shinde who had investigated the offence after registration of the FIR and who had supervised the investigation when the dead body was discovered. However, PSI Shinde was transferred to Gadchiroli district and was not examined as a witness. PW 7 Sr.PI Sautam Deshmukh had taken over investigation only on 23/03/2008. Therefore, the Investigating Officer who had arrested the accused, seized his clothes and had recovered the dead body, was not before the Court. Therefore, the prosecution did not prove through cogent evidence that the dead body of the victim was discovered at the instance of the present Appellant.

13. There is no other incriminating circumstance against the Appellant. The Appellant was shown arrested at about 11.50 p.m. on 22/03/2008. There is no medical report of the Appellant. The blood found on the clothes of the Appellant was human blood but the blood-group was not determined. Therefore, even that circumstance cannot be connected with the offence alleged against him.

14. Because of these infirmities, we are of the opinion that the prosecution has not proved the case against the Appellant beyond reasonable doubt. In this view of the matter, the Appellant deserves to be given benefit of doubt.

15. Hence, the following order :

**ORDER**

- (i) The Appeal is allowed.
- (ii) The Judgment and Order of conviction and sentence dated 13/01/2012 passed by the learned Additional Sessions Judge, Pune, in Sessions Case No.419 of 2009, convicting the Appellant for commission of the offences punishable under Sections 363, 366-A, 364, 376(2)(f) and 302 of the

IPC, are quashed and set aside. The Appellant is acquitted of the charges charged with.

- (iii) The Appellant is directed to be set at liberty forthwith, if not required in any other case.
- (iv) With the disposal of the Appeal, Criminal Application does not survive and stands disposed of accordingly.

**(SARANG V. KOTWAL, J.)**

**(B. R. GAVAI, J.)**