

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NO.76 OF 2015
WITH
CRIMINAL APPLICATION NO.493 OF 2018
IN
CRIMINAL APPEAL NO.76 OF 2015**

Mohit @ Dattatraya Vishnu Waikar,

Age : 44 years, Occ – Driver,

R/at. Revali, Tal : Khatav,

Dist. Satara.

(At present languished in Central

Prison, Kalamba, Kolhapur)

... **Appellant/Applicant**

V/s.

The State of Maharashtra,

(At the instance Aundh Police

Station, Aundh, Khatav,

District : Satara.)

... **Respondent**

.....

Ms.Nasreen S.K.Ayubi, Appointed Advocate for the
Appellant/Applicant.

Mr.Prashant Jadhav, APP for the Respondent/State.

....

CORAM : A.M.BADAR J.

DATED : 5th APRIL 2018.

ORAL JUDGMENT :

1 Vide Criminal Application bearing No.493 of 2018,

which came to be registered on the basis of communication sent by the appellant/accused through jail, prayer is made to dismiss the appeal and to direct grant of remission to the appellant. The said communication by the appellant/accused is accompanied by the letter dated 25/01/2018 of the learned Additional Sessions Judge, Vaduj, whereby it was informed to the Superintendent of Central Jail, Kolhapur that as appeal filed by the appellant/accused is pending before this Court, opinion regarding grant of remission cannot be given. The appellant/accused is behind bars and undergoing the sentence imposed on him right from February 2010 and that is how the appeal was required to be taken up for hearing.

2 The appellant/accused, by this appeal, is challenging the Judgment and Order dated 09/07/2012 passed by the learned Additional Sessions Judge, Vaduj, District Satara in Sessions Case No.70 of 2010 thereby convicting him of the offence punishable under Section 376(2)(f) of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for ten years apart from directing him to pay fine of Rs.5000/- and in default of payment of fine to undergo further rigorous imprisonment for four months.

3 Facts in nutshell leading to the prosecution of the appellant/accused are thus :

(a) P.W.No.3 Manda is a married woman residing separately from

her husband since ten years prior to the incident because of strained relations with her husband. The victim of the crime in question is her ten year's old daughter, who, at the relevant time, was taking education in 4th Standard in the school run by Zilla Parishad at village Revali. After separating from her husband, P.W.No.3 Manda along with her daughter i.e. the P.W.No.4 was residing with her mother at village Revali in Khatav Taluka of Satara District. Her brothers namely Mahadev and Arun were residing at Satara. For earning her livelihood, P.W.No.3 Manda used to work as labourer with a mason.

- (b) The alleged incident took place at the residential house of the appellant/accused on 21/10/2010. On that day, P.W.No.3 Manda – mother of the victim child P.W.No.4, as usual, left her house for doing labour work in the morning hours. It was Sunday. The P.W.No.4 along with her friend named Shejal Waikar was playing near Ganesh Temple of village Revali. The appellant/ accused called the P.W.No.4 as well as her friend Shejal on the pretext of catching crabs. He caught crabs from the nearby streams. Thereafter, accompanied by the appellant/accused, the P.W.No.4 along with her friend Shejal went to the house of the appellant/accused. He asked them to cook the crabs on the hearth outside the house. Daughter of the appellant/accused named Kajal was present there.

- (c) After some time, the appellant/accused called the P.W.No.4 and her friend Shejal inside the house for plucking white hair from his scalp. Shejal went outside the house in response to the call of daughter of the appellant/accused. The appellant/accused then closed the door of the house from inside and committed forcible sexual intercourse with the P.W.No.4 after threatening her to kill if she ventured to shout. As, because of the act of the appellant/accused, the P.W.No.4 suffered immense pain,she started shouting and crying. The appellant/accused then woke up from the person of the P.W.No.4. Knicker as well as frock of the P.W.No.4 was stained with blood because of the act of the appellant/ accused. She then returned to her house, but there was nobody at her house. After sometime, mother of the P.W.No.4 returned to her house and the P.W.No.4 then disclosed the incident to her mother P.W.No.3 Manda. She, in turn, approached Sarpanch of the village and disclosed the incident to him and others. However, they did not take any action and, therefore, she contacted her brother Mahadev telephonically. Mahadev accompanied by his wife then reached to Revali from Satara at about 2.00 a.m. in the night intervening 21/02/2010 and 22/02/2010. P.W.No.3 Manda accompanied by her daughter went to Police Station, Aundh immediately and lodged report (Exhibit 12), which resulted in registration of Crime No.12 of 2010 under Section 376 of the IPC.

- (d) The appellant/accused came to be arrested. On the basis of his disclosure statement, his pant as well as T-shirt came to be seized. The spot was inspected. The quilt came to be seized from the spot. The P.W.No.4 was sent to Rural Hospital, Aundh from where she was referred to the Civil Hospital, Satara, where she was examined medically. Her clothes came to be seized. The seized articles were sent for chemical analysis. On completion of routine investigation, the appellant/accused came to be charge-sheeted.
- (e) The charge for offence punishable under Section 376(2)(f) of the IPC was framed and examined to the appellant/accused. He pleaded not guilty and claimed trial.
- (f) In order to bring home the guilt to the appellant/accused, the prosecution has examined in all nine witnesses. P.W.No.1 Shivprasad Patil is a panch witness to the spot-cum-seizure panchnama (Exhibit 9). P.W.No.2 Nurmohammad Shaikh is a panch witness to the memorandum statement (Exhibit 12) and resultant recovery panchnama (Exhibit 11). P.W.No.3 Manda is mother of the victim female child. She has lodged the FIR (Exhibit 21) against the appellant/accused. The P.W.No.4 is the victim female child. P.W.No.5 Dr.Vilasrao Salunkhe, Medical Officer of Rural Hospital, Aundh had referred the victim to the General Hospital, Satara. P.W.No.6

Dr.Subhash Kadam, Medical Officer of Civil Hospital, Satara had issued the certificate (Exhibit 32) on the basis of record of medical examination of the P.W.No.4. P.W.No.7 Dr.Shivaji Sonawale, Medical Officer of Civil Hospital, Satara had medically examined the P.W.No.4 and prepared the papers of medical examination and treatment of the P.W.No.4. P.W.No.8 Gani Nagarjee is a panch witness to the seizure of clothes of the victim, whereas P.W.No.9 Balasaheb Mule is the Investigating Officer.

- (g) The defence of the appellant/accused was that of total denial. According to the defence version, the appellant/accused is falsely implicated in the crime in question because of strained relations with the prosecuting party due to dispute in respect of irrigating the fields and because of frequent quarrel between maternal uncle of the P.W.No.4 with the daughter of the appellant/accused.
- (h) Upon hearing the parties, by the impugned Judgment and Order dated 09/07/2012, the learned trial Court was pleased to convict the appellant/accused for the offence punishable under Section 376 (2)(f) of the IPC and accordingly, he came to be sentenced as indicated in the opening paragraph of this Judgment.

4 I heard Ms.Nasreen Ayubi, the learned Advocate appointed to represent the appellant/accused at the cost of the State. She argued that case of the prosecution is not free from doubts as, though during the course of the incident, friend of the victim namely Shejal Waikar as well as daughter of the appellant/accused namely Kajal Waikar were outside the house, both of them are not examined by the prosecution. The spot of the incident i.e. house of the appellant/accused was a small one room house admeasuring about 12 x 12 feet and it was surrounded by houses, school as well as temple. There was main road passing from the front portion of the house of appellant/accused. Many persons used to be present near the house of appellant/accused. Further, the prosecutrix has not raised hue and cry nor the incident was noticed by the passers-by and the people in the vicinity. Mr.Ayubi, the learned Advocate further argued that opportunity of cross-examining the prosecution witnesses was not accorded to the appellant/accused and therefore, his conviction and resultant sentence gets vitiated. Therefore, the appellant/accused is entitled to acquittal.

5 The learned Additional Public Prosecutor supported the impugned Judgment and Order by contending that evidence of prosecution coming from the mouth of the P.W.No.4 is clinching and therefore, conviction of the appellant/accused is proper.

6 The case in hand is a case of commission of forcible sexual intercourse on a female child, who, at the relevant time, was aged about ten years. The undisputed position, which is emerging on record and particularly, from cross-examination of the prosecution witnesses viz. P.W.No.3 Manda and the P.W.No.4 – the victim of the crime in question, is to the effect that at the time of incident i.e. on 21/02/2010, the P.W.No.4 was taking education in 4th Standard at the school run by Zilla Parishad. On the day of the incident, she was playing with her friend namely Shejal Ashok Waikar. The appellant/accused has two children. Babu is his son, who was also taking education in the school in which the P.W.No.4 was studying. Therefore, the P.W.No.4 used to visit the house of the appellant/accused and Babu also used to visit her house. Name of the another child of the appellant/accused is Kajal. From cross-examination of the P.W.No.4, it is brought on record that daughter of the appellant/accused namely Kagal also used to play with the P.W.No.4 and her friend Shejal Waikar. These facts are having bearing on appreciation of evidence adduced by the mother of the victim as well as the victim of the crime in question.

7 It is in evidence of the P.W.No.4 that on 21/02/2010, she and her friend Shejal Waikar were playing near the temple of Lord Ganesh and house of the appellant/accused was situated nearby that temple. The appellant/accused came towards them

and took both of them to the adjacent stream for catching crabs. Thereafter, they all returned to the house of the appellant/accused and the appellant/accused asked them to cook those crabs on the hearth situated outside the house. At that time, as per version of the P.W.No.4, daughter of the appellant/accused namely Kajal was also present outside the house. Then, as stated by the the P.W.No.4, the appellant/accused called her friend Shejal inside the house for plucking his white scalp hair. Therefore, they both went inside the house of the appellant/accused.

8 What happened thereafter is stated by the prosecutrix in cogent and clear manner. She stated that thereafter daughter of the appellant/accused namely Kajal gave a call to Shejal to come out with the pot of water. Hence, Shejal went outside of the house and at that time, the appellant/accused asked her to close the door. Thereafter, the appellant/accused spread the quilt on the floor and latched the door from inside. Then, the appellant/accused removed her knicker and also removed his pant. The P.W.No.4 was then made to lay on the quilt and the appellant/accused mounted on her and committed rape on her. At that time, the appellant/accused has threatened to kill her, if she dared to raise alarm. The P.W.No.4 further deposed that because of act of the appellant/accused she started weeping and raised alarm loudly making the appellant/accused to wake up from her body. The P.W.No.4 further deposed that she started bleeding.

Wearing her knicker, she left the house and returned back to her home. Her knicker and frock were stained with blood. On return of her mother from work, she disclosed the incident to her mother.

9 In cross-examination of the P.W.No.4, it is brought on record that Ganesh Temple, school and other houses are surrounding the house of the appellant/accused. The road passes from the front side of his house. With this, it was attempted to show that the P.W.No.4 did not raise any hue or cry. However, it needs to be noted that the appellant/accused had overpowered the P.W.No.4 and had threatened her not to shout. Similarly, it also needs to be noted that the P.W.No.4, who was just 10 years old, minor female child pitted against a fully grown adult male and as such, it was not expected of her to make a hue and cry. The P.W.No.4 had denied the suggestion that their relations with the appellant/accused were strained.

10 P.W.No.3 Manda in her statement before the Court had stated that on her return from work at about 6.30 p.m. on 21/02/2010, she found her daughter weeping. Thereafter, her daughter told her that when she and her friend Shejal were playing, the appellant/accused took them to his house and when Shejal went out of the house, he committed rape on her. P.W.No.3 Manda has stated that her daughter was found bleeding and frock and knicker of her daughter were stained with blood.

She though disclosed the incident to Laxman Waikar – Sarpanch as well as others, they had not taken any action. Hence, she telephonically disclosed the incident to her brother Mahadev, who was residing at Satara. Mahadev along with his wife then came to village Revali at about 2.00 a.m. and by that vehicle she along with her daughter went to Police Station, Aundh and lodged report (Exhibit 21).

11 In her cross-examination, P.W.No.3 Manda denied that her relations with appellant/accused are strained due to dispute in respect of irrigating the fields and that there used to be frequent quarrel between her brother and daughter of the appellant/accused. Thus, it is attempted to show that the appellant/accused is falsely implicated in the crime in question because of his strained relations with the prosecuting party. These suggestions are as vague as those can be. There is nothing on record to suggest that P.W.No.3 Manda, who was working as a labourer with a mason, was owning some irrigated agricultural field. Similarly, from cross-examination of the P.W.No.4, it is brought on record that daughter of the appellant/accused is also a child, used to play with the P.W.No.4. In the wake of this material, it is unbelievable that brothers of P.W.No.3 Manda, who were residing at Satara would indulged in frequent quarrel with the minor daughter of the appellant/accused. Thus, this theory of false implication because of dispute in respect of irrigating the fields is

totally undigestable. The victim of the crime in question, at the relevant time, was just ten years of age and her mother had undergone separation from her father since prior to ten years of the incident. In such situation, it is improbable nay impossible for P.W.No.3 Manda to falsely implicate the appellant/accused at the cost of ruining the future of her minor daughter. The FIR of the crime in question is lodged with promptitude and the said FIR at Exhibit 21 is fully supporting the version of P.W.No.3 Manda. Evidence of P.W.No.3 Manda is proving the former statement of the victim of the crime in question, which is admissible in evidence under Section 157 of the Evidence Act.

12 Version of the P.W.No.4 is gaining full corroboration from the medical evidence adduced on record by the prosecution. P.W.No.7 Dr.Shivaji Sonawale had medically examined the P.W.No.4 on the very next day of the incident. He found that there was irregular hymeneal tear on posterior aspect of hymen in mid line, so also tear on posterior vaginal wall anterior and adjacent to hymen of size 2 x 1 x 0.5 c.m. with minimal bleeding, suffered by the P.W.No.4. He was required to examine the P.W.No.4 under general anesthesia because of injuries to her private part. Finding of injuries on private part of the P.W.No.4, who, at the relevant time, was just ten years of age, corroborates her version regarding rape on her by the appellant/accused.

13 The prosecution is relying on forensic evidence as report of chemical analysis of clothes of the P.W.No.4 is showing stains of blood on them. Clothes of the P.W.No.4 were seized in presence of panch witness P.W.No.8 Gani Nagarjee by Investigating Officer P.W.No.9 Balasaheb Mule. The seizure was effected under seizure panchanama (Exhibit 40). However, it is seen that no proper opportunity of cross-examining both these witnesses was granted to the appellant/accused by the learned trial Court. At the time of recording the evidence of P.W.No.8 Gani Nagarjee, the defence Advocate was absent. The learned trial Court instead of following the provisions of Section 304 of the Code of Criminal Procedure by providing legal aid to the appellant/accused, insisted the appellant/accused to cross-examine P.W.No.8 Gani Nagarjee. The appellant/accused is a rustic villager residing in village Revale in Khatav Taluka of Satara District. He was not supposed to be acquainted of an art of cross-examining the prosecution witnesses. He, therefore, declined to cross-examine P.W.No.8 Gani Nagarjee and the learned trial Court closed the evidence of P.W.No.8 Gani Nagarjee.

14 In the similar way, at the time of recording the evidence of P.W.No.9 Balasaheb Mule, Investigating Officer, the learned Advocate for the appellant/accused was absent. Then, again the learned trial Court instead of providing legal aid to the appellant/accused had insisted the appellant/accused to cross-

examine the Investigating Officer. Without any legal knowledge and skill to cross-examine the witness, the appellant/accused was required to cross-examine the Investigating Officer. It appears that two formal questions were put in his mouth, which were to the effect that after investigation, it did not reveal that the accused committed rape on the victim and that the false charge-sheet is filed. This insistence of the learned trial Court in compelling the appellant/accused to cross-examine the Investigating Officer is totally unjustified. The proper course was to follow the provisions of Section 304 of the Code of Criminal Procedure by providing legal aid to the appellant/accused. Thus, for want of effective opportunity of cross-examination, evidence of P.W.No.8 Gani Nagarjee and P.W.No.9 Balasaheb Mule, Investigating Officer needs to be kept aside. Consequently, forensic evidence cannot be made use of against the appellant/accused.

15 Even if the evidence of panch witness P.W.No.8 Gani Nagarjee and that of Investigating Officer P.W.No.9 Balasaheb Mule coupled with the forensic evidence is kept out of consideration, still the prosecution has established the fact that the appellant/accused, on 21/02/2010 had committed rape on the P.W.No.4, who, at the relevant time, was aged about 10 years. Evidence regarding age of the P.W.No.4 is not at all disputed nor the defence had suggested to any of the prosecution witness that she, at the relevant time, was more than twelve years of age.

16 So far as sentence is concerned, minimum prescribed sentence is awarded to the appellant/accused by the learned trial Court. Hence, the following Order :

ORDER

- (i) The appeal is dismissed.
- (ii) In view of dismissal of appeal, Criminal Application bearing No.493 of 2018 also stands disposed of.
- (iii) The prison authorities are free to obtain fresh opinion from the concerned Court for grant of remission to the appellant/accused in view of disposal of appeal, as on earlier occasion, the learned trial Court did not give any opinion because of pendency of this appeal.

(A.M.BADAR J.)