

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NO.797 OF 2017
WITH
CRIMINAL APPLICATION NO.1271 OF 2017
IN
CRIMINAL APPEAL NO.797 OF 2017**

BALU @ BALASAHEB BHANUDAS KAMBLE)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Yashpal Thakur, Appointed Advocate for the Appellant.

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

CORAM : A. M. BADAR, J.

DATE : 2nd APRIL 2018

ORAL JUDGMENT :

1 The appellant/accused has sent a communication from the jail which is registered as Criminal Application No.1271 of 2017. By this application, the appellant/accused has communicated that he is in prison since the date of his arrest. The incident allegedly took place on 2nd March 2011. The appellant/accused, by his communication through jail, has

requested for expeditious hearing of his appeal, as he is undergoing jail sentence, and that is how this appeal came to be heard.

2 By this appeal, the appellant/accused is challenging the judgment and order dated 18th December 2015 passed by the learned Additional Sessions Judge, Sangli, in Sessions Case No.19 of 2014, thereby convicting the appellant/accused of the offence punishable under Section 376(2)(f) of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for 10 years apart from payment of fine of Rs.5,000/- and in default to undergo simple imprisonment for 1 month.

3 Brief facts leading to the institution of the present appeal can be summarized thus :

(a) The prosecutrix/PW3, at the relevant time, was a minor girl aged about 11 years, residing at Bhilwadi Datta Nagar, Taluka Palus, District Sangli. She was taking school education in 4th Standard at the Zilla Parishad School of

Bhilwadi. She was residing with her parents and younger sister named Chiwali.

- (b) On 2nd March 2011, at about 8.30 p.m., mother of the prosecutrix/PW3 directed her to bring back her younger sister Chiwali to the house from the house of Lohar. Accordingly, the prosecutrix/PW3 was taking her younger sister Chiwali to her home. At that time, the present appellant/accused met her and requested her to show the way. The prosecutrix/PW3, therefore, asked her sister Chiwali to go home and she had chosen to accompany the appellant/accused. It is case of the prosecution that when the prosecutrix/PW3 was accompanying the appellant/accused, PW2 Hrudaynath Kamble, resident of Bhilwadi, had seen them going by Hal Road. The appellant/accused informed the prosecutrix/PW3 that his house is situated at a longer distance and he will pay her money, if she showed him the way. In this manner, the appellant/accused had taken the prosecutrix/PW3 to the agricultural field located

at the area known as Halbhag. He, then, dragged her inside the sugarcane field and assaulted her. Thereafter, he denuded her and committed rape on her. The appellant/accused wrongfully confined the prosecutrix/PW3 in that agricultural field throughout the night and committed rape on her repeatedly.

- (c) At about 5.00 a.m. of 3rd March 2011, after hearing the siren of the sugar factory, the appellant/accused asked the prosecutrix/PW3 to tie her eyes by means of a cloth. She refused and ran towards the road.
- (d) When the prosecutrix came on the road, she saw a motorcycle coming towards her direction. PW5 Shashikant Gurav was riding that motorcycle and was going towards his agricultural field for watering it. The prosecutrix/PW3 stopped him and requested him to drop her at Datta Nagar. Accordingly, PW5 Shashikant Gurav took the prosecutrix/PW3 to Datta Nagar and gave a call in the locality which

was responded by the mother of the prosecutrix/PW3. Accordingly, the prosecutrix/PW3 was given in the custody of her mother.

- (e) The prosecutrix/PW3, then, disclosed the incident of commission of rape on her, to her parents. She was then taken to the Bhilwadi outpost of Police Station Palus. The incident was then disclosed to Assistant Police Inspector Vishnu Wadgaonkar (PW12) who had prepared Occurrence Report (Exhibit 54) and sent it to Police Station Palus. Accordingly, Crime No.23 of 2011 for offences punishable under Section 376 and 323 of the Indian Penal Code came to be registered. During the course of investigation, statement of PW2 Hrudaynath Kamble came to be recorded on 3rd March 2011 itself. The prosecutrix/PW3 was then referred to the Civil Hospital, Sangli, where she came to be examined by PW10 Dr.Nandkishor Gaikwad, Assistant Professor at Government Medical College and Hospital at Sangli. Bony age of the prosecutrix/PW3 came to be determined by PW7

Dr.Bharatkumar Mudlagi of Civil Hospital, Sangli. The prosecutrix/PW3 was subjected to the Ossification Test and she was found to be aged about 10 to 12 years. By visiting the primary school run by Zilla Parishad, Bhilwadi, certificate regarding date of birth of the prosecutrix/PW3 came to be collected. Her frock came to be seized and sent to the Forensic Laboratory. On completion of routine investigation, the charge-sheet came to be filed against the appellant/accused.

- (f) Charge for offences punishable under Section 376(2)(f), 323 and 201 of the Indian Penal Code came to be framed against 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 13 witnesses. Panch witness Rajendra Koli is examined as PW1, whereas the spot panchnama is at Exhibit 12. Hrudaynath Kamble is examined as PW2. The prosecutrix is examined as PW3.

The report lodged by her is at Exhibit 15. Panch witness Bajrang Jadhav is examined as PW4 and Seizure panchnama of the frock is at Exhibit 17. Shashikant Gurav is examined as PW5. Dr.Vishnu Shinde, Medical Officer of Civil Hospital, Sangli, is examined as PW6. Dr.Bharatkumar Mudlagi from the said hospital is examined as PW7. Shalani Mahadik, Head Mistress of Primary School, Zilla Parishad, Bhilwadi, is examined as PW8. Exhibit 32 is the extract of the General Register of the said school whereas Exhibit 33 is the Bonafide Certificate. Panch witness Samadhan Kharkande is examined as PW9. Exhibit 36 is the Memorandum statement. Dr.Nandkishor Gaikwad, Assistant Professor with Government Medical College and Hospital at Sangli, is examined as PW10. Case papers of the medical examination of the prosecutrix/PW3 are at Exhibit 38 whereas Medico Legal Certificate is at Exhibit 39. Tahsildar Shivaji Shinde, who had conducted Test Identification Parade is examined as PW11. Memorandum of Test Identification Parade is at Exhibit 40. Investigating Officers Vishnu Wadgaonkar,

Assistant Police Inspector, Bhilwadi Outpost and Police Inspector Bhausahab Gondkar of Police station Palus, are examined as PW12 and PW13 respectively.

- (h) The defence of the appellant/accused was that of total denial. After hearing the parties, by the impugned judgment and order, the learned trial court was pleased to convict the appellant/accused of the offence punishable under Section 376(2)(f) of the Indian Penal Code and he is sentenced accordingly, as indicated in the opening paragraph of the judgment. He, however, came to be acquitted of offences punishable under Sections 323 and 201 of the Indian Penal Code.

4 I have heard Shri Yashpal Thakur, the learned advocate appointed to represent the appellant/accused at the cost of the State. He argued that cross-examination of the prosecutrix/PW3 shows that because of darkness at the time of the alleged incident, she was not in a position to see the person who had committed

rape on her. Therefore, identity of the accused is seriously in dispute, and as such, it cannot be said with certainty that it was the appellant/accused, who had committed rape on the prosecutrix/PW3. The learned advocate further argued that the appellant/accused is convicted for the offence punishable under Section 376(2)(f) of the Indian Penal Code. He argued that evidence on record does not demonstrate that at the time of the alleged incident, the prosecutrix/PW3 was under 12 years of age. Her Birth Certificate was not produced. What was pressed in service is the date of birth of the prosecutrix/PW3 recorded in her School record. The learned advocate submitted that as per version of PW8 Shalani Mahadik, Head Mistress, date of birth of the prosecutrix/PW3 is recorded in the School record as per the Discharge card, but the said Discharge card was not produced in the court. The learned advocate for the appellant/accused criticized the Test Identification Parade conducted by PW11 Shivaji Shinde, Tahsildar, by submitting that the same is contrary to the guidelines given by this court. The victim has stated that the identification parade was conducted at the Police Station

where as PW11 Shivaji Shinde has stated that the same was conducted at the Tahsildar Office. Lastly, the learned advocate for the appellant/accused argued that in the wake of discrepant evidence adduced by the prosecution, non-examination of the mother of the prosecutrix/PW3 assumes importance and the appellant/accused is entitled for acquittal.

5 As against this, the learned APP has supported the impugned judgment and order by contending that evidence of the prosecutrix/PW3 is clear and unambiguous. She has identified the appellant/accused even in the Test Identification Parade. Her evidence is duly corroborated by medical evidence adduced by the prosecution. Hence, the appeal deserves to be dismissed.

6 I have carefully considered the rival submissions and also perused the Record and Proceedings including oral as well as documentary evidence. Case of the prosecution, primarily, rests on testimony of the prosecutrix/PW3, who is victim of the crime in question. Evidence of the prosecutrix/PW3 shows that at the

time of the incident, she was a school going girl, taking education in 4th Standard, at Zilla Parishad School of Bhilwadi in Sangli district. While assessing evidence of the victim of the sexual offence, the court is expected to bear in mind human psychology and behaviour. Victim of such offence of rape is not merely an injured witness but she stands on higher pedestal than the injured witness, the reason being apart from physical harm, she also suffers psychological trauma. The court, therefore, shoulders a great responsibility while trying an accused of charge of rape. The court is, therefore, required to show utmost sensitivity to such type of offence by appreciating evidence on broader probabilities of the prosecution case. Keeping in mind these aspects, let us examine what the prosecutrix/PW3 has stated about the incident in question. As per version of the prosecutrix/PW3, on 2nd March 2011, she had been to the house of Lohar for bringing back her younger sister Chiwali, on instructions of her mother. During the course of return journey, she met a middle aged person, who requested her to show the way. The prosecutrix/PW3 deposed that she, therefore, asked her sister Chiwali to go to the house and

she accompanied that person up to the tar road. That person then asked her to accompany him up to his house by alluring her that money will be paid to her. He informed her that his house is situated far away. The prosecutrix/PW3 then started walking with him and proceeded towards the road leading to Halbhag area. As per version of the prosecutrix/PW3, then that person took her in the sugarcane field and started beating her. Her mouth was gagged by pressing her throat. The prosecutrix/PW3 was then pushed on the ground and he took out her clothes. By removing his clothes, the said middle aged person committed rape on her. The prosecutrix/PW3 deposed that she suffered severe pain and started crying. However, said person repeated the said act causing severe pain to her. Evidence of the prosecutrix/PW3 shows that throughout the night, such act continued, and she was crying.

7 What happened in the morning hours of 3rd March 2011 is also stated by the prosecutrix/PW3. As per her version, at about 5.00 a.m., they heard siren of the sugar factory and that person asked her to cover her eyes with cloth. She refused and

removed that cloth from her eyes. Then, the rapist ran away, and she came on the road from the sugarcane crop. The prosecutrix/PW3 stated that then one motorcycle came and she requested the rider to take her to her house. The said person dropped her at the house and she disclosed the incident to her parents. She was, then, taken to the police station, where she lodged report Exhibit 15.

8 The prosecutrix/PW3 further stated that subsequently police called her in their office and asked her to identify the rapist from out of eleven persons, who were standing in a row. She identified the person who had committed rape on her. Then, as seen from evidence of the prosecutrix/PW3, the appellant/accused was shown to her and she had identified the appellant/accused as the person who had committed rape on her. The prosecutrix/PW3 also identified her yellow coloured frock while in the witness box.

9 The prosecutrix/PW3 was subjected to searching cross-examination in respect of directions and the positions of roads in Village Bhilwadi. She admitted that only one road is available for proceeding towards Halbhag and that road passed through the tower. She, however, denied that if a person shouts from the spot of the incident, then the sound can be heard at the turns of the road and by inmates of the houses. In cross-examination, the prosecutrix/PW3 has stated that it was not possible for her to run away from the rapist as he had caught her. She admitted that she did not scratch his hands. It is also brought on record from her cross-examination that she as well as the rapist were awake from 8.30 p.m. to 5.00 a.m. in that night. She has stated that because of darkness in the sugarcane field, she did not see that person, but has further stated that she had seen face of that person in the light and also identified him in the Test Identification Parade.

10 This is the version of the prosecutrix/PW3 about the incident of commission of rape on her when she was taking education in Fourth Standard at the school at Bhilwadi. The

incident, as seen from the evidence of the prosecutrix/PW3, took place in the night intervening 2nd March 2011 and 3rd March 2011. The prosecutrix/PW3 was taken from the road leading to her house by the appellant/accused to Halbhag area and then she was raped at the sugarcane field throughout the night. Thus, the prosecutrix/PW3 had been in the Company of the appellant/accused right from about 8.30 p.m. of 2nd March 2011 to 5.00 a.m. of 3rd March 2011. During whole night, she was subjected to sexual assault. Thus, considering the length of time during which the prosecutrix/PW3 was in company of the appellant/accused and the nature of act complained of by her to have been committed on her by the appellant/accused, stray sentence in her cross-examination that due to darkness she could not see that person, is not sufficient to jettison her version that it was the appellant/accused who had committed rape on her. Ultimately, she was in the company of the rapist for a period of more than nine hours. They proceeded by road for sometime and then she was dragged inside the sugarcane field. While in the dock, she had identified the appellant/accused as the person who had raped

her. Therefore, stray sentence in cross-examination that because of the darkness, she could not see that person, cannot be given overbearing importance.

11 The appellant/accused, on his arrest was subjected to Test Identification Parade by the prosecution. He came to be arrested on 12th September 2013. On 17th September 2013, as seen from evidence of PW13 Bhausahab Gondkar, Police Inspector, a letter was written to the Executive Magistrate for conducting Test Identification Parade of the appellant/accused. Names of the witnesses were also supplied to the Executive Magistrate by the Investigating Officer. PW11 Shivaji Shinde had conducted the Test Identification parade, memorandum of which is at Exhibit 40. It is seen from the Memorandum of the Test Identification Parade that along with ten panch witnesses, who were from the age group of 35 years to 42 years, the appellant/accused was made to stand in order to subject him to the identification by the prosecutrix/PW3 i.e. the victim of the crime in question. She has identified the appellant/accused by touching his person.

Subsequent thereto, PW2 Hrudaynath Kamble had also identified the appellant/accused. The Memorandum of Test Identification Parade so also cross-examination of PW11 Shivaji Shinde, Executive Magistrate, goes to show that witnesses were kept at his ante-chamber where as the Test Identification Parade was conducted in his chamber. Happenings in the chamber was not visible from his ante-chamber. Arrangement for changing clothes by the appellant/accused was also made by PW11 Shivaji Shinde, Executive Magistrate. Memorandum of Test Identification Parade further shows that the Executive Magistrate had ascertained from the witnesses as to whether they had an opportunity to see the appellant/accused after his arrest. On getting himself assured that there was no such opportunity for the witnesses, the Test Identification Parade came to be conducted in which the prosecutrix/PW3 as well as PW2 Hrudaynath Kamble had identified the appellant/accused. Thus, the evidence of identification of the appellant/accused by the prosecutrix/PW3, while in the witness box is gaining corroboration from the Test Identification Parade conducted by the prosecution.

12 It is well settled that if evidence of the prosecutrix/PW3 is clear, unambiguous and trustworthy, then there is no necessity for corroboration to her evidence in such type of offence. However, in this case, there is sufficient evidence to corroborate version of the prosecutrix/PW3. PW2 Hrudaynath Kamble is a resident of Bhilwadi. As per his version, at about 8 to 8.30 p.m. of 2nd March 2011, he was taking walk on Hal Road and during the course of his walk, he saw the appellant/accused with a girl aged about 9 to 9½ years. PW2 Hrudaynath Kamble has deposed that he as well as the appellant/accused belongs to the same caste, and therefore, he was knowing the appellant/accused. During the course of his evidence, PW2 Hrudaynath Kamble had claimed that he was in a position to identify the girl who was accompanying the appellant/accused. Therefore, the prosecutrix/PW3 was called from the office of the Public Prosecutor for showing her to PW2 Hrudaynath Kamble. While in the witness box, PW2 Hrudaynath Kamble has also identified the prosecutrix/PW3. From cross-examination of this witness, case of the prosecution is further cemented. It is elicited from his cross-examination that

the house of the appellant/accused is situated near his house and he knows all family members of the appellant/accused, including daughter of the appellant/accused, who is aged about 8 to 9 years. Similarly, from his cross-examination it is also brought on record that his statement was recorded by police immediately on 3rd March 2011 itself. There is nothing on record to infer that PW2 Hrudaynath Kamble has any enmity towards the appellant/accused for stating a lie. There are no suggestions to that effect made to him in the cross-examination. Thus, evidence of PW2 Hrudaynath Kamble unerringly points out that soon before the incident of commission of rape on the prosecutrix/PW3, it was the appellant/accused who had taken her towards the Hal Road, where the incident of rape on the prosecutrix/PW3 was committed.

13 Evidence of the prosecutrix/PW3 is further gaining corroboration from evidence of PW5 Shashikant Gurav, who has witnessed the post event happenings. Evidence of this witness shows that at about 5.30 a.m. of 3rd March 2011, he was

proceeding towards his agricultural field on his motorcycle for providing water to his field. When he was proceeding towards Halbhag area, suddenly a girl came on the way from the sugarcane crop and therefore, he stopped his motorcycle. PW5 Shashikant Gurav has stated that the girl was frightened and was unable to speak. Then, she requested him to drop her at Datta Nagar locality, and therefore, he took her to the chawl at Datta Nagar locality and gave a call to the residents of that locality. The call was responded by the mother of the prosecutrix/PW3 and he, therefore, gave custody of that girl to her mother. In cross-examination, this witness has stated that the said girl was unable to speak out as to what had happened with her. It is, thus, clear from evidence of this witness that he found the prosecutrix/PW3 in a frightened condition at about 5.30 a.m. and she had come out of the sugarcane field to obstruct his way. The condition of the girl when she was witnessed by PW5 Shashikant Gurav and narrated by him before the court is certainly a relevant fact and is admissible in view of provisions of Section 6 of the Evidence Act. After lodging the First Information Report (FIR) with Police

station Palus on 3rd March 2011 itself, the prosecutrix/PW3 came to be examined by PW10 Dr.Nandkishor Gaikwad, Assistant Professor, working in Government Medical College and Hospital at Sangli. Evidence of PW10 Dr.Nandkishor Gaikwad, shows that the victim female child had narrated to him history of the incident. As per version of PW10 Dr.Nandkishor Gaikwad, she told him that on the pretext of finding out the address, one unknown person took her in the open place and committed sexual intercourse with her repeatedly till 5.00 a.m. of that day. These narrations of the victim made to the attending Medical Officer are admissible in view of provisions of Section 157 of the Evidence Act. Apart from that, in medical examination of the prosecutrix/PW3, PW10 Dr.Nandkishor Gaikwad has found following external injuries on her person :

- i) 2x2 cm abrasion over left lateral aspect of right elbow. Black in colour.
- ii) 2x2 cm abrasion over lateral aspect of left elbow, black in colour.
- iii) Multiple small abrasion present over both lateral aspect of abdomen and trunk.

- iv) Multiple abrasion seen over back on lumber and sacral region.
- v) Right lower leg abrasion on lateral aspect 4x1 cm.
- vi) Contusion seen over left lower eyelid measuring 2x2 cm. bluish in colour
- vii) Upper lip contusion measuring 2x2 cm bluish in colour
- viii) Contusion on lower lip bluish in colour measuring 2x2 cm.

14 Evidence of PW10 Dr.Nandkishor Gaikwad further shows that during genital examination of the prosecutrix/PW3, he found her hymen ruptured at 12, 4, 6, 8, 11 O'Clock positions. PW10 Dr.Nandkishor Gaikwad also noticed laceration present over fourchette and minimal per-vaginal bleeding. He also noticed small contusion over left labia majora 2x2 cm over vulva region of the prosecutrix/PW3. PW10 Dr.Nandkishor Gaikwad opined that external as well as internal injuries were possible due to sexual assault on the victim.

15 In cross-examination of PW10 Dr.Nandkishor Gaikwad it is brought on record that external injuries can be caused by fall on hard surface and hymen can be ruptured for various other

reasons also. At this juncture, it is worthwhile to note that no such theory of fall on hard surface or various reasons causing rupture of hymen was put forth to the prosecutrix/PW3 while she was under cross-examination. As such, these bald suggestions are of no use to doubt the prosecution case. Suffice to state that external injuries on the person of the prosecutrix/PW3 coupled with injuries to her private part noted by PW10 Dr.Nandkishor Gaikwad are fully corroborating the version of the prosecutrix/PW3. Evidence of PW10 Dr.Nandkishor Gaikwad is gaining corroboration from contemporaneous documents in the form of Medical Certificate at Exhibit 39 and Medico Legal Case papers of the prosecutrix/PW3 at Exhibit 38. His evidence is further gaining corroboration from evidence of PW6 Dr.Vishnu Shinde, Medical Officer of the Civil Hospital, Sangli, who has deposed that he referred the prosecutrix/PW3 to the Gynecologist Ward of the Civil Hospital, Sangli. It is, thus, clear that medical evidence is fully corroborating the version of the prosecutrix/PW3.

16 The appellant/accused is convicted of the offence punishable under Section 376(2)(f) of the Indian Penal Code as the prosecutrix/PW3 was held to be a girl under 12 years of age. To establish age of the prosecutrix/PW3, the prosecution has relied on evidence of Ossification Test conducted on her so also her date of birth recorded in the School Register. Evidence of the prosecutrix/PW3 shows that she was taking school education at the Primary School run by the Zilla Parishad, Bhilwadi. PW8 Shalani Mahadik, Head Mistress of the said school had produced and proved relevant page of the General Register maintained by the school which is at Exhibit 32. The General Register in original was also brought by this witness. On the strength of said General Register, Bonafide Certificate Exhibit 33 showing date of birth of the prosecutrix/PW3 came to be issued by the Zilla Parishad School of Bhilwadi. Provisions of Section 35 of the Indian Evidence Act, 1872, makes it clear that if entries are made by the public servant in the official book in discharge of his official duty, then said entry become relevant fact and is admissible in evidence.

The date of birth of the prosecutrix/PW3 recorded in her school record, as seen from the General Register at Exhibit 32 is 30th October 1999. This date of birth came to be recorded in the School Register on the basis of Discharge card of the hospital. The same has not been produced on record by the prosecution. However, that by itself is not sufficient to cause a shadow of doubt on the prosecution case. The General Register is maintained by the Primary School of Zilla Parishad, Bhilwadi, regularly in the routine official course of its business and the date of birth of the prosecutrix/PW3 recorded therein is ante litem motam in nature. There was no reason for the school authorities to mention a false entry in respect of the date of birth of the victim as 30th October 1999 and that too when the prosecutrix/PW3 was admitted in the said school in first standard, way back in the year 2006.

17 The prosecutrix/PW3 was subjected to the Ossification Test which was conducted by PW7 Dr.Bharatkumar Mudlagi from the Civil Hospital, Sangli. Evidence of this witness goes to show that X-rays of wrist, elbow and pelvis of the prosecutrix/PW3 were

taken and upon examining those X-ray reports, this witness gave an opinion that the victim was 10 to 12 years of age. True it is that there is error of plus or minus sign of two years in the age determined by the Ossification Test, but in the case in hand, there is evidence regarding recorded date of birth of the prosecutrix/PW3 in the records of the Zilla Parishad School which shows that the prosecutrix/PW3 was born on 30th October 1999. The incident in question took place on 2nd March 2011. Thus, at the time of the incident in question, the prosecutrix/PW3 was below 12 years of age.

18 In the result, the prosecution has certainly established commission of the offence punishable under Section 376(2)(f) of the Indian Penal Code against the appellant/accused and minimum sentence prescribed for the said offence was imposed on him by the learned trial court. Hence, the appeal is devoid of merit, and therefore, the order :

ORDER

i) The appeal is dismissed.

- ii) In view of disposal of the appeal itself, Criminal Application No.1271 of 2017 does not survive and stands disposed of.

(A. M. BADAR, J.)