

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

CRIMINAL APPEAL NO. 699 OF 2015

Ashok Sadhu @ Sahadu Nimse
Age: 56 years, Occu. Agri.,
R/o. Nimgaon Wagha,
Tq. & Dist. Ahmednagar

... Appellant
(Orig. Accused)

Versus

The State of Maharashtra
Through the Police Inspector,
Nagar Taluka Police Station,
Dist. Ahmednagar

... Respondent
(Orig. Complainant)

....

Mr. N. V. Gaware, Advocate for the appellant.
Mr. S. M. Ganachari, APP for the respondent-State.
Mrs. S. G. Chincholkar, Advocate for the victim (Appointed)

....

CORAM : SMT. SADHANA S. JADHAV, J.

DATED : 17th JULY, 2019

ORAL JUDGMENT :-

1. Heard the respective counsel.
2. In the present case, although compensation is awarded to the victim, she has not been made party at the time of filing of appeal for bail and in the interest of justice, this Court had requested learned counsel Mrs. S. G. Chincholkar to espouse the cause of the victim and she has graciously accepted to do so.

3. The appellant herein is convicted by the Additional Sessions Judge, Ahmednagar vide judgment and order dated 27/02/2015 in Special Case No. 289 of 2010, for the offence punishable under Section 376 of Indian Penal Code and under Section 3(1)(xii) of the Scheduled Castes and Scheduled Tribes (Protection of Atrocities) Act, 1989 and sentenced to suffer rigorous imprisonment for 10 years and to pay fine of Rs.50,000/- (Rupees Fifty Thousand only) for the offence punishable under Section 376 of Indian Penal Code, in default to undergo simple imprisonment for 4 months. The accused is sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs. 25,000/- (Rupees Twenty Five Thousand Only), in default to undergo simple imprisonment for 3 months for the offence punishable under Section 3(1)(xii) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989.

4. Such of the facts necessary for the decision of this appeal are as follows :

- (i) On 08/09/2010, informant who happens to be the brother of victim, filed an application before the Superintendent of Police, Ahmednagar, alleging therein that on 02/08/2010 he received a phone call from his mother informing him that his sister who happens to be dumb and deaf is not keeping good health and that there is swelling on her

abdomen. The brother rushed to Nimgaon Wagha, Taluka Nagar, District Ahmednagar and had taken the victim to the doctor. She had undergone ultrasonography and it was revealed that she was carrying pregnancy of eight months.

- (ii) P.W.3 Raosaheb Yashwant Kedar and his sister had asked the victim by signs and gestures that who is responsible for the same and she has disclosed by signs and gestures so also by writing on a piece of paper that the appellant – Ashok Sadhu @ Sahadu Nimse, who happens to be her neighbour, is responsible for the same. Needless to state that the victim has studied upto 11th standard.
- (iii) It is stated in the application which is at Exhibit-58 that since the family members were apprehensive of exposure to social obloquy due to this incident, they had refrained from lodging any complaint and had taken the victim to Vishwa Balak Kendra, Nerul, Navi Mumbai. She was admitted in Dr. D.Y. Patil Hospital on 16/08/2010. On 04/09/2010 the victim has given birth to a male child. The sister of the victim was unable to maintain the child and therefore, they had decided to hand over the child to

Vishwa Balak Kendra, Navi Mumbai from where they would facilitate adoption of abandoned children. He had requested the Superintendent of Police, Ahmednagar to take action against the accused as the family was traumatised by the whole episode.

- (iv) It is seen from the record that the Superintendent of Police had not taken any action in respect of the said application. P.W.3 Raosaheb Kedar had inquired with the police regarding action against the accused and he was informed that the police are making confidential inquiry. P.W.3 was advised by the Vishwa Balak Kendra, Navi Mumbai, that in the eventuality of a rape case, then it would be difficult to accept the abandoned child unless there is a formal complaint with the police and therefore, he had once again approached the police on 06/10/2010.
- (v) On the basis of report, Crime No.I-153/2010 was registered at Nagar Taluka Police Station against the appellant for the offences punishable under Section 376 of Indian Penal Code and under Section 3(1)(xii) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

- (vi) After completion of investigation, charge-sheet was filed by the Superintendent of Police, Ahmednagar on 30/11/2010. It is a pitiable situation that the lady police officer had not mentioned the name of the victim in the list of witnesses. There is no doubt that the Superintendent of Police had failed in her duties. During investigation, statement of the victim was recorded with the help of interpreter Sau. Pushpa Prabhakar Shrotri (P.W.7), who was working as teacher with Dumb and Deaf school for a considerable period of time. The said statement is marked as Exhibit-45. It appears that the statement of the victim was recorded on 01/11/2010 in the presence of the Assistant Superintendent of Police. She has written it in her own handwriting and in column No.7, she has mentioned that there was forcible sexual assault by the appellant in her house. The statement is recorded in a printed proforma and therefore, there was no question of narrating the facts elaborately. The objective questions were put to the victim and she has answered the same. The said certificate has been proved by P.W.7 Sau. Pushpa Shrotri. In the course of investigation, the blood samples were sent for DNA test and the results are as

follows :

“For all 14 different genetic systems analyzed with PCR, accused putative father Ashok matched the obligate paternal alleles present in the child Shubam. Similarly, the mother “X” also matched the obligate maternal alleles at the 14 loci.”

5. Accused putative father Ashok and mother “X” are concluded to be the biological parents of the child Shubam. The said certificate is at Exhibit-138, as it has been proved by P.W.24 Dr. Varsha Rathod, who was working with Forensic Science Laboratory, Kalina, Santacruz (East), Mumbai as an Assistant Director.

6. At the trial, the prosecution has examined as many as 24 witnesses. The material witnesses would be P.W.3-the complainant Raosaheb Kedar, P.W.7-the interpreter, P.W.4-mother of the victim and P.W.5-sister of the victim P.W-21 the victim herself as well as P.W.24-the Assistant Director of Forensic Science Laboratory and P.W.23-Mrs. Jyoti Priya Singh, the then Superintendent of Police at Ahmednagar.

7. P.W.3-Raosaheb Kedar has deposed that the accused happened to be a person residing in their locality. His sister miss “X” is 30 years old. She is unmarried and she is dumb and deaf by birth. She is educated upto 10th standard and she is acquainted with the people residing in the neighbourhood. According to him, his parents are agricultural labours and his another sister works as Assistant in

Anganwadi, whereas she has been residing in Pune since 2006. According to him, his sister-victim was alone at home. He has deposed in consonance with his FIR and specifically stated that they were shocked to learn that the victim has conceived pregnancy and they were apprehensive that if they take treatment at Ahmednagar and the victim will deliver child, the whole family would be exposed to social obloquy. Therefore, she was taken to Mumbai where her sister resides at Mulund. His sister P.W.5 Lata Pachare had inquired with the victim and at that time the victim has disclosed that the accused used to come to her house during night and committed forcible sexual assault upon her. The victim was taken to Noor Hospital at Gowandi, Mumbai. P.W.3 and his friends inquired with Vishwa Balak Kendra, Nerul in New Mumbai and admitted the victim in D. Y. Patil Hospital at Nerul, since the pregnancy was at an advanced stage, there could be no medical termination of pregnancy and at last on 04/09/2010 the victim delivered a male child. After three to four days from delivery, they handed over the custody of child to Vishwa Balak Kendra. He has specifically stated that on 08/09/2010 he had approached the Superintendent of Police, Ahmednagar and informed about the atrocity meted out to his sister. He was not aware of the procedure of lodging of the report, however, by the advise from Vishwa Balak Kendra, he had finally lodged FIR Exhibit-15.

8. As far as the allegations against the accused appellant are concerned, the accused has not been able to create any dent in the evidence of P.W.3 in the course of cross examination. However it is elicited in the cross examination that on 06/10/2010 he had given a written report to the police as no action was taken on his application dated 08/09/2010 addressed to the Superintendent of Police, Ahmednagar and he was told that the Superintendent of Police is making confidential enquiry. He has produced the application dated 08/09/2010 and hence, the statement is proved at Exhibit-58. The FIR is at Exhibit-15.

9. P.W.4 Tarabai Yashwant Kedar happens to be the mother of the victim. She has deposed before the Court in the manner in which the incident had come to light. She has specifically deposed that once she had seen the victim while picking the clay of soil and small stones and putting in her mouth. She found it strange. The victim was trying to say something to her but she could not understand. Then she noticed her enlarged abdomen. Therefore, she was constrained to call her son P.W.3 Raosaheb. They, then took her to the hospital of Dr. Mrs. Deshpande and after undergoing sonography in the hospital of Dr. Kardile, they had learnt that the victim was pregnant. She has also deposed that due to fear of disreputation in the society, they did not approach the police.

10. P.W.5 Lata Pachare has also deposed on the same lines and she has further stated that her sister has disclosed to her in writing that the accused used to come to their house during night in an inebriated state and caused forcible sexual assault upon her.

11. P.W.7 Sau. Pushpa Prabhakar Shrotri is the material witness. She has deposed before the Court that she was serving as teacher in Jankibai Apte Dumb and deaf school, Ahmednagar till January 2011. The Headmaster of the said school has directed her to converse and interview the victim. A request was made on the basis of letter dated 26/10/2010 by Assistant S.P. (Rural) Ahmednagar. The letter is at Exhibit-46. The statement was recorded in the presence of Assistant S.P. Mrs. Jyoti Priya Singh. By signs and expressions the victim had mentioned her name. The victim can read and write as she had studied upto 11th standard in Navnath Vidyalaya, Takali Khatgaon. The victim had given answers to the questions in the proforma. Objective questions were put to her. She had disclosed that she knows the accused since her childhood. She has further stated that the accused has sexually assaulted her once in her house. The victim was with short I.Q. P.W.7 had specifically asked her as to whether she was assaulted or forced to drink liquor before sexual intercourse and the answers of the victim were in the affirmative. The victim had delivered the baby boy at Mumbai. She had written her reply to all 13 questions

in her handwriting in the presence of the Asstt. S.P. Mrs. Jyoti Priya Singh. The witness has admitted the contents of said statement and hence it was marked at Exhibit-47. In the cross examination, the witness has admitted that hearing and speech impaired children appear normal but their I.Q. is likely to be below average.

12. The most relevant witness in the present case would be P.W.21 the victim herself. It appears from the evidence on record that the witness was disturbed. Her statement was recorded with the help of the interpreter Shailaja. She had answered in the affirmative that the accused used to come to her house and thereafter hugged her, denuded her of her clothes, undressed himself and sexually assaulted her. She has identified the accused in the Court. The victim has deposed that at the relevant time her mother had been to the agricultural land and the incident took place during the day, in the absence of her parents. She has identified her signature on her previous statement. The state of mind of the victim can be gathered from question No.2 in the cross examination. She has rightly denied that she has not studied in the deaf and dumb school and that she is educated upto 11th standard, but not able to read and write. She had also expressed her inability to write before the Court. She mentioned the date of incident as 28.01.2013. She could not understand the rest of the questions.

13. P.W.20 Sau. Shailaja Dhananjay Pandkar obtained diploma as a teacher for deaf and dumb students. She had obtained the said diploma from Saint Rui Dumb and Deaf school, near S.P. College, Pune and she joined as a special teacher in Smt. Jankibai Apte Deaf and Dumb School, Ahmednagar. She was called as an interpreter in the present case by issuing witness summons to interpret the signs of the victim to the Court.

14. P.W.23 Mrs. Jyoti Priya Singh was posted as S. D. P.O. Nagar (Rural). She has deposed before the Court that on 06/10/2010 Raosaheb Yeshwant Kedar has lodged a complaint in Nagar Taluka Police Station and on the same day it was forwarded to her after registering offence vide Crime No.I-153/2010. There is no reference to the report lodged by P.W.3 on 08/09/2010 i.e. within four days after the child was delivered by the victim. She has deposed in respect of the steps taken by her in the course of investigation except that she had called P.W.7 Sau. Pushpa Shrotri to record statement of the victim in her presence. Certain irrelevant and immaterial omissions of P.W.3 are tried to be brought on record during recording of evidence. Upon perusal of the evidence of P.W.23, it is more than clear that there was deliberate attempt to save the accused. Needless to say that she has failed in her duties as an Investigating Officer in the present case. Needless to reiterate that she has not mentioned the name of the

victim as a relevant witness in the index of the charge-sheet. The fact that she was conducting a discreet inquiry instead of registering FIR on the basis of the statement dated 08.09.2010 is sufficient to hold that she was insensitive towards the incident. She was trying to save the accused at any cost. She has utterly failed to discharge her duties in accordance with law. In fact, the Court should have taken action under Section 166A(c) of Indian Penal Code, which reads as follows:

“166A. Public servant disobeying direction under law.—Whoever, being a public servant,—

(a)

(b)

(c) fails to record any information given to him under sub-section (1) of section 154 of the Code of Criminal Procedure, 1973 (2 of 1974), in relation to cognizable offence punishable under section 326A, section 326B, section 354, section 354B, section 370, section 370A, section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509,

shall be punished with rigorous imprisonment for a term which shall not be less than six months but which may extend to two years, and shall also be liable to fine.”

15. P.W.24 is Dr. Varsha Rajesh Rathod, who has proved the DNA certificate which is at Exhibit-138. Upon perusal of the evidence it is more than clear that the prosecution has proved its case beyond reasonable doubt. The DNA report and the statement of the victim

before the interpreter as well as before the Court are sufficient to indicate that it was the accused alone who has committed forcible sexual assault upon the victim. It is further pertinent to note that even in the statement recorded under Section 313 of the Code of Criminal Procedure, the accused has not only maintained silence but not answered to question No.113 and stated that there was dispute between his family and the family of prosecutrix on account of land situated outside the limits of Nimgaon Wagha. He could not mention the exact year when the dispute had arisen, but has stated that both the families were claiming ownership over the said land and therefore, the witnesses deposed against him. This is not only evasive answer but a false answer in defense. The victim has specifically stated, right from the beginning that it was none other than the accused who has committed forcible sexual assault upon her. There are certain lacunas in the investigation as well as the prosecution. However, the Court has been conscious enough to summon the witnesses.

16. The Hon'ble Apex Court in the case of Bablu Kumar and others Vs. State of Bihar and another¹ held that:

“Court cannot be a silent spectator or mute observer when it presides over trial. It is the duty of Court to see that neither prosecution nor accused play truancy with criminal trial or corrode sanctity of the proceeding.”

¹ (2015) 8 SCC 787

Hence, the Court had issued summons to the interpreter, the victim and the Assistant Director of Forensic Lab, as material witnesses. There is no reason to interfere with the judgment of the trial Court as the learned Judge has assigned justifiable reasons for convicting the accused for the offence punishable under Section 376 of Indian Penal Code.

17. As far as Section 3(1)(xii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 is concerned, it cannot be said that the victim was subjected to sexual assault by virtue of her caste but the appellant had taken undue advantage of her disability. It is an act of a pervert, with no respect for dignity of a woman. In the given circumstances the caste cannot be a relevant factor and therefore the accused deserves to be acquitted of the offence punishable under Section 3(1)(xii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

18. At this stage, the learned APP has submitted that the amount of fine has not been paid, however, the sentence of fine would commence only after the accused has undergone substantive sentence, and therefore, it would not be necessary to take the same into consideration. If the amount of fine is maintained, the victim would be entitled for compensation under the Manodhairya Scheme.

19. This Court had requested the learned counsel Mrs. Chincholkar to espouse the case of the victim and hence, she is entitled to professional fees as contemplated by law to be paid by High Court Legal Aid Services Sub-Committee, Aurangabad.

20. Hence, I proceed to pass the following order:

ORDER

- (i) The appeal is hereby partly allowed.
- (ii) The appellant/accused is hereby acquitted of the offence punishable under Section 3(1)(xii) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989.
- (iii) The conviction for offence punishable under Section 376 of Indian Penal Code is maintained.
- (iv) Sentence of fine for offence punishable under Section 376 of Indian Penal Code is maintained.
- (v) The appeal is accordingly disposed of.

[SMT. SADHANA S. JADHAV, J.]

SMS