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***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION***

CRIMINAL APPEAL NO.50 OF 2014

Kersu Brijraj Yadav Age : 46 years, Occu:Nil R/at : Galasheth Tabelawal Chawl, Gangdepada, Dhaniv, Nalasopara (E), (At present lodged in Thane Central Jail, Thane)	...Appellant (Ori.Accused)
Versus	
The State of Maharashtra (At the instance of Nalasopara Police Station)	...Respondent

Ms.Saili N. Dhuru i/b Mr.K.S.Patil, for the Appellant.

Mr.Vinod Chate, A.P.P. for the Respondent – State.

CORAM : REVATI MOHITE DERE, J.

DATE : 25th MARCH, 2019

ORAL JUDGMENT :

1. The Appellant vide Judgment and Order dated 8th January, 2014, passed by learned Additional Sessions Judge, Vasai, in Sessions Case No.68 of 2011, has been convicted and sentenced as under:-

- for the offence punishable under Section 376(f) of the Indian Penal Code, to suffer R.I for 10 years and to pay fine of Rs.25,000/- in default to

suffer R.I. for 1 year;

- Out of the said fine amount of Rs.25,000/-, a sum of Rs.20,000/- was to be paid to the parents of the victim by way of compensation.

2. The prosecution case is as under:-

On 4th April, 2011, according to PW1 (mother of PW2), the incident took place at about 1.30 p.m., when she asked her daughter (PW2), aged 7 years to fetch water from a bore well. According to the prosecution, the Appellant took PW2 near the compound wall behind Hanuman Temple and sexually assaulted her. Pursuant to the said incident, PW1 lodged a complaint on the very same day i.e. on 4th April, 2011, with the Nalasopara Police Station, which was registered vide C.R.No.I-192 of 2011, for the alleged offence punishable under Section 376(f) of the Indian Penal Code.

Pursuant to the registration of the offence, investigation commenced and after investigation, charge-sheet was filed as against the Appellant, in the Court of the learned J.M.F.C, Vasai. As the offence punishable under Section 376(f) of the Indian Penal Code was exclusively triable by the Court of Sessions, the matter was committed to the Court of

Sessions. The learned Additional Sessions Judge, Vasai, framed charge as against the Appellant, to which he pleaded not guilty and claimed to be tried. The prosecution in support of its case examined six witnesses. PW1 – mother of the victim girl; PW2 – victim girl, PW3-father of the victim girl; PW4-Dr.Vaibhavi Prasad Indulkar, Medical Officer, attached to the Civil Hospital, Thane; PW5 – Dr.Avinash Anant Dongare, who examined the Appellant and PW6 – P.S.I. - Shankar Bhiku Salunkhe, attached to the Nalasopara Police Station.

The defence of the Appellant was that of denial and false implication. The Appellant examined DW1-Rinky Satish Singh, as his defence witness.

After completion of the trial, the learned Additional Sessions Judge convicted and sentenced the Appellant as stated in paragraph 1 of this Judgment.

3. Learned Counsel for the Appellant vehemently submitted that there are several contradictions in the evidence of the witnesses, in particular the evidence of PW1, PW2 and PW3. She submitted that the victim girl (PW2) was taken for medical examination on the next day i.e.

on 5th April, 2011 and that there is no explanation for the same. She submitted that certain admissions that have come in the cross examination of PW2 show that on the next day, she attended school and that she was told by her mother what to depose. She submitted that the Appellant has been falsely implicated in the said case, as PW1 – mother of the victim girl had not paid an amount of Rs.500/- to the Appellant and as they were jealous of his business.

4. Learned A.P.P. submitted that no interference was warranted in the impugned Judgment and Order.

5. Heard learned counsel for the parties at length and perused the papers with the assistance of the learned counsel.

6. According to PW1-mother of the victim girl, her daughter was about 7 years of age, at the relevant time. She has stated that she knew the Appellant as he was running a tea stall in the nearby vicinity of the chawl where she was residing. She has stated that as there was water problem on 4th April, 2011, at about 1.00 to 1.30 p.m., she sent her daughter-PW2 to

fetch water from the bore well near the Hanuman Temple. She has stated that as her daughter did not return for about half an hour, she sent her elder daughter to look out for PW2. She has stated that her elder daughter returned back stating that something had happened to PW2 and hence she went to the spot. She has stated that on reaching there, she saw PW2 lying on the ground behind the temple. She has stated that when she asked her daughter (PW2), what had happened, she started crying and told her that Chaiwala Uncle had gagged her with a towel, removed her undergarment and inserted his private part into hers. She has stated that as she was in pain, she started shouting, as a result of which, the Appellant fled away. She has stated that she noticed that PW2s' private part was swollen and bleeding. She has further stated that she disclosed to the persons gathered at the spot, as to what had happened. She has stated that on hearing her daughter's cry, the Appellant started running and the persons who were gathered there chased and caught him. Accordingly, she went to the Police Station and lodged the FIR/Complaint (Exhibit – 7A). She has further stated that the police referred her daughter to the Primary Health Centre, Nalasopara; and that she had handed over the clothes worn by her daughter (PW2). PW1 has also stated that she had seen the Appellant running and

has stated the clothes worn by him at the relevant time.

7. The tenor of the cross examination is to show that there were several people who were present near the bore well at the relevant time and hence it was not possible for the Appellant to take PW2 to an isolated spot from near the bore well. The endeavour of the cross-examination is also to show that the said witness has lodged a false case against the Appellant as an amount of Rs.500/- was due to be paid to the Appellant. The cross examination of PW1, does not in any way dent her evidence, that has come on record in the Examination-in-Chief.

8. The prosecutrix, aged 7 years has also stated that on the day of the incident, she had gone to fetch water; that the Appellant called her, grabbed her and thereafter sexually assaulted her. She has stated that when she started shouting, the Appellant fled away, after which she narrated the incident. A few answers that have been elicited in the cross-examination will have to be examined, keeping in mind the victim girl's entire evidence and not in an isolation. It also appears that the victim girl was about 7 years of age at the relevant time. Merely because

PW2 in her cross-examination has stated that her mother had told her how to speak in Court and what to say, would not in anyway render the victim's testimony suspect. It cannot be lost sight of that the victim girl was only 7 years of age and was deposing after a year. The victim girl has categorically denied the suggestion that no such incident had taken place. It is thus evident that the evidence of PW1 and PW2 corroborates each other and the said evidence is again corroborated by the medical evidence that has come on record.

9. PW4-Dr.Vaibhavi Prasad Indulkar, Medical Officer, attached to the Civil Hospital, Thane, has stated that on 5th April, 2011, PW2, aged 7 years was brought to the Hospital with a requisition letter. She has stated that in the course of internal examination, she noted that the libia minora was inflamed; that there was abrasions on the libia; that no active bleeding but tenderness present; and that the hymen was intact. She has stated that after examination, she came to the conclusion that an attempt of forceful sexual assault was made on the victim girl. It is pertinent to note that the clothes of the victim girl were seized under the panchanama and so were the clothes of the Appellant. The C.A.Report (Exhibit – 29) show that there

were some blood stains which were found on the clothes of the victim girl i.e. on the frock and nicker. Similarly, blood stains were also found on the clothes of the Appellant i.e. Kurta, Pyjama and Gamcha. The blood found on the clothes of the victim girl as well as on the Appellant were of 'B' Group. It is pertinent to note that the Appellant in his 313 statement does not dispute the fact that the said clothes were seized under a panchanama. It is evident that the Doctor did not find any active bleeding when she examined the victim girl on 5th April, 2011, as the medical examination was done on the next day. However, the fact remains that the clothes, which were seized under the panchanama i.e. both of the victim girl and the Appellant showed that they were stained with blood. It is also pertinent to note that the Appellant was arrested on the very same day i.e. on 4th April, 2011 and his clothes were also seized on the same day. It is also pertinent to note that PW1 has identified the clothes worn by the Appellant, which were seized under the panchanama, as having been worn by the Appellant, at the relevant time. The evidence on record clearly shows that the Appellant had sexually assaulted the victim girl. Merely because, independent witnesses were not examined would not render the prosecution case suspect, considering the evidence that has come on record.

10. The reasoning of the learned Additional Sessions Judge cannot be said to be perverse, warranting interference. Considering the material on record, the Appeal being devoid of merit, is dismissed.

REVATI MOHITE DERE, J.