

Anand

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

CRIMINAL APPEAL NO. 428 OF 2016

Mithilesh Cheddi Yadav .Appellant
Age : 25 years, Occu : Vegetable Vendor
R/at : T/9, Jai Ambenagar No. 2,
Bhayandar (West), District – Thane.
Originally from Chakaur Tiwari
Post – Rampur, Khoribari,
Taluka – Selempur,
District – Deveria (Uttar Pradesh)
(At present in Nasik Jail)

Vs.

The State of Maharashtra .Respondent
At the instance of Bhayandar Police Station, Thane
(C. R. No. I-12/2014)

Mr. S. H. Joshi, Advocate, for the Appellant
Mrs. P. P. Shinde, APP, for the Respondent – State

CORAM : REVATI MOHITE DERE, J.

DATE : 13.03.2019

ORAL JUDGMENT

. By this Appeal, the Appellant has impugned the
Judgment and Order dated 10.02.2016 passed by the learned
Special Judge (P. O. C. S. O. Act), District Judge – 1 and
Additional Sessions Judge, Thane in Special Case No. 51 of 2014,

convicting and sentencing the Appellant as under :-

- For the offence punishable under Section 376(2)(f)(i) of the Indian Penal Code r/w Sections 4 and 12 of the Protection of Children from Sexual Offences Act, 2012, to suffer R. I. for ten years and to pay fine of Rs. 5,000/-, in default to suffer S. I. for six months.

2. A few facts as are necessary to decide the Appeal are as under :-

The Complainant (PW. 1), mother of the victim girl has stated that she was residing in a room in Bhayandar with her husband and two children and that there were 10 – 12 person residing in the room. She has stated that her husband was working in a Steel Company and that he would leave at 8.00 a. m. in the morning and return at 8.30 p. m. She has stated that her daughter (victim girl) was about five years at the relevant time. According to the Complainant (PW.1), the incident took place on 12.01.2014 between 12.00 noon and 1.00 p. m. She has stated that her daughter came weeping from the Appellant's house and

held her; that her daughter was holding a two rupee coin; that when she asked that who had given her money, she took out her panty and started cleaning and told her that the Appellant had removed her panty and done something to her private part. She has further stated that pursuant thereto, she lodged a complaint / FIR as against the Appellant. She has further stated that as her daughter was complaining about pain in her abdomen, she was taken to the hospital by a lady police constable. According to PW.1, her daughter was born on 25.12.2008, and as such was about five years of age. The Appellant was arrested on the very day of the incident i. e. 12.01.2014.

3. Pursuant to the complaint / FIR, investigation commenced and after investigation, charge-sheet was filed as against the Appellant. The learned Special Judge (P. O. C. S. O. Act) framed charge as against the Appellant, to which the Appellant pleaded not guilty and claimed to be tried. The prosecution in support of its case examined nine witnesses i. e. PW.1 – mother of the prosecutrix; PW.2 – victim girl; PW.3 – Geeta Singh (neighbour) (hostile); PW.4 – Barmu Kangralkar,

panch to the spot panchanama (hostile); PW.5 – Shivram Bind (neighbour of PW.1); PW.6 – Anilkumar Singh, panch to the spot panchanama (hostile); PW.7 – Dr. Mugdha Junagare, who examined the prosecutrix and issued the Certificate (Exh. 29); PW.8 – Chandrakant Koli, PSI, who was attached to the Bhayandar Police Station on the date of the incident. The said witness was entrusted with the investigation after registration of the FIR, pursuant to which he arrested the Appellant, conducted the spot panchanama, examined the witnesses, referred the accused for medical examination, collected the Birth Certificate of the victim girl, seized clothes of the Appellant as well as the victim girl under a panchanama; and PW.9 – Pradeep Pullarwar, API attached to the Bhayandar Police Station. The investigating officer, who after investigation submitted the charge-sheet, as against the Appellant.

4. The defence of the Appellant was that of total denial and of false implication.

5. Learned counsel for the Appellant assailed the

Judgment and Order and urged; (i) that the Appellant has been falsely implicated in the said case by the Complainant i. e. PW.1, as admittedly, there was a dispute between them on account of drawing of water from the common tap. According to the learned counsel, pursuant to the quarrel, the Complainant had threatened to implicate the Appellant in a false case; (ii) that the person, who carried the blood sample to the Chemical Analyzer was not examined and as such, the possibility of tampering with the same could not be ruled out; (iii) that the DNA Report has not been proved by the prosecution and as such, the same ought to be discarded; (iv) that the evidence of the victim girl (PW.2) shows that she had identified the Appellant on the say of the mother i. e. PW.1; (v) he submits that the Dr. - PW.7 has opined that the reasons for hymen tear could be several and in the light of said admission, the possibility of the hymen being torn, for any other reason (not sexual assault) could not be ruled out. Learned counsel for the Appellant relied on some Judgments of this Court to buttress his submission.

6. Learned APP submitted that there is no infirmity in the

impugned Judgment and Order, warranting interference. She submitted that there is ample evidence on record to show that it is the Appellant, who was responsible for the sexual assault on the victim girl.

7. Heard learned counsel for the parties and perused the papers and the evidence of witnesses and documents on record with their assistance. As far as the evidence of PW.1 – Complainant and mother of the victim girl is concerned, she has stated that the incident took place on 12.01.2014 and that around 12.00 noon to 1.00 p. m., her daughter came weeping from the Appellant's house and held her. She has stated that her daughter (PW.2) was holding a two rupee coin; that when she asked that who had given her money, she went inside the house, removed her panty and started cleaning and disclosed to her that the Appellant had done something to her private part. She has stated that her daughter stated that the Appellant had also removed his under garment. She identified the clothes worn by her daughter, which were seized under a panchanama. Although, in the cross-examination, the endeavour of the Appellant's Advocate was

to bring on record, the dispute between the Appellant and the Complainant for falsely implicating him, dispute by itself, cannot lead to an inference that the accused has been falsely implicated. All attending circumstances including the evidence on record will also have to be considered and given due weightage. Although some omissions were pointed out by the learned counsel for the Appellant, in particular, the omission, that the victim girl came weeping from the house of the Appellant and the time she came home, the fact remains that PW.1 has deposed that on the date of the incident i. e. 12.01.2014, her daughter came home, held her and told her that the Appellant had removed her panty and also removed his undergarment and done something to her private part and also pointed towards the Appellant. The Complainant does not dispute that there was a dispute with regard to drawing of water, but has denied that the Appellant was fetching water from the same tap, from which they were drawing water.

8. The evidence of the PW.2, aged six years is consistent with the evidence of the Complainant (mother). Considering her age, the learned Judge recorded her evidence by utilizing single

visibility curtain, to ensure that she was not exposed in anyway to the Appellant at the time of recording of her evidence. Learned Judge also ascertained that the victim girl was able to understand the questions put to her and that she answered it properly; that she understands the sanctity of oath and after ascertaining the same administered oath to her. The said witness aged six years has stated that the incident took place on Sunday in the afternoon when she was playing outside the house. She has stated that the Appellant (Mithilesh uncle) gave her a two rupee coin and took her to his house which was two houses away from their house; that he closed the door of the house; that there was nobody else in the house; and that thereafter, the Appellant removed her panty and touched her private part and thereafter, sexually assaulted her. She has stated that she had pain in the place of urination and that thereafter, she wore her panty after which the Appellant opened the door and she went home. She has further stated that she narrated the said incident to her mother, showed the house of the Appellant and thereafter, went to the police alongwith her parents.

9. The learned Judge after recording the victim's evidence, removed the single visibility curtain so as to confront the said witness with the Appellant - Accused. The victim girl identified the Appellant as being the same person i. e. Mithilesh uncle. She also identified the clothes worn by her i. e. Article 1 T shirt and Article 2 nicker. Although, the victim girl was cross examined by the Advocate for the Appellant, to show that there were quarrels between the two families on account of drawing of water from the public tap, the victim girl has specifically stated that the Appellant did not fetch water from the same tap and would fetch water from the another water tap.

10. Although, learned counsel for the Appellant urged that PW.2 was brought to the Court by her mother, father and uncle for evidence and on earlier occasions and as such, was tutored, the said argument is noted only to be rejected. Nothing turns on the same, more particularly as the girl was of tender age i. e. only six years of age, and would necessarily have to be brought by her parents, to give her strength to depose & to comfort her. The

statement of the child witness i. e. victim girl is consistent with what was stated by her when her statement was recorded earlier by the police. The victim girl in her cross-examination has denied the suggestion that the Appellant had not given her a two rupee coin or had not taken her to his house or had not committed the act. It is pertinent to note, that the victim girl has named the Appellant in her statement made before the police as well as to the Doctor.

11. The evidence of the victim girl (PW.2) & her mother (PW.1) is corroborated by the medical evidence. PW.7 – Dr. Mugdha Junagare, attached to the J. J. Hospital as Medical Officer, Gynecology Department, has stated that on 12.01.2014, when she was on duty as Assistant Professor Gynecology department, the victim girl aged six years was brought by the Woman Police Constable, Bhayandar Police Station. She has stated that the father of the victim girl was accompanying her and that the history was given by the father and that the victim supported the same. She has stated that the history was of attempt to commit sexual assault by known person of the

neighbourhood. PW.7 has stated, that she was told that on 12.01.2014 at 12.30 p. m., the said known person had removed clothes and forced her for penovaginal sexual intercourse. The history about per vagina bleeding and staining of underclothes was narrated by the victim. She has stated that the victim had narrated the history to her mother and had taken a bath and changed her clothes after the incident. On local examination, PW.7 found that the hymen of the victim girl was found at 4 O'clock position and the tear was fresh. Thereafter, on examination, there was minimal redness on vaginal mucosa. Vaginal swab was collected and after examination, she opined the possibility of penetrating penovaginal intercourse. Although, in the cross-examination, PW.7 has deposed that children while doing any experiment can also insert any object that would also result in hymen tear, she has specifically stated that in respect of the present case, the said possibilities were ruled out. PW.7 issued the Medical Certificate (Exh. 29), after examination of the victim girl.

12. As far as the submission of the learned counsel for the

Appellant with regard to non-examination of the carrier is concerned, there is no substance in the said submission. It is pertinent to note, that the blood sample of the Appellant was taken and similarly, the inner thigh swab (Exh. 2), labial swab (Exh. 3), hymenal swab (Exh.4), vaginal swab (Exh. 5), anal swab (Exh. 6) were sent to the Chemical Analyzer. The nail clippings of the victim girl were also taken. The opinion of the Analyst reads as under :-

“ Interpretation :-

Male haplotypes of ex. 2 inner thigh swab, ex. 3 labial swab, ex. 4 hymeneal swab, ex. 5 vaginal swab, ex. 6 anal swab of Hansika Tribhuvan Maurya **matched** with the male haplotypes of ex. 1 blood sample of Mithilesh Yadav in F. S. L. ML. Case No. DNA-133/14.

Opinion :-

DNA profiles of ex. 2 inner thigh swab, ex. 3 labial swab, ex. 4 hymeneal swab, ex. 5 vaginal swab, ex. 6 anal swab of Hansika Tribhuvan Maurya and ex. 1 blood sample of Mithilesh Yadav in F. S. L. ML. Case No. DNA-133/14 is **from the same paternal progeny.**”

It is pertinent to note, that the Appellant in his 313 statement has admitted the seizure of the clothes worn by the

victim girl as well as his clothes. He has also admitted the forwarding of his blood samples for DNA examination on 22.01.2014 under a letter at Exh. 45. The C. A. Report clearly shows that the samples which were received were in a sealed cover. Thus, the DNA Report corroborates the evidence of PW.1 and PW.2. The FIR was also lodged promptly.

13. The learned Sessions Judge after considering the evidence on record has rightly convicted the Appellant of the offences as stated in para 1 of this order.

14. Considering the evidence on record, no ground is made out warranting interference in the impugned Judgment and Order of conviction and sentence. The Appeal is, accordingly, dismissed.

(REVATI MOHITE DERE, J.)