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

CRIMINAL APPEAL NO.703 OF 2012

Sagar Ramchandra Salokhe,
Age: 25 years, Occ.: Agriculture,
R/a. Shirol, Tal:Karveer,
District – Kolhapur. ...Appellant
(presently lodged at Kolhapur Central Prison). (Orig. Accused)

Versus

1. State of Maharashtra,
(Through Karveer Police Station).
2. Vaishali Yuvraj Salokhe,
Age : 25 years; Occ.: Household,
R/at. Malyachi Shirol,
Tal:Karveer,
District – Kolhapur. ...Respondents.

Mr.Ganesh K. Gole, for the Appellant.

Mr.S.V.Gavand, A.P.P. for the Respondent No.1 - State.

Ms.Latika H. Belindage, for the Respondent No.2 / Original Complainant.

CORAM : REVATI MOHITE DERE, J.

DATE : 30th APRIL, 2019

ORAL JUDGMENT :

1. The appellant vide Judgment and Order dated 6th June, 2012,

passed by learned Additional Sessions Judge – 4, Kolhapur in Sessions Case No.142 of 2010, has been convicted and sentenced as under:-

- for the offence punishable under Sections 511 r/w 376 of the Indian Penal Code to suffer rigorous imprisonment for 5 years and to pay fine of Rs.4,000/-, in default, to suffer rigorous imprisonment for 1 month.
- Out of the fine amount so deposited, the learned Additional Sessions Judge – 4, Kolhapur, directed that an amount of Rs.3,000/- be paid to the complainant for the loss suffered to her and to the minor victim girl, under Section 357(1) of the Code of Criminal Procedure.

2. The prosecution case in brief is as follows:-

The complainant (PW1) is the mother of the victim girl, who was about 4 ½ years at the time of the incident. The appellant is the cousin brother-in-law of the complainant (PW1), residing in the house adjacent to the complainant's house. According to the complainant (PW1), the incident took place on 7th May, 2010 at about 6.15 to 6.30 p.m. She has stated that she called out to her daughter (victim girl) and as she did not come, she went to the house of the appellant and found her daughter in the appellant's house. According to the complainant (PW1), her daughter came out of

appellant's house, by putting on her nicker. She has stated that when she questioned her daughter, she disclosed that the appellant had removed her nicker and was doing something to her. According to the complainant (PW1), she removed her daughter's nicker and saw semen stains on her daughter's nicker and accordingly informed her brother-in-law (PW5) – Dnyandev Salokhe. Thereafter, the appellant's mother was called and was informed about the incident. According to the prosecution, when the complainant (PW1) told the appellant's mother about the nicker, the appellant's mother took the nicker with her. The complainant (PW1) has stated that her daughter had trouble urinating, pursuant to which, she took her to Dr.Pruthwiraj Dashavant (PW2) who told her that there was swelling on her daughter's private part. Dr. Dashavant is also stated to have told her to lodge a complaint with the police station, pursuant to which, she lodged a police complaint/FIR, with the Karveer Police Station, Kolhapur. Thereafter, the complainant's daughter was referred for medical examination to C.P.R. Hospital, Kolhapur. Thereafter, the appellant was arrested. After investigation, charge-sheet was filed as against the appellant for the alleged offence punishable under Sections 376 r/w 511 of the Indian Penal Code in the Court of the learned Judicial Magistrate First Class,

Kolhapur. As the offence punishable was triable by the Court of Sessions, the case was committed to the Court of Sessions for trial.

Charge was framed, as against the appellant for the offence punishable under Sections 376 and 511 of the Indian Penal Code, to which the appellant pleaded not guilty and claimed to be tried.

The prosecution in support of his case examined 9 witnesses. PW1 – complainant and mother of the victim girl aged 4 ½ years ; PW2 – Dr.Pruthwiraj Dashavant, where the complainant had taken the victim girl as she had pain in her private part; PW3 – Anjum Mahammad Shaikh, panch to the spot panchanama (hostile); PW4 – Madhukar Kamble, also panch to the spot panchanama (hostile); PW5 – Dnyandev Salokhe, brother-in-law of the complainant and uncle of the victim girl, who was present in the complainant's house at the relevant time; PW6 – Subhash Patil, Police Patil, who is stated to have advised the complainant and her husband to lodge a police complaint; PW7 – Naseerkhan Pathan, Police Head Constable, attached to Karveer Police Station, who registered an FIR and arrested the appellant; PW8 – P.S.I. - Ashok Jain, who was present at Karveer Police Station and who sent the victim girl for medical examination to C.P.R. Hospital, Kolhapur along with a lady constable and

PW9 – Dr.Amol Apate, the medical officer who was attached to the C.P.R. Hospital, Kolhapur and who examined the victim girl.

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

The learned Additional Sessions Judge – 4, Kolhapur, after considering the evidence on record, vide Judgment and Order dated 6th June, 2012, convicted and sentenced the appellant, as mentioned in paragraph 1 of this Judgment.

3. Learned Counsel for the appellant assailed the Judgment of conviction and sentence on several grounds. He submitted that the prosecution had failed to prove the case as against the appellant beyond reasonable doubt. He submitted that the medical evidence on record does not support the prosecution case i.e. of attempt to commit rape. He submitted that there are no external injuries on the victim girl and that the medical evidence completely falsifies the prosecution case. He submitted that the medical certificate shows that there were no signs of any abrasion and laceration on her private parts and that the redness i.e. Erythema was possible because of friction of the underwear and that the said possibility

has not been ruled out by the prosecution. He submitted that there was motive for the complainant to falsely implicate the appellant, inasmuch as, the appellant had seen the complainant (PW1) in a compromising position with her brother-in-law (PW5) – Dnyandev. He submitted that the other motive for falsely implicating the appellant is the dispute between the appellant's family and the complainant's family, on account of drawing water from the well. He submitted that no independent witness has been examined in support of the incident that allegedly took place on 7th May, 2010. He submitted that adverse inference ought to be drawn for non-examination of any independent witness. He submitted that the victim girl, aged 4 ½ years has also not been examined by the prosecution to show that any such incident as alleged has taken place. He submitted that recovery of a nicker, at the instance of the appellant is doubtful, inasmuch as, the complainant (PW1) i.e. mother of the victim girl would never have handed over the nicker to the appellant's mother. He submitted that the said act of the complainant (PW1) is extremely unnatural. According to the learned counsel, there are several contradictions in the evidence of the complainant (PW1) and PW5 – Dnyandev, with respect to the incident. He submitted that the offence, if any, would be one under Section 354 of the I.P.C and

not under Sections 376 r/w 511 of the I.P.C. He further submitted that the report of the Chemical Analyzer is also inconclusive.

4. Learned APP supported the impugned Judgment and Order of conviction and sentence and submitted that no interference was warranted in the same. Learned APP relied on the Judgment of the Rajasthan High Court in the case of ***Thana Ram v/s State of Rajasthan***,¹ to show that non-examination of the victim is not fatal to the case, having regard to the age of the girl. He submitted that the evidence of the complainant clearly shows that the victim girl was found in the house of the appellant and that the appellant was present in the house at the relevant time. He submitted that the medical evidence also supports the prosecution case. In this regard, he relied on the evidence of PW2 – Dr.Dashavant, who had initially examined the victim girl and the evidence of PW9 – Dr.Amol Apate, who examined the victim girl and opined that there is possibility of attempt to rape. He submitted that semen stains were found on the nicker and the same is reflected in the C.A. Report and also that the nicker was found at the instance of the appellant. He submitted that the medical Doctor had found Erythema + on labia majora labia minora, which is suggestive of sexual

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assault. He further submitted that the motive as suggested cannot be accepted, having regard to the evidence that has come on record.

5. Learned Counsel for the Complainant also supported the submissions advanced by the learned APP.

6. Heard learned counsel for the parties and perused the papers with the assistance of the learned counsel.

7. A perusal of the evidence of the complainant (PW1 and the mother of the victim girl) shows, that the appellant is her cousin brother-in-law and is residing in the house adjacent to her house. She has stated that she has two daughters i.e. the victim girl, aged 4 ½ years and another girl aged 3 years. She has stated that the two families were on visiting terms. According to the complainant (PW1), the incident took place on 7th May, 2010, at about 6.00 p.m., when she was cooking in the kitchen. She has stated that her brother-in-law PW5 – Dnyandev was present in her house and the appellant was present in his house. According to the complainant (PW1), her daughter (victim girl) was playing near the house,

when the appellant called the victim girl, pursuant to which, she went to the appellant's house. She has stated that at about 6.15 to 6.30 p.m., she called out to her daughter but she did not come and therefore, she went to the appellant's house and called out for her. She has stated that the appellant told her that her daughter was in his house; that she saw her daughter come out of the appellant's house and that while coming out, she was putting on her nicker; that she asked her daughter what had happened, pursuant to which, her daughter informed that the appellant had removed her nicker and was doing something with her; that she removed her daughter's nicker and saw that there were semen stains on her nicker; that she immediately informed the said incident to PW5 – Dnyandev; that PW1 called the appellant's mother and informed her about the the said incident; that she also informed about the stains on her daughter's nicker, pursuant to which the appellant's mother took the nicker with her; that her daughter was having trouble urinating and hence she took her to Dr. Dashavant's Clinic; that PW2 – Dr. Dashavant, told her that there was swelling on her daughter's private part and asked her to lodge a police complaint; that her husband called the Police Patil and informed him about the incident; and, that thereafter she went to Karveer Police Station and lodged a

report/complaint. The complainant (PW1) has identified the FIR which is at Exhibit – 13. She has stated that her daughter was referred for medical examination to the C.P.R. Hospital at Kolhapur. With regard to the delay in lodging the FIR, the complainant (PW1) has stated that she was in a shock, considering the act done by her own brother-in-law with her daughter and as her daughter was frightened. She has identified the nicker that was worn by her daughter.

8. The tenor of the cross-examination of the said witness is to show that she had falsely implicated the appellant in the said case. It is sought to be suggested to the said witness that there was a dispute between the appellant's family and complainant's family with respect to a bore well in the agricultural land, pursuant to an oral partition. It was also sought to be suggested that the appellant had seen her (PW1) and PW5 – Dnyandev, in an indecent condition, as a result of which a false complaint was registered as against him. Both the suggestions have been denied by the said witness. She has admitted the suggestion made to her that her daughter had trouble urinating, pursuant to which, she took her daughter to the doctor. A perusal of the cross examination of PW1 shows that there is no

cross examination with regard to the fact, that the complainant's daughter was found in the appellant's house and that she was seen coming out of the appellant's house putting on her nicker. There is also no suggestion to the said witness that the appellant's mother was present in the house at the relevant time when the incident took place. The cross examination does not in any dent the testimony/credibility of the complainant i.e. PW1.

9. The said evidence of the complainant (PW1) is corroborated by PW5 – Dnyandev. PW5 – Dnyandev, is the complainant (PW1)'s real brother-in-law, who was present in the house at the relevant time. According to PW5 – Dnyandev, he was present in the complainant's house on 7th May, 2010; that at about 6.00 p.m. the girl was playing in front of the house; that the appellant was in his house; that the appellant called the victim girl to his house; that after 10 to 15 minutes, the complainant (PW1) went to call her daughter, however, she did not come out; that the complainant (PW1) went in front of appellant's house and called out to her daughter, pursuant to which, the appellant told her that her daughter was in his house; that the complainant (PW1) told the appellant to send her; that the victim girl came out putting on her nicker; that the victim girl told her

that the appellant had removed her nicker and was doing something; that the complainant (PW1) checked the nicker of her daughter and found semen stains on the same; that the appellant's mother was called and informed about the same and was shown the nicker; that the appellant's mother took the nicker with her; that on the next day the victim girl had trouble urinating and hence was taken to the doctor; that on the incident being narrated, the doctor asked the complainant (PW1) to lodge a complaint; that the doctor asked the complainant (PW1) to take her daughter to the C.P.R. Hospital, Kolhapur; that the complainant's husband and his brother informed the Police Patil; that the Police Patil asked them to lodge a complaint, pursuant to which, an FIR was registered.

10. The tenor of the cross examination of this witness was to show that he was falsely deposing against the appellant for two reasons i.e. on account of the dispute regarding the bore well in the agricultural land, pursuant to the oral partition; and second, that the appellant had seen the complainant (PW1) and PW5 – Dnyandev, in a compromising position. Although several suggestion were made, that no such incident had taken place and that the appellant has been falsely implicated, the same has been

denied by the said witness. There is nothing in the cross examination which would otherwise affect the credibility of the said witness.

11. The evidence of both the aforesaid witnesses i.e. PW1 – complainant and PW5 – Dnyandev, is duly corroborated by the medical evidence on record.

12. PW2 – Dr.Pruthwiraj Dashavant, has stated that he was working as a Medical Practitioner at Shirolí Dumala, at the relevant time. He has stated that on 8th May, 2010, at about 6.00 p.m. the complainant (PW1) had come to his clinic with her daughter aged 4½ years and informed that her daughter had pain in her private part. He has stated that when he asked her why there was pain, the complainant (PW1) disclosed that there was an incident of sexual abuse with her daughter by her cousin brother-in-law. He has stated that the victim girl was also crying and considering the fact, he asked the complainant to take the victim girl to the Government Hospital, for medical checkup. He has stated that he had prescribed a pain killer to the victim girl.

13. In the cross examination, PW2 – Dr.Dashavant, has admitted that he had not produced any document before the police to show that the complainant had come to his clinic on 8th May, 2010. The said witness has denied the suggestion that the victim girl was not brought to the clinic; and that he was falsely deposing as against the appellant, as he was acquainted with the complainant. There is no reason that has come on record to show why PW2 – Dr. Dashavant, would falsely depose as against the appellant, more particularly, when he has not mentioned the name of the appellant. The evidence of PW2 – Dr. Dashavant, only shows what was communicated by the complainant i.e. the incident of sexual abuse by the cousin brother-in-law.

14. The evidence of PW9 – Dr.Amol Apate also corroborates the evidence of PW1 - complainant and PW5 – Dnyandev. According to PW9 – Dr.Apate, he was attached to the C.P.R. Hospital, Kolhapur, as a Casualty Medical Officer. He has stated that on 9th May, 2010, he received letter from Karveer Police Station for examining the victim girl, aged about 4 ½ years (Exhibit – 47). He has stated that he examined the victim girl and that the history of the patient was given by her mother that there was sexual

assault by her cousin brother-in-law on the child on 7th May, 2010 at about 6.30 p.m. The complainant is also alleged to have stated to PW9 – Dr. Apate, that the child was complaining of pains in the perineal region, along with burning muration. He has stated that he personally examined the victim girl and on local examination found there was Erythema plus on labia majora minora and no abrasion laceration on perineum region and accordingly he made a noting in the case paper (Exhibit – 49). On the basis of the examination, he opined that there is possibility of attempt to rape.

15. In the cross examination, PW9 – Dr. Apate, has admitted that if there is rape, there is possibility of injury and if there is attempt to rape, the victim can suffer pains in vagina; and that no external injuries were found on the victim girl. He has also denied the suggestion that such type of injury i.e. Erythema plus is possible with the use of the finger. He has denied the suggestion that he had not examined the victim girl. There is no cross examination of the doctor, with respect to finding of Erythema plus on labia majora of the victim girl.

16. As far as the term 'Erythema' is concerned, the said term in 'Forensic Investigation of Child Victim with Sexual Abuse' means inflammation and increased vascularity. Perianel erythema means reddening of the skin overlying the perineum as well the inner aspects of the thighs and labia generally indicates that there has been intercrural intercourse. The evidence of PW9 – Dr. Apate, shows that the child was complaining of pains at perineal region along with burning maturation and on local examination found Erythema plus on labia majora minora and no abrasion laceration on perineum region.

17. The evidence of the record clearly establishes that the appellant was in the house at the relevant time; that the victim girl came out of the house of the appellant, when the complainant (PW1) called out for her; that the victim girl was putting on her nicker when she was coming out of the appellant's house and on being asked made the disclosure. In the facts merely because the victim girl aged 4 ½ years has not been examined is not fatal inasmuch as, there are several attending circumstances to show that the appellant was in his house with the victim girl and the victim girl was seen coming out of the appellant's house, putting on her nicker. The

medical evidence also supports that there was an attempt to rape, the girl. The C.A. Report shows the presence of semen stains on the nicker. The evidence on record clearly points to the complicity of the appellant in the said crime.

18. Considering the aforesaid, there is no merit in the Appeal. No infirmity can be found in the impugned Judgment and Order, convicting and sentencing the Appellant as aforesaid.

19. Accordingly, the Appeal is dismissed.

REVATI MOHITE DERE, J.