

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 962 OF 2015**

Vishnu Nana Mandale .. Appellant

Versus

The State of Maharashtra .. Respondent

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Mr. Ashish Raghuwanshi (appointed) for the Appellant.
Mrs. M.H.Mhatre, APP for the Respondent/State.

CORAM: P. N. DESHMUKH, J.

DATED : 11TH DECEMBER, 2019.

ORAL JUDGMENT :

This appeal takes exceptions to judgment dated 6th May, 2015 passed by the Learned District Judge-1 and Additional Sessions Judge, Sangli in Sessions Case No. 42 of 2013, by which, appellant came to be convicted for the offence punishable under Section 376(2)(f) of Indian Penal Code and is sentenced to suffer rigorous imprisonment for 10 years and to pay fine of Rs.3,000/-, in default, to suffer rigorous imprisonment for two months.

2. Briefly, it is the case of prosecution that PW-4 the

prosecutrix minor girl aged 11 years was resident of village Kharsundi, Taluka Atpadi, District Sangli, where PW-3 Jayashree, the complainant and the aunt of prosecutrix was also residing with her family. Bapu Shitole, father of prosecutrix is brother of complainant and was residing in her neighbourhood alongwith his wife and prosecutrix, who, at the time of incident was studying in 5th standard in an Ashram School.

3. The incident is alleged to have occurred on 9th November, 2012 at about 4.00 p.m. on which day, the parents of prosecutrix had gone to village Vita for obtaining medical treatment to Bapu Shitole. While leaving the house, they had instructed PW-3 Jayashree to take care of their daughter, who, at around 4.00 p.m., however was required to visit the cattle shed for feeding the cattle and on reaching back home, noted that prosecutrix was not in the house. It is further case of prosecution that on inquiring about her with the nearby children, she was informed that prosecutrix has went to the house of appellant. Accordingly, she visited the house of appellant and found the doors of his house were closed from inside which rose suspicion in her mind and thus, went to house of PW-2 Mangal, who was residing in her neighbourhood and

informing above fact, requested PW-2 Mangal to accompany her to the house of appellant. When Jayashree and Mangal again visited house of appellant, and since the window of his room was open, PW-3 Jayashree requested Mangal to peep through window and to see if prosecutrix was inside. PW-2 Mangal on looking through the window, noted presence of prosecutrix in the house with the appellant and found that they were in the compromising position having no clothes on their person. PW-2 Mangal immediately narrated said fact to Jayashree and both of them raised cry for help. On hearing their shouts, neighbours gathered and knocked the door of the house which was accordingly opened by the appellant. Prosecutrix was taken to her home by Jayashree and Mangal, who on inquiry disclosed that appellant had committed sexual intercourse with her.

After arrival of parents of prosecutrix, they were informed about the incident and accordingly, report Exh.19 is lodged by PW-3 with Atpadi Police Station on the same day in the evening.

4. On the basis of report, offence came to be registered vide Crime No.104 of 2012 for the offence punishable under Section

376 of Indian Penal Code, which was investigated by PW-7 Sunil Gidde, A.P.I., Investigating Officer. During the course of which, he recorded statement of PW-4, the prosecutrix and by issuing requisition memo, forwarded her for her medical examination, of which, Medical Certificate is on record at Exh.28. Prosecutrix was further referred for her medical examination to Civil Hospital, Sangli, where she was examined by PW-6 Dr.Jyoti Rokde, who issued Medical Certificate (Exh.37). On the same day, appellant is arrested and his clothes came to be attached under Seizure Panchanama (Exh.50) and appellant was referred for his medical examination of which Medical Certificate is on record at Exh.31.

On the following day, Spot Panchanama came to be drawn at Exh.34 in the presence of PW-1 Balasaheb, the spot panch, wherefrom incriminating articles like bedsheet came to be seized. During the course of investigation, inner-wear and gown of prosecutrix was seized as produced by PW-3 Jayashree under Seizure Panchanama (Exh.16). All the muddemal articles were referred to Chemical Analyzer, for its analysis. On completion of investigation, chargesheet is filed in the Court of Judicial Magistrate, First Class, Atpadi, District Sangli.

5. In the course of time, case came to be committed to the Court of Sessions. Charge is framed against appellant for the offence punishable under Section 376(2)(f) of Indian Penal Code vide Exh.4, to which, he pleaded not guilty and claimed to be tried. The defence of accused is of total denial and of false implication.

6. To establish the charge levelled against appellant, prosecution in all examined seven witnesses and commenced its evidence by examining PW-1 Balasaheb, spot panch, who has proved Spot Panchanama (Exh.14), PW-2 Mangal, PW-3 Jayashree, the complainant, who has proved her report (Exh.19), PW-4 the prosecutrix, PW-5 Dr.Uttam Chandanshive, who had initially examined prosecutrix at Primary Health Centre, Atpadi, PW-6 Dr.Jyoti Rokde who examined prosecutrix at Civil Hospital, Sangli and concluded the evidence on examining PW-7 API Ginde, the Investigating Officer. Appellant had not examined any witness in his defence, nor had examined himself in support of his case.

Considering the evidence and documents on record, Learned Trial Court convicted appellant as aforesaid, hence this appeal.

7. Heard Learned Advocate Mr. Ashish Raghuwanshi (appointed) for the appellant and Learned APP, Mrs.M.H.Mhatre for the State.

8. Learned Counsel for the appellant had vehemently submitted that evidence of prosecutrix as well as of PW-2 Mangal do not corroborate with each other on the material aspects, with regard to window which was alleged to be in existence to the room, where the incident is alleged to have occurred, as according to her, it has come in the evidence of Mangal that there is only one window situated to the southern side of the room, while it is the case of prosecutrix that there was two windows and has thus, contended that the case of prosecution of PW-2 Mangal witnessing appellant having sexual intercourse with the prosecutrix is not reliable. It is further contended that evidence of prosecutrix is with full of material omissions and had lastly contended that there is no corroboration to the version of prosecutrix of medical evidence and thus, submitted that on all these counts, as prosecution has failed to establish its case beyond reasonable doubt, appeal is liable to be allowed.

Per contra, Learned APP contended that from the Spot

Panchanama (Exh.14) it has come on record that there is only one window to the room in occupation of appellant and has thus, contended that submissions on this aspect are thus, not worthy to be acted upon. So far as the omission which are pointed out, it is contended that those are all minor omissions not touching the subject matter of the case and has, thus, submitted that evidence of prosecutrix and of PW-2 Mangal and PW-3 Jayashree, fully corroborate with each other. It is also contended that there is ample medical evidence of PW-5 Dr. Chandanshive and PW-6 Dr. Jyoti corroborating the version of prosecutrix, thereby establishing appellant's involvement in the present crime and has thus, contended that appeal be dismissed.

9. In the background of case of prosecution as well as submissions advanced by Learned Counsels for both the sides, on perusal of evidence of PW-3 Jayashree, the complainant, it would reveal that prosecutrix was daughter of her cousin Bapu Shitole, residing as her neighbour, while prosecutrix was prosecuting her studies in 5th standard in an Ashram School. It has further come in her evidence that on the day of incident on 9th November, 2012, parents of prosecutrix had left for Vita for having medical

treatment, informing her to look after the prosecutrix as she was in the house, however, at around 2.30 p.m., Jayashree was required to visit the cattle shed for feeding the cattle. She returned back at around 4.00 p.m. and noted that prosecutrix was not present in the house. On inquiry, she was informed by one Prashant that prosecutrix had gone towards the house of accused which was situated at a distance of about 40 feet from the house of Jayashree. She, therefore, visited the house of appellant and noted that door of his house was closed and thus, suspected some foul play and therefore, visited to PW-2 Mangal, her neighbour and disclosed her above fact, who joined Jayashree to the house of the appellant. PW-2 Mangal from the window of the room of the appellant peeped inside and informed Jayashree that appellant and the prosecutrix were inside the room having no clothes on their person and are indulged in sexual act. On noticing such act, both of them raised cry, upon which, neighbours arrived on the spot and knocked the door which was opened by appellant, who was assaulted by the persons gathered there while prosecutrix was taken home by both the females. Jayashree has further deposed that on her inquiry with the prosecutrix, she disclosed that appellant after removing her clothes as well as his clothes, inserted his penis in her private part.

After arrival of parents of prosecutrix from Vita in the evening, they all went to Atpadi Police Station together where PW-3 Jayashree lodged report Exh.19.

Before considering the cross-examination of the complainant, perusal of report (Exh.19) would reveal that its contents corroborate the oral version of complainant in its entirety. Coming back to the evidence of complainant, it is found that nothing material can be elicited in her cross-examination which can doubt her version. In fact, in her cross-examination, it has come on record that when she alongwith Mangal visited the house of appellant, window was open and from that window inside portion of the room was visible. Though complainant is suggested that appellant is falsely implicated as prior to incident, father of the prosecutrix had obtained hand-loan from appellant, said suggestion has been replied by the complainant saying that he is not aware of the said fact. In spite of that, there is no case put to this witness suggesting that such loan was obtained by father of prosecutrix from the appellant and was unpaid and to avoid its repayment, he is falsely implicated. As such, no case of appellant is set out at all.

On the contrary, complainant has denied the entire case suggested to her including that prosecutrix has sustained injury to

her private part due to fall from bicycle. In that view of the matter, there is absolutely nothing on record to doubt evidence of complainant.

10. Coming to the evidence of PW-2 Mangal, same is found materially corroborating to the evidence of Jayashree when she has deposed that she knows PW-3 Jayashree as well as appellant being neighbours, residing at the same village Kharsundi and that on 9th November, 2012, Jayashree visited her house in the evening and informed that she had visited house of appellant to search for her minor daughter and on noticing doors of his house since closed, suspected foul play and thus, requested Mangal to accompany her to the house of appellant saying that prosecutrix had gone to the house of appellant. Accordingly, Mangal accompanied Jayashree to the house of appellant and on her peeping through the window, saw accused and the prosecutrix in naked condition and further witnessed that accused has inserted his penis in the private part of the prosecutrix. She informed this fact to Jayashree and on their raising shouts, neighbours gathered who knocked the door which was opened by the accused, who came out in frightened condition alongwith prosecutrix. In the entire course of examination, nothing

material has come on record to doubt her evidence.

11. Perusal of evidence of prosecutrix would reveal that her evidence is on the similar lines further establishing appellant's involvement, when she has deposed that one day, prior to two and half years before, after her parents had left house to go to Vita, while her brother Sagar was not in the town, and as such, when she was alone in the house and PW-3 Jayashree, her aunt has required to go to cattle shed, when she went out to play with the children and to see the fort prepared by them, of clay during Diwali Festival, when she was crossing in front of the house of appellant, he called her in his house and told to sit on the bed. She further stated that appellant thereafter, closed the door of his house and started removing her cloths, when she started shouting, appellant thereafter, gagged her mouth with the handkerchief and after tying her one leg to the cot, forcibly inserted his penis into her private part. She stated that though she could hear calls of PW-3 Jayashree, she could not reply as her month was gagged by handkerchief and further stated that appellant thereafter, wore his clothes as well as gave her clothes to wear and after opening the door, pushed her out of his house where PW-3 Jayashree, PW-2

Mangal alongwith others were present to whom she narrated the incident.

Considering evidence of prosecutrix as aforesaid, same is found fully corroborated on all material aspects with the evidence of Jayashree and Mangal which evidence, thus amply established appellant's involvement in the present crime to have sexually exploited minor girl by calling her in his house. Presence of accused with the prosecutrix in the house is also amply established as from above discussed evidence and particularly from the evidence of PW-2 Mangal, it has come on record that appellant was seen committing sexual intercourse with prosecutrix in his house, who after locking door of his house, came out with the prosecutrix and was caught by the neighbours on the spot.

12. Though it is submitted that evidence of prosecutrix is not reliable having omission, the omissions pointed out, are not material at all as prosecutrix admits to have not stated in her statement to Police that her parents had told PW-3 Jayashree to keep watch on her in their absence. In fact, prosecutrix cannot have knowledge of this fact as her parents must have informed above fact

to PW-3 Jayashree and there is nothing to hold that such request was made to Jayashree in the presence of prosecutrix. Thus, prosecutrix may even, in fact, not have knowledge of this aspect and as such, there is no reason for her to state the same in her statement before the Police.

Another omission pointed out is of her not stating in her statement of appellant tying her leg with his pant. However, this omission also do not go to the root of the case and as such is immaterial as against ample other evidence on record that goes to establish appellant's involvement in the present crime.

13. Apart from above thought, it is also submitted that evidence of prosecutrix as well as of PW-2 Mangal is contrary to each other on the aspect of number of windows to the house of accused where the alleged incident took place and as such, is stated to be liable to be discarded contending that when there is no convincing evidence establishing number of windows to the house where incident is alleged to have occurred, evidence of PW-2 Mangal of her peeping through window and observing the act of sexual intercourse of appellant with the prosecutrix is, thus, doubtful, cannot be relied upon as from the evidence of prosecutrix

on this aspect, though it has come on record that there was window on the northern side wall and on the southern side wall of the appellant, while according to PW-2 Mangal, the window was on the southern side wall of the appellant at the distance of 4 feet from ground. When this piece of evidence of these two witnesses is considered with Spot Panchanama (Exh.14), it is material to note that the spot consisting of a house having two rooms admeasuring 20 x 12 ft. each facing south direction and were rented, out of which, room situated to the west side was in occupation of appellant where the incident took place. In that view of the matter, evidence of prosecution as well as of Mangal cannot said to be contrary to each other as prosecutrix in her evidence had rightly deposed that there were two windows as she saw two windows to the premises while Mangal in her evidence had specifically stated of one window which was to the room in occupation of appellant. In that view of the matter and considering the age of prosecutrix, who was minor girl aged 11 years as on date of incident, cannot be expected to state number of windows of the room where incident took place, but, has rightly stated of existence of two windows which according to Spot Panchanama are found one each to the room. In that view of the matter, submissions advanced on this

count does not inspire confidence nor said evidence is in any manner sufficient to dislodge evidence of Mangal when she claims of her peeping through the window of the room in occupation of appellant and had seen him committing sexual intercourse with the minor prosecutrix.

14. Lastly, evidence of PW-5 Dr.Chandanshive as well as PW-6 Dr. Jyoti Rokde fully supports the case of prosecution and is found corroborated with the evidence of prosecutrix establishing that she was sexually assaulted as Dr. Chandanshive, who had examined the prosecutrix immediately after the incident stated that on his examination, he found labia majors having red in colour and labia muscle was swollen and tendered. Similarly, from the evidence of PW-6 Dr. Jyoti, it has come on record that on her examining prosecutrix, she noted redness at left side of labia on inner portion alongwith tenderness, of which, prosecutrix was complaining of pain. Above medical evidence coupled with the evidence of prosecutrix and of PW-2 Mangal and Jayashree from which, it is amply established that appellant had inserted his penis into her private part and as such, committed rape on her. No case of an attempt to rape attracting penal provisions of Section 354 of

Indian Penal Code alone can be attracted as submitted on behalf of appellant. On the contrary, from the above discussed evidence, it is amply established that the act committed by the accused is within the ambit of charge levelled against him.

15. In the circumstances, law in the case of **Madan Gopal Kakkad V. Naval Dubey**¹ can be usefully referred to wherein the accused was charged with the offence of rape on a minor girl of eight years. Then Court held that even slightest penetration of penis into vagina without rupturing the hymen would constitute rape.

Similarly, opinion as expressed by Modi in Medical Jurisprudence and Toxicology (21st Edn.) at page 369 is also relevant which reads thus;

“Thus, to constitute the offence of rape, it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda, with or without emission of semen, or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore, quite possible to commit legally, the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case, the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape, is crime and not a

¹ (1992) 3 SCC 204 : 1992 SCC (Cri.) 598.

medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one.”

16. For the reasons as aforesaid, as prosecution is found to have established charge levelled against appellant beyond reasonable doubt, appeal is liable to be dismissed.

17. Before parting with the Judgment, it is noted that the Learned Appointed Counsel has ably assisted the Court, Legal fees quantified to be paid to the legal aid Advocate is Rs.5,000/- (Rupees Five Thousand Only). Hence, the following order.

: ORDER :

Appeal stands dismissed.

(P. N. DESHMUKH, J.)