

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 990 OF 2015**

Tukaram Kerba Kamble

Age 30 years, Occ. Agriculturist,

R/o. Kasba Tarale, Taluka:Radhanagari,

Dist-Kolhapur.

(At present at Kolhapur Central Prison,

Kolhapur)

...Appellant.

V/s.

State of Maharashtra

...Respondent.

Mr. S. R. Phanse, advocate appointed for appellant.

Mr. S. S. Hulke, APP for State.

CORAM : SMT. SADHANA S. JADHAV,J.

DATE : JUNE 17, 2019.

JUDGMENT :

1. The appellant herein stands convicted for the offence punishable under Section 376(2) (i) or (j) and 506 Part-II of Indian Penal Code and under Section 4 of the Protection of Children from Sexual Offences Act, 2012 and is sentenced to suffer rigorous imprisonment for 7 years for the offence punishable under Section 506 Part-II of Indian Penal Code and 10 years for the offence punishable under Section 376 of Indian Penal Code and Section 4 of the Protection of Children from Sexual Offences Act, 2012, hence this appeal.

2. The case of the prosecution in nutshell is as follows:-

On 28/09/2013 at about 2.00 p.m., the victim P.W. 3 alongwith her friend P.W. 1- Swati Kamble had been to the house of one Suman Kamble, who happens to be paternal aunt of P.W. 1-Swati, to fetch stitched clothes as her husband was into tailoring business, whereas Swati was working as an Attendant in 'Anganwadi'. According to P.W. 1-Swati, Suman had informed that clothes are ready and are in the shop of her husband. Upon hearing this, both the friends departed. On the way, P.W. 1 halted near the house of the present appellant to pluck guavas from the tree. While they were talking to each other, the appellant has allegedly dragged the victim inside the house and has sexually assaulted her. The incident was reported to the police station on 12/10/2013. Thereafter, the victim was examined by the Doctor. Upon receipt of the said report, Crime No. 133/2013 was registered against the accused/appellant for the offence punishable under Section 376 and 506 of Indian Penal Code and under the provisions of the Protection of Children from Sexual Offences Act. The accused was arrested on 12/10/2013. The accused was on bail during the pendency of trial as he was reportedly released on 11/04/2014 and thereafter, taken into custody on 02/09/2015. The case was committed to the Court of Sessions and registered as Special Case No. 13/2013. The prosecution examined as many as 11 witnesses to bring home the guilt of the accused.

3. The case rests upon the evidence of P.W. 1-Swati Kamble, P.W. 3-Ms. 'X', P.W. 4-Anjana, mother of the victim, P.W.5-Suman Kamble and P.W. 6 Digambar Tonpe. P.W.1-Swati has deposed before the Court that she happens to be the eye-witness to the dragging of the victim in the house by the appellant. She heard the cries of the victim. The appellant had closed the door. P.W. 1 Swati had knocked at the door. It was the victim who opened the door.

4. P.W. 1 Swati had deposed before the Court that victim had opened the door. She had asked the victim as to where she was and victim had only replied that the appellant had dragged her in the house and thereafter, he had committed sexual assault upon her. P.W. 1 had also asked the appellant about the same and at that juncture, he had threatened her of dire consequences.

5. In the cross examination P.W. 1 has admitted that the house of Suman is in the close vicinity of the house of the appellant. The house of the appellant is surrounded by other houses. In the cross examination she has further deposed that she has not gone to give the clothes for stitching. She has also further clarified that the mother of the appellant is persistently ill therefore, she stays in the house. She has further changed the version and has stated that she was calling out for the victim because she could not find her for sometime and thereafter, she heard the voice of the victim

and then the victim had opened the door. According to P.W. 1 there was delay in reporting the matter since they were conscious that they would be exposed to social obloquy.

6. As against this, the victim has deposed before the Court that on 28/09/2013, she was in the company of her friend P.W. 1-Swati. That, while they were returning from the house of Vishnu Kamble, on the way, the victim was resting against the wall of the house of the appellant. He suddenly opened he door, caught her by the hand, and dragged her inside and thereafter had sexually assaulted her. According to her, it was P.W. 1 who was standing there and she had gone to enquire with P.W. 1 as to what she was doing at that spot. She admits that P.W. 1 Swati had knocked at the door while he was assaulting her. The victim has feigned ignorance as to whether the mother of the appellant is residing in the house due to her illness. She had seen the appellant before the date of the incident on one or two occasions. She further stated that she knows that some of her classmates are residing just next to the house of the appellant. There are inherent omissions and contradictions in the evidence of P.W. 1 and P.W. 3. P.W. 3 has admitted that she had disclosed to the police that her friend Swati had been to the house of the appellant. In fact, P.W. 1 has admitted that the appellant happens to be her relative.

7. It is pertinent to note that according to her, after 4 days

of the incident she was talking to Swati about the said incident of sexual assault. She denies that her mother had overheard the conversation between Swati and herself and accordingly enquired with them and disclosed about the same to her father and hence, criminal prosecution was initiated. She has also admitted that if one calls from the house of Suman, the call can be heard in the house of the appellant hence, even according to the prosecution, the appellant resides at call's distance from the house of Suman. She has further stated that the incident had lasted for not more than 5 minutes. She has further elaborated and stated that when she used to go to school the appellant had apprehended her and threatened her of dire consequences, in the eventuality, she disclosed the incident to anyone and therefore, after 4-5 days, she disclosed the incident to her mother. Above all this, it is pertinent to note that even according to the victim she was not interested in initiating prosecution against the appellant. However, her parents had insisted upon her and therefore, she has quietly accompanied them and lodged the report at the behest of her parents.

8. At this stage, it would be relevant to refer to evidence brought on record by P.W. 6-Dr. Digambar Tonpe. He had examined the victim on 12/10/2013 after registration of the offence. He has proved Exhibit-25, Exhibit-26 and Exhibit-27. Exhibit-26 is clinical examination report of the victim. It

shows that the date of incident is 2nd October, 2013. According to him, the clinical history is written as per the history narrated by the victim. The history was of sexual assault 15 days back. According to Dr. Tonpe, he has scribed the history given by the victim. He had mentioned the date 2nd October, 2013 in column No. 16 as per narration of the victim. He has further stated as follows:-

“As per my findings, I am unable to state definitely that whether rape was committed on victim girl or not.”

9. In view of the above observations, it is more than clear that the prosecution has not been able to show the exact date and time of the incident occurred. Coloumn No. 19 at Exhibit-26 reads as follows:-*“Place where it occurred- as per history, in her home.”*

It is therefore, not sure as to where the incident had occurred either in the house of victim or in the house of the appellant.

10. P.W. 4 Mrs. Anjana is the mother of the victim. According to her, she had overheard the conversation between her daughter and her friend-Swati and therefore, had enquired with her about the same. Since her husband was out of station, she could not approach the police station immediately. This has to be read in context with the evidence of victim herself that her mother had not

overheard the conversation between them but she herself disclosed the same to her mother. There are inherent omissions and contradictions in the evidence of mother. According to her, she does not remember the date of incident as narrated by her daughter or the date when she had overheard the conversation. Since her husband had returned on 11/10/2013, they approached the police station on 12/10/2013. According to P.W. 4, the appellant resides in his house alongwith his mother. His parents are doing labour work.

11. The learned counsel for the appellant submits that there is no plausible explanation for the inordinate delay in lodging the F.I.R. The victim and her mother are giving different versions for the delay. In fact, according to victim she was not interested upon registering the F.I.R. whereas, according to her mother, since the father of the victim was out of station therefore, there is delay in lodging the F.I.R.

12. In cases of rape delay in reporting to the police station is not fatal to the prosecution since, the parents and the victim are conscious about exposing victim to social obloquy. In the eventuality of reporting such an incident they fear the social stigma that is attached to it.

13. 'A lie does not last long'. The contradictory evidence of victim and her friend P.W. 1-Swati read in consonance with the evidence of Doctor and P.W. 5-Suman Kamble would

show that the incident may not have occurred in the manner in which it is being brought forth. According to P.W. 5-Suman Kamble, P.W. 1 and P.W. 3 the victim had been to her house at about 2 .00 p.m. to 2.30 p.m. She resides close to the house of appellant. The girls had come to collect the uniform of Swati which she had given to stitch. According to P.W. 5, Swati has not even entered into her house to enquire with her, but had asked her from outside of the house. P.W. 5 has also admitted that they are not on talking terms with the family of accused/appellant as there was quarrel between the accused and her husband in connection with one Raju Sutar. P.W. 4 Anjana has feigned ignorance about the enmity between her husband and accused/appellant.

14. There is discrepancy about the place of incident as to whether it was in the house of the victim or the house of the appellant, there is discrepancy has to whether P.W. 1 Swati was near the house of the appellant or it was the victim who was resting on the wall of the house of the appellant. Coupled with the fact that, the incident is reported 15 days after it is allegedly occurred. In such circumstances, it would be difficult to hold the accused guilty by drawing a presumption as contemplated by Section 29 of the Protection of Children from Sexual Offences Act, 2012. Section 29 of the Act reads as follows:

“The presumption to as certain offences- Where a person is prosecuted for

committing or abetting or attempting to commit any offence under sections 3, 5, 7 and 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence as the case may be unless the contrary is proved.”

15. In any case, criminal jurisprudence contemplates that irrespective of any presumption an accused has to be considered innocent unless proved by the prosecution. The accused has right to maintain silence and the prosecution has to prove its case beyond reasonable doubt. In the interest of the girl child the legislature in its wisdom has rightly drafted Section 29 of the Act.

16. The learned APP submits that by virtue of Section 29 of the Act, the accused deserves to be convicted. The learned APP submits that the Section mandates presumption since the word used is “shall”. The law does not contemplate “may” and therefore, the Court has to take into consideration only the evidence of the victim and that would suffice to convict the accused of the charges levelled under the provisions of the said Act. However, this does not discharge the onus upon the prosecution to prove its case beyond reasonable doubts. In such case, the evidence of victim has to be a sterling testimony in order to convict the accused of the charges levelled against him. Onus lies upon

the prosecution to prove guilt of the accused beyond reasonable doubt.

17. In the present case, it would not be possible to read evidence of the victim in isolation. P.W. 1 happens to be eye-witness to initial part of the accusation that she had seen the accused dragging the victim in the house. She had heard the cries of her friend. But she did not cry for help although the place of incident is in the densely populated area. The house of her paternal aunt is at close distance. The prosecution has not examined any other witness to show that the girl had come out of the house of the accused/appellant. Moreover, the date of incident initially as per P.W. 1 and 3 is 28/09/2013 whereas, the victim has disclosed to the Doctor that incident has occurred on 02/10/2013 in her house. These are the major discrepancies.

18. In view of the above discussions, the accused/appellant deserves to be acquitted by extending him the benefit of doubt.

19. Hence, following order is passed :

ORDER

(i) The appeal is allowed.

(ii) The conviction and sentence awarded against the appellant vide Judgment and Order dated 02/09/2015

passed by the Learned Sessions Judge, Kolhapur in Special Case No. 13/2013 is hereby quashed and set aside. The accused-appellant is acquitted of the offence punishable under section 376(2) (i) or (j) and Section 506 part II of the Indian Penal Code alongwith Section 4 of the Protection of Children from Sexual Offences Act, 2012.

(iii) The accused-appellant be released forthwith, if not required in any other offence.

(iv) The amount of fine, if paid, be refunded.

(v) Writ be expedited.

(vi) The advocates on record are not present therefore, this Court had requested learned counsel Mr. Shantanu Phanse to espouse the cause of the appellant. The learned counsel has put in the best efforts to espouse the cause of the accused/appellant. His professional fees are quantified as per rules to be paid by the High Court Legal Aid Committee.

(vii) The appeal is disposed of accordingly.

The Registry to communicate this order to the appellant who is lodged in the prison.

[SMT. SADHANA S. JADHAV, J.]