

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.134 OF 2017

Bapurao @ Sakharam s/o
Munjaji Wangkar, Age 72 years,
R/o Waghi, Tq. Jintur,
District Parbhani

... **APPELLANT**

VERSUS

1. The State of Maharashtra
(Copy is served on Public Prosecutor
High Court of Judicature at Bombay,
Bench at Aurangabad)

2. Varsha d/o prabhakar Wadwane,
Age 27 years, Occu. Nil,
R/o Waghi, Tq. Jintur,
District Parbhani

... **RESPONDENTS**

.....
Shri Rajendra N. Chavan, Advocate for appellant
Mrs. Geeta L. Deshpande, A.P.P. for respondent – State
Mrs. Sangmitra Wadmare, Advocate for respondent No.2
(appointed through Legal Aid)

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CORAM: R.G. AVACHAT, J.

Date of reserving judgment : 22nd June, 2021

Date of pronouncing judgment : 6th September 2021

J U D G M E N T :

The challenge in this appeal is to the judgment and order dated 9/2/2017, passed by Additional Sessions Judge, Parbhani in Sessions Case No.141/2011. By the impugned

judgment and order, the appellant has been convicted for the offence punishable under Sections 376 and 506 of the Indian Penal Code. He has, therefore, been sentenced to suffer rigorous imprisonment for a term of seven years and to pay a fine of Rs.1000/-, in default to suffer S.I. for one month and further sentenced to suffer rigorous imprisonment for three months and to pay fine of Rs.200/-, in default to suffer S.I. for seven days. Both the substantive sentences have been directed to run concurrently.

2. Facts giving rise to the present appeal are as follows :-

Saraswatibai (P.W.1) lodged First Information Report (F.I.R. - Exh.23) on 1/12/2010. It has been averred in the F.I.R. that, it was a Sunday on 28/11/2010. Her husband Prabhakar and herself were away at their respective place of work. Her son Akash and daughter Komal had gone for tuition. Vaishali (name changed - P.W.2) was alone at home. She is a simpleton and unable to speak properly. On her (Saraswati's) return to home in the evening, P.W.2 Vaishali informed her that the appellant had come home by 2.00 p.m. He took her to a corner of the room,

removed her skirt (Midi) and knicker, made her lie on the ground and committed sexual intercourse with her to his satisfaction. He then left, but not before giving Vaishali a threat if she goes public. Saraswati, therefore, took Vaishali (P.W.2) to the house of the appellant and questioned him why did he do so with her. Her husband came home late in the evening. Her both the brothers-in-law were out of the village. The appellant had given threats. Therefore, the F.I.R. was not lodged on the same day, but was lodged on 1/12/2010 at Bori Police Station.

3. Based on the F.I.R. lodged by Saraswatibai (P.W.1), crime vide C.R. 106/2010 came to be registered for the offences punishable under Sections 376 and 506 of the Indian Penal Code. Shankar (P.W.6), Assistant Police Sub Inspector was entrusted with the investigation of the crime. He recorded the statement of the victim with the assistance of an expert and arrested the appellant. Both the victim and the appellant were medically examined. The scene of offence panchanama was drawn. Statements of persons acquainted with the facts and circumstances of the case were recorded. On completion of the investigation, the appellant was proceeded against by filing the charge sheet.

4. On committal of the case, the trial Court framed the charge (Exh.11) against the appellant. The appellant pleaded not guilty. According to him, a false crime came to be registered on account of a dispute over recently concluded Grampanchayat elections.

5. The prosecution examined 9 witnesses and produced documentary evidence to bring home the charge. On appreciation of the evidence in the case, the trial Court convicted the appellant and sentenced him as stated above. Being aggrieved with the judgment of conviction and sentence of imprisonment, the appellant has filed this appeal.

6. Mr. R.N. Chavan, learned counsel appearing for the appellant would submit that, there is delay of about 3 days in lodging of the F.I.R. Medical examination report of the victim does not support the prosecution case. No independent witness has been examined. The house of the victim was situated in a populated area. Shri S.S. Sakhare, the expert in sign language meant for Deaf and Dumb has not been examined. The appellant is around 75 years of age. There is non-compliance of provisions

of Section 119 of the Indian Evidence Act. The learned counsel placed reliance on the following authorities to ultimately urge for acquittal of the appellant :-

- (1) State of Rajasthan Vs. Darshan Singh alias Darshan Lal
[AIR 2012 SC 1973]
- (2) Devisingh Hidhako s/o Maharsing Hidako & ors. Vs. State of Chhatisgarh (Criminal Appeal No.406 of 2014)

Learned counsel for the appellant alternatively urged for reducing the sentence of imprisonment to the period already undergone.

7. The learned A.P.P. appearing for the respondent – State and the learned counsel for respondent No.2 would, on the other submit that, the offence has duly been proved. The trial Court has rightly convicted the appellant. Learned A.P.P. reiterated the reasons given by the trial Court in support of the impugned judgment. The learned A.P.P. placed reliance on the judgment of the Apex Court in case of **State of Madhya Pradesh Vs. Preetam. (Criminal Appeal No.2229 of 2011).**

8. I have considered the rival submissions made by the learned counsel for the parties and gone through the record.

Based on the F.I.R. lodged by Saraswatibai (P.W.1), Crime came to be registered. It is in her evidence that, her family comprises of her husband and three children. All of them were residing together. On the given day, she and her husband were away at their respective work places. Her son Akash and daughter Komal had gone for tuition. Her daughter Vaishali was simpleton. She was partially dumb. She was alone at home. It is further in her evidence that she returned home by 6.00 in the evening. Vaishali informed her that, the appellant had come home by 2.00 p.m. He took her to a corner of the room, removed her skirt (Midi) and knicker, made her lie on the ground and committed sexual intercourse with her to his satisfaction. He then left but not before giving Vaishali a threat if she goes public. It is further in her evidence that, she, therefore, took the victim to the house of the appellant and questioned him as to why did he so behave with her. The appellant urged for mercy and then gave her threat if she reported the matter to the police. It is further in her evidence that, her husband came home late in the evening. He had also been to the house of the appellant. Due to the threats given by the appellant, they did not approach the police station for the next two days.

In response to the questions put to her during cross-examination, she denied that Vaishali was not capable of understanding anything. She was categorical to state that Vaishali was able to speak. It has also come in her evidence that her house was consisted of two rooms. The front room of the house did not have a door. Her son and daughter do not attend any of class. She claimed ignorance that Grampanchayat elections were held in the village a few months before. From her cross-examination, it has also come on record that her house is located in a thickly populated area. Her brothers-in-law and father-in-law do reside separately in her immediate neighbourhood.

9. Then, there is evidence of victim Vaishali (P.W.2). On 15/10/2015, the trial Court partially recorded her examination-in-chief since she was found to be mentally challenged. She was again examined afresh on 26/2/2016 with the assistance of an expert. Before recording of the evidence of the victim, the trial Court made following notes :-

(On 15.10.2015 Examination-in-chief of this witness is recorded as per Exh.29 and thereafter, as per the order passed below Exh.30, today evidence is recorded again).

The witness is semi dumb and not able to speak properly, therefore, the interpreter G.R. Kolhe-Psychologist, Meena Karewar Manovikas Vidyalaya, M.I.D.C.. Parbhani is present.

In view of the order below Exh.32, S.S. Sakhare who is qualified as Diploma in Hearing language and speech, presently working at Kanchan Katruwar Karnabadhir Vidyalaya, MIDC, Parbhani, has also submitted that he has sufficient experience in respect of understanding sign also. I given oath to both the witnesses to translate and interpret true and correct sign or verbal evidence given by the witness.

Both the experts interrogated the witness. According to them, she is able to hearing but unable to speak properly. Her disability is 60% as appears from the medical certificate, Civil Hospital, Parbhani, dated 15.12.2010. The photocopy of the certificate is filed along with the charge sheet and both the experts gone through it.

S.S. Sakhare brought the documents with him. Those documents produced in the Court. S.S. Sahare asked the name of the witness to which she replied as Varsha.

(As per the opinion of S.S. Sakhare, as the witness is mentally retarded, she is unable to understanding the sanctity of oath, so I have not administered the oath to the witness.)

(I also asked to G.R. kolhe about the mental condition at present of the witness. He informed to me that mental condition is as usual.)

10. Thereafter, evidence was recorded in question -
answer form as under :

Q:- What happened with you prior to five years ?

A:- (At this time, the witness put her hand at her breast and tried to press it. She also signed her finger towards her private part. Thereafter, she signed her finger towards the accused). S.S. Sakhare informed that witness also saying that kiss was taken.

Q. Whether she wants to tell anything more about the incident?

A: S.S. Sakhare informed that witness is unable to express more about the incident.

Q. Who is residing around you ?

A: S.S. Sakhare submitted that witness stating that in her house, her mother is residing. Witness is unable to state who is residing around her house.

Q. Who is residing in your house besides your mother ?

A: According to Sakhare, the witness stating that in her house a grandmother, brother and uncle are also residing with her.

11. Gangadhar (P.W.3) was a Psychologist, serving with Reena Karewar Manovikar Vidyalaya, M.I.D.C., Parbhani. He recorded the victim's statement at the police station. The victim identified the appellant at the police station. The statement (Exh.47) recorded by Gangadhar (P.W.3) was a statement recorded under Section 161 of the Code of Criminal Procedure. Whatever was stated by the victim and factum of identification of the appellant at the police station is, therefore, of no assistance

to the prosecution. The same is, therefore, ignored.

12. Vithal (P.W.4) is a witness to the scene of offence panchanama (Exh.54). The learned counsel for the appellant took me through the description of the house of the appellant and the surrounding thereof. The learned counsel meant to say that the house was situated in a thickly populated area. If any incident like one in question took place, there could have been commotion. The incident would not have gone unnoticed by the neighbours. The learned counsel for the appellant may be right. The fact is, however, that, such incident takes place within four-walls. The victim is simpleton and unable to speak properly. She was differently able as well (psychologically).

13. Subhash (P.W.5) is the police official who recorded the F.I.R. (Exh.23) as per the narration of Saraswatibai (P.W.1). Dr. Kalidas (P.W.6) had examined the appellant. It is in his evidence that, he tried to collect semen of the appellant, but at that time it was not possible. He, however, stoutly denied that due to old age person is not able to do sexual intercourse. The learned counsel for the appellant wanted to suggest that the appellant was more than 60 years of age. It was just impossible

for him to commit the alleged act. It is, however, not the defence of the appellant that due to age, he was altogether unable to perform sex. In reply to the question put by P.W.6 Dr. Kalidas, the appellant replied to have had sexual intercourse previously.

14. Ishwar (P.W.7) is brother-in-law of Saraswatibai. It is in his evidence that, on the day of the incident, he was not in the village. On his return, he was informed what had happened with the victim. He along with his brother, victim and Saraswatibai had been to the house of the appellant to question him. After two days, all of them went to the police station and Saraswatibai lodged the F.I.R. During his cross-examination, it has come on record that, Village Panchayat elections were held in the village six months before the incident. There were two panels. One of Bobde and other was of Janardhan Wangkar. He supported the panel of Bobde. He, however, stoutly denied that a false F.I.R. was lodged out of political enmity.

15. Bashir (P.W.9) was examined in proof of medical examination report (Exh.91) of the victim. It is in his evidence that, Dr. Fareha Anjum, who had examined the victim, was working with him in Civil Hospital as Lady Medical Officer. He

identified Dr. Fareha's handwriting in the medical report (Exh.91). This report was also referred to by witness Shankar (P.W.8), investigating officer, on the basis of his evidence, the medical report of the victim was admitted in evidence. Here, the learned counsel for the appellant would submit that, report Exh.91 has not been duly proved. The investigating officer was no way acquainted with the handwriting of Dr. Fareha. True, on the basis of the evidence of the investigating officer the report Exh.91 should not have been admitted in evidence. The defect has, however, been cured. Dr. Bashir unequivocally testified to have been acquainted with the handwriting of Dr. Fareha. He identified her handwriting on report Exh.91.

16. The appellant even could not slightly make out a case to have unfriendly relations with the family of the victim on account of Grampanchayat elections. None from the family member of the victim or even her distant relations was in the fray nor did the appellant contest the elections. The elections took place six months before the incident. It is true that it is for the prosecution to establish the charge beyond all reasonable doubt.

17. The evidence undoubtedly indicates that the victim

was not deaf. She was partially dumb. She was not administered oath. Record to that effect has already been made by the trial Court before recording the evidence of the victim. The certificate Exh.87 indicates the victim to have 60% disability. Her mental retardation was moderate. Chapter IX of the Indian Evidence Act speaks of witnesses. Sections 118 and 119 need to be adverted to. The Sections are, therefore, reproduced below for better appreciation.

“S.118. Who may testify. — All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. Explanation. — A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

S.119. Witness unable to communicate verbally. — A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court, evidence so given shall be deemed to be oral evidence: Provided that if the witness is unable to communicate verbally, the Court shall take the assistance of an interpreter or a special educator in recording the statement, and such statement shall be video graphed.

18. In case of Darshan Singh (supra), the Apex Court observed :

“18. The object of enacting the provisions of Section 119 of the Evidence Act reveals that deaf and dumb persons were earlier contemplated in law as idiots. However, such a view has subsequently been changed for the reason that modern science revealed that persons affected with such calamities are generally found more intelligent, and to be susceptible to far higher culture than one was once supposed. When a deaf and dumb person is examined in the Court, the Court has to exercise due caution and take care to ascertain before he is examined that he possesses the requisite amount of intelligence and that he understands the nature of an oath. On being satisfied on this, the witness may be administered oath by appropriate means and that also be with the assistance of an interpreter. However, in case a person can read and write, it is most desirable to adopt that method being more satisfactory than any sign language. The law required that there must be a record of signs and not the interpretation of signs.”

19. The trial Court observed as to why the oath was not administered to the victim. The evidence of the victim was recorded with the assistance of the experts. It was recorded in the presence of the appellant and the learned Advocate representing him in the case. It is reiterated that the victim was not deaf. She was partially dumb. She could explain what had

happened with her. She described her ordeal by making gesture. It is, therefore, not fatal for the prosecution for not recording the evidence of victim in sign language. Non-examination by Shri Sakhare also does not go against the prosecution.

20. The judgment in case of Devisingh (supra) is based on the Apex Court judgment in case of Darshan Singh (supra).

21. As there can be no two views as what has been observed in Devsingh's case (supra), it is reiterated that the victim in this case was not deaf and dumb. She was partially dumb. She could describe with the gestures and even answers what had happened with her. The non-compliance of proviso to Section 119 of the Evidence Act would, therefore, not render the evidence of the victim and the related witnesses to be not admissible and/or unreliable.

22. True, the medical examination report (Exh.91) reads thus :

“He/ she is physically disabled / visual disabled/ speech and hearing disabled and has 60% (sixty percent) permanent (physical impairments/ speech & hearing impliment) in relation to his / her”

Clause (j) of Item B – Local examination in certificate
Exh.91 reads :-

- “(१) सदर मुलीसोबत संभोग झाला आहे.
- (२) सध्या नाही UPT वरून UPT Negative.
- (३) राहू शकते.
- (4) Old healed tear of Hymen
- (5) There is no e/o any external injuries over part of body. Is She is having habitual intercourse ? Answer : Not commentable.”

23. Learned counsel for the appellant had also submitted that the statement of the victim was recorded by an expert in the school of Deaf and Dumb. The same is not forthcoming.

Exh.83 is the letter addressed by the investigating officer to Head Master of the school for Deaf and Dumb, asking him to record the statement of the victim with the assistance of an expert and assist him in the investigation. The investigating officer also testified that he was not present when the victim's statement was recorded. It needs to be mentioned that the evidence was recorded about five years after the incident. It appears that, in response to the said letter, P.W.3 Gangadhar was deputed and he recorded the statement of the victim at the

police station, I have already held it to be one under Section 161 of the Code of Criminal Procedure.

24. True, there is delay of three days in lodging the F.I.R. The delay has been explained. It has been in the evidence of Saraswatibai (P.W.1) that, due to threats extended by the appellant, they did not approach the police station for two days. It is also true that, before lodging of the F.I.R. the family members and the relations had discussion inter-se. The medical examination report does not support the prosecution since the victim was medically examined on the fourth day. There is, however, nothing on record to indicate the family of the victim to have any axe to grind against the appellant that too at the cost of chastity of a minor girl. The victim in her evidence pointed an accusing finger at the appellant. She described the act committed by the appellant by gestures. True, the victim could not distinguish between day and night. Her father was not examined. The victim's residence is situated in thickly populated area. The expert Sakhare was not examined nor any independent witness from the vicinity entered the witness box. It is reiterated that, since the victim was not 100% deaf and dumb, it was not necessary to record her evidence in sign language.

25. The victim's evidence before the Court made out the offence against the appellant. No interference with the impugned judgment of conviction is, therefore, warranted.

26. There is, however, another aspect of the matter. The appellant is more than 70 years of age. It has been 15 years since the incident took place. Before amendment of Section 376 of the Indian Penal Code in 2013, the offence under Section 376(1) was punishable with imprisonment for a term not less than seven years. The discretion was vested with the Court to impose imprisonment for a term less than seven years for adequate and special reasons to be recorded in the judgment.

27. The appellant has been in jail for 4 ½ years. He is septuagenarian. In the facts and circumstances of the case, I am inclined to reduce the sentence of imprisonment.

28. In case of State of Madhya Pradesh Vs. Preetam (supra), the Hon'ble Supreme Court, in the facts and circumstances of the said case, was pleased to reduce the sentence of imprisonment from seven years to a period of four years. The Supreme Court, in paragraph No.16 of the judgment,

observed as under :-

“16. Prior to Amendment Act 13 of 2013, (w.e.f. 3rd February, 2013), under Section 376(1) I.P.C., the sentence of imprisonment for a term shall not be less than 7 years extending for life. However, as per the proviso to 376(1) I.P.C. (prior to amendment), discretion is vested with the Court to impose imprisonment for a term of less than seven years for adequate and special reasons to be recorded in the judgment. In this case, the occurrence was of the year 1993 i.e. about 25 years ago. Having regard to the passage of time and other facts and circumstances of the case, the sentence of imprisonment of seven years imposed on the respondent-accused is reduced to a period of four years.”

29. In view of the above, the appeal partly succeeds in terms of the following order :-

ORDER

Criminal Appeal is partly allowed. Conviction of the appellant is maintained. However, the sentence is reduced to rigorous imprisonment for 5 ½ years. Rest of the terms of the order of sentence to stand unaltered.

(R.G. AVACHAT, J.)

fmp/-