

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

CRIMINAL APPEAL NO.764 OF 2018

Kanhoba s/o Krushna Dabhade
Age 52 years, Occ. Agriculture,
R/o Kaigaon, Tq. Sillod,
District Aurangabad

... APPELLANT

VERSUS

The State of Maharashtra
Copy to be served on the
Public Prosecutor, High Court of
Bombay, Bench at Aurangabad

... RESPONDENT

.....
Shri N.S. Ghanekar, Advocate for appellant
Shri S.P. Sonpawale, A.P.P. for respondent
.....

CORAM : R. G. AVACHAT, J.

Date of reserving order : 1st July, 2021

Date of pronouncing order : 9th July, 2021

J U D G M E N T :

The challenge in this appeal is to the judgment and order dated 5/10/2018, passed by Additional Sessions Judge, Aurangabad in Sessions Case No.176/2014. By the impugned judgment and order, the appellant has been convicted for the offence punishable under Section 376(2)(i) of the Indian Penal Code and sentenced to suffer rigorous

imprisonment for ten years and to pay fine of Rs.5000/-, in default to suffer rigorous imprisonment for six months. The appellant is further convicted for the offence punishable under Section 506 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs.1000/-, in default to suffer simple imprisonment for one month. The substantive sentences have been directed to run concurrently. No separate sentence is awarded for committing offence under Section 5(i) punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012.

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

Kum. Anita (name changed) (P.W.1) was a 7th Standard student of Dayanand Vidyalaya, Kaigaon in 2014. She was 13 years of age. On 10/4/2014, by 11.00 in the morning, Anita was proceeding to her school. The appellant has a house at village Nimgaon (name of village changed). It was in dilapidated condition. The appellant was residing in a house in his agricultural land, away from the village. Anita was passing by the lane adjoining the appellant's dilapidated house. The appellant was present there. He offered her

Rs.50/- and asked to come to him. The appellant caught hold of her hand. Took her in the house. Closed the door and windows. Anita's attempt to raise alarm was foiled as he gave her threat. The appellant then undressed her below the waist. He too undressed himself. He then committed rape of Anita. The appellant then gave her Rs.20/- and told not to disclose anything to anybody. Both the appellant and Anita came out of the house. Smt. Geeta Jaiwal (P.W.4) and one Indubai, residing in the neighbourhood saw both of them. Anita went to school. On her return to house, she related the incident to her mother. The appellant met Anita's mother in the evening and gave threat to their lives if they disclose the incident. It was only after six days of the incident, Anita accompanied by her mother, went to the Police Station and lodged the First Information Report (F.I.R.) Exh.13.

3. Based on the F.I.R., Crime No.I-58/2014 came to be registered for offence punishable under Sections 376(A), 506 of the Indian penal Code and Sections 4 and 8 of the Protection of Children from Sexual Offences Act. Machhindra (P.W.5), Assistant Police Inspector was entrusted with the investigation of the crime. He paid visit to the scene of offence and drew the scene of offence panchanama. He

arrested the appellant. Seized the clothes which were on the person of the appellant and Anita when the incident took place. Pursuant to the disclosure statement made by the appellant, a knicker came to be seized. Both the appellant and Anita were medically examined. Statements of the persons acquainted with the facts and circumstances of the case were recorded. Medical examination report and the C.A. reports were obtained. On completion of the investigation, the appellant was proceeded against. The case came to be committed to the Court of Sessions. The learned Additional Sessions Judge framed charge (Exh.8) against the appellant. The defence of the appellant is of false implication.

4. To bring home the charge, the prosecution examined 5 witnesses and tendered in evidence some documents. The appellant examined Head Master of the school of Anita as a defence witness. On appreciating the evidence in the case, the learned Judge convicted and sentenced the appellant as stated above.

5. Heard Mr. N.S. Ghanekar, learned counsel for the appellant and Mr. S.P. Sonpawale, learned A.P.P. for the respondent – State.

Mr. N.S. Ghanekar would submit that, there was delay of over six days in lodging of the F.I.R. Anita's mother has not been examined. Her medical examination report runs counter to the prosecution case. He, therefore, urged for allowing the appeal.

6. Mr. S.P. Sonpawale, learned A.P.P. would, on the other hand, submit that, the delay in lodging the F.I.R. has properly been explained and appellant has not offered any reason which would suggest him to have been falsely implicated in the case. In view of Section 29 of the Protection of Children from Sexual Offences Act, 2012, it is for the appellant to prove his innocence. The learned A.P.P. reiterated the reasons given by the trial Court for convicting the appellant.

7. Anita (P.W.1) gave her oral evidence very much consistent with the F.I.R. (Exh.13). It is in her evidence that, she was a 7th Standard student of Dayanand Vidyalaya, Kaigaon in 2014. The incident took place on 10/4/2014. She was on her way to school. It was 11.00 in the morning. She was passing by a lane adjoining the dilapidated house of the

appellant. The appellant was present. He asked her to come to him. He offered her Rs.50/-. The appellant caught-hold of her hand and took her in the house. He closed the door and the window. She tried to raise alarm. The appellant threatened her. He then undressed her below waist. He too removed his Dhoti and underpant. The appellant then committed rape of her. It is further in her evidence that, then appellant separated himself from her. She bled from her private part. The appellant wiped the blood with her knicker and his underpant. She then put on her Salwar. The appellant gave her Rs.20/- and told not to disclose to anybody. On coming out of the house, Geeta (P.W.4) and Sindhubai saw them. Anita then went to school. After her return from the school, she narrated her mother what the appellant did with her. In the evening, the appellant came home and threatened her mother. Due to the threats given by the appellant, the F.I.R. was lodged on 16th April.

8. In response to the questions put to Anita (P.W.1) in the cross-examination, it has come on record, the incidence took place on Thursday. It was weekly bazaar day. Her school timing was from 9.00 a.m. to 4.00 p.m. The appellant has four children (two daughters and two sons). His both

daughters and one of the sons have been married. The appellant has his residential house in his agricultural land, away from the village. She too resides in a field. She, however, denied to have lodged a false report to the police.

9. Geeta (P.W.4) testified that the incident took place on 10/4/2014. She was at her home. At about 11.00 in the morning, she saw the appellant entered his dilapidated house. Anita followed him. She, therefore, suspected something amiss. She, therefore, called her neighbour Indubai. Both of them went on the terrace of the appellant's house. The appellant thereafter left the house. Anita came out of the house weeping. She enquired with Anita, but Anita went away without any response.

10. It has come in the cross-examination of Geeta (P.W.4) that the house of the appellant did not have doors and windows. She denied to have had seen nothing and deposed falsely.

11. Datta (P.W.2) is a witness to the panchanama Exhibits 19, 20, 21 and 22. His evidence indicates that, the investigating officer P.W.5 Machhindra took charge of the

clothes namely a pink shirt, a Dhoti and underpant under the panchanama Exh.19. Then, he (investigating officer) seized Kurta and Salwar of Anita under the panchanama (Exh.20). It is in the evidence of Datta (P.W.2) that, on 18th April the appellant made a disclosure statement that he would take out Anita's knicker hidden by him under a stone, nearby the place of the incident. The appellant accordingly took the investigating officer and the panchas to the place and took out a knicker. The same came to be seized under the panchanama (Exh.22).

12. Sarangdhar (P.W.3) is a panch witness to the scene of offence panchanama (Exh.31).

13. Machhindra (P.W.5) was the investigating officer. It is he who filed the charge sheet against the appellant after completion of the investigation. The appellant admitted the medical examination report of Anita and the C.A. reports. He examined the Head Master of the school in which Anita was taking education.

14. I have considered the rival submissions. Appreciated the entire evidence in the case and come to a

conclusion that the prosecution has failed to establish the guilt of the appellant beyond reasonable doubt. The reasons therefor are :-

The alleged incidence took place at 11.00 a.m. on 10/4/2014. The F.I.R. has been lodged on 16/4/2014 i.e. 6 days after the incidence. The delay in lodging the F.I.R. is said to have been caused due to threat given by the appellant to the mother of Anita. The mother has not been examined. Admittedly, the school timing of Anita was from 9.00 a.m. to 4.00 p.m. She was proceeding for school by 11.00 in the morning. It is also the case of Anita that, after the incidence, she attended the school and informed her mother after the school was over. The defence witness – Uttam (D.W.1), Head Master of the school testified and placed on record school attendance register. The said evidence indicates that, Anita did not attend the school on 10/4/2014. As per the version of the victim, the appellant committed rape of her until he was satisfied (ejaculated). She bled from her private part. The medical examination report (Exh.360, however, runs counter to the prosecution case. The relevant clauses of the medical examination report read as follows : -

1.	Onset of puberty and L.M.P	No attained puberty.
2.	Complaints of pain or discomfort during walking	No
3.	Secondary sexual characters	No pubic & axillary hairs. Breast – Tannes Stage II
4.	Vulva: Labia majora/minora	Normal
5.	Vaginal mucosa and discharge, if any	Normal, no discharge.
6.	Hymen Type	Intact
7.	Fourchette and posterior commissure	Normal
8.	Opinion	Hymen is intact

Moreover, the knicker of Anita was recovered pursuant to the disclosure statement made by the appellant. According to the version of Anita, the appellant wiped the blood and semen with her knicker and his underpant. On seizure of these clothes, those have been subjected to Chemical Analysis along with other articles/ clothes. The C.A. report (Exh.49) disclose that, neither the knicker nor the underpant or any of the clothes bore blood and/or semen stains.

15. It is reiterated that, the medical examination report of the victim rules out sexual intercourse with her. The C.A. report also runs counter to the prosecution. There is delay of 6 days in lodging of the F.I.R. The mother has not been examined. When the school timing was from 9.00 a.m. to 4.00 p.m., it is not known as to why the victim started late for school. She claimed in the F.I.R. and in the evidence before the Court as well that, she attended the school after the incidence. The evidence of the Head Master speaks that she did not attend the school on the given day. The evidence let in by the prosecution is not such which will lead the Court to raise presumption that the appellant has committed the offence. The Court cannot reconstruct the prosecution case. The evidence on record is also not such that would lead the Court to observe the appellant to have committed a lesser offence.

16. The appeal thus succeeds. Hence the following order :-

ORDER

The Appeal is allowed.

The judgment and order dated 5/10/2018, passed by Additional Sessions Judge, Aurangabad in Sessions Case No.176/2014 is set aside. The appellant is acquitted of the offences punishable under Sections 376(2)(i) and 506 of the Indian Penal Code and Section 5(i) and 6 of the Protection of Children from Sexual Offences Act, 2012.

The appellant has been in jail since the date of impugned judgment i.e. 5/10/2018. He be set at liberty forthwith if not required in any other case. Fine amount, if paid, be refunded to the appellant.

**(R. G. AVACHAT)
JUDGE**

fmp/-