

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

CRIMINAL APPEAL NO.204 OF 2018

Bhagaji s/o Santu Hase,
Age 57 years, Occu. Agri.
R/o Rajapur, Tq. Sangamner,
District Ahmednagar

... APPELLANT

VERSUS

The State of Maharashtra,
through Police Inspector,
Sangamner Police Station,
Sangamner, Tq. Sangamner,
Dist. Ahmednagar

... RESPONDENT

.....
Shri A.N. Nagargoje, Advocate for appellant
Shri R.B. Bagul, A.P.P. for respondent – State
.....

CORAM : R. G. AVACHAT, J.

Date of reserving judgment : 31st January, 2022

Date of pronouncing judgment : 1st February, 2022

JUDGMENT :

The challenge in this appeal is to the judgment of conviction and sentence, passed by Additional Sessions Judge, Sangamner in Sessions Case, being Case No.55/2011, dated 14/2/2018. The appellant was convicted for the offence punishable under Section 376 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs.10,000/-. In default of payment of fine, he

is to undergo rigorous imprisonment for six months.

2. Facts giving rise to the present prosecution are as under :-

P.W.1 "A" - informant, was a student of 12th Standard in the year 2011. He would reside along with his parents and two sisters at village Shirur (name changed), Taluka Sangamner, District Ahmednagar. On 14/10/2011, the informant had been to the college from 7.00 to 10.00 in the morning. When he returned home, his mother and sister had been to Sangamner Court for attending Court case. His brother Nitin was away in the school. Father was not at home. The prosecutrix Sunita (name changed) is the informant's sister. She is deaf, dumb and mentally challenged as well. She used to be at home. The informant accompanied his aunt - Anita (name changed) (P.W.2), the wife of informant's real uncle, to the field to see the work of digging borewell. The prosecutrix alone was at home. The informant returned home by 4.00 p.m. While he entered the kitchen room for taking water, he saw the appellant engaged in sexual intercourse with the prosecutrix. On having seen the informant, the appellant got up. He tied his Dhoti,

tendered apology to the informant and then left. The prosecutrix too put on her Salwar. The informant then went to his aunt Anita (P.W.2) and related her of the incident. She in turn asked him to fetch his mother from Sangamner. The distance between Shirur and Sangamner is about 4 – 5 Kms. The informant went to Sangamner on motorbike and came with his mother and sister. Uncle Rajendra was also informed on cell phone. He too came from Umbraj, Taluka Junnar. On his arrival, they went to Sangamner Police Station. The informant lodged the First Information Report (F.I.R.) (Exh.27) against the appellant herein.

3. Crime vide C.R. No.163/2011 was registered for offence punishable under Section 376 of the Indian Penal Code. The prosecutrix was medically screened. The appellant came to be arrested. He too was medically examined. Blood samples of both of them were obtained. 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 a charge sheet in the Court of Judicial Magistrate, First Class (J.M.F.C.), Sangamner. The J.M.F.C., in turn, committed the case to the Court of Sessions for trial in accordance with law. The learned

Additional Sessions framed the charge (Exh.8). The appellant pleaded not guilty. His defence is of false implication.

4. The prosecution examined 6 witnesses to establish the charge. Certain documents also came to be tendered in evidence. On appreciation of the evidence in the case, the learned Additional Sessions Judge convicted the appellant as stated above. Hence the present appeal.

5. Learned counsel for the appellant would submit that, the prosecutrix has not been examined. Her medical examination report and C.A. reports as well run counter to the prosecution case. Anita (P.W.2), aunt of the informant has played a decisive role in falsely implicating the appellant herein. There is evidence to suggest that the relations between the appellant and Anita have not been good. Court cases have been pending between them. According to learned counsel, the sole testimony of the informant without there being any corroboration ought not to have been acted upon to convict the appellant. He, therefore, urged for allowing the appeal.

6. The learned A.P.P. would, on the other hand,

submit that, the informant was a 19 year old innocent boy. He is an eye witness. The prosecutrix could not be examined due to her mental retardness. The appellant could not satisfy his own lust since the informant came midway. The medical examination report would, therefore, necessarily be neutral. According to him, penetration howsoever slight, is sufficient to constitute the offence of rape. He, therefore, urged for dismissal of the appeal.

7. Considered the submissions advanced. Perused the evidence in the case. Although the prosecution has examined 6 witnesses to establish the charge, the relevant evidence is that of the informant and his aunt Anita (P.W.2).

8. Let us appreciate the evidence. It is in the evidence of the informant that, on the given date, he returned home from the College by 11.00 in the morning. His mother and one of the sisters were away at Sangamner for attending Court case. Younger brother was away in the school. His father too was not at home. The prosecutrix was alone at home. The informant had accompanied his aunt Anita (P.W.2) to the field to see the borewell work. It is further in his evidence that, he returned home by 4.00 p.m. As he entered

the kitchen for a glass of water, he saw the appellant engaged in sexual intercourse with the prosecutrix. On having seen him, the appellant got up and tied his Dhoti. He then left after tendering an apology to the informant. The prosecutrix too put on her Salwar. The informant then went to his aunt Anita (P.W.2) and informed her. On her advice, he went to Sangamner and brought her mother and sister back home. His uncle and father were also informed. On their arrival, the informant went to the police station. He lodged the F.I.R. thereat at Exh.27.

9. From the cross-examination of the informant, it has come on record that, he has good relations with the appellant. The appellant is cousin uncle of the informant. The informant would reside in the back side of the appellant's house. The informant was categorical to claim ignorance about no good relationship between the appellant and his aunt Anita (P.W.2). He also claimed ignorance about pendency of Court cases between the two. He, however, categorically denied to have lodged a false report.

10. The testimony of the informant was sought to be corroborated by the evidence of his mother and aunt (P.W.3

and P.W.2 respectively). Both these witnesses testified about having informed by the informant of the incidence.

11. Admittedly, the prosecutrix is deaf, dumb and mentally challenged. Her disability certificate is on record at Exh.28. The same indicates her to have been 90% mentally retarded. She was, therefore, not examined. The question is, whether, based on the sole testimony of the informant, the conviction could be sustained in the peculiar facts and circumstances of the case.

12. On registration of the F.I.R., the prosecutrix was medically examined. P.W.5 Dr. Bhaskar found no injury over her body and external genetalia. On per vaginal examination, he noticed that, hymen was having old healed tear. There was no fresh tear or bleeding noted. No injury bleeding noted in the vagina. He took her vaginal swab, blood in plain bulb. Pubic hair and nails were also obtained. On medical screening of the prosecutrix, he came to the conclusion that there was no recent sexual intercourse. The samples collected were preserved for chemical analysis. The samples were handed over to the police. The C.A. reports (Exhs.17 to 19) were tendered in evidence. The C.A. reports indicate that the

vaginal swab of the victim was not containing semen or seminal fluid. On the basis thereof, he endorsed his earlier conclusion that the prosecutrix was not subjected to sexual intercourse in the recent past.

13. As such, the medical evidence ruled out the case of the prosecution. True, for constituting an offence of rape, penetration howsoever slight, is sufficient. It is also true that, on sudden appearance of the informant the appellant is said to have not accomplished his act of sexual intercourse. In view of this Court, had there really been penetration, there could have been semen or seminal fluid on the vaginal swab. There is one more reason for this Court to hold the sole testimony of the informant to be insufficient to bring home the guilt. Admittedly, the informant's father has one brother by name Balasaheb. The aunt Anita (P.W.2) is Balasaheb's wife. Partition of the family property has already been effected between the informant's father and Balasaheb. P.W.2 Anita, aunt of the informant has categorically admitted that her husband had filed a civil suit against the appellant herein. The decision in the suit went in appellant's favour. She had also lodged a criminal case against the appellant and his wife. At the time of the crime in question, the said criminal case

was pending. The appellant and his wife have been acquitted thereof. She did not have good relations with the appellant.

14. The evidence undoubtedly indicates that, after having seen the alleged incidence, the informant first approached P.W.2 Anita (aunt). Thereafter he brought his mother from Sangamner. His uncle also came and thereafter he along with his father and aunt went to the police station and lodged the F.I.R. The informant is none other than a nephew of P.W.2 Anita. It is just difficult to imagine that the informant was not in the know about no good relationship between the appellant and his aunt Anita (P.W.2). The informant was in the company of his aunt just some time before and post incidence as well. Possibility of the informant having been influenced by his aunt to state something more about the alleged incident cannot be ruled out. As such, the sole testimony of the informant does not inspire confidence. The offence is serious one. The appellant was 50 plus at the relevant time. Based on such quality of evidence, the learned Additional Sessions Judge ought not to have convicted the appellant. In view of this Court, the appellant deserves to be given benefit of doubt.

15. In the result, the appeal succeeds. Hence the order :

ORDER

- (i) The Criminal Appeal is allowed.
- (ii) The impugned order of conviction and sentence passed by learned Additional Sessions Judge, Sangamner in Sessions Case No.55/2011, dated 14/2/2018 is hereby quashed and set aside. The appellant is acquitted of the offence punishable under Section 376 of the Indian Penal Code. The appellant be set at liberty forthwith, if not required in any other case. Fine amount, if paid, be returned to the appellant.

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

fmp/-