

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

CRIMINAL APPEAL NO. 519 OF 2018

Laxman s/o Sudam Toge
Age: 30 years, Occu. Agriculture,
R/o Mundewadi, Tq. Kaij,
District Beed

... Appellant

Versus

The State of Maharashtra and another

... Respondents

....

Mr. N. R. Thorat, Advocate for appellant
Mr. R. B. Bagul, APP for respondent No.1 – State
Mr. R. C. Bora, Advocate for respondent No.2

....

CORAM : R. G. AVACHAT, J.

RESERVED ON : 02nd MAY, 2022

PRONOUNCED ON : 16th JUNE, 2022

JUDGMENT :-

This is an appeal against conviction. The appellant has been convicted for the offence punishable under Section 376(2)(f) of the Indian Penal Code and therefore, sentenced to suffer rigorous imprisonment for twelve (12) years and pay fine of Rs.2,000/-. In default of payment of fine, he had been directed to undergo rigorous imprisonment for three months. No separate sentence has been

awarded for the offences punishable under Sections 4 and 8 of the Protection of Children from Sexual Offences (POCSO) Act, 2012.

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

PW1- “P” (victim), was resident of village Tandalachi Wadi. She was a 7th standard student in 2017. The victim would reside along with her parents and two of her five sisters. Her other three sisters have been married. The appellant is the husband of one of the sisters, namely, Kanta.

It so happened that on 05.09.2017, the victim, along with her two sisters was engaged in harvesting Udid (black gram) crop in their field. Little past 3.00 p.m., the appellant came to the field and informed them that their mother had purchased grocery and she was unable to bring the articles home. He, therefore, asked one of them to go to Nandur Phata to assist their mother. The victim therefore accompanied the appellant. The victim's cousin Sushant was requested to drop both of them, first at Nandur Phata. Sushant agreed. He was riding the motorbike. Both, the appellant and victim were the pillion riders on one and the same motorbike. On way, the appellant informed that the victim's mother is awaiting at Barad Phata. Sushant, therefore, dropped them at Barad Phata and went

away. It is also the case of the prosecution that the appellant went to a nearby medical shop to purchase some medicines as his son had sustained burn injuries. He came with some medicines. Both, the appellant and the victim started to proceed. The appellant received a phone call of the victim's mother. She told him to have returned home and asked him to drop the victim home. The appellant, therefore, took the victim through the field wherein Jawar crop was standing. According to him, it was a short way to reach home early. On way, he swallowed one tablet. Offered another tablet to the victim. She suspected something amiss. She threw away the tablet. The appellant embraced her. He gagged her mouth. Removed her clothes and his, as well. He, then, committed rape of the victim. The victim shouted. That time, 2 – 3 persons grazing she-goats, rushed to the place and rescued her. She told them that one Babasaheb is the husband of her another sister. Somebody from them contacted Babasaheb on phone. He and his wife came. They brought the victim home. Meanwhile, Babasaheb contacted the police on phone. The police too arrived. Initially, the family members were reluctant to lodge report of the incident. A lady Police Constable (PW2) took the victim in confidence. The victim related her what had happened with

her. Since the family members of the victim were reluctant to lodge First Information Report (FIR), PW2 lady Police Constable lodged the FIR Exh.37 on behalf of the State. Crime vide CR No. 221 of 2017 under Section 376(2)(f) of Indian Penal Code and under Sections 4 and 8 of the POCSO Act, came to be registered at Neknoor Police Station. It was investigated. The appellant was arrested. Both, the victim and the appellant were medically screened. Clothes on their person were taken charge of under the panchanamas. Scene of offence panchanama was drawn. Blood sample, vaginal swab etc., were sent to (Central Forensic Science Laboratory (C.F.S.L.)). 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 charge-sheet.

3. The learned Special Judge constituted for trial of the offences under the POCSO Act, framed the charge. The appellant pleaded not guilty. His defence was of false implication. It is his case that his in-laws felt that he was ill-treating their daughter. They were insisting him to give some land in the name of his wife (their daughter). With a view to teach him a lesson, false FIR was lodged.

4. The prosecution examined ten (10) witnesses and produced in evidence certain documents. On appreciation of the evidence in the case, the trial Court convicted and sentenced the appellant as stated above.

5. Heard.

The learned Advocate for the appellant took me through the evidence in the case to submit that the same is grossly inconsistent with each other. The officer in-charge of the Police Station had been serving with the concerned police station for little over five years. He had, therefore, acquaintance with the parents in-law of the appellant. Since the appellant was harassing and ill-treating his wife, his parents in-law got lodged the FIR at the behest of their minor daughter. According to the learned Advocate, the prosecution failed to prove the victim was below twelve (12) years of age. According to him, the victim was little over sixteen (16) years of age. He would further submit that if the Court held the offence to have been proved, he urged for taking lenient view and release of the appellant with the sentence already undergone. The appellant is behind the bars for little over five (5) years. The learned Advocate also relied on the following authorities:

- (i) Jitendra Suresh Gabhane and others vs State of Maharashtra – 2017 DGLS (Bom.) 807;
- (ii) Mahendra Subhashbhai Vankhede vs State of Gujarat etc. - 2017 DGLS (SC) 1280;
- (iii) Dashrath Aba More vs State of Maharashtra – 2016 DGLS (Bom.) 1081;
- (iv) Mohammad Sharif Latifur Rehman Shaikh @ Bilal vs State of Maharashtra – 2016 DGLS (Bom.) 604.

6. The learned APP would, on the other hand, submit that the victim is none other than younger sister of the wife of the appellant. She did not have a reason to falsely implicate him in the crime in question. The witnesses have deposed to as per the happenings. According to him, the relations between the victim and the appellant was that of a confidence. The appellant has betrayed the same. The trial Court has rightly convicted him with imposing adequate sentence. The learned APP urged for dismissal of the appeal.

7. The learned Advocate for the victim was first found to be siding the appellant. The same appears to be on instructions of his client. The Court even found nothing wrong in it, since the victim is the sister of the wife of the appellant. Due to the appellant to be required to remain behind the bars for further 5 – 6 years, the

victim's sister and her two minor children are going to suffer. The learned Advocate, however, later on came around to support the prosecution case. He urged for dismissal of the appeal.

8. Considered the submissions advanced. Perused the evidence relied on. Gone through the documents referred to.

The victim gave her evidence very much consistent with her police statement and the statement Exh.22 recorded under Section 164 Cr.P.C. It is in her evidence that her date of birth was 07.05.2005.

9. It is the case of the prosecution that on 05.09.2017, the victim, along with her two sisters was engaged in harvesting Udid (black gram) crop in their field. Little past 3.00 p.m., the appellant came to the field and informed them that their mother had purchased grocery and she was unable to bring the articles home. He, therefore, asked one of them to go to Nandur Phata to assist their mother. The victim therefore accompanied the appellant. The victim's cousin Sushant was requested to drop both of them, first at Nandur Phata. Sushant agreed. He was riding the motorbike. Both, the appellant and victim were the pillion riders on one and the same

motorbike. On way, the appellant informed that the victim's mother is awaiting at Barad Phata. Sushant, therefore, dropped them at Barad Phata and went away. It is also the case of the prosecution that the appellant went to a nearby medical shop to purchase some medicines as his son had sustained burn injuries. He came with some medicines. Both, the appellant and the victim started to proceed. The appellant received a phone call of the victim's mother. She told him to have return home and asked him to drop the victim home. The appellant, therefore, took the victim through the field wherein Jawar crop was standing. According to him, it was a short way to reach home early. On way, he swallowed one tablet. Offered another tablet to the victim. She suspected something amiss. She threw away the tablet. The appellant embraced her. He gagged her mouth. Removed her clothes and his, as well. He, then, committed rape of the victim. The victim shouted. That time, 2 – 3 persons grazing she-goats, rushed to the place and rescued her. She told them that one Babasaheb is the husband of her another sister. Somebody from them contacted Babasaheb on phone. He and his wife came. They brought the victim home. Meanwhile, Babasaheb contacted the police on phone.

It is further in her evidence that on arrival of police personnel, a lady Constable took her in confidence. She related her the incident. It is also in her evidence that she pointed out the police officer the scene of offence. It is also in her evidence that she was medically examined.

True, in her cross examination, it has come on record that the appellant was addicted to liquor. He would ill-treat his wife (sister of the victim). Her parents were insisting the appellant to transfer some of his land in the name of his children. They would also ask the appellant as to why did he ill-treat their daughter. It is also in her evidence that she did not give the police her date of birth as 07.05.2005. She could not assign reason as to why said date is appearing in her police statement. It is further in her evidence that she was taken first her home. Some villagers had gathered there. A sister's husband, Balasaheb had come in response to a phone call. True, Balasaheb has not been examined. The same is, however, not found to be fatal to the prosecution.

10. PW2 – Asha was a Police Naik, serving with Neknoor Police Station. It is in her evidence that by 4.00 p.m. on 05.09.2017, a phone message was received by her officer, informing that one girl

was sexually assaulted at Dhawajachi Wadi. She was on wireless duty. She was asked to accompany the other police officials to the place of the incident. She, therefore, went there in the company of the police officials. She, found the victim under fear. She took to the victim in confidence. Gave her courage and inquired with her as to the happenings. The victim, in turn, related the entire incident. It is further in her evidence that since the relations of the victim were reluctant to lodge FIR, she (PW2 - Asha) lodged the same vide Exh.37. Though she was subjected to searching cross examination, nothing substantial could be elicited to disbelieve her evidence. The report lodged by PW2 - Asha has rightly been treated as FIR. The victim had not narrated her case with a view to set criminal law in motion.

11. PW9 – Mahananda, mother of the victim gave evidence consistent with the prosecution case. It is in her evidence that on the given day she had gone to purchase grocery articles. Her husband was away in someone's field for labour work. Her three daughters including the victim were engaged in harvesting Udid crop. On her return, her daughter Sharda informed that the appellant had come there and took the victim with him under the pretext of joining the

victim to her mother so as to assist her to bring grocery articles. It is in her evidence that she had not asked the appellant to ask any of his daughters to come Neknoor Phata to assist her. It is further in her evidence that the victim related her what the appellant did with her.

Although PW9 – Mahananda was subjected to searching cross examination, nothing substantial could be elicited to disbelieve the prosecution case. No doubt, she admitted that the appellant was not treating her daughter well.

12. PW3 - Rajendra was a witness to the panchanamas whereunder clothes of the victim and the appellant on their person at the relevant time were taken charge of.

13. PW4 - Shivdas is a witness to the scene of offence panchanama Exh.51. It is in his evidence that one nicker and a pill were seized from the scene of offence.

14. PW5 – Mahadeo was the Head Master of the school wherein the victim was taking education. He produced school record (Exh.53) of the victim. It is to be stated that the appellant did not dispute the victim to have been below 18 years of age at the relevant

time. Whether the victim was below 12 years of age at the relevant time is not of much relevance, since the appellant was charged with the offence punishable under Section 376 (2)(f) IPC.

15. PW7 - Dr. Rajashri was the Medical Officer in Civil Hospital, Beed. It is in her evidence that she had screened the victim medically. The victim had given her history of having been sexually assaulted by the husband of her sister. On examination of the victim, PW7 found - *'urethral meatus and vestibule intact, labia majoria – intact, labia minora – intact and all were developed as per age. Fourchette and introitus – redness at introitus. Hymen perinem – torn at 3, 4, 6, 7, 9 O' clock'*. The doctor had obtained vaginal swab, blood sample, pubic hair etc. of the victim. She placed on record all the OPD papers. After having gone through the Chemical Analysis (CA) reports. she gave her final opinion (Exh.67) that sexual assault might have occurred.

16. The appellant too was medically examined to find him potent.

17. True, the CA reports may not support the prosecution. The fact remains that the victim girl, in the age group of 11 to 15

years, could not be said to have any reason to falsely implicate the appellant at the cost of her chastity. The report of the incident and her statement came to be recorded within one or two hours of the incident. They are bound to be some inconsistency inter-se the evidence of the prosecution witnesses.

This Court found the victim to be witness of truth. This Court, has therefore, no reason to interfere with the impugned judgment of conviction.

18. On the question of quantum of sentence is concerned, the offence punishable under Section 376(2)(f) IPC, is punishable with rigorous imprisonment for a term which shall not be less than ten (10) years. But which may extend to imprisonment for life. The trial Court has sentenced the appellant for twelve (12) years rigorous imprisonment. Because of the appellant having been behind the bars, his wife and two minor children do suffer a lot. The victim is none other than younger sister of appellant's wife. It was, therefore, found that her Advocate was not opposed for reduction of sentence of imprisonment. The appellant has already been behind the bars for little over five years. A minimum sentence prescribed for the offence is not less than ten (10) years. In this factual backdrop, I

am inclined to reduce the quantum of sentence from twelve (12) years rigorous imprisonment to ten (10) years rigorous imprisonment. With this, the appeal partly succeeds. Hence, following order is passed.

19. The appeal is partly allowed.

20. The conviction of the appellant for the offence punishable under Section 376(2)(f) of the Indian Penal Code, is maintained. However, the substantive sentence of imprisonment of twelve (12) years rigorous imprisonment is reduced to ten (10) years rigorous imprisonment.

21. Rest of the terms of the impugned order to stand unaltered.

[R. G. AVACHAT, J.]

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