

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

CRIMINAL APPEAL NO.915 OF 2015

Raju @ Kiran Dagadu Gavade
age 21 years, Occupation : Labour,
R/o Near B.S.N.L. Office, Mohadi,
Tq. & District Dhule

... APPELLANT

VERSUS

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

2. Vandana d/o Shantaram Garud @
Vandana w/o Nanu @ Umesh Kangude,
Age 18 years, Occupation : Household,
R/o Mhada Building No.1,
Tikhi Road, Mohadi,
Tq. & District Dhule

... RESPONDENTS

.....
Shri R.N. Dhorde, Senior Counsel with
Shri V.R. Dhorde, Advocate for appellant
Shri R.B. Bagul, A.P.P. for respondent No.1 – State
Mrs. Uma S. Bhosale, Advocate for respondent No.2
(appointed)

.....
WITH

**CRIMINAL APPEAL NO.929 OF 2015 WITH
CRIMINAL APPLICATION NO.722 OF 2021**

1. Rahul s/o Bhaskar Gavade
Age 22 years, Occu. Labour,
R/o Near B.S.N.L. Office, Mohadi
Taluka and District Dhule

2. Mahesh s/o Shivdas Gavade
Age 20 years, Occu. Labour,
R/o Mahajan Nagar, In front of
Mohadi Railway Station, Mohadi,
Taluka and District Dhule ... **APPELLANTS**

VERSUS

1. The State of Maharashtra
through the Dy.S.P. & S.D.P.O.
Shri Chandrakant Gavali
(Copy served on the Public
Prosecutor, High Court,
Bench at Aurangabad)
2. Vandana Shantaram Garud
Age 18 years, Occu. : Education,
R/o Mohadi, Tq. & District Dhule ... **RESPONDENTS**

.....
Shri C.R. Deshpande, Advocate for appellants
Shri R.B. Bagul, A.P.P. for respondent No.1 – State
Mrs. Uma S. Bhosale, Advocate for respondent No.2
(appointed)

.....

WITH

CRIMINAL APPEAL NO.38 OF 2016

1. Santosh Rohidas Borse,
Age 28 years, Occu. Labourer,
R/o Indira Nagar, Ranmala, Dhule
Taluka and District Dhule
2. Eknath Ramdas Pawar
Age 24 years, Occu. and
R/o as above.
3. Chandar Eknath alias Dashrath More,
Age 25 years, Occu. and
R/o as above.

4. Dharma Bhagwan Ahire,
age 25 years, Occu. and
R/o as above.

(At present the appellants are in Nashik
Central Prison, Nashik, District Nashik) ... **APPELLANTS**

VERSUS

The State of Maharashtra
through the Deputy Superintendent
of Police and Sub-Divisional
Police Officer, Dhule, Dist. Dhule
(Notice to the respondent to be
served through the Public
Prosecutor, High Court of Bombay,
Bench at Aurangabad) ... **RESPONDENT**

.....
Shri Govind Kulkarni, Advocate for appellant
Shri R.B. Bagul, A.P.P. for respondent No.1 – State
.....

CORAM : R. G. AVACHAT, J.

Date of reserving judgment : 26th April, 2022

Date of pronouncing judgment : 08th June, 2022

J U D G M E N T :

These appeals are being decided by this common judgment since the challenge therein is to one and the same judgment and order dated 30/11/2015, passed by Additional Sessions Judge, Dhule in Special Case No.108/2013, whereby the appellants in these appeals have been convicted for the offence punishable under Section 376-D read with Section 34 of the Indian Penal Code and under Section 4 of the Protection

of Children from Sexual Offences Act and sentenced to suffer rigorous imprisonment for 20 years each and fine of Rs.2000/- each, and rigorous imprisonment for 7 years each and fine of Rs.500/- each respectively. In default of payment of fine, they have been directed to suffer simple imprisonment for three months and one month respectively.

2. The facts in brief, giving rise to the present appeals, are as under :-

P.W.1 'A' was 16 years of age at the relevant time. She was a student of 11th Standard. She had emotional relationship with Umesh Kangude (juvenile in conflict with law). Umesh had taken her to Dedargaon Talav (place) on his motorcycle. It was 12.00 noon on 24/9/2013. While both of them were engaged in a conversation, his friends namely Rahul and Mahesh (appellants in Criminal Appeal No.929/2015), and Raju (appellant in Criminal Appeal No.915/2015) came there on motorcycle. All of them and Umesh forcibly took P.W.1 A to a secluded place under a bridge. They forcibly undressed her. All the four then committed rape on her by turn. They also did shooting of

each one's sexual act with her in a cell phone camera. A tractor was passing by that time. Four persons were therein including the tractor driver (other appellants). They stopped. All of them also had a sexual intercourse with P.W.1 A by turn. Each one's act was videographed. After their lust was satisfied, all of them went away leaving behind the victim P.W.1 A.

3. P.W.1 A lodged the F.I.R. (Exh.198) at Mohadinagar Police Station on 30/9/2015. Crime vide C.R. No.100/2013 was registered. Additional Superintendent of Police Chandrakant (P.W.19) was entrusted with the investigation of the crime. The appellants came to be arrested. All of them and the victim were medically examined. Clothes on their person at the time of commission of the crime were taken charge of under various panchanamas drawn in the presence of panch witnesses. Their blood samples were obtained. The seized clothes and blood samples were sent to Forensic Science Laboratory for D.N.A. profiling. Cell phones with the aid of which the crime was videographed were taken charge of. Those were sent to Central Forensic Science Laboratory. Statement of the

prosecutrix was recorded under Section 164 of the Code of Criminal Procedure. Her school record was obtained in proof of her age. Statements of persons acquainted with the facts and circumstances of the case were recorded. Test identification parade of the appellants was held. On completion of the investigation, the appellants were proceeded against by filing a charge sheet. The trial Court framed the charge (Exh.13). The appellants pleaded not guilty. Their defence was of false implication.

4. The prosecution examined as many as 22 witnesses and produced in evidence various documents. On appreciation of the evidence in the case, the trial Court convicted the appellants and sentenced them as stated above. Hence the present appeals.

5. Heard learned counsel appearing for the appellants in respective appeals. Also heard the learned A.P.P. and the learned counsel appointed to represent the victim.

Learned counsel for the appellants would submit that, it is a case of no evidence. Moral conviction has no

place in criminal jurisprudence. They, therefore, submitted for allowing the appeals by setting aside the conviction of the appellants recorded by the trial Court.

6. The learned A.P.P. and the learned counsel representing the victim would, on the other hand, submit that, the evidence of hostile witness/es could not be ignored altogether. They took me through the evidence of the victim and other witnesses to ultimately submit that, based on circumstantial evidence, the trial Court was justified in convicting the appellants. According to learned A.P.P., the victim gave her date of birth in her oral evidence. That piece of evidence has gone unchallenged. The victim had admitted to have accompanied Umesh (juvenile in conflict with law) to Dedargaon Talav. She admitted to have had a long conversation with him at a secluded place near Dedargaon Talav at the relevant time. When the victim was confronted with the F.I.R. (Exh.198), she admitted her name and address appearing therein. She also admitted to have had opened a Bank Account as a big amount was to be deposited in her name. According to learned A.P.P., a huge amount has changed hands, as a result whereof the victim did not stand

by the prosecution. He would further submit that, the victim had given history of the incident to the Medical Officer Dr. Shital Deore (P.W.3) before her medical screening. The doctor has reiterated the history given by the victim. The appellants had made disclosure statements, pursuant to which clothes on their person and the cell phones came to be seized. The D.N.A. report (Exh.138) reinforces the prosecution case. The trial Court viewed the C.D. containing the video recording of the crime and came to the conclusion that the appellants have committed the heinous crime. The learned counsel ultimately urged for dismissal of the appeals.

7. Considered the submissions advanced. Gone through the entire evidence on record. Perused the documents relied on. In view of this Court, it is a case of no evidence at all. True, the crime allegedly committed by the accused is heinous and serious one. One will be short of words to condemn the alleged act/s.

8. 22 witnesses were examined by the prosecution. P.W.1 is the victim. P.W.2 Dr. Ajit Pathak and P.W.3 Dr. Shital Deore are the Medical officers. P.W.4, 5, 8, 11, 12, 13, 14,

15, 16, 17 and 18 are the panch witnesses. P.W.6 Sharad Dubale is the Judicial Magistrate, who has recorded the statement of the victim under Section 164 of the Code of Criminal Procedure. P.W.7 Dattatraya Shejul is the Tahsildar, who conducted the test identification parade. P.W.9 Bhavesh Nikam and P.W.10 Shrikant Lahade are the scientific experts, serving with Central Forensic Science Laboratory. P.W.21 Shilpa Patil was a lady Police Inspector, who has recorded the F.I.R. (Exh.198). P.W.22 Rajendra Patil is the Head Master of Junior College wherein the victim took education.

9. Let us appreciate the evidence in the case. P.W.1 testified on oath that she was a student of 11th Standard of Arts stream. She gave her date of birth as 28/7/1997. She claimed to have belonged to Scheduled Caste. This much of her evidence has not been taken exception to during her cross-examination. It is further in her evidence that the incident took place on 24/9/2013. She accompanied her friend Umesh (juvenile in conflict with law) to Dedargaon Talav on his motorbike. It was about 12.00 noon. It is further in her evidence that both of them were at that place up to 3.00 p.m. According to her, no incident as has been

alleged by the prosecution did take place. The learned A.P.P., in charge of the case, therefore, subjected her to searching cross-examination. She was confronted with the contents of the F.I.R. She denied to have lodged the F.I.R. with the concerned police station. She claimed ignorance that the alleged acts were videographed. She admitted to have had opened a Bank Account. According to her, the police did pay her Rs.60,000/- and, therefore, she had opened an account in the Bank. According to her, although she participated in the test identification parade, she could only identify her boyfriend Umesh. She denied to have been sexually ravished by the appellants. According to her, she had never been to the police station to lodge the report of the incidence. One of the police personnel had come to her residence on 30/9/2013. That policeman took her to the police station. She was at the police station for about 3 hours. She did not give any statement.

10. The photographs and the video shooting of the crime in question was shown to her. She disowned the same. She denied that it is she who is appearing in the picture.

11. True, P.W.21 Shilpa testified to have had recorded the F.I.R. (Exh.198) as narrated by the victim. It is also proved that P.W.3 Dr. Shital Deore gave in her evidence the history given by the victim to her and which was recorded by her in the medical certificate (Exh.48). Dr. Shital Deore testified that, on medical screening of the victim, she found her hymen was torn. In her opinion, the victim was subjected to sexual intercourse. It is also true that the victim gave the details of her ordeal in her statement (Exh.90) recorded under Section 164 of the Code of Criminal Procedure. There are in the nature of previous statements of the victim, which could only be used for corroboration and/or contradicting the maker thereof. Admittedly, the victim in her own testimony did not attribute anything incriminating against any of the appellants. The F.I.R., statement recorded under Section 164 of the Code of Criminal Procedure and the history given by the victim cannot be a substantive piece of evidence. Since there being nothing incriminating deposed to by her, the same loses its efficacy.

12. As per the prosecution case, there was an eye witness to the incident. The said witness is none other than

P.W.4 Arun Wagh. As per the prosecution case, it was P.W.4 Arun who had rushed to the scene on hearing the cries and rescued the victim. Unfortunately, P.W.4 Arun also did not stand by the prosecution. He denied to have had seen the incidence and rescued the victim.

13. All the panch witnesses to the seizure of the clothes from the appellants and recovery of cell phones and the motorbike at their instance, pursuant to the disclosure statements made by the respective appellants, did not stand by the prosecution. Even if we accept the case of the prosecution that the clothes and cell phones came to be seized pursuant to the disclosure statements made by the respective appellants, there is no evidence to suggest that they were clad in those clothes at the relevant time. True, the D.N.A. report (Exh.138) indicates the semen stains were detected on Exhibits 1, 2, 7 and 9 (knicker and underwears) and the same being incriminating only against appellants Eknath, Rahul, Mahesh, Chandar and Dharma, there is, however, prima facie nothing to indicate that those were the very clothes on their person while the crime was being committed.

14. Same is the case about evidence as regards test identification parade. Although the Tahsildar Dattatraya Shejul (P.W.7) testified to have had conducted the test identification parade, wherein the victim identified the appellants, she (victim) in her evidence before the Court, denied to have identified the appellants in the test identification parade.

15. It is also true that the trial Court had viewed the video recording of the alleged sexual acts to find the persons appearing therein to be the appellants and the victim. The fact is, however, that, when the same was confronted to the victim, she disowned the same. It is also true that, the experts at Central Forensic Science Laboratory have given their opinion that the photographs of the victim and the appellants matched with the pictures in the video recording, the same is after all opinion evidence. When the victim herself disowns or denies to have ever been sexually ravished by the appellants and there being no material which could be termed to be a substantive piece of evidence indicating the appellants to have committed the crime in question,

interference with the impugned judgment is warranted.

16. The appellants were in the age group of 18 to 20 years at the relevant time. They are behind the bars for little over 8 ½ years. It is reiterated that had the offence been proved against the appellants, this Court would have sentenced them to the maximum punishment provided by law.

17. In the result, the appeals succeed. Hence the order :

ORDER

- (i) The Criminal Appeals are allowed.
- (ii) The judgment and order dated 30/11/2015, passed by learned Special Judge and Additional Sessions Judge, Dhule in Special Case No.108/2013, convicting the appellants and consequently sentencing them to imprisonment is hereby set aside.

- (iii) The appellants are acquitted of the offences punishable under Sections 376-D read with Section 34 of the Indian Penal Code and Section 4 of the Protection of Children from Sexual Offences Act, 2012. The appellants be set at liberty forthwith if not required in any other case.
- (iv) Fine amount, if paid, be refunded to the appellants.
- (v) Fees of Mrs. Uma S. Bhosale, learned counsel is quantified at Rs.8000/- (Rupees eight thousand).
- (vi) Criminal Application No.722/2021 stands disposed of.

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

fmp/-