

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.1225 OF 2013
WITH
INTERIM APPLICATION NO.3439 OF 2021
IN
CRIMINAL APPEAL NO.1225 OF 2013

Umesh Anant Kharose	)	
Aged : 31 years,	)	
R/o. Appasaheb Ghole Chawl,	)	
Vihari Khopoli, Taluka Khalapur,	)	
District Raigad	)	
At present undergoing the sentence imposed	)	
upon him at Alibaug District Prison.	)	Appellant / Applicant
Vs.		
1. State of Maharashtra	)	
At the instance of Senior Inspector of Police,	)	
Khopoli Police Station <i>vide</i> their	)	
C.R.No.I-102 of 2011	)	
2. XYZ	)	Respondents

Ms. Pooja Sejpal a/w. Ms. Akshata B. Desai i/b. Mr. Nitin Sejpal for
Appellant / Applicant.

Ms. G. P. Mulekar, APP for Respondent No.1-State.

**CORAM : S. S. SHINDE &
SARANG V. KOTWAL, JJ.**

DATE : MARCH 31, 2022

ORAL JUDGMENT : (Per Sarang V. Kotwal, J.)

. At the outset, it is required to be noted that since the subject matter is the offence under Sections 376 and 376(2)(f) of the Indian Penal Code, the identity of respondent No.2 herein needs to be concealed and hence, she

is referred to as 'XYZ'. The Registry is directed to mention the respondent No.2 as 'XYZ' in all the records of this appeal.

2. The appellant has preferred this appeal challenging the judgment and order dated 03.10.2013 passed by the learned Additional Sessions Judge, Raigad - Alibaug in Sessions Case No.149 of 2011. By the impugned judgment and order, the appellant was convicted for commission of the offence punishable under Section 342 of the Indian Penal Code and was sentenced to suffer rigorous imprisonment for one year with a fine of Rs.1,000/-; and in default of payment of fine to suffer further RI for three months. The appellant was further convicted for commission of the offence punishable under Section 506 of IPC and was sentenced to suffer RI for three years and to pay a fine of Rs.5,000/-; and in default of payment of fine to suffer further RI for six months. The appellant was mainly convicted for commission of the offence punishable under Sections 376 and 376(2)(f) of the IPC and was sentenced to suffer life imprisonment and to pay a fine of Rs.50,000/-; and in default, to suffer further RI for three years. The sentences were directed to run concurrently. On depositing the fine amount, Rs.55,000/- was directed to be paid to the victim. The appellant was given set-off for the period which he had undergone in detention as an undertrial prisoner. Directions were issued to the State to pay compensation of Rs.2,00,000/- to the victim girl under the *Manodhyaya* Scheme.

3. The prosecution case is about the rape committed by the appellant on the victim on 30.06.2011 in the afternoon at Khopoli. The FIR was lodged by the victim after the incident was told by her to her mother. After

registration of the FIR, investigation was carried out. During the course of investigation, the accused was arrested; the incriminating articles were seized; and the clothes, which were on the person of the accused at the time of incident, were also seized under *panchanama*. The victim was medically examined. The appellant was also medically examined and at the conclusion of the investigation, the charge-sheet came to be filed.

4. During trial, the prosecution examined eight witnesses viz. victim (PW-2) and her mother (PW-1); two medical officers - Dr. Sanjay Sadavarte (PW-6) and Dr. Megha Ghate (PW-7) as also the *panch* witnesses - Pramod Eknathrao Mugutrao (PW-3), Hanumant Parashram Mankar (PW-4) and Sachin Namdeo Shinde (PW-5) to prove the spot and discovery *panchanamas*. Investigating Officer - Mr. Shyamkant Chindhu Sonar was also examined as PW-8.

5. We have heard Ms. Pooja Sejpal, learned counsel for the appellant and Ms. Mulekar, learned APP for respondent No.1 - State.

6. Ms. Sejpal, learned counsel for the appellant vehemently submitted that the evidence brought on record by the prosecution is weak and the appellant should not have been convicted. The ocular evidence is not supported by the medical evidence. There are no corroborative circumstances in this case, and therefore, the benefit of doubt should be given to the appellant. In the alternative she submitted that, considering that the appellant is in custody since 2011, leniency may be shown to him and the sentence imposed on him may be reduced.

7. On the other hand, Ms. Mulekar, learned APP has strongly opposed this appeal. She submitted that the evidence of the victim itself is sufficient and there is corroborative evidence in the form of medical evidence. There was no reason to concoct a false story and to implicate the appellant falsely. She submitted that considering the fact that the victim was below 12 years of age at the time of incident and the manner in which she was threatened by the appellant at the time of commission of offence, no leniency can be shown to him.

8. We have considered the submissions, and with the assistance of learned counsel for the parties, perused the evidence on record.

9. At the outset it needs to be mentioned that the birth certificate of the victim was produced on record at Exhibit 59-A, which shows her date of birth as 03.12.1999. The date of incident is 30.06.2011. Therefore, on the date of the incident, the victim was below 12 years of age.

10. As mentioned earlier, the victim was examined as PW-2. She has stated that at the time of the incident, she was studying in 7th standard. Her school hours were in the morning from 7:30 a.m. upto 9:30 a.m. After the school was over, she used to go to the tuition class upto 11:30 a.m. On that day, after her tuition class was over, she was walking back towards her house with her friend. When they reached near the bridge, the appellant stopped her. She was knowing the appellant as he had provided cable services to the victim's house and he used to collect charges for the cable services. The appellant told her that her mother had gone to the school with

her brother and her mother had called her (PW-2). The appellant had asked the victim's friend to go to her house. The appellant acted as if he was talking to her mother on his mobile phone so that victim could believe him. The appellant took her in a building in front of the school and he opened the lock of the door of the room with a key. PW-2 did not find her mother there and she became suspicious and started crying. The appellant showed her a razor and a scissor and threatened to kill her. Then he committed rape on her. After the incident, the appellant took her in the rickshaw and told her that if she narrated this incident to anybody, he would kill her. He left her at some distance from the spot and went away. Thereafter the victim came home in the afternoon at 1:00 p.m. Initially she did not tell anything to her mother but on her mother's persistent inquiry, she narrated the incident to her. Then she and her mother went to Khopoli Police Station and informed the incident to the police. The police recorded her statement and registered the offence. The FIR is produced on record at Exhibit-20. The victim (PW-2) identified the appellant in the court. In her cross-examination, she was asked about place of the incident, her school timings as also whether the area near the spot of incident was crowded or not. According to her, the police had seized the razor and the scissor from the spot of the incident. She denied the suggestion that she was deposing at the instance of her mother.

11. PW-1 is the mother of the victim. She has narrated how the PW-2 had left for the school in the morning and thereafter did not return home at her usual time. Therefore, PW-1 made inquiry about the victim with her friends. As PW-1 did not get any information about the victim, she gave a

call to her husband and informed about the same. After some time, PW-2 came home, and on inquiry with her, PW-1 came to know the incident. She then went to the police station with the victim for lodging the FIR. In the cross-examination, hardly any material important to the defence was brought on record.

12. The prosecution has examined Dr. Sanjay Sadavarte (PW-6) and Dr. Megha Ghate (PW-7). Both of them have deposed about medical examination of the victim. The victim was examined on 01.07.2011. In the history narrated by the victim to PW-6, it was mentioned that at 12:30 p.m. on 30.06.2011, a person attempted to commit rape on victim. The medical examination was conducted by PW-7 at about 1:20 a.m. on 01.07.2011. Both the Doctors relying on the clinical evidence had given their opinion in the provisional certificate which is produced on record at Exhibit-42. In that provisional certificate, it was clearly mentioned thus :-

“female brought by police on 1/7/11 1.20 AM, 11 yr old. On examination there is clinical evidence of penetrative recent intercourse.”

13. Apart from the aforesaid evidence, there is a recovery of razor and scissor at the instance of the present appellant. Consideration of the evidence shows that PW-2 has given reliable and cogent evidence before the court. There are no infirmities in her evidence. The FIR was lodged within a reasonable time. Her evidence is corroborated by PW-1. The testimony of PW-1 is about the steps taken by her in lodging the FIR. PW-1 and PW-2 immediately approached the police. Medical examination was conducted immediately and there was no scope for concoction of a story

falsely implicating the appellant. More importantly, ocular evidence is supported by the medical evidence, and in particular by the provisional certificate issued by the doctor. Thus, the prosecution has proved its case beyond reasonable doubt that the appellant had committed rape on the victim who was below 12 years of age at the time of the incident which is supported by the birth certificate.

14. Though it is true that CA certificates show that no semen was detected on vaginal swab and pubic hair, the prosecution evidence discussed earlier shows that the prosecution has successfully proved the case against the appellant beyond reasonable doubt. The learned counsel for the appellant submitted that the friend accompanying the victim and the victim's father were not examined as witnesses. In our view, those witnesses were not important enough as there is nothing contrary on record to create doubt about the prosecution case. The evidence which is brought on record is sufficient to prove the case against the appellant beyond reasonable doubt.

15. Considering the overall evidence and material on record, we are of the opinion that there is no reason to reduce the quantum of the sentence imposed on the appellant. The victim was less than 12 years of age. She was taken to a secluded room by the appellant on false pretext while she was going to her house from tuition classes. Appellant took advantage of the situation and took her to the room and she was threatened by him by showing scissor and razor and after that he committed rape on her. Even after that, while she was taken in rickshaw, he continued threatening her.

This conduct on his part shows that it is a heinous crime committed on a helpless victim who was below 12 years of age. No mitigating circumstances are brought on record. The offence is quite serious. We are, therefore, not inclined to reduce the sentence.

16. Therefore, the appeal fails and is accordingly dismissed.

17. In view of the dismissal of the appeal, nothing survives in Interim Application No.3439 of 2021 and the same is dismissed accordingly.

(SARANG V. KOTWAL, J.)

(S. S. SHINDE, J.)

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