

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL APPEAL NO. 524/2013

APPELLANT : Himmat Samrat Dongardive,
aged about 60 years, Occ. Labour
R/o. Shyampur, Tq. Achalpur,
District : Amravati

...VERSUS...

RESPONDENT: Government of Maharashtra,
Through Police Station Officer,
Police Station Pathrot, Tq. Anjangaon Surji,
Dist. Amravati

Ms. D.V.Sapkal, Advocate (appointed) for appellant
Mrs. Mayuri Deshmukh, APP for respondent/State

CORAM : AVINASH G. GHAROTE, J.
DATE : 06/07/2022.

ORAL JUDGMENT

1] Heard Ms. Sapkal, learned appointed counsel for the appellant and Mrs. Deshmukh, learned APP for the respondent/State.

2] The appellant has been convicted for the offence punishable under Sections 376 and 511 of the Indian Penal Code and sentenced to suffer Rigorous Imprisonment for 3 years and to

pay a fine of Rs. 500/-, in default to suffer Simple Imprisonment for 1 month.

3] It is contended by Ms. Sapkal, learned appointed counsel for the appellant, that there are various infirmities in the prosecution case. She submits that there is delay in lodging the First Information Report, since the incident had taken place on 23.01.2010 between 04.30 to 05.30 p.m., whereas the First Information Report has been lodged on 24.01.2010 at 09.30 a.m. Inviting my attention to the cross examination of PW-1, the father of the victim, who was the informant (page 27), she submits, that PW-1 has admitted that he had not made any attempt to visit the Police Station on 23.01.2010 to lodge the complaint, and therefore, there was delay in lodging the First Information Report. It is also submitted, that there are two rival groups in the Village Isapur, one of Madhukar Thakare to which the father of the victim belongs and the other being Vinod Thakare and the accused belongs to the rival groups and therefore has been falsely implicated. Inviting my attention to the evidence of PW-2, it is contended that victim has admitted of being told by her parents what to say in her deposition,

and therefore, PW-2 was a tutored witness. So far as the evidence of PW-4 is concerned, she submits that in the cross-examination, PW-4 has admitted that when she had been to the Police Station on the next day with the victim for lodging the report, throughout the victim was with her and no enquires were made by the Police Authorities with the victim. It is further submitted, that the statement under Section 164 of the Code of Criminal Procedure of the victim has not been recorded, for which there is no reason whatsoever, as the same would have lent greater credibility in the allegation. She does not dispute that the Medical report of the victim at Exh. 23 (page 15) and that of the accused (page 17) as well as the spot panchnama has been admitted by the accused. She however submits, that nothing turns upon it, as admittedly there was no injury to the private parts of the victim. She further submits that the appellant/accused is a person who is deaf and dumb and was aged 60 years at the time of the alleged incident, which had happened in the year 2010, and therefore, is now a person who is more than 70 years of age, which factor needs to be taken into consideration. It is further submitted that the appellant was arrested on 24.01.2010 and was bailed on 23.04.2010, and therefore, has already suffered

incarceration of a period of more than 90 days. She therefore submits, that considering the admissions given in the evidence of PW-2 and 4, the story of the prosecution lacks credibility and needs to be discarded by setting aside the impugned judgment and acquitting the appellant, or in the alternative she submits, that the appellant be released on the undergone sentence.

4] Mrs. Deshmukh, learned APP for the respondent/State submits, that even if the statement under Section 164 of the Code of Criminal Procedure has not been recorded, that by itself would not destroy the credibility of the case of the prosecution, which is proved by the evidence of PW-2 victim as well as the evidence of PW-3, the mother of the victim and that of PW-4 too. She further submits that the Medical Report of the victim at Exh. 23 as well as that of the accused at Exh. 24, would indicate that the appellant/accused has indeed indulged into the act of sexual intercourse against the victim, and therefore, the impugned judgment ought not to be interfered with.

5] The incident is dated 23.01.2010 at about 04.30 p.m., when the victim/PW-2 who came to her residence after the school, was called by the accused by hand signs to drink tea at his residence, to which she agreed. When the victim entered into the house of the appellant/accused, he is said to have thrown away the school bag of the victim, removed her nicker and put his private part (penis) to the private part of the girl, as a result of which, she started crying, whereupon the appellant/accused had pressed her mouth. She was found weeping standing outside her house by PW-1 her father and PW-3 her mother. When she was enquired about the reason why she was weeping, she informed them about the aforesaid incidence. Upon examining her, they found some swelling upon her private parts, whereupon turmeric powder was applied. The complaint was lodged on the next day ie. on 24.01.2010 at 09.30 a.m. Insofar as the allegation that there is delay in lodging of the complaint is concerned, it is material to note, that the incident has occurred at Village Isapur, where there is no Police Station or Police Chowki. In the cross-examination of PW-1, it has come on record, that the distance between Isapur and Pathrot where the Police Station is situated is about 10 to 11 Kms. PW-4 states, that on the night of

23.01.2010, since there was no vehicle available therefore they were not able to go to the Police Station and went on the next day. Thus, the delay in lodging the First Information Report stands satisfactorily explained. Insofar as the plea regarding enmity between PW-1 the father of the victim and the accused is concerned, on the claim that they belong to two different groups, PW-1 belongs to the group of Madhukar Thakare and the accused belongs to the group of Vinod Thakare, what has come on record in the cross-examination of PW-1, is that he belongs to the group of Madhukar Thakare. He has denied regarding the enmity of himself and the accused or the suggestion that the accused belongs to Vinod Thakare group. Suggestion regarding earlier quarrels between them has also been denied, and therefore, there being nothing else on record, the contention that the appellant/accused has been falsely implicated on account of group rivalry, has rightly been rejected.

6] The submission that PW-2 the victim, in her cross-examination has stated that it was correct that her parents had given her understanding as to what she has to state before the Court and that she was deposing as per understanding given to her by her

parents, has to be understood in the light of the age of PW-2, which at the time of the incident was 5 and half years and about 8 years at the time of her deposition. The suggestion given to her in the cross-examination that the accused did not call her by sign language and did not attempt to sexually assault her, has been denied and therefore, nothing much can be made out of this. Insofar as the contention that PW-4 in her cross examination has said that Police did not enquire with victim/PW-2, the record indicates, that the statement of the victim was duly recorded by the Police Authorities, and therefore, nothing much can be made out of the aforesaid statements.

7] The spot panchnama has been admitted by the counsel for the accused. So also, the Medical Report of the victim/PW-2 has been admitted, and therefore, exhibited as Exh. 23 and the Medical Report of the accused has been admitted by the accused, and therefore, marked as Exh. 24.

8] The entire matter therefore depends upon the testimony of PW-2/victim and the Medical Report. A perusal of the testimony

of PW-2/victim would indicate that she has sustained the onslaught of the cross-examination and has categorically narrated the incidence in her examination-in-chief. Contrary suggestions given to her in the cross-examination have also been specifically denied.

9] A perusal of the Medical Report of accused Exh. 24, (page 17) indicates, “there is no abrasion or swelling over genital organ, but there is congestion over glans penis”. The examination of the accused/appellant wherein the above condition was noticed was done on 24.01.2010 at 07.00 pm. Congestion, of any organ, is the result of accumulation of blood within the organ, as a result of back pressure within its veins and may be associated with edema (accumulation of fluid in the tissues). The fact that the medical report dated 24.01.2010 states that there was congestion over the glans penis is something, which would indicate that there was back pressure which in turn would point out the possibility of the accused having attempted to sexually assault the victim, in the matter as stated by her in her evidence. The medical report further indicates that the appellant even at his age was capable of performing sexual intercourse.

10] In view of the aforesaid material which has come on record, though there are some minor contradictions, I do not see any infirmity in the judgment of the learned trial Court so as to enable me to interfere in the same. The appeal is therefore, without any merit and is accordingly dismissed.

11] Though a plea for leniency has been made, considering the present age of the appellant and the fact that he is deaf and dumb, however, considering the law applicable as it then stand, in my considered opinion, sufficient leniency has already been shown to the appellant.

12] Appropriate fees as per the schedule be paid to learned appointed counsel.

JUDGE

Rvjalit

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