

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

CRIMINAL APPEAL NO. 178 OF 2016

REMSING @ RAMLAL BILDAR BARELA
VERSUS
THE STATE OF MAHARASHTRA

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Advocate for Appellant : Mr. M.P. Kale
Advocate for Respondent/State : Mr. A.V. Deshmukh

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**CORAM : SMT. VIBHA KANKANWADI &
Y.G. KHOBRAGADE, JJ.**
DATE : 12th April, 2023

ORDER :- (Per: Y.G. Khobragade, J.)

1. The present appeal under Section 374 of the Cr.P.C. has been filed by the appellant/original accused challenging his conviction by the learned Additional Sessions Judge, Jalgaon in Sessions Case No.35/2013 for the offence punishable under Section 307, 376 (2) (f), 366 of the I.P.C. in Crime No.113/2012 registered with Taluka Police Station Jalgaon on 17.10.2012. The appellant/accused has been held guilty and directed to undergo life imprisonment for the offence under section 307 with fine of Rs.5,000/- and R.I. for 10 years with fine of Rs.2,000/- for offence under Section 376(2) (f) and R.I. for one year for offence under Section 366 with fine of Rs.10,000/-. All the sentences have been directed to run concurrently. Apart from substantial sentence, he has been directed to undergo simple imprisonment in default of payment for maximum five months.

2. It is the case of prosecution that, the informant- victim's aunt lodged a report with Taluka Police Station, Jalgaon on 17.10.2012 alleging that, she, her husband and children had slept in her hut after dinner, on 15.10.2012. Her three minor nieces (daughters of her brother-in-law) were sleeping in neighboring hut. However, she and her husband came to know from villagers around 9 a.m. on 16.10.2012 that a small girl has fallen in the well situated near old school. Therefore, she went with her husband near that well and after reflecting the sunlight in the well with the help of a mirror, they noticed their niece/minor daughter was crying, holding an iron angle to the well. After that, her husband alighted into the well with the help of a rope and pulled the victim out of the well. Thereafter, the minor victim pointed finger towards the house of Remsing @ Ramlal Barela and then victim was taken to private hospital in unconscious state for primary treatment. Subsequently victim was hospitalized at Civil Hospital, Jalgaon. The victim minor regained conscious on 17.10.2012, at that time she disclosed to the informant that day before yesterday, at about 8.00 p.m., accused- Remsing Barela had visited her hut and by alluring her to give banana, took her in the cotton field situated near the old school, where the accused asked her to lay down and tried to remove her nicker. When the victim shouted, the accused pressed her neck and threatened her not to shout. Thereafter, the accused inserted his finger in her private part and then tried to insert his private part in her private part. Since the private part of the accused did not enter in her

private part, the accused inserted his two fingers in her private part, but due to pain she (victim) started crying due to which accused annoyed and tried to strangle her. Thereafter, the accused picked her up and threw her in to the well. In the said incident victim's right leg was fractured and she remained in well throughout the night. After getting those facts, said Aunt lodged the FIR. On the basis of said report, a Crime No.113/2012 was registered against the accused for the offence under Section 307, 376 (2) (f), 366 of the I.P.C.

3. The Investigating Officer-PW11- P. I. Prakash Khandekar has conducted spot panchanama, arrested the accused and recorded statements of the witnesses. During the course of investigation, the Investigating Officer collected medical examination report, and birth certificate of the victim minor. On completion of investigation, charge-sheet came to be filed against the accused.

4. After the committal of the case, the trial Court has framed charge at Exh.6 against the accused for the offence under Section 307, 376 (2) (f), 366 of the I.P.C. The plea of the accused was recorded at Exh.7. Accused has not pleaded guilty and therefore, trial has been conducted. In order to bring home guilt of the accused, the prosecution has examined in all 11 witnesses. The statement of accused was recorded under Section 313 of the Cr.P.C. at Exh.82 and incriminatory evidence was duly explained to the accused. The defence of the accused is of total denial and disputed his identity as culprit.

Upon hearing both sides, the learned trial Court passed impugned judgment and order on 11.02.2016, wherein he has held the accused guilty for the offence under Section 307, 376 (2) (f), 366 of the I.P.C. Being aggrieved by the same, the appellant has filed present appeal.

5. Vide order dated 11.04.2016 passed by this Court, learned Advocate Mr. M.P. Kale came to be appointed as *amicus curiae* to defend the cause of the appellant. Heard learned advocate appearing for the appellant as well as Mr. A.V. Deshmukh learned APP for the State at length.

6. The learned advocate appearing for the appellant-accused submits that, the learned trial Court failed to appreciate evidence in positive manner and convicted the appellant-accused without corroborative piece of evidence much less the testimony of minor victim. It is submitted that though the prosecution has examined 11 witnesses, however, none of them is eye witness to the incident. None of the witness says that he/ she had seen the victim with the accused prior to the incident. The entire prosecution story is based on sole testimony of the minor victim. Possibility of minor being tutored has not been ruled out. Accused was not of regular acquaintance of minor therefore, his identification by the minor is doubtful.

7. The learned advocate appearing for the appellant-accused further canvassed that though the prosecution alleged about forcible sexual

intercourse with the victim (PW-4) by the appellant accused, however, the testimony of the victim appears about inserting finger in her private part and bleeding was caused, hence, there is no penetration. Therefore, at the most there may be an attempt to commit rape as per provisions of section 375 of Indian Penal Code as existed at the time of incident. However, the learned trial Court wrongly considered the testimony of prosecutrix and medical examination report (Exh.37 and 39).

8. It is further canvassed that the appellant-accused charged for offence under Section 307 of the I.P.C. for attempting to commit murder of the victim-minor by throwing her in the well, however, as per the injury certificate Exh.37, there was no grievous injuries on the person of PW-4 victim. Evidence of Medical Officer PW-6 Dr. Renuka Bangale also does not suggest that there was grievous injury to the victim. Therefore, the ingredients of Section 307 of the I.P.C. do not get attracted, however, the learned trial Court has wrongly held guilty to the accused under Section 307 of the I.P.C.

9. According to the learned advocate appearing for the appellant it creates doubt about identity of the accused for want of eye witness to the incident which allegedly occurred after 8.00 p.m. in the field. Victim-PW-4 had not disclosed the name of the appellant-accused either to PW1 Informant, PW5 husband of informant (Uncle of the victim) or to any villager, after she

was pulled out of the well. The PW4 Victim had allegedly pointed out finger towards the accused's hut but no detailed description of the suspect was given for identification, except having hair clump. The prosecution failed to conduct Test Identification Parade of the accused. Evidence of the victim-PW4 is not in corroboration with other ocular evidence, therefore, the learned trial Court ought to have granted benefit of doubt to the accused, however, the learned Trial Court failed to appreciate the evidence and wrongly convicted the appellant-accused. Therefore, the impugned judgment and order is illegal, bad in law and prayed for quash and set aside the same.

10. Per contra the learned APP supported findings and reasons recorded by the learned trial Court and submitted that at the time of incident PW4-victim was approximately 10 years old and studied up to 3rd std. The victim-PW4 was well acquainted with the appellant/accused-Remsing @ Ramlal who was residing in neighboring hut situated in the field opposite to victim's hut. As per the testimony of PW4, the appellant/accused came to her and asked her to accompany him by alluring her with bananas and took her to the cotton fields. The accused then made the victim to lie down on the ground, removed her salwar and inserted his thumb in her private part. The accused then tried to insert his private part into her private part, but the appellant/accused was not successful and then inserted his finger into her private part which caused bleeding. When the victim-PW4 shouted, the

accused pressed her neck and threatened her. Thereafter, the accused lifted her on his waist and tried to throw her in the well, but the prosecutrix-PW4 caught hold the pole lying on edge of the well. Then, the accused had removed her hand from the pole and pushed her in the well. Therefore, testimony of victim PW-4 inspire confidence that the accused had sexually assaulted her and threw her into well thereby attempted to commit her murder. The evidence of the victim PW-4 is in corroboration with the medical reports Exh.37 and 39 as well as oral evidence of PW6 - Dr. Renuka Bangale. The learned trial Court considered the evidence available on record and held the accused guilty, hence, prayed for dismissal of the appeal.

11. At the outset, though the appellant-accused charged for the offence under Section 307, 376 (2) (f), 366, 506 of the I.P.C.; the learned trial Court has answered the point no.5 in negative holding that the prosecution failed to prove charge under Section 506 of the I.P.C. Learned Trial Court has convicted the accused for the other offences, hence, it is necessary to have scrutiny of the evidence led by the prosecution in respect of those offences.

12. In order to ascertain the age of the victim, the prosecution has examined Investigating Officer PW11-Prakash Khandekar at Exh.65. The PW11 deposed that he collected certificate Exh.66 from Headmaster of Primary School Z.P. Bhokar and as per certificate Exh.66 date of birth of PW4-minor victim is 01.06.2003. The accused has not disputed the primary school

certificate Exh.66 issued by the Headmaster Z.P., in which the victim PW-4 shown to have studied up to 3rd std. In the case of **Desh Raj V/s. Bod Raj (2008) 2 SCC 186**, it has been held that entry in school register in regard to age, caste is relevant and admissible. No objection has been taken when the said certificate Ex.66 came to be exhibited. In the case in hand, the alleged incident occurred in the intervening night of 15.10.2012 and 16.10.2012. As per certificate Exh.66 date of birth of victim-PW4 is 01.06.2003 and no adverse evidence brought on record to discard birth entry of PW-4 victim. Therefore, on the day of incident the victim-PW4 was around 9 years, 4 months. In the cross examination of the victim and her uncle-Aunt, there is no challenge to her age. Therefore, there is no hurdle in concluding that victim was 'minor' on the day of incident.

13. PW1-Informant, who is victim's aunt, at Exh.13 has deposed that the victim PW4-minor is daughter of her divorcee brother-in-law and in the night of 15.10.2012 after taking meals the PW-1 and her family members slept in her hut and the victim (PW-4) with her two sisters slept in their neighboring hut. On next day at about 9.00 a.m., the PW-1 and her husband PW-5 came to know from villagers about falling of a small girl in the well. Therefore, she and her husband (PW-5) went to the well situated near old school and with the help of sunlight reflected in the well through mirror. They realized that the said girl is their niece. Victim was crying by holding angle in

the well. PW-5 then alighted into the well with the help of a rope and brought the victim to the edge of the well. Thereafter, the PW-1 made enquiry with victim (PW-4) how she had fallen into the well and at that time the victim-PW4 raised her hand and pointed finger towards the hut of the accused because she was not in position to speak due to severe injuries to her right leg. Meanwhile the father of the injured/victim came there and took the victim to the hospital at Kinod. Thereafter, victim was referred to the Civil Hospital, Jalgaon. As per the testimony of PW1, the victim-PW4 regained conscious after two days and on inquiry, the victim (PW-4) disclosed that the accused had come to her hut and allured her to provide banana and took her with him in agricultural field near the well. Victim had then disclosed to her the entire incident about sexual assault and how accused had thrown her in the well. In her cross-examination, the defence has brought on record about construction of wall with brick and cement and guard wall about two feet height from the ground level and standing two peepal trees near the well. It is also brought on record that water level in the well was not visible from the surface and no one can hear voice if it is raised from bottom of well.

14. The prosecution examined PW2-Surendra Sonawane at Exh.19 and proved spot-cum-seizure panchanama (Exh.20). The prosecution examined PW3-Bandu Pardesi and proved clothe seizure panchanama of accused (Exh.23).

15. The prosecution examined PW4-victim at Exh.28 has deposed that, the accused visited her house and asked her to accompany with him for eating banana and took her on foot near well in the field of cotton and laid her on the ground. Thereafter, the accused removed her salwar and inserted his thumb in her private part and then fingers due to which bleeding was started from her private part. The accused tried to insert his organ in her private part but he could not insert and when she shouted, the accused pressed her neck. Thereafter, the accused took her on his waist towards the well and tried to throw her in the well but she caught hold the pole however, the accused pulled her hand and threw her in the well due to which her leg fractured. The PW4 victim has deposed that there was water in well up to her knee level and she shouted but no one came to rescue her and for whole night she remained in the well. Thereafter, in the morning, her uncle to who she calls as 'elder father' (PW5) came near the well and with the help of rope he alighted into the well and brought her out of the well. Thereafter, she was hospitalised. As per the testimony of PW4, the police have seized her salwar – Article 1 and top - Article 2 from the cotton field. In cross-examination, it has been brought on record about existence of other houses near the victim's hut and hut of victim having two partitions out of which in one part she, her parents and sisters are residing and another portion is occupied by other family. The victim admitted in her cross-examination about existence of angle

in well and the cement pole lying across the well to which she had caught hold.

16. The evidence of PW5 is in corroboration with the evidence of PW1 about finding of victim-PW4 in the well on 16.10.2012 and taking her out from the well with the help of rope and the victim pointing towards the hut of accused-Ramlal because the victim PW-4 was not in position to speak.

17. The testimony of PW6-Dr. Renuka Bangale who medically examined the victim-PW4 on 16.10.2012 and found following injuries:

- [1] On her nose, there was contusion measuring 1 x 1 cm.
- [2] One contusion was present on right cheek admeasuring 1 cm. x 1 cm.
- [3] Swelling on right thigh region, suggesting fracture of right femur.
- [4] Compound fracture of right tibia.
- [5] Swelling present on right leg and right thigh region.
- [6] Three small cuts present on the heel region of left leg.

18. The PW6 deposed that she had referred the patient PW4 to Orthopedician and issued injury certificate Exh.37. On 17.10.2012, the victim minor PW4 gave story of her sexual assault by Remsing @ Ramlal Barela (accused) and she medically examined the victim after obtaining consent from father of the victim and on legal examination she found following injuries:

- [1] Hymen torn at 6 o'clock position
- [2] Perineal tear present at 6 o'clock position, having reddish colour edges, minimal bleeding was present. Vagina admitted only one finger.

[3] Small tear present on right labia majora.

19. The PW6 issued MLC certificate Exh.39 and collected vaginal swab and blood samples. As per the opinion of PW6 found tear of hymen, perineal tear, reddish colour edges and minimal bleeding and there is possibility of patient subject to sexual assault. In cross-examination, the PW6 admitted about not mentioning known or unknown assailant in the history column of Exh.39 but she had examined the history which was given by the aunt of the victim and second history as per the narration of the victim-PW4. She had not noticed bleeding on private part of the victim (PW-4) and while examining the edges of perineal region she had not use magnifying glass. However, the PW6 denied about possibility of hymen of minor due to strong flow of water on private part.

20. The testimony of the prosecutrix-PW4 stood corroborated by the testimony of Medical Officer-PW6 as well as injury certificate Exh.37 and 39 and medical papers Exh.40. No doubt vaginal swab and blood samples of victim was collected and referred to chemical examination. The FSL report Exh.43 and Exh.44 appears about not finding any semen stain on salwar (article 1) and top (article 2). During the course of trial, the accused has admitted his medical examination report dated 23.10.2012 issued by Medical Officer, Civil Hospital, Jalgaon, wherein, no nail scratching injuries were

found on his person and no injury was found on his private part, however, the accused was found competent for performing sex. On perusal of medical certificate Exh.39 hymen of minor PW4 found torn and perineal tears were present with reddish colour edges with minimal bleeding and was admitted only one finger and small tear was present on right labia majora. These facts were sufficient to constitute offence of rape.

21. The record shows that, the victim PW4 was found crying in the well by holding iron angle at about 9.00 a.m., on 16.10.2012, and the water level of the well was up to her knee. As per spot panchanama Exh.20, depth of well is 110 feet and it is constructed with bricks of 7 x 7 diameter, but at the relevant time, water in well was up to knee level of the victim.

22. The victim, who was acquainted with the accused, narrated the entire story of sexual assault by the accused and when the accused failed to penetrate, she was thrown into the well. The accused had not brought any substantial evidence on record to prove any enmity between him and the minor-PW4 or her family members. Then the obvious question would be why and under what circumstances PW4 would depose against him. Since the minor victim-PW4 was approximately ten (10) years old at the time of the incident could not have used force against him. Therefore, there may not be any injury marks on the body of the accused. The sole testimony of the innocent minor victim is sufficient here to prove the prosecution story. No

doubt, there are minor contradictions and omissions in the testimony of the witnesses, but they are not sufficient to discard the entire prosecution story.

23. The prosecution has proved panchanama of seizure of baniyan of the accused (Ex.23) and discovery of underpant Article-4 under Section 27 of the Evidence Act at the instance of accused, through panch witness. Nothing contrary is transpired from the cross-examination. It is evident that, the Investigating Officer had referred all the seized articles for C.A., through the PW-7 and PW-8 to C.F.S.L. Nashik. However, it appears that the result of the analysis is inconclusive. Therefore, even if the C.A. report is not supporting, it is not fatal to prosecution.

24. It is pertinent to note that in the case in hand, the offence had taken place in the intervening night of 15.10.2012 and 16.10.2012. The appellant-accused has sexually assaulted the victim-PW4 who is a girl below the age of 10 years and the accused did not succeed in penetrative assault. The Protection of Children from Sexual Offences (POCSO) Act, 2012 came into force w.e.f. 14.11.2012; that means the offence was committed prior to coming into force of POCSO Act. Amendment to Section 375 of I.P.C. came into force w.e.f. 03.02.2013 in which even insertion of any part of body into the vagina falls under the definition of rape, however, prior to amendment to Section 375 of the I.P.C., penetration was essential. In the case in hand, as per the testimony of the prosecutrix-PW4, the accused inserted his fingers in

her private part. The medical report Exh.39 proves about sexual assault which means an attempt was made to commit rape. Therefore, accused can be held guilty of committing offence punishable with Sec.376 r/w Section 511 of the I.P.C. In that event, the imprisonment that can be imposed would be to the extent of one-half of the imprisonment which could be awarded under the relevant main provision.

25. In order to attract application of Section 307 IPC, it was necessary on part of the prosecution to establish that due to throwing the victim PW-4 in the well by the accused, there could have been death of victim (PW-4) and the offence would have been one under Section 302 IPC. An attempt to commit a crime is an act done with intention to commit that crime, and would constitute its actual commission, if not interrupted. To justify a conviction under this section, it was not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even in some cases, be ascertained without any reference at all, to the actual injury sustained.

26. In the case of **Amulya Bahera Kumar V/s. Nabaghana Behera** 1995 Cri.L.J. 3559, wherein, it has been held that “*intention of the accused*

must be to cause alarm to the victim and whether he is alarmed or not is of no consequence”

27. In the case of **Girija Shankar V/s. State of U.P.; AIR (SC) 1812**, the Hon’ble Supreme Court has observed thus:

“... To justify a conviction under this Section, it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The Section makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned, but still there may be cases in which the culprit would be liable under this Section. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the Section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof.”

(Emphasis supplied)

28. In the case **Sagayam V/s. . State of Karnataka AIR SC 2161**; it has been held as under:

... To justify conviction under section 307, I.P.Code, it is not essential that bodily injury capable of causing death should have been inflicted. An attempt in order to be criminal need not be the penultimate act

foreboding death. It is sufficient in law if there is present an intent coupled with some overt act in execution thereof, such act being proximate to the crime intended and if the attempt has gone so far that it would have been complete but for the extraneous intervention which frustrated its consummation. There are different stages in a crime. First, the intention to commit it; second, the preparation to commit it; third, an attempt to commit it. If at the third stage, the attempt fails, the crime is not complete but the law punishes for attempting the same. An attempt to commit crime must be distinguished from an intent to commit it or preparation of its commission.”

29. In the case in hand in testimony of prosecution witnesses appear trustworthy that, the minor-prosecutrix was taken away by the accused and subjected her to sexual assault and thrown her in the well. She remained overnight in the well and when she regained her sense she shouted for help and noticed by the villagers. As per the testimony of the PW1 and 5 the victim was not in a condition to speak and she (victim) had only pointed finger towards hut of the accused. PW4-victim sustained fracture at her leg due to fall in the well. The water level of the well was at the knee of the victim. Accused had not allowed the victim go after he failed to attempt rape. He had rather lifted her and thrown her in the well, which he knew to be sufficiently deep. This act on his part might be with a fear that if he let her go, she would disclose the said fact. Therefore, act of throwing the victim in the well can infer the intention and knowledge of accused to commit murder of the victim PW-4 and the accused would have been guilty of her murder. It would be

worthwhile to mention here that even otherwise, if level of the water in the well could have been higher than the height of the victim-PW4 in the event the victim could have died due to drowning. Victim had sustained fracture to her leg and it amounts to grievous hurt. Thus, prosecution has proved that the accused has committed offence punishable under section 307 of IPC beyond reasonable doubt.

30. On perusal of impugned judgment and order, it appears that, the learned trial Court has convicted the appellant-accused for offence under Section 366 of the I.P.C., however, Section 366 provides punishment for kidnapping, abducting or inducing the woman to compel her marriage against her will or in order that woman be forced or seduced to illicit intercourse. However, evidence of the prosecution witnesses does not suggest that the accused kidnapped or abducted the victim, compelling her to marry against her will or seduced to have illicit intercourse. However, evidence of the prosecution witnesses appears that in the intervening night of 15.10.2012 and 16.10.2012 the accused taken away minor victim from her lawful guardian and sexually assaulted her. Therefore, considering the evidence of the prosecution witnesses, the act of accused certainly falls within the meaning of Section 361 of I.P.C. which is punishable under section 363 of IPC.

31. Learned trial Court passed the impugned judgment and order on 11.02.2016 and held guilty to the accused for the offence punishable under

Section 307 and sentenced him to life. Further, the appellant accused has been sentenced R.I. for 10 years for the offence under Section 376(2) (f) of I.P.C. and one year for the offence punishable under Section 366 of I.P.C. and all these sentences are directed to run concurrently. Therefore, even if the sentence awarded to the accused for the offence under Section 376 (2) (f) and 366 of IPC are modified, even then the accused is required to undergo life imprisonment for proved offence under Section 307 of I.P.C. Therefore, we do not find any substantial grounds to interfere with the findings recorded by the trial Court. Hence, the present appeal is hereby dismissed.

[Y.G. KHOBRADE, J.]

[SMT. VIBHA KANKANWADI, J.]