

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

CRIMINAL APPEAL NO.490 OF 2018

Madhukar Sitaram Dhavare,
age 60 years, Occu. Labour,
R/o Pohner, Taluka and
District Osmanabad

... APPELLANT

VERSUS

The State of Maharashtra
through Police Station Officer
Police Station (Rural) Osmanabad,
District Osmanabad
Copy to be served on Public Prosecutor,
High Court, Bench at Aurangabad.

... RESPONDENT

.....
Mrs. A.N. Ansari, Advocate for appellant
Mr. N.T. Bhagat, A.P.P. for respondent
.....

CORAM : R.G. AVACHAT, J.

DATE : 28th MARCH, 2023

ORAL JUDGMENT :

Heard. This appeal has been filed by the appellant against the judgment and order of conviction and sentence dated 1/2/2018, passed by learned Additional Sessions Judge, Omanabad in Sessions Case No.72/2017, whereby the appellant has been convicted for the offence punishable under Sections

376(2)(j)(1) and 506 of the Indian Penal Code and, therefore, sentenced to suffer rigorous imprisonment for 10 years and 1 year respectively and fine with default stipulation. Both the substantive sentences have been directed to run concurrently.

2. It is the case of the prosecution that the appellant committed rape of victim "A", a mentally challenged woman of 30 years of age, on 5/6/2017. the victim related the said incident to her mother on 23/7/2017. The same day the mother approached the concerned police station and lodged the F.I.R. (Exh.21).

3. Based on the said F.I.R., Crime vide C.R. No.231/2017 came to be registered against the appellant. He was arrested. Scene of offence panchanama was drawn. Statements of the persons acquainted with the facts and circumstances of the case were recorded. On completion of the investigation, the appellant was proceeded against by filing a charge sheet.

4. The case came to be committed to the Court of Sessions, Osmanabad for trial in accordance with law.

5. The learned Additional Sessions Judge framed the charge (Exh.5). The appellant pleaded not guilty. His defence is of false implication on account of some dispute between the appellant and mother of the victim over grazing of goats.

6. To establish the charge, 8 witnesses were examined. It was the case of the prosecution that the victim was mentally challenged to the extent of 70%. An assistance of expert was, therefore, taken during recording of her evidence.

7. Let us first advert to the evidence of the victim (P.W.4). It is in her evidence that she was staying along with her mother. On the day of the incident, she was alone at home. Madhu came her home. He kissed her. He laid himself on her person. Touched her private part. Fondled her breast. Pressed her legs. She stated him "Don't do so". Madhu removed clothes on her person. Then he again laid himself on her person. The victim pointed out her private part. Madhu also removed clothes on his person. She again referred to her private part. She described the act of accused by signs. She further testified that, after completion of the act, Madhu asked her to come him to meet him again and if she did not come, he would beat her.

During her cross-examination, she testified that, she used to go to her land along with her mother. She denied to have given evidence on the say of her mother.

8. Then there is evidence of the informant, mother of the victim (P.W.2). It is in her evidence that the victim was her daughter. The appellant is their distant relative. On the given day, she left home to graze goats. It was 11.00 in the morning. The victim alone was at home as she (victim) was not keeping well. It is further in her evidence that the victim had her period regularly. After the alleged incident, there was cessation of her period. She, therefore, enquired with the victim. Thereupon the victim narrated what the appellant did with her. Thereafter she lodged the F.I.R. (Exh.21). The informant was suggested that there was dispute between her and the appellant over grazing of she-goats. She has flatly refused the suggestion.

9. Then there is evidence of P.W.3 Rupali, who is a Psychologist. Her evidence is of not much assistance for the prosecution. It is in her evidence that the victim's police statement was recorded in her presence.

10. Evidence of P.W.5 Netaji and P.W.6 Mesa is not of much assistance for the prosecution to bring home the charge.

11. Then there is evidence of the Medical Officer, P.W.7 Dr. Sonali. It is in her evidence that she examined the victim on 23/7/2017. The victim was brought to her by her mother. A lady Police Constable had also accompanied them. Both, the victim and her mother gave history of sexual assault. The same was recorded in verbatim. Although the victim was found to be mentally retarded, she found her in disposition of mind and understanding of her queries. On medical examination of the victim, no injuries were noticed at her private part. Hymen was ruptured. Pregnancy test was negative. She collected the samples of pubic hair, nail clippings etc. and handed them to police officer for chemical analysis. Although in her opinion as per overall findings were consistent with sexual assault on victim, she reserved her findings until receipt of FSL report. She issued medical examination certificate Exh.38.

12. It is surprising that when the incident took place on 5/6/2017 and the medical officer examined the victim on 23/7/2017, she gave her opinion on clinical examination that overall findings are consistent with sexual assault on the victim.

Be that as it may. The record indicates that C.A. reports have not been produced in evidence. An adverse inference in that regard, therefore, needs to be raised.

13. As such, to hold the appellant guilty of the offence of rape, the only evidence before the Court is a testimony of the victim herself. The victim in her evidence could not describe the entire acts which constitute an offence of rape. When the alleged offence took place on 5/6/2017, the F.I.R. came to be lodged on 23/7/2017 i.e. after 46 days after the alleged incident. There is no corroborative evidence to support the testimony of the prosecutrix. F.I.R. was lodged since the mother found the victim to have missed her period. The same turned out to be incorrect. Pregnancy test was negative. As such, it can at the most be observed that the incident as alleged might have taken place. The prosecution was required to travel a long between from 'might' to 'must'. The appellant is in jail for little over 5 years and 8 months. On the basis of the aforesaid evidence, the trial Court ought not to have convicted the appellant. Interference with the order of conviction and consequential sentence is, therefore, warranted. Hence the order :

ORDER

- (i) The Criminal Appeal is allowed.
- (ii) The order of conviction and consequential sentence dated 1/2/2018, passed by learned Additional Sessions Judge, Omanabad in Sessions Case No.72/2017 is hereby set aside. The appellant is acquitted of the offences punishable under Sections 376(2)(j)(1) and 506 of the Indian Penal Code.
- (iii) The appellant be set at liberty forthwith if not required in any other crime.
- (iv) Fine amount, if paid, be refunded to the appellant.

(R.G. AVACHAT, J.)

fmp/-