

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 42 OF 2020

Nana Vithal Mane

..Appellant

Versus

The State of Maharashtra & Anr.

..Respondents

**WITH
INTERIM APPLICATION NO. 1394 OF 2022
IN
CRIMINAL APPEAL NO. 42 OF 2020**

Ms. Tripty M. Kapadia (Appointed Advocate) a/w. Chitra Mhaske
for Appellant.

Mr. S. R. Agarkar, APP for State/Respondent No.1.

Mr. Sagar Amrut Rane (Appointed Advocate) for Respondent No.2.

**CORAM : SARANG V. KOTWAL, J.
DATE : 28 FEBRUARY 2023**

ORAL JUDGMENT:

1. The Appellant has challenged the Judgment and order dated 08/03/2018, passed by learned Additional Sessions Judge, Solapur, in Sessions Case No.332 of 2016. The Appellant was convicted for commission of offence punishable U/s.376 of the I.P.C. and was sentenced to suffer R.I. for ten years and to pay a

fine of Rs.10000/- and in default of payment of fine to suffer R.I. for six months. The fine amount was directed to be credited to the Government. In addition, he was directed to pay Rs.50000/- by way of compensation to the victim within three months from the date of the Judgment. He was granted set off U/s.428 of the Cr.p.c.

2. Heard Ms. Tripty Kapadia, learned appointed advocate for the Appellant, Shri. Agarkar, learned APP for the State/Respondent No.1 and Shri. Sagar Rane, learned appointed advocate for the Respondent No.2.

3. The prosecution case is that, the victim used to take her cattle for grazing in their agricultural field. The appellant was working as a labourer with one of the villagers. He also used to take his cattle for grazing. At that time, he committed rape on the victim on two to three occasions; resultantly, she became pregnant. Her parents enquired with her, but she did not answer as to how she became pregnant. She was scolded and beaten by her parents. She left her house for about four months, but then she was traced. On enquiries made by her mother, she narrated that the appellant

had committed rape on her. The parents approached the police and the F.I.R. was lodged at Solapur Taluka police station vide C.R.No.262 of 2016 on 03/07/2016 at about 10.30p.m. The appellant was arrested on 04/07/2016 and since then he is in custody. The investigation commenced. The statements of various witnesses were recorded. Different panchanamas were recorded. A child was born to the victim on 05/11/2016. The blood samples for D.N.A. testing in respect of the appellant, the victim and the child were sent to F.S.L. The D.N.A. report was received mentioning that the victim and the appellant were the biological parents of the child. At the conclusion of the investigation, the charge-sheet was filed. The trial was conducted before learned Additional Sessions Judge, Solapur.

4. During trial, the prosecution examined eight witnesses including the victim, her parents, the carrier of samples, the Medical Officer and the investigating officers. The D.N.A. report was produced on record at Exhibit 36.

5. The defence of the appellant was of total denial. He had

nothing to say about the D.N.A. report. Learned Trial Judge observed that, though, the victim's father claimed that she was mentally challenged, he did not find it as the correct fact as the victim could give rational answers. There was nothing on record to suggest that she was suffering from any such disadvantage. Learned Trial Judge took recourse to Section 114-A of the Evidence Act. He relied on the deposition of the victim herself to reach a conclusion that there was no consent involved. The D.N.A. report, according to him, showed that the appellant had committed this act. Based on this reasoning, he convicted and sentenced the appellant, as mentioned earlier.

6. The victim is examined as PW-4. She has deposed that, she knew the appellant. She used to go for grazing the cattle. While she had gone to her agricultural field for grazing the cattle in the summer, the appellant had forcible sexual relations with her. Thereafter, she missed her menstrual cycle. She became pregnant from him. She gave birth to the child in the Civil Hospital, Solapur. She could not tell her own date of birth. Her father had lodged the complaint and the police had recorded her statement.

In her cross-examination, she stated that they had 19 to 20 acres of agricultural land. It was a barren land. The other villagers also used to bring their cattle for grazing in their land. She had not stated before the villagers that the appellant had forcible sexual relations with her. She accepted that, she had not told her parents about her pregnancy and from whom she had got pregnant. She accepted that, her parents had beaten her and had abused her. She had left her house for about one and half month because of the harassment caused by her parents. When she returned home, the other women from the village enquired with her about her pregnancy, but she did not tell them the name of the person who was responsible for her pregnancy. She denied that the sexual relations were with her consent. She also denied the suggestion that, she got pregnant out of the consensual sexual relations.

7. PW-1 was the father of the victim. He was the first informant. He has deposed that the victim was mentally challenged to some extent since her birth. They had two cows. The victim used to go to their agricultural field for grazing cows. She

used to go at 10.00a.m. and used to return at 5.00p.m. The appellant was also grazing the cattle of one Gavali from their village. He used to take his cattle in PW-1's agricultural field. PW-1's wife had informed him about the victim's pregnancy. He had shouted at the victim and, therefore, she had left the house. He approached the Tanta Mukti President. He advised PW-1 to approach the Taluka police station. Therefore, he went to Taluka police station with the victim and lodged the F.I.R. The F.I.R. is produced on record at Exhibit 12. According to him, the victim's statement was recorded by the police. He identified the appellant in the court. His own statement was recorded U/s.164 of the Cr.p.c. The victim delivered a baby boy after four months from lodging the F.I.R. He has deposed that the appellant was married and had two children.

In the cross-examination, he admitted that the victim's age was between 20 to 23 years. His evidence was recorded on 25/04/2017 and the alleged incident had taken place around March 2016. Thus, even at the time of the incident i.e. around March 2016 the victim was about 18 years of age. In any case, it is

not the prosecution case that the victim was below 18 years of age at the time of the incident. He further admitted that, even after the victim was beaten she did not disclose how she got pregnant. He volunteered that the victim had told him the reason of her pregnancy. He deposed that, they had not approached any doctor for the victim's mental condition.

8. PW-2 was the mother of the victim. After starting recording her evidence to some extent, learned Trial Judge observed that, she was unable to give proper and rational answers. She was unable to understand the questions and, therefore, she was discharged. Considering this observation, her evidence will have to be left out of consideration.

9. PW-3 Ashok Chavan was the President of Tanta Mukti Samiti of the village. He deposed that, two women from the village informed him that the victim had got pregnant and he should look into the matter. He denied the suggestion that the victim had got pregnant because she was raped by the appellant. After this answer he was declared hostile and was cross-examined by learned

APP. But he denied further suggestions. In any case, he did not know anything about the incident personally. Therefore, his evidence is not of much importance.

10. PW-5 Anis Shaikh was the carrier who had carried the samples of the appellant's blood for D.N.A. testing. He had carried the samples on 08/07/2017 to F.S.L. Pune.

11. PW-6 Dr. Vrushali Bavage had examined the victim on 04/07/2016. The victim's mother had given history of the incident blaming the appellant. It was also told to PW-6 that the victim was mentally challenged. On her medical examination, she found that the victim was 28 weeks pregnant. She collected the necessary samples for sending to Forensic Department. The victim delivered a male child on 05/11/2016. After that, the D.N.A. sample of the baby was sent for analysis. The D.N.A. report was received subsequently. It is produced on record at Exhibit 36. PW-6 went through the D.N.A. report. She has deposed that the appellant and the victim were the biological parents of the victim's baby. The victim was discharged from the hospital after two months, after

the delivery of the child. PW-6 has further deposed that the victim's family was not ready to keep the baby and had intended to give it for adoption. But she did not know what happened after that.

In the cross-examination, she admitted that it was not mentioned in her certificate that the victim was mentally challenged. PW-6 volunteered that the psychiatrist's opinion was obtained from the concerned department and it was mentioned in the case history. As mentioned earlier, the D.N.A. report is produced on record at Exhibit 36.

12. PW-7 A.P.I. Babasaheb Koli was the first investigating officer. After registration of the F.I.R. vide C.R.No.262 of 2016 on 03/07/2016 at Solapur Taluka police station, he had referred the victim for medical examination to Civil Hospital, Solapur. The victim's statement was recorded by a woman P.S.I. i.e. PW-8. The victim was sent for medical treatment to Civil Hospital, Solapur. The appellant was arrested. The statements of the witnesses were recorded. The clothes of the appellant were seized. The spot

panchanama was conducted. He had asked for D.N.A. kit for D.N.A. testing. He had obtained the D.N.A. report. He had filed the charge-sheet against the appellant.

13. PW-8 P.S.I. Amruta Patait had recorded the victim's statement on 03/07/2016. She denied the suggestion that the victim told her that the act was committed with her consent.

This, in short, is the evidence led by the prosecution.

14. Learned counsel for the appellant submitted that, the long silence on the part of the victim indicates that it could be a case of consent. The victim had not blamed the appellant. She had not told his name to her parents in spite of their beating; instead, she had left her house for more than a month. This all indicates that, it was a case of consent. Without prejudice to this submission, she further submitted that, it is not conclusively proved that the appellant has committed this offence and the D.N.A. report is not free from doubt. She further submitted that, there is no other corroborative piece of evidence. The evidence of the victim's parents does not support the prosecution case. The Analyst who

had conducted the D.N.A. test was not examined. Finally, she submitted that, considering the over all circumstances, some leniency be shown to the appellant by reducing the substantive sentence, as the appellant is in custody since 04/07/2016.

15. Learned counsel for the respondent No.2 and learned APP opposed these submissions. They submitted that the victim has specifically stated that there was no consent and rape was committed against her wish. The D.N.A. report is the strong evidence against the appellant. There are indications that the victim was not mentally alert and, therefore, the appellant had taken advantage of the situation.

16. I have considered these submissions. As far as the capacity of the victim to give consent is concerned, no specific charge was framed U/s.376(2) of the I.P.C. There was nothing to show that the victim was suffering from any mental disadvantage. Learned Trial Judge has observed that the victim was capable of understanding the questions and was able to give clear and rational answers. He did not find anything even to suggest that she

was not able to understand the questions.

17. Learned Trial Judge thereafter relied on the presumption U/s.114-A of the Evidence Act, which reads thus:

“114-A. Presumption as to absence of consent in certain prosecution for rape. - In a prosecution for rape under clause (a), clause (b), clause (c), clause (d), clause (e), clause (f), clause (g), clause (h), clause (i), clause (j), clause (k), clause (l), clause (m) or clause (n) of sub-section (2) of section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.”

However, as can be seen that there was no charge U/s.376(2) of the I.P.C. and none of the sub clauses of Section 376(2) of the I.P.C. are applicable in this case. Therefore, it is not necessary to take recourse to Section 114-A of the Evidence Act in this particular case. Instead, the evidence of the victim will have to be considered minutely. As reproduced earlier, the victim has categorically stated that the appellant had established forcible physical relations with her. She denied the specific suggestion that,

it was an act committed with her consent. There is no reason to disbelieve her deposition in that behalf. There is no other circumstance brought out on record either through the defence evidence or through the evidence led by the prosecution to even suggest that it could be a case of consent. Therefore, it is not possible to hold that the physical relations were kept with the consent of the victim. The fact that the physical relations were established is sufficiently proved through the D.N.A. report. The victim had become pregnant and had delivered a male child on 05/11/2016. The D.N.A. testing showed that the victim and the appellant were the biological parents of the child. Therefore, these basic facts are sufficiently proved by the prosecution beyond reasonable doubt that physical relation was established by the appellant with the victim against her wish resulting in her pregnancy and finally in the birth of a child. It is not the prosecution case that the victim was below 18 years of age. Therefore, the charge was framed U/s.376 of the I.P.C. and not under the Protection of Children from Sexual Offences Act. In this particular case, there was clear absence of consent and, therefore,

all the ingredients of Section 375 of the I.P.C. are fulfilled attracting sentence U/s.376 of the I.P.C.

18. The next question which would call for consideration is about the quantum of sentence. When the offence was committed in the year 2016 the minimum sentence provided U/s.376(1) of the I.P.C. was for seven years. Learned Trial Judge has recorded this fact in paragraph 38 of the impugned Judgment and has observed that, the minimum sentence was for seven years. Having observed this, he recorded his opinion that, looking at the nature of the offence, the sentence of 10 years of R.I. was justified. No fault can be found with this reasoning. However, there are certain circumstances which I am taking into account. The appellant is continuously in custody since 04/07/2016. He has two children and a wife who are dependent on him. The victim had not named him immediately and for a few months kept avoiding naming him. Therefore, though, I am inclined to show some leniency, considering that a child is born in this case, the sentence will be more than minimum sentence. At the same time, if the compensation amount is enhanced and is directed to be paid to the

victim, then his substantive sentence can be reduced to a certain extent; so that the victim will also get some compensation which she can use for the benefit of her child. Considering this discussion, in my opinion, the appellant can be sentenced to suffer R.I. for eight years by way of substantive sentence. Though, he is directed to pay the compensation of Rs.50000/- on failure of such payment, no 'in default' sentence was awarded; this needs to be modified and the appellant will have to suffer the 'in default' sentence. To that extent, the operative part of the impugned Judgment and order needs modification. With the result, the following order is passed.

ORDER

- i) The Appeal is partly allowed.
- ii) The conviction of the Appellant recorded for commission of offence punishable U/s.376 of the I.P.C. is maintained. However, instead of R.I. for 10 years, he is sentenced to suffer R.I. for eight years and to pay a fine of Rs.75000/- and in default of payment of fine he shall undergo further R.I. for one year and six months.

- iii) If the fine amount is deposited, Rs.65000/- be paid to the victim as compensation U/s.357 of the Cr.p.c. .
- iv) The Appellant is granted set off U/s.428 of the Cr.p.c.
- v) The other clauses in the operative part of the impugned Judgment and order which are not inconsistent with this operative part, are maintained as they are.
- vi) With these observations, the Appeal is disposed of.
- vii) With disposal of the Appeal, the Interim Application No.1394 of 2022 is also disposed of.

(SARANG V. KOTWAL, J.)