

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

CRIMINAL APPEAL NO.819 OF 2019

WITH

INTERIM APPLICATION NO.259 OF 2011

IN

CRIMINAL APPEAL NO.819 OF 2019

WITH

INTERIM APPLICATION NO.1115 OF 2020

IN

CRIMINAL APPEAL NO.819 OF 2019

Nitin Maruti Nanaware

Age 34 years, Occ : Service

R/at – S. No.16, Damodar Building,

Flat No.1, Ambegaon Pathar,

Dhankawadi, Pune

.... Appellant

versus

1. State of Maharashtra
Through the Sahakarnagar Police Station

2. XYZ Respondent

.....

- Mr. Ashish Vernekar i/b. Mr. Satyavrat Joshi, Advocate for Appellant.
- Smt. M. R. Tidke, APP for the State/Respondent No.1.
- Mr. Aniesh S. Jadhav, (Appointed) Advocate a/w Mr. Rushikesh Kekane, Advocate for Respondent No.2.

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CORAM : SARANG V. KOTWAL, J.
DATE : 19th JANUARY, 2023

JUDGMENT :

1. The Appellant has challenged the Judgment and Order dated 08/01/2019 passed by the Additional Sessions Judge, Pune in Sessions Case No.24/2013. By the impugned Judgment and Order, the Appellant was convicted as follows ;

- (a) He was convicted for commission of offence punishable u/s 363 of the Indian Penal Code and was sentenced to suffer rigorous imprisonment of 3 years and to pay a fine of Rs.2,000/- and in default of payment of fine to suffer simple imprisonment for two months.
- (b) He was also convicted u/s 366A of the Indian Penal Code and was sentenced to suffer rigorous imprisonment of five years and to pay a fine of Rs.3,000/- and in default of payment of fine to suffer simple imprisonment for three months.
- (c) He was further convicted u/s 376(2)(f) of the Indian Penal Code and was sentenced to suffer rigorous imprisonment of twelve years and to pay a fine of Rs.15,000/- and in default of payment of fine to suffer simple imprisonment for six months.

- (d) He was further convicted u/s 506(2) of the Indian Penal Code and was sentenced to suffer rigorous imprisonment of two years and to pay a fine of Rs.1,000/- and in default of payment of fine to suffer simple imprisonment for one month.
- (e) All the sentences were directed to run concurrently.
- (f) The Appellant was given set off u/s 428 of Cr.P.C.
- (g) The victim was given compensation of Rs.10,000/- out of the fine amount.

2. Heard Mr. Ashish Vernekar, learned counsel for the Appellant, Mr. Aniesh S. Jadhav, learned counsel for the Respondent No.2 and Smt. M. R. Tidke, learned APP for the State.

3. The prosecution case is that the victim's date of birth was 14/01/2003. The incident took place on 28/05/2012. Therefore at the time of incident, the victim was barely 9 year old. On that day, in the evening, the victim's mother sent her to buy some groceries. The Appellant was standing near the

grocery shop with his motorcycle. He offered to drop the victim to her house. He requested her to show a particular place as he was new to that area. The victim agreed to help him. She sat on his motorcycle. The Appellant then took her to an under construction building on the second floor at a secluded spot and committed rape on her. He threatened her at the point of knife. After that, he dropped her near her house. The victim told this incident to her mother. In the meantime the victim's father was searching for her. The victim's mother called him and informed about the incident. He rushed home. He enquired with the victim and then went to the police station and lodged his FIR. The offence was registered at Sahakarnagar police station vide C.R.No.199/2012. The victim was sent for medical examination. Her clothes were seized. On the basis of description given by her, sketch of the offender was drawn. The Appellant was arrested in connection with C.R.No.154/2012 registered with Bharati Vidyapith police station. He was arrested on 10/09/2012. The officers of Sahakar Nagar police station got his custody through the transfer warrant. His clothes were seized as they were

recovered at his instance. Even the knife was recovered at his instance. The articles were sent for Chemical Analysis. The statement of witnesses were recorded. Various Panchanamas were conducted. At the conclusion of the investigation, the charge-sheet was filed. The case was committed to the Court of Sessions at Pune.

4. During trial, the prosecution examined in all 13 witnesses including the victim, her parents, Medical Officer, the carrier of articles to C.A., the Panchas, the Professor who drew sketch of the Appellant and the police officers.
5. The defence of the Appellant was of total denial. In his statement u/s 313 of Cr.P.C. he has stated that the victim was brought to the police station and she had stated that the Appellant was not the offender. On 28/05/2012 he was present in his office. At that time, he was having his working shift at 07.00 p.m. and he was on his duty. False case was filed against him due to pressure exerted by the relatives of the victim. In

September 2012, a demand of Rs.1 lakh was made from him at the gate of the Sassoon Hospital and he was falsely implicated in this case. At the time of Test Identification Parade, in jail, one lady had asked the victim to point towards him. Therefore he is falsely implicated.

6. The learned Trial Judge considered the evidence on record and defence of the Applicant and at the conclusion of the trial, convicted and sentenced the Appellant as mentioned earlier.

7. The victim is examined as P.W.2. She has deposed that in June 2012 she was studying in 4th standard. On 28/05/2012 at about 08.00 p.m. her mother asked her to bring some articles from a shop. She went to that shop and purchased some articles. She was returning home. On the way, one person on motorcycle stopped her. He told her that he wanted to go to a particular spot in that locality as his sister and daughter were staying there and he was new to that locality. Initially, the victim refused to go

with him, but he told her that he would call her mother and tell her about it. He took the mobile number of the victim's mother from her. He dialed some number. He spoke something on the mobile phone. Because of this show, the victim trusted him. She sat on the motorcycle. He took her towards another shop. She wanted to get down, but he again made some phone call and then took the victim at some distance. He stopped near one building. He took her upstairs. It was a dark place. He took out a knife and threatened her. Then committed rape on her. He again threatened her with the knife and again repeated that act. Then he took her on the motorcycle and dropped her near her house. On reaching home, she immediately disclosed the incident to her mother, who in turn informed her father. The father came home and then they went to the police station and lodged the FIR. She showed the spot of incident to the police. She was sent for medical examination. An Artist came to her house and on the description given by her, he drew the sketch of the culprit. After some days, she was called to jail for Test Identification Parade of the suspect. She went there and identified the Appellant. Even in

the Court, at the time of her deposition, she identified the Appellant as the person who had committed that offence.

In the cross-examination, she admitted that the shop from where she purchased the articles, was in a thickly populated area. She did not remember whether she carried those articles in a carry bag. She met the Appellant within five minutes from leaving her house. After that, they took 10 minutes to reach the spot of incident. Prior to the incident, she had not been to that spot. The construction of the building was still incomplete. The spot of incident was not in a closed room. She denied the suggestion that she did not cry or shout at the time of incident. She did not remember whether she had given history of the incident to the Doctor. She was in the hospital for two days and then she was discharged. She came to know from the police after 4-5 months that the culprit was arrested. But she did not remember that on 23/09/2012 she was called by the police. There is some variance in the English deposition and Marathi deposition whether the accused was shown to her in Bibwewadi

police station. But from the context of her deposition, it is clear that she had not admitted that the accused was shown to her in the Bibwewadi police station. Marathi deposition is clear and there it is not mentioned that the accused was shown to her. She has not admitted that the Appellant was shown to her in Bibwewadi police station. She has further deposed that after 4-5 months of the incident, she was called by the police for Test Identification Parade.

8. The Test Identification Parade memo was produced by the prosecution u/s 291-A of Cr.P.C. by filing an application vide Ex.19. The defence did not give any say though the Trial Court had called upon the defence to give say. The memo of the Test Identification Parade was therefore exhibited at Ex.24. That has remained unchallenged and therefore the evidence of the identification of the Appellant in the Test Identification Parade held on 12/10/2012, has remained unchallenged. This fact is important because the identity of the culprit is an important issue in this case.

9. P.W.1 was the father of the victim. He has corroborated the evidence of the P.W.2. He has deposed as to how he was searching for her in the evening and as to how he got a phone call from his wife informing about that the victim had returned home. He made enquiries with the victim and then she told him about the incident. He then went to Sahakar Nagar Police Station and lodged the FIR. The FIR is produced on record at Ex.14. The FIR substantially corroborates his version. He has further deposed that after some days police from Bharati Vidyapith police station had called them to identify the culprit since the culprit had already committed similar type of offence. They went to the police station. The victim identified the culprit as the same person who was the accused before the Court. P.W.1 also identified him.

In the cross-examination, hardly any material in favour of the defence was brought on record.

10. P.W.3 was the mother of the victim and she has deposed in the same manner as P.W.1 and P.W.2 about the events of that day. She has substantially corroborated the evidence of P.W.2.

In the cross-examination, she has deposed that she came to know about the name of the Appellant from her husband after the Appellant was arrested. She deposed that, in her presence, her husband did not take the victim to the police station for identifying the accused. She further deposed that on 28/05/2012 itself the victim had narrated the incident to the police, but on that day the police did not record her statement.

11. P.W.4 Pratap Kakde, was a Pancha for Spot Panchanama. He was called by the police on 29/05/2012. He has accepted the contents of the Spot Panchanama, which is produced on record at Ex.37. It is mentioned in the Spot Panchanama and P.W.4 has also deposed that one newspaper with yellowish spot was seized from the spot of incident, which was on the second floor of the building. The spot was an open space between the staircase and the lift.

12. P.W.5 Sudhakar Deshmukh was a Pancha for Panchanama dated 21/02/2012 when the Appellant had taken the police and the Panchas at the spot of incident. Since the spot of incident was already known to the police, this particular Panchanama does not carry any significance.

13. P.W.6 Namdeo Kunjir was a Pancha in whose presence, the clothes of the victim were seized under the Panchanama Ex.43 on 28/05/2012 itself. He was also a Pancha when the Appellant had shown willingness to show the place where he had concealed his clothes, seat cover of his motorcycle and the knife. At the instance of the Appellant all the articles were recovered from his house. That Panchanama is produced on record at Ex.44.

14. P.W.7 Police Naik Shamrao Lhamkar and P.W.9 Police Constable P. N. Pawar were the two carriers who had carried the articles to the FSL on 15/10/2012 and 12/06/2012 respectively.

15. P.W.8 Police Constable Ganesh Kulal was the driver of the police vehicle when the accused had led the police party to the different places for showing the spot and for recovery of the articles. He had produced the relevant entries from the logbook.
16. P.W.11 Police Hawaldar Shobha Gundale had recorded the victim's statement in June 2012.
17. P.W.12 Girish Charwad had drawn a sketch of the offender on the basis of the description given by the victim - P.W.2. That sketch is produced on record at Ex.67.
18. P.W.10 Dr. Shruti Gadekar, was an important witness. She had examined the victim in the night between 28/05/2012 and 29/05/2012. She had recorded the history given by the victim and her aunt. In the medical history, she had noted that the offender had attempted to commit vaginal intercourse. On the medical examination of the victim she found inflammation

on labia-minora and labia-majora. Hymen was torn at multiple sites – 5, 7 and 10 O'clock positions. Perihymenal inflammation was present. Small fourchette mucosal, tear present and not actively bleeding. Hymen admitted little finger patulous. She obtained the samples of pubic hair, vaginal swab, survival smear and blood for grouping. In her opinion, there was evidence of penetrative sexual vaginal intercourse. She issued the certificate. It is produced on record at Ex.52. According to her, such type of injuries are possible if a penetrative sexual assault is committed on a minor girl about 9-12 year old.

In the cross-examination, she admitted that she did not find any active bleeding from victim's private part. She had not mentioned the colour and edges of hymenal tears, which would have been helpful in determining the time of the offence. She agreed with the proposition that in case of injury to vagina, head or face, there is possibility of much bleeding. She admitted that in case of injury to vagina, inflammation starts vanishing in a couple of hours. According to her, it was a case of multiple

hymen tears and that generally occurs in the case of a woman habituated to sexual intercourse. However, she volunteered that perihymenal inflammation and fourchette mucosal tear do not occur in a woman habituated to sexual intercourse. She deposed that such inflammation may occur in case of unhygienic condition or negligence. According to her, such incident might have occurred 3-4 days from her examination.

19. PW.13 PI Shabsikant Khot, was the Investigating Officer. He has deposed that he had conducted the Spot Panchanama and seized the newspaper from the spot. He recorded statements of the witnesses. On 18/06/2012, the victim's statement was recorded by PW.11. He came to know that the Appellant was arrested by Bharati Vidyapith Police Station. He took custody of the Appellant by transfer warrant on 17/09/2012. The Appellant showed the spot of incident and the articles were recovered at his instance. He then sent the articles for Chemical Analysis. He obtained birth certificate of the victim, which is produced on record at Ex.80. He requested the

Tahasildar to conduct the Test Identification Parade. At the conclusion of the investigation, he filed the charge-sheet.

In the cross-examination, he deposed that he did not record statements of the people in the locality of that building. He explained that he did not record the statement of the victim immediately because she was in the hospital. He denied the suggestion that on 23/09/2012 he showed the Appellant to the victim, the first informant and the other witnesses.

20. Besides this evidence, the prosecution produced the documentary evidence in the form of C.A. certificate which shows that the newspaper found at the spot and the T shirt of the victim showed the presence of semen stains. That C.A. report is produced on record at Ex.84.

21. The learned Trial Judge relied on the evidence of the prosecution. He disbelieved the defence of total denial of the Appellant and recorded his conviction and sentence as mentioned earlier.

22. Learned counsel for the Appellant submitted that the identification of the Appellant is crucial and the victim's father i.e. P.W.1 has admitted that the Appellant was shown to the victim in the police station. Therefore, subsequent identification in the Test Identification Parade and in the Court are vitiated. He submitted that the conduct of the victim's mother and father was unnatural. The mother did not remember the details of any money, carry bag etc. given to the victim for purchasing the articles. Even the conduct of the victim was unnatural, as she did not remember whether there were people in the locality. According to the prosecution case, the shop from where she purchased the articles, was situated in a crowded locality. There is a serious doubt about the spot of incident because the victim has deposed that it was an open space and the father has deposed that it was a closed place in a room. He submitted that the spot of incident was in a commercial building and naturally there would be watchmen and other people present. But the prosecution has not brought their evidence on record. The

Investigating Officer did not record statements of anybody near the building where the incident had taken place.

23. Learned APP and learned counsel for the Respondent No.2 opposed these submissions. According to them, the prosecution has proved its case beyond reasonable doubt. The victim had made immediate disclosure to her parents. The father had immediately gone to the police and there was no scope for concocting a false story. The evidence is sufficiently corroborated by the medical evidence. The Test Identification Parade of the Appellant is proved beyond reasonable doubt. He was also identified in the Court. There was no enmity between the Appellant and the victim's family and therefore there was no reason to implicate the Appellant falsely. The age of the victim is not challenged. The C.A. report has also supported the prosecution case.

24. I have considered these submissions. As far as the age of the victim is concerned, that evidence is not seriously challenged. The birth certificate of the victim is produced on

record at Ex.80, which shows that at the time of the incident, she was around 9 years of age.

25. Though, learned counsel for Appellant has raised doubt about the exact spot, the newspaper found on the spot was sent for Chemical Analysis and it shows presence of semen stains. This fixes the spot of incident and corroborates the victim's evidence that the incident had taken place at that particular spot. The evidence shows that the building was under construction and it was a secluded spot where the incident had occurred. Therefore it was not possible to record the statement of any witness who could have seen the victim and the Appellant near that spot of incident. To that extent, the prosecution case does not suffer from any infirmity.

26. The C.A. report also shows presence of semen stains on the T shirt of the victim. It was immediately seized by the police. This also shows that the incident had taken place and the victim is telling the truth.

27. Her evidence is further corroborated by the medical evidence which shows hymenal tear and the other indications showing that she had undergone trauma of forcible sexual intercourse. The Doctor, P.W.10, in fact has given clear opinion that the victim had undergone such forcible sexual intercourse. Thus, the prosecution has proved beyond reasonable doubt that the incident is true and the victim is not lying.

28. The only crucial question is about the identity of the offender. Learned counsel for the Appellant tried to contend that the Appellant was shown by the police to the victim and her father at Bharati Vidyapith Police Station. P.W.1, the victim's father, has deposed in his examination-in-chief itself that after some days, the police from Bharati Vidyapith police station had called them to identify the culprit since the culprit had already committed similar type of offence. They went to the police station and the victim identified the culprit. In this context, it is important to note that the victim has not given any such

admission. Even her mother had not given such admission. The record also shows that there were two other offence pending against the Appellant. One was C.R.No.154/2012 registered with Bharati Vidyapith police station and another at Bibewadi police station. P.W.1's evidence does not show exactly when they were called by Bibewadi police station and whether they were called before holding Test Identification Parade. In any case, there was other offences pending including the one at Bharati Vidyapith police station against the Appellant. There is nothing to show that the victim was shown the Appellant, by the police, in connection with the present offence, before the Test Identification Parade was held. The victim's evidence is more important and she has not stated that the Appellant was shown to her at the police station. She has categorically stated that the Appellant was identified by her at the Test Identification Parade held in Yerwada Central Prison.

29. As mentioned earlier, the defence has not challenged the Test Identification Parade memo, which is produced on

record at Ex.24. Therefore, identification of the Appellant has remained unchallenged and there is no reason to doubt the prosecution case that the victim had identified the Appellant in the Court at the time of her deposition. The Appellant had spent considerable time with the victim while the offence was committed. It was a trauma which the victim was not likely to forget. Therefore, her identification of the Appellant assumes importance and in fact proves the prosecution case beyond reasonable doubt.

30. There is nothing on record brought out by the defence as to why the victim was deposing against the Appellant. There was no connection between the families of the victim and of the Appellant. The Appellant was a stranger, the victim was only 9 year old and she had no reason to implicate him falsely. There was nothing to suggest that she was tutored to depose against the Appellant.

31. On the other hand, the Appellant has taken a specific defence in his statement recorded u/s 313 of Cr.P.C. that at the

exact point of commission of offence, he was in his office in his shift duty. However, he has not examined anybody from his office in support of his contention.

32. Taking into account all these factors, in my opinion, the prosecution has proved its case beyond reasonable doubt.

33. Learned counsel for the Appellant submitted that the Appellant is in custody since 17/09/2012 and more than 10 years have passed. He therefore submitted that some leniency, as far as quantum of sentence is concerned, be shown to the Appellant. Learned APP and learned counsel for Respondent No.2 strongly opposed these submissions. According to them considering the nature of the offence and the trauma which a 9 year old child had to undergo because of the Appellant, who was around 34 years of age at the time offence, shows that the Appellant does not deserve any sympathy.

34. I have considered and I agree with the submissions of learned APP and learned counsel for the Respondent No.2. The

Appellant has committed this serious offence, as a result of which a 9 years old child had to undergo the trauma. The Trial Court has already shown him leniency in not imposing the maximum sentence. Therefore, I do not see any reason to interfere with the reasons given by the Trial Court in imposing sentence of 12 years of rigorous imprisonment in this case. Based on this discussion, I do not find any merit in the Appeal. The Appeal is accordingly dismissed.

35. In view of the dismissal of the Appeal, the connected Interim Applications are also disposed of.

(SARANG V. KOTWAL, J.)