

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

**CRIMINAL APPEAL NO.112 OF 2019
WITH
INTERIM APPLICATION NO.1821 OF 2021
IN
CRIMINAL APPEAL NO.112 OF 2019**

Rahul Ramhari Gaikwad
Hindu, Aged 22 years,
Permanently residing at Post Bahulgoan,
Taluka Yeola, District Nasik
Presently undergoing sentence at
Nasik Road Central Prison Nasik Road Appellant

versus

1. State of Maharashtra
At the instance of Yeola City
Police Station, Taluka – Yeola,
District – Nasik
2. XYZ Respondent

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- Mr. Anil G. Lalla a/w Mr. Aditya Singh i/b. Lalla and Lalla,
Advocate for Appellant.
- Mr. S. R. Agarkar, APP for the State/Respondent No.1.
- Ms. Priyanka Chavan (Appointed) Advocate for Respondent
No.2.

**CORAM : SARANG V. KOTWAL, J.
DATE : 12th JANUARY, 2023**

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JUDGMENT :

1. The Appellant has challenged the Judgment and Order dated 29/08/2018 passed by Additional Sessions Judge, Niphad, in Sessions Case No.34/2017. By the impugned Judgment and Order, the Appellant was convicted as follows ;

- (a) He was convicted for commission of offence punishable u/s 376(2)(i) of the Indian Penal Code and was sentenced to suffer rigorous imprisonment of 10 years and to pay a fine of Rs.25,000/- and in default of payment of fine to suffer simple imprisonment for six months.
- (b) He was also convicted u/s 323 of the Indian Penal Code and was sentenced to suffer rigorous imprisonment of six months and to pay a fine of Rs.5,000/- and in default of payment of fine to suffer simple imprisonment for 15 days.
- (c) He was further convicted u/s 506 of the Indian Penal Code and was sentenced to suffer rigorous imprisonment of one year and to pay a fine of Rs.10,000/- and in default of payment of fine to suffer simple imprisonment for one month.

- (d) He was also convicted u/s 4 of the Protection of Children from Sexual Offences Act, 2012. But separate punishment was not imposed on him in view of sentence passed u/s 376(2)(i) of the Indian Penal Code.
- (e) All the sentences were directed to run consecutively.
- (f) The Appellant was given set off u/s 428 of Cr.P.C.

2. Heard Mr. Anil G. Lalla, learned counsel for the Appellant, Ms. Priyanka Chavan, learned counsel for the Respondent No.2 and Mr. S. R. Agarkar, learned APP for the State.

3. The prosecution case is that, the victim's date of birth was 12/04/2004. On 28/03/2017, the victim was dragged to a secluded spot by the Appellant. He committed rape on her. He had put a Condom on his private part. He had threatened the victim. After returning home, she informed the incident to her family members. She was not knowing the name of the Appellant. On the next morning when she had gone to purchase milk, she saw the Appellant sleeping on a cot in the

neighbourhood. She informed this fact to her parents. They went there. They confronted the Appellant's mother. In the meantime, the Appellant ran away. The Appellant's mother requested the victim's family not to lodge the FIR. The victim's father made enquiries. He came to know the name of the Appellant. After that, the victim and her family approached the police and lodged the FIR. The Appellant was arrested. The investigation was carried out. The victim and the Appellant were sent for medical examination. The clothes of the Appellant as well as the victim were seized and were sent for chemical analysis. The Spot Panchanama was conducted. A torn Condom was found at the spot. It was also sent for chemical analysis. At the conclusion of the investigation, the charge-sheet was filed and the case was committed to the Special Court.

4. During trial, the prosecution examined six witnesses, including the victim, her parents, the Medical Officer, the Head Master of the victim's school and the Investigating Officer. Besides the oral evidence, the prosecution produced

documentary evidence in the form of her birth certificate at Ex.66 and the C.A. reports.

5. The defence of the Appellant was of total denial. According to him, a false case was lodged against him. He examined himself as defence witness No.1. He has deposed that he knew the victim. She was residing in front of his house. But he denied the incident dated 28/03/2017. He had to pass from the victim's house as he was residing in that area itself. The victim's relatives were suspecting him because of misunderstanding. The victim's grandmother and the parents came to his house and started quarreling with the Appellant's family members. His mother tried to pacify them and requested them not to go to the police station, but they did not listen and lodged the false case against him.

6. Learned Trial Judge on consideration of evidence led by both the sides, believed the prosecution case and convicted and sentenced the Appellant as mentioned earlier.

7. The victim was examined as PW.1. She has deposed as follows;

She was residing with her parents, sisters and brother. She was educated upto 7th standard. The incident took place on 28/03/2017. It was a Tuesday. Her grandmother and mother had gone to a village to sell cutlery. In the afternoon, at about 03.00 p.m., even her father went to the market. She went to collect wood as fuel for cooking. When she was collecting wood, a boy from the village came near her. He caught her. She shouted. He assaulted her with fist blows on her stomach. He pressed her mouth. He fell her down. He removed her clothes. He removed his own clothes. He put on a condom and then committed rape on the victim. It caused bleeding from her private part. She wiped the blood with her Odhani. That boy threatened her. After that, she returned home. She was crying. Her father enquired with her. She told the incident to him. She further told her father that the boy who was roaming around their house, was the same boy who had committed that offence. Her father informed her mother telephonically. She came home.

The victim was suffering from pain and also it was late. Therefore they did not go to the police station. On the next day morning, she went to bring milk. While returning she saw that the Appellant was sleeping on a Cot in front of a neighbouring house. She came back home and told others that the same boy was sleeping on the Cot nearby. The victim, her mother and grandmother then went to the house of the Appellant. They questioned the Appellant's mother. They came to know about the Appellant's name from her. In the meantime, the Appellant had run away. The Appellant's mother offered Rs.500/- to settle the matter. But the victim's family refused. After that, the victim lodged her FIR at the police station. The FIR is produced on record at Ex.11. She identified the Appellant before the Court. After registration of her FIR, she was referred for medical examination. She showed the spot of incident to the police. Her statement was recorded u/s 164 of Cr.P.C. It is produced on record at Ex.12. During investigation, the police seized her clothes. She identified her clothes and the torn Odhani. She also identified the Condom which was found at the spot.

In the cross-examination she stated that she, her sisters and brother were born at Sangamner. She was born at Sangamner in a Government hospital. After the incident, she had taken bath. When she told her family members about the incident, they decided to wait till the next day. At the time of lodging of the FIR one Police officer took down her complaint. One lady police officer took her in confidence and inquired about the incident. She also wrote down something and both these narrations were combined together to draft the final complaint. The victim and her family stayed at the police station for the entire day and night. She was not referred to the hospital immediately after lodging of the FIR. She had given her Odhani to the police which was stained with blood. According to her, she had cleaned the blood from her private part with that Odhani. Her underwear was also stained with blood. She had received a bruise injury. According to her, the Appellant used to move around her house on his motorcycle since 2-3 days before the incident. She denied the suggestion that she had complained

to the police only about his roaming around her house, but the police gave serious colour by registering it as an offence of rape.

The FIR is produced on record at Ex.11. It shows that it was registered at 00.10 a.m. on 30/03/2017 at Yeola City Police Station vide C.R.No.38/2017. Her FIR substantially corroborates her evidence. The statement of P.W.1 u/s 164 is produced at Ex.12. She has accepted that the contents of that statement were correct. That statement also substantially corroborates her deposition.

8. P.W.2 is the father of the victim. He has deposed that on 28/03/2017, he had gone to the market at about 03.00 p.m. He returned after about an hour. He saw that P.W.1 was crying. She told him about the incident. He called his wife. He went on his motorcycle to bring her back. He also brought his mother from another village. P.W.1 narrated the incident to all of them. P.W.1 was having pain in the stomach. She was frightened. It was late in the night. Therefore they did not go to the police station. On

the next day, P.W.1 told the family members about the Appellant that he was sleeping in the neighbourhood. P.W.2 himself went in the village to make enquiry about the Appellant. He came to know that his name was Rahul and he was a Mason. He produced copies of the bonafide certificate and the birth certificate.

In the cross-examination, he accepted that P.W.1 had not told him that the Appellant had given a blow on her stomach. He did not take her to a Doctor though P.W.1 was suffering from pain. He did not tell about the incident to the Police Patil of the village. He denied the suggestion that a false complaint was lodged.

9. P.W.3 was the mother of the victim. She has deposed in almost the same manner as deposed by P.W.2. She has corroborated the version of P.W.1 and P.W.2.

10. P.W.4 Dr. Sonal Khandare had examined the victim on 30/03/2017. From the medical examination, she found abrasion

of size 4 x 5 cm over left buttock of the victim. There was no other external injury. The victim's hymen was torn. That part was painful for the victim. There were no injuries on the genitals.

In the cross-examination she admitted that, on the basis of hymen tear only, no definite opinion could be expressed that the victim had undergone sexual intercourse. She also admitted that if the sexual organs were disproportionate and there is forceful intercourse, then there was possibility that there may be injury to the private parts. Finger insertion examination is very primary test and the pain in the area was depending on the size. This witness further deposed that on the basis of medical examination she could not definitely tell if the victim had undergone forceful sexual intercourse. She had given her primary report regarding suspected intercourse only on the basis of torn hymen and abrasion on buttock. The medical papers were produced at record at Ex.28.

11. P.W.5 Babaji Gunjal was the Head Master of the school where the victim studied. He issued the bonafide certificate as per their register. The entry regarding the victim was at Sr.1500. According to that entry, the victim's date of birth was 12/04/2004. On the basis of that entry, the bonafide certificate was issued.

In the cross-examination, he deposed that the victim was given admission on the basis of School Leaving Certificate issued by the previous school. He had not seen the birth certificate issued by Primary Health Centre. The bonafide certificate was produced on record at Ex.30.

The victim's birth certificate was produced on record at Ex.66.

12. P.W.6 API Vishwas Raosaheb Nimbalkar was attached to Yeola City Police Station. On 29/03/2017 the victim had given a complaint. The offence was registered vide C.R.No.38/2017.

This witness conducted the investigation. The victim was sent for medical examination. The Appellant was arrested on 30/03/2017. He was sent for medical examination. The clothes of the victim and the Appellant were seized. This witness went to the spot and conducted the Spot Panchanama. One Condom which was torn in two pieces was seized from the spot. He sent the victim for recording of statement u/s 164 of Cr.P.C. the clothes and other articles were sent for chemical analysis and on completion of the investigation, the charge-sheet was filed. The C.A. report was produced on record which Ex.51. The Condom, the clothes of the victim and the clothes of the Appellant were sent for chemical analysis. Semen was found on the underwear of the Appellant. On the knicker and Odhani of the victim, blood of 'AB' group was detected. There was no semen found on other clothes and no vaginal fluid was detected on the Condom or on the clothes of the Appellant. The victim's blood group was found to be 'AB'. The Appellant's blood group was 'A'.

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

13. As mentioned earlier, the Appellant examined himself as defence witness No.1. He denied the incident. The learned Trial Judge believed the evidence of the prosecution, disbelieved the defence and convicted and sentenced the Appellant as mentioned earlier.

14. Learned counsel for the Appellant made following submissions -:

The medical evidence does not support the case of the victim. The Panchas to the Panchanamas are not examined. No explanation is offered by the Investigating Officer as to why none of the Panchas was examined. There was delay in lodging the FIR. The C.A. report is not incriminating. In fact, it supports the defence, because nothing was detected on the Condom, neither semen nor vaginal fluid. There was no injury to the private part of the victim. There was improvement in respect of the offering of Rs.500/- from the police statement of the witness, on the part of the mother of the Appellant. The

Appellant was admittedly staying in the neighbourhood and yet the victim and her family did not know the Appellant's name or any other details. This is not believable. He finally submitted that there was no reason to make the sentences run consecutively and therefore the sentence is harsh.

15. Learned APP as well as learned counsel for the Respondent No.2 opposed these submissions. According to them, the victim was not highly educated. She belonged to a poor family. Her family used to go to from place to place for selling cutlery. There was no reason for her to know the name and other details of the Appellant. They were not knowing each other. The evidence of PW.1 is clear enough and on that basis alone the conviction can be recorded. The medical evidence is not against the version of the victim. The date of birth of the victim is not disputed.

16. I have considered these submissions. As far as date of birth of the victim is concerned, the prosecution has produced

on record the birth certificate and the bonafide certificate showing her birth date as 12/04/2004. That evidence is not challenged seriously by the defence. In any case, the birth certificate is duly proved through its certified copy. It can safely be held that her date of birth was 12/04/2004 and on the date of incident i.e. on 28/03/2017, she was 12 years and 11 months old.

17. As far as the corroborative piece of evidence is concerned, the prosecution has sought to rely on the evidence of the Doctor and also on the Spot Panchanama. As far as the Doctor's evidence is concerned, she has not given a conclusive opinion about the forcible sexual intercourse. However, at the same time, she has observed that the hymen was torn and that area was painful for the victim. though it does not conclusively corroborate the version of the victim, yet it is not against the prosecution case either. To that extent, it does support the case of the P.W.1.

18. As far as finding of Condom recovered on the spot is concerned, as rightly submitted by learned counsel for the Appellant, the Panchas to the Panchanama were important witnesses and but they were not examined and no explanation whatsoever was given by the Investigating Officer or the prosecution for not examining those Panchas. In a given case, such Panchanama and seizure of articles can be proved through the evidence of the Investigating Officer, but in this particular case the Panchas are not examined at all and no explanation is offered by the prosecution for their non-examination. Therefore this has considerably weakened the evidentiary value of the Spot Panchanama and recovery of the Condom. Further more, the C.A. report regarding that the Condom also has not revealed anything. It did not show presence of either semen or vaginal fluid.

19. More importantly, there is one strong corroborative incriminating piece of circumstance in the nature of blood stained Odhani of the victim. That Odhani was produced by the

victim herself. The C.A. report shows that the said Odhani had blood stains of 'AB' group which was the blood group of the victim. The victim stated that, at the time of the incident she had used that Odhani to wipe blood from her private part. There was no other bleeding injury on her person. Therefore finding victim's blood on the Odhani is seriously incriminating circumstance against the Appellant. This also corroborates the version of the victim/PW.1.

20. Apart from this corroborative piece of evidence the most important evidence in this case is that of the victim herself. Her version is required to be considered minutely. After reading her evidence in detail, I do not find any circumstance which raises doubt regarding her version. I find that her evidence is clear, cogent and free from any doubt. She has described the incident in sufficient details. Sequence of events narrated by her are corroborated by her parents. Therefore, on the basis of the evidence of PW.1 alone, the prosecution has proved its case beyond reasonable doubt. I do not find any substance in the

arguments that there was delay in lodging the FIR. The father of the victim (P.W.2) has explained that it was late in the night and therefore they did not go to the police station on the same day. On the next day morning the Appellant and his family were confronted and after that the victim and her family members approached the police station. After all this, the victim's statement was recorded and ultimately the FIR was lodged. Therefore it cannot be said that there was delay in lodging the FIR or that there was concoction of false story.

21. The defence of the Appellant is also not acceptable. Just because the Appellant was roaming in the area, it was not a good enough reason for implicating him falsely in such a serious offence. The victim was a girl of hardly 12 years of age. Her evidence is found to be truthful. She had given details of the threats given by the Appellant and has established how she was rendered helpless during the entire incident. In this view of the matter, the examination of the Appellant himself as a defence witness does not help him in disproving the prosecution case.

The learned Judge has rightly considered all these aspects and has recorded the conviction and sentence.

22. The next question is about the sentence imposed on the Appellant as mentioned earlier. He was sentenced to suffer rigorous imprisonment for 10 years for commission of offence punishable u/s 376(2)(i) of the Indian Penal Code. It was also referred to as the alternate punishment for commission of the offence under section 4 of POCSO. Besides this sentence, the Appellant was separately sentenced for commission of offence punishable u/s 323 and 506 of the IPC. Sentence of 10 years rigorous improvement is the minimum sentence prescribed by section 376(2)(i) of the Indian Penal Code as it stood then on the date of incident. Since the sentence imposed is minimum, there is no scope to reduce it further. However, learned Judge has not given acceptable reasons as to why the substantial sentences were directed to run consecutively. Considering the young age of the Appellant who at that time was of 22 year old, some benefit can be extended to him by making the substantive

sentence to run concurrently instead of consecutively. To that extent, the operative part needs to be modified.

23. Hence, the following order :

ORDER

- (i) The Appeal is partly allowed.
- (ii) The conviction and sentence awarded to the Appellant are maintained. However, all the substantive sentences are directed to run concurrently instead of consecutively.
- (iii) The Appellant is given set off u/s 428 of Cr.PC.
- (iv) With this modification, the Appeal is disposed of.
- (v) With disposal of the Appeal, the connected application is also disposed of.

(SARANG V. KOTWAL, J.)