

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR.

CRIMINAL REVISION APPLICATION NO. 156 OF 2015

APPLICANT : Wasim @ Mayabhai S/o. Mohamad Solanki, Aged about 26 years, Occu. Labour, R/o. Tarapura Weekly Market, Yavatmal, Tq. & Dist. Yavatmal, Presently at Central Prison Amravati.

//VERSUS//

NON-APPLICANTS : 1. State of Maharashtra, through Police Station Officer, Wadgaon Road Police Station, Yavatmal.

Amended as per Court's Order Dt. 22/06/2023

2. XYZ (Victim), PSO, PS Wadgaon Road Yavatmal, Crime No.44/2012.

Mr. M.N. Ali, Advocate (appointed) for the Applicant.
Mr. A.R. Chutke, APP for Non-applicant No.1/State.
Ms. Kirti Deshpande, Advocate (appointed) for Non-applicant No.2.

CORAM : G. A. SANAP, J.
DATED : 13th JULY, 2023.

ORAL JUDGMENT

In this revision application, challenge is to the judgment and order dated 30th January, 2015, passed by learned Sessions Judge, Yavatmal, whereby learned Sessions Judge dismissed the appeal filed by the applicant/accused against his conviction and

sentence awarded by learned Ad-hoc Assistant Sessions Judge, Yavatmal for the offence punishable under Sections 341, 363, 366, 376 and 506 of the Indian Penal Code, 1860 (for short “IPC”). Learned Ad-hoc Assistant Sessions Judge, on conviction, had sentenced the accused to suffer rigorous imprisonment for one month for the offence punishable under Section 341 of the IPC, rigorous imprisonment for three years for the offence punishable under Section 363 of the IPC, rigorous imprisonment for five years for the offence punishable under Section 366 of the IPC, rigorous imprisonment for seven years for the offence punishable under Section 376 of the IPC and rigorous imprisonment for one year for the offence punishable under Section 506 of the IPC. He was further sentenced on all the counts to pay the fine.

02] The facts are as follows:

The prosecutrix, on the date of the incident, was around 14 years of age. She was residing with her mother at Ashok Nagar, Yavatmal. On 23rd February, 2012, she lodged a report of the incident of sexual assault on her. On the basis of the said report, a crime bearing No.44/2012 was registered against the accused. It is the case of the prosecution that the parents of the prosecutrix are doing labour work. On the date of the incident, she was studying

in 9th standard at Katebai Madhyamik Vidyalaya, Tahsil Chowk, Yavatmal. Her school hours were between 11:00 a.m. and 5:00 p.m. After the school hours, she used to attend the tuition class for English subject between 6:00 p.m. and 7:00 p.m. run by Mr. Mukhtiyar at Athawadi Bajar, Chapanwadi. She started to attend the tuition class 15 days prior to the incident.

03] It is stated that on 23rd February, 2012, after attending the school, she came back to her house. She went to attend the tuition class. It is stated that at about 7:00 p.m., when she was returning from the tuition class on bicycle, one boy came from behind on a motor-cycle. He went ahead and obstructed her bicycle. The prosecutrix saw him. He was the accused Wasim Solanki. She had seen the accused earlier at the residence of her friend Guddi Meshram. It is stated that the accused caught hold her hand and pointed knife at her neck. She got frightened. She tried to raise shout, but the accused threatened to kill her. The accused at the point of knife made her to sit on his motorcycle. The accused took her behind Ram Temple in an open space. She tried to run away from the said place. The accused chased her. The accused removed her cloths. The accused knocked her down. When she tried to raise shout, the accused again threatened to kill

her. The accused committed sexual intercourse with her. The prosecutrix somehow managed to free herself from the clutches of the accused and ran away towards hutment area. She went to the hut of a lady who is examined as PW-7. She narrated the incident to the old lady. The old lady PW-7 gave shelter to her in the night. On the next day, the said old lady brought the prosecutrix to her house at about 10:00 a.m. She narrated the incident to her mother. They went to Wadgaon Road Police Station and lodged the report. On the basis of the report of mother of the prosecutrix, PW-6 A.P.I. Rathod registered the crime against the accused.

04] The prosecutrix was sent to the hospital for medical examination. The Investigating Officer arrested the accused. The investigation was then entrusted to PW-11 Lata Phad. PW-11, after completion of the investigation, filed the charge-sheet. The prosecution examined 11 witnesses to bring home the guilt against the accused. Learned Ad-hoc Assistant Sessions Judge, on consideration of the evidence, held the accused guilty of the charge and sentenced him as above. The appeal filed by the accused against his conviction and sentence was dismissed by learned Sessions Judge. The accused has, therefore, come before this Court in revision.

05] I have heard Mr. M.N. Ali, learned advocate (appointed) for the accused, Mr. A.R. Chutke, learned Additional Public Prosecutor for the State and Ms. Kirti Deshpande, learned advocate (appointed) for the prosecutrix. Perused the record and proceedings.

06] Learned advocate for the accused submitted that on the basis of oral and documentary evidence, the prosecution has failed to prove that on the date of the incident, the prosecutrix was 14 years old. Learned advocate pointed out that the documentary evidence relied upon by the prosecution to prove her birth date, is not the primary evidence and therefore, the secondary evidence adduced by the prosecution cannot be relied upon. Learned advocate submitted that on this count, the Courts below have committed error in accepting the case of the prosecution. Learned advocate submitted that the medical evidence does not support the oral evidence of the prosecutrix on the point of sexual assault on her by the accused. Learned advocate pointed out that the C.A. report of the vaginal swab was negative for the presence of semen. Learned advocate submitted that the negative C.A. report on this count is sufficient to create a doubt about the evidence of the prosecutrix with regard to the rape on her by the accused. Learned

advocate submitted that the absence of the injuries on the private part of the prosecutrix as well as on the body of the prosecutrix indicates that the prosecutrix was not subjected to sexual intercourse. Learned advocate submitted that the evidence of prosecutrix PW-1 and her mother PW-5 is not cogent, concrete and reliable. Learned advocate took me through the evidence of prosecutrix PW-1 and the evidence of the mother of the prosecutrix PW-5 and submitted that it is full of inconsistencies and as such creates a doubt about their credibility. Learned advocate submitted that the evidence of independent witness PW-7 is not sufficient to corroborate the testimony of the prosecutrix on material aspects. Learned advocate submitted that the evidence adduced by the prosecution creates doubt about the case of the prosecution.

07] Learned Additional Public Prosecutor submitted that the evidence brought on record on behalf of the accused in the form of information obtained under the Right to Information Act, 2005 in the nature of document at Exh.51 is sufficient to corroborate the documentary evidence adduced by the prosecution from the school with regard to her age. Learned Additional Public Prosecutor submitted that on the basis of cogent and concrete evidence, the

prosecution has proved that on the date of the incident, the prosecutrix was 14 years old. Learned Additional Public Prosecutor further submitted that the evidence of prosecutrix is of sterling quality and as such sufficient to prove the incident of rape on her by the accused. Learned Additional Public Prosecutor submitted that the evidence of prosecutrix has been corroborated by the evidence of her mother PW-5 and the independent witness PW-7. Learned Additional Public Prosecutor pointed out that the Medical Officer PW-2 has corroborated the evidence of prosecutrix PW-1. Learned Additional Public Prosecutor submitted that the Courts below have considered the entire evidence and on appreciation of the same, convicted and sentenced the accused. Learned Additional Public Prosecutor submitted that the concurrent findings of fact cannot be interfered with in the exercise of revisional jurisdiction.

08] Learned advocate appointed to represent the prosecutrix took me through the evidence available on record and submitted that the said evidence is sufficient to prove the charge against the accused. Learned advocate, in short, adopted the submissions made by learned Additional Public Prosecutor.

09] As per the case of prosecution on the date of the incident the prosecutrix was studying in 9th standard in Zilla Parishad (Katebai) High School, Yavatmal. PW-1 prosecutrix and her mother PW-5 have categorically stated that on the date of the incident, the prosecutrix was 14 years old. PW-9 is the Headmistress of Zilla Parishad Girls High School, Yavatmal. PW-9 was examined to prove the bonafide certificate at Exh.46 as well as the relevant entry from the admission register of the school, where the birth date of the prosecutrix was recorded. PW-5 has stated that at the relevant time, her daughter was studying in 9th standard and she was 14 years old. PW-9 has stated that the school record indicates that the prosecutrix was admitted in the school in 5th standard on 26th June, 2007 and she left the school on 14th May, 2012. She has stated that the birth date of the prosecutrix recorded in the school admission register is 27th July, 1997. The photocopy of the school admission register is at Exh.48. PW-9 has admitted that the contents of Exh.48 were not written by her. She has, however, stated that the entry from the original register was signed and certified by her.

10] It is undisputed that learned trial Judge admitted this photocopy in evidence, on the basis of the endorsement of

verification made by the Registrar of the Court dated 2nd April, 2013. This endorsement was made on the date of the evidence. The verification endorsement does not indicate that the original register was produced, perused and verified. It is further seen that the Registrar, being the ministerial staff, had no authority to make such an endorsement. It was the duty of learned Judge to insist the witness to produce the original register and then depending upon the evidence and the entry from the register, admit it in evidence. It needs to be stated that without producing the original register with the relevant entry, learned Judge should not have admitted this photocopy in evidence. In this situation, the learned Judge was required to play a proactive role. He was required to put the prosecution to notice that in the absence of production of original register, the photocopy could not be admitted in evidence. Before exhibiting the photocopy, the learned Judge was expected to tell the prosecution to produce the original register with the relevant entry and prove the document. It was the duty of the learned Judge to ensure fair trial to the prosecution as well as to the accused. The learned Judge, as can be seen from the record, has acted as a mute spectator.

11] It is seen that the date of birth of the prosecutrix mentioned in Exhs. 46 and 48 is 27th July, 1997. It is the case of the prosecution that at the relevant time, the prosecutrix was in 9th standard. It is the case of the prosecution that on the date of the incident, the prosecutrix was 14 years old. It is seen on perusal of record that the prosecutrix was admitted in the school of PW-9 on 26th June, 2007 in 5th standard. In the year 2012, she was in 9th standard. Cross-examination of PW-9 conducted by the defence advocate and the documents produced during the course of cross-examination of PW-9 at Exh.51, in my view, to some extent have lend an assurance to the case of the prosecution on this point. Exh.51 is the information obtained under the RTI by the advocate for the accused. In this document, it was stated that in the year 2012, the prosecutrix was studying in 9th standard. The birth date of the prosecutrix is 27th July, 1997. The rough calculation on the basis of the date of birth, the date of admission of the prosecutrix in the school of PW-9 and the age of the prosecutrix on the date of the incident, would show that it is sufficient to conclude that on the date of the incident, the prosecutrix was 14 years of age. The birth date of the prosecutrix is 27th July, 1997. As per the evidence of PW-9, the prosecutrix was admitted in her school in 5th standard on 26th June, 2007. It is apparent that on the date of her admission

in 5th standard on 26th June, 2007, the prosecutrix was around 9 to 10 years old. This clearly indicates that she would have been admitted in 1st standard in the year 2003. In order to accept the defence of the accused that on the date of the incident the prosecutrix was above 16 years of age, the Court would have to hold that at the age of 3, she was admitted in 1st standard. In my view, it is, therefore, crystal clear that on the date of the incident, the prosecutrix was below 16 years of age. I am constrained to observe that in view of the production of the document at Exh.51 by the accused, the accused has taken care of the case of prosecution. Even if it is assumed that the documents at Exh.46 and 48 may not be sufficient to conclusively establish her birth date, the document at Exh.51 corroborates the case of prosecution. It has been stated in Exh.51 that in the year 2012, the prosecutrix was studying in 9th standard. Therefore, on this count, the defence of the accused cannot be accepted.

12] Before proceeding to the evidence of prosecutrix PW-1 and the evidence of the other witnesses, it would be appropriate to consider the medical evidence. PW-2 Dr. Rajani Kamble is the Medical Officer. She has stated that on 24th February, 2012, the prosecutrix was brought to her by lady police Constable buckle

No.966. The mother of the prosecutrix had also accompanied her. She has stated that the prosecutrix narrated her the history of the incident. After obtaining the permission of her mother, she examined the prosecutrix. On examination, she found the abrasion on right side of neck and on right knee. She has stated that on local examination of genital, she found that the hymen was ruptured in 6'clock position. The hymen tear was fresh. Her orifice admitted two fingers. Exh.22 is the medical examination certificate. She has opined that the prosecutrix was subjected to sexual intercourse. At the time of the examination, PW-2 collected the blood sample, vaginal swab and pubic hair. In her cross-examination, she has admitted that the possibility of rupture of the hymen is possible in case of cycling and a fall. She has further admitted that the ruptured hymen could look fresh for 4 to 5 days. In her cross-examination, she has further admitted that on the basis of ruptured of hymen, she opined that the prosecutrix was subjected to sexual violence.

13] Perusal of Exh.22 would show the history of assault narrated by the prosecutrix was recorded. The history of assault recorded in Exh.22 is consistent with the other evidence and particularly the evidence of the prosecutrix. The evidence of

Medical Officer, therefore, is sufficient to conclude that the prosecutrix before her examination by the Medical Officer was subjected to sexual intercourse. The question that needs to be addressed is whether the medical evidence corroborates the oral evidence of the prosecutrix PW-1, her mother PW-5 and independent witness PW-7 with regard to the incident of sexual assault and vice versa.

14] It needs to be stated at this stage that the birth date of the prosecutrix has been seriously challenged by the accused. I have accepted the oral and documentary evidence to come to a conclusion that on the date of the incident the prosecutrix was minor. In this case, even if it is assumed that the prosecutrix on the date of the incident was not minor, the evidence adduced by the prosecution and the defence of the accused would be sufficient to prove the charge under Section 376 of the IPC. The accused has not come before Court with a defence that the sexual act with the prosecutrix was consensual. It needs to be stated that in the absence of such defence by the accused, the Court cannot draw an inference of any consensual intercourse by the accused with the prosecutrix. In my opinion, this aspect is very relevant and material for the purpose of consideration of the charge framed against the accused

under Section 376 of the IPC.

15] PW-1 prosecutrix has narrated the first hand account of the incident. She has stated that she was proceeding on her bicycle to the coaching class. The accused stopped her bicycle and pointed the knife at her neck and forced her to sit on his motor-cycle. She has stated that the accused by applying force, took her in the open area on the side of Ram Mandir. She has stated that she tried to escape from the clutches of the accused, but the accused pushed her to the ground. She has stated that the accused at the point of knife threatened to kill her in case she raised shout. She has stated that at the point of the knife the accused forced her to remove her cloths and then committed intercourse with her. She has stated that somehow she escaped from the clutches of the accused and ran away from the spot. She fell down on the ground and sustained injuries to her knees. She has stated that she ran towards slum and knocked the doors of several persons, but nobody came to her help. She went to the hut of one old lady. She narrated the incident to the said old lady. The old lady gave her shelter during the night and on the next day, the said old lady, who is PW-7, took her to her mother. She has stated that after reaching home, she narrated the incident to her mother. She along with her mother went to the

police station and lodged the report. It has come in the evidence that during the course of investigation, the cloths of the prosecutrix were seized from the spot. It has come in her cross-examination that when she went to the house of old lady, she covered her body with bedsheet. She has further stated in the cross-examination that she went to her house with the old lady by covering her body with bedsheet. PW-1 prosecutrix has narrated in her evidence the first hand account of the incident. In her evidence, she has narrated as to how she came to know the accused. The prosecutrix identified the accused in the Court. She has further stated in her cross-examination that the accused at the point of knife made her to sit in front of him on the motor-cycle. She has stated that she did not raise shout because she was completely overpowered by the accused at the point of knife.

16] Perusal of her cross-examination would show that no serious dent has been accused to her evidence. Perusal of her cross-examination would show that she has reiterated most of the facts stated by her in her examination-in-chief with regard to the incident and the involvement of the accused. On minute scrutiny of her evidence, I am satisfied that her evidence cannot be disbelieved and discarded. Her evidence, in my view, is sufficient to

prove the sexual assault on her by the accused. Medical evidence of Dr. Rajani Kamble PW-2 has corroborated her evidence on this material aspect.

17] PW-5 is the mother of the prosecutrix. She has stated that on 23rd February, 2012 when her daughter did not return home, she went to the Police Station, Wadgaon Road, Yavatmal and lodged the report. She has stated that at that time the police told her to wait till night. She has stated that on 24th February, 2012 in the morning one old lady brought her daughter to her house. She has stated that at that time her daughter narrated the incident to her. Further evidence of PW-5 reiterates the fact of the incident and the involvement of the accused. She has stated that thereafter she went to the police station and the matter was reported to the police. It was suggested to her during the cross-examination that she and old lady PW-7 were working with Bhagwandas Lohana. The accused had carried a morcha to the factory of Mr. Lohana. It was further suggested that in order to teach a lesson to the accused, on the say of Bhgandas Lohana, the false report was lodged against the accused. In my view, this defence is neither probable nor acceptable. The necessary details to substantiate the defence are lacking.

18] It is further pertinent to note that mother would not even think of spoiling the career and life of her daughter at the instance of third person. She was cross-examined. Perusal of her cross-examination would show that no material has been elicited in cross-examination to discard and disbelieve her evidence. It is seen on perusal of the report at Exh.19 that the specific name of the accused was stated in the report. This fact indicates that the prosecutrix had knowledge of the identity of the accused.

19] PW-7 is an independent witness. PW-7 is the old lady at whose house, in the night, the prosecutrix had taken shelter. Perusal of the evidence of PW-7 in entirety would show that she has tried to support the case of the prosecution as well as the defence of the accused. In this situation her evidence requires careful and minute scrutiny. In her evidence, she has stated that she was residing at Venkatesh Nagar near Borle Layout, Yavatmal in a hut. She has stated that on the date of the incident at about 8 to 9 p.m., one girl entered in her hut in a hurried manner. She has stated that the girl told her that one boy was chasing her. She has stated that the girl was frightened. She offered her a glass of water. She has further stated that the girl requested her to give shelter for night. She gave shelter to her. She has categorically stated that on

the next day, she carried the girl to her house and handed over the girl to her mother at Ashok Nagar. In her examination-in-chief, she has narrated the name of the girl. The evidence of PW-7 is consistent with the evidence of the prosecutrix on the point of the prosecutrix going to her house, request from PW-7 to provide her shelter by narrating the incident, shelter provided to her by PW-7 for the night and dropping of the prosecutrix at the house of the mother of the prosecutrix in the morning. In her examination-in-chief, she has not stated that the prosecutrix had narrated the incident to her. However, she has stated that the girl had told her that one boy was chasing her and she found that the girl was in a frightened condition. It is, therefore, apparent that on material part, the evidence of prosecutrix has been fully corroborated by the evidence of PW-7. In her cross-examination, she has stated that in the night of 23rd February, 2012, the prosecutrix had come to her house twice with an unknown person. She has admitted that eight days prior to the incident, the accused had carried a morcha to the factory of Bhagwandas Lohana. She has further stated that Bhagwandas Lohana had attended the police station with the mother of the prosecutrix and narrated the incident to the police and on the basis of the said narration, the FIR was registered.

20] Perusal of her cross-examination would suggest that she has tried to support the defence of the accused as well. However, perusal of her evidence in entirety would show that on certain vital and material aspects, she has supported the case of the prosecution. In my view, therefore, on the material part of the incident, the evidence of PW-1 prosecutrix and PW-5 mother of prosecutrix has been corroborated by PW-7. The evidence assumes importance because it is not the defence of the accused that he and the prosecutrix went to the house of the old lady and there with the consent of the prosecutrix committed intercourse with her. Therefore, the answers given by PW-7 in the cross-examination would not wash away the incident narrated by her in her examination-in-chief.

21] The evidence of PW-1, PW-5 and PW-7 is concrete, cogent and reliable. On minute perusal of the evidence, I am satisfied that there is no reason to discard and disbelieve the said evidence. PW-7 in the ordinary circumstances had no reason to make false statement about the incident. It is further seen that the narration of the incident by PW-7 is not possible with her sheer imagination. The possibility of tutoring the PW-7 has been completely ruled out.

22] Perusal of the judgment and order passed by learned Sessions Judge would show that the learned Sessions Judge has very carefully re-appreciated the evidence of the prosecution witnesses. Learned Sessions Judge in the teeth of the evidence on record examined the correctness of the judgment and order passed by learned Ad-hoc Assistant Sessions Judge. Learned Sessions Judge on all points agreed with the conclusion arrived at by learned Ad-hoc Assistant Sessions Judge. It is apparent that the Courts below have recorded the concurrent findings of fact. On going through the judgment and order passed by learned Sessions Judge, I am satisfied that the concurrent findings of fact recorded by learned Sessions Judge are supported by evidence and the reasons. In my view, therefore, no interference is warranted in the well reasoned judgment and order passed by learned Sessions Judge.

23] Considering the magnitude and seriousness of the crime, learned Ad-hoc Assistant Sessions Judge sentenced the accused to undergo rigorous imprisonment for seven years under Section 376 of the IPC. On taking a re-look at the reasons recorded by the Courts below, I am satisfied that the sentence awarded on this count is proportionate to the gravity and seriousness of the crime. No interference is, therefore, warranted in the well reasoned

judgment and order passed by learned Sessions Judge. Therefore, I conclude that the revision application is without substance and merits. It is accordingly **dismissed**.

24] Before parting with the matter, it is necessary to place on record the appreciation for the able assistance rendered by learned advocate Mr. M.N. Ali appointed to represent the applicant, learned Additional Public Prosecutor Mr. A.R. Chutke and learned advocate Ms. Kirti Deshpande appointed to represent the non-applicant No.2.

25] Fees payable to learned advocate Mr. M.N. Ali appointed to represent the applicant and learned advocate Ms. Kirti Deshpande appointed to represent the non-applicant No.2 is quantified at Rs.10,000/- (rupees ten thousand only) each, and which shall be paid to them by the High Court Legal Services Sub-Committee, Nagpur.

(G. A. SANAP, J.)

Vijay