



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

CRIMINAL APPEAL NO. 62 OF 2019

Jagdish Shriram Pawar
Age: 42 years, Occu.: Driver,
R/o Lane No.5, Pundlik Nagar,
Aurangabad, Dist. Aurangabad

..APPELLANT

VERSUS

State of Maharashtra
Through PSO,
Mukundwadi Police Station,
Aurangabad

..RESPONDENT

....

Mr. A.G. Dalal, Advocate for appellant (appointed through Legal Aid)
Ms. U.S. Bhosale, A.P.P. for respondent - State

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**CORAM : R.G. AVACHAT AND
NEERAJ P. DHOTE, JJ**
RESERVED ON : 03rd JANUARY, 2024
PRONOUNCED ON : 10th JANUARY, 2024

JUDGMENT (PER : R.G. AVACHAT, J.) :

1. This is an appeal against conviction. The appellant has been convicted for having committed rape of his minor daughter (below sixteen years of age) many a time. The details of offences for which the appellant has been convicted and quantum of sentence imposed on each count is given below in tabular form :-

Section	Act	Sentence and Fine
376(2)(f)(j)(n)	I.P.C.	R.I. for life, Fine of Rs.5,000/-, I.D. S.I. for one year

323	I.P.C.	R.I. for six months
506	I.P.C.	R.I. for one year
4	POCSO	R.I. for seven years, Fine of Rs.500/-, I.D. S.I. for six months
10	POCSO	R.I. for five years, Fine of Rs.500/-, I.D. S.I. for six months
12	POCSO	R.I. for five years, Fine of Rs.500/-, I.D. S.I. for six months

The substantive sentences have been directed to run concurrently.

2. The facts leading to the present appeal are as follows :-

First Information Report ('F.I.R.') has been lodged by the victim ('X') herself on 03rd December, 2016. It is her case that she was born on 07th May, 2001. She was in 10th standard while the F.I.R. was registered. She would stay alongwith her mother and two siblings, twelve years old sister and brother of ten years of age. Her father, the appellant is a truck driver. Her mother was a housewife. The victim's school time was from 07:00 a.m. to 12:00 noon. She would, however leave home by 06:30 a.m. The mother used to be away from home three days a week as she was a member of Women Help Group (*Mahila Bachat Gut*).

3. It is the case of the victim that the first incident of rape was committed by the appellant while she was in fifth standard. It was the incident of about five years before registration of the F.I.R. Her mother left the home to bring her daughter back from the school. The appellant, the victim and victim's younger brother (small child) were home. The appellant

closed the door from inside. He caught hold hands of the victim and undressed her. He too undressed himself and then committed sexual intercourse with the victim. The appellant then gave her threats of committing murder of her mother, if she disclosed the incident to anyone. The appellant then left the home. The victim did not relate the incident to her mother on her return from school due to the threats given by the appellant. It is further her case that the appellant committed the same act fifteen days after the first one. When the victim raised cries, he beat her up with the belt. It is further her case that thereafter whenever the appellant used to be at home she used to be in the home only when her mother is there. Whenever nobody used to be at home, the appellant would try to behave the same way with her.

4. It has further been averred in the F.I.R. that while the victim was in eighth standard, the appellant again started behaving with her the same way as he used to behave in the past. Whenever the appellant would be home and the mother used to be away, he would ask his another daughter to go outside the home for one or the other reason. He would sent the son out of home for playing. If the victim refused to submit to his sexual desire, he used to beat her up.

5. It has further been averred that last such incident took place fifteen to twenty days before the F.I.R. was lodged. The victim got fed up

thereby. She decided to disclose everything to her mother. She did not dare to share the same with her mother in the presence of her siblings. She, therefore, made a audio recording of the matter she wanted to relate to her mother, in the cell phone. The mother got shocked on having heard the recording. She then enquired with the victim. She narrated her what had happened with her. The mother then contacted the appellant on phone. He denied to have ever misbehaved with the victim. He did not come home for next five to six days. On his return to home, the victim told her mother that either he (appellant) would stay in the home or herself (victim), but not both would stay together. The mother thereupon asked the appellant to leave the home, else she would leave. The appellant thereupon left the home. He started making phone calls. He would give threats of committing suicide.

6. It has further been averred that the appellant came outside the home. It was little past 11:30 p.m. of 02nd December, 2016. The mother was not home. He enquired with the victim whereabouts of her mother. He then gave her threats. The appellant continued to roam in the vicinity until 12:00 midnight. The victim and her mother, therefore, approached a social activist – Vidya Khotkar. With her assistance the F.I.R. was lodged.

7. Crime vide C.R. No. 1252 of 2016 was registered with Mukundwadi Police Station, Dist. Aurangabad for the offences punishable under Sections 376(2)(f)(j)(n), 323 and 506 of the Indian Penal Code

(‘I.P.C.’) and under Sections 4, 10 and 12 of the Prevention of Children from Sexual Offences Act (‘POCSO’). P.W.11 – Anita Fasate did the investigation. Scene of offence panchanama (Exh.25) was drawn. The victim was medically screened for ascertaining her age and evidence of rape as well. The statements of persons acquainted with the facts and circumstances of the case were recorded. On completion of investigation, the appellant was proceeded against by filing the charge-sheet before the Court constituted for trial of offence under POCSO.

8. The trial Court framed charge (Exh.6). The appellant pleaded not guilty. Defence of the appellant was that of his wife had extra marital relationship with one Nandkishor Chavan. She used to be away from home many a time. He did not like the same. The victim has, therefore, lodged a false F.I.R. at the instance of her mother.

9. Learned counsel appointed to represent the appellant would submit that there is long delay in lodging the F.I.R. Conduct of the victim is unusual. If she was subjected to sexual intercourse while she was in fifth standard, she must have suffered pain and bleeding at her private part. It is surprising that she did not relate the incident to her mother, nor the mother realised the same. According to learned counsel, the social activist, on whose intervention the F.I.R. was lodged, was not examined. The evidence of victim, her sister and their mother is grossly inconsistent with each other.

According to him, it is a serious offence. Life sentence has been handed out by the trial Court. According to him, the offence ought to have been proved beyond reasonable doubt. Learned counsel took us through the evidence on record to ultimately urge for allowing the appeal.

10. Learned A.P.P. would, on the other hand, submit that relationship between the victim and the appellant was that of confidence. No daughter would like to lodge the F.I.R. against her own father. There is no reason to disbelieve her case. The appellant being father, the family members would necessarily take sometime to decide whether the matter would be reported to the police. Delay in lodging of the F.I.R., therefore, should be considered in light of such facts and circumstances. Learned A.P.P. reiterated the reasons given by the trial Court for convicting the appellant. She ultimately urged for dismissal of the appeal.

11. Considered the submissions advanced. Perused the evidence on record and documents admitted in evidence. Let us first refer to the evidence on record and then appreciate the same.

12. The prosecution examined eleven witnesses to bring home the charge. For deciding this appeal, the relevant evidence would be that of the victim, her sister, their mother and the medical officer, who medically screened the victim in proof of offence of rape.

13. Averments in the F.I.R. have already been referred in paragraph nos. 2 to 6 hereinabove.

14. The victim ('X') gave evidence somewhat consistent with the F.I.R. We, therefore, do not propose to reproduce her examination-in-chief. The gist of her case is that while she was in fifth standard (about ten years of age), the appellant committed rape of her while her mother was away from home. He gave the victim threats of committing murder of her mother, if she disclosed the incident to anybody. She, therefore, did not disclose the incident to anyone. The appellant then committed the similar act fifteen days thereafter. When she refused, she was assaulted with belt. As per her evidence in the examination-in-chief, there was lull in such behaviour of the appellant for three years. Then when she was in eighth standard, the appellant started troubling her the same way. He used to commit rape of the victim when her mother used to be away. He would ask his other two children to go out of home for playing. Then same incident took place after two years i.e. when she was in tenth standard. He again behaved with her the same way. She, therefore, made a voice recording of the matter she decided to disclose to her mother. Her mother heard the recording and enquired with the appellant. It is the appellant, who left the home on the say of mother (his wife). He, however tried to return home a day before lodging of the F.I.R. Mother of the victim was not home. Apprehending the appellant

would again trouble the victim and even another daughter, mother of the victim approached one social activist – Vidya Khotkar and lodged the F.I.R.

15. P.W.2 – Sapna Pawar, mother of the victim testified in her evidence that the victim was born on 07th May, 2001. By 07:30 p.m. on 05th December, 2016 she was home alongwith her children. The appellant was away on duty. The victim gave her the cell phone and asked to hear the matter recorded therein. She, accordingly heard the same to find the appellant to have had sexually abused the victim many a time. It is further in her evidence that she, therefore, contacted the appellant on cell phone and enquired about the same. He denied. He came home after five to six days. She again enquired with him. A quarrel, therefore, ensued between the two. The appellant gave fist blows to the victim. It has further come in her evidence that then she approached a social activist – Vidya Khotkar and then approached the concerned police station.

16. In her cross-examination, it has come on record that she would run a mess to earn her living. Her parents were no more. She has no brother as well. She denied to have extra marital relationship with any person. It has further come on record during her cross-examination that the victim had complained stomach pain while she was in fifth standard. She was referred to one Dr. Mhaslekar. The doctor treated her but did not give any inkling of cause of stomach pain. She went on to state that she used to be away from

home for two to three days in a week in connection with Women Help Group (*Mahila Bachat Gut*).

17. Then we have evidence of P.W.10, sister of the victim. It is in her evidence that her father used to be away in Gujarat as he was a truck driver by profession. Four-five months before recording her statement, the appellant (father) returned home after a gap of seven-eight days. Her mother was not home. The victim, herself and brother were there. The appellant sent her and the brother out for playing. He latched the entrance door from inside. There was curtain as well. She removed the curtain and saw from ajar that the victim was sleeping on the bed. The appellant removed his cloths. He then slept on the person of the victim. According to her, she did not disclose the incident to anyone as she was frightened. It is further in her evidence that twenty-five days after the said incident another incident took place. It was about 08:00 p.m. The mother was home. She saw the appellant to have put his hand on the breast of the victim. It is further in her evidence that the appellant would beat her and the victim.

18. In her cross-examination it has come on record that there used to be quarrel in home before filing of the complaint. The defence of the appellant that she gave evidence at the instance of her mother has been denied. According to her, the entrance door is only of one plank.

19. A passing reference to the evidence of other witnesses is being made since same is of little consequence for deciding the present appeal, except evidence of medical officer, who medically screened the victim to ascertain whether there was evidence of rape. P.W.3 – Rahul Borde is a witness to the seizure of clothes of the appellant. The cloths allegedly on the person of the appellant at the relevant time came to be seized. P.W.4 – Milind is another panch witness. He did not stand by prosecution. P.W.5 – Bhavna is a witness to the voice recording panchanama (Exh.16) She is also witness to the seizure of cell phone (Exh.15) delivered by the victim. P.W.6 and 7 are the medical officers, who had radiologically examined the victim to ascertain her age. P.W.9 – Ganesh was the headmaster of the school whereof the victim was one of the students. He tendered in evidence entry of the school admission register (Exh. 41). P.W.11 – Anita, Police Sub-Inspector did the investigation of crime.

20. **Appreciation** :-

Admittedly, the F.I.R. has been lodged twenty days after the last alleged incident of rape. The victim and her mother were first approached to one Vidya Khotkar, a social activist cum press reporter. She has not been examined. The F.I.R. has been preceded by deliberation and discussion among the family members and the press reporter. We can understand that it being a case of alleged rape committed by father on his minor daughter,

one would give a second thought before approaching the police. Needless to mention, the prosecution is expected to drive home the charge beyond reasonable doubt.

21. The victim admittedly gave P.W.8 – Dr. Yogita the following history before she was medically screened to ascertain whether she was subjected to sexual intercourse/rape :-

“16 yrs. old Miss. Rajashri Jagdish Pawar, resident of Pundalik Nagar, Grakheda, Aurangabad brought by LPC R.S. Shingane under Section 376, 323, 506 for medical examination, history given by survivor herself, as per history, she knows accused Jagdish Shriram Pawar, age – 40 yrs., her father, truck driver by occupation, was sexually abusing her since last 5 yrs., intermittently every 15-20 days, under influence of alcohol, sometimes survivor attained her menarche, after 2 yrs. of first incident. He was threatening her verbally and sometimes he used to physically abuse her. During any of the incidences, survivor was not drugged or given any medication before or after contact. During her last contact survivor recorded his threats in her mobile and shown to her mother 15 days back. But accused verbally threatened both of them. But her mother lodged police complaint at Pundalik Nagar Police Station, Aurangabad.”

22. The medical examination report (Exh.36) records :-

“There are no signs of use of force / forceful penetration of vagina, sexual assault cannot be ruled out. Samples sent for chemical analysis, report awaited.”

23. If we compare the aforesaid history given by the victim with her testimony before the Court, we find there are glaring inconsistencies inter se. As per the F.I.R. and the victim's evidence before the Court, she was subjected to sexual intercourse by the appellant two or three times while she was in fifth standard. The appellant did not repeat such incident for next three years. He again behaved with her the same way when she was in eighth standard. After two to three such incidents in that year, again for about two years there was no such incident. The last incident took place when the victim was in tenth standard. The same took place about fifteen/twenty days before registration of the F.I.R. When the victim was allegedly deflowered, she was around ten years of age. It just surprises us as to how she could keep mum post such incident. She must have suffered bleeding and pain at her private part during and soon after such incident. Her silence goes a long way to doubt veracity of her case. She did not speak anything about the appellant to have been addicted to alcohol. Admittedly, the mother used to be away from home two/three days in a week. The appellant was a professional truck driver. He too used to be away from home for couple of weeks every month. If we rely on the evidence of the victim's mother that the victim was examined by Dr. Mhaslekar while she had complained stomach pain, it surprises us as to how the doctor did not disclose them reason of stomach pain. The victim appears to be a smart girl. She was

in the age group of sixteen-eighteen years. It is evident from the evidence of her mother, who gave her date of birth. The radiologist (P.W.6) opined her to have been above sixteen years of age, but below eighteen. It is a matter of common knowledge that it is a daughter, who always share her personal problems with her mother. The reason offered by the victim to have not related her ordeal to her mother as she did not dare to disclose in the presence of her two younger siblings, does not appeal to us. We found her to be a smart girl because she recorded her version in the form of voice recording in a cell phone and hands it over to her mother to listen to it. When the mother enquired about the same with the appellant, it is the victim, who gave the mother option that either she will live in the house or her father (appellant). Victim's such statement indicates that she was prepared to leave her mother and siblings if the appellant was allowed to stay alongwith others. The victim could not give cell phone number and was even unable to state to whom the cell phone belongs. Admittedly, the family is financially not sound. The mother would run a mess to earn her living. Be that as it may. The fact that the victim recorded her ordeal in a cell phone and gave it to her mother for listening would, in our view, be of little consequence. It might be an attempt to have her own testimony corroborated by her previous statement. Admittedly, the victim and her mother had approached a social activist cum press reporter about eight days before registration of the F.I.R.

24. Here is the mother, who without verifying veracity of the allegations of the victim asked her own husband (appellant) to leave the home. Admittedly, the appellant obliged. He left the home. His relationship and bonding brought him back. Admittedly, he would make repeated phone calls to his wife. He had then told them that he may commit suicide. What triggered to lodge the F.I.R. is the fact of the appellant to have returned home. It was an incident that took place by 11:30 p.m. two-three days next before registration of the F.I.R. It is the prosecution case that the appellant was roaming in the vicinity. The same suggests he wanted to enter his home. Admittedly, the mother was not home. It was 12:00 midnight. It is not known when the mother returned home and where she was. The appellant after roaming in the vicinity, went away. It is his case that his wife had illicit relationship with one person. He even gave name of said person in his examination under Section 313 of the Code of Criminal Procedure. The appellant has been in jail since the day of his arrest. It for eight years he is behind the bars. There appears to be nobody on his side. There, therefore, might have been limitations on his part to lead positive evidence in his defence. The evidence of sister of the victim appears to be got up. She was younger to the victim by just two years. It is not the case of prosecution that the appellant has ever tried to molest her (his second daughter). It is just difficult to believe testimony of the sister of victim. The entrance door of the home was of one plank. She claimed to have witnessed the incident when

the door was partly open. She did not disclose the same to anyone. The victim, her sister and their mother are the birds of a feather. Within months of registration of the F.I.R., the victim got married. It is a case of child marriage. The medical examination report (Exh.36) of the victim and the C.A. report (Exh.37) do not support the prosecution case. We are conscious of the legal position that in a case of rape, conviction can be based on sole testimony of the victim. In the case in hand, the victim's sole testimony and the evidence of her mother and younger sister do not inspire confidence. The trial Court has handed out the conviction and sentence for all the offences with which the appellant was charged. The appellant allegedly used to beat up the victim with belt. Handing over of the belt to the investigating officer has also been relied on by the trial Court, when there is nothing to indicate to connect the same with the crime in question. First such incident of rape said to have been taken place while the mother had left the house to bring her younger daughter from school. Same suggests every possibility of the mother returning any time. The case of the victim that the appellant first completely undressed her and then he removed all the clothes on his person, therefore, do not appeal to us. In our view, the prosecution evidence at the most may lead to infer that the case of the victim might be true and not, "must be true". In our view, when serious is the offence and severe is the punishment, strict shall be the proof.

25. Considering the nature of quality of evidence, the trial Court ought not to have convicted the appellant for any of the offence he was charged with. We are not in agreement with the findings recorded by the trial Court. The appeal, therefore, succeeds. Hence, the following order :-

- I) Criminal appeal is allowed.
- II) Order dated 22nd November, 2018 passed by Additional Sessions Court, Aurangabad thereby convicting the appellant for the offences punishable under Sections 376(2) (f)(j)(n), 323 and 506 of the Indian Penal Code and under Sections 4, 10 and 12 of the Prevention of Children from Sexual Offences Act and sentencing therefor is hereby set aside.
- (III) The appellant stands acquitted.
- (IV) The appellant shall be set at liberty forthwith, if not required in any other case.
- (V) Fine amount paid, if any, be repaid to him.

(NEERAJ P. DHOTE, J.)

(R.G. AVACHAT, J.)

SSD