



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 106 OF 2020

Dasharath S/o Gangaram Koli,
Age : 38 years, Occu: Truck Driver,
R/o Indira Nagar, Lasur,
Taluka Chopda, District Jalgaon.

... Appellant
[Orig. Accused]

Versus

1. The State of Maharashtra

2. XYZ

... Respondents

.....

Mr. Ravindra M. Deshmukh, Advocate for the Appellant.

Mr. S. M. Ganachari, APP for the Respondent-State.

Mr. A. R. Hange, Advocate for Respondent No.2 [appointed].

.....

CORAM : ABHAY S. WAGHWASE, J.

Reserved on : 04.01.2024

Pronounced on : 10.01.2024

JUDGMENT :

1. By this appeal under Section 374 of the Code of Criminal Procedure [Cr.P.C.] appellant is taking exception to his conviction under Sections 376(2)(j), 376(2)(l), 354-B and 452 of the Indian Penal Code [IPC] vide the judgment and order dated 20.01.2020 passed by learned Additional Sessions Judge, (District Judge-2), Amalner in Sessions Case No. 11 of 2016.

2. In brief, prosecution was launched against present appellant on accusation that, on 26.01.2016 appellant entered the house of informant PW1 and finding her mentally retarded daughter alone in the house, sexually ravished her. Hearing her cries, neighbours came and informed PW1 on phone when she had been for labour work. PW1 mother rushed home and made inquiries with her daughter, who informed that appellant initially entered the house, caught hold of her by both hands, made her fall on the cot, disrobed her and committed rape on her. Consequently, on return of her husband, PW1 appraised him and then approached Chopda police station and set law into motion vide report Exhibit 19.

3. After registration of crime, investigation was entrusted to PW10 PSI Ahire who, after collection of sufficient evidence, chargesheeted the accused and case being exclusively triable by court of Sessions, was committed in Sessions Court and on its assignment to the Additional Sessions Judge (District Judge-2), Amalner, trial was conducted which culminated into conviction. Hence the appeal.

SUBMISSIONS

4. Learned counsel for the appellant would submit that there is false implication. Secondly, there is no corroboration to the testimony of victim who is reported to be mentally retarded. According to him, there is no conclusive proof, either medical or scientific, that appellant is the perpetrator of the crime. He pointed out that very neighbour, who allegedly informed mother, has not supported. Learned counsel lastly submitted that appellant has already undergone more than four years of imprisonment and therefore, he prays that the sentence undergone be held as sufficient sentence and he be let off.

5. Per contra, learned APP would point out that appellant has committed rape on a mentally retarded girl. That, her mother has promptly lodged report. Victim is also examined. Medical witness who examined victim and confirmed rape is also examined by prosecution in the trial court. Evidence of rape is confirmed and corroborated by doctor. Learned trial Judge has rightly appreciated the evidence on record and has committed no error whatsoever in holding accused guilty. According to him, there is no case made out on merits and so he prays to dismiss the appeal.

6. Learned counsel appointed for the victim also opposed on the ground that offence is serious. There is clinching, overwhelming evidence and as necessary ingredients for attracting charges are available in the evidence, he submitted that, learned trial court has committed no error in returning the guilt and hence he too prays to dismiss the appeal for want of merits.

7. This being first appellate court, is now called upon to re-examine, re-analyze and re-evaluate the entire prosecution evidence to ascertain whether the findings reached at by learned trial Judge are legally sustainable.

8. On undertaking the exercise of re-evaluation, it seems that prosecution has based its case on testimony of 11 witnesses and their status can be reproduced as under:

PW1 Mother is victim.

PW2 Nandabai is the neighbour who has not supported prosecution.

PW3 Victim.

PW4 Father of victim.

PW5 Dr. Sachin Ahire and **PW8** Dr. Prajakta Bhirud medically examined victim on 26.01.2016 and issued report Exhibit 26.

PW6 Rita Bhangale, Protection Officer in Child Development Project Office, Chopda recorded statement of victim on 01.02.2016 [Exhibit 28].

PW7 Brother of victim.

PW9 Dr. Subhash Badgujar, a Psychiatrist, who conducted I.Q. test of victim and issued certificate Exhibit 53.

PW10 PSI Yuvraj Ahire is the Investigating Officer.

PW11 Ramakant is the pancha to spot panchanama Exhibit 68.

9. It is pertinent to note that during appeal or rather even during trial, there is nothing adverse as against prosecution case to the extent of victim to be mentally retarded.

PW9 Dr. Badgujar, who is examined by prosecution at Exhibit 52, deposed that he is a Psychiatrist. On 22.08.2013, victim was referred to him by her relatives and on examination, he claims to have found her to be suffering from mental retardation and so he issued

certificate to that extent. He claims to have undertaken Intelligence Quotient [IQ] test. He has computed 55% mental disability. Defence could not dislodge his findings while he was in the witness box. On the contrary, in cross he answered that patient has suffered permanent disability. Certificate issued by him is at Exhibit 53. Consequently, victim PW3 is shown to be a mentally retarded person.

10. On taking survey of the entire evidence, in the considered opinion of this court, evidence of the victim and the medical witness who physically examined victim is crucial and assumes significance.

PW1 mother was out of the house and she returned home on being called and she had learnt about the incident from the very victim.

Likewise, **PW4** father and **PW7** brother of victim also had reached later on and so they have hearsay information.

Neighbour **PW2** Nandabai has not supported. Be it so.

PW6 Rita Bhangale seems to be a Government Official working as Protection Officer and she was summoned at Chopda Police Station and in her presence, statement of victim was recorded and the same is finding place at Exhibit 28. She claims that during inquiry, victim told about the occurrence to her by naming appellant for entering the house, removing her clothes and committing sexual assault.

11. According to prosecution, victim was mentally retarded girl and she has been sexually exploited but her evidence is inspiring confidence and so, worthy of credence. Whereas, defence questions her testimony because of her such mental condition.

Before adverting to the merits of the evidence of prosecution, and thereafter of the medical expert who issued opinion, it would be fruitful to refer to the landmark judgment of the Hon'ble Apex Court in the case of *Patan Jamal Vali v. State of A.P.* ; (2021) 16 SCC 225 wherein the Hon'ble Apex Court observed and held that testimony of disabled prosecutrix/witness should not be discarded treating it as weak or inferior evidence merely because disabled person interacts in a manner different from able-bodied person. In this judgment, the Hon'ble Apex Court has exclusively dealt with the aspect of intersectionality, vulnerability of the victims who are more

particularly disabled or differently abled on some or other count and are being oppressed and exploited.

Referring to the decision in the case of ***Mange v. State of Haryana*** ; (1979) 4 SCC 349 delivered by the same Court, it has been noted that even non-examination of prosecutrix was not a major infirmity in the prosecution case. Presumptions of disability of the nature like deafness, dumbness, which construe disability as an incapacity to participate in the legal process reflects not only an inadequate understanding of how disability operates but may also result in miscarriage of justice through devaluation of crucial testimonies given by a person with disability.

Further, recently in the case of ***Chaman Lal v. State of Himachal Pradesh*** ; (2020) 17 SCC 69, the Hon'ble Apex Court held that though victim was proved to be mentally retarded and her IQ was computed to 62, it was held that she was not in a position to understand the good and bad aspects of sexual assault. That, IQ of a person can be known on the basis of questions, activities and her history. In terms of medical science, IQ of 62 falls in the category of mild mental retardation.

12. It is worth taking note here that victim has stepped into the witness box. Only on due satisfaction, she is allowed to depose. At this juncture, it would be apt to deal with Section 118 of Evidence Act which provides that all persons are competent to testify unless they are, **in the opinion of Court**, (a) unable to understand the questions put to them or (b) unable to give rational answers to the questions owing to (i) tender years (ii) extreme old age (iii) decrease of mind or body or (iv) any other such cause. Even a lunatic, if capable of understanding the questions put and give rational answers, is a competent witness.

13. Here, as stated above, victim not only deposed about the act of accused with her, but has also faced cross-examination. Therefore, in the light of above discussion, her so called mental retardation itself would not come in the way of prosecution or itself would not be sufficient to discard her entire testimony. Even law is fairly settled that signs, gestures, if deducible, can be taken aid of for arriving to a conclusion. Therefore, merely victim to be differently abled itself would not be sufficient to preclude her otherwise reliable evidence.

14. Keeping above legal requirements and settled position in mind, on critical analysis of the evidence of the victim, which is at Exhibit 22, it is emerging that learned trial Judge put up questions to her and then he marked about satisfaction that oath can be administered to her and thereafter her evidence seems to have been recorded during which she has stated that at the time of incident, her mother had been to the field and she was alone. She was sitting in a varanda of her house. Accused appellant came to her house. She narrated that he resides in the village near a new shop and she claims that he asked her to come inside. When she refused to come, he pressed her mouth, lifted her and took her inside the house to the cot, touched and pressed her breasts and after removing her clothes, he removed his own cloths and then penetrated his private part in her private part. Learned trial court has taken note that witness made gestures with her hand and showed towards her private part. She further stated that her private part was having pains and there was bleeding from it. Accused left her house. She further deposed that Nandatai PW2 put up clothes on her body. Sindhu Kaku also came there. She stated that she can identify the accused if shown to her. Photograph of the accused pasted on the arrest panchanama was confronted to her and she pointed that he is the same accused. Then she spoke about being

taken to hospital at Jalgaon by mother and subjected to examination by doctor and further about her statement recorded in the court at Chopda which she identified to be at Exhibit 23. She also identified her clothes and other articles.

15. In her cross, she stated that she gave statement to police in Ahirani language and police recorded in said language. Then she stated that her mother gave information to the police in Marathi language. Following omissions are brought in her cross:

Mother had been to the field; that, she was alone in the house and sitting on the ota; that, before police she used the word “Dasrya”; that she refused; that accused lifted her; removed her clothes and penetrated his private part in her private part; she suffering pain and there was bleeding; and about Nandabai putting clothes on her person.

On being informed about such material to be missing, learned trial Judge has recorded that she kept silence and did not answer. In further cross she answered that she took bath after her mother's arrival and that when she gave statement in the court at Chopda, police had taught her. Rest is all denial. In para 8 of the cross, she

stated that house of Rama is in front of her house and from the said house, one can see as to what is happening in others' houses. Then she again denied that no such incident ever happened with her and that she deposed falsely.

16. If we visit the evidence of PW8 Dr. Prajakta Bhirud, a medical officer posted at Civil Hospital, Jalgaon, it is seen that this medical expert had occasion to examine victim on 26.01.2026 i.e. on the same day. She deposed that CMO Sahin Ahire [PW5] called her for gynecological examination. On conducting examination, she found her hymen to be ruptured. She noticed congestion and oedema in the perineal area. Position of tear of hymen was 7 and 5 O' clock. She gave report to that extent to Dr. Ahire [PW5], collected samples and issued medical report Exhibit 26. She further categorically stated that position of hymen tear being 7 and 5 O' clock, was caused after forceful sexual intercourse. Doctor denied that symptoms noticed by her cannot be seen if the victim takes bath, changes clothes and passes urine two to three times. However she admitted that she did not notice external injuries on the person of the victim and that during forcible intercourse, there is possibility of external injuries. She admitted that she did not make inquiry with the victim.

17. On analyzing the evidence of PW1 mother, PW3 victim and PW8 Dr. Bhirud, it is emerging that firstly, mother while going to render labour work, had met appellant on the road near a temple and told him that she wanted to dispatch a teapoy to the house of her daughter at Shirpur. Mother further deposed that she told accused that she was going to the field and further requested him not to go to her house as her daughter (victim) was alone in the house and thereafter she proceeded towards the field for work.

Evidence of mother clearly shows that she had informed appellant that her daughter (victim) was alone in the house. Probably getting knowledge to that extent i.e. about loneliness of victim, appellant entered the house and victim has narrated in her testimony the acts and deeds indulged into by him. She has categorically stated about she being lifted and taken inside the room when she was sitting on the varanda and then, after disrobing her, he having forceful sexual intercourse, she suffering pains as well as act resulting into bleeding. The act was committed on a cot and therefore, there are no chances of her suffering external injuries regarding which faint attempt has been made before this Court in support of submission of

no possibility of forceful sexual act. Rather, Medical expert PW8 Dr. Bhirud has also confirmed forceful sexual act. Therefore, there is evidence of very victim about she being forcibly sexually assaulted. She has named the appellant. She has also stated about he residing near the new shop and she has identified him in the court.

18. Much hue and cry is made before this court by submitting that firstly, victim being mentally retarded, it is unsafe to rely on her sole testimony as there is no corroboration. Such submissions deserve to be discarded for the simple reason that it is fairly settled position and there are series of judgments that sole testimony of prosecutrix, if it inspires confidence, is itself sufficient to record conviction. Here, though it is submitted that victim is mentally retarded, as discussed above, her retardation is not of such extent that she is unable to communicate completely or to understand whatever happened with her. It is pertinent to note that, as discussed above, testimony of victim PW3 has been recorded by learned trial Judge on getting satisfied about her competence to depose. Her percentage of retardation is not 100% but is rather 55% which as per medical science falls in the mild category and hence it can safely be inferred that she is not completely precluded from understanding or deposing.

19. It is also pertinent to note that she was medically examined on the same day and examining doctor confirmed sexual assault. Mere non-availability of positive forensic evidence is of no avail to the appellant accused. Apparently, no defence also is taken about false implication or to wreck any vengeance on any count. Therefore, even possibility of false implication is ruled out.

20. Therefore, even this court is convinced on re-analysis and re-appreciation that prosecution has proved that victim, a partly mentally retarded girl, has been sexually assaulted and forced upon by appellant. With such quality of evidence, the only conclusion that can be drawn is that offence is brought home. Prosecution has established the occurrence and charges beyond reasonable doubt.

21. We have gone through the judgment under challenge. No perversity is brought to my notice so as to interfere. Submission made before this court, that appellant has already undergone more than four years of imprisonment and therefore he be set at liberty by reducing his sentence to the term of imprisonment already undergone, cannot be entertained more particularly in the light of

severity and gravity of the offence. In spite of knowing victim to be mentally retarded and on getting knowledge of her loneliness, she was ravished. Therefore, such prayer for reduction of sentence and letting off appellant by sentencing him to a term of imprisonment already undergone, cannot be considered. Hence, I proceed to pass the following order:

ORDER

- I. The appeal is hereby dismissed.
- II. Since learned Advocate Mr. A. R. Hange is appointed to prosecute the cause of respondent no.2, his fees be paid as per the schedule of fees maintained by the High Court Legal Services sub-committee, Aurangabad.

[ABHAY S. WAGHWASE, J.]