

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

CRIMINAL APPEAL NO.309 OF 2022

Shyam Jivan Medhkar

.....Appellant

Versus

The State of Maharashtra

.....Respondent

....

WITH

INTERIM APPLICATION NO.1484 OF 2025

IN

CRIMINAL APPEAL NO.309 OF 2022

Mr. Pramod G. Kathane, Advocate for the Appellant.

Ms. Kranti T. Hiwrale, APP for the Respondent-State.

**CORAM : SARANG V. KOTWAL &
SHYAM C. CHANDAK, JJ.**

DATE : 20th JUNE, 2025

ORAL JUDGMENT : [PER SARANG V. KOTWAL, J.]

1. The Appellant has preferred this Appeal challenging the judgment and order dated 7.7.2017 passed by the Additional Sessions Judge, Kalyan in Sessions Case No.193/2013. The Appellant was convicted for commission of the offence punishable under Section 376 read with Sections 511, 354, 504, 506 of IPC. This order was in the first clause of the operative part. In the second clause, it was recorded that the Appellant was convicted for the offence punishable under Section 376 read with 511 of IPC and

he was sentenced to suffer life imprisonment and to pay a fine of Rs.5,000/- and in default to suffer S.I. for six months. The Appellant was also convicted for commission of the offence punishable under Section 354 of IPC and was sentenced to suffer S.I. for three years and to pay a fine of Rs.5,000/- and in default to suffer S.I. for three months. The Appellant was further convicted for commission of the offence punishable under Section 504 of IPC and was sentenced to suffer SI for one year and to pay a fine of Rs.1,000/- and in default to suffer S.I. for one month. He was also convicted for the offence punishable under Section 506 of IPC and was sentenced to suffer S.I. for one year and to pay a fine of Rs.1,000/- and in default to suffer S.I. for one month. All the sentences were directed to run concurrently. Set off under section 428 of Cr.P.C. was granted to him.

2. Heard Mr. Pramod Kathane, learned counsel for the Appellant and Ms. Kranti Hiwrale, learned APP for the Respondent-State.

3. Though the Appellant was specifically convicted under Section 376 read with Section 511 of IPC., the charges were framed under different headings. The first heading was under Section 376

read with Section 511 of IPC; and the last heading was under Section 376 of IPC only. Thus two separate charges, (i) attempt to commit rape and (ii) the specific charge of actual commission of rape, were framed. The operative part of the judgment and order mentions Section 376 read with Section 511 of IPC. However, in the previous discussion; and in particular in paragraph No.30, the learned Judge had clearly observed that the accused had committed rape. Therefore, it is obvious that the judgment is not clearly worded; but if the entire judgment is read; it is more than clear that the learned Judge has convicted the Appellant for commission of the offence of rape i.e. the offence punishable under Section 376 of IPC.

4. The incident is dated 27.9.2012. The victim in this case is the Appellant's own daughter. She was six years of age at that time. The prosecution case is that when she came home, the Appellant, who was addicted to liquor, sent his son outside the house. He then removed his clothes. He removed clothes of his daughter and committed rape on her. In the meantime, the Appellant's wife came home. She saw the incident. The Appellant ran away. The Appellant's wife had not lodged the FIR immediately

but lodged it after two days. The investigation was carried out. The Appellant was arrested. The victim was subjected to medical examination. The investigation was carried out and the charge-sheet was filed. As mentioned earlier, the charges were framed under different headings. During the trial, the prosecution examined seven witnesses, including the victim, her mother, her aunt, the Medical Officer, a pancha and the investigating officer. The defence of the Appellant was of total denial. According to him, because of quarrels with his wife, this false case was filed. The learned trial Judge considered the evidence and then convicted and sentenced the Appellant as mentioned earlier.

5. The prosecution case relies on the evidence of the victim herself. She was examined as PW-2. At the time of recording of her evidence, after more than four years of the incident, she was more than ten years of age and, therefore, she was in a position to understand the questions put to her. She deposed that she was residing with her two brothers, a sister and her parents. Her elder sister used to do labour work. One of her brothers and she herself used to attend the school. The other brother used to play in the locality. She further deposed that the

Appellant did not do any job and was addicted to liquor. The incident took place when she was in the 1st standard. At the time of deposition, she was in the 5th standard. It was the days of Ganpati festival. On the date of incident, she came home. The Appellant asked her brother to go outside the house. She has further deposed that her father took off her clothes and then took off his own clothes and slept on her person. At that time, her mother (PW-1) came there. The Appellant wore his clothes and ran away. PW-2 was crying. She told her mother what had happened. According to her, she was having pain in her stomach and, therefore, she was taken to a hospital near her house. They then went to another hospital. When they came back, the Police came to their house and enquired with PW-2 and PW-1. PW-2 narrated the incident to them. She identified the Appellant before the Court. She did not remember the exact date of the incident and which dress she was wearing at that time.

In the cross-examination, she deposed that her paternal aunt was residing nearby. Her maternal uncle and his wife had come to their house. She deposed that in those days the Appellant was addicted to liquor and there used to be continuous quarrels

between the Appellant and PW-2's mother. She admitted that the Appellant used to scold PW-2 and her brothers and sister. She denied the suggestion that she was deposing falsely about the incident. She denied that she had pain in the stomach because of the food which she had eaten outside.

6. PW-1 is the mother of the victim and the wife of the Appellant. She has deposed that there used to be constant disputes with the Appellant as he used to be under influence of liquor. Her brothers and relatives were residing in the same locality. The incident took place on 27.9.2012. On that day, she had gone to attend her labour work at a site for construction of a road. PW-2 and her brother had gone to school. At about 6.30 p.m., PW-1 had returned home. She opened the door of the house. She saw that the Appellant was sleeping on the person of the victim (PW-2). They did not have clothes on their persons. The Appellant saw her and ran away. PW-2 was crying. She told her that when they returned home, the Appellant asked her brother to go out and then removed their clothes and slept on her. PW-2 started crying but the Appellant threatened her. At that time, PW-1 had returned home. In the night, the Appellant returned back. He threatened PW-1 not

to disclose this incident to anybody. She approached her relatives and then went to Mharal Outpost. The police advised her to report to the Kalyan Taluka police station. On 28.9.2012, she went to Titwala police station, but, they did not take her complaint. Then she took her daughter PW-2 to the hospital on 29.9.2012 as she was having pain in the stomach. The doctor enquired about the incident. The victim was admitted to the hospital. Then PW-1 lodged her complaint at Mharal Outpost. She produced the FIR at Exhibit-13. The investigation was carried out. She showed the spot to the police. She produced the clothes of the victim and the short pant of her husband i.e. the Appellant.

In the cross-examination, she accepted that it was not mentioned in the report that PW-2 was admitted in the hospital. She admitted that from the date of the complaint, the relatives used to accompany her. At that time, even the Appellant's sisters used to accompany them. During that period, the Appellant was present in their locality but not in their house. She denied the suggestion that on 26.9.2012, there was a quarrel with the Appellant. She could not explain as to why she did not mention in her FIR that on 29.9.2012, PW-2 was having stomach pain and,

therefore, they had gone to Mharal Outpost. She denied the suggestion that because of the enmity with the Appellant, she had used her daughter and lodged the false complaint.

7. PW-3 Dr. Meenal Pingale had examined the victim on 29.9.2012. She has deposed that there were contusions present at labia minora. There was tear at 12 O’Clock position on the hymen. It was her opinion that there was an attempt to make sexual intercourse with the victim. She produced the medical certificate at Exhibit-18. According to her, the injuries mentioned in the certificate could have taken place prior to 48 hours from 29.9.2012.

In the cross-examination, she deposed that the injuries mentioned in the Medical Certificate were not possible by cycling, horse riding, jumping or even playing. There was no laceration or abrasion on the victim. The medical certificate is produced at Exhibit-18. The age of the girl was mentioned as six years.

8. PW-4 Vilas Shevale was the Headmaster of the Zilla Parishad School. He produced the birth-certificate showing the date of birth of the victim as ‘20.9.2006’. Considering the tender age of the victim, her age is not really disputed; and in any case it

is also established that she is below twelve years of age.

9. PW-5 Parshuram Chavan was a pancha for spot panchnama, which was conducted on 30.9.2012. It is produced on record at Exhibit-23. Nothing much can be seen from that spot panchnama. It is the description of the house of the Appellant.

10. PW-6 Anusuya Dhamane was PW-1's sister-in-law. She does not know the incident by her own knowledge, but, she deposed that in the evening of the date of incident, PW-1 came to her house and narrated the incident to her and that she expressed her desire to lodge the complaint against the Appellant. Beyond that, her evidence is not very material.

11. PW-7 API Moreshwar Pendam was the investigating officer. He investigated the crime No.179/2012 registered at Kalyan Police Station. He deposed about the investigation carried out by him. He had arrested the Appellant. He had carried out the spot panchnama. According to him, the investigation revealed that there was an attempt to commit rape. He collected the bonafide certificate. He recorded the statements of the victim and her brothers and sisters.

In the cross-examination, he accepted that the FIR was

delayed because there was discussion between the first informant and her relatives; and that she had not explained the delay of two and half days in lodging the FIR. He accepted that the witnesses were relatives of the first informant.

12. Learned counsel for the Appellant submitted that the conviction and sentence is recorded under Section 376 read with 511 of IPC. Therefore, even as per the prosecution case it was a case of attempt to commit rape and not the actual commission of the rape. He submitted that there is evidence to show that there were disputes between the Appellant and his wife and, therefore, using the daughter, the wife has filed this false case against the Appellant.

13. Learned counsel submitted that there were no injuries on the *labia minora* mentioned in the medical certificate. The Medical Officer had mentioned that injury in her evidence. He submitted that the hymen can be ruptured because of many reasons - that may not point to the only possibility of commission of rape. He submitted that the incident could not have taken place. The door was not locked from inside. PW-1 could easily enter the house. The entire evidence does not inspire confidence. The

medical certificate mentions that blood was found on her clothes. That blood was of 'O-Group' and the victim's blood group was also 'O-Group' as can be seen from the C.A. report. But the blood group on the Appellant's clothes was inconclusive.

14. Learned APP, on the other hand, submitted that there was no other injury on the person of the victim and, therefore, the blood found on her clothes was directly related to the offence committed by the Appellant. She further submitted that there is no reason to disbelieve the version given by PW-2 considering her tender age. She has described the incident. In such cases, it is not expected that the FIR is lodged promptly. Therefore, the delay of about two days in lodging the FIR does not give any benefit to the Appellant. She submitted that the medical evidence clearly supports the case of prosecution and, therefore, though the learned Judge has wrongly recorded the conviction under Section 376 read with 511 of IPC, the correct conviction would be under Section 376 of IPC which can be seen from the entire discussion of the judgment. Therefore, no prejudice is caused to the Appellant.

15. We have considered these submissions. As rightly submitted by the learned APP, the victim was of tender age of six

years. Therefore, she has described the incident in the best possible manner in which she could describe it. Her version of the incident is supported by the evidence of PW-1, who had entered the house right at that time. The victim had told that after removing their clothes, the Appellant had slept on her. There was pain in her stomach subsequently and the medical evidence shows that there were injuries to her private parts. There was fresh tear causing bleeding, which supports the victim's case. Thus, in this case the ocular evidence is supported by the medical evidence. It is further supported by the C.A. reports which shows that the blood of the victim was 'O Group'. Therefore, it is clear that there was fresh blood on her clothes which was a result of the incident. All these factors together show that the incident has taken place.

16. The victim has clearly named the present Appellant. Rest of the evidence may not be of much importance because PW-6 did not have any personal knowledge. The age of the victim is proved through the bonafide certificate produced by the Headmaster of the school. There is no reason to dispute that particular evidence and hardly any cross-examination is conducted and, therefore, it is not possible to discard that evidence. Rest of

the evidence is given by the investigating officer which is procedural in nature. He has conducted the investigation, has carried out the spot panchnama, had arrested the Appellant and he had taken all the necessary steps for completing the investigation. Thus, from the evidence on record it is quite clear that the Appellant has committed this offence.

17. The question is whether some leniency can be shown to the Appellant in this particular case. In that context, learned counsel for the Appellant submitted that the incident had taken place on 27.9.2012. Since then the Appellant is continuously in custody. The Appellant had suffered a heart-attack in the year 2019.

18. Learned counsel for the Appellant submitted and learned APP also accepted that in the year 2012 i.e. on the date of offence, the minimum sentence provided for the offence of rape on a child below twelve years of age, was 10 years. In this situation considering that the Appellant is continuously in custody for thirteen years and since he has already suffered a heart-attack, we are inclined to show some leniency to him. The Appellant is in custody for almost thirteen years now. Therefore, interest of justice

would be served if the sentence is reduced to the period which is already undergone by the Appellant.

19. Though the operative part of the impugned judgment and order shows that the conviction was under Section 376 read with Section 511 of IPC, as mentioned earlier, the entire discussion and specific observation of the learned Judge mentions that it was the offence of commission of rape. Therefore, we treat the offence as under Section 376 of IPC. No prejudice would be caused to the Appellant because the charges are also framed separately under Section 376 of IPC.

20. Hence, the following order :

:: O R D E R ::

- i. The Appeal is partly allowed. The judgment and order dated 7.7.2017 passed by the Additional Sessions Judge, Kalyan in Sessions Case No.193/2013, is modified as under.
- ii. The conviction of the Appellant under Section 376 of IPC is upheld. However, instead of the sentence of life imprisonment, the sentence is modified and the Appellant is sentenced to suffer the imprisonment for the period which he has already undergone from 29.9.2012. The conviction and

sentence under other Sections are maintained.

- iii. All the sentences are directed to run concurrently.
- iv. The Appellant is entitled for set-off for the period undergone as an under-trial prisoner under Section 428 of Cr.P.C.
- v. The Appeal is disposed of accordingly. With the disposal of the Appeal, nothing survives in the Interim Application, which is also disposed of.

(SHYAM C. CHANDAK, J.)

(SARANG V. KOTWAL, J.)

Deshmane (PS)

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