

Urmila Ingale

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

CRIMINAL APPEAL NO. 803 OF 2016

Sudam Ramnath Shelke,
Age: 27 years,
R/at : Nandur Shingote,
Tal : Sinnar, Dist : Nashik
present at Nashik Central Jail .. Appellant

Vs.

The State of Maharashtra
(At the instance Vavi Police Station,
Dist. Nashik) .. Respondent

Mr.Aniket Vagal, for Appellant.
Dr.F.R.Shaikh, APP for State.

**CORAM : S. S. SHINDE,
M. S. KARNIK, JJ**

**RESERVED ON : 19th AUGUST, 2020
PRONOUNCED ON : 19th OCTOBER, 2020**

JUDGMENT (PER M.S.KARNIK, J.) :

The appellant by this Appeal challenges the judgment and order dated 18/01/2016 passed by Additional Sessions Judge, Nashik convicting the appellant (original accused) for the offence punishable under section 376(2)(f) of the Indian Penal Cod ('IPC' for short) and sentencing him to suffer rigorous imprisonment for life and to pay fine of Rs.30,000/-, in default of payment of fine,

to suffer rigorous imprisonment for two years.

The prosecution case in brief is as under :

2. The FIR - Exhibit 17 was registered by Lata (P.W.1), grandmother of the victim. The victim was about 3 years and 8 months of age on the date of the incident. P.W.1 - complainant lodged report on 13/09/2014. P.W.1 was residing along with her husband, son, daughter-in-law and the victim - grand daughter. The incident took place on 12/09/2014 and it occurred around 3.00 p.m.. The victim went in the hotel (dhaba) while playing. P.W1 is the owner of the hotel which is just in front of her residence. The victim girl came home with a mobile phone. The accused told P.W.1 that the phone belongs to him and he had given the phone to the victim to play. Then P.W.1 carried on with her work. 10-15 minutes thereafter, P.W.1's husband came from the agricultural field and enquired whereabouts of victim. P.W.1 informed him that she is playing in front of the house. The victim, however, was not found, therefore they searched for her. P.W1 went towards the agricultural field. She heard noise of weeping from the agricultural field. The same was of her granddaughter - the victim. At that time, P.W.1 saw the accused running from the field towards the road.

3. The victim had suffered injuries on her waist and blood was oozing from her private part. There were no underclothes on her person. P.W.1 made enquiry with the victim, but she was too terrified to disclose anything. The victim was taken to the hospital of Doctor Chandurkar in village Nandur, Shingote. The victim was examined by Dr.Anita Satish Kanitkar (P.W.5). P.W.5 suspected that the said injuries might be due to sexual assault on victim. P.W.5 prescribed medicines. The prescription is at Exhibit 39. P.W.5 suggested that the victim should be taken to the civil hospital.

4. P.W.1 informed about the incident to the parents of the victim on their returning home from the agricultural field at 7.00 p.m.. On the next day morning, at around 7.00 a.m., the victim disclosed to P.W.1 and victim's mother that the mobilewala baba (accused) took her in agricultural field. He removed his pant & hers and slept on her person. P.W.1 realised that that the victim was subjected to sexual intercourse. P.W.1 approached Vavi Police Station and lodged FIR which is at Exhibit 17.

5. The investigation was carried out by Mr.Hemant Subhash Patil - Investing Officer (for short 'IO') - P.W.11. The IO

visited the spot with two panchas and recorded the spot panchanama at Exhibit 27. The spot panchanama was recorded by Mr.Ramdas Savliram Sanap - P.W.8 attached to the Vavi police station as police constable. Nandkumar Laxminarayan Ladhha (P.W.2) is a panch witness of the spot panchanama. P.W.2 deposed that spot of incident is situated behind the dhaba. There was bajra crop standing in the filed. It was 4 to 5 feet high. The IO collected the blood stained soil and simple soil and leaves of the bajra crop having blood stains. The motorcycle used by the accused for coming to the spot of the incident was seized in the presence of panchas.

6. The victim was referred for medical examination on 13/09/2014 vide letter which is at Exhibit 61. Dr. Mahesh Arun Khairnar - P.W.6 examined the victim. P.W.6 deposed that there was no external injury. On examination of genital parts labia majora was found edematous. Labia minora was bruised. There was bleeding from vulva. Hymen was torn at 6.00 O'clock position. There was vaginal bleeding. During examination, P.W.6 collected blood sample, vaginal swab, vulval swab for the purpose of analysis. P.W.6 - Doctor opined on the basis of the examination that findings are consistent with recent sexual assault. The certificate at Exhibit 41 was issued by him. P.W.6

deposed that the injury was recent within 24 hours. The collected samples were handed over in a sealed condition to the police constable.

7. The IO issued a letter - Exhibit 63 to T.I.L.R Sinnar for drawing a map of the spot of the incident. The accused was arrested on 17/09/2014 vide arrest panchanama - Exhibit 64. Mr.Kiran Sopan Patil - P.W.3 is the panch witness of seizure of clothes of the victim. The panchanama of the seizure of the clothes is at Exhibit 30. The clothes of the accused were seized by preparing the panchanama at Exhibit 33. P.W. 4 - Santosh Dashrath Bhopi is a panch witness of this panchanama. The accused was sent for medical examination vide letter at Exhibit 65. Upon deposit of the clothes of the accused, muddemal receipt obtained is at Exhibit 66.

8. Mr.Vijay Lokhande - P.W.9 was given two sealed packets and report to be handed over to the forensic science laboratory, Panchavati, Nashik. The said sealed packets were handed over on same date on 19/09/2014.

9. After completing the investigation, the IO submitted

the charge-sheet. The Session Judge framed the charge at Exhibit 2 on 13/11/2014. The accused pleaded not guilty and claimed to be tried vide his plea at Exhibit O/3. The prosecution examined as many as 11 witnesses. By the impugned judgment and order, the appellant was convicted and sentenced as mentioned hereinbefore.

10. P.W.1 - complainant deposed that the incident took place on 12/09/2014. Her granddaughter - victim was playing in front of the hotel owned by her. The hotel is just in front of residential house of P.W.1. P.W.1 noticed the victim had a mobile phone. The accused came there and said that he had given it to the victim to play. P.W.1 went back to attend her work. 10-15 minutes thereafter, P.W.1's husband asked the whereabouts of victim. The victim was not seen around. They went in search of the victim. The victim was found weeping in the agricultural field. P.W.1 saw the accused running towards the road from agricultural field. The victim sustained injuries on her waist and blood was oozing from her private part. There was no knicker on her person. P.W.1 made enquiry with the victim, but she was unable to disclose anything. The victim girl was 3 years and 8 months old at the time of incident. Thereafter she was taken to the hospital where she was examined by the Doctor- P.W.5. Next

day at 7.00 a.m., the victim disclosed to P.W.1 and victim's mother that the mobilewala baba (accused) took her to the agricultural field. He removed her pant and slept on her person. He removed his pant as well. P.W.1 realised that the victim was subjected to sexual assault. She then filed FIR.

11. P.W.1 was cross examined by the defence. The defence tried to suggest that the activities in the field would not be visible from her house and therefore P.W.1 could not have noticed the incident or the accused running away from the field. P.W.1 denied that the bajra crop was 6 feet high. The defence also tried to suggest that bajra crop was thick and the incident could not possibly have taken place in the agricultural field. The defence tried to establish the innocence of the accused on the basis of initial history given by husband of P.W.1 to the doctor - P.W.5 as nothing was recorded alleging any role of the accused. The defence case is that the victim went to answer nature's call in the agricultural field which resulted in the injuries.

12. The evidence of P.W.1 shows that when she was searching for the victim in the agricultural field, she saw the accused running towards the road from where the bajra crop was

standing. The victim was found in the agricultural field weeping. It is material to note that the agricultural field of the complainant is right behind the dhaba and in the agricultural field itself the house is also constructed. No doubt, the complainant has admitted that if there is crop in the agricultural field, then the activities in the field are not visible from the house. However the evidence of P.W.1 needs to be considered from the standpoint that P.W.1- complainant was in the agricultural field when she saw the accused running away from the agricultural field. The complainant was running away towards the road as deposed by P.W.1. It is not her testimony that she saw accused running away from her house. Nothing has been elicited in the cross examination of P.W.1 which casts a doubt on the veracity or truthfulness of her version. In our opinion, nothing would turn on the contradiction brought on record as regards the presence of the complainant in the hospital where the victim was examined. From the evidence of P.W.5 - Doctor, it is seen that it is the grandfather of the victim who brought her to the hospital. P.W.5 has deposed that she examined the victim girl. The victim sustained genital injuries which P.W.5 - Doctor treated. The injuries sustained by the victim is consistent with the prosecution case.

13. We shall now consider whether the evidence of P.W.1 stands corroborated with the other evidence on record to prove beyond reasonable doubt the complicity of the accused in the crime.

14. P.W.2 - Nandkumar Laxminarayan Ladhha acted as a panch of the spot panchanama. P.W.8 - Ramdas Savliram Sanap - police constable was present at the time of spot panchanama. The spot of the incident was shown by P.W.1 - complainant. The police collected the blood stained soil and blood stained roots of the bajra crop and the same came to be sealed by wrapping it. The police also seized the motorcycle of the accused by drawing panchanama at Exhibit 27.

15. It is argued that non examination of victim is fatal to the prosecution. Admittedly, the age of the victim girl is hardly 3 years and 8 months. Considering her tender age, it cannot be expected of her to understand the questions asked by the prosecution. There can be no infirmity in the prosecution case only because of non-examination of the victim. In such circumstances, the evidence of P.W.1 - complainant who is the grandmother of the victim and the other evidences on record

obviously needs to be considered to find out whether the guilt of the accused can be brought home. It is significant to note that the presence of the accused is not denied by the defence.

16. The evidence of complainant regarding the spot of the incident is corroborated by the evidence of P.W.2 - Nandkumar Laddha and P.W.8 - Ramdas Sanap - police constable. They collected the blood stained soil and dried leaf of bajra crop and said articles were seized and sealed by affixing the labels. The articles reached in seal condition for chemical analysis. There is no evidence of tampering. The said labels are at Exhibit 28.

17. So far as the medical evidence is concerned, Dr.Ujwala Subhash Tejale was examined at Exhibit 76 as Court witness No.2. She deposed that on examination of genital parts of victim, she found that Labia Majora was edematous, Labia Minora was bruised, vulva was having minimum bleeding. Hymen was torn at 6 O'Clock position. Vagina was bleeding. Dr.Ujwala opined that victim girl was subjected to sexual assault and the findings are consistent with recent sexual intercourse. In the cross examination she admitted that there was history of

mild abrasion on inner side of thigh and mild abrasions on genitals recorded by the Casualty Medical Officer. No doubt, she admitted that there is possibility of injuries on back and buttock if the alleged incident has taken place on hard and rough surface like agricultural field having bajra crop. She further admitted that such injuries are possible if a girl went to answer nature's call and while sitting, such type of injuries can be caused by the small pieces of branch of roots. She admits that hymen can be torn completely in case of a sexual assault by a grown up man. These admissions form the basis of case of the defence that the victim sustained these injuries when she went to answer the nature's call. However, these admissions do not in any manner affect the genesis of the prosecution version having regard to the quality of the clinching evidence on record which proves beyond reasonable doubt that the accused is the author of the crime.

18. Immediately therefore, it would be material to consider the evidence relied upon by the prosecution regarding the seizure of clothes of the victim girl and the accused. P.W.3 and P.W.4 are the panch witnesses of the seizure panchanama of the clothes. The said clothes are seized and sealed in their presence and label with their signatures are affixed. The said labels are at Exhibit 31 and Exhibit 34. Learned Counsel for the

accused would invite our attention to the evidence of P.W.4 where he admits that there were no blood stains on the clothes. The incident in question occurred on 12/04/2014 whereas the accused was arrested on 17/04/2014 i.e. after 5 days. In our opinion, considering the time gap, blood stains may not be visible.

19. P.W.9 - Vijay Ramesh Lokhande received the sealed samples to be handed over to CA. He handed over the samples to the CA Nashik along with letterhead Exhibit 55. The letterhead at Exhibit 55 clearly mentions that the muddemal mentioned in column No. 13 is handed over to police constable - Vijay Lokhande in a sealed condition. If we consider CA reports at Exhibits 7, 8, 9 & 10, the same would show that the sealed parcels are received by CA Nashik. It is the prosecution case that initially articles were sent to CA Nashik for chemical analysis and thereafter CA Nashik forwarded it to CA Kalina, Mumbai for DNA examination. Considering all these materials, it is not possible for us to accept the contention of the defence that samples were not in a sealed condition. The question of tampering is completely ruled out.

20. Learned Counsel for the accused made an attempt to contend that no reliance should be placed on DNA analysis as CA Kalina had received stain cuttings and not the entire clothes and therefore there is possibility of tampering. DNA report however shows that stain cuttings of frock, stain cuttings of full pant, stain cuttings of underwear, stain cuttings of full pant were received. The numbers mentioned in DNA profile were also matching. The Court witness - Dr.Shrikant Hemant Lade has produced on record the letter received from CA Nashik wherein it is specifically mentioned that stain cuttings were forwarded for DNA analysis. DNA report shows that blood stains found on the underwear of the accused are of the victim girl. The complainant's version is thus corroborated by the medical and other evidence. Nothing is on record to indicate that there is enmity between P.W.1 and the accused, hence possibility of a false implication is ruled out. There is even no suggestion in the cross examination of P.W.1 to this effect. The evidence of P.W.1 appears to be reliable and trustworthy corroborated by the other evidence on record.

21. Let us now consider the evidence relating to the medical examination of the victim by witnesses i.e. P.W.5- Dr. Anita Satish Kanitkar, P.W.6- Dr. Mahesh Arun Khairkar and Court

witness No.2 - Dr.Tejale. It is seen that the victim was initially examined by P.W.5 and thereafter by Dr.Tejale in civil hospital, Nashik. The injuries as mentioned earlier were found on her person. It is opined that all these injuries are fresh injuries and that on the basis of the said injuries, it can be opined that these injuries are possible due to sexual intercourse.

22. We find no merit in the contentions of the accused that as the accused has not sustained any injuries on his private part, his complicity is ruled out. The victim is only 3 years and 8 months old. The trial Court has observed that "medical jurisprudence shows that in young children, there are few or no signs of general violence, for the child usually has no idea of what is happening and also incapable of resisting. The hymen is deeply situated and as the vagina is very small, it is impossible for the penetration of the adult organ to take place. Usually the penis is placed either within the vulva or between the thighs. As such the hymen is usually intact and thereby may be little redness and tenderness of the vulva. To attract the provisions of section 376 of IPC, complete penetration is not required, slight penetration is also sufficient." We are in agreement with the view of the trial Court that no benefit can be given to the

accused merely because he has not sustained any injury on his private part.

23. The DNA report specifically shows that blood group of DNA extracted from the blood stains found on the underwear of the accused are of blood group of victim girl. The trial Court has correctly observed that no explanation is put forth by the accused about the blood of the victim girl found on his under garments. The accused has also not denied his presence on the spot of the incident.

24. The contention of the learned Counsel for the appellant that delay in lodging FIR would enure to the benefit of accused lacks merit in the light of the law laid down by the Apex Court in the case of ¹**State of Punjab Vs. Gurmit Singh**. The Apex Court observed that in sexual offences, delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged. Even if there is some delay in

1 AIR 1996 Supreme Court 1393

lodging FIR in respect of offence of rape, if it is properly explained and the explanation is natural in the facts and circumstances of the case, such delay would not matter and is not fatal.

25. In the present facts the evidence shows that on the date of the incident the victim was not in a position to narrate anything about the incident which is but natural considering her tender age. She had to be taken to the hospital for treatment. It is next day morning on 13/09/2004, she disclosed about the incident. At 8.00 a.m. the report is lodged. The victim was hardly 3 years and 8 months old on the date of the incident. In such circumstances, it cannot be said that there is any delay in lodging FIR. It can hardly be expected of her to reveal the manner in which the incident happened and that too with promptitude.

26. We are satisfied that the prosecution has established beyond reasonable doubt that the accused is guilty of offence alleged. Having gone through the order of the trial Court, we are in respectful agreement with the well considered order passed by the trial Court. It is pertinent to refer to paragraph 56 of the trial

Court's order which reads thus :

"56. After appreciating the entire evidence and proved circumstances on record by the prosecution, I have no hesitation to hold that it is the accused who took the victim girl of 3 years and 8 months of age along with him and subjected her for sexual assault. The prosecution has proved through direct evidence of complainant grandmother of the victim girl. The evidence of grandmother of the victim is corroborated by various circumstances.

1. Accused is seen running away from the spot of incident.
2. Bloods stains are found at the spot of incident.
3. Motor cycle of the accused was found near the spot of incident and it is seized from the spot of incident.
4. Medical evidence of P.W.5 Dr. Kanitkar, P.W.6 - Dr.Khairkar and Court witness Medical Officer Dr.Tejale. The evidence of Dr.Tejale is not only in the nature of opinion but she has actually seen the injuries sustained in the private part of the victim girl and regarding the witnessing the injuries on the private part is the evidence which is direct in nature.
5. DNA report shows blood stains found on the underwear of the accused are having DNA extracts of blood of victim girl.
6. The seal of the DNA samples was intact from the seizure till its examination."

27. It would also be material to reproduce paragraphs 65 & 66 of the trial Courts order which read thus :

“65. Heard both the sides. I have recapitalized the entire episode. It appears from the evidence on record that victim girl, who is from the village of the accused, aged about 3 years and 8 months, was sexually assaulted by the accused on 12/09/2014. When victim girl was playing, accused has handed over his mobile phone to her to play and taken her with him. She was taken in the agricultural field of Bajra crop and subjected for sexual assault. The evidence on record shows that the grandmother of the victim girl has lodged report against the accused on 13/09/2014. Victim girl was found in the agricultural field by grandmother in an injured condition. There was no knicker on her person and blood was oozing from her private part. She was immediately taken to private clinic. P.W.5 Dr.Kanitkar examined her and observed injuries in her private part. On the next day, small girl disclosed to her mother and grandmother that Mobilewala Baba has taken her and removed her clothes. Thereafter report was lodged. She was referred for medical examination and Medical officer has observed that she was subjected for sexual assault. Not only the medical evidence, but DNA report shows blood stains of the blood group of victim girl are found on the underwear of the accused. The evidence of Court Witness Chemical Analyzer Shri Lade specifically shows that the blood stains of the blood group of victim girl was found on the underwear of the accused. Thus, the entire evidence which is in the nature of direct evidence is corroborated by medical evidence. Though accused has submitted that he is implicated falsely, but there is nothing on record to show that there was enmity between family of accused and family of victim girl. During cross examination, no reason came forward to show that there was reason for the grandmother of the victim girl or her family members to implicate the accused falsely.

66. The evidence on record shows that accused has committed a crime, which is heinous in nature. Accused has betrayed the trust of a small girl who was playing with the accused. The sexual assault on the children is one of the heinous crime. In the present case, victim girl is only three years and 8 months of age. It is an ugly breach of our commitment to protect the innocent. The act of the accused shows that he has committed barbaric act and shown total disregard towards humanity.”

28. So far as question of punishment is concerned, we are of the same view as the trial Court that having regard to the fact that the accused is 27 years of age, a resident of the same village who betrayed the trust of the victim & became a violator deserves no leniency. We therefore do not find any infirmity in the order passed by the trial Court, consequently, Appeal is dismissed.

29. This judgment will be digitally signed by the Private Secretary of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

(M.S.KARNIK, J.)

(S.S.SHINDE, J.)