

(2019) 07 BOM CK 0229

Bombay High Court (Aurangabad Bench)

Case No: Criminal Appeal No. 496 Of 2016, Criminal Suo Moto Revision Application No. 1 Of 2017

Dnyaneshwar
Manjabapu Bange And
Ors

APPELLANT

Vs

State Of Maharashtra
Through Police Station
Officer

RESPONDENT

Date of Decision: July 25, 2019

Acts Referred:

- Indian Penal Code, 1860 - Section 376, 376(2), 376(2)(i), 376(2)(n), 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376AB, 376B, 376C, 376D, 376Da, 376DB, 376E, 509
- Protection Of Children From Sexual Offences Act, 2012 - Section 4, 9(i), 42, 42A
- Code Of Criminal Procedure, 1973 - Section 164
- General Clauses Act, 1897 - Section 26

Citation: (2019) 07 BOM CK 0229

Hon'ble Judges: Sadhana S. Jadhav, J

Bench: Single Bench

Advocate: N.V. Gaware, S.J. Salgare, N.V. Gaware

Final Decision: Dismissed/Partly Allowed

Judgement

Sadhana S. Jadhav, J

1. Heard learned Counsel for the appellant and learned A.P.P. for respondent - State.
2. The appellant herein is convicted for the offence punishable under Section 376 of Indian Penal Code and sentenced to suffer rigorous imprisonment

for seven years and to pay fine of Rs. 5,000/- in default of payment of fine to undergo simple imprisonment for six months. He is also convicted for

the offence punishable under Section 4 of Protection of Children from Sexual Offences Act, 2012 and sentenced to suffer rigorous imprisonment for

seven years and to pay fine of Rs. 5,000/- in default of payment of fine to undergo simple imprisonment for six months.

3. Such of the facts, as are necessary for the decision of this appeal are as follows:

4. The appellant herein was acquainted with the step mother of the victim, as he happens to be her distant relative. He used to visit the house of the

victim quite often. That, one day, the appellant had attempted to outrage the modesty of the victim in her house, however, since there was visitor, he

released her from his clutches. Then, on one day, when she was on her way to school, appellant-accused forcibly made victim to sit in his jeep. He

parked the jeep near Vitthal temple. The accused then pulled her and pressed her mouth. He had denuded her of her clothes and had committed

forcible sexual assault upon her. He had then reached her to her house. She had then attended the school since her examinations were in progress. It

appears that few days thereafter, the accused had again visited the same place in the closed jeep and sexually assaulted her in the jeep, as he had

done earlier and then dropped her home. She has specifically stated so in her statement under Section 164 Cr.P.C. The victim had visited her maternal

aunt's house i.e. sister of her biological mother for vacation and at that time, she had disclosed to her the atrocities meted out to her at the hands of the

present appellant. Her maternal aunt was shocked and had decided to approach the police. Hence, she had lodged a report at M.I.D.C. police station

which is at Exh.16. Victim was examined by P.W.3 Dr. Shrikant Pathak, who upon examination had found perforation of hymen. After investigation,

the charge-sheet was filed, case was committed to the Court of Sessions and registered at Sessions Case No. 211 of 2014.

5. The prosecution has examined as many as eight witnesses to bring home the guilt of the accused. P.W.1 Rani Bargaje is the complainant, who

happens to be the maternal aunt of the victim girl. P.W.2 Miss X is the victim. P.W.3 Dr. Shrikant had examined the victim at District Hospital,

Ahmednagar. P.W.4 Nandkishor and P.W.5 Laxman who happened to be the panchas to the spot panchnama and seizure panchnama. They were

declared hostile. P.W.6 Diksha had recorded statement of the complainant. P.W. 7 Suhas is the Investigating Officer and P.W.8 Bansi Lande is the

Head Master of Navbharat Vidyalaya, Dehare, Dist. Ahmednagar, who has proved the date of birth of the victim by producing extract of admission

register of the victim.

6. In the present case, the statement of the victim was recorded under Section 164 of Cr.P.C. before the Judicial Magistrate, First Class, Ahmednagar

on 17.5.2014. The said statement is proved by P.W.7 Suhas, who happens to be the Investigating Officer.

7. The case rests upon the evidence of P.W.1 Rani, P.W.2 the victim Miss X and P.W.3 Dr. Shrikant. P.W.1 Rani is the maternal aunt who has

deposed before the Court that her niece had come to stay at her house on 20.4.2014 during her summer vacation. She was dropped by her father. For

about seven to eight days, the victim was upset. She used to maintain silence and, therefore, the maternal aunt was constrained to ask her the reason

and upon enquiry, it had transpired that her niece Miss X was sexually assaulted by the present appellant.

8. In cross-examination of P.W.1 Rani, most of the suggestions are given in respect of the caste of the step mother. It is the specific defence of the

accused that only because the father of the victim had not remarried a girl from the same community, the appellant, who happens to be the relative of

the step mother has been falsely implicated. It is pertinent to note that in the cross-examination, P.W.1 Rani has deposed that upon detailed enquiry,

the victim had told her that she had not disclosed the incident to her step mother because this entire event was managed by the step mother of the

victim and the accused happens to be her brother and he used to visit their house regularly. P.W.1 Rani has further admitted in cross-examination that

she had taken help of childline to approach the police and then lodged the report. The defence has tried to bring on record by way of examination that

although the disclosure was made in April, P.W.1 Rani had approached the police station and lodged the report on 7.5.2014. In any case, delay in

lodging the first information report in a rape case would not be fatal to the prosecution, as the image of the victim is involved and the family members

have to be careful that she is not exposed to social obloquy. Delay in reporting a rape case is not merely a mathematical calculation that is the time

gap between the alleged incident to the police station. The victim was just a child and could not have reposed faith in her step-mother as the accused

happened to be her brother. The Honourable Apex Court in the case of State of H.P. v. Shree Kant Shekari, reported in (2004) 8 SCC 153 has held:

“The unusual circumstances satisfactorily explained the delay in lodging of the first information report. In any event, delay per se is not a mitigating

circumstance for the accused when accusations of rape are involved. Delay in lodging the first information report cannot be used as a ritualistic

formula for discarding the prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any explanation

has been offered for the delay. Once it is offered, the court is to only see whether it is satisfactory or not.”

9. In this background, it has to be necessarily seen that the victim has disclosed the incident at the first point of time which she could avail and,

therefore, delay would not be fatal to the prosecution.

10. P.W.1 Rani has specifically stated before the Court that in the case after the demise of the mother of the victim, there was an attempt to suppress

the case and finally the father of Miss X succeeded and no charge-sheet was filed in the Court him. In fact, it is not relevant to this case. It appears

that the step mother belongs to different caste Vanjari and not Marwadi.

11. P.W.2 Miss X happens to be the victim. It is a sorry state of affairs that the prosecution has not recorded her examination-in-chief in consonance

with her statement under Section 164 of Cr.P.C. and even 161 of Cr.P.C. thereby giving an opportunity to the defence lawyer to confront the victim

with minor inconsistencies. The statement under Section 164 of Cr.P.C. has not been exhibited for the reasons best known to the prosecution. In fact,

the victim has stated in her statement about the second occasion also wherein she was once again sexually assaulted in the same manner in the Xylo

jeep. The same does not find place in her examination-in-chief for the reasons best known to the prosecution. She has deposed before the Court the

manner in which she was sexually assaulted by the accused in the jeep which was parked near Lord Vitthal temple which happens to be on her way

to school. The minor inconsistent part of the incident as to whether the windows of the jeep were closed prior to placing her into the jeep or after she

had boarded the jeep. However, she has stood the test of cross-examination and has categorically stated that the glasses of the vehicle were already

closed as she had deposed before the Magistrate and that her second statement is correct. The learned Counsel for the defence has placed implicit

reliance upon a stray admission in the cross-examination, which reads as follows:

“When he made me to sit in the vehicle, I did not feel that anything wrong is happening.”

12. The Court could not be oblivious of the fact that the victim was hardly 13½ years old at the time of incident.

13. P.W.3 Dr. Shrikant Pathak has proved the medical certificate at Exh.20. Upon perusal of Exh.20, the injuries found on the body are as follows:

Gynecological reference: hymen centrally perforated (not ruptured) and further, pass finger through it. No fresh rupture indicating act of intercourse.

No recent act of intercourse.

14. The Court cannot be oblivious of the fact that the incident was reported to the police after more than 2½ months and that she was clinically

examined thereafter on 7.5.2014.

15. The learned Counsel for the appellant has vehemently submitted that there was no evidence of recent intercourse. However, since she was

examined after 2½ months, the opinion was quite natural. P.W.7 Suhas Hattekar who had investigated Crime No. 93/2014 had admitted in the cross-

examination that the victim could not show the exact scene of offence. However, he has further admitted that he had not taken the victim on the route

from her house to school. Naturally she could not have shown the scene of offence. Her specific allegation was that she was forcibly picked up by the

accused when she was on her way to school. The crux of the argument of learned Counsel is on false implication and the fact that she had attended

the school after the incident which, according to the learned Counsel was not a natural conduct. In fact, she has specifically stated that she was

having examinations on that day and naturally she could not have skipped her examination. Moreover, her precarious condition has to be understood

that there was no person in the house in whom she could repose faith since she was being taken care by a step-mother, and that the accused happens

to be the brother of her step-mother. It is further only when she visited her aunt's house i.e. the house of P.W.1, she could gather courage to disclose

as to what she has undergone at the hands of the appellant. Her date of birth is 3.11.2001 and the incident has occurred in the year 2014. P.W.8 Bansi

Lande who happens to be the Head Master of Navbharat Vidyalaya has proved her certificate. He had brought to the Court the original admission

register which showed that the date of birth of Miss X is 3.11.2001. The copy of the extract of the school register is Exh.43. He has specifically stated

that Miss X has taken admission in the said school in 5th Standard wherein she was transferred from Zilla Parishad Primary School Dehere. At the

time of admission, she had produced the school leaving certificate of Zilla Parishad Primary School, Dehere. It is, in these circumstances that it can be

safely inferred that the prosecution has proved the case against the accused beyond reasonable doubt.

16. A judicial note needs to be taken in the present case wherein the learned Prosecutor had not taken sufficient effort to put forth before the Court

the case as demonstrated by the victim in her statement under Section 164 of Cr.P.C.

17. It is laid down that the special Act (Protection of Children from Sexual Offences Act, 2012) would clearly establish the intention of the legislature

to protect the child from any kind of sexual assault and harassment. It has also laid stress upon the mental and physical disability of the child that the

legislature was alive to the condition of mental disability. In the case of *Eera through Dr. Manjula Krippendorf v. State (NCT of Delhi)*, reported in

(2017) 15 SCC 133, the Apex Court has held that:

“the very purpose of bringing a legislation of the present nature is to protect the children from the sexual assault, harassment and exploitation, and

to secure the best interest of the child. On an avid and diligent discernment of the Preamble, it is manifest that it recognises the necessity of the right

to privacy and confidentiality of a child to be protected and respected by every person by all means and through all stages of a judicial process

involving the child. Best interest and well-being are regarded as being of paramount importance at every stage to ensure the healthy physical,

emotional, intellectual and social development of the child. There is also a stipulation that sexual exploitation and sexual abuse are heinous offences

and need to be effectively addressed.”

18. In the present case, according to the victim, it is not a case of solitary incidence of rape, but a repetitive act.

19. The statement of the accused under Section 164 of Cr.P.C. would show that the accused had committed penetrative sexual assault upon her more

than once, however, that is not reflected in the examination-in-chief. That would be a lapse on the part of the prosecutor in-charge of the prosecution.

The offence would be covered under Section 9(i) of the Protection of Children from Sexual Offences Act, 2012. The statement under Section 164 of

Cr.P.C. would carry equal weightage since the same is recorded by the Magistrate on oath and in confidence when the child is free from any external

pressure. In the case of *Kashinath Mondal v. State of West Bengal*, reported in (2012) 7 SCC 699, the Apex Court has observed that:

“If there is sufficient evidence to establish the substratum of the prosecution case, then irregularities which occur due to remissness of the

investigating agency, which do not affect the substratum of the prosecution case, should not weigh with the Court.”

20. This Court has a legal obligation to examine the evidence of prosecution witnesses besides the lapses, and carefully find out whether the evidence

is reliable or not. The whole object of the Court would be to find out the truth.

21. It is due to this obligation that this Court vide order dated 2.2.2017, i.e. at the time of admission of the appeal, had registered a Suo Moto revision

application and had issued notice to the appellant - accused to explain as to why the sentence be not enhanced, in the event the appeal is dismissed.

The learned Counsel for the appellant had not addressed the suo moto revision application. The Court has observed that the offence committed by the

accused would fall under Section 376(2)(i) of the Indian Penal Code and under Section 376(2)(n) which read as follows:

Section 376(2)(i): commits rape on a woman when she is under 16 years of age; or

(n): commits rape repeatedly on the same woman, shall be punished for rigorous imprisonment for a term shall be punished with rigorous imprisonment

for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of

that person's natural life, and shall also be liable to fine.”

22. However, Section 376 of Indian Penal Codes reads, “whoever, except in the cases provided for in sub-section (2), commits rape, shall be

punished with rigorous imprisonment of either description for a term which shall not be less than ten years, but which may extend to imprisonment

for life, and shall also be liable to fine.”

23. Sub-section (2) (i) omitted.

24. Sub-section (2) Whoever, -

(a) being a police officer, commits rape -

(i) within the limits of the police station to which such police officer is appointed; or

(ii) in the premises of any station house; or

(iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

(b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public

servant; or

(c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or

(d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in

force or of a woman's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or

(e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g) commits rape during communal or sectarian violence; or

(h) commits rape on a woman knowing her to be pregnant; or

(i) commits rape on a woman when she is under sixteen years of age; or

(j) commits rape, on a woman incapable of giving consent; or

(k) being in a position of control or dominance over a woman, commits rape on such woman; or

(l) commits rape on a woman suffering from mental or physical disability; or

(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

(n) commits rape repeatedly on the same woman, shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but

which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to

fine.Ã¢â¬â€

25. In the present case, since the appellant was not a custodian of the child and no charge was framed under Section 376(2), it would not be necessary

to consider the suo moto revision for enhancement. The charge was specifically framed under Section 376 of the Indian Penal Code and under

Section 4 of the Protection of Children from Sexual Offences Act, 2012, where the punishment prescribed is not less than seven years, but would

extend to life.

26. Section 26 of the General Clauses Act contemplates as follows:

Ã¢â¬â€“Provision as to offences punishable under two or more enactments - Where an act or omission constitutes an offence under two or more

enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be

punished twice for the same offence.Ã¢â¬â€

27. Section 42 and 42-A of the Protection of Children from Sexual Offences Act contemplate as follows:

42: Alternate punishment: Where an act or omission constitutes an offence punishable under this Act and also under Sections 166-A, 354-A, 354-B,

354-C, 354-D, 370, 370-A, 375, 376, 376A, 376AB, 376B, 376C, 76D, 376Da, 376DB, 376E or section 509 of the Indian Penal Code, then,

notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be punishment under this Act

or under the Indian Penal Code as provides for punishment which is greater in degree.

Section 42-A: Act not in derogation of any other law: The provisions of this Act shall be addition to and not in derogation of the provisions of any other

law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such

law to the extent of the inconsistency.

28. In view of this, the conviction and the sentence awarded for offence punishable under Section 4 of the Protection of Children from Sexual

Offences Act which is a special statute for protection of a child would meet the ends of justice.

29. In view of above discussion, the Criminal Appeal is dismissed. The suo moto revision application is partly allowed. As far as the contemplation of

sentence is concerned, although the sentence can be enhanced, this Court is inclined to enhance the fine amount, which shall be Rs. 50,000/-, in

default sentence for one year of rigorous imprisonment. Hence, the fine is enhanced to Rs. 50,000/-, in default of payment of fine amount, the accused

to suffer rigorous imprisonment for one year.