**(2010) 03 BOM CK 0036**

**Bombay High Court (Nagpur Bench)**

**Case No:** Criminal Appeal No. 450 of 2009

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| Vishnudas Bhagade | | APPELLANT |
| | Vs | |
| The State of Maharashtra | | RESPONDENT |

**Date of Decision:** March 12, 2010

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 164A, 294, 313
- Penal Code, 1860 (IPC) - Section 201, 342, 376

**Citation:** (2010) 03 BOM CK 0036

**Hon'ble Judges:** A.P. Bhangale, J

**Bench:** Single Bench

**Advocate:** D.B. Walthare, for the Appellant; K.S. Dhote, APP, for the Respondent

**Final Decision:** Dismissed

**Judgement**

A.P. Bhangale, J.
The instant Appeal stems from the judgment and order dated 19th August, 2009 passed in Sessions Case No. 121/2008 by learned Sessions Judge, Chandrapur, whereby the appellant was convicted as under:

All sentences were directed to run concurrently.

2. Facts briefly mentioned are : Victim school girl "S" (PW 2) who was born on 21.03.1993, was studying with Prabodhini ( daughter of the appellant ). On 8.7.2008 at about 11.30 a.m., she went to Prabodhini"s house. Her father (accused ) informed "S" that Prabodhini had gone to attend the School. At that time it was raining and, therefore "S" (victim) requested the accused to provide an umbrella to her. The accused told "S" that umbrella was taken away by Prabodhini and asked "S" to sit inside the house as it was raining. "S" went inside house and sat on the sofa. The accused then offered one book to "S" and asked her to go through the same and then asked her whether she wants

water for drinking. "S" refused. The accused went ahead ; closed the front door of the house by bolting it from inside. There was nobody else in the house. The accused came near "S", gagged her mouth and made her to lie down on cot, lifted his lungi by one hand, removed her inner-wear and inserted his private part in her private part. While "S" tried to push the accused, she could not. After some time she succeeded to push the accused. "S" found sticky substance and blood oozing out from her private part. The accused asked "S" to wash her private part. Victim who was frightened to the hilt, washed it in the bathroom. The accused threatened "S" not to disclose the incident to anybody else she will be defamed. Victim who rushed outside, tried to contact by phone to her father from a nearby STD booth but her father was on duty and as such could not be contacted. Her School bag was inside the house of the accused. Hence she stood outside the house as she had no courage to enter in house . Later when mother of Prabodhini came, she asked the victim to come inside as it was drizzling and then gave clothes of Prabodhini to wear as clothes of the victim were wet due to incessant rain. Prabodhini who returned from the school, asked "S" as to why she did not attend the School. "S" told her that she was late and could not attend and thereafter narrated the incident to Prabodhini who went inside the house and brought school bag and wet clothes of "S" and also narrated the incident to her mother. Mother of Prabodhini asked "S" not to disclose the incident to anybody, and then Prabodhini and her mother accompanied "S" to her house. As the accused had threatened "S", she could not disclose the incident to her mother. Later "S" disclosed it to her friends, Neha and her mother and Vedashree. After "S" returned from the school her mother inquired with her about the incident and she narrated it to her mother. Her mother had gone to question the accused about it but he was not at home. On the next day, mother of "S" along with few ladies again went to the house of the accused. In the evening "S" along with her parents proceeded to Police Station to lodge complaint. The Police had referred "S" to the General Hospital, Chandrapur for medical examination. Thereafter, statement of "S" was recorded. The incident was reported by Smt. Smita (PW 1), mother of the victim as FIR No. 245/2008 on 12.7.2008 at Ramnagar Police Station in Chandrapur, who registered offences punishable u/s 342 and 376 of the IPC. API Shri. M.M. Dhande (PW 8) recorded complaint (FIR :Exh.32) and started investigation. He referred the victim girl for medical examination to General Hospital, Chandrapur. He arrested the accused on 12.7.2008 under arrest memo (Exh.14) and sent him to General Hospital for medical examination. Shri Dhande API recorded the statement of victim and visited the spot pointed out by the victim and prepared spot panchnama (Exh.51). During the course of investigation, he received articles i.e. vaginal swab, blood sample, pubic hair on 13.7.2008 which were seized under Panchnama (Exh.18) on 15.7.2008. He also received sample of blood, pubic hair of the accused and seized under Panchnama (Exh.21). The seized articles were sent to C.A. under forwarding letter (Exh.22) on 1.8.2008. C.,A. reports were received (Exh.25 colly). The accused was charge-sheeted before the Chief Judicial Magistrate Chandrapur on 10.10.2008 who committed the case to the Court of Sessions on 4.11.2008.

3. Charge (Exh.5) for offence punishable under Sections 376, 342, 201 IPC was read over and explained to the accused, to which he pleaded not guilty and claimed to be tried.

4. The prosecution examined a total of eight witnesses and closed evidence. The defence admitted genuineness of documents listed at Exh.9 and examined three witnesses who were Prabodhini (daughter of accused), Smt Bangubai (mother in law of the accused ); and Rana Hatesingh ( friend of the accused).

5. In his statement u/s 313 of Cr.P.C. the evidence that in 2008 the victim "S", aged 15 years was studying in 10th standard in Vidya Niketan Vidyalaya, Urjanagar, Chandrapur in the same class of Prabodhini (daughter of the accused ) is not in dispute.

6. Learned Sessions Judge, Chandrapur, upon recording evidence and hearing the parties concluded that the accused committed heinous offence punishable under Sections 376, 342 read with Section 201 IPC and recorded sentences accordingly.

7. Learned Advocate for the appellant submitted that the finding of conviction is unreasonable and not justified as according to him, the incident was not proved by reliable and independent evidence. He also submitted that the evidence of the victim girl was not trustworthy for to base conviction upon it. Learned Advocate contended that the evidence of victim suffered from vice of improvements and her evidence without independent corroborating evidence ought not to have been accepted by the learned trial Judge. He further submitted that the incident as alleged occurred on 8.7.2008, but it was reported on 12.7.2008 ; hence delay in reporting the incident was not explained. It is also contended that the provisions of Section 164A Cr.P.C. were not complied before the medical examination of victim girl as her consent was not obtained in writing. According to learned Advocate, the accused was entitled to claim benefit of doubt for contradictions in evidence, improvements over oral report, and lack of observance of laid down procedure u/s 164A of the Cr.P.C. Learned Advocate submitted that victim stated that after the incident of rape, she tried to contact her father from STD booth but owner of STD booth was not examined to corroborate the testimony of "S" in this regard and, therefore, prosecution did suppress best evidence that could have been led. Learned Advocate made reference to plethora of rulings in support of his submissions to argue that the testimony of "S" required independent corroboration and the trial Court erred in appreciating the evidence of witnesses. He, therefore, urged to set aside the conviction and to acquit the accused.

8. Learned APP, on the other hand, supported the impugned judgment and order contending that the trial Court had considered the entire evidence including defence evidence in details to conclude that the appellant was guilty of charges framed against him. The rulings relied upon by the parties were also perused and referred to in the light of penal provisions and the legal position. According to him, no case is made out to disturb the findings of guilt.

9. I have heard submissions at the Bar and also perused written submissions placed on record as also the number of rulings cited by the parties.

10. The prosecution has relied upon evidence of "S" prosecutrix (PW 2) to prove the incident of rape and to corroborate her evidence examined Smt. Smita (PW 1) who is mother of prosecutrix, Ujjawala (PW 3) who friend of Smt. Smita, Vedashree (PW 6) and Neha (PW 7) who are friends of victim to when victim had narrated the incident of rape. The prosecution also proved Kumari "S""s date of birth as 29.3.1993 by examining Municipal Clerk (PW 4) to positively establish that victim was below 16 years of age on the date of incident. Investigating Officer Shri Madhav (PW 8) was examined to establish the investigation done in the case. The accused chose to lead defence evidence and examined three witnesses who are daughter, mother -in-law and a friend of the accused. In his statement u/s 313 of the Cr.P.C, the accused did not dispute that victim was aged about 15 years studying in 10th standard in Vidyaniketan Vidyalaya in Urja Nagar, Chandrapur along with his daughter Prabodhini and the fact that he resided in Urja Nagar. The accused defended the prosecution case on the ground that he is falsely implicated because he had opposed mother of victim (PW 1) while she contested in Gram Panchayat elections. The suggestions in this regard were denied by PW 1 stating that Gram Panchayat elections were held after the complaint was filed. The accused also sought to prove that there was alleged incident of riot when victim''s mother with her friends (PW 3) etc. visited house of the accused and questioned him about incident and allegedly assaulted him for which he lodged complaint with police. The entire evidence and defence contentions which were raised in this appeal, if considered in totality, one cannot find that any benefit can be extended to the accused. It is true that there was four days delay to report the incident to the Police Station but it was not fatal in the facts and circumstances of the case. The victim girl was threatened by the accused not to disclose the incident to anybody . She had naturally disclosed it to her girl friends and mother of her girl friend. Immediately after the incident, she tried her level best to contact her father from nearby STD booth but could not. The mother of victim came to know of the incident from Ujjawala (PW 3) who is mother of victim''s girl friend and then inquired with the victim. She had also decided to question about the incident to the accused who offered his apology for the incident. In these circumstances there was no unreasonable delay to report the incident.

11. The trial Court could not be blamed for relying upon genuineness of the documentary evidence tendered by the prosecution which was admitted by the defence in view of Section 294 of the Cr.P. Code, as any such document may be read in evidence in trial without insisting upon evidence of signatory.

12. When a girl below 16 years of age is sexually ravished corroboration to her evidence about the rape is not always essential, although under certain circumstances when victim''s evidence is not safely reliable, prudence may demand necessity of corroboration to her testimony. Normally in Indian society, a girl would not venture to make such serious accusations which may defame the unmarried girl and ruin her prospects of finding

suitable groom in life. In non-permissive Indian society, an unmarried girl would be most reluctant to level such accusations that too against father of her school-mate. Every unmarried girl has chastity dear to her heart and would not normally disclose such incident which can lead to her defamation or ostracization by the society. Therefore, like an injured witness in the criminal trial, her testimony is entitled to a great weight. Credibility of the prosecutrix in the present case remained unshaken. There was sufficient corroboration to her testimony on the record. The evidence of the victim girl was corroborated by her mother, friends, and mother of her friend. Their evidence read together appears credible and trustworthy. Medical witness was not examined in this case as the defence did not dispute genuineness of medico -legal certificates tendered by the prosecution. Therefore, much in defence can not be said about the procedure stated u/s 164A Cr.P.C. as the Doctor was neither summoned nor examined by the defence, although defence chose to lead evidence in this case, one cannot accept the defence that the appellant was falsely implicated. Learned Advocate for appellant also tried to submit that the trial Court did not record statement of the accused but a Clerk of the Court recorded it. This submission appears bald and result of an afterthought and must be rejected as baseless and groundless. The defence evidence was led and there is nothing to believe that the accused would sign each page when Court did not question him in statement u/s 313 of Cr.P.C.

13. Learned Counsel for appellant placed reliance on Jogi Dan and Others Vs. State of Rajasthan, , in order to lay stress on legal aspect with respect to appreciation of evidence of the prosecutrix. He further relied on Kiran Yadav Vs. State of Bihar, which is the case of delay in lodging the FIR. He pressed into service Vimal Suresh Kamble Vs. Chaluverapinake Apal S.P. and Another, . in order to contend that in view of unreliable , uncorroborated testimony of prosecutrix and her highly unnatural conduct, no conviction can be based.

14. The rulings cited by the learned Advocate for defense are not attracted to the facts and circumstances of the present case to rescue the appellant from the clutches of law. He had taken disadvantage of situation and in wrongful confinement, committed rape upon minor girl below 16 years of age, who was the same age as of his school going unmarried daughter studying in the same class. He also tried to ensure that evidence may disappear by asking the victim to wash her private part. The trial Court did consider the entire evidence to reach a right conclusion. The gravity of the offences do not warrant any sympathy or generosity to award lesser sentence. The Appeal is without merit and deserves to be dismissed. In the result, the Appeal is dismissed.