

## Dashrath Aba More Vs State of Maharashtra

**Court:** BOMBAY HIGH COURT (AURANGABAD BENCH)

**Date of Decision:** Feb. 9, 2016

**Acts Referred:** Penal Code, 1860 (IPC) â€” Section 376(2)(f)

**Citation:** (2016) 2 AIRBomRCri 581 : (2016) ALLMRCri 2018 : (2016) 3 MhLJCrI 761

**Hon'ble Judges:** M.T. Joshi, J.

**Bench:** Single Bench

**Advocate:** N.R. Shaikh, Advocate, for the Appellant; R.V. Dasalkar, A.P.P, for the Respondent

**Final Decision:** Partly Allowed

### Judgement

M.T. Joshi, J.(Oral) - Heard both sides.

2. Aggrieved by the conviction recorded by learned Assistant Sessions Judge, Bhusawal, in Sessions Case No.216 of 2014 for the offences

punishable under Section 376 (2) (f), 448 and 506 of Indian Penal Code, present appeal is preferred by the original accused. The appellant was

sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs. 5,000/- for the offence punishable under Section 376 (2) (f) of

Indian Penal Code. He was sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs. 500/- for the offence punishable under

Section 448 of Indian penal Code. He was also sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs. 1,000/- for the

offence punishable under Section 506 of Indian Penal Code.

3. The prosecution case, in short, is as under :-

That, the present appellant's family was residing in the neighborhood of the complainant and the victim at Yawal, Dist. Jalgaon. On 4th June,

2012, PW 1 - complainant i.e. the mother of victim, along with her husband and elder son Dinesh had left the house for their regular labour

work. Her another son and the victim who was eleven years old at the time of the incident, were in the house.

At about 12:00 pm. in the noon, when the victim went to bathroom, the appellant entered in the bathroom. He undressed himself and

thereafter, committed forcible sexual intercourse with the victim. At that time, blood started oozing from her vagina of the victim. Upon

seeing the blood, the appellant ran away from the bathroom by giving threats of life to the victim. There was swelling to the vagina of the

victim. Thereafter, the victim went to cot and slept on the same.

At about 5:30 pm. when the complainant - mother of the victim came to the house, the victim told that she had stomachache. At that time,

the complainant noticed blood on the bed. Upon taking into confidence, the victim narrated about the incident to the complainant.

In the circumstances, the complainant initially took the victim to the hospital of Dr. Chandan Patil. He, however, told the complainant to

lodge a report to the police. Therefore, the report came to be lodged at Yawal Police Station.

Upon registration of the offence, PW 6 - Ramdas Patil, PSI took over the investigation. The victim was referred to the Rural Hospital,

Yawal wherefrom, she was referred to the Civil Hospital at Jalgaon. PW 3 - Dr. Sachin Ahire, Medical Officer, Civil Hospital, Jalgaon

examined the victim. Her vaginal swab was collected. Her clothes were seized. Panchanama of the spot was drawn. The appellant's clothes

were seized. Statements of relevant witnesses were recorded. The property was sent for chemical analysis and on completion of necessary

investigation, charge sheet came to be filed.

4. Before the learned Assistant Sessions Judge, in all six witnesses were examined, as narrated earlier. PW 1 is the mother of the victim. PW 2 is

the victim. PW 3 - Dr. Sachin Ahire is the Medical Officer. PW 4 - Lahu Mali and PW 5 - Prabhakar Dhangar are the panch witnesses to the

recording of panchnama of the spot of occurrence and seizure of the clothes. PW 6 - Ramdas Patil is the Investigating Officer.

5. The learned Assistant Sessions Judge found that the prosecution has proved its case beyond the reasonable doubt and therefore, the conviction

and sentence, as detailed supra, came to be recorded. Hence, the present appeal.

6. Mr. Shaikh, learned counsel for the appellant took me through the evidence on record. He submitted that there was inimity between the family of

the victim and the appellant. Besides this, there is a long standing dispute between Cobbler community and Matang community regarding the

immovable property in the locality. The appellant and the victim belonged to these two different communities. Even, a complaint was filed by the

appellant's mother against the mother of the victim in the past. The mother of the victim had, earlier, proposed to purchase the house of the

appellant's family the appellant's family, however, did not agree for the same. He submits that on the date of the alleged incident, in fact, the victim

was under menstrual cycle and taking undue advantage of the bleeding from the private part of the victim, a false complaint was filed against the

appellant.

7. Mr. Shaikh further submitted that though the victim was claimed to be a child witness, the learned Assistant Sessions Judge has not examined

any witness to find out whether, she was prudent to make any statement before the court. Even questions put to the victim and her answers were

not recorded by the learned Judge. Not only this, the victim, though entered in the witness box after two years of the alleged incident, she narrated

the incident in detailed. Glaringly, the history given to the Medical Officer, would show that though the victim told the Medical Officer that there

was forceful intercourse with her, she did not name the appellant and told that it was a known person.

He further submitted that there is no evidence regarding the age of the victim. The Medical Officer has agreed with the possibility that the injury

noted by him on the private part of the victim i.e. rupture of hymen is possible due to inserting an object in the same. According to the medical

officer, there is no injury on the body of the victim. In the circumstances, he submits that the evidence of the victim does not inspire confidence.

Mr. Shaikh further pointed out that though it was deposed by the complainant that another son was present in the house, the victim did not speak

about presence of her brother. Even said brother was not examined. In the circumstances, he submits that the appeal may be allowed.

8. On the other hand, learned A.P.P. for the respondent - State submits that the statement of the victim is corroborated by the evidence of Medical

Officer. Though it is possible that the injury of hymen can be caused due to insertion of an object, mere possibility of the same would not falsify the

prosecution case. The evidence on record also corroborates about the inimity between the two families. The bare suggestion in this regard has no

value. He further submits that the family of victim would not put to stake the honour of the family by using their girl as a pawn. In the circumstances,

he submits that only because certain flaws are there in the prosecution material, the reasonings of the learned Assistant Sessions Judge cannot be

interfered with.

9. On the basis of this material, following points arise for my determination :-

[I] Whether the prosecution has proved that on 4th June, 2012 in the noon at about 12:00 p.m., present appellant has committed rape on

the victim who was 11 years of age, in her house ?

[II] Whether the prosecution has further proved that on the given date, time and place, present appellant has committed house trespass ?

[III] Whether the prosecution has further proved that the appellant has committed criminal intimidation by giving threats to the victim with

dire consequences ?

[IV] What order ?

My findings to point (I), is in the affirmative as regards the forcible intercourse. However, the age of the victim could not be proved by the

prosecution. My findings as to points (II) and (III), are in the affirmative. The appeal is therefore, partly allowed for the reasons to follow.

## REASONS

10. The prosecution claims that the victim was eleven years old at the time of the incident. However, ossification test of the victim was not carried

by the prosecution. Though it is the prosecution case that during the relevant period, the victim was taking education, neither the school record nor

any record of register of birth of the victim, was placed. The Medical Officer has deposed that the pubic hairs of the victim were absent. Only from

this evidence, we cannot jump to the conclusion that the victim was eleven years old at the time of the incident.

11. As regards the incident statement of PW 2 - victim corroborated by PW 1 - mother and PW 3 - Dr. Sachin Ahire, Medical Officer, would

show that on the day of the incident, the victim suffered injury to her hymen. According to the Medical Officer, a small hymen tear of 7 O'clock

position and 5 O'clock position was present in the private part of the victim. Not only this, according to the Medical Officer, the victim had given

the history of forcible intercourse by a known person.

Though the name of the appellant was not disclosed while giving the history to the Medical Officer, it should be noted that the girl had suffered

forcible intercourse. In the circumstances, merely because she did not tell the name of the appellant at the time of giving the history to the Medical

Officer, it would not take us to totally disbelieve her testimony.

12. A defence was put to the relevant witnesses that there was a long standing inimity in between the two families and also between the two

communities i.e. Matang and Cobbler. It was also suggested that there was a proposal of PW 1 - mother of the victim to purchase the house of the

appellant's family. Those suggestions were denied by the relevant witnesses. It was also suggested that the mother of the appellant had filed a

criminal case against PW 1 - complainant in the Yawal Court, however, no document in this regard was filed on record. In the circumstances,

except the suggestions, there is nothing on record to probablise the defence of the appellant.

13. The evidence of the Medical officer would show that though there was no injuries on the body parts of the victim, her hymen was ruptured, as

detailed above. There was also a slit ad-measuring 5 mm. to the cervix.

14. Mr. Shaikh, learned counsel for the appellant has relied on the ratio laid down in the cases of (i) Rai Sandeep alias Deepu v. State of NCT of

Delhi, 2012 Cri. L.J. 4119; (ii) K. Venkateshwarlu v. State of A.P., AIR 2012 SC 2955; (iii) Rajkumar v. State of M.P. AIR 2014 SC (Supp)

1109; (iv) Ramu alias Ram Kumar v. State of Rajasthan, 2006 Cri. L.J. 4363; and (v) Mohammad Farooq Abdul Rauf v. State of Maharashtra,

2010 Cri. L.J. 1468.

In those cases, while general test regarding variance in the evidence of the witnesses and child witness, are repeated, the ratio of the judgments

would show that each of the case was decided on its own merit by keeping in mind the general principle regarding the appreciation of evidence of

the witnesses and appreciation of evidence of the child witness. The victim was claimed to be eleven years old at the time of the incident and when

she entered into the witness box, she was at least thirteen years old, though she deposed that she was fourteen years old. In the circumstances,

there would be a debatable question as to whether, she can be called as a child witness.

Further, we have already found that there is no iota of material to show that the appellant was falsely involved by making false allegations against

him. We have, however, already found that the prosecution has failed to prove that the victim was below 16 years of age at the time of the

incident.

In the circumstances, conviction of the present appellant for the offence punishable under Section 376 (2) (f) of Indian Penal Code will have to be

set aside. Instead, the offence is made out against him for the offence punishable under Section 376 (1) of Indian Penal. Code.

The learned Assistant Sessions Judge has sentenced the appellant to suffer rigorous imprisonment for ten years for the offence punishable under

Section 376 (2) (f) of Indian Penal Code. The same also, therefore, will have to be set aside.

15. The offence punishable under Section 376 (1) of Indian Penal Code provides for minimum sentence of seven years, which may extend to

imprisonment for life and also fine.

Considering all the circumstances and that the appellant is a poor from labour class, in my view, rigorous imprisonment for seven years for the

offence punishable under Section 376 (1) of Indian Penal Code, would meet the ends of justice.

16. Hence, the following order :-

[A] The appeal is hereby partly allowed.

[B] The conviction of the appellant for the offence punishable under Section 376 (2) (f) of Indian Penal Code is hereby set aside.

Instead, he is convicted for the offence punishable under Section 376 (1) of Indian Penal Code. He is hereby directed to suffer rigorous

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

[C] Rest of the conviction and sentence recorded by the learned Assistant Sessions Judge, needs no interference. The appeal to that extend

is dismissed.