

(2022) 09 BOM CK 0160
In the Bombay High Court
Case No : Criminal Appeal No. 122 Of 20 22

Ajikhha (khan) Bismillakha (Khan)

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 30-09-2022

Acts Referred:

Indian Penal Code, 1860 — Section 375(b), 376(2)(j)(n), 506

Citation : (2022) 09 BOM CK 0160

Hon'ble Judges : G. A. Sanap, J

Bench : Single Bench

Advocate : D. R. Rupnarayan, S. S. Jachak

Final Decision : Allowed

Judgement

G. A. Sanap, J

1. In this appeal, challenge is to the judgment and order dated 19.01.2022, passed by the learned Additional Sessions Judge, Amravati in Sessions Case No. 01/2021, whereby the learned Judge convicted the appellant for the offences punishable under Sections 376(2)(j)(n) and 506 of the Indian Penal Code. The appellant is sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs.10,000/-, in default of payment of fine, to undergo further rigorous imprisonment for six months for the offence punishable under Section 376(2)(j)(n) of the Indian Penal Code. He is sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs.5,000/- and in default of payment of fine, to undergo further rigorous imprisonment for six months for the offence punishable under Section 506 of the Indian Penal Code.

2. Brief facts of the prosecution case are as follows :

The victim (PW3) is a mentally retarded girl. Both, the appellant and the victim-girl, are resident of Amravati. Father of the victim-girl is plying auto rikshaw. Mother of the victim is working in a cloth shop at village Morgaon. At the relevant time, the victim-girl was studying in Mand Buddhi and Sharirik Apang Vidyalaya,

Harshraj Colony, Amravati. The incident occurred on 28.09.2020 at 2.00 p.m. at Vilas Nagar Galli No.5, Amravati. The appellant is doing work of 'coolie'. It is the case of the prosecution that on 28.09.2020, at about 2.00 p.m. the appellant caught hold the victim and took her in a cattle shed of Kishor Patel. The appellant pressed her breasts and inserted his finger in her private part. The victim shouted for help. On hearing shouts, Kishor Patel went there and questioned the appellant. The appellant replied that he had come to the spot to wash his hands and the victim came there to collect cow-dung. After this, the appellant left the place of the incident. The victim, in the evening, narrated the incident to her mother. It is further the case of the prosecution that prior to this incident, on 4 – 5 occasions the appellant had committed the same act with the victim on 08.08.2020, 10.08.2020, 24.09.2020 and 27.09.2020. It is the case of the prosecution that the victim girl did not disclose the earlier incidents to anybody because of threat extended by the appellant. The appellant threatened to defame her and make a complaint to her parents, which would result into her beating at the hands of her parents, if she had disclosed about the incident to anybody. It is stated that because of this threat, the victim did not disclose the earlier incidents to anybody. On 30.09.2020 at about 2.00 p.m., brother of the victim found the appellant and took him to police station. The victim was taken to the police station on 30.09.2020. The victim lodged report of the incident. On the basis of the report, crime bearing No. 856/2020 for the above offences came to be registered against the appellant.

3. PI Rekha Londhe (PW4), conducted the investigation. She arrested the appellant. During the course of investigation, the victim was sent for medical examination. The appellant was also sent for medical examination. The Investigating Officer collected the documents of mental illness of the victim. She recorded the statements of the witnesses. The samples collected during the course of investigation were sent to the Chemical Analyser. On receipt of C.A. report and on completion of investigation, charge-sheet was filed against the appellant.

4. Learned Additional Sessions Judge, on committal of the case by the learned Magistrate, framed Charge (Exh.2) against the appellant. The appellant pleaded not guilty. In order to bring home the guilt of the appellant, the prosecution examined in all six witnesses. The learned Additional Sessions Judge found evidence of the prosecution witnesses cogent and reliable and therefore, based on the said evidence, convicted and sentenced the appellant as above. The appellant being aggrieved by the said judgment and order has come before this Court in appeal.

5. I have heard Mr. D.R. Rupnarayan, learned advocate for the appellant and Mrs. S. S. Jachak, learned Additional Public Prosecutor for the respondent/State. Perused the record and proceedings.

6. Mr. Rupnarayan, learned advocate for the appellant submitted that the C.A. report and the medical examination report of the appellant does not support the

case of the prosecution. The learned advocate submitted that oral evidence of the Medical Officer Dr. Sandhya Kharate (PW4) is contrary to the opinion given in the medical examination certificate (Exh.22). The learned advocate submitted that the prosecution has not examined important witness Kishor Patel. The learned advocate submitted that in order to establish identification and complicity of the appellant in commission of the crime on the given date at the spot in question, examination of this witness Kishor Patel was necessary. No plausible explanation has been placed on record for non-examination of such an important witness. The learned advocate submitted that evidence of the victim cannot be believed. Learned advocate submitted that the victim did not tell the name of the appellant either to her brother or to her mother on the date of the incident. The learned advocate submitted that there is no material on record to establish as to how identity of the appellant being involved in commission of the crime, was established. Learned Advocate submitted that the report was lodged after two days of the incident. There is no explanation in respect of the delay in lodging report. Learned advocate took me through the evidence of the mother of the victim (PW3) and submitted that in her evidence, no reason has been stated for delayed lodging of the report on 30.09.2020. The learned advocate submitted that evidence of the victim (PW2) and her mother (PW3) is the interested version on record and therefore, on the basis of interested witnesses, the accused cannot be convicted. In short, the learned advocate submitted that the learned Additional Sessions Judge has not taken all these facts into consideration and as such has come to wrong conclusion.

7. Smt. Jachak, learned Additional Public Prosecutor submitted that there was no reason for the victim (PW3) to falsely implicate the appellant. Learned APP submitted that the appellant had indulged in the same act with the victim on 4 – 5 occasions prior to the date of the incident in question. Learned APP submitted that the victim did not disclose the incidents occurred with her on earlier occasions because of the threat extended by the appellant. Learned APP submitted that evidence of the victim (PW2) and her mother (PW3) is consistent, cogent and reliable. Learned APP submitted that in the evidence before the Court, the Medical Officer Dr. Kharate (PW4) has categorically stated that her private part was touched forcefully and accused tried to insert his finger in her private part. Learned APP submitted that considering the nature of the finding of fact that the victim was mentally retarded, the delay in lodging report may not be a ground to give benefit to the appellant. Learned APP submitted that the learned Sessions Judge has recorded cogent reasons in support of his findings. In the submission of learned APP, a well reasoned judgment of the learned Additional Sessions Judge does not warrant interference.

8. It is the case of the prosecution that the appellant had inserted his finger in the private part of the victim. Such act constitutes an offence of rape under clause-(b) of Section 375 of the Indian Penal Code. The learned Additional Sessions Judge relied upon the opinion of the Medical Officer (PW4) as a corroborative piece of evidence. The report of the Medical Officer is at Exh.22. In

the report, Medical Officer (PW4) has stated that no definite opinion can be given regarding sexual intercourse. The Medical Officer further opined that an attempt of sexual intercourse was performed and private parts are touched and pressed. The opinion is silent about forceful insertion of fingers in the private part. In the examination report (Exh.22), an opinion has been given with regard to the private "parts". This would, therefore, indicate that the Medical Officer referred to the breasts, as well, in her opinion. If the opinion was with regard to the vagina only, then the Medical Officer would not have stated it in plural form. It, therefore, indicates that this opinion also relates to the breasts. The Medical Officer for the first time in the Court deposed that her private part was touched forcefully. She has stated that there was no injury either to the private part or any other part of the body. In her cross-examination, the Medical Officer has admitted that if a finger is inserted in private part, then there is possibility of nail injury to the private part. In the report (Exh.22), the Medical Officer has categorically stated that there was no injury to the private part. The report (Exh.22) shows that the Medical Officer (PW4) examined the victim on 30.09.2020 at 7.45 p.m. This fact would, therefore, prove that after two days of the incident, the victim was examined by the Medical Officer (PW4). The Medical Officer without any injury to the private parts, has opined that her private parts were touched and pressed. Therefore, in my view, this opinion of the Medical Officer does not corroborate the case of the prosecution on material aspect. It can be seen that on the basis of history of assault narrated by the mother and the victim at the time of examination, the Medical Officer (PW4) gave such a vague opinion. I am, therefore, not prepared to accept the medical evidence as a corroborative piece of evidence to the oral testimony of the victim (PW2) and her mother (PW3).

9. Investigating Officer PI Rekha Londhe (PW6), during the course of the investigation had referred the victim to Civil Hospital, Amravati for obtaining opinion about mental illness of the victim. A certificate issued by the panel of Medical Officers of the General Hospital, Amravati, dated 17.10.2020 is at Exh.34. In this certificate, the panel of Doctors has opined that the victim is a case of mild intellectual disability. Her IQ was 69%. One more medical certificate in this regard is at Exh.37. It is dated 19.04.2014. This certificate was also issued by a panel of Medical Officers of District Hospital Amravati. The panel opined that the victim was a case of mental retardation of moderate nature. The percentage of her disability was 45%. The disability was permanent, non-progressive and not likely to improve. It is seen on perusal of cross-examination on behalf of the accused that these certificates are not seriously disputed. Therefore, the learned Additional Sessions Judge was right in relying upon these certificates to record a finding that the victim was a case of mentally retarded girl. On re-appreciation of the evidence, it is not possible to take a different view by this Court.

10. I have already observed that evidence of the Medical Officer (PW4) is not of any help to the case of the prosecution. Similarly, the C.A. reports are also of no

help to the prosecution. It is, therefore, necessary to consider the evidence of the victim (PW2) and the evidence of her mother (PW3). It is to be noted at this stage that in this case, Kishor Patel would have been the most important witness. His evidence would have assisted the Court to come to a positive conclusion on the point of identity of the accused and his presence at the place of the incident on the given time. It is the case of the prosecution that the cattle shed where the incident occurred, was belonging to Kishor Patel. It has been stated in the report that when he heard shouts of the victim, he came to the spot and questioned the accused. In the facts and circumstances, it was necessary to examine such an important witness. If there was any impediment in the way of the prosecution, then the prosecution ought to have placed on record a plausible explanation for his non-examination. In my opinion, therefore, this would be a vital draw back in the case of the prosecution. It is pertinent to note that the victim had not stated the name of the appellant either to her mother or to her brother. The appellant and the victim are resident of the same locality. If the factual situation had been as stated by the victim before the Court, then in all probability, the victim would have stated either his name or his description to her mother. If the victim had made such disclosure, the appellant would have been immediately arrested. It has come on record that the brothers of the victim caught hold the appellant on 30.09.2020 while he was standing in front of a pan stall and took him to the police station. It is, therefore, apparent that when he was taken to the police station, the victim was also called to the police station. In the facts and circumstances, while appreciating the evidence of the victim (PW2) and her mother (PW3), above facts deserve an appropriate consideration.

11. The victim is PW2. It has come on record that her date of birth is 29.03.2002. It is, therefore, apparent that on the date of the incident, she was above 18 years of age. In her evidence, the victim has stated that the incident took place on 30.09.2020 at about 1.00 p.m. The report lodged by the victim is at Exh.12. The printed FIR is at Exh.13. In her evidence, she has stated that the appellant took her in a cattle shed of Kishor Patel. The appellant lifted her T-shirt and pressed her chest. She has stated that the appellant inserted his finger in her private part and kissed her. She has stated that she shouted and hearing her shouts, Kishor came there. Kishor questioned the appellant as to why he came there. The appellant told him that he had come there for washing his hand and the victim had come to collect cow-dung. She has stated that Kishor instructed her to go to home. She has stated that Kishor warned the appellant not to come to said place. She has categorically stated that she has narrated the incident to her cousin Saurabh on the same day. It is to be noted that Saurabh has not been examined in this case by the prosecution. If the victim had narrated the incident first time to her cousin Saurabh, then in that event, examination of Saurabh would have been of a great assistance to the case of the prosecution. Saurabh could have unfolded the incident narrated to him by the victim on the very same day and involvement of the person in the incident. The victim has not stated in her evidence that she informed Saurabh that the person indulged in the act was

the appellant. She has further stated that the accused had threatened her and therefore, she did not disclose such acts committed on her by the appellant on earlier occasions. She has further stated that prior to this incident, she had told the incident to her big father and her big father had beaten the appellant. She has stated that she narrated the incident occurred on 30.09.2020 to her mother. She has stated that the person involved in the incident was the accused present in the Court. It is pertinent to mention that identity of the appellant was not known by his name or by his description till the report was lodged. It is not the case of the prosecution that identity of the appellant by name or by description was stated by the victim either to Saurabh or to her mother. It is further pertinent to mention that if the victim had disclosed the identity of the appellant, which she was expected to do so inasmuch as the appellant being the resident of same locality, the brothers of the victim would have easily traced him out. In her cross-examination, she has admitted that there was quarrel in between her father and the appellant on account of money transaction. It is the defence of the appellant that because of money dispute, he has been falsely implicated in this case.

12. The material omissions have been proved from the evidence of the victim (PW2). The statement of the victim that she had narrated the incident to Saurabh has been proved to be an omission. Similarly, the statement of the victim that she told her father that the appellant used criminal force to her for 5-6 times has also been proved to be an omission. She has admitted in her evidence that on 30.09.2020, her cousin brother and his friend beat the appellant. She has denied the suggestion that in order to prevent the appellant from lodging the report, she lodged false report at the instance of her father. She has admitted that in the police station, Saurabh and Sahil were present. Minute perusal of her evidence would show that it is silent about the specific identity of the accused on the date of the incident. There is no evidence as to how the family members of the victim identified the appellant being the person involved in the incident. I have perused the list of witnesses attached to the charge-sheet by the Investigating Officer. In the said list of witnesses, name of Kishor Patel was not mentioned. The record does not indicate that the statement of Kishor Patel was recorded during the course of investigation. The evidence of the Investigating Officer (PW6) is silent on this aspect.

13. It would be necessary to consider the evidence of the mother of the victim (PW3). In her evidence, she has stated that the incident occurred in the month of September-2020. On that day, she returned from work at 6.00 p.m. The victim narrated the incident to her. She has deposed that the victim told her that the appellant threatened to defame her if she had disclosed the incident to anybody. She has further stated that the victim told her that her father would beat her if the incident is disclosed by her. She has deposed that the victim told her that the accused had threatened her that if she disclose the incident to anybody, he would defame her and in that eventuality her father would beat her. She has stated that when she took the victim into confidence, she told her that

she could identify the accused by face. Her evidence is silent about identification of the accused either by name or by description. She has stated that the victim could identify the appellant by face because he was doing work in the godown situated in front of their house. If this is the fact, then why the family of the victim took two days to ascertain the identity of the appellant. In my view, this is a very important lacuna in the case of the prosecution. In order to fill this important lacuna, evidence of Kishor Patel would have been the best evidence.

14. Perusal of the evidence of the victim (PW2) and her mother (PW3) in entirety would show that it is not sufficient to prove beyond doubt the involvement of the appellant in the incident in question. The appellant on the date of the incident was 46 years old. The victim was 18½ years old. If the appellant had indulged in this act on 4-5 occasions before the incident in question, then the victim would have narrated the same atleast once to her parents. It is not the case of the prosecution that on any occasion the appellant committed sexual intercourse with the victim. It is apparent on the face of the record that the learned Judge has not taken all these aspects into consideration. The evidence on record is not sufficient to prove the alleged incident as well as involvement of the appellant in the said incident. In my opinion, based on such a shaky evidence, conviction and sentence cannot be maintained. A doubt is created in the mind of the Court about the incident and involvement of the appellant. It is true that in such cases, some leeway has to be given while appreciating the evidence of the victim. Minor omissions and contradictions cannot be given much weightage. Sympathy of the Courts is always with the victim. In this case, the victim is mentally retarded. However, the conviction cannot be based solely on sympathy and moral consideration. Minute perusal of the evidence of the victim (PW2) and her mother (PW3) would show that the same is not sufficient to prove the guilt of the appellant. Medical Evidence does not corroborate the evidence of the victim. The important witness Kishor Patel has not been examined by the prosecution. In absence of evidence of Kishor Patel, the link of the case of the prosecution on vital aspect has been broken. In the facts and circumstances, I am of the view that the learned Additional Sessions Judge has not taken all the above facts into consideration and came to a wrong conclusion. The judgment impugned, therefore, cannot be sustained and the same deserves to be set aside. Hence, the following order :

ORDER

1. The Criminal Appeal is allowed.
2. The judgment and order of conviction and sentence dated 19.01.2022, passed by the learned Additional Sessions Judge, Amravati in Sessions Case No. 01/2021, is set aside.
3. Appellant – Ajikha (khan) Bismillakha (khan) is acquitted of the offences punishable under Sections 376(2)(j)(n) and 506 of the Indian Penal Code.
4. The appellant be set at liberty forthwith, if not required in any other crime/

case.

5. The appeal stands disposed of in the aforesaid terms.