

(2017) 09 BOM CK 0107
In the Bombay High Court
Case No : 373 of 2015

Nishikant Maruti Nimbalkar

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 08-09-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 164](#) - Recording of confessions and statements
[Indian Penal Code, 1860](#), [Section 376](#),
[Section 376\(2\)\(1\)](#) - P

Citation : (2017) 09 BOM CK 0107

Hon'ble Judges : Swapna Joshi

Bench : SINGLE BENCH

Advocate : C.A. Babrekar, N.H. Joshi

Judgement

1. The appellant/accused has preferred the present Appeal against the judgment and order dated 24.08.2015 in Sessions Case No. 54/2015 delivered by the learned Sessions Judge, Amravati, thereby convicting the appellant under Section 5(m) read with section 6 of the Protection of Children from Sexual Offences Act, 2012, in the alternative, u/s. 376(2)(i) of the Indian Penal Code and sentencing him to suffer R.I. for ten years and to pay a fine of Rs. 5000/, in default, to suffer RI for five months.

2. The prosecution case in brief is that, in the year 2015 the complainantPW1Smt. Sunanda Pathade was residing with her husband and three children at Jodmod, Aurangpura, Dist. Amravati. The victim at the relevant time was aged about 9years. The husband of the complainant was working as a labourer in a Printing Press at Amravati. The victim was studying in 5th standard at Ramkrishna Vidyalaya, Amaravati. The accused was residing in the same locality. It is the case of the prosecution that the friends of the victim, namely, Amrita was residing adjacent to the house of the accused. The victim used to visit the house of Amrita very often. On 24.1.2015 at about 9.00 am, as usual, the complainant had gone to the mess of HVMP for cooking food. Her husband

had gone out for work. Her three children were in the house. When the complainant returned back between 1.00 and 1.30 pm, she saw that her daughter (victim) was weeping and was repeatedly going for urination. On making enquiry with her daughter, she informed her that she was having inflammation at her urination organ (private parts). At that time, she was weeping. On further enquiry, the victim informed her mother that she had gone out near the house of Nishikant Kaka. He called her inside his house. Nishikant Kaka sent her friends outside and told her that he would pay her Rs. 10/for purchasing eatables and on saying this he closed the door. The victim further informed her mother that the accused pulled her nicker indulged in sex with her. Further the victim informed her mother that she had pains in her vagina. On hearing this, the complainant went to the house of the accused and made enquiry about the said incident. However he flatly denied that he had committed such a heinous act. After the husband of the complainant returned home at about 7 to 7.30 pm, she narrated the incident to him. On the next day, i.e. 25.1.2015 at about 3.30 p.m, the complainant proceeded to the Police Station and lodged her complaint (Exh. 8). On the basis of said complaint, offence was registered at Kotwali Police station vide Crime No. 22/2015 u/s 376 of IPC as well as Sections 3 and 4 of the POCSO Act. The victim was referred for medical examination. The statement of the complainant as well as the victim was recorded by a lady Magistrate u/s 164 of the Cr.P.C. The clothes of the victim as well as that of the accused, were taken charge by the Police and were sent to CA office for analysis. After completion of investigation, charge was framed by the learned trial Judge. The accused pleaded not guilty to the charge and claimed to be tried. The defence of the accused was of total denial. The accused examined defence witness on his behalf. According to the defence witness, at the time of the incident, the accused was not present in his house and had gone to attend his work. It is further defence of the accused that there was a quarrel between the complainant and the accused on the count of some money lending transaction.

3. I have heard Shri Babrekar, the learned counsel for the appellant and N.H.Joshi, learned Additional Public Prosecutor for the respondent. I have meticulously gone through the record and proceedings of the case.

4. Learned counsel for the appellant vehemently argued that the learned trial Judge has not considered the discrepancies in the testimony of the prosecution witnesses, so also failed to consider that although the hymen of the victim was noticed in torn condition by the Medical Officer, no bleeding injury as such, was noticed by her. According to the learned counsel for the appellant there are various reasons for rupturing of the hymen. Shri Joshi, the learned A.P.P. contended that the learned trial Judge has rightly convicted the accused on careful scrutiny of the testimony of the prosecution witnesses PW 1Sunanda and PW 2victim. He contended that the victim has in must natural manner, deposed before the Court and there are no material improvements as such in her testimony. He further contended that the testimony of the complainant has not been shattered in the crossexamination.

5. In order to consider the rival contentions of both sides, it would be proper to go through the testimony of the victim of rape as well as her mother Sunanda, who is the complainant and the Medical officer, Dr. Sarika Bhutada (PW4) who examined the victim.

6. So far as the testimony of the victim PW2 is concerned, the learned trial Judge has satisfied himself that the witness understands the sanctity of oath. At the relevant time PW2 was studying in IVth standard. She was aged about 9 years. She stated that Jhanvi, Amrita, Samiksha are her friends residing in the same locality. Nishikant kaka resides near the house of her friend Amrita. According to her, as there was some programme in her school she had not gone to attend the school. In the afternoon, she went with Amrita and Samu to play near the house of Nishikant kaka. At that time Nishikant kaka called her alone in his house and told her that he would pay the amount of Rs. 10/- for purchasing eatables. As she went inside his house, he removed knicker of the victim and touched his penis to her private parts: "VERNACULAR MATTER OMITTED" The accused asked her that she should not disclose the incident to anybody. She has severe pain in her private parts. She further deposed that she was weeping and came home. She further stated she was examined by the Medical Officer as she had pains for several days.

7. The cross-examination of PW2 depicts that, it was suggested to PW2 that whenever they used to play in the house of Amrita, the talks used to be heard in the house of Nishikant Kaka and he used to say not to raise shouts. The said query was made with PW2 probably in order to show that whenever noise used to be there it was possible to hear in the adjacent house. PW2 admitted that on the next day of the incident i.e. on Sunday she had gone with Vaishali to play. Learned counsel for the appellant contended that when the victim was in position to go to play on the very next day of the incident, the said fact indicates that there was no injury on her private parts. I am unable to agree with the said argument advanced by the learned counsel for the appellant, for the simple reason that it is the case of the prosecution that on the very next day victim had gone with her mother to Kotwali Police Station, Amravati. Apart from that, no material discrepancies are pointed out. PW 2 is found to be reliable and trustworthy witness and her evidence has not been shattered in the cross-examination as such. PW1 has immediately disclosed the incident to her mother.

8. The testimony of PW2 victim is well supported by the testimony of PW1 Sunanda, who is the complainant. According to PW1 Sunanda, on 24.1.2015 at about 9.00 am, she left for work and returned to the home at 3.00 to 3.30 pm. She saw that her daughter weeping and repeatedly going for urination. On making enquiry, her daughter informed that there was inflammation in her urination (private parts). PW1 touched her private parts with her finger and questioned whether she has touched her private parts with fingers having chilly powder. On this her daughter replied that nothing of that sort had happened.

However she continued to weep. PW2Sunanda stated that on cajoling her daughter, PW2 told her that she had gone out for playing and when she was near the house of Nishikant kaka, he called her inside the house. Nishikant Kaka sent his friends outside and told her that he would pay Rs. 10/for purchasing eatables and closed the doors. Her daughter further told that the accused pulled her nicker down and touched his "Nanu" to her "Sasubai". She told that the word "Nanu" is used for penis and word Sasubai for vagina. Her daughter said that due to this she had pains in her vagina. According to PW1 she got frightened and after her husband returned home at about 7 to 730 p.m, she disclosed the incident to him. She also told the incident to brother in law 's wife, elder brother in law and nephew. On the next day i.e. 25.1.2015 at about 3.30 p.m. PW1 proceeded to Police Station, Kotwali along with her daughter PW2 and lodged the complaint (Exh. 8).PW1 specifically stated as her daughter was young and was likely to be defamed, it took some time to take a decision about lodging of the complaint. PW1 stated that the clothes of the victim were taken charge by the police. Her daughter was referred for medical examination at Duffarine Hospital, Amravati. The Medical Officer examined PW2. Nothing adverse was elicited from the crossexamination of PW2 on her exhaustive crossexamination. An improvement was pointed out in her deposition before the Court that she had noticed the redness on the vagina of her daughter.

9. Apart from the said improvement in the version of PW1 there is no improvement as such in her version. In my opinion, the witnesses are not supposed to give the details to the police immediately. Sometimes the witness exaggerate their version before the Court. In this case, it was natural on the part of PW1 to examine the private parts of her daughter. One suggestion of the incident was given to PW1 that she had not stated in her complaint that her daughter was young and she was likely to be defamed and as such, took time for lodging the complaint. In my opinion, the said version of the complainant cannot be termed as an improvement as such. PW1 has explained the reason for delay while she was examined before the Court. So also it is well settled that in rape cases the delay of one or two days is bound to be there as the parents of the victim normally give a cool thought over lodging of the complaint as reputation of their daughter and family is at stake and thereafter only proceed to lodge the complaint.

10. In the case of Tulsidas Kanolkar vs. State of Goa, reported in (2003) 8 SCC 590, it is held by the Hon"ble Apex Court that the delay in lodging of the first information report cannot be used as a ritualistic formula for discarding the prosecution case and doubting its authenticity.

11. In the case of State of Punjab vs. Gurmit Singh and others, reported in (1996) 2 SCC 384, it was observed by the Hon"ble Apex Court that, the Courts cannot overlook the fact 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 station 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.

12. The testimony of PW1Sunanda is not shaken in the cross-examination. Thus, the testimony of PW2 corroborates on all material particulars with the testimony of PW1. There was no reason for PW1 to falsely implicate the accused in such a heinous offence by putting the reputation of her daughter and family at stake.

13. As far as the medical evidence is concerned, PW 4Medical OfficerDr. Sarika Bhutada, examined the victim on 26.1.2015. She found on local examination that the hymen of the patient was ruptured and there was no redness, no swelling but tenderness was present. According to PW4Dr. Sarika, patient was complaining of micturition (frequent urination). PW 4 gave her opinion that the patient was not eligible for intercourse and there was no evidence of swelling over private part. PW4 issued the medical certificate (Exh.19). PW4 deposed that there is very less possibility of hymen getting ruptured in sports activity in view of the tender age of the patient. She specifically stated that the hymen of the girl, aged 9years can be ruptured by forceful penetration. PW1 stated that since she carried out the examination of the victim/patient after 36 hours, the injuries might have subsided. PW 4 failed to state as to exactly when the hymen was ruptured. The meticulous scrutiny of the testimony of PW4 depicts that tenderness was noticed in the hymen and the hymen was ruptured. The testimony of PW4 does not indicate that there was fresh injury to the hymen. However since the tenderness was seen on the hymen and the said fact coupled with the fact that the victim was examined 36hours after the incident, it can be said that the testimony of PW4 corroborates with the testimony of victim as well as complainant with regard to the factum of incident.

14. As far as the age of the victim is concerned, it is not disputed that she was 8 1/2 years old at the time of incident. It is wellsettled that the testimony of the sole eye witness cannot be discarded when it is found to be reliable cogent and trustworthy.

15. In the case of Aman Kumar and another vs. State of Haryana, reported in (2004) 4 SCC 379, the Hon"ble Apex Court has held as under :

" 5. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands on a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the Court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice, would suffice."

16. For the reasons aforementioned and the position of law as discussed above, I am of the opinion that the learned trial Judge has rightly convicted the accused. No interference at the hands of this Court is necessary. Hence the following order

:ORDER:

I) Criminal Appeal No. 373/2015 is dismissed.

2) The judgment and order dated 24.08.2015 in Sessions Case No. 54/2015 delivered by the learned Sessions Judge, Amravati, convicting the appellant under Section 5(m) read with section 6 of the Protection of Children from Sexual Offences Act, 2012, in the alternative, u/s. 376(2)(i) of the Indian Penal Code and sentencing him to suffer R.I. for ten years and to pay a fine of Rs. 5000/, in default, to suffer RI for five months, is maintained.

iii) Muddemal property, if any, be destroyed after the appeal period if over.