

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 183 OF 2016

<b>Mr. Vishal Ramesh Bhalerao</b>	]	
A-24 years old, Occupation: Nil	]	
R/o Pimpri Chinchwad Municipal	]	
Corporation,	]	
Dustbin Center, M.I.D.C.	]	
Bhosari, Pune	]	
At present-Yerwada Jail	]	..Appellant (Ori. Accused)
v/s.		
<b>The State of Maharashtra</b>	]	
(At the instance of Chinchwad Police Station	]	..Respondent (Ori. complainant)

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Mr. Swapnil Ovalekar for Appellant.  
Mr. Y.Y. Dabke-APP for the State.  
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**CORAM : SMT. SADHANA S. JADHAV, J.**

**Reserved on : 26<sup>th</sup> February 2019.**

**Pronounced on : 4<sup>th</sup> June 2019.**

**JUDGMENT**

1. The appellant is convicted for the offences punishable under section 366 of Indian Penal Code and sentenced to suffer rigorous imprisonment for four years. The appellant is also 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. 2,000/-, in default, to suffer simple imprisonment for one year by the 5<sup>th</sup> Additional Sessions Judge, Pune in Sessions Case No. 826 of 2012 vide judgment and order dated 4<sup>th</sup> February 2015.

2. Such of the facts necessary for the decision of the appeal are as follows:

3. The victims' father had died when she was a child and her mother had abandoned the children and therefore, her paternal grandmother was looking after victim and her younger sister. The victim was about 12 years at the time of incident.

4. The appellant herein was a close friend of the uncle of the victim. The accused-appellant used to visit the house of the uncle quite often and therefore she was acquainted to him.

5. It is the case of the prosecution that on 9<sup>th</sup> of November 2011 the grandmother of the victim had been to the forest for grazing her goats. The victim was alone at home. At about 4.00 p.m. the accused-appellant had been to her house. He had informed the victim that he was going towards the field, where her grandmother was grazing the goats. He had also asked her whether she would like to meet her grandmother. She answered in the affirmative and agreed to accompany him. The victim had no hesitation in accompanying the victim, since on earlier occasions also she had been with him. The accused had taken her in an Auto-rickshaw. They had proceeded towards the garbage depot which was adjacent to the forest. He had then denuded her of her clothes and had ravished her.

She had raised cries but since it was an isolated place, no one had heard her cries. The accused had then given her money to reach her home by an Auto-rickshaw.

6. She had returned home in torn and soiled clothes. Her paternal Aunt Bharti @ Ruksana Shaikh was shocked to see her condition and therefore, had enquired with her. Upon enquiry she had disclosed the trauma that she had gone through at the hands of the accused- appellant. Her grandmother and her aunt had called upon her uncle Ganesh and then they had approached the police station. The victim had narrated the incident to the police. On the basis of her statement Crime No. 287 of 2011 was registered at Chinchwad Police Station for the offence punishable under sections 366 and 376 of Indian Penal Code. The accused was arrested on 19 of November 2011 and was tried as an under trial prisoner. Upon completion of investigation the charge-sheet was filed on 31<sup>st</sup> January 2012.

7. At the trial the prosecution examined as many as 12 witnesses to bring home the guilt of the accused.

8. The case rests upon the evidence of the victim i.e. P.W.-1. P.W.-3 Ashabai Pardeshi who happens to be her grandmother, P.W.-4 Bharti @ Ruksana Shaikh, P.W.-7 Dr. Vipul Gurav, P.W.-9 Dr. Ajay Taware and P.W.-11 Neeta Misal an Investigating Officer.

9. P.W-1 the victim has deposed before the Court as per the First Information Report. According to her when she was residing with her uncle, sister and grand-parents, the accused Irfan Shaikh has seen her. She has further stated that the accused had taken the

Auto-rickshaw ahead of Telco Company and then they had alighted from the Auto-rickshaw and he took her to the forest, she was scared, she wanted to return home. Further the accused did not let her go, he had slapped her and then thereafter has ravished her. When she returned she had narrated the incident to her Aunt. The defence has failed to shatter the testimony of the witness in the cross-examination, she has admitted that even prior to this incident she has travelled along with the accused by Auto, therefore, she had no hesitation to accompany him. She had accompanied once for bringing Biryani and on the second occasion for bringing footwear It is the defence of the accused that the accused-appellant has quarreled with her uncle Ganesh and therefore he has been falsely implicated. She had denied the said suggestions. There are no omissions and contractions in her evidence

10. To establish that the victim was last seen in the company of the accused. The prosecution has examined P.W.-2 Irfan Shaikh who has resiled from his earlier statement and was declared hostile. P.w.-3 Ashabai Pardeshi is the grandmother of the victim, she had deposed before the Court the incident as narrated by her granddaughter. She has specifically stated that since the victim had not returned home for quite sometime, she and her daughter Bharti @ Ruksana Shaikh had searched for her at various places and finally when she reached home they had seen her in soiled clothes.

11. P.W.-4 Bharti @ Ruksana Shaikh has corroborated the evidence of P.W.-1 and P.W.-3. There are minor discrepancies in the evidence of the P.W.-4 to the extent as to whether the victim had not

accompanied the grandmother for grazing goats as she was ill etc. However, it does not affect the case of the prosecution.

12. P.W.-7 Dr. Vipul Gurav had examined the victim on 10<sup>th</sup> of November 2011. The victim was 11 years old. Dr. Gurav had examined the victim and had found some old healed multiple abrasion on trunk anteriorly on back. There were no external injuries on labia majora and labia minora. She had also noted that the Hymen had old healed multiple tear at 4, 7 and 9 o'clock position. There was no vaginal bleeding. He has proved the contents of the certificate issued by him which is at 'Exhibit-30'.

13. Upon perusal of Exhibit-30 it is pertinent to note that the history as narrated by the patient to the doctor at the time of her examination. According to the history given by the victim the accused had removed her under garments and had fondled with her private parts. **The accused had also attempted sexual intercourse with the victim.**

14. P.W.-9 Ajay Taware had conducted the radiological examination of the victim and upon clinical and radiological examination the victim was found to be above 11 and below 13 years including margin of error.

15. P.W.-11 Neeta Misal had deposed before the Court in respect of steps taken by her in the course of the investigation. She has proved the omissions and contractions of the witnesses. She has categorically admitted that she has not recorded the statement of the watchman of the garbage depot as the father of the accused himself was the watchman. She has also admitted that she has not made any



effort to trace out the auto-rickshaw by which the accused and the victim had allegedly travelled.

16. Upon perusal of the evidence adduced by the prosecution it can be safely inferred that prosecution has proved the guilt of the accused beyond reasonable doubt. The learned counsel appointed for the victim has urged that the victim was examined on 10<sup>th</sup> of November 2011 by the doctors whereas according to the victim the incident had occurred at about 4.00 p.m. on 10<sup>th</sup> of November 2011. According to the counsel this aspect goes to the root of the matter as even according to the victim the incident has occurred on 10<sup>th</sup> and not on 9<sup>th</sup> of November 2011. This suggestion was given in the cross-examination and in all probability the minor was confused as to whether the incident had occurred on 9<sup>th</sup> or 10<sup>th</sup> of November 2011. At the time of incident the victim was hardly 12 years old and she was to stand the test of cross-examination. She cannot be falsified on a minor discrepancy. Apparently there is no reason for the victim to falsely implicate the accused. She does not appear to be a tutored witness and therefore her sterling testimony deserves to be believed. Moreover, the statement of the victim can not be lightly brushed aside. The defence of the accused is that of total denial. The evidence of the victim stands corroborated by P.W.-3 and P.W.-4.

17. The learned counsel has further argued that it cannot be said that the accused did not have actual sexual intercourse with the victim. As there were old hymen tear and therefore even before the doctor the victim herself has stated that the accused had attempted to have sexual intercourse. According to the learned counsel since it

is an attempt, the accused would be liable to be tried under Section 511 of Indian Penal Code and would further to be liable to undergo one-half of the imprisonment provided for the offence. Section 511 is a general provision which does not deal with a particular act or offence not made punishable by other specific section.

In the case of *Koppula Venkat Rao v/s State of Andhra Pradesh (2004) 3 SCC 602*, the Hon'ble Apex Court has held thus:-

*“an attempt is made punishable, because every attempt, although it falls short of success, must create alarm, which by itself is an injury, and the moral guilt of the offender is the same as if he had succeeded. Moral guilt must be united to injury in order to justify punishment”.*

18. In the present case an attempt is equally injurious not only to the victim physically but also morally and moreover she would have to live with the trauma throughout her life. She was a minor and had reposed faith in the accused-appellant at the stage when she agreed to accompany him to meet her grandmother.

19. The defence has not examined the uncle of the victim in order to establish that there was some enmity due to which the possibility of false implication could have been ruled out. Hence this Court is of the opinion that the prosecution has established the guilt of the accuse beyond reasonable doubt.

20. The accused was in custody from 19/11/2011 to 04/02/2015. He was not granted bail during the pendency of the appeal and had completed his sentence. In view of this appeal stands dismissed.

**ORDER**

The Appeal is dismissed and disposed of accordingly.

**(SMT. SADHANA S. JADHAV, J)**