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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 816 OF 2017

Anil Ramesh Kolhe,
Aged : 22 years, Occ. Labourer,
Residing at Siddharthnagar,
Kasara, Tal. Sahapur, Dist. Thane,
(At present lodged in Nasik Road
Central Prison, Nasik Road, Dist. Nasik) .. **Appellant**
(Ori. Accused)

Versus

1. **State of Maharashtra,**
(Through Sahapur Police Station,
C.R. No.I-119/2014.)

2. **Manki Panga Karade**
Age : 19, Occ.: Nil
Add.: Aatkar Pada, Tal. - Shahapur,
District – Thane.

3. **Sonya Panga Karade,**
Age : 25, Occ.: Labour,
Add.: Shahapur, Dist. Thane. .. **Respondents**

Mr. Aniket Vagal a/w. Mr. Kunal Pednekar, Advocate for Appellant.
Mr. Ajay Patil, APP for the Respondent – State.

CORAM : A.S. GADKARI &
MILIND N. JADHAV, JJ.

DATE : 03rd August 2022.

JUDGMNET (PER : MILIND N. JADHAV, J.)

. The present Appeal questions the legality of the conviction and sentence delivered by Judgment and Order dated 28.01.2016 passed by the Court of Additional Sessions Judge, Kalyan in Sessions Case No.301 of 2014, convicting Appellant for offence punishable under Section 376(2)(l) of the Indian Penal Code, 1860 (for short

"**IPC**") and sentencing him to undergo imprisonment for life which shall mean imprisonment for the remainder of his natural life and payment of fine of Rs.10,000/-, and in default thereof to undergo rigorous imprisonment for 6 months.

2. The gist of the prosecution case is as under:-

2.1. First informant i.e. PW-1 is brother of victim. Victim resided with first informant and her family members at Aatkarpada, Village Kalambhe, Taluka Shahapur, District Thane. Victim is mentally retarded since her childhood and used to wander throughout the day outside and travel upto Asangaon Station, Shahapur, Washind Station, Kalyan Station and Thane Station and used to beg. Since victim was mentally retarded, she was not married.

2.2. PW-1 was informed by female members of his family two months prior to the filing of First Information Report (FIR) that they suspected victim to be pregnant.

2.3. On 08.05.2014, victim underwent sonography at Kamakhya Sonography Center, Shahapur and it was revealed that she was pregnant. On enquiry by family members, victim did not reveal any details as to how she became pregnant. PW-1, therefore approached Shahapur Police Station and lodged FIR against an unknown person. After lodging FIR, Investigation Officer (IO) recorded statements of family members of victim. Lady PSI recorded statement of victim and

handed it over to IO. This statement of victim revealed that victim had physical relations with Appellant and victim also divulged the mobile number of Appellant. Investigating Officer obtained Call Detail Records (CDR) of the mobile number disclosed by victim which revealed that the number belonged to one Dharma Mohankar. Investigating Officer recorded statement of Dharma Mohankar and another person Pandhari Ganpat Kambale and learnt that the mobile number belonged to Appellant who resided in Kasara. Appellant was traced by police and brought to the police station. In the police station, victim identified the Appellant. Appellant was arrested and thereafter showed his willingness to disclose the spot of incident near Kasara Railway Station to the IO. IO prepared spot panchnama and also obtained blood samples of Appellant and victim and sent them for chemical analysis.

2.4. On 01.07.2014, victim gave birth to a male child in Sion Hospital. IO obtained blood sample of the newly born child from Sion Hospital and sent it for chemical analysis. Since victim was not in a position to take proper care of the newly born child, with the help of Child Welfare Committee, the child was given to Janani Ashish Charitable Trust, Dombivali, District Thane.

2.5. On 27.01.2015, victim was referred to J.J. Hospital for examination, ossification test and test of her mental health.

Ossification test and mental health report was obtained vide Exhibit-31 from J.J. Hospital.

2.6. Since offence was punishable under Section 376(2)(l) and exclusively triable by the Court of Sessions, learned Judicial Magistrate First Class, Shahapur committed to the case to the Court of Sessions for trial.

2.7. Charge was framed and read out in vernacular to the Appellant to which he pleaded not guilty and claimed to be tried.

2.8. To bring home guilt of the accused, prosecution examined 6 witnesses to prove its case. Appellant examined himself in his defence.

3. We have heard Mr. Aniket Vagal, Advocate for Appellant and Mr. Ajay Patil, APP for Respondent – State and with their assistance perused the entire evidence on record.

4. Victim has herself testified below Exhibit-15 as PW-3. PW-1 and PW-2 are the brother and sister-in-law of victim. PW-4 and PW-5 are Medical Officers who have given evidence vide Exhibits 20 and 30 whereas PW-6 is the IO. Prosecution has mainly relied upon medical examination report issued by J.J. Hospital vide Exhibit-21, DNA Report dated 27.01.2015 establishing Appellant and PW-3 as biological parents of the male child born to PW-3, sonography reports dated

08.05.2014 and 13.05.2014 vide Exhibits 23 and 24, Mental Health Report of victim vide Exhibit-31, disclosure statement of accused vide Exhibit-34 and spot panchnama of the incident spot vide Exhibit-34A. Accused in his defence has examined himself on oath as DW-1 vide Exhibit-40.

5. Case of the prosecution is that around 7 to 8 months prior to 08.05.2014 in the old railway cabin near Thakurwadi, Kasara, Taluka Shahapur, Appellant committed forcible sexual intercourse on more than one occasions with the victim having complete knowledge that she was mentally retarded. In defence, case of Appellant is that victim is not mentally retarded and physical relationship with her was with her consent and out of love affair.

6. PW-3 victim has deposed before the trial court. In her deposition, trial court initially asked her preliminary questions to assess her capacity to understand the questions and thereafter answer the same. Trial court after considering the answers given by victim to the preliminary questions, came to the conclusion that victim is competent and able to depose before court and thereafter recorded her deposition. PW-3 in her deposition has stated that she was acquainted with Appellant; he met her near Kasara Railway Station as he resided in Kasara itself. She stated that Appellant took her to a lonely place in the forest and used to sleep on her; she further stated

that she told the Appellant not to sleep on her as she was pregnant from him and according to victim such incident occurred five times with Appellant. Victim has identified Appellant in court and had also confided in her sister-in-law and the doctor in Civil Hospital Thane, where she was referred for examination. In cross-examination, PW-3 has stated that, she knew the Appellant, liked him and also wanted to be married. She has deposed that she has knowledge about the fact that physical relations are to be kept after marriage. She has further stated that even after having physical relations with Appellant she did not feel it to be bad. She stated that even on the date of her deposition she was ready to get married to the Appellant but her family members opposed the alliance. From the deposition of PW-3, what is pertinent to note is that she has deposed and answered questions put to her in a rational manner. On reading of the victim's evidence as a whole, it clearly appears to us that though she may have some mental condition, she was quite aware about her actions. This is fortified when the trial court at the end her deposition recorded as under:-

> *" During recording of examination-in-chief and cross-examination. I found that witness is competent to understand the questions, most of times and she answered rationally but once or twice she could not understand question and gave answers rationally. It was difficult to understand her pronouncation but APP and defence counsel have taken proper efforts to understand the same and court also understood the same after taking some efforts."*

7. Evidence of PW-4 and PW-5 therefore assumes significance. PW-4 - Dr. Priyanka Ashwith Mahajan is a Psychiatrist Medical Officer working in Thane Civil Hospital. Victim was admitted in the hospital on 10.05.2014. On 12.05.2014, PW-4 examined victim and evaluated her mental condition. PW-4 has stated that as per her clinical examination victim was suffering from moderate mental retardation. In cross-examination however PW-4 has stated that she has not issued certificate stating that victim was suffering from moderate mental retardation.

8. Evidence of PW-5 on the above aspect is relevant. PW-5 - Dr. Sanika Abhijeet Dakshikar is M.D. in Psychiatry and working in the Psychiatrist Department of J.J. Hospital. She has deposed that on 27.01.2015 victim was brought to the hospital for evaluation of her I.Q. test as well as mental evaluation test. According to PW-5 victim was examined by a panel of three specialist Doctors namely Dr. Sagar Mundada, Junior resident doctor, PW-5 – herself and Dr. V.P. Kale. Victim was examined for clinical examination as also for history and I.Q. test and the final diagnosis of victim was “mild mental retardation”. She has deposed that victim has I.Q. of 60 whereas in the case of normal person I.Q. is between 90 - 120.

9. PW-5 has relied upon Exhibit-31 which is the Mental Health Report issued by the panel of doctors stated above which bears her

signature as one of the empanneled doctor. In the report, it is stated that from the history of the victim, psychological evaluation, serial observations, mental status examination, the victim though conscious and fairly co-operative but having intelligence below average is opined to have “mild mental retardation”.

10. Reading of the aforementioned medical evidence coupled with the evidence of PW-3 victim shows that though victim was major, she was capable of understanding the consequences of her acts, however considering her mental condition/disability which is certified and does not stand disproved, Appellant took advantage of the victim and committed the offence.

11. DNA extracted from blood samples of the male child born to victim matches with the DNA extracted from blood samples of Appellant and victim. DNA Report dated 27.01.2015 at Exhibit-22 and is not disputed. That apart, evidence of Appellant himself shows that he had admitted to having physical relationship with the victim.

12. From a careful scrutiny of the evidence given by the two doctors who are expert witnesses, it is clearly discernible that victim was suffering from mild mental retardation. Oral evidence of these witnesses is corroborated and supported by the Mental Health Report dated 26.01.2015 of the victim which is placed on record vide Exhibit-31. PW-5 - Sanika Dakshikar in her evidence has opined that victim

was suffering from mild mental retardation; her I.Q. was 60 and I.Q. for a normal person is between 90 – 120; hence mental age of victim is of a 12 year old girl. Mental Health Report - Exhibit-31 has been issued by Grant Medical College and Sir J.J. Group of Hospitals, Department of Psychiatry, Report by Mental Health Experts to the Superintendent of the Hospital after detailed examination of the victim. This medical evidence is supported by oral evidence given by PW-1 and PW-2, who are close family members of victim. Alleged acts of Appellant of having physical relationship with victim on one and more occasion thus stand proven with the victim giving birth to their child. As alluded to hereinabvoe and clearly discernible from the evidence on record, victim was indeed suffering for mild mental retardation when Appellant had physical relations with her. Hence, on the reading of the evidence the case of Appellant cannot be accepted completely. Prosecution has proved its case beyond all reasonable doubts that victim was and is suffering from mild mental retardation. That apart, deposition of PW-3 victim herself clearly refers to the acts committed by Appellant and the court cannot be oblivious to understand the import of the deposition of the victim; the deposition of victim clearly proves that Appellant had sexual intercourse on one and more occasion with her. It is also proven beyond reasonable doubt that Appellant and victim are the biological parents of the male child born to the victim and this proves that the victim got pregnant because of

the act committed by Appellant with her.

13. The aforesaid discussion leads to the inevitable conclusion that prosecution has proved its case beyond all reasonable doubts that the Appellant has committed the act of rape on the victim who was and is suffering from mild mental retardation.

14. The defence of Appellant if considered shows that, the Appellant knew the victim but it has come on record that he was not aware that the victim was suffering from any form of mental disability much less mild mental retardation. Trial court has sentenced the Appellant to life imprisonment. The Appellant has not denied or run away from the act committed by him on the victim. It is his defence that, Appellant and the victim had a love affair and therefore their acts were consensual.

15. In the case of ***Moti Lal Vs. State of M.P.***[1], the Supreme Court while considering a case under Section 376 IPC, referred to the observations of Vivian Bose, J. in ***Rameshwar Vs. The State of Rajasthan***[2] and has observed that a woman or a girl who is raped is not an accomplice; that corroboration is not the *sine qua* for conviction in a rape case; that it is settled law that the victim of sexual assault is not treated as accomplice and as such, her evidence does not require corroboration from any evidence including the evidence of a doctor;

1 2008 ALL MR (Cri) 2583 (S.C.)
2 AIR 1952 SC 54

that in a given case even if the doctor who has examined the victim does not find sign of rape, it is no ground to disbelieve the sole testimony of the prosecutrix; that in normal course a victim of sexual assault does not like to disclose such offence even before her family members much less before public or before the police; the Indian women has tendency to conceal such offence because it involves her prestige as well as prestige of her family and only in few cases, the victim girl or the family members has courage to go before the police station and lodge a case.

15.1. In the present case, it is seen that the victim is a helpless, mild mentally retarded married woman whose privacy and personal integrity has been shattered by the Appellant. In paragraph 8 of the above judgment, the Supreme Court has held as under:-

> *"8. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault -- it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Court, therefore, shoulders a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If*

> *for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial Court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations. This position was highlighted in* ***State of Punjab Vs. Gurmeet Singh[3].***"

15.2. Thus, from the above, it is seen that rape is not merely a physical assault but it destructs the whole personality of the helpless woman. In the present case, the victim is helpless mild mentally retarded girl and thus, the present case requires to be dealt with utmost sensitivity. As seen, evidence of the victim in the present case inspires confidence and also stands corroborated in material particulars on the basis of testimony of the medical evidence.

16. Perusal of the evidence of the victim clearly suggests that the victim was aware about her proximity and the consequences of her proximity with Appellant. The entire deposition of the victim including her cross-examination further suggests that being aware of the consequences of having physical relations with the Appellant, the victim continued the same and as per her testimony, atleast on five occasions she went alongwith the Appellant to the secluded spot of incident. This clearly shows that though on the one hand the victim is suffering from mild mental retardation, but on the other hand the victim was in a position to know the consequences of her acts and

3 1996(2) SCC 384

despite that went alongwith the Appellant. Therefore, we are of the considered opinion that the sentence imposed by the trial court on the Appellant sentencing the Appellant for life imprisonment for the remainder of his life is harsh and not determinative of the offence in the facts and circumstances of the present case.

16.1. In this context, hence we would usefully refer to the observations of the Apex Court in the case of ***Adu Ram Vs. Mukna and Ors.***[4], on the aspect of proportionality in prescribing liability according to the culpability of the criminal act in the given facts and circumstances of the present case. We may usefully quote paragraph Nos.11 to 17 to persuade us to consider reducing the sentence awarded to the Appellant to 10 years of rigorous imprisonment under Section 376(2)(l) IPC. Paragraph Nos.11 to 17 of the said judgment read as under:-

> "*11. The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of "order" should meet the challenges confronting the society. Friedman in his Law in Changing Society stated that:*
>
> > *"State of criminal law continues to be -- as it should be -- a decisive reflection of social consciousness of society".*

4 (2005) 10 SCC 597

Therefore, in operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. By deft modulation sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. For instance, a murder committed due to deep-seated mutual and personal rivalry may not call for penalty of death. But an organised crime or mass murders of innocent people would call for imposition of death sentence as deterrence. In Mahesh V. State of M.P.[5], this Court while refusing to reduce the death sentence observed thus:

> *"It will be a mockery of justice to permit the accused to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for the appellants would be to render the justicing system of the country suspect. The common man will lose faith in courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon."*

12. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc. This position was illuminatingly stated by this Court in Sevaka Perumal etc. v. State of Tamil Naidu[6] .

13. The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just desert as the basis of punishment and create cases of apparent injustice that are serious and widespread.

14. Proportion between crime and punishment is a goal

5 (1987) 3 SCC 80 : 1987 SCC (Cri) 379 : (1987) 2 SCR 710
6 (1991) 3 SCC 471 : 1991 SCC (Cri) 724 : AIR 1991 SC 1463

respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. The practice of punishing all serious crimes with equal severity is now unknown in civilized societies, but such a radical departure from the principle of proportionality has disappeared from the law only in recent times. Even now for a single grave infraction drastic sentences are imposed. Anything less than a penalty of greatest severity for any serious crime is thought then to be a measure of toleration that is unwarranted and unwise. But in fact, quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences.

15. After giving due consideration to the facts and circumstances of each case, for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the Court. Such act of balancing is indeed a difficult task. It has been very aptly indicated in Dennis Councle McGautha v. State of Callifornia[7] *that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished.*

16. Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime, e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order, and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result- wise counter productive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.

17. In the instant case taking note of the background facts and special features of the case custodial sentence of six years would serve the ends of justice. Normally, sentence for conviction for offence relatable to Section 304 Part I IPC would be more. But this is a case which could be, on the facts of the case covered under Section 304 Part II IPC. Though there is no appeal on

7 402 US 183:28 L Ed 2d 711(1971)

behalf of the accused persons, the same is apparently because of reduction of sentence. The enhanced fine has to be deposited, if not already done, within two months from today. In case the fine is not deposited the default custodial sentence will be two years RI."

17. Considering the factual background of the present case and the evidence of the prosecution and defence witness discussed hereinabvoe, in our considered view, while maintaining the conviction of the Appellant, we deem it appropriate to sentence the Appellant / original accused for committing the offence under Section 376(2)(l) IPC for a period of 10 years rigorous imprisonment. The fine amount awarded by the trial court also stands enhanced to Rs.50,000/- and in default of non-payment, Appellant is directed to further undergo rigorous imprisonment for one year. To that extent the impugned Judgment and Order dated 28.01.2016 passed by the Court of Additional Sessions Judge, Kalyan shall stand modified.

18. Criminal Appeal No.816 of 2017 stands partly allowed in the aforesaid terms.

[MILIND N. JADHAV, J.] **[A.S. GADKARI, J.]**

AJAY TRAMBAK UGALMUGALE

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