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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 725 OF 2019

Farukh Abdul Raheman Shaikh,
Age 31 yrs, Occ. Nil,
R/o. Room No.1, Patel Chawl, Indira Nagar,
Rani Sati Marg, Malad (E),
Mumbai – 400 097

...Appellant
(Ori. Accused)

Versus

1. The State of Maharashtra
(through Dindoshi Police Station,
Dist: Mumbai)

2. XXXXXXXXX

...Respondents

Mr. Aniket Vagal for the Appellant

Mr. S. V. Gavand, A.P.P a/w Mr. P. H. Gaikwad-Patil, A.P.P for the
Respondent No.1–State

Ms. Devyani Kulkarni, appointed Advocate for the Respondent No. 2

CORAM : REVATI MOHITE DERE, J.

FRIDAY, 18th JUNE 2021

JUDGMENT :

1 By this appeal, the appellant has impugned the judgment and order dated 25th April 2019, passed by the learned Additional Sessions



Judge, Borivali Division, Dindoshi, Goregaon, Mumbai, in Special Case No.19 of 2016, convicting and sentencing him as under:

- for the offence punishable under Section 363 of the Indian Penal Code, to suffer rigorous imprisonment for 5 years and to pay a fine of Rs.3,000/-, in default of payment of fine, to suffer simple imprisonment for 6 months;
- for the offence punishable under Section 366 of the Indian Penal Code, to suffer rigorous imprisonment for 7 years and to pay a fine of Rs.3,000/-, in default of payment of fine, to suffer simple imprisonment for 6 months;
- for the offence punishable under Section 376 of the Indian Penal Code, to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.3,000/-, in default of payment of fine, to suffer simple imprisonment for 6 months.

All the aforesaid sentences were directed to run concurrently.

In addition to the aforesaid sentences and fine, PW 2 (victim girl) was awarded compensation of Rs. 30,000/- under Section 357 of the Criminal Procedure Code r/w Victim Compensation Scheme (Manodhairya, Maharashtra) and as such the matter was referred to the District Legal Services Authority, Mumbai, for compliance.



2 The prosecution case in brief is as under :

According to PW 1-complainant, mother of the prosecutrix (PW 2), the incident took place on 8th January 2016. PW 1 has alleged that as her daughter (prosecutrix), aged 21 years and intellectually challenged, did not return home, she and her family went in search of her and that at about 10:00 p.m, they saw the prosecutrix returning home. When the prosecutrix was questioned as to why she was late, she informed that one person (appellant) had taken her to a fair on his bike and from there, in the bushes in Ghosh compound, where she was undressed. She disclosed that the said person had inserted his finger in her private part. The prosecutrix pointed out to the appellant who was answering the nature's call, close-by. When the appellant tried to flee from the spot on being pointed out, he was apprehended by the people and assaulted. The police were called and thereafter PW 1 (mother of the prosecutrix) lodged an FIR with the Dindoshi Police Station, Mumbai, which was registered vide C.R. No. 19/2016 for the offences stated aforesaid.

During the course of investigation, the statement of the prosecutrix was recorded under Section 164 of the Criminal Procedure Code and the prosecutrix was sent for medical examination. After completion of investigation, charge-sheet was filed as against the appellant



in the Court of the learned Metropolitan Magistrate, 67th Court, Borivali, Mumbai. The case was committed to the Court of Sessions since the offence under Section 376 was exclusively triable by the Court of Sessions.

The learned Sessions Judge framed charge as against the appellant, to which he pleaded not guilty and claimed to be tried. The prosecution, in support of its case, examined 13 witnesses i.e. PW 1- complainant and mother of the prosecutrix, who lodged the FIR (Exhibit 14); PW 2- prosecutrix; PW 3-PSI Deepak Golatkar, who received a wireless call about the incident and visited the spot and took the accused to the police station; PW 4-Mrs. Meena, neighbour of PW 2; PW 5-Mr. Subhash, neighbour of PW 2, who called the police by dialing “100” and gave information of the incident to the police; PW 6-Mrs. Kalpana, who accompanied the complainant and the prosecutrix to the police station; PW 7-Ms. Pallavi (hostile); PW 8-Dr. Poornima, Medical Officer, who examined the prosecutrix and prepared the medical report (Exhibit 23); PW 9-PSI Mr. Yogesh Patil (S.H.O.), who recorded the statement of PW 1 and registered the FIR and arrested the accused under arrest panchanama (Exhibit 26); PW 10-Mr. Nobendu Roy, who sold his motorcycle to the appellant, which was used in the commission of the offence; PW 11-API Sachin Suryawanshi, the Investigating Officer, who visited the spot and



prepared the spot panchanama, collected samples of soil, took the motorcycle of the appellant in custody, seized the clothes of the victim and the appellant, recorded statements of witnesses, sent the prosecutrix and the appellant for medical examination, sent the samples to the Chemical Analyser, and after investigation, submitted charge-sheet; PW 12-Mohd. Hussain Choudhary, panch to the seizure panchanama of the appellant's clothes (Exhibit 34) and PW 13-Mrs. Sanchita More, panch to the seizure panchanama of the clothes of the prosecutrix (Exhibit 32) in para 1.

The defence of the appellant was that of denial and false implication. After recording of the 313 statement of the appellant and after hearing the parties, learned Sessions Judge convicted the appellant as stated aforesaid.

3 Mr. Aniket Vagal, learned counsel for the appellant does not press the appellant's conviction recorded under Sections 363 and 366 of the Indian Penal Code. He submits that as far as the offence under Section 376 is concerned, the act of the appellant would not fall within the purview of Section 375 and that, at the highest, taking into consideration the evidence on record, the act of the appellant would be one under Section 354 of the Indian Penal Code.



4 Ms. Devyani Kulkarni appearing for the respondent No. 2 vehemently opposes the submissions advanced by the learned counsel for the appellant. She submits that the evidence of the prosecutrix is duly corroborated by the medical case papers and that the evidence of PW 8-Dr. Poornima would clearly show that the prosecutrix was sexually assaulted and as such the offence would be one under Section 376.

5 Mr. Gavand, learned A.P.P reiterated the submissions advanced by the learned counsel for the respondent No.2.

6 Perused the evidence and the relevant documents with the assistance of the learned counsel for the parties. As stated aforesaid, the appellant is not challenging his conviction under Sections 363 and 366 of the Indian Penal Code and hence, it is not necessary to delve into the evidence pertaining to the same.

7 As far as the submission of the learned counsel for the appellant as to whether the offence would be one under Section 376 or would be a lesser offence, the relevant witnesses which will have to be considered are PW 1-complainant, PW 2-the prosecutrix, PW 8-Dr. Poornima and PW 6-Kalpana Gholap, as well as the CA and DNA reports.



8 The fact that PW 2-prosecutrix, aged 21 years was intellectually challenged is not in dispute. PW 1-complainant and mother of the prosecutrix has stated that on the date of the incident i.e. 8th January 2016, when she returned home, she did not find her daughter (prosecutrix) at home; that she thought her daughter may have gone to the temple, as she would visit the temple often; that as the prosecutrix did not return, she and her family members started searching for her; that at about 10:00 p.m, the prosecutrix returned home; that she was not in a proper condition and that her hair were disheveled. When PW 1 questioned her daughter (prosecutrix), she disclosed that one boy had taken her on bike to Ghosh compound and had sexually assaulted her. When asked to show the boy, she pointed out at the boy (appellant), pursuant to which, people held him and called the police by dialing 100. She has further stated that the police arrived on the spot and took all of them (including the appellant) to the police station.

A perusal of the cross-examination reveals that instead of giving any suggestions to the said witness/putting up the appellant's defence, the witness was put questions, resulting in the witness reiterating her evidence that has come in her examination-in-chief and infact more.



Para 8 of PW 1's cross is reproduced hereunder :

“8. My daughter is mentally ill, doctor told us that jar ti 10 varshachi zali tar ticha mendu (brain) paach varshacha asel. I can understand whatever she talk. I can understand her language. When my daughter meet me on the road, I saw her position. Her hair was scattered. There was blood stains on her clothes to back side. I gave her slap, where were you. She told me not to slap her. She told me that mala ek mulga gadi varti gheun jangala madhe gela, ani maze kapade kadhale, to mazya angavar aala ani chati dabali, ani tyane tyache ling aat madhe ghatle, me nako nako bolat hoti.”

Cross-examination of a witness is to elicit truth or discredit the witness. Infact, having regard to the cross-examination of PW 1, there is nothing in the said cross-examination to disbelieve her testimony.

9 PW 2-prosecutrix, intellectually challenged and the same is not seriously disputed. She has stated that she had been to Kalimata Mandir and that one person told her *“yete ka Mela baghayla”* to which, she replied *“mi nahi yenar Mummy marnar”*. She has further stated that the appellant held her hand and took her to the *Mela* and thereafter in the bushes, disrobed himself as well as the prosecutrix and slept on her. She has stated that when she returned home, she was holding her underwear in her hand.



The prosecutrix has identified the appellant during trial as the same person who committed sexual assault on her.

There is hardly any cross-examination of this witness. The suggestion that she was falsely deposing has been denied by the prosecutrix. There is also no cross to the evidence of the prosecutrix that her statement was recorded by the Magistrate under Section 164 of the Criminal Procedure Code. The disclosure made by the prosecutrix with respect to sexual assault on her is duly corroborated by PW 6-Kalpana.

10 According to the learned counsel for the appellant, since the prosecutrix had not given the details of the sexual assault in her evidence, the offence would not be one under Section 376 of the Indian Penal Code but would be a lesser offence.

11 A perusal of the evidence of PW 8-Dr. Poornima reveals that the prosecutrix had given history of sexual assault by the appellant on 8th January 2016 between 7:00 p.m to 11:00 p.m. The history given by the prosecutrix to the doctor and as revealed in the case papers (Exhibit 23) is as under :



“Sexual assault by unknown person named Farukh Abdul Rehman Shaikh aged 27 yrs on 8/1/16 at between 7 pm-11 pm. Victim has changed clothes but not taken bath since incidence. Victim gives H/o penovaginal sexual intercourse. No h/o physical assault. Being mentally challenged, victim is unable to narrate the above incidence properly.”

The case papers further reveal that there were injuries present to the hymen and the position of tears was 4, 8 O’Clock.

12 It appears from the evidence on record that the appellant had inserted his finger in the prosecutrix's private part, which act is squarely covered under the definition of the offence 'rape', as defined under Section 375 of the Indian Penal Code. The medical papers of the prosecutrix reveal that there was injury to the hymen and the position of tear was 4, 8 O'Clock. The fact that the appellant had inserted his finger is also duly corroborated by the DNA report (Exhibit 40). The result of the analysis shows that one of the mixed DNA profile obtained from Exhibit 1 nail clippings of right hand of appellant matched with control DNA profile obtained from Exhibit 2 nail clippings of left hand and Exhibit 4 urethral swab of appellant. Another DNA profile from the mixed DNA profile obtained from Exhibit 1 nail clippings of right hand of appellant matched with control DNA profile



obtained from Exhibit 7 nail clippings of right hand and Exhibit 8 nail clippings of left hand of the prosecutrix in F.S.L. ML. Case No. DNA-484/16. Similarly, the soil found on the clothes of appellant and prosecutrix matched the earth collected from the spot where the sexual assault took place. The same is evident from the Forensic Science Laboratory report (Exhibit 41). The said evidence gives credence to the prosecutrix's case that she was sexually assaulted by the appellant. It hardly matters in the facts, and having regard to the evidence, that there was no penovaginal intercourse. Fingering of the vagina also constitutes an offence under the law.

13 What cannot be lost sight of, is that the appellant was apprehended immediately on the very day, soon after the incident; the fact that the FIR was also lodged on the very same day and the prosecutrix was taken for medical examination on 9th January 2016 within 24 hours and was examined by the doctor. What also cannot be lost sight of, is the fact that the prosecutrix was intellectually challenged. In the facts, having regard to what is stated aforesaid i.e. the evidence on record, merely because the prosecutrix has not given minute details of sexual assault on her, would not absolve the appellant of the offence under Section 376.



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14 Considering the material on record, the conviction of the appellant under Section 376 of the Indian Penal Code, cannot be said to be unwarranted. Accordingly, the judgment and order of conviction and sentence is upheld. The Appeal is dismissed.

REVATI MOHITE DERE, J.