

IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 493 OF 2019

Hanumant S/o. Vithoba Bangar,
Age : 26 years, Occu. Agri & Labour,
R/o. Khokarmoha, Tq. Shirur,
District Beed.

... Appellant

VERSUS

The State of Maharashtra

... Respondent

AND

CRIMINAL APPLICATION NO. 1702 OF 2019

IN

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Hanumant S/o. Vithoba Bangar,
Age : 26 years, Occu. Agri & Labour,
R/o. Khokarmoha, Tq. Shirur,
District Beed.

... Appellant

VERSUS

The State of Maharashtra

... Respondent

.....

In both matters

Shri. Nilesh S. Ghanekar, Advocate for the applicant/appellant

Shri. S. J. Salgare, APP for respondent/State

.....

CORAM : A. M. DHAVALA, J.

DATE : 26TH JUNE, 2019

PER COURT :-

1. Heard Shri. Nilesh S. Ghanekar, learned counsel for the
appellant and Shri. S. J. Salgare, learned APP for respondent/State.

2. Considering the important issue of mode of recording of evidence of deaf and dumb victim girl, the appeal is **admitted**.

3. With the consent of the parties, the matter is taken up for final disposal at the stage of admission.

4. The appellant has been convicted for offence u/s 376(2)(1) IPC for committing rape on a deaf and dumb girl and is sentenced to suffer RI for 10 years and to pay fine of Rs. 10,000/-, in default to suffer RI for three months. He is also convicted for offence u/s 323 IPC. On 16.11.2016, the victim's brother lodged FIR at Shirur Police Station, Tq. Shirur Kasar, Dist. Beed. As per the FIR, the informant had five sisters and the victim was deaf and dumb. She was aged 23 years. Since 7-8 days prior to the FIR, the victim girl had abdominal pains and was feeling weakness. When she was taken to the Civil Hospital, it was disclosed that she was pregnant for five months. When the informant and his parents made enquiry with her as to with whom she had relations, she pointed by signs the house of the accused and stated that the person residing there had entered her house before Ramjan and used force to press her neck and thereafter committed sex with her. FIR was registered at Crime No. 226/2016

and was investigated into. The investigation revealed that the victim was illiterate and was not even knowing the scientific sign language of the deaf and dumb persons. Her statement was recorded through an interpreter from mentally retarded school and its video recording was done.

5. Shri. S. J. Salgare, learned APP submits that, the victim girl has delivered a child and there was DNA testing which proved that the accused was biological father of the child. The accused has taken a defence of total denial. Shri. Ghanekar, learned counsel for the appellant submits that, when witness or victim girl is deaf or dumb, her evidence should be recored as per Section 119 of the Evidence Act. He relies on the judgment of the Apex Court in **State of Rajasthan vs. Darshan Singh @ Darshan Lal** reported in 2012 AIR SCW (S.C.) 3036, wherein it is laid down that,

21. To sum up, a deaf and dumb person is a competent witness. If in the opinion of the Court, oath can be administered to him/her, it should be so done. Such a witness, if able to read and write, it is desirable to record his statement giving him questions in writing and seeking answers in writing. In case the witness is not able to read and write, his statement can be recorded in sign language with the aid of interpreter, if found necessary. In case the interpreter is provided, he should be a person of the same surrounding but should not have any interest in the case and he should be administered oath.

6. Shri. Ghanekar submits that, since the victim girl was illiterate, first course to record her evidence in writing was not possible but the ld. trial Judge committed error in recording her statement with the aid of interpreter without giving him oath. Besides, the interpreter was the same person who had recorded her statement u/s 161 Cr.P.C. The ld. trial Judge was bound to record the signs made by victim girl while giving answers. He argued that, though there is no specific defence that the act was committed with the consent, the prosecution is bound to show that if there was sexual intercourse it was against the will or without the consent of the victim girl. She was major and cannot be presumed to be mentally retarded or idiot. She is capable of giving consent and if the act has taken place with her consent, there would be no offence. He points out that, the victim girl had not disclosed the incident to anybody for a period of more than five months. Even the FIR was not immediately lodged after knowledge of her pregnancy. Shri. Ghanekar relies on the evidence of Dr. Babasaheb Dhakane (PW6) to submit that the pregnancy of the victim girl was detected by her relatives in August-2016 only whereas the FIR is filed in November - 2016. The victim's brother has turned hostile. He also pointed out that, as per Section 119, it is mandatory to record the evidence of deaf and dumb person



with videography. This has not been followed. The victim girl was not in a position to tell her name and age. No questions were asked to make enquiry about her intellectual capacity. Considering the facts, there was no fair trial and the accused has been prejudiced.

7. Per contra, learned APP submits that, statement of deaf and dumb was recorded with the help of interpreter and it was also videographed. Her evidence is supported with DNA report shows that the accused is biological father of the child begotten by her. He refers to the evidence of PW3 that, she has identified the accused at the time of her evidence and showed by signs that he had pressed her throat and had moved her hand on her stomach indicating that the accused is responsible for her pregnancy.

8. Considering the facts, the most material issue in this matter is, whether PW3 - the victim girl was consenting party or not? She was major and it is nobody's case that she was not sound. She was capable of giving consent. There are some facts which may support the defence story that she was consenting as there was delay in reporting the matter to police. Nonetheless, there can be reasons which can be accepted for delay in lodging the FIR in such matters.



9. I find that, the ld. trial Judge while dealing with a case of deaf and dumb girl ought to have considered the provisions of Section 119 and the apex court's judgment on the same. The trial Court did not verify her understanding capacity. Though evidence of the witness was recorded by appointing an interpreter, the ld. trial Judge has not followed certain conditions. No oath was administered to the interpreter that he would fully and correctly interpret the questions put to the witness and shall also fully and correctly interpret the answers given by the witness in sign language to the court. As per Section 119 of Evidence Act amended from 03.02.2013, the proviso lays down that, when the witness is unable to communicate verbally, the court shall take the assistance of an interpreter or a special educator in recording the statement, and such statement shall be videographed. The apex Court has observed that, the Judge has not only to record the interpretation given by the interpreter but also he has to record the signs made by the witness. This is difficult and now the videography will solve the problem faced by the Judge in recording the signs. These provisions are not followed.

10. Considering the facts, it is difficult to determine whether the prosecutrix was a consenting party or not. In the light of these

facts, the conviction cannot be sustained and the matter will have to be remanded to the Sessions Judge with direction to record the evidence of PW3-victim girl afresh by following the provisions of Section 119 as interpreted by the apex Court in Darshan Singh @ Darshan Lal's case (supra). The Judge shall record the competency to understand and interpret the sign language of deaf and dumb person. The Judge shall give oath to the interpreter for correctly interpreting the questions to the witnesses and the answers given by the victim to the court. Once it is done, the evidence shall be recorded and the same shall be videographed. The prosecution shall make arrangement of the videography of the evidence. The focal point of the evidence should be, whether the act was with consent or without consent. However, the parties shall be at liberty to lead evidence and challenge the same on any other legally permissible point according to law.

11. Considering the facts the appeal is partly allowed. The conviction is set aside. The matter is remanded to the trial Court to record evidence of the prosecutrix again and decide the matter afresh. Since the accused is in Jail from 17.11.2016, he is permitted to file fresh Bail Application which the trial Court shall consider on its own merits.

12. The appellant is directed to remain present in the trial Court on 08.07.2019. The ld. Trial Judge shall hear the matter expeditiously and shall dispose it of within one month from the date of receipt of record and appearance of the parties. The Registrar shall forward the record immediately.

13. In view of disposal of main appeal, nothing survives in the connected Criminal Application and same stands disposed of.

[A. M. DHAVAL]
JUDGE

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