Bombay High Court
Sunil Ramdas Salve vs The State Of Maharashtra on 1 September, 2017
Bench: Sangitrao S. Patil

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.420 OF 2015

Sunil s/o. Ramdas Salve,
Age : 21 years, Occ. Nil,
r/o. Ramjan-Chincholi,
Tq. Karjat, Dist. Ahmednagar,
presently in Yerwada Central
Prison, Pune ..Appellant

Vs.

The State of Maharashtra,
Through Police Station Officer,
Karjat Police Station,
Dist. Ahmednagar ..Respondent

Mr.N.V.Gaware, Advocate for appellant

Mr.G.O.Wattamwar, A.P.P. for respondent

CORAM : SANGITRAO S. PATIL, J.
RESERVED ON : AUGUST 23, 2017
PRONOUNCED ON : SEPTEMBER 01, 2017

JUDGMENT :

Heard

2. The appellant has assailed the legality and correctness of the judgment and order dated 29.04.2014 passed in Sessions Case No.278 of 2013 by 2 cri.appeal.420-15 the learned Additional Sessions Judge, Ahmednagar, whereby he has been convicted for the offences punishable under Section 376(2)(i) of the Indian Penal Code ("I.P.C.", for short) and under Section 3 punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 ("POCSO Act", for short), and sentenced for the offence punishable under Section 376(2)(i) of the I.P.C. only, to suffer rigorous imprisonment for ten years and to pay a fine of Rs.10,000/- (Rs.Ten Thousand), in default to suffer rigorous imprisonment of one year.

3. The victim girl is the daughter of the informant namely, Intaj w/o. Shabbir Shaikh, r/o. Village Chincholi-Ramjan, Tq. Karjat, District Ahmednagar. The victim was aged about 14 years at the time of the incident. She was studying in 5 th standard at Parewadi, Tq. Karmala, Dist. Solapur. She is hearing impaired and suffering from mild mental retardation. She was not able to speak fluently.

3 cri.appeal.420-15

4. On 25.06.2013 prior to about 8.00 p.m., the victim had gone to purchase a stove-washer to the shop of one Balasaheb Damodar Kale at village Chincholi-Ranjan. As she did not come back even after a considerable time, the informant went to the shop of Balasaheb Damodhar Kale to see her. The said shop was closed at that time. Balasaheb Kale was standing near the shop. The informant asked Balasaheb Kale about the victim, whereon he informed that she had left his shop before about 15 minutes. The informant then searched for the victim in the nearby places. At that time, she heard the shouts of the victim 'Mummi, Mummi' from the backside of a primary school building. The informant then went to the backside of the school building. At that time, the victim rushed towards her. She was crying. On being asked, she informed that the appellant took her in the dark behind the school building, removed her Salwar and knicker and committed rape on her. When she tried to 4 cri.appeal.420-15 raise shouts, the appellant pressed her mouth. Thereafter, the informant along with the victim girl and her nephew namely, Amin Shaikh, went to the house of the appellant to question him about the incident. At that time, the appellant admitted his mistake and beg for pardon. Since it was a night time, the informant did not immediately approach the Police Station. On the next day, she lodged the F.I.R. against the appellant in respect of the above- mentioned incident.

5. On the basis of that FIR, Crime No.I-120 of 2013 came to be registered against the appellant for the above-mentioned offence. The investigation followed. The spot panchnama was prepared. The victim and the appellant were medically examined. The garments of the victim and that of the appellant came to be seized and sent to the Chemical Analyst for analysis and report. The statements of the witnesses were recorded. The school record showing the date of birth of the victim came to be collected.

5 cri.appeal.420-15 After completion of the investigation, the appellant came to be charge-sheeted for the above-mentioned offences.

6. The learned trial Judge framed charges against the appellant for the above-mentioned offences vide Exh.7 and explained the contents thereof to him in vernacular. The appellant pleaded not guilty and claimed to be tried. His defence is that of total denial and false implication on the say that he had demanded back the amount of hand-loan from the informant, and therefore he was involved in this case.

7. The prosecution examined eight witnesses to bring home guilt of the appellant. The appellant also examined three witnesses in his defence. After scrutinizing the evidence on record, the learned trial Judge held that the prosecution established the above-mentioned offences against the appellant beyond reasonable doubts. He, therefore, convicted and 6 cri.appeal.420-15 sentenced the appellant for the said offences, as stated above.

8. The learned Counsel for the appellant submits that the age of the victim has not been duly proved by positive and dependable evidence showing that she was aged about 14 years at the time of the incident. According to him, the extract of the general register and the certificate produced by the

In-charge Headmaster of Zilla Parishad Primary School, Parewadi are suspicious documents. Relying on the judgments in the cases of Sandeep Janaji Konde Vs. State of Maharashtra, All.M.R. (Cri.) 1433 and Sindhu Sukhdeo Waghmare Vs. State of Maharashtra, 2005 All.M.R. (Cri.) 2240, he submits that the school record produced by the In-charge Headmaster should not have been relied on by the learned trial Judge. He submits that no ossification test or radiological examination was done in order to ascertain the age of the victim. In the absence of such test, examination and any reliable evidence showing age of the victim, 7 cri.appeal.420-15 it cannot be said that the victim was below 16 years of age at the time of the incident. The learned Counsel further submits that the victim is a mentally retarded person. She is suffering from loss of hearing. She was not in a position to speak fluently. In the circumstances, as per the provisions of sub- section (3) of Section 26 of the POCSO Act, the learned trial Judge should have taken assistance of a Translator or Interpreter, while recording the evidence of the victim. According to him, the evidence of the victim recorded by the learned trial Judge, without seeking assistance of Translator or Interpreter, is not at all admissible. In the absence of proper recording of the evidence of the victim, the appellant should not have been connected with the alleged incident. He submits that the C.A. reports do not incriminate the appellant. The finding of semen stains on the clothes of the appellant by themselves would not connect him with the alleged incident of rape. In support of this contention, he relied on the 8 cri.appeal.420-15 judgments in the cases of State of Maharashtra Vs. Dadarao s/o. Bapurao Jivtode and ors., 2006 All.M.R. (Cri.) 735 and Ashok Premaji Nirbhawane Vs. The State of Maharashtra, 2014 (4) Mh.L.J.(Cri.) 407. The learned Counsel pointed to the evidence of the defence witnesses namely, Nana Bobade and Rohidas Salve, who specifically states that the amount of Rs.50,000/- was lent by the appellant to the informant in the month of January, 2013 in their presence. Nana Bobade further states that on the day of the incident at about 8.00 p.m., the appellant and himself had gone to the house of the informant to demand that amount. At that time, their had been exchange of hot words between the informant and the appellant. She did not return the amount of hand-loan and on the next day, she lodged the FIR against the appellant. He submits that the FIR has been lodged at 10.00 p.m. on 26.06.2013. No explanation has been given for the delay of more than one day in filing the FIR. He submits that a false FIR came to be 9 cri.appeal.420-15 lodged against the appellant, only because he demanded back the amount of hand-loan from the informant. The learned Counsel, therefore, submits that the appellant may be acquitted of the above- mentioned offences.

9. On the other hand, the learned APP submits that the informant specifically states that the victim was aged of 14 years at the time of the incident. The victim also states that her age as 14 years when she was examined before the trial Court. The Investigating Officer, A.P.I. Rakh (PW 7) also states that on the basis of the school record of the victim, it was confirmed that she was aged about 14 years at the time of the incident. The evidence of these witnesses about the age of victim has not been challenged in their cross-examination. Their evidence is supported by the extract (Exh.26) from the general register of the school, where the victim was studying, wherein her date of birth is mentioned as 03.08.1999. The In-charge Headmaster had brought the 10 cri.appeal.420-15 original general register. The entry about admission of the victim in that register was taken in the ordinary course of business. There was no reason to prepare false record when the victim was admitted in that school much prior to the date of the incident, when it was not even anticipated that the victim may face such incident. Relying on the judgment in the case of Arjun Singh Vs. State of H.P., AIR

2009 SC 1568, he submits that the entry in the school register has evidenciary value and can be considered for determination of age of the victim. In the circumstances, according to him, it was not necessary to subject the victim to ossification test or radiological examination for ascertaining her age. He submits that the defence of the appellant is not at all natural, probable and acceptable. There is no documentary evidence to show that the appellant lent Rs.50,000/- to the informant at any point of time. A suggestion was given to the informant on behalf of the appellant that she had taken Rs.10,000/- from the 11 cri.appeal.420-15 appellant and when he insisted her to return that amount, she lodged a false FIR against him. This suggestion has been flatly denied by the informant. Moreover, this suggestion is not consistent with the evidence of Nana Bobade (DW 2) and Rohidas Salve (DW3) that the appellant had lent Rs.50,000/- to the informant. He submits that the victim was quite competent to depose before the Court. The learned trial Judge got it confirmed before recording her evidence, about her competency to depose as a witness. She has faced the cross-examination effectively. In such circumstances, it was not necessary to take assistance of a Translator or Interpreter for recording her evidence, as prescribed under sub-section (3) of Section 26 of the POCSO Act. He submits that there was no reason for the informant and the victim to state false against the appellant. The informant has given explanation that due to night time, she did not approach the police station immediately after the incident. He submits that the 12 cri.appeal.420-15 evidence on record sufficiently proves beyond the reasonable doubts that the appellant committed rape on the victim. He supports the impugned judgment and order and prays that the appeal may be dismissed.

AGE OF THE VICTIM GIRL

10. The victim girl states at Exh.33 as PW 6 on solemn affirmation her age as 14 years. The informant (PW 1) (Exh.13) also states that the victim was 14 years old. In the FIR (Exh.14) also, the age of the victim is mentioned as 14 years. Dr.Pushpa Narote (PW3) (Exh.17), who examined the victim on 26.06.2013 also mentions the age of the victim as 14 years in her deposition as well as in the Certificate (Exh.18). A.P.I. Rakh (PW 7)(Exh.34) states that on the basis of the school record of the victim, he got it confirmed that she was aged about 14 years at the time of the incident. The evidence of these witnesses about the age of the victim has not at all been challenged in their cross-examination. It is not even 13 cri.appeal.420-15 suggested to them that the victim was more than 16 years of age. Shahaji Deokate (PW 5)(Exh.25), who happened to be the In-charge Headmaster of the Zilla Parishad Primary School, Parewadi, deposes that the victim was admitted in his school as a fresher in the first standard on 30.08.2007 by her mother and her date of birth is 03.08.1999. He had brought the original general register of the school with the extract (Exh.26) thereof in respect of the entry of the victim in that school. On that basis of that record, he issued the Certificate (Exh.27) showing the date of birth of the victim as 03.08.1999.

11. The learned Counsel for the appellant points out to Entry No.1215 in respect of the victim from the extract (Exh.26), wherein the name of her mother is shown as "Lintaj". He submits that the name of the informant is "Intaj". Therefore, according to him, the said entry cannot be said to be that of the victim. He further submits that in column no.6 of the extract (Exh.26), there has been interpolation and 14 cri.appeal.420-15 the student concerned is shown to have been admitted for the first time in that school. Therefore, according to him, the extract (Exh.26) from the admission

register cannot be believed.

12. I am not inclined to accept this contention. There may be some difference in recording the name of the informant because of clerical mistake in the said column of the extract (Exh.26) showing it as 'Lintaj' instead of 'Intaj' being the mother of the victim. However, the name of the father of the victim has been correctly recorded as Shabbir Shaikh. There is no dispute that the name of the father of victim is Shabbir Shaikh. The original general register was also produced by Deokate (PW 5) when he was examined before the Court. Entry no.1215 in respect of the victim has been taken in the ordinary course of business by the school authorities. The said entry has been taken on 30.08.2007 i.e. prior to six years of the date of the incident. It was not even anticipated at that time that such entry would be 15 cri.appeal.420-15 required to be produced before the Court to prove the age of the victim. The said entry would certainly be admissible under Section 35 of the Indian Evidence Act in proof of the age of the victim. On the basis of the date of birth of the victim recorded in the general register of the school, her age would be 13 years and 10 months at the time of the incident. In view of this documentary evidence coupled with the unchallenged above-referred oral evidence of the victim and other three witnesses, I have no hesitation to hold that the victim was 14 years of age or even less than 14 years of age at the time of the incident.

13. In the case of Sandeep Janaji Konde (supra), the age of the victim was sought to be proved on the basis of her own statement and the school leaving certificate. The entries in the school register were not at all produced. There was no material to prove that the school leaving certificate contained accurate record of entries in the general register 16 cri.appeal.420-15 maintained by the school. The headmaster, who issued the certificate, also was not examined. In the circumstances, it was held that the prosecution failed to prove that the victim was below 16 years of age at the time of the incident. In the present case, the extract (Exh.26) has been duly proved by producing the original general register before the Court. The In-charge Headmaster himself appeared as a witness to prove the entry in the extract (Exh.26). Moreover, there is unchallenged oral evidence of the above-named witnesses about the age of the victim. In the circumstances, the judgment in the case of Sandeep Janaji Konde (supra) would be of no help to the appellant to discard the evidence of the prosecution that has been produced to prove the age of the victim.

14. In the case of Sindhu Sukhdeo Waghmare (supra), the prosecution examined the Headmaster of the school, where the prosecutrix was studying. He produced the original register and on the basis of 17 cri.appeal.420-15 the said register, he produced the school leaving certificate of the prosecutrix showing her date of birth. In the cross-examination, he admitted that the police did not record his statement and did not collect copy of the school leaving certificate. He further admitted that the name of the school was not mentioned in the register. He then admitted that it was not the first entry of the prosecutrix when she took admission to the school. He states that initially, the prosecutrix has taken admission in Zilla Parishad Marathi School and thereafter, she took admission in English school. In the circumstances, his evidence was disbelieved. It was held that the Headmaster was examined to fill-up the lacunae in the prosecution case, though his name did not figure in the list of the witnesses and though his statement was not recorded. It was further observed that neither the mother nor the prosecutrix state that she was minor below 16 years of age at the time of the incident.

18 cri.appeal.420-15

15. The facts in the present case are totally distinguishable. In the present case, the victim and her mother have specifically stated about the age of the victim, which evidence has remained unchallenged. It is not that Deokate (PW 5) was not examined by the Investigating Officer as witness during the course of investigation. The original general register showing the name of the school of the victim was produced before the Court. The Certificate (Exh.27) also has been produced showing the name of the school and the date of birth of the victim. In the circumstances, the judgment in the case of Sindhu Sukhdeo Waghmare (supra) would not assist the appellant to through suspicion on the evidence produced by the prosecution about the age of the victim.

16. In view of the above evidence, I have no hesitation to hold that the victim was below 16 years of age at the time of the incident.

19 cri.appeal.420-15 APPLICABILITY OF SECTION 26(3) OF THE POCSO ACT

17. As per sub-section (3) of Section 26 of the POCSO Act, the Magistrate or the police officer, as the case may be, may, in the case of a child having a mental or physical disability, seek the assistance of a special educator or any person familiar with the manner of communication of the child or an expert in that field, having such qualifications, experience and on payment of such fees as may be prescribed, to record the statement of the child.

18. In the present case, the informant states that the victim is hearing impaired to some extent. She cannot speak fluently. The informant does not state that the victim is mentally challenged. The victim has been examined by the learned trial Judge at Exh.33. In the preliminary examination, the learned trial Judge made following observations :-

" Witness sought to be examined

is 14 years old, minor girl. As per

20 cri.appeal.420-15

the report of Medical experts, her

hearing is impaired since childhood and as per the report of Psychologist, she is having mild mental retardation. On this background, I put some questions to ascertain her capability to give evidence and to know her views about sanctity of oath. No doubt, she has replied the questions put to her about name, place where she resides, the standard in which she is studying, Quran and its importance, but replied all these questions in cryptic manner, that too after asking those questions

repeatedly. That itself would not make her incompetent witness. Thus, it is necessary to record her evidence after administering oath."

19. As per Section 118 of the Indian Evidence Act All persons shall be competent to testify unless 21 cri.appeal.420-15 the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. The explanation under Section 118 of the Indian Evidence Act makes it clear that even a lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

20. Though it is observed by the learned trial Judge that the victim was having mild retardation, he found in preliminary examination of the victim, that she was capable to give the evidence. As seen from the examination-in-chief, the victim has deposed verbally as well as by making signs/gestures, whenever necessary. From the manner in which the victim deposed before the Court, as exhibited from her examination-in-chief as well as the cross- examination, it is quite clear that she was able to 22 cri.appeal.420-15 understand the questions put to her and give rational answers thereto. She has effectively faced the cross- examination. The learned Counsel for the appellant did not raise any objection before the trial Court on the ground that the victim was not able to answer or understand the questions that were being put to her. In the circumstances, in my view, it was not necessary to resort to the provisions of sub-section (3) of Section 26 of the POCSO Act for recording the evidence of the victim.

OCCULAR EVIDENCE

21. The victim deposes that after purchasing the washer from the shop she was going back to her house. At that time, the appellant approached her, took her kiss and pressed her chest. Thereafter, he removed her knicker and that of himself and committed sexual intercourse with her. She used a Marathi word " " for the act of sexual intercourse. On hearing her shouts, her mother came and took her to home. She 23 cri.appeal.420-15 informed her mother about the aforesaid act committed by the appellant with her. The victim could not give the exact date, day and time of proceeding to the grocery shop for purchasing the washer. She denied the suggestions put to her by the learned Counsel for the appellant in her cross-examination. Considering the disability suffered by the victim and her age, it was not expected of her to give all the details about the date, day and time as well as the description of the clothes of the appellant and that of herself. She denied that she was tutored by the informant to speak against the appellant. The evidence of the informant appears to be quite natural. She would not have thought of making any false allegations against the appellant had he not been involved in the incident in question.

22. The informant specifically states that the victim had gone to the shop of Balasaheb Kale (DW 1) for purchasing washer of stove. Since the victim did not come back home for a considerable time, she went 24 cri.appeal.420-15 to the shop of Balasaheb Kale (DW 1) to inquire about the victim. The shop was closed. Balasaheb Kale (DW1) was standing near his shop. On inquiry, he informed that the victim had left his shop just prior to 15 minutes. Then the informant started searching for the

victim. At that time, she heard shouts 'Mummi Mummi' from behind a Marathi school building. Then, the victim also came towards her. She was weeping. On being asked by her, the victim told that the appellant took her to the backside of the school building, removed her knicker, salwar, gagged her mouth and committed rape on her. Thus, the evidence of the informant about the conduct of the victim, subsequent to the incident of rape, is quite relevant and admissible in view of the illustration (j) under Section 8 of the Indian Evidence Act. Furthermore, the informant states that after the incident, she went to the house of the appellant with the victim and her nephew Amin Shaikh. On being asked, the appellant tendered apology saying that he committed 25 cri.appeal.420-15 mistake. This reaction of the informant also fortifies the version of the victim in respect of the misdeeds of the appellant. Thus, the evidence of the informant corroborates the version of the victim in respect of occurrence of the incident in question.

MEDICAL EVIDENCE

23. Dr.Pushpa Narote (PW 3)(Exh.17) states that on 26.06.2013 at about 10.05 p.m., she examined the victim in the sub-District Hospital at Karjat and found that her hymen was absent and there was evidence of vaginal penetration. According to her, she issued Certificate (Exh.18). She collected the samples of vaginal swab, parineal swab, blood in plain bulb, blood in citrate bulb, nails pubic hairs etc. and sent them to the Chemical Analyst. After perusal of the C.A. reports in respect of those samples, she gave final opinion (Exh.20) that there was evidence of vaginal penetration. It has come in her cross-examination that the hymen may be absent 26 cri.appeal.420-15 because of various reasons i.e. cycling, swimming, fast running, long jump, high jump, etc. and that absence of hymen cannot be a decisive factor to decide rape or sexual intercourse. She further states that she gave opinion as to vaginal penetration and that it may be due to sexual intercourse or by climbing and swimming etc. According to the learned Counsel for the appellant, the medical evidence does not establish positively that sexual intercourse was committed with the victim girl. This statement cannot be accepted. There is absolutely no evidence to show that on the day of the incident, the victim had indulged in cycling, swimming, fast running, long jumping, high jumping, etc. Therefore, alternative possibilities of absence of hymen or opinion as to vaginal penetration suggested on behalf of the appellant, would not come in the way of the prosecution to establish that the victim was subjected to sexual intercourse only.

27 cri.appeal.420-15

24. The learned Counsel for the appellant tried to challenge the evidence of Dr.Pushpa Narote (PW 3) on the ground that while obtaining consent for physical examination of the victim, thumb mark of the informant has not been attested. It has come in the evidence of Dr.Pushpa Narote (PW 3) that the victim was produced in the Sub-District Hospital, Karjat by A.P.I. Rakh (PW 7) with a requisition letter. She further states that she examined the victim clinically and gynecologically after obtaining the written consent of her mother Intaj Shaikh. The letter (Exh.45) is the office copy of the letter received by Dr.Pushpa Narote (PW 3), whereby she was requested to conduct the medical examination of the victim. The said office copy bears her signature. With this strong evidence on record, there is no room to raise doubt about production of the victim before Dr.Pushpa Narote (PW 3) for medical examination on 26.06.2013, as mentioned in the Certificate (Exh.18). Only because

the thumb mark of the informant in the 28 cri.appeal.420-15 consent form is not attested, the evidence of Dr.Pushpa Narote (PW 3) cannot be seen with suspicion. This medical evidence fully supports the version of the victim that she was subjected to penetrative sexual assault at the time of the incident.

25. As per Section 29 of the POCSO Act, where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved. It is true that the appellant was under an obligation to disprove the case of the prosecution beyond doubt. He was expected to bring some evidence on record to make his evidence probable and acceptable.

26. The appellant examined Balasaheb Kale (DW 1) (Exh.48), the shop-owner, to whom the victim had gone 29 cri.appeal.420-15 to purchase washer of stove on the day of the incident. He simply states that his shop was closed from 24.06.2013 to 26.06.2013 as he had gone to Pandharpur for darshan of Lord Pandurang. It seems that this is a got-up witness coming forward to support the appellant. This witness must be keeping accounts of his shop. The said accounts would have disclosed, whether that shop was closed on the above- mentioned dates. He has not produced those accounts. His bare version that his shop was closed on those dates does not inspire confidence. The informant specifically states that this witness met her on the day of the incident, when she went to his shop to inquire about the victim and that he had told that the victim had left just prior to 15 minutes from his shop. There was no reason for the informant to state false about her visit to the shop of this witness and interaction made with him on the day of the incident.

27. Nana Bobade (DW 2) and Rohidas Salve (DW 3) states that in the month of January, 2013, the 30 cri.appeal.420-15 appellant had lent Rs.50,000/- to the informant as hand-loan. There is absolutely no documentary evidence in proof of this hand-loan translation. The appellant was aged 19 years at the time of the incident. Nana Bobade (DW 2) admits that the appellant was not in any private service. There is nothing on record to show that the appellant was having sufficient income, from which he could have lent Rs.50,000/- to the informant. The learned Advocate for the appellant, on the instructions of the appellant, cross-examined the informant, wherein he suggested that she had taken Rs.10,000/- from him. This discrepancy in the amount of hand-loan itself falsifies the defence of the appellant that he had lent Rs.50,000/- to the appellant and when he demanded that amount, the informant lodged a false report against him. This defence is not at all plausible because the informant would not have thought of lodging a false report against the appellant at the cost of dignity of her daughter and 31 cri.appeal.420-15 herself. The appellant, thus, has totally failed to prove anything contrary to what has been alleged against him by the victim and the informant. The presumption under Section 29 of the POCSO Act, thus, strengthens the case of the prosecution.

28. The garments of the victim and that of the appellant were sent to the Chemical Analyst for analysis and report. There were few semen stains on the middle portion of underwear of the appellant, however, no semen stains were found on the underwear of the victim. The blood of the victim also was not found on the underwear of the appellant. The C.A. report would be of no help to

the prosecution to incriminate the appellant. The learned Counsel for the appellant rightly relied on the judgment of Ashok Premaji Nirbhawane (supra), wherein it is observed that the finding of semen stains on the clothes of the accused, by itself, would not incriminate him.

32 cri.appeal.420-15

29. Considering the evidence of the victim and the informant supported by the medical evidence, in my view, the absence of semen stains on the undergarments of the victim and the appellant, by themselves, would not be helpful to the appellant to disprove the case of the prosecution. The learned Counsel for the appellant cited the judgment in the case of State of Maharashtra Vs. Dadarao s/o. Bapurao Jivtode and ors. (supra), wherein the C.A. report disclosed no semen stains on the garments and vaginal swab of the victim and also on the garments of the accused. It was an additional circumstance found by this Court while upholding the judgment of acquittal. In that case, the incident took place at night when, admittedly, there was no electricity supply. The identity of the miscreants could not be proved. Therefore, the accused were acquitted. In the present case, identity of the appellant is not in question. Therefore, the above-cited judgment would be of no help to the appellant.

33 cri.appeal.420-15 DELAY IN LODGING THE REPORT

30. It is true that the FIR (Exh.14) has been lodged on 26.06.2013 at about 10.00 p.m. i.e. after about one day of the incident. There is no dispute that the husband of the informant is no more. After the incident, she did not go to the police station immediately since it was a night time. She states that on the next day at about 11.00 a.m., she went to village Mirajgaon and then, to Karjat Police Station. It is quite natural on her part to inform her relatives and seek their advise as to what should be done in respect of the incident. It is a common knowledge that in respect of such incidents, generally, the reports are lodged with reluctance, because lodging of the report may have adverse effect on the dignity of the family of the victim and that of herself. In the circumstances, if the informant takes some time in thinking over lodging of the report, it cannot be said that it was an outcome or 34 cri.appeal.420-15 afterthought or result of due deliberation. In the circumstances, the delay in lodging the report would not have any adverse effect on the case of the prosecution.

31. The learned trial Judge rightly considered the facts of the case as well as the evidence on record and rightly held the appellant guilty of the above-mentioned offence. The offence under Section 376(2)(i) of the I.P.C. is punishable with rigorous imprisonment for a term, which shall not be less than 10 years and, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life and shall also be liable to fine. The offence under Section 3 punishable under Section 4 of the POCSO Act, shall be punishable with imprisonment of either description for a term, which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine. Section 42 of the POCSO Act reads as under :-

"42. Alternate punishment.- Where an

act or omission constitutes an offence punishable under this Act and also under Sections 166-A, 354-A, 354-B, 354-C, 354-D, 370, 370-A, 375, 376, 376-A, 376-C, 376-D, 376-E or Section 509 of the Indian Penal Code, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree."

32. The punishment for the offence punishable under Section 376(2)(i) of the I.P.C. being greater, was liable to be imposed against the appellant. The learned trial Judge has rightly imposed the said punishment on the appellant. The impugned judgment 36 cri.appeal.420-15 and order are quite legal, proper and correct. They do not call for any interference.

33. Hence, the order :-

The appeal is dismissed.

[SANGITRAO S. PATIL] JUDGE kbp