



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 628 OF 2021

Shivaji Eknath Mali
Age: 40 years, Occu.: Labour,
R/o Bidkin, Tq. Paithan,
Dist. Aurangabad

..APPELLANT

VERSUS

State of Maharashtra

..RESPONDENT

WITH
CRIMINAL APPEAL NO. 522 OF 2022

State of Maharashtra
Through Police Inspector,
Police Station Paithan,
Tq. Paithan, Dist. Aurangabad

..APPELLANT

VERSUS

1. Shivaji Eknath Mali
Age: 40 years, Occu.: Labour,
R/o Bidkin, Tq. Paithan,
Dist. Aurangabad

2. XYZ

..RESPONDENTS

....
Mr. S.G. Bobade, Advocate for appellant in APEAL/628/21 and for
respondent no.1 in APEAL/522/22

Mr. A.D. Wange, A.P.P. for respondent – State in APEAL/628/21 and for
appellant in APEAL/522/22

Ms. S.S. Tekale, Advocate for respondent no.2 in APEAL/522/22 (appointed)

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CORAM : R.G. AVACHAT AND
NEERAJ P. DHOTE, JJ

RESERVED ON : 18th JUNE, 2024

PRONOUNCED ON : 21st JUNE, 2024

JUDGMENT (PER : R.G. AVACHAT, J.) :

1. Both these appeals are decided by this common judgment since they are inter-connected. Criminal Appeal No. 628 of 2021 is filed challenging the judgment and order of conviction and consequential sentence passed on 21st August, 2019 by Special Judge (POCSO Act), Aurangabad in Special Case Child Protection No. 202 of 2016. Vide the impugned order, the appellant has been convicted for the offences punishable under Sections 376(f) and 506-Part II of the Indian Penal Code ('I.P.C.') and consequently sentenced to suffer rigorous imprisonment for fourteen years and one year respectively and to pay total fine of Rs.3,500/- with default stipulation. Whereas, Criminal Appeal No. 522 of 2022 is preferred by State against the appellant's acquittal of the offences punishable under Sections 4, 6, 8 and 9(n) of the Protection of Children from Sexual Offences Act, 2012 ('POCSO Act'). For the sake of convenience, we refer the said parties as appearing in Criminal Appeal No. 628 of 2021.

2. The facts of the prosecution case in brief, are as follows :-

P.W.11 – A (name withheld) was the step-daughter of the appellant. P.W.12 - Gayabai is the victim's natural mother. Her husband deserted her. She came in contact with the appellant and was residing with him as his wife for more than five years. She claimed the appellant to be her husband.

3. It so happened that on 15th September, 2016, the appellant, the victim – A and her mother (P.W.12 – Gayabai) had come together to village Pategaon, Tq. Paithan, Dist. Aurangabad for doing labour work. They were engaged for construction of a road. They stayed at the house of P.W.4 – Dhrupadabai, maternal aunt of the victim, overnight. It was 16th September, 2016. The trio went to sleep on ota of the house of P.W.4 – Dhrupadabai. It is the case of the prosecution that the appellant asked P.W.12 – Gayabai to sleep away from him. He slept close to the victim. The appellant undressed the victim and committed sexual intercourse with her twice. Gayabai saw the same. She raised hue and cry. The appellant allegedly gave threats to her life. The incident was stated to be witnessed by P.W. 4 – Dhrupadabai too. After having gathered courage, they approached P.W.3 – Fakirchand. All of them went to Paithan Police Station to lodge the report. The victim's statement was recorded by lady police official, P.W.5 – Komal. Her another statement was recorded by P.W.6 – Swapna, A.P.I. The statement is one and the same. It is not known as to why two different exhibit numbers have been given to the victim's statement–cum–F.I.R. For the sake of convenience, we refer it as Exhibit 47.

4. Based on the F.I.R. (Exh.47), crime vide C.R. No. 354 of 2016 was registered against the appellant for the offences punishable under Sections 376 and 506 of the I.P.C. and under Sections 4, 6, 8, 9(n) and 10 of POCSO Act.

5. During investigation, the victim was medically screened. During medical screening of the victim, samples of certain articles were obtained for C.A. Crime scene panchanama (Exh.13) was drawn. Clothes on the person of both, the appellant and the victim were seized. The victim was further medically screened by the radiologist to ascertain her age. The appellant too was medically screened. Statements of the persons acquainted with the facts and circumstances of the case were recorded. Upon completion of the investigation, charge-sheet was filed.

6. Court of Additional Sessions Judge-cum-Special Court constituted for trial of the offences punishable under the POCSO Act framed the charge (Exh.24). The appellant pleaded not guilty. His defence was of false implication. According to him, the victim was previously married. She was even involved with one Kaduba Gaikwad. She delivered a baby. The victim and her mother dumped the baby alive. The appellant had witnessed the same. He wanted to relate the matter to police. A quarrel, therefore, ensued between him and P.W.12 – Gayabai, mother of the victim. He has, therefore, been falsely implicated.

7. To bring home the charge, prosecution examined ten witnesses and produced in evidence certain documents. The trial Court, on appreciation of the evidence in the case, convicted and consequently

sentenced the appellant as stated above. The appellant was, however acquitted of the offences punishable under the POCSO Act. The trial Court, relying on the report of the radiologist indicating the victim's age to be in the age group of fourteen to sixteen years, gave the benefit of margin of two years on either side and held the prosecution to have failed to prove the victim was a child, below eighteen years of age at the relevant time.

8. Learned counsel for the appellant would submit that there is delay of four days in lodging of the F.I.R. Medical evidence does not support the prosecution case. It was just illogical to imagine that by 09:00 in the night the appellant would undress his so called step-daughter. He too undressed himself and committed sexual intercourse twice at a place surrounded by residential houses. Learned counsel brought to our notice certain inconsistencies *inter se* evidence of the prosecution and history given by the victim as well. According to him, the appellant has been languishing behind the bars for about eight years. He took us through the evidence of each and every witness to ultimately urge for allowing the appeal.

9. Learned A.P.P. and learned counsel representing the victim, relied on the judgment of Division Bench of this Court in case of ***Sunil Fattensing Sable Vs. State of Maharashtra, Criminal Appeal No. 718 of 2016***, dated 03rd October, 2023, wherein it has been observed that in the absence of any other

material in proof of age of the victim, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board. Both the learned counsel relied on the report of radiologist suggesting the victim to have been in the age group of fourteen-sixteen years at the relevant time. According to them, the victim had no reason to falsely implicate her father. The appellant's wife would also not depose against him putting her marital relationship at stake. Our attention then adverted to the medical examination report (Exh.95) which suggests the victim was sexually exploited. Learned counsel took us through the evidence of each and every witness. According to them, since it was a matter amongst the family members, delay occurs in such matters. There was delay of four days in registration of the F.I.R. The appellant has threatened the P.W.12- Gayabai, mother of victim (his wife) of dire consequences, if the matter was reported to police. Learned counsel took us through the reasons given by the trial Court in support of the impugned judgment and order. Both of them ultimately urged for dismissal of the appellant's appeal with further prayer of allowing the State's appeal.

10. Considered the submissions advanced. Perused the evidence on record. Also perused the impugned judgment and order. Let us advert thereto and appreciate the same.

11. P.W.1 – Ramesh is a witness to the crime scene panchanama (Exh.13). Nothing incriminating was found thereat. The said panchanama is, therefore, of little consequence to further the prosecution case. However, it is admitted fact that on the given night, the appellant, the victim – A and her mother were slept on the ota of the house of P.W.4 – Draupadabai. The incident was said to have taken place by 09:00 p.m. Admittedly, there are various residential houses by the side and in front of the house of Draupadabai. According to the case of the prosecution itself, the incident was witnessed by the victim's mother, P.W.12– Gayabai and P.W.4 – Draupadabai.

12. Although the incident took place at the night (09:00 p.m. on 16th September, 2016), the matter was reported to the police on 20th September, 2016 i.e. four days after the incident. The same was recorded by P.W.5 – Komal and P.W.6 – Swapna. P.W.11 – A, the victim testified that the appellant is her step-father. In the year 2016, they had come for work to Paithan. They had stayed at the house of P.W.4 – Dhruvadabai, her maternal aunt. It was the 16th day of the month. She went to sleep on ota of the house of her maternal aunt. The appellant asked her mother to sleep at some distance away from him. The appellant then came close to her (victim) and removed her clothes. He undressed himself. The appellant then committed sexual intercourse with her twice. Her mother, P.W.12 – Gayabai, therefore, raised noise and asked the appellant not to do so. The appellant thereby gave

her threats. Then she, alongwith her mother and maternal aunt approached the police station. She lodged the report (Exh.47).

13. The victim was subjected to a searching cross-examination, wherefrom it has been brought on record that she did not remember the day and date of the incident. Her natural father had fled with another woman. Her mother (P.W.12 – Gayabai), therefore started residing with the appellant. She denied to have already been married with one Kaduba Gaikwad. She denied to have been conceived by him and even delivered a baby. She further denied to have thrown the newly born in a boar well. She further denied the same was seen by the appellant and he wanted to report the said matter to the police. She denied that a false report was, therefore, lodged against the appellant. It is further in her evidence that she did not know Fakirchand, Draupadabai and Vitthal Barde. She then admitted to have known them. According to her, at the relevant time it was dark. She denied to have been more than eighteen years of age at the relevant time. She denied that no such incident did take place. She was confronted with her statement (recorded under Section 164 of Cr.P.C.) (Exh.102). According to her, the contents thereof are correct.

14. We do not propose to refer the evidence of P.W.5 – Komal and P.W.6 – Swapna since their evidence is only in relation to recording of statement-cum-F.I.R. (Exh.47 and 56).

15. P.W.2 – Pratibha is a witness to the panchanamas whereunder clothes of the appellants and victim were seized (Exh.15 and 16) respectively. Since those were seized a few days after the alleged incident, naturally the C.A. reports in relation thereto do not support the prosecution case. The police officer, who carried those articles to the FSL has not been examined. The C.A. reports find place at Exhibit 132. It is true, one of the C.A. reports indicates that there was semen stains on the knicker. Since the police officer, who carried the articles to FSL was not examined and the list of articles sent to have not been proved, it is just difficult to come to the conclusion that it was the knicker of the appellant and none else. Moreover, panchanama indicates no knicker of the victim was seized. P.W.3 – Fakirchand testified in relation to the incident that took place on the night of 16th September, 2016. He admittedly not an eye witness to the incident. It is in his evidence that on 21st September, 2016, the victim, her mother and P.W.4 – Dhrupadabai had come to him. The victim's mother (P.W.12 - Gayabai) related her about the incident and threats given by the appellant. On their request, he accompanied them to the police station whereat the victim reported the matter.

16. In his cross-examination, questions relating to the defence version were put. He denied the same. It is, however suggested to him that on the given night the appellant, victim – A and her mother had slept on the opla of the house

17. P.W.4 – Dhruvadabai testified that on the given night, the appellant, the victim and her mother Gayabai had come to her village. They had stayed at her house overnight. It was about 09:00 p.m. The trio went to sleep on the otla of her house. She claimed to have seen the appellant undressed the victim and slept with her. According to her, P.W.12 - Gayabai, mother of the victim too witnessed the same. The appellant gave threats and even quarreled with Gayabai. On the following day, therefore, they went to P.W.3 – Fakirchand and related him about the incident. During her cross-examination, it has been brought on record that she was previously married to one Arun Mali. Vitthal Barde was her second husband. She had accompanied Vitthal to Court to give evidence. It is further in his evidence that there were public lamp posts nearby the crime scene. She admitted that by 09:00 p.m., the neighbours remained awake. She was suggested that it was raining that time. She denied the appellant to have not committed atrocity on the victim and/or abused and threatened Gayabai. It is further in her evidence that Vitthal is the real brother of P.W.3 – Fakirchand. The defence version was put to her during her cross-examination. She stoutly denied the same.

18. P.W.12 – Gayabai, mother of the victim, gave her evidence on the lines of the evidence of victim herself. It is in her evidence that she had come to village Pategaon alongwith her daughter (victim) and husband (appellant).

They were staying in the house of P.W.4 – Dhrupadabai. The incident took place by 09:00 p.m. on 16th September, 2016. The appellant, the victim and herself were sleeping on the ota of the house. The appellant had asked her to sleep at some distance from him. The appellant went close to the victim. He undressed her and also removed clothes on his person. He then committed sexual intercourse twice, with her (victim). She had seen it. She asked the appellant not to commit such act. The appellant assaulted her. The victim was frightened. She thereafter took the victim to the police station alongwith her maternal aunt, P.W.4 – Dhrupadabai. The victim lodged the report at the police station.

19. In her cross-examination, she admitted that adjacent to the ota they were sleeping on, there were several houses. She could not state date of birth of the victim. Defence of the appellant was put to her in the form of suggestions. She has stoutly denied the same.

20. On registration of the F.I.R., the victim was medically screened by P.W.7 – Dr. Supriya. The victim gave her following history :-

“History narrated by survivor herself, named Jyoti Popat Thakre, who is residing with her mother and her step father Shivaji Mali, since last 5 years approximately. (Prior to that she was residing with her aunt). Since then her father is abusing her (since last 5 years), and having forceful sexual intercourse with her. He threatens to kill her mother if she opposes for intercourse. Last intercourse was on 17/9/16, at night, at her aunt’s home which

was noticed by people around and complaint was launched against him.”

21. The medical examination report reads thus :-

“There are signs suggestive of forceful penetration of vagina. Genital injury in the form of old healed hymenal tear present. Pubic hairs, vaginal swabs, smears, blood collected of chemical analysis are available.”

22. The very doctor was put to questionnaire by the investigating officer. The answers thereto are as follows :-

“फिरादी नामे (A), MLC Case No.17033/SUK/16, वैद्यकीय परीक्षण अभिप्राय -

- १. संभोग झालेला आहे. कालावधी निश्चित सांगता येत नाही.*
- २. सदर पिडीत मुलीचे वय १४ ते १६ वर्षांदरम्यान असावे, अहवाल सोबत जोडलेला आहे.*
- ३. गुप्तांगावर जखमा आहे. योनीमार्गाचा पडदा फाटलेला आहे.*
- ४. पिडीत मुलीचे व्हायनल स्वॅब राखून ठेवलेले आहे.*
- ५. पिडीत मुलीच्या रक्ताचा नमुना राखून ठेवलेला आहे.*
- ६. बलात्कार संबंधाने आवश्यक तपासणी होवून आवश्यक असलेले सर्व सॅपल राखून ठेवलेले आहे.”*

23. The appellant too was medically screened by P.W.9 – Dr.Vishal to find him to be nothing abnormal to opine him unfit for sexual intercourse. The victim was subjected to radiological examination test for ascertaining her age. It is P.W.8 – Shruti, who examined her and certified to be in the age group of fourteen to sixteen years. Her cross-examination is very relevant. She admitted that on having seen x-ray film of the victim, she determined her

age. She went on to state that her observations of age on bone was approximate. She further admitted that there may be difference of plus or minus two years in the age observed by her of the victim.

24. Based on this cross-examination, the trial Court held the prosecution to have failed to prove the victim to have been below eighteen years of age. We too do not find any other reason to disagree therewith. Reliance on the judgment in case of Sunil Fattesing Sable (supra) would of little consequence for the prosecution in view of the admission given by P.W.8 – Shruti in her cross-examination. There was no other evidence in proof of age of the victim.

CONCLUSION :-

25. On appreciation of the aforesaid evidence, we find the prosecution to have failed the prove the victim to have been below eighteen years of age at the relevant time. When two views are possible based on the evidence on record, the one which favours the accused needs to be taken. The State's appeal against acquittal of the appellant for the offences under the POCSO Act, therefore, fails.

26. Admittedly, the appellant was the step-father of the victim. Her real father was said to have eloped with some other woman. The appellant, the victim and her mother (P.W.12) had come to village Pategaon for labour

work. Admittedly, they had stayed at the house of P.W.4 – Dhrupadabai. Close reading of the evidence indicates that there was no relationship between the victim and Dhrupadabai. Dhrupadabai was said to be her foster maternal aunt. Admittedly, on the given night (16th September, 2016), the trio i.e. the appellant, the victim and her mother were asleep on the otla in front of the house of Dhrupadabai. There were public lamp posts at and around the area of crime scene. The crime scene panchanama (Exh.13) and further evidence on record indicate that it was a populated area. There were many houses adjoining and around the crime scene. True, it was raining. Case of the prosecution is that the appellant completely undressed the victim. He too undressed himself. He then committed sexual intercourse with her twice. There is no evidence to indicate the victim to have raised alarm. As per the case of prosecution, the act was witnessed by P.W.12 – Gayabai, mother of the victim. She, therefore, asked the appellant not to commit such act. P.W.4 – Dhrupadabai also claimed to have witnessed the said incident. All these facts indicate that if at all such act did take place and noticed by neighbours, there was no difficulty for the victim and her mother to approach the police station on the very next day. The appellant gave threats to the victim's mother appears to be a reason put forth afterthought so as to explain the delay of four days in registration of the crime. Since the victim was medically screened 4/5 days after the incident, the C.A. reports (Exh.132) in relation to the clothes on the person of both, the appellant and the victim, do

not further the prosecution case. History given by the victim to the medical officer is very much inconsistent with her evidence before the Court. Moreover, her statement under Section 164 of Cr.P.C. was recorded. The defence confronted the same to the victim. Said statement finds place at Exhibit 102. What has been stated there is as under :-

“मी पाटेगाव येथील रस्त्याचे काम चालू असलेल्या ठिकाणी माझे दुसरे वडील शिवाजी माळी व आई यांच्यासोबत सहत होते. गेल्या आठवड्यात सत्रीच्या वेळी माझे वडील दारु पिवून आले व त्यांनी माझ्या आईला मारहाण केली व माझ्या आईला दूर झोपण्यास सांगितले व मला त्यांच्याजवळ झोपण्यास सांगितले. मी त्यांना तुम्हाला तुमची बायको आहे, तुम्ही आईजवळ झोपा असे सांगितले असता त्यांनी माझ्या आईला मारहाण करून काढून दिले व मला जबरदस्तीने जवळ झोपविले. माझ्या वडिलांची नियत फिरली होती. ते मला करू दे असे म्हणाले व नाहीतर तुला फाशी देईन असे म्हणाले व माझ्यावर अत्याचार केला. त्यानंतर मी माझ्या आई व मामासोबत पोलीस ठाण्यात गेले होते.”

27. True, from this statement one may infer that something has happened with the victim on the given night. But the said statement in no way lead us to infer the appellant to have committed sexual intercourse with her.

28. The trial Court relied on this statement to observe to have corroborative evidence of the victim. It also found the defence of the appellant to have not been proved. There is difference between an accused/appellant failing to make out his defence and/or coming out with a false defence. It is true that false defence gives a missing link. So is not the case herein.

29. On appreciation of the evidence in the case, we find testimony of the victim to be not inspiring confidence. It is reiterated that it was just 09:00 p.m. There is evidence to indicate that neighbours were awake. It was a populated area. Street lights were there. The appellant completely undressed himself. He then undressed the victim. He then committed sexual intercourse twice, with the victim. The victim did not raise alarm. It is only her mother (P.W.12 – Gayabai), who noticed the same and then confronted the appellant. This speaks in volumes to infer even the case may be other way round. We do not propose to observe anything more on this aspect. The victim has already found to be not below eighteen years of age. The history given by her to the medical officer and statement under Section 164 of Cr.P.C. (Exh.102) do not reinforce her evidence before the Court about the incident that took place on the given night. We, therefore, found the evidence of the victim to have not been inspiring confidence. The delay in registration of the F.I.R. has not been explained with sound reasons. Based on such kind of evidence, in our view, the trial Court ought not to have convicted the appellant. The appellant has been in jail since 20th September, 2016 till date i.e. close to eight years.

30. For all the aforesaid reasons, interference with the order of conviction and consequential sentence is warranted. In the result, we pass the following order :-

ORDER

- (I) Criminal Appeal No. 628 of 2021 is allowed.
- (II) Impugned judgment and order dated 21st August, 2019 passed by Special Judge (POCSO Act), Aurangabad thereby convicting the appellant for the offences punishable under Sections 376(f) and 506-Part II of the Indian Penal Code is hereby set aside. The appellant is acquitted thereof.
- (III) The appellant be released forthwith, if not required in any other case.
- (IV) Criminal Appeal No. 522 of 2022 preferred by State against acquittal of the appellant of the offences punishable under Sections 4, 6, 8 and 9(n) of the Protection of Children from Sexual Offences Act, 2012 is dismissed.
- (V) Fees of Ms. Sayali S. Tekale, learned counsel, appointed through Legal Aid to represent Respondent No.2, is quantified to Rs.10,000/- (Rupees Ten Thousand).

(NEERAJ P. DHOTE, J.)**(R.G. AVACHAT, J.)**

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