

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CRIMINAL APPEAL NO. 80 OF 2018

Ashwin @ Bunty Narendra Chaouhan,
Aged about 23 years, Occ.- Labour,
R/o Sai Nagar, Near Masjid, Gitti Khadan,
Nagpur.

.... **APPELLANT**

VERSUS

State of Maharashtra,
through Police Station Officer,
Police Station Gittikhadan, Nagpur.

.... **RESPONDENT**

Shri Y.B. Mandpe, Counsel for the appellant,
Smt. Ritu Sharma, Addl.PP. for the respondent.

CORAM : ROHIT B. DEO, J.
DATED : 14th JUNE, 2019.

ORAL JUDGMENT :

The appellant is assailing the judgment dated 28-12-2017 rendered by the Additional Sessions Judge-3, Nagpur in Special Child Protection Case 89/2015, by and under which the appellant-who shall be referred to as the accused-is convicted for offence punishable under Section 363 of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for five years and to payment of fine of Rs.

1,000/-, and is convicted for offence punishable under Section 4 of the Protection of Children from Sexual Offences Act (POCSO Act) and is sentenced to suffer rigorous imprisonment for seven years and to payment of fine of Rs.1,500/- and is further convicted for offence punishable under Section 376(2) of the Indian Penal Code for which conviction no separate sentence is imposed.

2. The prosecution case is thus :

(i) The incident occurred on 07-2-2015. The child victim returned from her school and at 5-00 p.m. was riding a bicycle in front of her house. The child victim is mentally challenged.

(ii) The child victim returned home weeping, her mother-who is the complainant-asked her why she was weeping and the answer was that while riding the bicycle the accused stopped her bicycle, dragged her to his house, closed the door, took the child victim inside the bedroom, removed her clothes and subjected her to forcible sexual intercourse. The child victim complained of pain in her private part. After sometime the accused wore his clothes, asked the child victim to wear her clothes, gave two packets of biscuits to child victim and asked her to meet the accused daily without informing anybody.

(iii) The complainant-mother of child victim-contacted her

family friend Sau. Ragina Sakhare and alongwith Ragina went to the house of the accused and found the house locked. The complainant and Ragina returned home. The husband of the complainant returned from duty at 7-00 p.m. and the complainant narrated the incident to him. The husband of the complainant accompanied by the complainant and the victim then went to the house of the accused. When the accused was confronted, he initially denied the incident and then admitted his guilt. The complainant lodged report (Exhibit 29) at Gittikhadan Police Station.

(iv) On the basis of the report, offence under Section 376(2), 363 of the Indian Penal Code and under Sections 4 and 6 of the POCSO Act was registered. Investigation ensued. The victim was sent for medical examination alongwith woman Police Constable Poona. PW 6- Dr. Rajendra Wakarkar and Dr. Mohd. Jabbar Iqbal examined the child victim, recorded the medical history and issued provisional medical certificate. The accused was arrested and the culmination of investigation led to the submission of the charge-sheet in the court of Judicial Magistrate First Class, Nagpur who committed the proceedings to the Sessions Court. The learned Sessions Judge framed charge under Sections 363, 376(2) of the Indian Penal Code and Sections 4 and 6 of the POCSO Act to which the accused pleaded not guilty.

3. The defence of the accused is that he is the victim of false implication. The defence is that there was a dispute between his mother and the mother of the child victim on the issue of some money transaction, the mother of the accused could not return the money and was threatened by the mother of the child victim of false implication.

4. The prosecution examined eight witnesses. PW 1-Shushma Jambhulkar is the mother of the child victim and first informant. PW 2-Bhagwan Khobragade is the panch witness to seizure. PW 3-Narendra Sakhare is also a panch witness. PW 4-Anil Bhaskar accompanied the father of the child victim to the house of the accused. PW 5 is the child victim. PW 6-Dr. Rajendra Wakarkar examined the child victim. PW 7-Vaishali Kannake and PW 8-Abhijit Sonwane are the Investigating Officers.

The accused examined Sau. Ragina Sakhare in defence.

5. The learned Sessions Judge relied on the evidence of the child victim and sought corroboration from medical evidence. The learned Sessions Judge relies on the report of the Chemical Analyzer which states that blood of Group-A which is the blood Group of the child victim, was found on the knicker allegedly wore by the child

victim. The learned Sessions Judge disbelieved the defence witness Sau. Ragina.

6. I have heard Shri Y.B. Mandpe, learned Counsel for the appellant and Smt. Ritu Sharma, learned Additional Public Prosecutor for the respondent-State and with their able assistance, I have scrutinized the evidence on record and the reasons recorded by the trial Court.

7. The submissions of the learned Counsel Shri Y.B. Mandpe can be summed up thus :

(i) The evidence of the child victim and her mother PW 1-Sushma Jambhulkar must be discarded on the short ground that admittedly the said witnesses have used their statements recorded during the investigation in a surreptitious manner and have deposed on the basis thereof.

(ii) The evidence of the child victim is clearly tutored.

(iii) The father of the child victim is not examined.

(iv) The independent witness PW 4-Anil Bhaskar has come out with a version which is totally inconsistent with the version of the mother of the child victim.

(v) The seizure of the knicker is not proved. Neither is it proved that the knicker on which the Chemical Analyzer allegedly found stains of blood Group-A belongs to the child victim and was worn by her.

(vi) The medical evidence does not support the case of the prosecution and rather militates against the prosecution case that the child victim aged 12 years was subjected to forcible sexual intercourse.

(vii) In any event, in the absence of substantive evidence, the fact that the doctor noticed two tears to the hymen of the child victim is not decisive of rape.

(viii) The defence of false implication is proved and the learned Sessions Judge committed a serious error in discarding the evidence of the defence witness Sau. Ragina who even according to the complainant accompanied her to the house of the accused. The defence witness is disbelieved by a convoluted process of reasoning.

8. The learned Additional Public Prosecutor Smt. Ritu Sharma would submit in rebuttal, that the trial Court did not commit any error in accepting the testimony of the child victim as trustworthy and in seeking corroboration from the medical evidence. The learned Additional Public Prosecutor would submit that the seizure of the

knicker is duly proved and the fact that blood stains on knicker were noticed in the chemical analysis corroborates the evidence of the victim that she was subjected to forcible sexual intercourse. The learned Additional Public Prosecutor would submit that the fact that the doctor noticed two tears on the hymen, and the fact that the Chemical Analyzer found blood stains on the knicker worn by the child victim, proves that the child victim was subjected to forcible sexual intercourse. The learned Additional Public Prosecutor Smt. Ritu Sharma would further submit that the defence of false implication is rightly disbelieved by the trial Court, and that there is no conceivable reason for the child victim and her mother to falsely implicate the accused. The learned Additional Public Prosecutor would submit that rarely, if at all, would mother use her child to settle score. The stigma of rape, in the conservative Indian society, haunts a girl for years to come, if not for the entire life, and a mother would not accused an innocent of raping her girl child only to settle score, is the submission.

9. Before I consider the evidence of the child victim, it would be necessary to consider the evidence of PW 1-Sushma Jambhulkar and PW 4-Anil Bhaskar. PW 1-Sushma states that after she learnt from the child victim that the accused ravished the child victim, she alongwith

the child victim and the defence witness Sau. Ragina went to the house of the accused, found the house locked and returned and when her husband returned home, she alongwith her husband again went to the house of the accused where, she met the mother of the accused and sister of the accused. The accused arrived later on. PW 1-Sushma states that the accused was confronted with the accusation, the accused denied the incident and PW 1-Sushma lodged report at Gittikhadan Police Station. PW 1-Sushma makes no reference to the presence of PW 4-Anil Bhaskar. The deposition of PW 4-Anil Bhaskar is that he received a call from the father of the victim (who is not examined) and went to the residence of the victim. PW 4-Anil Bhaskar was informed that the accused subjected the child victim to forcible sexual intercourse. PW 4-Anil Bhaskar then states that he and the father of the child victim went to the house of the accused and confronted him. Since the accused denied the incident, the victim was summoned and she identified the accused as the culprit and then the accused admitted guilt. The version of PW 1-Sushma and PW 4-Anil Bhaskar are inconsistent and irreconcilable. While PW 1-Sushma does not speak of the involvement of PW 4-Anil Bhaskar, in his deposition PW 4-Anil Bhaskar makes no reference to the presence of PW 1-Sushma when the accused was allegedly confronted at his house.

10. PW 5 – the child victim deposed that the accused dragged her inside his house when she was riding a bicycle, removed her clothes and inserted his penis in the vagina. The child victim states that she informed her mother who in turn informed her father and then they went to the house of the accused twice but found the house locked. The child victim states that third time the accused was found at his residence and then the police arrived at the residence of the accused. The child victim states that she narrated the incident to the lady constable. The child victim makes no reference to the presence of PW 4 – Anil Bhaskar. Her version is again inconsistent with the version of her mother PW 1 – Sushma Jambhulkar and PW 4 - Anil Bhaskar. It is elicited that whenever she attended the Court, police used to read out her statement to her and tell her what is to be deposed. It is further elicited that initially her mother narrated the incident to the police and then she narrated the incident on same lines. The child victim admits that her mother and mother of the accused do not share cordial relationship. She admits that on the date of the incident her parents went to the house of the accused with intent to assault. However, she denies the suggestion that the intent to assault was due to money dispute. The statement that the accused inserted his penis in the vagina is an omission.

11. Shri Y.B. Mandpe, the learned counsel for the accused would submit that not only the child victim, her mother PW 1 Sushma Jambhulkar too admits that she read her statement whenever she attended the Court. Shri Y.B. Mandpe would further submit that it is brought in evidence that PW 1 is residing in crowded locality. A suggestion is given to PW 1 that when her daughter was riding the bicycle, people residing in the locality were sitting in front of their houses, to which PW 1 responded “I cannot tell”. Shri Mandpe, would further highlight the statement in the cross-examination of PW 1 that the clothes of the child victim were seized at her residence.

12. Shri Y.B. Mandpe, the learned counsel would submit, relying on the Division Bench decision in ***Suresh Purushottam Ashtankar vs. State of Maharashtra & another, 2015(3)Mh.L.J. (Cri.)424*** that the evidence of PW 1 and PW 5 – the child victim is not admissible and at any rate must be taken with a pinch of salt since their 161 statements were read by them prior to recording of evidence and that the statements were read not before the Court but surreptitiously. A relatively recent decision of a learned Single Judge in ***Nivrutti s/o. Ganpati Sadekar vs. State of Maharashtra [2019(1)Mh.L.J. (Cri.)355*** is also brought to my notice. The submission is not without

substance. The purpose of the cross-examination is to test the veracity of the witness. The witness is expected to depose on the strength of his memory. The witness may be permitted to refer to contemporaneous record for a limited purpose of refreshing the memory. But then, this has to be done in a transparent manner before the Court and not secretly. The child victim has gone to the extent of admitting that her statement was not only read out to her, she was further told what to depose. Some latitude must be given to the child witness who according to the prosecution is mentally challenged, although, she is found to be a competent witness by the trial Court. However, even granting every possible latitude, there is a lingering doubt that the child victim was, more likely than not, tutored.

13. The evidence of PW 1 – Sushma Jambhulkar, PW 4 – Anil Bhaskar and the child victim herself is not implicitly trustworthy, and I therefore, scrutinized the material on record minutely to ascertain whether there is any corroborative evidence inspiring confidence which would lend assurance to the prosecution case. The prosecution seeks corroboration from the report of the Chemical Analyzer which notices bloodstains on the knicker supposedly worn by the child victim. However, in my considered opinion, the prosecution miserably failed to

prove that the knicker which was subjected to chemical analysis was worn by the child victim on the date of the incident. The mother of the child victim PW 1 – Sushma Jambhulkar states that the clothes of the child victim were seized from the house. In stark contrast, the case of the prosecution is that PW 6 – Dr. Rajendra Wakarkar, who examined the child victim collected the clothes worn by the child victim at the time of the incident, which he sealed and handed over to Lady Police Constable Poonam Nepare. It is not in dispute that no seizure panchanama was recorded. The medical examination report makes a reference to four clothes i.e. one shirt, one pant, one petticoat and one underwear. Exh. 50 which is the communication addressed by the Investigating Officer to the Forensic Science Laboratory which refers to the parcel containing clothes is issued on 23.2.2015. While no panchanma was recorded when PW 6 Dr. Rajendra Wakarkar collected and sealed the clothes and handed over the parcel to constable Poonam Nepare, a seizure panchanama Exh. 37 is recorded showing that the parcel of clothes was seized by the Investigating Officer from constable Poonam Nepare. The reference is to a sealed parcel which is packed in the white bandage material of the hospital. The reference in Exh. 23 which is the Chemical Analysis report is to a cardboard box wrapped in cloth. The prosecution did not examine Poonam Nepare the police

constable who collected the clothes from PW 6 - Dr. Rajendra Wakarkar nor did the prosecution examine the person who delivered the parcel to the Forensic Science Laboratory nor is the possibility that the clothes supposedly seized were not the same clothes worn by the child victim ruled out particularly since according to the mother of the child victim, the clothes were seized from her residence.

14. In the chemical analysis, no trace of semen or spermatozoa is found on the clothes of the child victim. Thus, the medical report is inconclusive. Doctor has noticed two tears to the hymen. However, no injury is noticed on labia majora, labia minora or on any other private part. While the tear is described as fresh, no bleeding is noticed. The learned Additional Public Prosecutor Smt. Ritu Sharma, is right in the submission that when a 12 year child is subjected to sexual intercourse given her inability to put up a stiff resistance, absence of injury is not decisive. However, it is well recognized in medical jurisprudence that hymen injuries may be caused due to diverse reasons.

15. The evidence of PW 1 Sushma Jambhulkar, PW 4 – Anil Bhaskar and that of the child victim is not of such sterling quality as would obviate the need of strong corroborative evidence, which is

lacking. The evidence on seizure of the knicker supposedly worn by the child victim is not implicitly reliable and the scientific and medical evidence is insufficient to hold, with any degree of certainty that the child victim was subjected to penetrative assault, as is the case of the prosecution.

16. The accused has examined DW 1 - Smt. Ragina Sakhare in defence. Even according to the prosecution, the defence witness accompanied PW 1 to the house of the accused. The defence witness deposes thus in the examination in chief:

“3. The mother of the accused is also working. After Jambhulkar Madam came to me, myself and Smt. Jambhulkar went to the house of accused at that time we found that house was locked, therefore, we returned back to my house. During that period, I had talked with Smt. Jambhulkar who told me that she wanted to go to the house of accused for money and told that if Jyoti Chauhan has not paid her money, then she will take steps to falsely implicating her then she left my house and went to her house. Thereafter, at about 7.30 pm Sushma Jambhulkar and her husband Bhojraj Jambhulkar came to my house then myself and above both persons went to the house of Jyoti Chauhan. At that time Jyoti Chauhan, her daughter were present. Then Sushma has demanded her money with Jyoti Chauhan saying that, she is in dire need of money. At that time Jyoti Chauhan replied, presently she has no money then quarrel took place between them. Then I had tried to pacify them at that time accused came there. Then he has explained that they are not leaving the house but avoid to quarrel. Then Jambhulkar threatened to mother of the accused saying that, she will take action against them. Then we returned back to our house at that time Sushma threatened

that she will falsely implicate Jyoti Chauhan in any case.

The defence witness is disbelieved by the trial Court reasoning that the incident took place prior to the quarrel between mother of the accused and the mother of the child which excludes the possibility of false implication. The trial Court in essence first assumes that the incident did take place and then discards the evidence of the defence reasoning that since the incident took place prior to the quarrel, there is no reason of false implication of the accused. The other reason given is that neither the accused nor his mother entered the witness box nor is there any documentary evidence to show that the accused or his mother lodged police complaint against PW 1 - Sushma Jambhulkar as regards the threat issued. It is well settled that the evidence of a defence witness must not be viewed from the prism of suspicion. The probative value of a witness examined in defence is no more and no less than any prosecution witness. The evidence of the defence witness must be tested on the same touchstone and applying the same standard as would apply to a prosecution witness. A reference may be made to the Decision in *Dudh Nath Pandey vs. State of Uttar Pradesh, (1981)2 SCC 166*. Even if it is assumed, arguendo, that the trial Court is justified in discarding the testimony of the defence witness, in my considered view, the accused successfully rebutted the statutory

presumption and sufficient doubt is created in the veracity of the prosecution case rendering it extremely unsafe to convict the accused for the offence alleged.

17. The conviction of the accused for offence punishable under section 4 of Protection of Children from Sexual Offences Act and under section 363, 376(2) of the Indian Penal Code is set aside.

18. The judgment dated 28.12.2017 in Special Child Protection Case 89 of 2015 delivered by Additional Session Judge – 3, Nagpur, is set aside.

19. The appeal is allowed.

20. The accused be set at liberty forthwith unless his detention is required in connection with any other crime.

JUDGE

adgokar/RSB