

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL APPEAL NO.288/2018

Ramu s/o Ramlal alias Khode Belsare,
aged 28 years, Occ. Labour,
r/o Badnapur, Tq. Chikhaldara,
Dist. Amravati.

.....APPELLANT

...V E R S U S...

The State of Maharashtra through
Police Station Officer, P.S. Chikhaldara,
Dist. Amravati.

...RESPONDENT

Mr. P. W. Mirza, Advocate for appellant.
Mr. M. A. Khan, A.P.P. for respondent-State.

CORAM:- V. M. DESHPANDE, J.
DATED :- 03.09.2019

ORAL JUDGMENT

1. The present appeal is directed against judgment and order of conviction passed by learned Additional Sessions Judge-I and Special Judge, Achalpur in Special Criminal Case No.89/2014. By the said, appellant was convicted for the offence punishable under Section 6 of the Protection of Children From Sexual Offences Act and Section 376(1) of the Indian Penal Code and is directed to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.2,000/-, in default to suffer rigorous imprisonment for six months. He was also convicted for the offence punishable

under Section 341 of the Indian Penal Code and was directed to suffer simple imprisonment for one month. Both the sentences were directed to run concurrently. The appellant was in jail from 16.07.2014 till the date of impugned judgment dated 25.04.2017. Therefore, set off was given. This appeal was admitted on 08.02.2019. However, appellant was not given bail. Hence, the appellant is in jail.

2. The prosecution case, as it was unfurled during the course of trial is as under:

Baliram Gite (PW7), at the relevant time was attached to Police Station, Chikhaldara as Police Inspector. On 16.07.2014, as per the report lodged by victim (PW1), he registered a crime against appellant vide Crime No.89/2014 for an offence punishable under Section 376 and 341 of the IPC and Sections 4 and 6 of the POCSO Act. Oral report (Exh.-16) of victim and printed FIR (Exh.-17) are available on record.

As per oral report (Exh.-16), on Tuesday at 8:30 p.m., victim after having her dinner was sleeping with her aunt. At that time, her brother Rajesh (PW5) asked her to bring his cellphone, which was kept with appellant. Therefore, she went to his house

and demanded cellphone. As per report, that time the applicant left his home without any talk with victim and went towards her home. That time, victim seated on a cot at the house of applicant. The report further states that thereafter applicant returned to his house, noticing that victim started to proceed to her house. At that time, she was intercepted and after gagging her mouth, she was dragged towards the house of one Sitaram Lohar, assaulted on her and thereafter loosened her garments and against her wish, committed forcible sexual intercourse. When he was committing forcible sexual intercourse, that time, she shouted, thereby her brother Rajesh and her brother-in-law Ramdas came. They separated her from appellant and thereafter they went to house of Police Patil. With this allegation, the report was lodged.

3. After registration of crime, PI Gite (PW7) sent victim to Rural Hospital, Chikhaldara for her medical examination and thereafter she was sent to Government Hospital, Amravati for her medical examination. PI Gite (PW7) thereafter prepared spot panchanama (Exh.-25) in presence of pancha Hiranman Sawalkar (PW2). He also seized clothes of victim in presence of Hiranman (PW2) under seizure panchanama (Exh.-26). He also collected

school leaving certificate of victim girl. Statement of the witnesses were also recorded. Appellant was arrested by him on 16.07.2014. Appellant was sent for his medical examination. He seized clothes of appellant under panchanama (Exh.-36) in presence of pancha Hanif Shah (PW4). He also seized medical samples of victim under seizure panchanamas (Exhs.-34 & 35). Samples were seized by PI Gite in presence of Hanif Shah (PW4). In the meanwhile, PI Gite was transferred. Therefore, investigation was further carried by PI Nitin Gaware (PW8). This prosecution witness sent muddemal articles to Chemical Analyser (CA) under CA requisition (Exh.-48). He issued letter to Gram Panchayat and requested to issue birth certificate of victim girl (Though in the evidence it is recorded that requisition letter is at Exh.-49, original record shows that the said requisition is at Exh.-35). Gram Panchayat issued birth certificate of victim (Though in evidence of PI Gaware (PW8), said is at Exh.-50 perusal of the original record shows that it is at Exh.-36). After completion of investigation, he filed charge-sheet.

Charge was framed against the appellant. He abjured his guilt and claimed for his trial.

4. In order to prove its case, prosecution has examined in all nine witnesses. After appreciation of prosecution case, Court below recorded finding of guilt as narrated in opening paragraph of the judgment. Hence, this appeal.

5. I have heard Mr. Mirza, learned counsel for appellant and Mr. Khan, learned A.P.P. for respondent-State in extenso. With their able assistance, I have gone through record and proceedings and also notes of evidence. Gist of submissions of learned counsel for appellant is that age of victim is not proved beyond reasonable doubt. He also submitted that there is inconsistency in ocular and medical evidence. It is another limb of submission that no independent witnesses are examined in this prosecution case so also delay is not properly explained. It is also his submission that scientific evidence does not substantiate the prosecution case. Learned counsel for appellant, during the course of his submission, also harped on the unnatural conduct on the part of Rajesh (PW5), brother of the victim. He, therefore submitted that prosecution case is not proved beyond reasonable doubt. Therefore, he prayed that the appeal be allowed and appellant who is in jail be released forthwith.

Per contra, learned A.P.P. submitted that victim's evidence inspires confidence. He submitted that injury certificate (Exh.-18) shows that there was scratch on the chest of victim. Therefore, it substantiates her claim that she was assaulted. He supported impugned judgment and prayed for dismissal of appeal.

6. Appellant was charged for the offence punishable Section 6 of the POCSO Act. According to prosecution, victim was “Child” within the meaning of Section 2 (d) of the POCSO Act.

The Division Bench of this Court, to which I am party along with Hon'ble Mr. Justice B. R. Gavai, as His Lordship then was, took a view that provisions of the Act are stringent in nature. Since the enactment is stringent in nature, the degree of proof is stricter. Prosecution is under bounden duty to prove age of victim to show that at the time of incident, prosecutrix was “Child” within the meaning of provisions of the POCSO Act.

7. In the present case, neither in report (Exh.-16) nor substantive evidence the victim disclose her age of birth. She only states that her age is 17 years. Parents of victim are not examined to disclose date of birth of victim. Rajesh (PW5), who is brother of

victim is also conspicuously silent, not only about date of birth of victim but also about her age.

8. In the evidence of PI Gite (PW7) who has conducted most of the investigation, it is brought on record that during investigation, he collected the leaving certificate of victim girl from her. In order to prove said leaving certificate, the prosecution has examined Gopal Mandawkar (PW6), Head Master of Government Madhyamik Uchha Madhyamik Ashram School. While recording his evidence, it was noted by learned Judge of trial Court that original transfer certificate was not placed on record and only photocopy of certificate dated 19.07.2019 is there and this witness was not author of said transfer certificate. Therefore, though during the course of trial, learned A.P.P. tried to impress upon the Court that it should be exhibited and it should be admitted in the evidence, learned Judge of trial Court, while recording evidence of Mandawkar (PW6), recorded a finding that transfer certificate dated 19.07.2013, which is a photocopy and original is not brought on record nor said witness prepared the said document, the said document was not admitted by learned Judge of the Court below in the evidence.

9. Prosecution is relying on birth certificate (Exh.-36). It is issued by Secretary, Gram Panchayat, Badnapur. It shows that date of birth of the girl whose name is synonymous to the victim is 04.03.1997. Perusal of birth certificate (Exh.-36) would show that said certificate was given on 04.10.2014. Perusal of the certificate would show that name of mother of the girl is mentioned. This particular certificate came in the hand of investigating officer when he issued requisition (Exh.-35) on 26.09.2014. The prosecution has not examined the mother of the girl. Even the prosecution did not care to examine the Secretary who issued the said certificate and handed over the same to the investigating officer. In view of aforesaid nature of evidence and in absence of evidence of the Secretary, who has issued certificate, much importance cannot be given to said certificate.

10. Insofar as actual sexual assault is concerned, the prosecution is relying upon version of victim as well as evidence of Rajesh (PW5). If evidence of victim inspires confidence, the solitary evidence of victim is sufficient to record a finding of guilt. There is a variance in the substantive evidence of victim and her oral report. In her oral report, it is disclosed by her that initially

she went to the house of appellant and demanded cellphone of her brother. However, without entering into any talks whatsoever in nature with her, he left his house along with cellphone to give it to her brother. The report shows that at that time, she on her own seated on the cot in the house of appellant and only when the appellant returned from her house, she started proceeding to her house. Her substantive evidence is totally silent in respect of this aspect. However, in the cross-examination, she has admitted that on the date of incident, she went to the house of appellant to bring cellphone on the say of her brother. There is nothing on record to show that at the time of said incident, other family members of appellant were present. If that be so, had really appellant was to commit rape on the victim girl, he would not have missed the said chance at his house alone. Further, there is no occasion for the victim girl to sit on the cot when she noticed that the purpose for which she visited the house of appellant is accomplished inasmuch as appellant himself went towards her house along with cellphone.

11. According to evidence of victim, when she started proceeding towards her house that time, she was intercepted and she was dragged in nearby place i.e. backside the hose of one

Sitaram Belsare-Lohar and after assault made on her, she fell down and thereafter rape was committed. The spot panchanama (Exh.-25) would show that spot of incident was having numerous stones. Rajesh (PW5), the brother of victim, who was examined as eye witness, also admitted in his evidence that place of incident was having rough surface and there were stones lying there. During the course of investigation, girl was sent to Dr.Mrs. Ashwini Tidke (PW3), who examined her on 17.07.2014, on the requisition to examine the victim girl (Exh.39). She has proved medical certificate (Exh.-18). The injury certificate does not show any type of injuries on the back, heap, lumber bone of the victim, which is unnatural, looking to the fact that the incident has taken place having rough surface and numerous stones and when there was resistance from the victim.

Learned A.P.P. vehemently submitted that there is a scratch mark over the chest. Neither certificate (Exh.-18) nor evidence of Dr. Mrs.Tidke would reveal the said scratch mark on the chest was fresh in nature.

12. According to the Medical Officer, when she examined victim, she was found to be in menses. Though certificate

(Exh.-18) would show that girl's hymen was found to be torn, the medical certificate as well as evidence of Dr. Mrs. Tidke is totally silent that the tear was fresh one. On the contrary, Dr. Mrs. Tidke gave information that she cannot give exact opinion as to whether victim was assaulted sexually. She stated that when the girl was in menses, her private parts could not be examined.

13. According to victim, when sexual assault was in progress, she shouted thereby inviting attention of her brother and her brother-in-law. Spot panchanama (Exh.-25) would show that spot of incident was surrounded by numerous houses. Distance between house of the appellant and house of the victim is 200 ft. and in between them there exist houses of other neighbours. Rajesh (PW5), brother of the victim has admitted that from the spot of incident, voice can reach to the house of Sitaram. Sitaram is not examined by prosecution. As per prosecution case, victim shouted loudly. If that be so, looking to the time of incident and evidence of girl, villagers remain awake during that time. Therefore, had really she shouted, her shouts would have been heard by Sitaram and others.

14. As per FIR, after hearing her shouts, her brother and brother-in-law gathered there and then separated appellant from her and thereafter they took them to the house of Police Patil. The Police Patil is not examined in this prosecution case. Rajesh (PW5) has admitted, apart from the fact that, no injury was noticed by him on the person of his sister, he did not go to the police station to lodge report. He admitted that he did not go to the police station to lodge the report from the place of incident itself. As per his evidence, when he separated his sister, they went quietly to his house. Thus, in my view, this is the most unnatural conduct on the part of brother of a girl who was sexually assaulted and there is no reaction on the part of the brother. It is not the prosecution case that there was any terror in the village on the part of appellant. FIR is lodged on the next day of incident at about 16:00 hrs. Thus, there is a delay in lodging FIR, which is not at all explained by the prosecution.

15. The learned A.P.P. relied upon the CA reports. He submits that as per CA report (Exh.-51) there is human blood on knicker and pyjama and odhani of victim and human blood on

shirt of the appellant. Therefore, according to him, the scientific evidence is also there.

16. The above submission of learned A.P.P. is required to be rejected for:-

(a) Even as per evidence of Dr. Ashwini Tidke (PW3), when she examined the victim girl, she found that she was in her menses. Therefore, noticing human blood on the clothes of the victim is most natural.

(b) The clothes of appellant were seized under seizure panchanama (Exh.-36) in presence of Hanif Shah (PW4). This pancha witness is silent in his evidence that in his presence, the clothes were "Sealed".

Even the investigating officer PI Gite (PW7) does not state in his evidence that after the clothes were seized, those were sealed. Further, pancha witness did state during his cross-examination that police first obtained his signature on panchanama then clothes were shown and even the appellant was not present that time nor appellant's signature was obtained.

(c) Though, the CA report is used by the Court below as incriminating circumstance, when the appellant was examined during statement under Section 313 Cr.P.C., the CA report was not brought to his notice nor any explanation was sought from him.

In view of above, the CA report is required to be excluded from consideration.

16. Even the CA report does not show the presence of semen on clothes of victim on appellant nor in the vaginal smear of victim collected by Medical Officer.

17. Upshot of the aforesaid discussion leads me to record a finding that the prosecution has not proved its case beyond reasonable doubt against appellant. Therefore, the appeal is required to be allowed. Hence, I pass the following order.

ORDER

- (i) The appeal is allowed.
- (ii) Impugned judgment and order dated 25.04.2017 passed by Additional Sessions Judge-1, Achalpur in Special Criminal Case No.89/2014, is quashed and set aside.

(iii) Appellant-Ramu s/o Ramlal alias Khode Belsare is acquitted of the offence punishable under Section 6 of the Protection of Children From Sexual Offences Act and Sections 376 (1) and 341 of the Indian Penal Code.

(iv) The appellant who is in jail, shall be released forthwith, if not required in any other crime.

JUDGE

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