

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

CRIMINAL APPEAL NO. 811 OF 2018

Ramdas Santosh Bende,
Aged about 42 years,
Occupation – Tailor,
R/o Bhishnur, Tahsil – Narkhed,
District – Nagpur.

.... **APPELLANT**

VERSUS

State of Maharashtra,
through Police Station Officer,
Police Station, Jalalkheda, District
Nagpur.

.... **RESPONDENT**

Shri M.P. Kariya, Counsel for the appellant,
Ms. Ritu Kaliya, Addl.PP. for the respondent-State.

CORAM : ROHIT B. DEO, J.

DATE OF RESERVING THE JUDGMENT : 16-08-2019
DATE OF PRONOUNCING THE JUDGMENT : 20-12-2019

JUDGMENT :

The appellant is assailing the judgment dated 28-9-2018 rendered by the learned Special Judge, Nagpur in Special Child Criminal Case 125/2013, whereby and whereunder the appellant is convicted for offence punishable under Section 376(1) of the Indian

Penal Code and for offence punishable under Section 4 of the Protection of Children from Sexual Offences Act (POCSO) and is sentenced to suffer rigorous imprisonment for ten years and to payment of fine of Rs.10,000/- and in default of payment of fine, to suffer further rigorous imprisonment for three months. The accused is acquitted of offence punishable under Section 506 of the Indian Penal Code.

2. The genesis of the prosecution lies in oral report Exhibit 30 lodged by the minor victim at Jalalkheda Police Station on 12-8-2013. The gist of the report is that the victim returned home from school at 9.30 a.m. She was alone in the house since 10.00 a.m. since her parents left for work. The accused came to her house and conveyed that since the wife of the accused left to work in the field in the morning, she did not cook food and on the said pretext requested the plaintiff to cook food for him. The victim went to the house of the accused at 1.00 p.m. and cooked four to five chapatis for the accused. When the victim told the accused that she was leaving, the accused closed the front door and sought sexual favour. The victim declined and tried to open the front door and also to raise alarm. The accused bodily lifted the victim and made her lie on the cot. The accused

forcibly removed the clothes of the victim and subjected her to sexual intercourse. The victim started crying and the accused threatened her that should the incident be disclosed, she would be physically harmed. The victim again shouted loudly, in response to which Smt. Jyotsna Dhote, Indira Daware and Seema Pote approached the house and called out the victim from the window. The victim opened the door. The accused who was present, then fled and the victim disclosed the incident to the neighbourhood women. The parents of the accused were summoned and alongwith them the victim approached the police station and lodged the report at 2.25 p.m. or thereabout.

3. First Information Report Exhibit 31 was registered on the basis of the victim's complaint. She was sent for medical examination and the medical certificate Exhibit 32 was obtained. The blood and pubic hair samples and the vaginal swab of the victim were collected and seized vide seizure panchanama Exhibit 40. The clothes of the victim were seized vide seizure panchanama Exhibit 33. The statement of the victim was recorded under Section 164 of the Criminal Procedure Code and her birth certificate was collected from the Gram-Panchayat, Bhishnur. The spot panchanama was drawn, incriminating articles were seized and the accused was arrested. The accused was

sent for medical examination and the medical certificate Exhibit 58 was obtained. The biological samples of the accused were collected and seized and so were the clothes of the accused. The investigation proceeded on the usual lines. The statements of witnesses were recorded. The sketch map of the spot of incident was prepared and during the course of the investigation the reports of the chemical analysis were obtained. Completion of the investigation led to filing of the charge-sheet in the special Court.

4. The learned Special Judge framed charge Exhibit 12 for offences punishable under Sections 376 and 506 of the Indian Penal Code and Section 4 of the POCSO Act. The accused abjured guilt and claimed to be tried in accordance with law. The prosecution examined as many as seven witnesses. The statement of the accused was recorded under Section 313 of the Criminal Procedure Code. The defence of the accused was of total denial. The accused specifically stated that on the day of the incident from 9.00 a.m. till 4.30 p.m. i.e. till arrest he was working in his tailoring shop. The accused stated that he and his wife used to leave his house unlocked and the victim has lodged a false report taking advantage of the situation. The accused examined himself as DW 1.

5. The learned Special Judge was pleased to convict the accused as aforestated. The learned Special Judge held that the accused proved that the date of birth of the victim was 09-4-1997 and that the victim was, therefore, a minor as on the date of the incident. The learned Special Judge relied on the birth certificate Exhibit 34. The learned Special Judge noted that the victim was not cross-examined on the point of the date of birth. Considering the evidence on record holistically, the learned Special Judge rejected the submission of the learned Counsel for the accused that the birth certificate did not have evidentiary value since the prosecution did not examine the person who issued the birth certificate nor did the prosecution prove the primary material on the basis of which the date of birth was recorded. The learned Special Judge then considered the evidence of the victim and found the testimony to be trustworthy. The learned Special Judge then considered the evidence of PW 3-Jyotsna and PW 4-Indira and found the said evidence to be of corroborative value notwithstanding certain variance in the testimony of the said witnesses. The learned Special Judge further found that the testimony of the victim is corroborated by the medical and chemical analysis evidence. The learned Special Judge then considered whether the accused was successful in rebutting the presumption under Section 29

of the POCSO Act and from the said perspective the learned Special Judge considered the evidence of the accused. The learned Special Judge held that the accused failed to rebut the statutory presumption.

6. Shri M.P. Kariya, learned Counsel for the appellant made a valiant effort to persuade me to hold that the judgment of conviction is flawed. Relying on the decision of the Hon'ble Supreme Court in ***Dudh Nath Pandey vs. State of U.P., AIR 1981 SC 911***, Shri M.P. Kariya would submit that defence witnesses are entitled to equal treatment with the prosecution witnesses and that in the facts of the case, the learned Special Judge was clearly unmindful of the note of caution sounded by the Hon'ble Supreme Court that the Courts ought to overcome their traditional, instinctive disbelief in defence witnesses. Shri M.P. Kariya would submit that by examining himself the accused established the plea of *alibi*. Shri M.P. Kariya invited my attention to the decisions of the Hon'ble Supreme Court in ***Tameezuddin @ Tammu vs. State of (NCT) of Delhi, 2009(15) SCC 566***, ***Md. Ali alias Guddu vs. State of U.P., AIR 2015 SC (Supp.) 838***, ***Sham Singh vs. State of Haryana, AIR 2018 SC 3976***, decision of the Division Bench of this Court in ***Deepak s/o Jitendra Sawant vs. The State of Maharashtra, 2017 ALL MR (Cri.) 2058***, decisions of the Single Bench of this Court in ***Motiram***

Krishnarao and others vs. State of M.P., AIR 1955 Nagpur 121, Ashok Shamrao Thakare vs. State of Maharashtra, 2004(3) Crimes 664, Kailas Madhukar Sandase vs. State of Maharashtra, 2009 All MR (Cri) 145, Tukaram Govind Yadav Vs. State of Maharashtra, 2011(1) ALL MR (Cri.) 157, Sujit Bhurandas Borkar vs. The State of Maharashtra, 2016 ALL MR (Cri) 2029, decision of the Division Bench of the Delhi High Court in Mohd. Habib vs. State, 1989 CriLJ 137, decision of the Single Bench of Delhi High Court in Aslam @ Akram vs. State (NCT of Delhi), 2015(3) JCC 1697, decision of the Single Bench of Punjab and Haryana High Court in Rabbo alias Raban vs. State of Haryana, 2010(25) R.C.R. (Criminal) 228, decision of the Division Bench of the Rajasthan High Court in Ramji Lal vs. State of Rajasthan and State of Rajasthan vs. Ramji Lal, 2006(1) Cri.L.R.(Raj) 145, decision of the Single Bench of the Rajasthan High Court in Shakoor vs. State of Rajasthan, 2001 Cri.L.R. (Raj.) 841 and decision of the Division Bench of the Calcutta High Court in Syed Sabuj Khandakar vs. The State of West Bengal and Another, 2010(89) AIC 425.

7. Ms. Ritu Kaliya, learned Additional Public Prosecutor would submit that the judgment of conviction is unexceptionable. The learned Additional Public Prosecutor would submit that the decisions

on which reliance is placed on behalf of the accused are rendered on facts. Illustratively, in *Shyam Singh vs. State of Haryana*, the material witnesses were not examined nor did the medical evidence corroborate the prosecution version that the victim was raped after tying her hands with rope. The Hon'ble Apex Court further noted that the offence could not have been committed without attracting the attention of the inmates. In *Tameezuddin @ Tammu vs. State of (NCT) of Delhi*, the victim was married woman and the medical evidence did not support the prosecution version. In *Md. Ali alias Guddu vs. State of U.P.*, the first information report was delayed and the victim was with the accused for almost two months without any demur. The Division Bench decision of this Court in *Deepak s/o Jitendra Sawant vs. The State of Maharashtra*, turned on the evidence adduced on the age of the victim. In *Tukaram Govind Yadav vs. State of Maharashtra*, the learned Single Judge of this Court scaled-down the offence to 354 after recording a finding that the medical evidence did not establish either rape or attempt to rape. In *Sujit Bhurandas Borkar vs. The State of Maharashtra*, the learned Single Judge of this Court found that there was no medical evidence as would corroborate the prosecution case of forcible sexual intercourse. In *Aslam @ Akram vs. State (NCT of Delhi)*, the Delhi High Court noted that the evidence of the witnesses

was marred by inconsistencies and contradictions. In *Rabbo alias Raban vs. State of Haryana*, the learned Single Judge of Punjab and Haryana High Court noted that there was no injury on any private part and the hymen was intact and that considering that the victim was aged 9 years, the prosecution did not establish offence punishable under Section 376 of the Indian Penal Code and the accused was convicted for offence punishable under Section 354 of the Indian Penal Code. The other decisions also turned on the facts of the case and the benefit of doubt was given to the accused for several reasons including that the medical evidence did not support the prosecution case.

8. The first issue which will have to be addressed is whether the prosecution established that the victim was aged less than 18 years as would attract the provisions of the POCSO Act. Be it noted that apart from the birth certificate Exhibit 34, the prosecutrix disclosed her age as 17 at the first available opportunity, that is while lodging the oral report Exhibit 30. The victim, who was examined as PW 1, deposed on oath that she was born on 09-4-1997. The victim has not been cross-examined on the point of the date of birth. In the entire cross-examination, there is no reference to the date of birth muchless a suggestion that the victim was not a minor or that she was not

disclosing the correct date of birth. Considering that the testimony of the victim on the point of the date of birth has gone unchallenged, I do not see any reason to take a view different from that taken by the learned Special Judge. I am satisfied that the prosecution successfully proved that the victim was a minor as on the date of the incident.

9. Section 29 of the POCSO Act reads thus :

“Presumption as to certain offences – 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.”

10. This Court has taken a consistent view that the presumption under Section 29 of the POCSO Act is triggered only if the prosecution establishes certain foundational facts. If the foundational facts are established, the presumption is triggered. It is of course open for the accused to rebut the presumption by bringing on record such evidence, either in the cross-examination of the prosecution witnesses or in the form of defence witnesses, as would render the prosecution case either unbelievable or create such doubt as would lead the Court to infer that in every probability the incident did not occur or that the incident did not occur in the manner suggested by the prosecution.

11. The victim-PW 1 has deposed broadly consistent with the oral report. If the cross-examination is perused, the victim is suggested that she and her family was on visiting terms with the accused. Notably, it is not the case of the accused either suggested in the cross-examination of the victim or spoken of in the statement under Section 313 of the Criminal Procedure Code that there was any reason for the victim to falsely implicate the accused. The only suggestion is that when the victim demanded money in the morning, the accused refused and, therefore, he is falsely implicated. The victim candidly admits that there is a custom in the village that food is not prepared during the menstrual period and that on the date of the incident she was undergoing menstrual period. I have given my anxious consideration to the evidence of the victim and have found the evidence natural and truthful.

12. It is well settled that if the testimony of the victim of sexual offence is of sterling quality, corroboration is not necessary. At the most some assurance may be sought from medical and scientific evidence. In the present case, the testimony of the victim is more than amply corroborated by the testimony of PW 3-Jyotsna and PW 4-Indira. PW 3-Jyotsna has deposed that she heard the victim saying in loud

voice 'काका मी तुमच्या मुली सारखी आहे असे नका करु ' (Uncle please do not do this I am like your daughter). Jyotsna states that she knocked the door of the house of the accused. This version does appear to be embellished. However, to the extent that she heard some shouts/noise and approached the house of the accused does corroborate the evidence of the victim. Jyotsna then deposes that since nobody opened the door, she called out Smt. Indira and Smt. Seema and all three again knocked the door of the accused. After sometime the victim opened the door. Jyotsna states that the accused after wearing his clothes ran away from the backside door. This version of Jyotsna is corroborated by PW 4-Indira. Jyotsna has further deposed that the victim immediately disclosed the incident.

13. The victim was examined by PW 6-Dr. Mansi Shrigiriwar who issued certificate Exhibit 32. Dr. Mansi Shrigiriwar noticed injury on fourchette and an abrasion which was tender and red in colour. Dr. Mansi Shrigiriwar opined that the hymen was intact, there was no oedema or any other perennial injury and that attempt to sexual assault cannot be ruled out.

14. To constitute rape, even the slightest penetration of the

penis in the private parts is sufficient. That hymen was intact is not decisive and considering the legal definition of rape, offence of rape is not excluded. The learned Special Judge has rightly appreciated the evidence of the victim alongwith the medical and scientific evidence and has concluded that since even the slightest penetration of the male organ in the private parts of the victim would constitute rape, the fact that hymen was intact would not exclude the commission of the offence. I see no reason to differ. Exhibit 39 is the seizure memo of the bedsheet which was seized from the cot in the house of the accused. Chemical analysis report Exhibit 60 is that blood detected on the bedsheet was of blood group AB which is the blood group of the victim. While dealing with the chemical analysis report, Shri M.P. Kariya would strongly urge that the absence of semen on the clothes of the victim or the accused would rule out the commission of the offence. It is difficult to agree with the said submission. Ejaculation or discharge of semen is not decisive. Slightest penetration with or without discharge of semen would suffice to constitute the offence of rape. Considering the evidence of the chemical alanyser, the fact that the blood found on the bedsheet which was seized from the house of the accused, is of the blood group of the victim corroborates the version of the victim.

15. The accused examined himself and set up plea of *alibi*. The accused deposed that he was in his tailoring shop from 9.00 a.m. to 4.30 p.m. till he was arrested. Pertinently, the accused did not examine either his wife or any other person who could have vouched for the presence of the accused in the tailoring shop from 9.00 a.m. till the time of arrest. The accused deposed that he was not on talking terms with the family members of the father of the victim. Notably, this assertion is in sharp contrast with the suggestion given to the victim that the victim and her family was on visiting terms with the accused. The accused has deposed that he learnt that the victim was having a relationship with a boy and both were misusing the house of the accused in his absence. In the cross-examination, the accused admitted the photographs Exhibits 84 to 87. He further admitted that he left his house without lunch box. He admitted that he did not have strained relationship with the victim and her family.

16. The plea of *alibi* postulates the physical impossibility of the presence of the accused at the scene of the crime. In view of the statutory presumption under Section 29 of the POCSO Act, the burden to prove the plea of *alibi* was onerous. The accused could have examined his wife or any other person who could have vouched for his

continuous presence in his tailoring shop during the relevant period. The accused chose not to examine either his wife or any other independent witness in support of the plea of *alibi*. I am not inclined to accept the plea of *alibi*.

17. The evidence of the victim is natural and truthful and there is nothing on record to suggest that she had any reason to implicate the accused falsely. The evidence of PW 3-Jyotsna and PW 4-Indira, though at times embellished lends sufficient corroboration to the prosecution of the victim, although such corroboration is not strictly required. The medical and scientific evidence lends assurance to the prosecution version. Considering the evidence holistically, I do not find any reason to hold that the judgment of conviction suffers from any infirmity. The appeal is without substance and is dismissed.

JUDGE

adgokar