

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 711 OF 2019

Babul Khan Wali S/o. Mohmaad Khan
Age : 72 Years, Occu : Labour,
R/o. Hamilpura, Bidkin, Tq. Paithan,
Dist. Aurangabad. ... APPELLANT

VERSUS

The State of Maharashtra ... RESPONDENT

Shri. Kayyum Shaikh, Advocate for the appellant
Shri. B. V. Virdhe, APP for the respondent/State

CORAM : M. G. SEWLIKAR, J.

RESERVED ON : 30/01/2021
PRONOUNCED ON : 18/02/2021

JUDGMENT :

. The appellant has challenged his conviction under Sections 376 and 506(2) of the Indian Penal Code recorded by the Special Judge (POCSO Act), Aurangabad dated 10/07/2019 in Special Case Child Prot. No. 38/2017. The appellant has been sentenced to 10 years rigorous imprisonment and fine of Rs. 2,500/-, in default to further suffer rigorous imprisonment for three months for the offence

punishable under Section 376 of Indian Penal Code and has been sentenced to undergo rigorous imprisonment for one year and fine of Rs.1,000/-, in default to further suffer rigorous imprisonment for one month for the offence punishable under Section 506(2) of the Indian Penal Code. Appellant came to be acquitted under Sections 4, 6, 8 and 12 of the POCSO Act as age of the victim could not be proved to be of 14 years at the time of the incident.

2. Facts leading to this appeal can be succinctly stated as under:

. The victim aged 14 years at the time of the incident was adopted by the accused/appellant herein as her father died during her childhood and her mother abandoned her. Since then she has been living with the accused and his wife (DW-2). At the time of the incident she was studying in 7th standard.

3. The victim has alleged that on 16/12/2016 her mother had gone to Chikhalthana. Therefore, the victim and her father (the appellant) were at home. After having dinner, the victim went off to sleep. At 10.00 p.m., the appellant slept beside her and pressed her breast. The victim woke up. The

appellant asked her to remove her salwar. The victim resisted his advances. The appellant took off her salwar and took off his undergarments and placed his penis on her vagina and tried to insert it but he could not insert it. Thereafter, the victim went off to sleep again.

4. It is further alleged in the FIR that on 17/12/2016 when the victim was asleep, at 12.00 in the night she woke up as the appellant had pressed her breast. The appellant took off her salwar and threatened her not to shout else she would be done away with. He took off his clothes and placed his penis on the vagina. But he could not insert it. The victim suffered pains. The appellant again made the attempt to insert, but again he failed. Thereafter, there was discharge of semen. The victim put on her salwar and went off to sleep. Her salwar had semen stains. It is further alleged in the FIR that the appellant had made these attempts 2-3 times about 8 to 10 months before the incident in question. She had narrated these incidents to her teacher (PW-4). On these allegations she lodged FIR on 18/12/2016. On the basis of this FIR, offence under Sections 376 and 506(2) of the IPC and under Sections 4, 6, 8 and 12 of the Protection of

Children from Sexual Offences (POCSO) Act came to be registered.

5. Investigation was taken up. Statements of the witnesses were recorded and on the disclosure of the offence charge-sheet came to be filed against the appellant.

6. Charge was framed at Exhibit 7 under Sections 376, 506(2) of the IPC and under Sections 4, 6, 8 and 12 of the POCSO Act. Prosecution examined as many as 8 witnesses. The accused examined two witnesses in defence.

7. Defence of the accused is of total denial. It is also defence of the accused that the victim was seen in the company of 'A' (mention of his name is avoided in accordance with the directions of Hon'ble Apex Court in the case of **Nipun Saxena and Another Vs. Union of India and Others, (2019) 2 Supreme Court Cases 703** and directions of this Court in the case of **Sangita Vs. The State of Maharashtra and Ors. in Criminal Public Interest Litigation No. 1 of 2016, decided on 19/01/2021**) who is the son of his wife's brother 'B' (mention of his name avoided for the same reason). Her conduct was not good. Therefore, the victim was asked to vacate the room.

It was also the defence of the accused that the share of wife of the appellant was sold by 'B' and his son. Her share in the land was 3 acres 5 gunthas. On that account 'B' had threatened her that he would implicate the appellant in a false case. Therefore, the appellant has been falsely implicated in this case.

8. The learned trial Court after appreciation of entire evidence concluded that the age of the victim could not be proved and therefore she acquitted the accused/appellant under Sections 4, 6, 8 and 12 of the POCSO Act. She held that charges under Sections 376 of the IPC and 506(2) of the IPC were proved against the appellant and therefore recorded conviction and sentenced the appellant as stated above.

9. Heard Shri. Kayyum Shaikh, learned counsel for the appellant and Shri. Virdhe, learned APP for the State.

10. Shri. Shaikh submitted that the medical evidence does not show any evidence of rape. There were no injuries on the private parts of the victim. There is no evidence to show that there was penetration on the part of the appellant. Under Section 376 of the IPC, conviction cannot be recorded

unless there is evidence of penetration. He submitted that even the victim has admitted in the cross-examination that there was no penetration and therefore conviction under Section 376 of the IPC ought not to have been recorded. He further submitted that the victim has admitted in the cross-examination that on 3 to 4 occasions she had left the house of the appellant and his wife. The appellant and his wife searched for her and brought her back on every occasion and had warned her that she should not leave the house in such a manner. She has also admitted in the cross-examination that the appellant and his wife loved her like a daughter. She further admitted that the appellant and his wife used to scold her for her follies. He further argued that the victim has admitted in the cross-examination that the appellant and his wife wanted her to become a doctor. Shri. Shaikh submitted that this clearly shows that the appellant and his wife took every care in the upbringing of the victim. He further submitted that both of them loved her like their own daughter. He further submitted that it is incomprehensible that a person of the age of 69 years would do such a heinous act especially with a girl whom he loved like his own daughter. He submitted that he examined his wife in defence. She stated that her

brother 'B' had sold the land of her share. The victim was seen in the company of 'A', the son of 'B' which the wife of the appellant did not like. Therefore, at the instance of her brother 'B', this false case has been filed against the appellant. He submitted that at the most the offence would be under Section 354 of the IPC he therefore prayed for allowing the appeal.

11. Shri. Virdhe, learned APP submitted that the victim had left the house on 3-4 occasions because of the objectionable behaviour of the appellant. He submitted that for proving the guilt of the accused under Section 376 of the IPC, corroboration is not required. The only requirement is that evidence of the witness should be of sterling quality. He submitted that despite searching cross-examination, nothing could be elicited from the cross-examination of the victim. He further submitted that if the evidence of the victim is reliable cogent and trustworthy no corroboration is required. He submitted that the appellant had placed his genital organ on the genital organ of the victim. This clearly shows that there was rape on the victim. He submitted that semen stains were detected on the clothes of the appellant. Therefore there is

corroboration to the testimony of the victim. He submitted that the learned Sessions Court rightly recorded the conviction of the appellant. Therefore the appeal deserves to be dismissed.

12. It is settled principle of law that corroboration is not required for the testimony of the victim in case of rape if the evidence of the victim is cogent and is of sterling quality. Who can be considered a witness of sterling quality has been elucidated by the Hon'ble Supreme Court in the case of **Rai Sandeep @ Deepu Vs. State of NCT of Delhi** reported in **(2012) 8 SCC 21** as under :

22. In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a

position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

13. The aforesaid decision has been quoted with approval by the Hon'ble Apex Court in its recent decision in Criminal Appeal No. 264 of 2020 decided on 14/02/2020.

14. From the observations of the Hon'ble Apex court in the case of **Rai Sandeep Vs. State Of NCT Of Delhi** (supra), it is clear that a witness will be called a witness of sterling quality when his statement is natural and consistent with the case of the prosecution qua the accused, the witness should be in a position to withstand the cross-examination of any length and should not give room for any doubt as to the factum of the occurrence, the persons involved as well as the sequence of it.

15. Admittedly, medical evidence does not support to prosecution version. As per the evidence of Medical Officer (PW-6) there were no signs of rape her hymen was intact. Therefore, in the absence of the medical evidence, whether conviction under Section 376 is possible or not is the question before this Court. It is worth noting that PW-7 has stated that the accused is capable of sexual intercourse.

16. The victim was 14 years of age at the time of the incident and was 15 years of age at the time when her evidence was recorded. She has described the incident vividly. She has given a detailed account of the incident. It is not in dispute that the biological mother of the victim did not live

with her after father of the victim left for heavenly abode. The appellant and his wife had taken her in adoption.

17. The victim has stated in her examination-in-chief that on 16/12/2016, her mother (wife of the appellant) had gone for marriage at Chikhalthana. Therefore, she and the appellant were at home. In that night, she slept after dinner. At about 10.00 p.m. accused entered her blanket, in local language called as 'godhadi' and pressed her breast, because of which she woke up. Thereafter, the appellant asked her to remove her salwar which she did not. Therefore, accused himself removed her salwar and undressed himself. He touched his penis to her vagina. As the same was not inserted in her vagina he left it.

18. She has further stated that this incident was repeated on 17/12/2016 at about 12.00 in the night. The appellant again entered her godhadi and pressed her breast because of which she woke up. Again he asked her to remove her slawar but she did not. Accused told her not to shout else she would be killed. He again touched his penis to her vagina. Thereafter, semen was discharged. She has further deposed

that prior to the incident in question, on 2 to 4 occasions accused had done the above stated acts. She had stated about the same to her teacher (PW-4). On 18/12/2017 she lodged the report against the appellant.

19. The victim withstood the searching cross-examination by the appellant. She answered all the questions honestly. She stated in the cross-examination that there was no insertion of penis into her vagina. She stated in the cross-examination the names of brothers of wife of appellant. She has also admitted that for selling agricultural land in her village the appellant had come to her village and on the account of selling of agricultural land quarrel had taken place with his wife and these three brothers.

20. Thus the testimony of this witness clearly shows that she had candidly admitted that the appellant had placed his penis on her vagina. She further admitted that the appellant could not insert penis into the vagina. This clearly shows that she did not make any exaggeration. If she wanted to implicate the appellant falsely, she would have stated that there was insertion. From her testimony it appears that she deposed the above the incident as it happened. Now the

question is placing of the penis on the vagina would amount to rape. For this purpose definition of Section 375 in which rape is defined will have to be looked in to Section 375 reads thus :

375. Rape — A man is said to commit "rape" if he-

(a) penetrates his penis, to any extent, into the vagina, mouth urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:-

First.- Against her will.

Secondly. - Without her consent.

Thirdly. - With her consent when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly. - With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly. - With her consent when, at the time of giving such consent, by reason of

unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly. - With or without her consent, when she is under eighteen years of age.

Seventhly. - When she is unable to communicate consent .

21. Under Section 375 of the IPC, 6 categories indicated above are the basic ingredients of the offence. In the case of the **State of U.P. Vs. Babul Nath (1994) 6 SCC 29** almost similar question had fallen for consideration before the Hon'ble Apex court. The Hon'ble Apex Court observed as under : -

"8. It may here be noticed that Section 375 of the IPC defines rape and the Explanation to Section 375 reads as follows:

"Explanation.- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape."

From the Explanation reproduced above it is distinctly clear that ingredients which are essential for proving a charge of rape are the accomplishment of the act with force and resistance. To constitute the offence of rape neither Section 375 of IPC nor the Explanation attached thereto require that there should necessarily be complete penetration of the penis into the private part of the victim/prosecutrix. In other words to constitute the offence of rape it is not at all necessary that there should be complete penetration of the male organ with emission of semen and rupture of hymen. Even partial or slightest penetration of the male organ within the

labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim would be quite enough for the purpose of Sections 375 and 376 of IPC. That being so it is quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains.

(Emphasis supplied)

22. In the case of **Tarakeshwar Sahu Vs. State of Bihar (2006) 8 SCC 560** it has been held that the word "penetrate" according to Concise Oxford Dictionary means "find access into or through, pass through".

23. From the observations made in this decision by the Hon'ble Supreme Court, it is evident that even an attempt at penetration into the private part of the victim would be enough for attracting the provisions of Sections 375 and 376 of the IPC.

24. In the case of **Radhakrishna Nagesh Vs. State of Andhra Pradesh, (2013) 11 Supreme Court Cases 688**, a similar question had arisen for decision before Hon'ble Supreme Court. In that case a girl aged 11 years was raped. In the case of **Radhakrishna Nagesh Vs. State of Andhra Pradesh (Supra)** the accused closed the door of the room,

lifted the lehenga of the victim, took off his pants and inner-wear, put her on the floor of the room and passed liquid like urine into the private parts of the victim. The Hon'ble Supreme Court observed as under:-

"The penetration itself proves the offence of rape, but the contrary is not true i.e. even if there is no penetration, it does not necessarily mean that there is no rape. The Explanation to Section 375 IPC has been worded by the legislature so as to presume that if there was penetration, it would be sufficient to constitute sexual intercourse necessary for the offence of rape. The penetration may not always result in tearing of the hymen and the same will always depend upon the facts and circumstances of a given case. The court must examine the evidence of the prosecution in its entirety and then see its cumulative effect to determine whether the offence of rape has been committed or it is a case of criminal sexual assault or criminal assault outraging the modesty of a girl."

25. From these observations of the Hon'ble Supreme Court, it is evident that even if there is no penetration it does not necessarily mean that there was no rape.

26. Applying these principles, it will have to be examined whether the accused/appellant committed rape on the victim. The victim stated that on 16/12/2016 the accused had touched his private part on the private part of the victim.

Again on 17/12/2016 the accused/appellant had placed his private part against the private part of the victim. At that time the victim felt the discharge of semen. The placing of the private part and discharge of the semen indicates that there was insertion on the part of the accused/appellant. This evidence is further corroborated by the fact that the under garments and banian of the appellant had semen stains. Chemical Analyzer report is at Exhibit 92. CA report shows that the knickers and diaper of the accused/appellant had blood stains of group B. Blood stains were there also on lungi of sandow baniyan of the appellant. This evidence in the nature of CA report corroborates the testimony of victim (PW-1) that the appellant had raped her.

27. It has come in the cross-examination of the victim (PW-1) that 3-4 times she had left the house and the appellant and his wife had searched the victim and brought her back and she was cautioned against leaving the house alone. She made a voluntary statement that she had left the house because of the objectionable behaviour of the appellant. This conduct of this witness explains why she had left the house. Thus, the entire evidence on record clearly

points to the guilt of the accused/appellant.

28. It was tried to establish that the victim was used by the three brothers of the wife of the appellant for settling their personal scores with the appellant. It is the defence of the accused/appellant that she was seen in the company of 'A' which the appellant and his wife did not like. It is further the defence of the accused/appellant that the said 'A' had threatened the appellant to implicate in a false case. All these suggestions were put to the victim but she denied those suggestions. Thus, there is no evidence to show that the accused/ appellant was fixed in a false case.

29. Nothing is brought on record to show that the victim had any animus against the appellant or his wife. A girl of tender age would never think of implicating a person who gave her shelter in the absence of her father and mother. A girl of the age of the victim would never think of implicating an innocent person especially who happens to be the adopted father of the victim. The testimony of the victim is cogent and leaves no room for doubt that the appellant committed rape on her.

30. Learned counsel Shri. Shaikh placed reliance on the case of **Krishna Alias Krishnappa Vs. State of Karnataka, (2014) 15 Supreme Court Cases 596**. The facts in this authority were that the accused aged 17-18 years wrongfully restrained the victim aged 60 years gagged her mouth and despite her protest had sexual intercourse with her. Victim was sent for medical examination but no signs of sexual intercourse were found. There were civil and criminal cases pending between the parties. A medical witness showed that there was no sign to indicate that the victim was subjected to sexual intercourse. Therefore the trial Court had acquitted the accused but the High Court converted acquittal in to conviction. The Hon'ble Apex Court set aside the conviction and restored the acquittal. This is not the factual position in the case at hand. There is nothing on record to indicate that the victim had any animus against the appellant. Nothing is brought on record to show that the brothers of the wife of the appellant had any role to manipulate the FIR. Therefore merely suggesting that she acted at the instigation of the said 'A' is not enough.

31. As indicated above, the evidence on record

indicates that there was rape on the victim by the appellant. Therefore I do not find that the learned trial Court committed any error in recording conviction against the appellant/accused. Hence appeal is devoid of any substance. Appeal is therefore dismissed.

[M. G. SEWLIKAR, J.]

ssp