

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

**CRIMINAL APPEAL NO.497 OF 2017
WITH
CRIMINAL APPLN/1385/2021 IN APPEAL/497/2021**

Yogesh Bhagwan Saunkhe (Salunke)
Age : 29 years, Occu.: Education,
R/o. New Raj Nagar,
Behind Kalyani Bunglow, Deopur
Tal & Dist. Dhule.

APPELLANT

VERSUS

1. The State of Maharashtra
through, Deopur Police Station,
Dule, Dist. Dhule.
2. Gayatri Kailas Jadhav
Age : 18 years, Occ: Student
R/o. Plot No. 5 Survey No.131
Shriraj Nagar Nagesh Bari Road
Behind Kalyani Bungalows
Near Swastik Kirana
Deopur Dhule.

RESPONDENTS

...
Advocate for Appellant : Mr. N.L. Chaudhari
APP for Respondent / State : Mr. R.B. Bagul
Advocate for Respondent No.2 : Mr. D.G. Nagode
...

CORAM : MANGESH S. PATIL, J.

Reserved on : 15.07.2021

Pronounced on : 20.07.2021

JUDGMENT :

This is an appeal under Section 374 (2) of the Code of Criminal Procedure being aggrieved and dissatisfied by the judgment and order convicting the appellant for the offences punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter the

POCSO Act) and under Sections 376, 342 and 504 of the Indian Penal Code and sentencing him to various substantive sentences and fine maximum of which being rigorous imprisonment for 8 years and fine of Rs.500/- for the offences punishable under Section 376 of the Indian Penal Code.

2. The FIR has been lodged by a girl stated to be aged 16 years and odd on the date of the incident. She alleges that the incident occurred on 24.11.2015 at about 2:00 pm. When she was studying in the platform in front of her house the appellant who resides across the road called her. He pulled her inside the house, closed the door, gagged her mouth and committed rape on her. He also threatened her of dire consequences. In the meanwhile her sister Namrata (PW-3) knocked at the door. He threatened the victim (PW-1) not to disclose the incident to anybody. When the door was opened Namrata (PW-3) was there and the victim (PW-1) just left without disclosing the incident. She further alleges that since she was frightened she did not disclose the incident to anybody. She could gather courage and narrated the incident to her mother Nirmala (PW-2) on 01.12.2015. Even her mother got confused as to what was to be done. She narrated the incident to victim's father and it is thereafter that on 04.12.2015 the FIR (Exhibit-44) was lodged. The offence was registered. The appellant was arrested on the same day i.e. 04.12.2015. Medical examination of the victim (PW-1) was conducted by Dr. Chaudhari (PW-6) and that of the appellant was conducted by Dr. Gadhari (PW-7). Their clothes were seized, samples were drawn those were sent for Chemical

Analysis and in due course of time the charge sheet filed. The matter was committed to the Special Court. The charge was framed. The appellant pleaded not guilty and the prosecution led its evidence. The appellant was then examined under Section 313 of the Code of Criminal Procedure and was convicted and sentenced as mentioned herein above.

3. The appellant's defence, as can be gathered from the tenor of the cross-examination of the prosecution witnesses and the reply given during his examination under Section 313 of the Code of Criminal Procedure, is to the effect that there was an affair between him and the victim (PW-1). But since they belong to different castes the relation was not acceptable to her family members and he has been falsely implicated after their affair was revealed.

4. The learned advocate Mr. Chaudhari for the appellant would submit that the appellant has been convicted without their being sufficient and cogent evidence of commission of the crime. There is an enormous delay in lodging the FIR of about 10 days. No plausible explanation is coming forth. This circumstance substantiates the appellant's defence of false implication. The testimony of the material prosecution witnesses is not convincing and reliable. The medical evidence also does not concretely reveal commission of rape. There is serious doubt as to the exact age of the victim (PW-1). Her date of birth has also not been duly proved and in the absence of concrete evidence and the unreliable testimonies of the prosecution witnesses particularly the victim (PW-1), the appellant ought to

have been given benefit of doubt. In the alternative, the learned advocate would submit that the appellant has been in jail for almost six years. The maximum punishment meted out to him is eight years of rigorous imprisonment. He is an unmarried man in thirties and at least may be set at large by limiting the sentence to the period he has already undergone in jail.

5. Per contra, the learned APP would submit that no importance can be attached to the delay of 10 days in reporting the matter to police. Reasonable explanation has been extended by the prosecution for the delay. It is a matter of rape of a minor girl and not only the girl but even her parents must have been required to give it a serious thought before disclosing the incident to the society at large. There is an element of social stigma attached to it. All these circumstances including the psyche of the victim and her parents has been taken note of by the learned Special Judge. The learned APP would further submit that there is a concrete evidence in the form of extract of Birth Register (Exhibit – 56) to prove the date of birth of the victim (PW-1) since the record is forthcoming from an official sources. The conclusion of the learned Special Judge cannot be faulted with as regard her age.

6. The learned APP would further submit that though the medical evidence is not concrete, it was bound to be so in as much as the matter itself was reported belatedly. Therefore not much importance can be attached for absence of medical evidence regarding rape. Besides, there is a circumstance noted by Dr. Chaudhari (PW-6) who had noticed an old tear of

hymen at 3 O'clock place which according to him was 5 to 6 days old. No plausible explanation has been sought to be elicited by the defence to wash out this circumstance. Therefore this piece of medical evidence clearly substantiates the allegations of rape.

7. The learned APP would further submit that since it is a matter of commission of an offence under the POCSO Act, the learned Special Judge has rightly drawn a presumption under Section 29 of the Act and expected the appellant to have dislodged the presumption which he has miserably failed to do. She therefore submits that the learned Special Judge has rightly appreciated all the aforementioned facts and circumstances and evidence while reaching the conclusion which cannot be faulted with.

8. Lastly, the learned APP would submit that since it is a matter of penetrative sexual assault which is an offence punishable under the POCSO Act, taking into account the fact that the appellant who is at least 12 or more years older than the victim having taken advantage of his such position has sexually exploited the girl. Since the offences of the kind are on the rise in the society, it would send a wrong signal if he is allowed to let go without suffering the complete sentence.

9. I have carefully considered the rival submissions and perused the record and proceeding.

10. Since the incident itself was reported belatedly, after 10 days of its occurrence, it was bound to result in absence of medical evidence.

Obviously, the medical examination of the victim and the appellant and the corresponding Chemical Analysis Report do not clinchingly support the theory of rape.

11. However there is one observation noted by Dr. Chaudhari (PW-6) regarding presence of a 5 to 6 days old hymen tear at 3 O'clock place. As has been rightly noted by the learned Special Judge, though suggestions were put to Dr. Chaudhari (PW-6) to the effect that such tear can occur for variety of reasons as suggested in the question, there is no corresponding cross-examination of the victim (PW-1). It is therefore a circumstance which though in itself may not be insufficient to draw a conclusion regarding sexual intercourse, can certainly be relied upon as a corroborative piece of evidence. This is what has been precisely done by the learned Special Judge while referring to this circumstance in juxtaposition to the ocular evidence.

12. Needless to state that in the absence of concrete medical evidence the fate of matter hinges on veracity or otherwise of the material prosecution witnesses. As far as victim (PW-1) is concerned, she has narrated the incident in accordance with her version in the FIR (Exhibit-44). Though there is some kind of improvement while describing the actual act in as much as in the deposition she states about insertion of penis into the vagina which is conspicuously absent in the FIR, she has specifically stated about having described the incident in the same fashion even while lodging the FIR. For that matter the Investigating Officer Mrs. Jadahv (PW-8) admitted about the victim (PW-1) having narrated the incident in such

manner but has come out with an explanation that she thought it fit to describe it in vernacular saying that appellant indulged in dirty thing. The learned Judge has rightly considered the inhibition of persons describing such acts and has rightly believed the victim (PW-1) ignoring this circumstance.

13. True it is that the incident is stated to have occurred in the house of the appellant situated just across the road of the house of the victim (PW-1). There is also some contradiction in the evidence of victim (PW-1), her mother Nirmala (PW-2) and her sister Namrata (PW-3) in respect of the manner in which Namrata (PW-3) had reached the appellant's house and had knocked at the door. Though the victim (PW-1) is silent about it, Nirmala (PW-2) and Namrata (PW-3) have stated that it was at the former's direction that the latter had gone there to call the victim meaning thereby that perhaps they were aware that she would be found there.

14. In my considered view, this circumstance can be looked at from a different angle as well. As is noted herein above, the appellant has come with a tentative defence of consent. Though he does not admit of having indulged in sexual intercourse, he states that he was having an affair with the victim (PW-1). The aforementioned circumstance is indicative of the fact that perhaps, even going by the preponderance of probabilities, the victim (PW-1) could have voluntarily indulged in sex and perhaps that could be the reason for delay in disclosing the incident and the delay in lodging the FIR. However, this is a special case under the POCSO Act and if it can be

established that the victim (PW-1) was still a child as defined under that Act being below 18 years of age, she was certainly incapable of giving consent and consequently, the appellant would not be entitled to seek any benefit from this circumstance. Consequently it would be a matter of the age of the victim (PW-1) on the date of the incident which would be decisive of the matter, to which I shall advert a little later.

15. The fact remains that the testimonies of victim (PW-1), her mother Nirmala (PW-2) and sister Namrata (PW-3) do inspire confidence. It is trite that minor contradictions here and there are not sufficient to discard the entire testimonies of the prosecution witnesses. The principle of *falsus in uno, falsus in omnibus* is not applicable in India. To the extent the incident has been described by these witnesses they are entitled to be believed and have been rightly believed by the learned Special Judge. Coupled with the oral account, the circumstance regarding a tear of hymen at 3 O'clock being an old tear of 5 to 6 days certainly would come in aid of the prosecution to corroborate the version of the victim (PW-1). The learned Special Judge has correctly appreciated the evidence and has reached a correct conclusion while holding that there was rape and penetrative sexual assault.

16. As far as the age of the victim (PW-1) is concerned, the prosecution examined one Mr. Deepak Bhangale (PW-5) who works as a Sanitary Inspector with the concerned Grampanchayat where she was born. He had brought the original Birth Register on the basis of which he testified

that the date of birth of the victim recorded in the official record. He further identified the signature of one Mr. D.K. Sapdhare under whose signature the Birth Certificate (Exhibit – 57) was issued. Though this witness was not having any personal knowledge, he was called upon to testify from the official record of the village and his personal knowledge was indeed inconsequential. He specifically stated and identified signature of the then Village Development Officer Mr. Sapdhare on the Birth Certificate (Exhibit-57). Though it was elicited during his testimony that there was some over writing/scratching in the entry in the original Birth Register, when the victim's mother Nirmala (PW-2) specifically stated victim's date of birth, one could easily overlook this circumstance of presence of over writing/scratching in the original Birth Certificate. True it is that the learned Special Judge has overlooked this aspect. But even on an independent scrutiny, I do not find it to be a material circumstance to disprove the age of the victim (PW-1). Consequently no fault can be found with the conclusion of the learned Special Judge that the victim was aged 16 years 3 months and 10 days on the date of the incident.

17. Apart from the above state of affairs, it is equally important to note that deviating from the settled norms recognized in criminal jurisprudence, POCSO Act requires a presumption to be drawn in favour of commission of the offence and casts the burden on the defence to prove the contrary. Section 29 of the POCSO Act read thus :

Sec.29 : Presumption as to certain offences. - Where a person is prosecuted for committing or abetting or attempting to commit

any offence under Section 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.

As the wording suggests the Special Court is mandated to draw the presumption and seek the contrary to be proved. Bearing in mind this provision, it was expected of the appellant to have disproved the allegation of penetrative sexual assault. Though such a presumption cannot take a place of substantive proof it can certainly be read in conjunction with the evidence on the record. If it is so read, the learned Special Judge has clearly scanned the evidence and has taken aid of this presumption while rightly concluding about the appellant having failed to dislodge the presumption.

18. Though some tentative attempt was made on behalf of the appellant to show that he has been falsely implicated due to some political reasons, the cross-examination of the prosecution witnesses is not concrete in this respect. Nothing was put by way of concrete suggestion to reveal either any political motive or some ulterior motive on the part of the prosecution to falsely implicate him. Pertinently even during his examination under Section 313 of the Code of Criminal Procedure he has completely ignored his such defence.

19. Precisely for this reason, the appellant is not entitled to seek any benefit from the decision of the Supreme Court in the case of **Santosh Prasad @ Santosh Kumar Vs. The State of Bihar ; Criminal Appeal No.264/2020 (Arising out of SLP (Crl) No.3780/2018)**. As can be noticed,

in the matter before the Supreme Court there was sufficient evidence which revealed that the prosecutrix therein was having some animosity with the accused which is not the fact situation in the matter in hand.

20. In the result, the learned Special Judge has rightly considered the evidence and has reached a correct conclusion while convicting and sentencing the appellant.

21. So far as the request for showing some lenience is concerned, the offence is indeed serious and it would send a wrong signal if the persons like the appellant are allowed to let go by reducing the sentence. The very purpose of promulgating the special enactment like the POCSO Act would be defeated if one decides to take some lenient view. Therefore the request cannot be considered.

22. The Appeal is dismissed. The Criminal Application No.1385/2021 is disposed of.

(MANGESH S. PATIL, J.)