

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

CRIMINAL APPEAL NO. 7/2020.

Rakesh s/o Madhukar Hagde,
Age about 35 years, Occupation Labour,
resident of Khodshioni, Tahsil Sadak Ajuni,
District Gondia 441807
at present detained at
Central Prison, Nagpur. ... **APPELLANT.**

VERSUS

State of Maharashtra,
through Police Station Officer,
Police Station, Duggipar,
Tahsil Sadak Ajuni,
District Gondia. ... **RESPONDENT.**

Mr. H.P. Lingayat, Advocate for the Appellant.
Mr. M.J. Khan, A.P.P. for the Respondent.

CORAM : VINAY JOSHI, J.

JUDGMENT RESERVED ON : 05.08.2021.
JUDGMENT PRONOUNCED ON : 12.08.2021.

JUDGMENT :

Challenge in this appeal is to the judgment and order of
conviction dated 05.11.2019, passed in Special (POCSO) Case

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no.36/2015 by the Special Judge/Additional Sessions Judge, Gondia. The trial Court held the appellant/accused guilty for the offence punishable under Section 376[2] of the Indian Penal Code and Section 6 of the Protection of Children from Sexual Offences Act, (POCSO). The trial Court sentenced him to suffer rigorous imprisonment for 10 years along with fine of Rs.3000/- for the offences punishable under Section 376[2] of the Indian Penal Code. No separate sentence has been passed for the offence punishable under Section 6 of the POCSO Act.

2. Heard both sides at length and gone through the impugned judgment along with record and proceedings.

3. The prosecution case as emerges from the first information report (Exh.26), lodged by the grand-mother of the victim is regarding the incident dated 28.03.2015. The informant – lady stated that the victim girl, aged 10 years, was residing with her, whilst her parents were residing elsewhere. On the date of incident, there was marriage in the village, hence, everybody was in a hurry. Around 12 noon, the victim left the house by saying that she is also going to attend the marriage ceremony. Within half an hour the

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victim returned weeping and stated that the accused defamed her. On enquiry, the victim disclosed that while she was on the way, the accused caught hold her hand and took her to a nearby cattle shed by saying that he would give her ten rupees and would stitch new clothes for her. No sooner they entered into the cattle shed, the accused undressed her and inserted his penis into her vagina. Since it was paining, the victim started to cry. The accused asked her for not to disclose the things, and went away. After learning the things, the informant lady asked the victim to show the culprit, who did so. Thereafter, both of them came out of the house and near cattle shed the victim pointed towards the accused, who on pursuing the things, ran away.

4. In order to establish the guilt of the accused though the prosecution has relied on the evidence of 13 witnesses, however, the evidence of informant – Devikabai (P.W.3), victim girl (P.W.5) and Dr. Mali (P.W.1), who has examined the victim, carries importance. Since the accused was charged for the offence punishable under provisions of POCSO Act, it is the primary duty of the prosecution to establish that the victim was a ‘child’ within the meaning of Section

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2[d] of the POCSO Act. To that effect, the prosecution has tendered date of birth certificate of the victim (Exh.65), issued by the Health Department. The prosecution has examined P.W.7- Bhageshwar Chauhan, Gram Sevak, who has identified the said birth certificate. As per the birth certificate, the date of birth of the victim girl was 27.03.2005, whilst the birth entry was taken on 04.04.2005 itself. Pertinent to note that during trial, the victims' age has not been disputed. Date of birth certificate is a public document having presumptive value. In absence of any material, the said primary evidence can be safely relied. Having regard to the date of birth, the victim was barely 10 years of age on the date of occurrence, meaning thereby she was a 'child', within the meaning of Section 2[d] of the POCSO Act.

5. In order to establish the actual occurrence, the prosecution proceeds further by heavily relying on the evidence of P.W.5 – victim. It has come in her evidence that at the relevant time, she was studying in 4th standard. On the date of the incident, while she was going to attend the marriage, the accused took her to the cattle shed of one Bandu by saying that he will take her

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measurements for stitching school uniform. The accused closed the door, removed her underwear and inserted his penis in her private part. She added that the accused was also asking her to take his penis into her mouth, but, she refused. This was the brief narration of the incident stated by the minor victim. The defence has cross examined the victim, but, was unable to elucidate any material to shake her credibility.

6. The record indicates that the Court has put preliminary questions to the child witness to satisfy that the victim girl was capable of understanding the questions. It is a settled law that the evidence of child witness can not be rejected, per-se but, the Court as a rule of prudence considers such evidence on close scrutiny and only on being convinced about the quality and reliability thereof, records conviction based on it. Precisely, there is no rule of law that the conviction cannot be based on the evidence of child witness, unless it is corroborated. Having regard to the nature of accusation, there is neither any possibility of viewing the incident by stranger nor the prudence allows to expect so.

7. P.W.3 – informant has supported the prosecution case by

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stating that, soon after the occurrence the victim returned weeping to the house. When she asked, the victim disclosed the entire occurrence and particularly by accused. Moreover, the prosecution has examined P.W.10 a village lady, who stated that at the relevant time she came across the informant and victim girl, who was crying. On asking, she informed that the accused committed sexual assault and also finger pointed the accused, who was in the village.

8. As regards to the medical evidence, the prosecution is relying on the evidence of P.W.1 Dr. Vijay Mali, coupled with the medical papers (Exh.23). It has come in the evidence of the Medical Officer that on the date of occurrence, he has examined the victim girl. He noted that there was laceration at her local part and hymen was absent. The hymen tear was of position 6 O'clock. He opined that it was heard to comment upon the deep penetration, but, there had been sexual intercourse. During cross examination, the medical officer has admitted that the injuries i.e. laceration is possible by itching, but, he was quick enough to say that tear of hymen can be caused due to over cycling. However, it was not suggested to the victim. Moreover, laceration by itching or tear of hymen by cycling

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is one of the possibility. Always evidence of Medical Officer is to be appreciated along with direct evidence which speaks about sexual assault.

9. I have closely examined the medical certificate (Exh.23). There was no specific reference that libea minora was lacerated, fourchette and introitus/vagina had been reddened. Moreover two small lacerations were noted on libia majora and hymen was torn. The Medical Officer has examined the patient on 28.03.2015 at around 9 p.m. and opined that the injuries were within 7-9 hours. Evidence of the Medical Officer coupled with the injury certificate strongly corroborates the evidence of the minor victim.

10. The learned Counsel for the appellant/accused argued that the prosecution has not examined grand-father of the victim. It is not the prosecution case that at the relevant time the victims' grand-father was accompanying her, therefore, non examination of victims grand-father is of no consequence. It is pointed out that the victim girl has admitted that one Namdeo told her to state that the accused did all the things. Contextually it is submitted that the informant also stated about the quarrel in between Namdeo and accused.

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There may be dispute in between Namdeo and the accused, however, it does not falsify the evidence of the child victim. It is not a case that the accused was unknown to the victim girl. In that case the admission that Namdeo asked to tell the name of the accused, would have some significance. However, it is the victims' consistent case that the accused has committed sexual intercourse with her.

11. Besides that some minor inconsistencies are pointed out. To be specific, it is argued that though the victim girl stated that the accused has closed the door of the cattle shed, however, as per the spot panchnama report (Exh.28), there was no door to the cattle shed. On the background of direct evidence, these minor contingencies makes no difference. It is to be understood that the victim was a vulnerable minor girl, barely aged 10 years. Evidence of victim is to be appreciated by keeping in mind her tender age and her mental condition at the time of occurrence.

12. As per the prosecution case, the incident took place on 28.03.2015 around 12.30 p.m., whilst the first information report was lodged on the very day at 3.30 p.m. Thus, within 3 hours from the occurrence, first information report has been lodged detailing

the role of the accused. Always quick lodgement of first information report eliminates the chances of concoction. The defence is not able to point any material so as to falsely implicate the accused.

13. The evidence of minor victim which is supported by medical evidence inspires full confidence. It is her evidence that the accused has inserted his penis into her vagina which amounts to penetrative sexual assault within the meaning of Section 3 of the POCSO Act. Since the victim girl was below 12 years of age, the act of accused amounts to aggravated form of penetrative sexual assault in terms of Clause [m] to Section 5 of the POCSO Act, as well as it would fall under Section 376 [2] of the Indian Penal Code.

14. On reassessment of entire evidence, it reveals that there is cogent, reliable and trustworthy evidence against the accused about the charged offences. The findings recorded by the Trial Court are well founded. In view of that, the conviction of the accused is well sustainable in the eyes of law. Hence, the appeal being devoid of merit is dismissed.

JUDGE

Rgd.