

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

CRIMINAL APPEAL NO. 105 OF 2021

Rushishek s/o Ishwar Nagale,
 Aged 21 years, Occ. Labour,
 R/o Chaman Nagar, Zopadpatti, Ward
 No.4, Kurha, Tq. Tiosa, Distt. Amravati.
 Presently in Central Prison, Amravati.

... **APPELLANT**

VERSUS

State of Maharashtra,
 Through P.S.O. Kurha,
 Amravati, Distt. Amravati.

... **RESPONDENT**

Mrs. Sonali Saware Gadhave, Advocate for the appellant.
 Shri I.G. Damle, A.P.P. for respondent-State.

CORAM : **VINAY JOSHI, J.**
CLOSED FOR JUDGEMENT ON : **01/09/2021**
DATE OF PRONOUNCEMENT : **11/10/2021**

JUDGMENT :

1. Conviction of appellant (accused) in Special POCSO Case No.140 of 2019 by the Sessions Judge, Amravati vide judgment and order dated 21.10.2020 led him to challenge the order of conviction in

this appeal.

2. The Special Court held the appellant guilty for the offence punishable under Sections 376(2)(i) of the Indian Penal Code, Section 4 of the Protection of Children From Sexual Offence Act, 2012 (for short 'the POCSO Act') and sentenced him to undergo rigorous imprisonment for 10 years along with fine of Rs.5000/- with default clause. Though, the appellant was also charged for the offence punishable under Sections 363 and 366 of the Indian Penal Code, however, a finding of acquittal has been recorded for those offences. The State has not challenged the acquittal for the offence punishable under Sections 363 and 366 of the Indian Penal Code. Hence, the appeal remains to the extent of challenging the order of conviction as aforesaid mentioned.

3. It is the prosecution case that, the victim-girl aged 15 years was residing with her mother at Tiwasa Taluka, District Amravati. On 03.05.2019, around 11.00 am, the victim – a school going girl, left her house under the pretext of attending tuition classes, however, did not return. The victim's mother (informant) took search at possible places, however, could not succeed. The informant-mother learnt that the

victim-girl was having love affair with the appellant (accused) who was also missing. Therefore, on the following day i.e. on 04.05.2019, the informant-mother went to the concerned Police Station and lodged the report. Initially, the Police have registered the crime for the offence punishable under Sections 363 and 366 of the Indian Penal Code. Within two days, the victim-girl returned on which her statement was recorded by the Police. The victim stated that since she was scolded and beat by her parents due to her love affair with the accused, she eloped with him. Both of them went to Agra at sister's house of the accused. They stayed for one day and on the following day, the accused left alone for Bhopal. Thereafter, sister of the accused arranged for victim's return to Nagpur by train and accordingly, she came back. On the basis of victim's statement, the Police have added Section 376(2)(i) of the Indian Penal Code, Section 3 read with Section 4 of the POCSO Act.

4. During course of investigation, victim's date of birth certificate, was collected. The victim-girl was medically examined. Cloths of the victim as well as of the accused, were seized and sent for chemical analysis. Panchanama of the scene of the offence was drawn. After completion of investigation, final report was submitted in

the Special Court.

5. Charges were framed against the accused vide Exhibit 2. The accused disowned the guilt by claiming innocence and false implication. The prosecution has examined only three witnesses i.e. PW1 victim-girl, PW2 informant-mother and PW3 – Medical Officer. Besides that the prosecution banks upon certain documents of which reference can be made at later stage. On appreciation of oral as well as documentary evidence, the Special Court held that the prosecution has ably established the offence punishable under Section 376(2)(i) of the Indian Penal Code read with Section 4 of the POCSO Act.

6. Heard. Learned Counsel appearing for the appellant (accused) and learned A.P.P. for the respondent-State.

7. In nut-shell, the prosecution alleges that the accused has committed sexual intercourse on minor victim which amounts to rape as well as penetrative sexual assault within the meaning of Section 3 of the POCSO Act. It is the prosecution case that on the date of incident, the victim was below 18 years of age i.e. a child within the meaning of Section 2(d) of the POCSO Act. In order to establish victim's minority, the prosecution relied on the evidence of the victim, her mother and

date of birth certificate issued under the Registration of Births and Deaths Act, 1969. It has come in the victim's evidence that her date of birth is 16.11.2004. The victim's evidence is corroborated by birth certificate (Exhibit 12). It is well settled that a birth certificate issued by the Competent Authority is relevant and admissible in terms of Section 35 of the Evidence Act. The entry of date of birth was made by the Public Servant in the discharge of his official duty, which bears a presumptive value. On the other hand, besides denial, the defence is unable to point any material to discard said credible evidence. The learned Special Judge has rightly considered the said aspect and by placing reliance on the date of birth certificate concluded that the victim was 14 years and 6 months of age at the time of occurrence. The said finding is well founded on the basis of credible evidence, hence, it can be safely held that the victim was a 'child' at the relevant time.

8. It takes me to consider the material allegations about rape or penetrative sexual assault on the victim. In order to establish said vital aspect, the prosecution has heavily relied on the evidence of PW1 victim-girl. It is her evidence that she was knowing the accused since long and they had love relationship. In past, they had sexual relations. The victim stated that at the instance of her relationship her parents

beat her, hence she ran away with the accused. On 03.05.2019, both of them went by train to Agra and stayed for one day at the sister's house of the accused. On the following day, the accused left for Bhopal under pretext of appearing for some exam, but did not returned. The sister of accused arranged for her traveling and sent her back from Agra to Nagpur. It reveals from victim's evidence that in initial part, she made a stray statement that they had sexual relations (शारीरिक संबंध होते). Victim has not stated the place or even approximate period when they had physical relations. Besides said stray statement, there is nothing in her evidence about sexual relations.

9. Be that as it may, the prosecution has relied on the evidence of PW3 – Medical Officer to support the charge of rape. The Medical Officer deposed that he has examined the victim on 07.05.2019. The victim stated the history of sexual intercourse on 04.05.2019 at Agra. The Medical Officer found that Hymen was old torn and there was minimal bleeding. He opined that the possibility of forcible intercourse cannot be ruled out. The Medical Officer has admitted that there can be tear of hymen due to cycling. There are various possibilities of tear of hymen. However, that alone cannot be considered independently as a substantive evidence to establish the offence of rape.

10. Besides that the prosecution has relied on the evidence of Chemical Analyzers' report. During course of investigation, the Police have seized cloths of victim as well as of accused. Blood samples of both were collected. On Chemical Analyzation, the blood of the victim was of 'A' group whilst blood of accused was of 'AB' group. The analysis report shows that blood stains found on the cloths of the accused and victim-girl are of blood group 'A' i.e. of victim-girl. The said circumstance was heavily pressed into service by the prosecution.

11. The Special Court has held that the victims' evidence on the point of rape is well corroborated by the evidence of the Medical Officer. To be specific, history narrated by the victim to the Medical Officer along with her examination report was held to be corroborative piece of evidence. Moreover, the Special Court weighed the Chemical Analyzer's Report in which blood found on the cloths of the accused was found to be of victim's blood group. In view of that the Special Court observed that the victim's oral evidence is fully corroborated by three circumstances i.e. history narrated by the victim to the Doctor, finding of old tear of hymen and finding of blood of 'A' group on the cloths of the accused. The Special Court held that the said evidence is very well sufficient to establish the guilt and accordingly,

convicted the accused. Thus, principally, it was held by the Special Court that on 04.05.2019, when the victim and the accused were at Agra, they had sexual intercourse. The said fact was corroborated by the above circumstances and therefore, the finding of guilt was recorded.

12. Reverting to the victim's evidence, it is surprising to note that the victim nowhere stated in her evidence that they had physical or sexual relations at Agra. It is to be remembered that conviction is solely based on the allegation of rape on 04.05.2019 at Agra. It is her evidence that both of them went to Agra and stayed for one day at the sister's house of the accused. She stated that on the following day, the accused left the place under the pretext of going to Bhopal and directly came back to Nagpur. Thus, the victim's evidence is totally silent on the point of sexual relationship in between them at Agra i.e. on 04.05.2019. The Special Court while discussing the evidence (Paragraph 21) has stated that the evidence of victim-girl says that the accused took her at his sister's house under the promise of marriage. He has subjected her for sexual assault at his sister's house, left her and returned to their village via Bhopal. However, it is noteworthy to see that the victim has not uttered a single word about their sexual

relations at Agra on 04.05.2019. Out of anxiety, I have compared the victim's evidence also recorded in Marathi language, but unable to find stated anything about sexual relations at Agra. Apparently, the Special Court by misreading the evidence proceeded by presuming victims evidence on the point of rape on 04.05.2019 at Agra, which was not there. Needless to say that what is not in the evidence can not be presumed nor Court can add anything in the evidence. In the light of said position, the matter requires consideration.

13. Learned Special Court by presuming victim's evidence of sexual intercourse at Agra, proceeded to evaluate the corroborative evidence. The Special Court held that the victim's oral evidence about sexual intercourse on 04.05.2019 at Agra was well corroborated by the history stated by the victim to Doctor and Chemical Analyzer's Report. The very basis for accepting the corroborative evidence was the direct evidence of the victim, which in fact was absent. The Special Court gravely erred in presuming that the victim has stated about sexual intercourse on 04.05.2019 at Agra. It is well settled that the corroborative evidence is to be taken into the aid of substantive evidence. In absence of victim's substantive evidence, though she is examined, it is risky to draw a conclusion on the basis of corroborative

pieces of evidence.

14. Since the victim nowhere stated that they had sexual relations at Agra on 04.05.2019, finding of blood stains of 'A' group on the cloth of the accused is of no significance. History narrated to the Doctor or Chemical Analyzer's Report would always play a secondary role in strengthening the direct evidence. As stated above, there is no direct evidence of victim about their sexual intercourse on 04.05.2019 at Agra. Pertinent to note that it is not a case that victim was not available to give evidence for some constrains. In that case the other circumstances may assist to draw inference in given facts, since the parameters would be different. Herein the victim herself led evidence but not uttered a word about sexual intercourse on 04.05.2019 at Agra nor stated that she narrated history of sexual assault to the Doctor, hence it heavily goes against the prosecution case.

15. Though there was a stray statement of the victim that they had sexual relationship, however, it was without any particulars. The accused has specifically denied that they had sexual relations at any point of time. Moreover, it is submitted on behalf of accused that under pressure of the Police and parents, false statement has been recorded.

In that context, the defence has pointed out certain admissions given by the victim. The victim admits that when she returned from Agra, she directly went to the Police Station to withdraw the report lodged by her mother. She further admits that the Police telephonically called her parents and under pressure of Police and parents, she gave a statement. In the light of these admissions, it is evident that at the behest of parents, the victim's statement was recorded. Pertinent to note that, the victim went to the Police Station to withdraw the report lodged by her mother about kidnapping. Moreover, the victim has admitted that there was quarrel in between her parents and the accused on account of tap water. It is evident that the parents of victim were in inimical terms with the accused on account of tap water and their daughter's relationship with the accused. In such a background, victim's admission that she gave statement under pressure carries importance. Therefore, the possibility of exaggerating the things cannot be ruled out. In the light of said position, vague statement about past relationship does not inspire confidence to base conviction.

16. Besides that the learned Counsel for the appellant would submit that there were high chances of tampering of the seized articles. She would submit that there was tampering of blood samples and

cloths at the hand of the Police. Pertinent to note that the prosecution has neither examined carrier nor Investigating Officer. On that point, learned defence Counsel would submit that defence has been greatly prejudiced by non-examination of Investigation Officer. In support of said contention, she relied on the decision of Patna High Court in case of *S.K. Rashid @ Abdul Rashid and anr. vs. State of Bihar 1986 SCC OnLine Pat 221* and Karnataka High Court in case of *State vs. Peddahanumappa and ors 2004 Cri. L.J. 2255*.

17. It is submitted that the victim has improved her story about promise of marriage, however, as the Investigating Officer was not examined, defence lost the opportunity to bring said contradiction on record. Moreover, it is argued that the accused did not get opportunity to impeach the credit about seizure of samples and to put the question on tented statement of the victim on the background of admissions given by the victim. Certainly, in above peculiar facts, non-examination of the Investigating Officer has caused serious prejudice to the defence, which cannot be overlooked.

18. The Special Court has fundamentally based its conviction on the victim's evidence about sexual assault at the sister's house of the

accused on 04.05.2019, corroborated by the history narrated by the victim to the Medical Officer and Chemical Analyzer Report. At the cost of repetition, I may say that there is no such evidence of the victim about their sexual relations at Agra on 04.05.2019, therefore, in absence of substantive evidence, merely on the basis of corroborative material, conviction cannot be based. One can understand that in cases based on circumstantial evidence, the different incriminating circumstances may assist to draw probable inference about the guilt of accused. However, in case at hand, the victim was very much available and she also led evidence in the Court. However, the victim is totally silent on the point of sexual assault at Agra. In such a background, the corroborative pieces cannot fill a gap of substantive evidence to establish the guilt.

19. In view of above discussion, definitely, it is a case where the possibility of exaggeration and false implication cannot be ruled out. It is cardinal principle of criminal jurisprudence that when two view emerges from the situation, the view favorable to the accused would take precedence. To summarize the position, corroborative circumstances can hardly take the place of substantive evidence. Before acting on such corroborative evidence, it would be desirable to consider

whether it is supported either by clear direct evidence or by circumstantial evidence. In absence of victim's evidence, on the basis of supporting material, guilt cannot be held to be proved with requisite standard of proof. It is a fit case where benefit of doubt belongs to the accused. The Special Court erred in passing conviction on the basis of corroborative pieces of evidence and therefore, it is not free from error. In view of that impugned judgment and order of conviction is not sustainable in the eye of law, hence, the following order :

- (a) The Criminal Appeal stands allowed.
- (b) The impugned judgment and order of conviction dated 21.10.2020 passed in Special (POCSO) Case No.140 of 2019 is hereby quashed and set aside.
- (c) The appellant/accused Rushishek s/o Ishwar Nagale is acquitted from the offence punishable under Section 376(2)(i) of the Indian Penal Code and Section 4 of the Protection of Children From Sexual Offences Act 2012.
- (d) The appellant/accused be released forthwith, if not required in other offences.
- (e) Fine amount, if any deposited by the appellant/accused be refunded to him.
- (f) Muddemal property be dealt with in accordance with law.

JUDGE