

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

CRIMINAL APPEAL NO. 647 OF 2019

Rupesh Vijay Raut,
Aged about 23 years,
Occ.- Labour, Resident of Swalambi
Nagar, Amravati, Taluka and District
Amravati.

... **APPELLANT**

VERSUS

State of Maharashtra,
through Police Station Officer,
Police Station, Walgaon,
Tq. and Distt. Amravati.

... **RESPONDENT**

Shri S.K. Bhandarkar, Advocate for the Appellant.
Shri M.J. Khan, A.P.P. for respondent/State.

CORAM : **VINAY JOSHI, J.**

CLOSED FOR JUDGMENT ON : **21/08/2021**

JUDGMENT PRONOUNCED ON : **01/09/2021**

JUDGMENT :

By consent of learned Counsel appearing for the parties, the
appeal is taken up for final hearing.

2. Failure of appellant/accused in securing acquittal in Atro. Special Case No.6 of 2014 led him to approach this Court for challenging the judgment and order of conviction dated 27.08.2019. The Trial Court held the appellant/accused guilty for the offence punishable under Sections 323, 377 of the Indian Penal Code, and Section 4 of the Protection of Children from Sexual Offences Act, (POCSO) 2012. The Trial Court has imposed sentence to suffer rigorous imprisonment for seven years along with fine of Rs.10,000/- with a default clause, for the offence punishable under Section 4 of the POCSO Act. However, no separate punishment was imposed for the offence punishable under Sections 323 and 377 of the Indian Penal Code. The accused was also charged for the offence punishable under Section 3(ii)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities), Act (for short 'the SC and ST Act), however, the Trial Court acquitted him from the said charge.

3. The accused has allegedly committed unnatural offence on victim-boy aged 17 years. The said act also amount to 'penetrative sexual assault' as defined under Section 3 read with Section 4 of the

POCSO Act.

4. It is the prosecution case that on 03.11.2013, around 2.20 to 2.40 pm., while the victim-boy went to fill petrol in his moped, the accused Rupesh Raut met him. The accused took off goggle from the victims' pocket and went away. The victim chased him and asked for return of goggle. The accused by assaulting victim forcibly made him to sit on the moped. The accused took victim-boy at secluded place i.e. in the field on Chandur Bazar Road. By giving threats, accused compelled the victim-boy to remove his undergarments. By giving life threats, the accused put his penis into the mouth of the victim as well as inserted at his anus. Thereafter, the accused took the victim back, gave threats and left him. The victim returned to his house and informed the things to his father. In turn, they went to the Walgaon Police Station and lodged a report (Exhibit 18). The Police registered a crime vide Crime No.126 of 2013 for the offence punishable under Sections 323 and 377 of the Indian Penal Code. Later on, Section 4 of the POCSO Act has been added.

5. During the course of investigation, the victim-boy was got medically examined. The Police have seized cloths and necessary

samples. Panchanama of the scene of offence was drawn. On completion of investigation, final report came to be submitted in the Special Court.

6. The Trial Court framed charges vide Exhibit 4. Since the accused denied the guilt, the prosecution has examined as many as six witnesses to bring home the guilt of accused. The statement of accused was recorded in terms of Section 313 of the Code of Criminal Procedure. The defence of the accused was of total denial and false implication. The prosecution also banks upon certain documents namely Spot Panchanama, Medical Examination Report, Birth Certificate, School admission register, etc.. On assessment of oral and documentary evidence, the Trial Court held accused guilty for the offence punishable under Sections 323, 377 of the Indian Penal Code, Section 4 of the POCSO Act and imposed sentence as aforesaid mentioned.

7. Heard Shri S.K. Bhandarkar learned Advocate appearing for accused. He would submit that the Trial Court failed in appreciating the evidence in proper perspective. There was no eye-witness to the occurrence. The prosecution has not examined the witness in whose

presence there was a quarrel in between them. It is submitted that medical evidence does not support the victims' testimony. It is also submitted that chemical analysis report does not support the prosecution case. There were no signs of struggle on the person of the victim. The time line stated by the victim does not matches in view of distance between the Rangoli Lawn and place of the occurrence.

8. On the other hand, learned A.P.P. Shri M.J. Khan submitted that the prosecution evidence is sufficient to establish charged offences. The defence has not challenge that the victim was a minor on the date of incident. The victims' evidence is fully corroborated by the medical evidence. The Trial Court has correctly appreciate the evidence and therefore, judgment and order of conviction calls no interference.

9. It is the prosecution case that the accused took the victim-boy to secluded place, put his penis into victims' mouth and also inserting his penis into the anus of the victim. Since, the accused is charged for the offence punishable under POCSO Act, it is incumbent on the prosecution to establish that the victim-boy was minor i.e. child on the date of occurrence. In order to establish victims' minority, the

prosecution has examined P.W.3 a Junior Clerk from St. Joseph English Primary School. She has brought original admission register showing the date of birth of the victim-boy as 14.08.1996, entered into the register vide entry no.6601. A copy of relevant page of register (Exhibit 34) is produced in support of said contention. Besides that, the prosecution has produced a birth certificate (Exhibit 55) of the victim-boy showing his date of birth as 14.08.1996. The birth entry was taken on 15.08.1996. In terms of Section 35 of the Evidence Act, the birth certificate issued by the Competent Authority is having presumptive value. The defence has not challenged the date of birth of the victim in true sense. Besides that, the evidence of birth certificate and birth entry in first school attended clearly establishes that the victims' date of birth was '14.08.1996 meaning thereby he was 17 years and 2 months old on the date of occurrence. In other words, the victim was a child within the meaning of Section 2(d) of the POCSO Act.

10. In order to establish the alleged offence, the prosecution is heavily banking upon the evidence of P.W.1 victim and P.W.6 Dr. Anil Meshram, who has examined the victim soon-after the occurrence. It is the victim's evidence that on 03.11.2013, around 2.20 pm, when he went to fill petrol, the accused met and took off his goggle. The accused

slapped him and made to sit on the moped. The accused took him to the road side field by putting him under threat. The accused caused him to remove cloths and also removed his own cloths, put his penis into the victims' mouth and then also had carnal intercourse. The victims' testimony was tested by way of cross-examination. Some omissions are brought on record, but they are of no significance.

11. True, it has come in the evidence that, during meantime, the accused took victim to one hut and then had a cigarette near Panshop. According to the defence, the prosecution ought to have examined witnesses from said place. The prosecution could have made such exercise, but non-examination of those persons, does not falsifies the prosecution case, if otherwise, found credible. By placing reliance on the decision of Supreme Court in case of ***Phool Singh vs. State (Govt. of NCT of Delhi) 2011 SCC OnLine Del 3012***. It has been argued by defence that the prosecution has to establish all the circumstances, leading only to the inference about the guilt of the accused. Particularly, my attention has been invited to paragraph 13 of the judgment. In said case, the Supreme Court has reiterated the well-known principles about appreciation of evidence, in cases based on the circumstantial evidence. The case in hand is quite distinct since it is not

solely based on circumstantial evidence, but the prosecution has led evidence of victim. Therefore, defence cannot muster any strength from the above decision.

12. In order to support the victims' evidence, the prosecution has examined P.W.6 Dr. Anil Meshram, who was working as a Medical Officer. It has come in his evidence that on 04.11.2013, around 1.50 am, the victim-boy was brought for medical examination. Upon examination, he found superficial abrasion over anal region and superficial injury over the middle finger of the left hand. He opined about the possibility of unnatural sex. The age of both injuries was about 10 to 12 hours. Accordingly, P.W.6 Dr. Anil Meshram has issued medico-legal injury certificate (Exhibit 48). During cross-examination, the Medical Officer has admitted that he is not sure as to whether carnal intercourse is taken place with the victim. Admissions given by the Medical Officer cannot be read in isolation, but requires consideration along with the victims' direct evidence.

13. It requires to be noted that the alleged occurrence took place on 03.11.2013 in between 2.20 to 2.40 pm whilst in the late-night, around 1.50 am, on 04.11.2013, victim was examined by the Medical

Officer. Pertinent to note that the Medical Officer has found superficial abrasion over anal region and the age of injury was within 10 to 12 hours. Likewise, there was superficial injury over the middle finger of the left hand of the victim, which was also recent one. The time of injury matches with the prosecution case regarding the occurrence. Recent abrasion on the anal region supports the victims' evidence about unnatural act. It requires to be noted that insertion of genital to any extent renders completion of the offence. So also, finger injury suggests the mark of struggle.

14. Learned Counsel appearing for the accused by relying on the decision of Delhi High Court in case of ***State (Govt. of NCT of Delhi) vs. Mullah Muzib 2015 SCC OnLine Del 7228*** has submitted that in absence of medical evidence, the case of carnal intercourse cannot be established. In said case, the Court noted that the contradictions in testimony were material, coupled with total absence of medical evidence. Moreover, the victim was 15 years of age whilst the accused was adult aged 55 years.. The said decision was totally based on the facts of said case. Needless to say that, two criminal cases cannot be identical on facts. Each case bears its' own distinct features, therefore, evidence is to be appreciated on the basis of given facts.

15. The victims' testimony remained un-shattered on the point of actual occurrence. Finding of fresh superficial abrasion over anal region strongly supports the case of unnatural sexual assault. Negative chemical analysis report on the canvass of direct evidence, does not make any difference. Moreover, the act of putting penis into the mouth amounts to penetrative sexual assault within the meaning of Section 3 of the POCSO Act.

16. As per the prosecution case, the incident took place in between 2.20 to 3.30 pm. The victim stated that after the incident, he returned to his house in the late afternoon and informed the things to his father. Thereafter, the victim along with his father, initially went to Gadgenagar Police Station, then Walgaon Police Station and lodged a report around 11.00 pm on the same day. Therefore, it is evident that within few hours from the occurrence, First Information Report was lodged. Always quick lodgement of report, eliminates the chances of concoction. In other words, immediate disclosure of occurrence to the Police, vouches about the credibility of the information. Moreover, no potential reason surfaced for false implication. Though, there are minor improvements and inconsistencies, they does not affect the material evidence on the core issue of sexual assault. The evidence of victim-boy

inspires full confidence, hence conviction can be safely based on his evidence.

17. In view of the above discussion, on careful examination of entire material, I have come to the conclusion that impugned judgment and order of conviction passed by the Trial Court is correct, proper and legal. Therefore, no interference is called for.

18. Accordingly, the criminal appeal is dismissed.

JUDGE

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