

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

CRIMINAL APPEAL NO.188 OF 2022 WITH CRI.APLN/1897/22

Ajay Maroti Waghmare,
Age-21 years, Occu-Service,
R/o. Rajura (Bk), Tq. Mukhed,
Dist. Nanded

...APPELLANT

VERSUS

1. The State of Maharashtra,
Through Police Station Officer,
Police Station Mukramabad,
Tq. Mukhed, Dist. Nanded

...RESPONDENTS

2. XYZ Victim

Mr. Shivaji Bhimrao Bhapkar, Advocate for the appellant
Mr. Renuka Ghule, Advocate for the respondent No.2
Mr. Y. G. Gujrathi, APP for the respondents/State

CORAM : KISHORE C. SANT, J.

RESERVED ON : 19th October, 2022

PRONOUNCED ON : 23rd December, 2022

JUDGMENT:

1. Challenge in this appeal is to the judgment and order passed by the learned Additional Sessions Judge, Kandhar, Link Court, Mukhed in Special Case (POCSO) No.6/2021. The appellant is held guilty for the offences punishable under

Sections 363, 366(A), 376 (2)(j)(n) of the Indian Penal Code, 1860 and Section 6 of the Protection of Children from Sexual Offences Act, 2012 and is sentenced to suffer rigorous imprisonment for a period of 20 years and to pay fine of Rs.10,000/-, in default, to suffer rigorous imprisonment for one year for the offence punishable under Section 376 (2)(j)(n) of the IPC read with Section 6 of the POCSO Act and is sentenced to suffer rigorous imprisonment for a period of five years and to pay fine of Rs.5,000/-, in default to suffer rigorous imprisonment for six months for the offence punishable under Section 363 of the IPC and is also sentenced to suffer rigorous imprisonment for a period of seven years and to pay fine of Rs.7,000/-, in default to suffer rigorous imprisonment for nine months for the offence punishable under Section 366-A of the IPC. Sentences are directed to run concurrently. Since the trial the accused is in jail.

2. FIR was lodged by father of the victim that on 30-01-2021 at 01.00 pm his daughter aged about 13 years left the

house for tuition class. The victim did not return to home till 06.00 pm in the evening and therefore, he went to tuition class and made enquiry with the teacher who told that the victim did not come to attend the tuition class. He, therefore, made enquiry in the village and with the relatives. However, she was not found. He therefore lodged a complaint as his daughter was missing. The police started search of the victim. In the search it revealed that accused had taken the victim. From location of mobile of accused it transpired that he was at Nizamabad. Police went to Nizamabad and found the accused with victim. The victim stated that the accused took her on the motorcycle to Nizamabad. There was sexual intercourse on many occasions. On this the accused came to be arrested on 04-02-2021 at 10.28 pm. Accused and victim were brought back.

3. In the first statement that came to be recorded on 04-02-2021, the victim told about the entire episode. During the course of the investigation statements of parents of the victim came to be recorded under Section 164 of the Code of Criminal

Procedure. The police after investigation filed a charge-sheet. The case is thereafter committed. After framing of charges trial was held in which the accused is found guilty of the offences.

4. The police examined 13 witnesses in support of the prosecution case. The police has also produced on record the reports of the medical examination of the victim and the accused. Prosecution has further proved the chemical analyser's reports. First witness is father of the victim. In his evidence he deposed that on 30-01-2021 at 01.30 pm his daughter left the house for attending the tuition. However, she did not come back till the evening. This witness, therefore, went to the tuition class. On asking the teacher, it was informed that on that day his daughter did not attend the tuition class. He took search of the daughter in the village and with the relatives. So, on next day he went to the police station and lodged the complaint (exh.14). The witness further stated that police of Mukramabad Police Station went to Niazamabad and they brought the daughter from the Nizamabad. In the police station he enquired with his

daughter on which she told that the accused had taken her on his motorcycle from near the tuition class and told her that he loves her and he wants to marry her. On saying this the accused took her on his motorcycle to Nizamabad, to the house of the his cousin and committed sexual intercourse with her. Thereafter, police took him before the JMFC where his statement came to be recorded. In the cross-examination suggestion was given that because this witness wanted to marry his daughter with relative of his wife and for that reason he has made false allegation against the accused. Suggestion was given that at the time of incident the age of daughter was more than 18 years.

5. The victim is examined as PW-3 after verifying that she is competent and in a position to give answers. She stated her birth date to be 09-06-2008 and she was studying in 7th std. in Zilla Parishad Kendriya Primary School, Rajura. She stated that the accused happens to be her uncle who told her that he loves and will marry her. After 15-20 days of Diwali festival, when she had been to answer the nature's call, the accused

came there and told her that he loves her and there he had a sexual intercourse. Thereafter for 2-3 times he committed sexual intercourse. At the time of Sankranti festival her mother had told that she looks as fully grownup and she will be married soon. As far as the date of incident she stated that when she was going to tuition classes the accused came close to her and she told accused that her mother now is thinking of her marriage. The accused on asked her to sit on the motorcycle and took her to the house of his cousin sister at Nizamabad saying that he wants to marry her. There the accused told his sister that they have performed the marriage. She allowed them to stay in her house. There he committed sexual intercourse with the victim. On 04-02-2021 the police came there and took them to Mukramabad Police Station where the statement came to be recorded in presence of her mother. She identified photo of the victim.

6. Though she is cross-examined in detail nothing much has come to shatter her story in the chief. To a suggestion

that her age is more than 18 years, she denied.

7. Mr. Hakim Mehtabsab Waghdare-PW-5 is the Village Development Officer, Rajura proved the birth certificate of the victim and stated date of birth to be 10-09-2008 at Exh.36.

8. Mrs. Rani Khushal Vannalika-PW-6 is cousin sister of the accused with whom the accused and the victim had stayed at Nizamabad. Since she did not support the case of the prosecution, learned APP sought permission to cross-examine this witness. In cross there is no material to support the prosecution.

9. Mr. Ashok Laxmznrao Bhandarwar-PW-7 is the Police Constable from Mukramabad Police Station who deposed on 03-02-2021 that he was directed by Police Inspector to go to Nizamabad in search of the victim. There they went to Hamalwadi where the victim was found. There panchanam was prepared. From there accused and the victim girl were

taken in the custody and were brought to Mukramabad Police Station. This witness proved the seizure panchanama of motorcycle. Nothing much has come in the cross.

10. Mr. Uttam Gopalrao Gaikwad-PW-8 working as a API in Mukramabad Police Station deposed that on 05-02-2021, the clothes of the victim and accused, their body samples for chemical analysis were taken and sent to Forensic Science Laboratory, Nanded.

11. Dr. Sudhakar Sambhajirao Tahade-PW-9 is the Medical Officer who was working in Sub-District Government Hospital, at Mukhed. He deposed that on 12-05-2021 he examined the accused. He did not find any injury to his genital. He also did not notice any deformity to his penis and opined that the accused was able to perform the sexual act.

12. Dr. Rashtrapal Dattatraya Avsare-PW-10 who examined the victim in the Government Hospital, Vishnupuri,

Nanded on 05-02-2021. He did not notice any surface injury on the her body. On local examination, he found that the victim has sustained old healed hymenal tears present at position 11'3'4' O'clock. He collected samples of her pubic hair, vaginal swab, nails and blood etc. Female doctor B. N. Dhavle was present at the time of conducting examination of the victim. After examining her he gave opinion that over all findings are consistant with signs showing sexual intercourse. Samples were kept for Forensic Science Laboratory examination. He was shown Exh.33. On going through the report of Chemical Analysis he confirmed that examination report Exh.51 are consistent with sexual intercourse. In the cross-examination the accused could not take out any reason to support the case of the prosecution.

13. Mr. Devidas Ganpat Bhalke-PW-11 is one more panch to seizure panchanama. The police had seized the bed sheet and also prepared spot panchanama from where the victim and accused were brought from Niazamabad. He identified the bed

sheet that was seized in his presence and also mobile phone in which photo was captured. Police also seized the Passion-Pro motorcycle on which it is alleged that victim was taken by the accused. He also prove the panchanama where the police has seized motorcycle owned by victim Exh.54. In the cross-examination, it is taken that this witness happens to be uncle of the victim. He denied the suggestion that he was deposing at the instance of mother of the victim. This panch proved the map and also seizure panchanama.

14. Another witness is Gopinath Adinath Waghmare-PW-12, PSI, Investigating Officer. He stated that the investigation was handed over to him on 01-02-2021. He stated about the investigation and about preparing of spot panchanma and seizure panchanama etc. He collected the CDR and from CDR he collected the location of the accused at Nizamabad. He further deposed that on 03-02-2021 he went to Nizamabad with police staff and two panch witnesses in a private vehicle. In Hamalwadi, Nizamabad area they were found the accused and

victim and panchanama was drawn. The vehicle and other clothes were seized. He proved various panchanamas and the CA report etc. In the cross-examination an attempt was made to show that this Investigating Officer has not collected the documents in respect of the house property from where the accused and victim were brought and he also did not collect the documents about ownership and possession of the said house. He could not tell the boundaries of the said house without perusing panchanama etc. Further he was asked, like seized bed-sheets are available in market. He did not obtain school admission extract of the victim. It is taken in cross that one of the panchas Chandrakant Rajurkar happens to be uncle of the victim and another panch Devidas Bhalke happens to be maternal uncle of the victim. Thus, this is the oral evidence adduced before the court. This clearly shows that the victim who is 13 years had suffered sexual intercourse frequently. PW-13 is Deepak Jadhav PSO in Mukramabad Police Station who reduced the complaint of father of the victim in writing and handed over the investigation to PSI Waghmare.

15. It is seen from the report Exh. 51 that the victim had given the history sexual intercourse by the accused her uncle and there was love affair between them & they had sexual intercourse. Thereafter accused took the victim to Nizamabad. After examination it is observed that the victim was well oriented to time, place and persons. There was no evidence on tears loss of parts, stains on cloths as well as on body. The injuries were found to be old healed hymenal tears. Samples of the pubic hair, vaginal swab, nails and blood samples were preserved for Forensic Laboratory examination. Overall findings were consistent with sexual intercourse.

16. From the evidence, to prove that the victim was taken by the accused to Nizamabad. The victim herself has stated about taking her by the accused and having intercourse with her at Nizamabad. She has also narrated earlier instances where accused had intercourse with her. As already discussed the doctor has clearly recorded finding that there was sexual

intercourse. In CA report in respect of Jangya i.e. article 3 was detected with the human blood. Group of blood detected on Exh.3 could not be determined as the results are inconclusive. The CA report in respect of nail clippings, public hair, urethral swab and blood of the accused is concerned, neither blood nor tissue matter is detected on Exh.1. No semen is detected on Exh.s 2 and 3. Exh. 4 and 5 are of blood group -B. CA report in respect of blood, vaginal swab, pubic hair, nail clipping of victim is concerned, it is found that no seiman was detected on Exh. 2 and 3. i.e. vaginal swab and pubic hair. On Exh.1 blood is found to be of B-group. Considering CA report, there is no clinching evidence that it is either of the accused or victim. Thus, case rest upon the oral testimony of the witnesses. On this evidence the learned advocate submits that when the father of the victim lodged the report he has no personal knowledge that accused has taken the victim. Though the statement of the mother of the victim is recorded by the police, however, she is not examined before the court and therefore, adverse inference needs to be gathered. He submits that the statement of the mother was

recorded even under Section 164 of the Code of Criminal Procedure. Same is contrary to her statement given before the police. So far as the evidence of the victim-PW-3 is concerned, it is submitted that she has not stated anything about her earlier relation with the accused. She has never made any complaint about the same and therefore, further evidence cannot be relied upon. So far as taking the victim through Nizamabad there is no statement of any independent witnesses. Except statement of the victim there is no evidence that the accused has taken the victim on the motorcycle to Nizamabad. Though independent witnesses were available, their statements were not recorded. Only statement of Rani was recorded. However, she is declared hostile and therefore, her evidence is also of no use to the prosecution. The land owner or neighbouring persons from Nizamabad where allegedly the victim and accused stayed is not examined. From medial evidence it is submitted that no surface injuries were found. However, there is no cross-examination on this count. He further submitted that no semen is found on the body. He further submitted that there is no evidence of used clothes on

the victim. There are no stains of blood except on exh.3. This overall finding of the medial evidence is contrary to the prosecution story. So far as the panch witnesses are concerned, he submits that all panch witnesses are related to the victim and it is clear from the evidence of the informant and panch themselves. The evidence of the victim is consistent with the statement recorded before the police and the statements recorded under section 164 of Cr. PC.

17. He also submits that there is delay in lodging the FIR. He further submits that accused is falsely implicated in the offence as the informant wanted the accused to marry with brother of his sister-in-law. This accused did not accept the said relation and because of this the accused is falsely implicated in the offence.

18. His further submission is that victim is minor and therefore, she was tutored to give statement against this accused.

19. He relied upon the judgment reported in *AIR 1980 SC 249 in the case of Phul Singh Vs State of Haryana* wherein the accused was not habitual offender and therefore sentence of 4 years was reduced to 2 years, when the accused was held guilty of the offence punishable under Section 376 of the IPC. He also relied upon the judgment reported in 2008 Cri. Law Journal 721 in the case of *Bibhishan Vs State of Maharashtra* wherein in para 6 and 7 the Hon'ble Apex had recorded that since there was no injury on the body of the prosecutrix and since there was no sign of semen on the private part of the body nor clothes were torn, there was no presence of hair of the accused on the private part of the prosecutrix. The Doctor after examining the prosecutrix deposed that girl was habituated to sexual intercourse. Under those circumstances the benefit of doubt was given to the accused as the charges framed against him were not proved beyond the reasonable doubt and therefore, the accused was acquitted. He even relied upon the judgment reported in *2003 Cri. Law Journal 258 in the case of*

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Chandrayya Hanumanthapa Mallappanavar and others. He submits that the medical evidence was slightly weak about the conclusiveness of the sexual assault on the victim and therefore, acquittal was recorded.

20. Learned advocate for the accused thus submits that there is no sufficient evidence to connect with the accused any of the instances and he submits that case is of acquitted for lack of sufficient evidence and prays in the alternate, some leniency be shown considering the age of the accused was only 21 years when alleged incident took place. He submits that sentence appears to be exorbitant.

21. Learned APP opposed the appeal. He submits that victim is only of 13 years of age. Therefore, the provision of POCSO are attracted. Consent of the victim cannot be considered. He submits that from the medial evidence that there is history of penetrating intercourse. This aspect is not

challenged in the cross-examination. History is given by the minor to the Medial Officer and same is recorded and this part is not challenged in the cross-examination. He submits that the injuries were healed and there is a finding recorded in the medical evidence which is consistent with the story of the prosecution. On article 3 Jangya in the CA report blood is found of blood Group-B. Though the blood group of both the victim and accused is of blood group-B, still it was for the accused to challenge said part of the evidence in the cross-examination. However, there is no cross in this respect. Innocence of the victim cannot be ignored. In the cross of the victim only suggestion was about relation of panch witness with the father of the victim.

22. The learned APP submits that the statement of PW-6 is proved by the prosecution. In the evidence of the Investigating Officer Exh.63 wherein PW-6 had stated before the police that the accused had taken victim to her house and they stayed in her house as husband and wife. He submits that this material

portion is thus proved. Considering the submissions and the judgments cited before this court, it is clearly seen that the prosecution has proved its case. There is sufficient evidence available on record. Considering the age of victim, it is clear that it cannot be said that she would implicate her uncle falsely in an offence. The theory put-up by the accused is not even probable from any angle. From the investigation papers and the panchanama proved before the court, it is clear that the accused and the victim were found at Nizamabad in the house of PW-6 with the accused. Defense though attempted to show that the accused is falsely implicated, however, there is no cross on the material evidence led by the prosecution.

23. Considering the nature of the offence i.e. under POCSO Act sufficient evidence is brought on record which is rightly considered by the learned court below. The judgment reported in the case of State of *Karnataka Vs Chandrayya Hanumanthappa Mallappanavar and others* (supra) the court observed that there was no evidence and therefore the accused

was acquitted. About the judgment in the case of *Phul Singh Vs State of Haryana* (supra) is concerned it is seen that the court had considered the case only for the purpose of showing leniency. In this case considering the provision of POCSO, the trial court has rightly awarded the punishment.

24. Considering the above, this court does not find any reason to interfere with the findings recorded by the trial court. The evidence is properly appreciated. In the result, the criminal appeal fails and same is dismissed. In view of dismissal of the criminal appeal, the pending criminal application stands disposed off.

[KISHORE C. SANT, J.]

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