

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

CRIMINAL APPEAL NO.292 OF 2018

Motiram Asaram Gore
Age 50 years, Occ. Agriculturist,
R/o Village Guru Pimpri,
Taluka Ghansawangi, District Jalna ... **APPELLANT**

VERSUS

1. The State of Maharashtra
 through Police Station, Ghansawangi,
 Taluka Ghansawangi, District Jalna.
2. A ... **RESPONDENTS**

.....
Shri Mahesh B. Karande, Advocate for appellant
Shri S.P. Sonpawale, A.P.P. for respondent No.1 – State
Shri S.S. Tope, Advocate for respondent No.2.

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CORAM : R. G. AVACHAT, J.

Date of reserving judgment : 18th February, 2022

Date of pronouncing judgment : 23rd February, 2022

J U D G M E N T :

The challenge in this appeal is to the judgment of conviction and order of sentence dated 27/3/2018, passed by Special Judge/ Additional Sessions Judge-2, Jalna in Special Case (Child) No.21/2014. Vide impugned judgment and order, the appellant came to be convicted for the offence punishable under Section 376(1)(i) of the Indian Penal Code,

and under Section 4 of the Protection of Children from Sexual Offences Act and, therefore, sentenced to suffer rigorous imprisonment for 10 years and 7 years respectively with a direction to pay fine of Rs.5000/- on each count, in default of payment of fine, he has been directed to undergo rigorous imprisonment for three months.

2. The facts giving rise to the present appeal are as under :

P.W.3 - A (prosecutrix) was resident of a village in Ghansawangi Taluka, District Jalna. Her date of birth is stated to be 14/9/2001. In the year 2014, the prosecutrix was in 6th Standard. She would reside along with her parents and siblings. The prosecutrix had been to the school in the morning of 22/3/2014. she returned from school by little past 12.00 noon. The prosecutrix went to play out of the house after lunch. The mother of the prosecutrix (P.W.2 - B) along with her sister-in-law was home. The prosecutrix returned home crying. It was 4.00 p.m. She told her mother (P.W.2 - B) that she went to the house of the appellant in response to his call. The appellant latched the entrance door of the house from inside, laid her on cot. He removed his pant and inserted his private part in her female organ. She shouted

complaining burning sensation. The appellant, therefore, rose with a view to apply oil to her private part. Taking this opportunity, the prosecutrix left his house and came home to narrate her mother. The mother, in turn, called her brother-in-law (K). He came. All of them approached Ghansawangi Police Station. The prosecutrix lodged the First Information Report (F.I.R.) Exh.28.

3. Based on the F.I.R., a crime vide C.R. No.81/2014 came to be registered. The prosecutrix was medically screened. The appellant was arrested. Scene of offence panchanama was drawn. clothes on the persons of both of them were seized under panchanamas. Their blood samples were obtained. During medical screening of the prosecutrix, her vaginal swab too was obtained. Statements were recorded of the persons acquainted with the facts and circumstances of the case. On completion of the investigation, the appellant was proceeded against by filing the charge sheet.

4. The trial Court framed the Charge Exh.18. The appellant pleaded not guilty. His defence is of false implication on the ground of having refused to pay interest on the amount taken as a hand loan from the father of the

prosecutrix.

5. The prosecution examined 9 witnesses and produced in evidence certain documents to establish the charge. On appreciation of the evidence, the trial Court convicted and sentenced the appellant as stated hereinabove.

6. Heard. Learned counsel for the appellant would submit that, the evidence of the prosecutrix is grossly inconsistent with the F.I.R. and her statement recorded under Section 164 of the Code of Criminal Procedure. The medical examination report of the prosecutrix rules out sexual assault. According to him, as such, it is a case of acquittal. He, therefore, urged for allowing the appeal.

7. Learned A.P.P. and learned counsel for the prosecutrix would, on the other hand, submit that, penetration howsoever slight, constitutes an offence of rape. The prosecutrix was 12 years of age when the incidence did take place. It was not a completed sexual activity and, therefore, the C.A. report does not suggest presence of semen on vaginal swab and/or the garments of both, the prosecutrix and the appellant as well. According to learned counsel, the parents of the victim have no reason to falsely implicate the appellant at the cost of honour and career of

their daughter. The appellant failed to make out his defence even on preponderance of probabilities. According to the learned counsel, no interference is warranted with the impugned judgment and order.

8. Considered the submissions advanced. Perused the evidence relied on. Although 9 witnesses were examined before the trial Court, the evidence relevant for deciding the present appeal would be that of the prosecutrix (P.W.3 - A), her mother (P.W.2 - B) and the doctor who medically screened the prosecutrix. Some of the witnesses are panchas to the scene of offence panchanama, seizure of clothes, arrest of appellant etc. Let us appreciate the relevant evidence.

9. The prosecutrix testified that she was playing in the courtyard of her house. It was 4.00 p.m. of 22/3/2014, the appellant called her to his house for some work. She went to his house. He latched the door from inside. He enquired with her as to who were present in her house. She told him that her mother and aunt were there. The appellant then laid her on a cot. He removed his pant and underwear as well. The appellant then inserted his private part into her female organ and gave 2 - 3 jerks. She shouted complaining of burning sensation. The appellant told her that he would

apply oil to her private part. Taking this opportunity, she fled from his house and came home. She narrated her mother the ordeal. It is further in her evidence that she accompanied her mother to Ghansawangi Police Station. She made a report of the incidence. The police officials took it down as narrated by her. She then signed the same. The F.I.R. is at Exh.28.

10. In her cross-examination, it has come on record that, on the given day, she had returned from school at 12.30 noon. She was in the courtyard of her house for playing. No one was playing with her. The house of the appellant was in the close-by. The appellant gave her a call from a bye-lane. He told her that he wanted bidis. She asked him to give her money to buy bidis. He in turn told her that he wanted to buy on credit. She was about to leave his residence. He, however, closed the door. Latched it from inside. She could not shout because his mouth was pressed by him. According to her, she was at his house for about two hours. She put up resistance, but in vain as she was handicapped physically. It is further in her evidence that, her private part had a swelling and turned reddish. There was, however, no bleeding. She was also confronted with her statement under Section 164 of the Code of Criminal Procedure. she admitted to have stated in her statement that the incident took place on 20/4/2014.

11. P.W.2 - B (mother of the prosecutrix) testified that, house of the appellant was in the close-by of her residence. The appellant is an agricultural labourer. The prosecutrix was playing in the front yard of her house. It was little past 2.30 p.m. The prosecutrix was alone. The prosecutrix returned home crying. It was 3.30 p.m. She narrated everything as to how the appellant behaved with her in his house. It is further in her evidence that she thereafter called her brother-in-law - K. all of them went to the police station. The prosecutrix lodged the F.I.R.

In her cross-examination, it has come on record that, house of the appellant abuts a main road in the village. Houses of one Macchindra and Sarjerao Kolhe are adjacent to the house of the appellant. The appellant's house is in the nature of one room of tin sheets. Although the father of the prosecutrix was informed, he did not return by the time she approached the concerned police station. She denied the appellant to have obtained Rs.5000/- as a hand loan from her husband. She denied his suggestion that the amount was returned but no interest was paid thereon. All the suggestions disclosing the appellant's defence came to be denied.

12. P.W.7 Kashinath was a Police Station Officer on duty at Ghansawangi Police Station during relevant time. He took down the F.I.R. as narrated by the prosecutrix. **It is, however, not known as to why the F.I.R. has been signed by the Head of Women's Vigilance Cell.** Be that as it may.

13. Dr. Ramkrushna Gaul (P.W.4) was a Medical Officer on duty at District Women's Hospital, Jalna. It is in his evidence that, the police had referred the prosecutrix for her medical examination. He did examine her to find that her vaginal examination was painful. Hymen was intact. He took vaginal swab and blood sample of the prosecutrix for chemical analysis. He issued the medical examination report Exh.34. It is also in his evidence that he replied the queries made by the investigating officer. His response to the queries is at Exh.35. In his opinion, the prosecutrix was not capable of having sexual intercourse. On examination of her private part, it could not be observed that she was subjected to sexual intercourse. The C.A. reports are at Exhs.55 and 56.

14. The appreciation of the aforesaid evidence undoubtedly leads to observe that the medical examination report of the prosecutrix and the C.A. reports as well rule out case of sexual assault. It is true that, penetration howsoever

slight, is sufficient to constitute the offence of rape. It is also true that, the prosecutrix had testified that the appellant put his male organ into her private part and gave jerks. Had the same really been true, her hymen would not have been intact. It is also true that, the sole testimony of the prosecutrix, if found to be true, is sufficient to base a conviction for an offence of rape.

15. In the case in hand, the medical evidence falsifies her claim of having been sexually assaulted. There is no any other evidence to reinforce the case of the prosecutrix. It is true that, the family of the prosecutrix would not go to an extent of lodging a false case against the appellant on account of his failure to pay interest on the sum of Rs.5000/- advanced to him as a hand loan, as per the case of the appellant himself. No parents would like to put the career/honour at stake. There must have been some substance in the case made out by the victim. In view of this Court, the evidence of the victim brings down the offence to attempt to commit rape or attempt to penetrative sexual assault. The punishment provided for attempt to commit such an offence is an imprisonment which may extend to half of the punishment and sentence provided for the offence attempted. The appellant herein has been behind the bars for about four

years and two months. Hence the order :-

ORDER

(i) The Criminal Appeal is partly allowed.

(ii) The order dated 27/3/2018, passed by learned Special Judge/ Additional Sessions Judge-2, Jalna in Special Case (Child) No.21/2014, convicting the appellant for the offence punishable under Section 376(2)(i) of the Indian Penal Code and under Section 4 of the Protection of Children from Sexual Offences Act and sentencing the appellant to undergo rigorous imprisonment for 10 years and 7 years respectively and to pay fine of Rs.5000/- on each count, is hereby set aside.

(iii) The appellant is, however, convicted for the offence of committing rape/ attempt to penetrative sexual assault, being punishable under Section 511 read with Section 376 of the Indian Penal Code and Section 18 of the Protection of Children from Sexual Offences Act and sentenced to suffer rigorous imprisonment for four years and four months and to pay fine of Rs.10,000/- (Rupees ten thousand). In default of payment of fine, the appellant shall undergo rigorous imprisonment for further two months.

(iv) the appellant will be entitled for the set off under

Section 428 of the Code of Criminal Procedure for the period he has already undergone in prison.

(v) The amount of fine, if paid in excess, be paid back to the appellant.

**(R. G. AVACHAT)
JUDGE**

fmp/-