

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

**CRIMINAL APPEAL NO.1140 OF 2019
WITH
CRIMINAL APPLICATION NO.1171 OF 2021**

Govind s/o. Narayan Ghule,
Age : 35 years, Occ. Labour,
r/o. Dhagi, Post Borgaon,
Tq. and Dist. Jalgaon,
and at present r/o. Dhuliya Crane,
Chalisgaon Road, Dhule

..Appellant

Vs.

1. State of Maharashtra
2. Victim through Mother - "Z"
Age:32 years, Occ. Household,
r/o. Pawan Nagar (West)
HUDCO, Chalisgaon Road, Dhule

..Respondents

Mr.N.R.Shaikh, Advocate for appellant
Mr.R.B.Bagul, APP for respondent no.1
Mrs.S.G.Chincholkar, Advocate for respondent no.2

**CORAM : R.G. AVACHAT, J.
DATE : JANUARY 06, 2022**

JUDGMENT :-

This appeal is directed against the judgment of conviction and the order of sentence dated 12.07.2018 passed by learned Special Judge, Dhule in Special (POCSO) Case No.82 of 2013. The appellant herein has been convicted for the offence punishable under Section

376(2)(i) of Indian Penal Code and Sections 4 and 6 of the Protection of Children from Sexual Offences Act, 2012 and sentenced to suffer rigorous imprisonment for 14 years and to pay a fine of Rs.40,000/-. In default of payment of fine, he is directed to undergo rigorous imprisonment for six months.

2. The case of prosecution, in short, is as under:-

3. The victim ("X") was four years of age. Her father i.e. PW - 3 ("Y") and the appellant herein were serving as crane-drivers with PW 2 – Dinesh. The incident took place in the afternoon of 01.07.2013. The victim had returned from school by 12 noon. Her father ("Y") was away at the work place. The appellant herein came home of the victim. He took the victim under the pretext of taking her to her father. He took the victim to a field and sexually assaulted her. PW 5 – Dursing was working in the nearby field. The cries of child invoked his attention towards the field. He went there to find a small girl (victim) and a man (appellant) there. On having seen him, the appellant ran away. PW 5 – Dursing had some interaction with the victim. He brought her to her home. The mother of the victim, PW – 6 ("Z"), noticed that her daughter was sexually assaulted. After a while, it was informed to her husband ("Y"). He

contacted his employer (PW 2) on phone. He came home of the victim. The parents of the victim took her to the police station. The First Information Report (Exh.23.) came to be lodged. The victim was medically screened. The appellant was arrested. The scene of offence panchnama (Exh.44) was drawn. Some articles in the nature of clothes of the victim and that of the appellant, came to be seized. On completion of the investigation, the appellant was proceeded against by filing charge sheet.

4. Learned Judge framed Charge (Exh.6-A). The appellant pleaded not guilty. His defence is of false implication in view of no good relationship with the father of the victim. On appreciation of the evidence in the case, learned Special Judge convicted and sentenced the appellant, as stated above.

5. Heard learned counsel appearing for the parties.

6. Mr.N.R.Shaikh, learned counsel for the appellant, would submit that no statement of the victim was recorded by the Investigating Officer. The appellant herein was not subjected to test identification parade. The victim was four years of age. Being a child witness, she was prone to tutoring. The victim testified that

the appellant gave *Tapli* (टपली) on her private part, meaning thereby the appellant had simply placed his hand thereat. According to learned counsel, the medical examination report is not helpful for the prosecution. Hymen of the victim was intact. The same rules out sexual assault. He would further submit that the trial court did not put questions to the victim to ascertain, whether she could understand sanctity of oath and was able to distinguish between right or wrong. Learned counsel has relied on following authorities:-

- (i) Ratna Munda and anr. Vs. The State, 1986 Cri.L.J. 1363;
- (ii) Nivrutti Pandurang Kokate and ors. Vs. State of Maharashtra, AIR 2008 SC 1460;
- (iii) Rabindra Kumar Pal alias Dara Singh Vs. Republic of India, AIR 2011 SC 1436;
- (iv) Kala alias Chandrakala Vs. State through Inspector of Police, AIR 2016 SC 3912;
- (v) Chattar Singh and anr. Vs. State of Haryana, AIR 2009 SC 378;
- (vi) Rajkumar Vs. State of M.P., AIR 2014 SC (Supp) 1109;
- (vii) State of U.P. Vs. Hari Chand, AIR 2009 SC (Supp) 1535

Learned counsel, ultimately, urged for allowing the appeal. He would further submit that the appellant, so far, has been behind the bars

for little over seven and half years. He would alternatively submit that at the most, the appellant could be held to have committed a lesser offence and he may, therefore, be released on the term of imprisonment already undergone.

7. Learned APP and learned counsel representing the victim would, on the other hand, submit that a four years old girl has been ravished. The victim and her parents have no reason to falsely implicate the appellant. Both learned counsel took this Court through the evidence, to ultimately submit that the offence has duly been proved and the appellant, therefore, has rightly been convicted and sentenced. They, therefore, urged for dismissal of the appeal.

8. Considered the submissions advanced by learned counsel for the parties. Perused the evidence and the citations relied on. To establish the Charge, the prosecution had examined nine witnesses and relied on certain documentary evidence.

9. PW 1 – Dr.Milind Pawar was working as an Asst. Professor with Bhausaheb Hire Government Medical College, Dhule. It is in his evidence that the victim (X) was brought to the hospital by 08.30 p.m. on 01.07.2013. The parents of the victim had accompanied the victim. It is further in his evidence that the victim

had not taken bath till the time of her examination. He noticed as under:-

“.....Lacerations of 1 x 0.5 cm on lateral part of right labia majora which was bright red in colour and swelling was also present. There was another laceration of 1 x 0.5 cm. on left labia majora which was red in colour and swelling was present. There was also laceration at fourchette 1 x 0.5 cm., and swelling was present. There was white sticky discharge on the mons pubis. Injuries were fresh. Oedema was present and conjunctures were seen all over perineum. Her hymen was intact. As per my opinion above findings were suggestive of recent sexual assault with the said minor girl.”

It is further in his evidence that the culprit might have tried to insert his penis in the victim's private part. But the penis could not reach upto hymen, so it was found intact. Due to such act, the injuries mentioned in the certificate (Exh.9) could be possible. In response to the questions put to him during cross-examination, he testified that the labia majora is situated at outside by which it is visible. Labia minora is situated inside. He denied the suggestion that labia majora comes into contact if a person falls on the ground. He, however, admitted that if a girl of four years of age falls on the rough surface, the injury like laceration to labia majora may be possible. The clothes on the person of the victim were neither stained with blood or mud.

10. From the evidence of PW 1 – Dr. Milind, who is an independent witness, it has been proved that the victim was subjected to recent sexual assault. The question is, whether the appellant herein is the author thereof.

11. Admittedly, both the appellant and the father of victim were serving as crane drivers with PW 2 – Dinesh. It is in the evidence of PW 2 – Dinesh that a day before the incident, the appellant had left for attending his matrimonial case. He came back on 01.07.2013. He had seen the appellant under influence of liquor. By 03.00 p.m., he received a call from the father of the victim, informing the appellant to have had ravished his daughter. He had, therefore, been to the house of the victim. The appellant was found within hours. Nothing could be elicited from the cross-examination of this witness to disbelieve his version.

12. PW 4 – victim (‘X’) testified that she had returned from the school. Her mother was cooking in the house. She was standing outside. The appellant came and asked her to accompany him to his father. He promised her to take her to her father. She, therefore, accompanied him. The appellant, instead of taking her to her father,

took her towards a thorny place. He removed her nicker and done *Tapli* (टपली) on her private part. The appellant too removed his trouser. In her cross-examination, she testified to have not remembered what act has been committed by the appellant with her. She, however, denied to have given evidence at the say of her father.

13. True, the victim was four years of age when she met with the ordeal. During the investigation, her statement, therefore, appears to have not been recorded. There is no dispute about the proposition that the child witness is prone to tutoring [**Rajkumar's case** (Supra)]. The trial Court had put some questions to the victim to find her to be able to give rational answers. No oath was administered to the victim. The victim did not state in so many words that the appellant committed rape of her. The fact, however, remains that within hours, she was subjected to medical examination. The Medical Officer found her to have been subjected to sexual assault. In the case of **Syed Pasha Vs. State of Karnataka, 2004 Cri.L.J. 4123**, it has been observed that in the case of rape alleged to have been committed on a child of 4-5 years, the duty is cast on the Court to have utmost sensitivity and it is necessary to

appreciate the evidence in its totality, keeping in view the background of the entire case, and not in isolation. In the said case, the victim was not examined. Based on the circumstantial evidence, the offence was held to have been proved.

14. PW 5 – Dursing testified that he was working in the field of one Shashikaka. It was about 1.30 p.m. He heard some shouts from the side of a *Nala*. He, therefore, went to find a small girl (victim) and a man there. On having seen him, the man ran away. He found the nicker of the victim to have been removed from her person. The victim was weeping. He, therefore, brought her to his house and served with water. He made some inquiry with her. On having realised her identity, he took her to her parents' house and handed her them over. This witness identified the appellant before the Court as the person, who was seen by him with the victim at a secluded place. True, on arrest of the appellant, he was not subjected to test identification parade. If we ignore identification by PW 5 – Dursing of the appellant before the Court, what has been brought on record is the fact that on the fateful day, a man had taken the girl to a secluded place. Her nicker was removed. The girl was found weeping. PW 5 – Dursing consoled her and brought her to her parents' house. She was none other than the victim herein.

15. PW 6 - "Z" testified that on the fateful day, the victim had returned home from school. She was playing outside. The appellant had taken her away. Said fact was narrated to her by the victim. Here, we may refer the Apex Court's observations in the case of **Syed Pasha** (supra), wherein, the child, on inquiry, gave out name of the accused. Such circumstance was relied on inspite of the victim having not been examined as witness. It is further in the evidence of the mother of the victim that a person had brought the victim to home. The victim was subjected to rape. She found that the victim's urethra was swollen. She, therefore, took the victim to the hospital for medical examination.

16. The evidence of PW 2 – Dinesh (employer) is to the effect that the appellant was brought to the house of the victim. Admittedly, no Police Officer was present there that time. The appellant confessed to have had committed rape of the victim. True, the extra-judicial confession is a very weak piece of evidence. It is inadmissible if it is made in presence of Gramrakhi or Police Officer [Ratna Munda's case (Supra)].

17. In the case in hand, neither a Police Officer nor a Police Patil of the village was present when the appellant was brought to

the house of the victim. There is *prima facie* nothing to suggest him to have had made extra-judicial confession under duress. Although same is a weak piece of evidence, I take it into consideration along with other facts and circumstances of the case. Although the victim was four years of age when she was subjected to ordeal, she gave evidence within two years thereof. The trial Court found her to be a competent witness. Although the victim testified that the appellant had given *Tapli* (टपली) to her private part, the medical evidence, undoubtedly, indicates the victim to have been sexually ravished. The appellant made extra-judicial confession. There is nothing to suggest the parents of the victim to have had an axe-to-grind against the appellant that too at the cost of their daughter (victim).

18. In the totality of the circumstances, the trial Court has rightly convicted the appellant for the offence of rape. This Court has no reason to take a different view.

19. Before parting with, it has to be mentioned that the Advocate appointed to represent the appellant did his best to assist the Court in this matter.

20. In view of the above, the appeal, as such, fails. The same is dismissed.

21. In view of dismissal of the appeal, Criminal Application No.1171 of 2021 does not survive and stands disposed of.

22. Fee of the Advocate (appointed) for the appellant is quantified at Rs.20,000/- (Rupees Twenty Thousand) and the legal fee of the Advocate (appointed) for the respondent – victim, is quantified at Rs.10,000/- (Rupees Ten Thousand), to be paid by the High Court Legal Services Authority, Aurangabad.

[R.G. AVACHAT, J.]

KBP