

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

CRIMINAL APPEAL NO.132 OF 2021

Vinod s/o Rambhau Chambulwar,
Age : 44 years, occupation service,
R/o Ratnapur (Heti), tahsil Sindewahi,
District Chandrapur. **Appellant.**

:: V E R S U S ::

State of Maharashtra,
Through Police Station Officer,
Police Station, Sindewahi,
District Chandrapur. **Respondent.**

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Shri Aniruddha C.Jaltare, Counsel for the Appellant.
Shri N.S.Rao, Additional Public Prosecutor for the
Respondent/State.

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CORAM : ROHIT B.DEO & URMILA JOSHI-PHALKE, JJ.
DATE : 22/12/2022

JUDGMENT (Per : Urmila Joshi-Phalke, J.)

1. By this appeal, the appellant (accused) challenges judgment and order of conviction and sentence dated 5.3.2021 passed by learned Additional Sessions Judge-1, Chandrapur in Special POCSO Case No.26/2020.

2. By the said impugned judgment and order, learned Judge below convicted and sentenced the accused, as under:

In view of Section 42 of the POCSO Act, the accused is sentenced to suffer rigorous imprisonment for ten years and to pay fine Rs.5000/- and in default of payment of the fine amount

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to suffer simple imprisonment for one year for offence punishable under Section 4 of the POCSO Act instead of Section 376(2)(f) (k), 376(2)(n), and 376(3) of the Indian Penal Code and rigorous imprisonment for twelve years and to pay fine Rs.5000/- and in default of payment of the fine amount to suffer simple imprisonment for one year for offence punishable under Section 6 of the POCSO Act.

He is sentenced to suffer rigorous imprisonment for two years and to pay fine Rs.1000/- and in default of payment of the fine amount to suffer simple imprisonment for three months for offence punishable under Section 506 of the Indian Penal Code.

He is sentenced to suffer rigorous imprisonment for two years and to pay fine Rs.1000/- and in default of payment of the fine amount to suffer simple imprisonment for three months for offence punishable under Section 3(1)(w)(ii) of the SCST Act.

He is also sentenced to suffer life imprisonment and to pay fine Rs.5000/- and in default of payment of the fine amount to suffer simple imprisonment for one year for offence punishable under Section 3(2)(v) of the SCST Act.

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Learned Judge below directed that all sentences shall run concurrently and set-off under Section 428 of the Indian Penal Code was also given to the accused since he was in jail.

3. Brief facts are as follows:

The accused is a teacher of the victim – girl belonging to the Scheduled Caste. The offence is registered on the basis of report lodged by the victim – girl on 27.12.2019 on an allegation that she is aged about 12 years and 5 months and studying in “Bharat Vidyalaya Navargaon”. Her date of birth is 24.7.2007. The accused is her class teacher. It is further alleged that on 21.12.2019 the accused has planned a picnic of her class and informed all students that he would take them to Shivtekadi for picnic. The victim – girl has not consented to join the said picnic. On 22.12.2019, at about 12:00 pm, friends of the victim - girl made a phone call from the mobile of the accused to the mobile of the victim – girl’s mother by which they insisted her to join the picnic. Initially, she denied to join, but on their insistence she consented for the same. Accordingly, she left the house and reached at Ratnapur Fata. But, she could not find any of her friends and, therefore, she started returning to her house. On the way, the accused met her and took her along

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with him on his motorcycle. He took her in a dilapidated house and subjected her for sexual assault. As per allegations in the First Information Report, as she was scared, she has not disclosed the said incident to anybody. Subsequently, her mother received the information and, therefore, her mother enquired with her and she disclosed the incident to her parents. On the basis of the said report, the police have registered the offence vide Crime No.687/2019.

4. After registration of the crime, the wheels of the investigation started rotating. During investigation, Investigating Officer has visited the alleged spot of the incident and drawn the spot panchnama. He also referred the victim – girl for her medical examination and seized her clothes. The accused was arrested. After his medical examination, the clothes of the accused are also seized. Investigating Officer collected the necessary samples and forwarded to Chemical Analyzer. After completion of the investigation, he submitted chargesheet against the accused.

5. Learned Judge below has framed the charge vide Exhibit-11. The accused pleaded not guilty and claimed to be tried. To substantiate the charge, the prosecution examined in all

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seven witnesses and they are, PW1 victim – girl (Exhibit-37); PW2 mother of the victim – girl (Exhibit-40) (**Note** : *due to the mandate of Section 228-A of the Indian Penal Code, the names of the victim – girl and her mother are not mentioned*); PW3 Shankarsingh Balasingh Rotele (Exhibit-42), pancha on the spot; PW4 Kunal Rupchand Undirwade (Exhibit-52), the Block Development Officer; PW5 Dr.Shreya Uttam Dahiwade (Exhibit-58), Medical Officer; PW6 Milind Deoram Shinde (Exhibit-65), Investigating Officer, and PW-7 Swapnil Chandrashekhar Jadhav (Exhibit-79), Investigating Officer.

6. Besides the oral evidence, the prosecution relied upon arrest panchanama Exhibit-27, Chemical Analyzer Reports Exhibits-33 to 35, oral report Exhibit-38 , FIR Exhibit-39, spot panchanama Exhibit-43, seizure panchanama regarding samples of the accused Exhibit-44, seizure panchanama regarding the samples of the victim – girl Exhibit-45, clothes seizure panchanama of clothes of the accused Exhibit-46, clothes seizure panchanama of clothes of the victim – girl Exhibit-47, spot panchanama of the house of the accused.

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7. After recording the evidence and after hearing both sides, learned Judge below was pleased to convict the accused as indicated above.

8. Heard learned counsel Shri Aniruddha C.Jaltare for the appellant – accused and learned Additional Public Prosecutor Shri N.S.Rao for the respondent – State.

9. Learned counsel for the accused submitted that the entire prosecution case is rested on the evidence of the victim – girl which is not cogent and reliable. Her evidence is not corroborated by any other circumstances like medical evidence or the Chemical Analyzer's Reports . As per the victim – girl, she was subjected for sexual assault lastly on 22.12.2019. Prior to that also she was allegedly subjected for sexual assault, but she has not disclosed the incident to anybody. The cross-examination of the victim – girl falsifies the story of sexual assault and her evidence is not at all trustworthy. However, learned Judge below has ignored the same and wrongly convicted the accused. He further submitted that considering the evidence on record the prosecution miserably failed to prove the charges against the accused and hence the accused be acquitted of the charges.

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10. On the other hand, learned Additional Public Prosecutor for the State submitted that the victim – girl fully supported the case of the prosecution and her evidence is consistent. The accused can be convicted on the sole testimony of the victim – girl. The evidence of the victim – girl is cogent and reliable and there is no reason put forth before the Court behind the false implication of the accused. Hence, no interference is called for in the judgment and order of conviction impugned in the appeal.

11. Having heard rival submissions, we have perused the record. In order to prove the charge against the accused, the prosecution has to prove that the victim – girl was minor and within the definition of “child”. The implicit reliance was placed on the testimonies of PW1 the victim – girl, her mother PW2, and PW4 Kunal Undirwade. As per the evidence of PW1, her birth date is 24.7.2007 and she was studying in 7th Std. at the time of incident. Her mother has also testified her birth date as 24.7.2007. Though PW1 and PW2 are cross-examined at length, the birth date of the victim - girl is not challenged during the cross-examination. Besides the oral evidence of PW1 and PW2, the prosecution relied on the evidence of PW4 Kunal Undirwade who is serving as the Block Development Officer. He testified

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that his office has received a letter from police for issuing birth certificate. As per the record, birth date of the victim is 24.7.2007. He produced birth register extract (Exhibit-54) and certified copy of birth certificate (Exhibit-55). Though he is cross-examined at length, nothing incriminating is transpired during his cross-examination. Admittedly, the defence has not challenged the birth date of the victim – girl seriously. There is consistent evidence on record to show that birth date of the victim is 24.7.2007 and the alleged incident has occurred on 22.12.2019. Thus, the prosecution has proved that the victim - girl was 12 years at the time of the incident in question.

12. Learned Additional Public Prosecutor for the State vehemently submitted that the accused can be convicted on the sole testimony of the victim - girl when the deposition of the prosecutrix is trustworthy and no corroboration is required.

13. Now, it has to be seen whether the evidence of the victim – girl is inspiring the confidence and is trustworthy.

14. The implicit reliance placed on record by the prosecution is on the evidence of the victim - girl. Admittedly, the victim – girl belongs to the Scheduled Caste. She testified

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about the incident that on 22.12.2019 the accused who is her class teacher planned picnic at Shivtekadi. Initially, she was not inclined to join the picnic, but on the insistence of her friends she had shown her willingness and, therefore, left the house. As her friends had already left and as she was about to return back at home, the accused met her and asked her to come along with him on his motorcycle. She alleged that when they were proceeding, the accused took her in a dilapidated house and subjected her for sexual assault. She narrated the manner in which she was subjected for sexual assault. As per her evidence, one person from the village had witnessed them and also asked them what they are doing and the accused replied to that person that the victim – girl is his student. She further deposed that the accused has threatened her that he would defame her in the school, if she disclosed the incident to anybody and, therefore, she has not narrated the incident. Her evidence further reveals that on 26.12.2019 her parents were called in the school and her mother enquired with her and, therefore, she narrated the incident and, thereafter, she lodged the report. During her cross examination, it is elicited that to proceed towards Shivtekadi one has to cross several agricultural fields and the Government offices. It is further elicited that Shivtekadi is at the distance of

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two kilometers. She admitted that when she was proceeding along with the accused, 2-3 boys of her village crossed them from opposite direction. She further admitted that while returning from Shivtekadi, she came along with the accused. Thus, learned defence counsel from the cross-examination elicited the fact that though the alleged incident had taken place before the victim – girl reached at Shivtekadi, she has not disclosed the said incident either to her friends or after returning to her parents. Some contradictions are also brought on record which show that the victim – girl has improved her version. The said omissions are proved by the defence through the Investigating Officer.

15. Besides the evidence of the victim - girl, the prosecution relied upon the evidence of her mother, PW2. She corroborated to the version of the prosecution that she received a call and friends of her daughter insisted to send her daughter to picnic and, therefore, her daughter proceeded from home. Her evidence further discloses that her daughter returned home at about 5:00 pm and on the next day she attended the school. After two days of the incident, she as well as the father of the victim – girl was called in the school. The father of the victim – girl went in the school and the Headmaster of the school told the

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father of the victim – girl that some wrongful act was committed by the accused at Shivtekadi. Therefore, she enquired with the victim – girl and the victim narrated the incident. During her cross examination, she admitted that there are good relations with the victim – girl. There is good bond between them and, therefore, she immediately understands if the victim – girl is frustrated or disappointed. Admittedly, evidence of PW2, the mother, is to the extent of disclosure by the victim – girl.

16. Besides the oral evidence of PW1 and PW2, the prosecution mainly relied upon the evidence of PW5 Dr.Shreya Dahiwade who testified that the victim – girl was referred to her for medical examination. The victim – girl narrated her the history. Upon examination, she found no external injury on the person of the victim – girl and, therefore, she collected blood samples, nail clipping, and other samples. Medical certificate is at Exhibit-61. The Medical Officer admitted that in case of penetrative forcible sexual assault, normally injuries over labia majora and labia minora, hymen fourchette found on the person of the victim - girl. The evidence of the Medical Officer is to be appreciated in the background that the alleged incident has occurred on 22.12.2019. Whereas, the victim – girl was examined on 27.12.2019 that is after five days.

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17. The evidence of the Investigating Officer reflects that he forwarded the samples and seized articles to the Chemical Analyzer. The Chemical Analyzer's Reports are at Exhibits-33 to -35. The Analyzer's Reports show that neither blood nor semen is detected on any of articles.

18. The evidence of PW3 Shankarsingh Rotele is in respect of spot panchnama. He acted as pancha on the spot. The victim - girl has shown spot of the incident. He only stated that the spot of incident was one dilapidated office. The spot panchanama is at Exhibit-43. During his cross examination, it is elicited that the spot of incident is a dilapidated building and in a dirty condition. He further admits that at that place plants were grown up and garbage was lying. The building is situated at T-Point. He further admits that at a distance of 100 feet there was a office of the Forest Department and guards used to remain present there. As per the evidence of the victim - girl, the alleged spot of incident was a dilapidated house which is shown by her to the panchas. PW3 admits that it is a dilapidated building, in a dirty condition plants were grown up and garbage was lying. The medical evidence shows that no external injuries were found on the person of the victim - girl.

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19. In the light of the above facts, the evidence of Investigating Officers PW6 Milind Shinde and PW-7 Swapnil Jadhav is also material. These witnesses narrated about the investigation carried out by them. The spot panchanama was drawn by PW7 Swapnil Jadhav. The Investigating Officers also admitted that the alleged spot of the incident was dilapidated house.

20. It is well settled that the conviction of the accused can be recorded on the sole testimony of the victim when the deposition of the prosecutrix is found to be trustworthy, unblemished, credible, and of sterling quality. The testimony of the victim is vital and unless there are compelling reasons which necessitate for corroboration of her statement, there is no difficulty to act on the testimony of the victim of sexual assault. For applying the above said principles, it is crystal clear that the evidence the prosecutrix should be of such a nature which inspires the confidence. After appreciating the evidence of the victim - girl, as per her evidence, the alleged incident has occurred on 22.12.2019 before she joins the company of her friends at Shivtekadi. Her evidence shows that on the insistence of her friends she agrees to join the picnic, but she has not disclosed the incident to the friends though she was along with

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them for a long time. As per the victim – girl, after the incident, she returned home on the motorcycle of the accused. Thus, this fact of returning of the victim – girl on the motorcycle of the accused, after the incident, is also difficult to accept. The conduct of the victim – girl that as all girls had already left for the picnic spot, therefore, she went along with the accused can be accepted, but her contention that after the incident, she went at Shivtekadi and in the evening she left Shivtekadi along with the accused, is difficult to digest. Before she reached at Shivtekadi, as no other girls were there, she went along with the accused can be accepted, but her contention that after the incident, she went at Shivtekadi and in the evening she left Shivtekadi along with the accused is difficult to digest. As per her evidence, the alleged incident had occurred in a dilapidated house. It is pertinent to note that pancha witness has admitted that the alleged spot of incident was a dilapidated building and in a dirty condition plants were grown up and garbage was lying. The evidence nowhere shows that the girls to whom she had joined observed any stains or garbage on her clothes. PW2 the mother of the victim – girl also nowhere states that when her daughter came at home, she observed some soil garbage or any stains on the clothes of the victim - girl. It is well settled that

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injuries are not *sine qua non* in every case, but in a peculiar circumstances like in the present case, when the alleged incident has occurred in dilapidated house and the victim - girl is not sustaining any external injuries, though she was subjected for forcible sexual assault, is difficult to accept. The subsequent conduct of the victim – girl not disclosing the incident to the parents, appears to be improbable and unacceptable.

21. Though learned Additional Public Prosecutor for the State placed his reliance on the decision of the Honourable Apex Court in the case of Phool Singh vs. State of Madhya Pradesh, reported at (2022) 2 SCC 74 wherein it has been held that the conviction can be recorded on a sole testimony of the victim when the deposition of the prosecutrix is found to be trustworthy, credible and is of sterling quality. He further relied upon the reliance on the decision of the Honourable Apex Court in the case of Madan Gopal Kakkad vs. Naval Dubey and another, reported at (1992) 3 SCC 204 wherein it has been held that slightest penetration of penis into vagina without rupturing the hymen would constitute rape. There is no dispute regarding the legal position. It is well settled that the rupture of hymen is not necessary to constitute the offence of rape even slightest

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penetration in the vulva is sufficient to constitute the offence of rape.

22. Here, in present case, PW5 Dr.Shreya Dahiwade has not even observed the redness over the genitals. We are expecting injuries on the person of the victim in the background that the alleged incident has occurred in a dilapidated house. When the victim of a tender age is subjected for sexual assault by using force on hard and rough surface, like dilapidated house, the external injuries on the back and on the legs ought to have occurred. But, here in the present case, not a slightest abrasion is noted by the Medical Officer.

23. Moreover, the First Information Report is registered on 27.12.2019 that is after five days of the incident. It is well settled that belated First Information Report is not fatal to the prosecution case when the delay is explained. As per the recitals of the First Information Report, on 26.12.2019, she narrated the incident to her parents in the evening and, thereafter, the First Information Report was lodged on 27.12.2019 at about 3:00 pm. The prosecution has not explained the said delay behind the belated First Information Report.

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24. In case of rape, the onus is always on the prosecution to prove affirmatively each ingredient of the offence. It is no part of duty of defence to explain as to how and why the accused falsely implicated.

25. The sole testimony of the victim – girl in the present case did not inspire the confidence. Here, the conduct of the victim – girl shows that she has disclosed the earlier incident to anybody. Though the alleged incident had occurred in a dilapidated house, the victim – girl neither sustained external injuries nor her clothes were having any soil or garbage. Though her clothes were forwarded to the Chemical Analyzer, the Chemical Analyzer's Reports also nowhere show any soil on her clothes. The alleged incident has occurred in a dilapidated house and as per the victim - girl one person met them, but the said person is not examined by the prosecution to show that the victim – girl and the accused were seen by the said person in a dilapidated house. The evidence of pancha witness shows at a distance of 100 feet there was office of the Forest Department and guard used to remain present there. The Investigating Officers have not investigated the matter to ascertain the fact whether the victim - girl was really seen with the accused near the said dilapidated house. Though the victim - girl shouted for

help and none has noted her shouts, creates doubt regarding the alleged incident.

26. It is a matter of record that besides the sole testimony of the prosecutrix, there is no corroborative evidence in the present case. Learned Additional Public Prosecutor for the State though submitted that the sole testimony of the prosecutrix is sufficient to convict the accused, but the evidence is to be convincing. The Honourable Apex Court in the case of Sadashiv Ramrao Hadbe vs. State of Maharashtra and anr, reported at (2006) 10 SCC 92 has held that, "*it is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring of confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The Courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen*".

27. Therefore, unless the substantive evidence of the prosecutrix inspires confidence of the Court, the conviction

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cannot be recorded on the basis of the sole testimony of the prosecutrix. In the present case, upon perusal of the records and upon hearing the respective counsel, this Court is of the opinion that the evidence of the prosecutrix does not inspire confidence of the Court. There is also no evidence on record worth its name to corroborate the allegations levelled by the prosecutrix. The medical evidence and the CA reports negated the version of the prosecutrix. Thus, the prosecution has failed to establish the guilt of the accused beyond reasonable doubt and hence the appeal deserves to be allowed.

28. In this view of the matter, the appeal of the accused deserves to be allowed. Hence, we proceed to pass following order:

ORDER

(1) The criminal appeal is **allowed**.

(2) The judgment and order of conviction and sentence dated 5.3.2021 passed by learned Additional Sessions Judge-1, Chandrapur in Special POCSO Case No.26/2020 is hereby quashed and set aside.

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(3) The accused is acquitted of offences for which he was convicted and sentenced.

(4) The accused be released from custody, unless he is required in some other case.

With this, the criminal appeal is **allowed** and disposed.

(URMILA JOSHI-PHALKE, J.)

(ROHIT B.DE0, J.)

!! BrWankhede !!

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