

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPEAL NO.171 OF 2018

Ghanshyam Dnyaneshwar Yerme (In Jail)
detained in Central Prison,
Amravati.

..

Appellant

.. Versus ..

State of Maharashtra,
Through Police Station Officer,
Police Station, Yavatmal Rural,
District-Yavatmal.

..

Respondent

.....
Ms. N.G. Chaubey, Advocate (Appointed) for the Appellant,
Shri A.M. Kadukar, APP for the Respondent-State.
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CORAM : SMT. M.S. JAWALKAR, J.
DATED : 23.09.2022.

ORAL JUDGMENT

1. The present appeal is filed by the appellant-accused challenging impugned judgment and order dated 17th of January 2018 passed by the learned Special Judge and

Additional Sessions Judge, Yavatmal in Special Case (POCSO) No.03/2017. By this judgment, the accused stands prosecuted for the offence punishable under Sections 450, 376 (2) (i) of the Indian Penal Code and Section 6 of the Protection of Children from Sexual Offences Act, 2012 registered in connection with Crime No.401/2016 of Police Station, Yavatmal Rural. The appellant-accused was awarded sentence to suffer rigorous imprisonment for a period of two years with fine of Rs.500/- in-default to suffer rigorous imprisonment for a period of 15 days for the offence punishable under Section 450 of the Indian Penal Code. He was further awarded sentence to suffer rigorous imprisonment for a period of 14 years with fine of Rs.1,000/- in-default to suffer rigorous imprisonment for a period of one month for the offence punishable under Section 376 (2) (i) of the Indian Penal Code. He was further awarded sentence to suffer rigorous imprisonment for a period of 14 years with fine of Rs.1,000/- in-default to suffer rigorous imprisonment for a period of one month for the offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012.

2. The case of the prosecution, in brief, is as under :

(i) On 25.10.2016 the parents of the victim girl went for labour work of sowing Soyabean crop in the field of one Narendra Rathod. At about 11.30 p.m. Narendra Rathod went to the house of victim girl for taking tiffin of her father. He saw that the door was closed from inside. To take the tiffin he pulled the chain by putting hand inside. He saw the victim girl lying on ground in kitchen in nude condition and accused Ghanshyam Yorme was lying on her person and his pant and underwear was removed. By seeing Narendra, the accused got up, wore his pant and underwear. He beg for apology of Narendra and requested him not to disclose this fact to anybody. Narendra gave him 2 to 3 slaps and scuffle took place between them, due to which, some household articles were scattered. Then accused ran away. It is alleged by the prosecution that the victim girl was just of the age of 10 years at the time of incident and the accused entered in her house with intent to commit offence and then committed rape on her, which amounts to aggravated penetrative sexual assault.

(ii) On 25.10.2016 Narendra Kawadu Rathod lodged report to Police Station, Yavatmal Rural, on the basis of which, offence came to be registered against the accused vide Crime No.401/2016 under Sections 376 (2)(i), 450 of the Indian Penal Code and Section 6 of the Protection of Children from Sexual Offences Act, 2012. The matter was investigated by API Pramod Pralhadrao Pachkawade. He visited the spot of incident and prepared spot panchanama in the presence of panchas, collected samples, photographs of spot of incident and sent the victim girl as well as accused for medical examination to Govt. Hospital, Yavatmal. The statement of victim girl was recorded through video shooting by lady A.P.I. Rakhi Gedam. The SIM card in which statement of victim girl is recorded sent for determining its hash value at P.I. Cyber Branch, Yavatmal. He issued letter to Z.P. School Jodmoha to obtain certificate about age of victim girl. He recorded the statement of victim girl and witnesses under Section 164 of the Code of Criminal Procedure and thereafter filed charge-sheet.

3. The prosecution has examined in all eight witnesses in support of its case i.e. PW-1 Victim girl examined at Exh.18, PW-2 Narendra Kawadu Rathod, a witness examined at Exh.19 as informant. PW-3 Devanand Sitaram Ramteke examined as a panch witness at Exh.22. He did not stand by the prosecution. PW-4 Ashok Dnyaneshwar Deokar, Photographer at Exh.28, PW-5 Suman Rajurkar, Police Patil of village Jodmoha examined at Exh.32, PW-6 Mina Raju Madavi, mother of victim at Exh.35, PW-7 API Pramod Pralhadrao Pachkawade, Investigating Officer at Exh.38 and PW-8 Dr. Vimlakumari Meena at Exh.65, who examined the victim.

4. Learned counsel for the appellant submitted that the panch witness did not stand by the prosecution. So far as the informant is concerned, he did not support the prosecution story. Even the victim, in her cross-examination, admitted that she is deposing at the instance of informant Naresh. If the contention of the counsel for the appellant that though involvement of accused is denied, the fact that there was no attempt made by the victim to resist and to call anybody needs

to be considered. As such, it has to be held that she was consenting with the accused.

5. Learned Additional Public Prosecutor for the respondent-State vehemently opposed the appeal on the ground that the judgment passed by the learned Sessions Court is perfectly justified with all sound reasons and after due appreciation of evidence, oral as well as documentary and medical on record, convicted the appellant-accused.

6. I have heard the learned counsel for the appellant-accused and the learned Additional Public Prosecutor for the respondent-State at length. I have gone through the evidence. In view of the depositions of PW-1-Victim, she has narrated the alleged incident. However, it appears that in cross-examination, she has admitted that Naresh Kaka told her to dejure that accused removed clothes and inserted penis in her private part. The informant Naresh has not supported the case of the prosecution and denied that he lodged the report to the Police Station. It is contended by the learned counsel for the appellant

that the report is not proved by the prosecution. It is a matter of record that the accused came to be arrested immediately. The medical evidence supports the prosecution case. Learned counsel for the appellant fairly conceded that there is no defence of any enmity to conclude his false implication, however, it is not proved by the prosecution that there is any forcible intercourse.

7. In my considered opinion, even on perusal of evidence that there is possibility of consensual sexual intercourse, however, considering the age of the victim, it amounts to sexual intercourse without consent. So far as the evidence of Narendra Rathod (PW-2) is seen, this witness did not support the case of the prosecution. He has deposed that when he had been to the house of the victim on the day of the incident, the door of the house was locked from inside. He pulled out the chain by inserting hand. At that time, the accused Ghanshyam was sitting in the house. Victim was also in the house and she was in nude condition. In cross-examination by the learned APP, nothing material supporting

prosecution was revealed. As per deposition, he gave statement in the court as per the instructions of the Police. This witness has admitted that his statement was recorded before the learned Judicial Magistrate, First Class, Yavatmal, wherein he has stated about the incident. He has narrated the incident before the learned Judicial Magistrate, First Class, while recording his statement under Section 164 of the Code of Criminal Procedure, whereas while deposing in the Court, he has made improvement but he admitted that incident occurred in the year 2016. Thus, even if this witness turned hostile, it is well settled position of law that the portion of evidence which stands in favour of the prosecution or the accused may be accepted, but the same shall be subjected to close scrutiny and thus, it can be used for the purpose of corroboration to the evidence of other witnesses. From the evidence of PW-5, it is clear that he had witnessed the accused in the house and the victim was in nude condition. Even statement under Section 164 of the Code of Criminal Procedure supports prosecution case. Though he denied that he has lodged complaint, he admitted his signature on complaint. The contents in complaint

supported by the statement recorded under Section 164 of the Code of Criminal Procedure.

8. According to the learned counsel for the appellant, no independent witness is examined. However, considering the nature of offence and in absence of any defence for implicating the accused falsely in the offence, there is no reason to discard the evidence of the witnesses.

9. On the day of the incident itself, victim was referred for medical examination and PW-8 Dr. Vimlakumari Meena, who examined the victim. The age of the victim is 10 years. On examination, she found redness around vulva and hymen region. She did not find any external injuries on her body and genital region. She opined that the possibility of sexual assault on the victim girl cannot be ruled out. Learned Trial Court rightly appreciated the medical evidence. The defence of the accused was that in absence of hymen tear, possibility of forceful sexual intercourse is ruled out. It is significant to note here that as per medical jurisprudence, in case of a girl of the age of 10 years, the hymen is deeply situated and it is difficult

to insert even a little finger in vagina. As there is no hymeneal tear, it can be inferred that it will not be a complete act of sexual intercourse, but due to attempt of insertion of penis, there is redness observed around vulva and hymen region, which is clearly suggestive of an act of sexual intercourse. Though there is no semen detected, the version of victim and medical report are corroborated with each other. Section 375 of the Indian Penal Code as well as Section 3 of the Protection of Children from Sexual Offences Act are clear. Section 3 (a) of POCSO Act defines penetrative sexual assault which reads as under :

*“3. **Penetrative Sexual Assault** :- A person is said to commit “penetrative sexual assault” if -*

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b)

(c)

(d)

So also Section 375 (a) of IPC reads as under :

*“375. **Rape** – A man is said to commit “rape” if he -*

(a) penetrates his penis, to any extent, into the vagina, month urethra or anus of a woman or makes her to do so with him or any other person; or

(b)

(c)

(d)

Thus penetration of penis to any extent amounts to penetrative sexual assault or rape as defined under POCSO Act as well as Indian Penal Code. Looking to the age of the victim girl, it could not be expected that she should offer resistance, as such there is no possibility of external injuries. However, as mentioned in medical opinion, the possibility of sexual assault on victim cannot be ruled out, as Doctor found redness around vulva and hymen region.

10. In my considered opinion, even as per the defence, there is possibility of consensual intercourse, however, in view of the age of the victim, it will be treated as there is no consent for such act. As such, the evidence placed by the prosecution on the record corroborates to the deposition of victim. In view of above discussion, I do not see any reason to interfere with the impugned judgment and order warranting sentence. As such, appeal is devoid of any merit and stands **dismissed**. Fees of the learned counsel appointed for the appellant be paid as per the rules.

(SMT. M.S. JAWALKAR, J.)