

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

CRIMINAL APPEAL NO. 57/2019
WITH
CRIMINAL APPEAL NO. 654/2019

CRIMINAL APPEAL NO. 57/2019

Govind S/o Burla Pungati,
Aged about 21 years, Occ. Majuri,
R/o. Dhodraj, Tah. Bhamragad,
Dist. Gadchiroli,
Presently in Judicial Custody, Nagpur Central Prison/
Jail, Convict No. C-10065.

..... **APPELLANT/**
CONVICT

:: V E R S U S ::

The State of Maharashtra,
through Police Station Officer,
Police Station Laheri, Tah.
Bhamragad, Dist. Gadchiroli.

RESPONDENT.

WITH
CRIMINAL APPEAL NO. 654/2019

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Aged about 21 years, Occ. Majuri,
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The State of Maharashtra,
through Police Station Officer,
Police Station Laheri, Tah.
Bhamragad, Dist. Gadchiroli.

RESPONDENT.

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Shri N. M. Kolhe, Advocate for appellants (appointed).
Shri M. K. Pathan, Additional Public Prosecutor for
respondent/State.

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**CORAM : V.M.DESHPANDE, &
AMIT B.BORKAR, JJ.**
DATE : MARCH 21, 2022

ORAL JUDGMENT (Per : V.M.DESHPANDE, J.)

1. These two appeals are heard simultaneously and they are decided by this common judgment because both these appeals are arising out of judgment and order of conviction passed by the learned Additional Sessions Judge, Gadchiroli in POCSO Trial No. 19/2017.

2. The appeal No. 57/2019 is filed by appellant - Govind S/o Burla Pungati who was accused No. 1 and appeal

3

No. 654/2019 is filed by appellant – Vinod S/o Bandu Gedam who was accused No. 2 as per the charge in POCSO Case No. 19/2017. They stand convicted by the impugned judgment for offence punishable under Sections 363, 366 read with Section 34 and Section 376(D) of the Indian Penal Code ('IPC') and under Section 6 of the Protection of Children from Sexual Offences Act, 2012 ('POCSO'). However, learned Additional Sessions Judge in view of Section 42 of the POCSO Act, did not record the sentence under Section 6 of the POCSO Act. Offence punishable under Section 363 read with Section 34 of the IPC, both were sentenced to suffer rigorous imprisonment for 7 years and to pay fine of Rs. 1,000/- with default clause. Similarly, offence punishable under Section 366 read with Section 34 of IPC, they were sentenced to suffer rigorous imprisonment for 7 years and to pay fine of Rs. 1,000/- with default clause. In so far as Section 376(D) is concerned, sentence is 20 years and fine of Rs. 8,000/-.

3. In these appeals, for these two appellants, Mr. N. M. Kolhe, learned counsel is appearing. He is appointed by the High Court Legal Services Sub-Committee, Nagpur and Shri M. K.

4

Pathan, learned Additional Public Prosecutor is appearing for the State.

4. According to the learned counsel for the appellants, age of the victim is not properly proved, therefore it cannot be said that she was a child within the meaning of provision of the POCSO Act. It is also his submission that two witnesses are not examined by the prosecution, though their statements were recorded under Section 164 of the Criminal Procedure Code. It is also his submission that the appellants are falsely implicated in crime. According to him, one Vinod Madavi, Pramod Kudiyaami have committed rape on victim and the appellants are falsely implicated. He therefore, submits that the appeals to be allowed.

5. Per-contra, learned Additional Public Prosecutor for the State has vehemently opposed the submission. He submits that the prosecution has duly proved the age of the victim. In order to buttress his submission, he placed reliance on the authoritative pronouncement of the Hon'ble Apex Court in case of *Harpal Singh and another Vs. State of Himachal Pradesh*, reported in (1981) 1

SCC 560 . He also submitted that the evidence of victim would show that she has not falsely implicated the appellants. According to him, the cumulative effect of the reading of the prosecutrix version would inspire the confidence in the judicial mind. Inasmuch as according to him, her version is trustworthy and therefore, it can be made basis for conviction. He prayed for that both these appeals be dismissed.

6. PW-9 – Ravikiran Agatrao Kadam was attached to the Dhodraj outpost Police Station, Bhamragarh, District Gadchiroli as Police Sub-Inspector on 05.03.2017. On the same day, the report was received from Bhamragarh Police Station vide FIR No. 00/2017 for offence under Section 376 of the IPC and under Sections 4 and 6 of the POCSO Act. The said was bearing signature of Police Sub-Inspector Ralebhat which was identified by Police Sub-Inspector Ravikiran Kadam. The said FIR is at Exh. 46. On the basis of said, the offence was registered vide C.R. No. 01/2017 at Laheri Police Station, District Gadchiroli. The said is at Exh. 47.

6

7. Oral report with the Police Station Bhamragarh was given by Bichchhu Pungati (PW-2). It is dated 05.03.2017. This Bichchhu Pungati is father of victim. Oral report as given by him is at Exh. 9. From the recital of the said, it is clear that the incident of rape on her was narrated by the victim to her father.

8. The victim was taken to the Rural Hospital at Bhamragarh from where she was referred to the General Hospital, Gadchiroli where she was examined.

9. After registration of the offence, PW-9 Ravikiran Kadam, requested the Range Forest Officer to provide two panch witnesses. Accordingly, one Sunita Majji and Dinesh Rokade (PW-6) were sent to act as panch. In their presence, the Investigating Officer inspected the spot of incident. The spot of the incident was house. He prepared spot panchanama in presence of panchas. It is at Exh. 20. He also prepared Crime Details Form (Exh. 21). He seized soil from the spot of incident under the seizure memo (Exh. 22). On 06.03.2017, he arrested accused Govind under Arrest Form is at Exh. 49. He was also sent for medical examination. His

samples were drawn. He also seized his clothes in presence of panchas. Exh. 24 is the seizure panchanama for the same.

10. On 08.03.2017, the Investigating Officer arrested another accused - Vinod under Arrest Form (Exh. 56). He was also sent for medical examination. His samples were also drawn. Clothes of accused Vinod were also seized under the seizure panchanama (Exh. 29) in presence of pancha witness Vijay Alone (PW-7). He also seized clothes of the victim under seizure panchanama (Exh. 65 to 67).

11. He also gave written communication to the Headmaster, Bhagwantrao Secondary School, Bhamragarh to furnish the bona fide certificate of the victim. Bona fide certificate is at Exh. 69. He sent the muddemal articles to the CA and after completion of investigation, he filed charge-sheet.

12. The charge was framed against both the appellants by the learned Additional Sessions Judge, Gadhciroli for offence punishable under Sections 363, 366 read with Section 34 and Section 376(D) of the IPC and under Section 5(g) read with

8

Section 6 of POCSO Act. Both the appellants denied charge and claimed for their trial.

13. In order to prove its case, the prosecution examined in all nine witnesses and also relied upon various documents which were duly proved during the course of the trial. After appreciation of the evidence, the learned Judge of the Trial Court passed impugned judgment. Hence, this appeal.

14. Let's examine the submissions put-forth by the learned counsel for the appellants. His first submission is that the prosecution has not proved its case in respect of age of the victim, will have to be considered firstly. The criminal law was set into motion by Bichchhu Pungati (PW-2) by lodging his oral report at the Police Station Bhamragarh. In the said, though he has not disclosed the date of birth of his daughter, however he has specifically stated the age of the victim as 13 years.

15. The victim was examined as prosecution witness No. 1 during trial. In her examination-in-chief, she has stated her date of birth as 24.04.2003. What is important to note is that her say

about her date of birth is not at all even touched by the learned examiner when the victim was available for her cross-examination, resultantly, the statement made by the victim that her date of birth is 24.04.2003 has gone unchallenged.

16. During the course of investigation, the Investigating Officer has given a letter (Exh. 68) to the Headmaster, Bhagwantrao Secondary School, Bhamragarh, where the victim was admittedly taking the education at the relevant time. By giving that communication, the Investigating officer requested to furnish the copy of bona fide certificate of the victim. Accordingly, bona fide certificate was obtained. The same is at Exh. 69. Perusal of the said shows that at the relevant time, she was taking the education in 8th Standard and her date of birth as per the school record is 24.04.2003. From the tenor of the cross-examination of the Investigating Officer, the steps taken by the Investigating Officer in this behalf are not questioned.

17. Further, most important is the birth certificate of the victim herself. The birth certificate of the victim was brought in

10

the Court by PW-8 Vijay Kasture. This prosecution witness is the Secretary to Grampanchayat, Dhodraj, where the victim is used to reside along with her family. He being the secretary of the Grampanchayat, Dhodraj, obviously, he is the custodian of the record of village Dhodraj. He brought the certificate (Exh. 34). Perusal of the said would show that the intimation of birth of victim is given by the Arogya Sewak. Exh. 30 would show the name of the father of the victim, her mother's name and also name of the victim. This information was given to the Grampanchayat on 10.05.2003. As per this proved document, the date of birth was 24.04.2003, therefore it a contemporaneous document and the note of date of birth was taken in the concerned official record of Grampanchayat immediately. Therefore, it has its own importance. Cross-examination of Vijay Kasture would show that Exh. 34 is not signed by him. Obviously, in the year 2003, Vijay Kasture might not be the Secretary, however the document is coming on record from his proper custody. In that context, in our view, the learned Additional Public Prosecutor for the State was right in placing his reliance on the law laid down in case of *Harpal Singh and another Vs. State of Himachal Pradesh* (Supra).

11

In paragraph 3 of the said, the Hon'ble Apex Court has observed as under :-

“3. In the instant case the prosecution has proved the age of the girl by over whelming evidence. To begin with, there is the evidence of Dr. Jagdish Rai (PW 14) who is a radiologist and who, after X-Ray examination of the girl found that she was about 15 years of age. There is corroborated by Ex. PF which is an entry in the admission register maintained at the Government girls High School, Samnoli (where in the girl was a student) and which is proved by the Head Master. That entry states the date of birth of the girl as October 13 1957. There is yet another document, viz., Ex. PD, a certified copy of the relevant entry in the birth register which shows that Saroj Kumari, who according to her evidence was known as Ramesh during her childhood, was born to Lajwanti wife of Daulat Ram on November 11, 1957. Mr. Hardy submitted that in the absence of the examination of the officer/chowkidar concerned who recorded the entry, it was inadmissible in evidence. We cannot agree with him for the simple reason that the entry was made by the

12

concerned official in the discharge of his official duties, that it is therefore clearly admissible under Section 35 of the Evidence Act and that it is not necessary for the prosecution to examine its author. From whatever angle we view the evidence, the conclusion is inescapable that Saroj Kumari was below 16 years of age at the time of the occurrence. Accordingly we agree with judgments of the courts below and see no merit in this appeal which is dismissed.”

18. Similarly, he also brought the birth certificate (Exh. 33) which was given in the year 2017 which also shows date of birth as 24.04.2003. It would be useful to observe hear that he has issued the copy of the Register and he brought the original record in the Court while giving his evidence and the learned Judge before him the trial was conducted, after verifying the entries, he handed over the original record to the Secretary and thereafter, he exhibited the document as Exh. 33.

19. In view of the aforesaid cogent and consistent evidence which is not dented at all at any stage from the side of defence, we have no hesitation in our mind to record our finding by rejecting

13

the contention of the counsel for the appellants about the age, that the prosecution has properly proved the date of birth of the victim as 24.04.2003. The date of the offence is 04.03.2017. Thus, on the date of incident, she was aged 13 years, 10 months and 10 days. Thus, she is child within the meaning of Section 2(d) of the POCSO Act. If that be so, the provisions of said Act will apply with full force.

20. The another submission of the learned counsel for the appellants is that though other two witnesses were available in view of recording of their statements under Section 164 of the Criminal Procedure Code, they are not examined and that fact itself is sufficient that the crime is registered against the appellants falsely.

21. We are afraid that this submission has any merit. It is always the choice of the prosecution to examine or discard the witnesses whose statements are recorded during the course of investigation. There is no straight jacket formula that the prosecution can be said to have been proved against the accused only by examining certain number of prosecution witnesses.

22. It is a trite law that the conviction can be recorded on the sole testimony of the victim, if the Courts are of the view that the evidence of the victim is found to be trustworthy, unblemished and credible. This law is laid down by the Hon'ble Apex Court in case of *Ganesan Vs. State, (2020) 10 SCC 573*. Keeping in this mind, let's examine the evidence of victim. From evidence of the victim, it is clear that both appellants are her near relatives. Therefore, there is a least possibility that she will not recognize them. Further, from the evidence of various prosecution witnesses, it is clear that the defence could not point out that there was any reason for the victim to depose falsehood against both the appellants. According to her version, on 04.03.2017 at 09.00 p.m., the victim had gone to watch dance programme in front of Grampanchayat, Dhodraj. There accused Vinod came and stated to her that accused Govind had called her, since the keys of his house were missing. Her evidence shows that therefore, she immediately went to the house of accused Govind, made search for the keys in the varanda, however, the keys could not be found therefore, she went to the house of Bukalu which is adjacent to the house of accused Govind. There was nobody at that place.

15

According to her evidence, accused Vinod asked her to search the keys and when she was searching keys, accused Vinod came from behind, held her and thereafter, accused Govind, he was concealing himself in dark, came out and accused Vinod sat on her chest. Accused Govind removed her clothes. Firstly, accused Vinod committed rape and thereafter, accused Govind also committed rape on her. According to her evidence, during this sexual assault, she sustained injury on hands, nose and back. According to her evidence, she was indoor patient for three days. Her evidence further shows that she disclosed the incident immediately to one Lata kannake (PW-4) who took her to the place of her sister-in-law – Radha Pungati (PW-5) where the incident was narrated to them.

23. In her evidence, the victim has specifically disclosed that during sexual assault on her by these two accused, she received injury on her various parts. The prosecution evidence shows that she was taken initially to the Rural Hospital at Bhamragarh. However, there was no lady Medical Officer, therefore she was referred for her medical examination at

Government Hospital, Gadchiroli. Referral document is at Exh. 14. Perusal of the said, show that she was referred on 05.03.2017 and the reason for her referral is mentioned in the said document that she was required to send her for medical examination and specialization inspection offered because there was no lady Medical Officer.

24. Prosecution has examined Dr. Minakshi Jambhulkar (PW-3). This prosecution witness was attached to the Civil Hospital as Gynecologist. On 06.03.2017, when she was discharging her duty there, the victim was referred to her. She admitted the victim in the Hospital on 05.03.2017. Dr. Minakshi Jambhulkar's evidence would show that the victim herself disclosed the entire history of assault stating therein that rape was committed on her by her cousin and his friend. She received the injury when she was trying to resist and escape from their clutches. Dr. Minakshi Jambhulkar found following external injuries:-

1. Abrasions and laceration around and on nose and left foot.
2. Abrasions and laceration on left shoulder

17

- region, bilateral gluteal (buttucks) region.
3. Abrasions and laceration on left lateral aspect of left thigh
 4. Abrasions and laceration lateral aspect of left knee joint.
 5. Abrasions and laceration right elbow joint specially on the posterior aspect.
 6. Abrasions and laceration right wrist joint.

Dr. Minakshi also found injuries on her private part after the genital examination:-

1. Hymen was ruptured.
2. Posterior fourchette abraded and ragged.
(fourchette is the small fold of membrane, connecting the labia in the posterior part of the vulva).
3. Muroid discharge was present (type of vaginal discharge).

As per Dr. Minakshi Jambhulkar's evidence, while narrating the incident to her, she was conscious and she herself has given the entire history. She proved the Medico-legal Examination Report of Sexual Violence which is at Exh. 15. Though during the course of cross-examination of Dr. Minakshi Jambhulkar, a suggestion was

18

made to her that the hymen can be ruptured due to cycling, however, in our view, Dr. Minakshi has rightly denied the said. Her evidence in cross-examination would show that for that the manner of cycling, its duration, the roads on which the bicycle is ridden are also to be taken into consideration and without such data, it cannot be said that by cycling only the hymen can be ruptured. In that behalf, cross-examination is halfhearted.

25. From the medical external injuries on the person of the victim, clearly corroborates the evidence of the victim that when she was sexually assaulted, she resisted, that time, she received injuries.

26. Further, the prosecution has examined Lata Kannake (PW-4) and Radha Pungati (PW-5). These two prosecution witnesses not only know the victim, but also both appellants. According to evidence of Lata Kannake, on the date of incident, the victim came to her house at that time, prosecution witness Lata was sleeping and when she inquired, the victim disclosed that the appellants Vinod and Govind committed rape on her and therefore,

she wants to commit suicide. The victim however, was consoled by the prosecution witness Lata. Thereafter, she was taken to the house of another prosecution witness Radha, sister-in-law.

27. Thus, the prosecutrix did not waste precious time to disclose to the independent persons about the heinous sexual assault made on her by known persons to her. That inspires the confidence in the judicial mind while appreciating the evidence of the prosecutrix. On re-appreciation of the evidence of the prosecutrix, which is corroborated by the medical evidence as well as the evidence of the prosecution witnesses Lata and Radha, there is no reason for this Court to discard the evidence of Dr. Minakshi Jambhulkar. On the contrary, we are of the opinion that the victim has given truthful version from the witness box. Her evidence is trustworthy, natural and is absolutely free from implicating the appellants falsely.

28. During the course of investigation, various muddemal properties were seized and those were sent to chemical analysis. The clothes of the appellants were sent. On the clothes of the

20

appellants, human blood was found.

29. Though it appears from the examination of statement recorded under Section 313 of the Criminal Procedure Code that the said was not put to the accused persons. In our view, it will not make much difference, inasmuch as, the chemical analysis reports are always corroborative piece of evidence and not substantive evidence. The substantive piece of evidence in the present case is the evidence of prosecution witnesses i.e. Lata, Radha and Dr. Minakshi Jambhulkar. In that view of that matter, we are of the opinion that there is no merit in this appeal and therefore, we pass the following order:-

ORDER

(I) Criminal Appeal No. 57/2019 and Criminal Appeal No. 654/2019 stand dismissed.

(II) The appellants, who are in Jail and are serving sentences, shall undergo all the sentences, however, concurrently.

Judgment

apeal57.19 with apeal 654.19

21

(III) Learned counsel for the appellants, who is appointed by the High Court Legal Services Sub-Committee, Nagpur is entitled to receive his professional charges and we quantify it at Rs. 7500/-.

JUDGE

JUDGE

!! Gohane !!

JITENDRA
BHARAT
GOHANE

Digitally
signed by
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