

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.116 OF 2017

Shri. Abasaheb s/o Barikrao Kamble
Age- 25 years, Occ- Nil,
R/o. Gaur, Taluka- Kallam,
District- Osmanabad.

...Appellant

Versus

1. The State of Maharashtra
Through Police Station Yermala,
Taluka- Kallam, District- Osmanabad.
(Vide C.R. No. 24/2015)

2. X.Y.Z.

...Respondents

Mr. S.H. Pathan, Advocate for the appellant.
Mr. V.S. Badakh, APP for respondent No. 1.
Mr. Pratap P. Mandlik, appointed advocate for respondent No. 2.

.....

[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 18th JANUARY, 2023

JUDGMENT:

. By the present appeal, appellant challenges his conviction under section 376 of the Indian Penal Code and under section 6 of Protection of Children From Sexual Offences Act, 2012 (for short 'POCSO Act'), and sentence of 10 years rigorous imprisonment awarded to him along with fine amount of Rs. 6,000/-.

2. Prosecution case is that, on 30.03.2015 at about 4.00 pm., appellant wrongfully restrained the victim in his house and committed rape on her, who was minor at the relevant time. The appellant was therefore charged for offences punishable under sections 341 and 376 of IPC and under section 5(i) read with 6 of POCSO Act. In support of its case, prosecution has examined 15 witnesses. The Trial Court found appellant guilty and has convicted him as aforesaid. Hence, the present appeal.

3. Heard the learned advocate for the appellant, learned Additional Public Prosecutor for respondent No. 1 and learned advocate for respondent No. 2.

4. Learned advocate for the appellant submits that there is delay of 2 days in lodging FIR. Evidence of victim and her brother is full of contradictions. PW 3-Medical Officer has admitted in his evidence that there was no sign of violence on the body of accused. He submits that on the date of incident victim was admitted in the Civil Hospital, however, she has not disclosed about alleged commission of offence under section 376 of IPC on her, at that point of time. By relying on Alamelu & Another vs State of Represented by Inspector of Police, 2011 (2) SCC 385 and Satpal Singh Vs. State of Haryana, (2010) 8

SCC 714, he submits that prosecution has failed to prove age of victim and/or the fact that victim was minor on the date of incident. Father and mother of the victim were not examined. Therefore, conviction of the appellant under the provisions of POCSO Act is unsustainable. Age of the victim is recorded as 22 years when she was first time admitted in hospital for treatment for consumption of poison. Medical evidence does not support the allegations of prosecution about commission of rape. Further by relying on the admission given by medical officer he submits that, injuries on the person of victim were possible due to fall on earth while running on the floor, is the admission given by PW9. Therefore, prosecution has failed to prove beyond reasonable doubt that victim was ravished by the appellant. He therefore submits that the appellant is entitled for benefit of doubt. In the alternate he submits that since 23.05.2015 appellant is in jail and he has so far completed 7 years of actual imprisonment, he therefore, may be released on period already undergone.

5. Learned Additional Public Prosecutor on the other hand submits that evidence of victim and PW 10 Headmaster proves on record that the victim was minor at the date of incident. Evidence of victim is corroborated by PW 2 her brother,

PW 8 her neighbor and PW 9 Medical Officer, who has noticed injuries on her person. According to him, sexual assault is proved by the prosecution and presumption under section 29 of POCSO Act deserves to be drawn against the appellant. He therefore submits that the Trial Court was justified in convicting the appellant and there is no substance in the appeal and appeal may be dismissed.

6. Learned advocate for respondent No. 2 would urge that victim has given date of birth as 10.09.1998. The same is not challenged in the cross examination by the appellant. By relying on *Kundan Nanaji Pendor vs. State of Maharashtra*, 2017 (1) Bom.C.R.(Cri.) 838, he submits that there was no cross examination as to date of birth of victim and same is required to be accepted and therefore, prosecution has proved that the victim was minor on the date of incident. On the point of delay he would urge that due to fear of defamation in the society, incident of rape was not disclosed at the first possible opportunity. Said explanation deserves to be accepted as the same is given by victim as well as PW2 her brother. According to him, medical evidence corroborates the prosecution case. Medical Officer has deposed that injuries found on the person of

victim are possible if victim resisted the rape. He therefore submits that there is no merit in the appeal and appeal deserves to be dismissed.

7. Prosecution to prove charge against the appellant has examined victim (PW1) who has categorically deposed in her evidence that when she went to throw away garbage, accused caught her hand and dragged her inside his house, threw her on the floor and ravished her. During the incident she sustained abrasion on both her hands and knees. The manner in which incident has taken place is vividly described by the victim. When her brother was entering the house that time accused ran away from the house. Her brother- PW2 and neighbor- PW 8 came there. They took her out of the house of appellant. She was under fear and started thinking that she will be defamed and under that fear she went inside her house and drank phenyl. Due to consumption of phenyl, she sustained giddiness and vomiting. Then, she was taken to Rural Hospital and from there to Civil Hospital, Osmanabad. She was unconscious and therefore she could not disclose the incident to her parents. She was discharged on 01.04.2015 and then she narrated the incident to her parents. After discharge, they immediately went to the police

station and lodged the report. She asserted in her evidence that her date of birth is 10.09.1998.

8. In cross examination she has stated that under the fear of defamation, at the time of first admission in the Civil Hospital, she has stated that she has consumed poison as she had tension of examination. She has denied the suggestion that since last more than one year she was having love affair with the appellant. Her evidence could not be shaken in the cross examination.

9. It is necessary to note here that not a single question was asked to the victim in respect of her birth date.

In Kundan Pendor (supra), Division Bench of this Court in similar circumstances has held '*Victim stated on oath that her date of birth to be is 5.1.1997. There was no cross examination as to her date of birth. Such assertion as to date of birth gone unchallenged. Therefore, it was held that age of victim was below 18 years at the time of commission of sexual offence against her.*'

In unreported decision of learned Single Judge, at Nagpur in Criminal Appeal No. 579/2017, Division Bench

judgment is followed. In this case headmistress of school of victim proved on record leaving certificate issued by the school wherein birth date of victim was recorded.

10. In the case in hand Headmaster of school in which victim is taking education has proved on record the entry in the admission register Exhibit-48 and 49 and Nirgam Utara, Exhibit-50, where birth date of victim is recorded as 10.09.1998. Considering the same and the assertion of victim that her birth date is 10.09.1998 it can be safely held that the prosecution has proved that on the date of incident victim was minor.

11. The decisions in Alamelu (supra) and Satpal Singh (supra), relied upon by the learned advocate for the appellant would not help the appellant in view of aforestated reasons.

12. The evidence of victim on the point of incident is corroborated by evidence of PW2 her bother. PW 8 her neighbor has also supported the prosecution case by stating that the victim was found weeping and under fear, when PW2 brought her from the house of appellant. After the victim consumed poison she accompanied PW2 and victim to the Civil Hospital.

13. Medical Certificate of victim Exhibit-42 is proved by PW9. As per the medical certificate the incident has taken place on 30.03.2015 and victim is examined on 02.04.2015. Medical Officer noticed following injuries on the person of victim.

1. Lower Lip- abrasion present. (Minute).
2. Scratches on right cheek (Brown scab).
3. Abrasion on left elbow (1x1 cm.)(1x1cm) (brown scab).
4. Abrasion on left knee (1x1 cm)(1x1cm)(1x1 cm) (Brown scab).
5. Scratches of (Nail) right breast.(Brown scab).

14. On the basis of examination of victim, PW9 has deposed that victim must have sustained sexual assault. Injuries noted on MLC register and certificate at Exhibit-41 and 42 are probable when victim is resisting the incident of rape.

15. In view of aforesaid evidence, the prosecution has proved that on 30.03.2015 the appellant has committed rape on victim. Delay in lodging FIR is properly explained by the prosecution.

16. There is no substance in the argument of the appellant that at Exhibit-22, age of victim is mentioned as 22 and therefore benefit of doubt should be given to the appellant

as the prosecution has failed to prove the age of the victim. The investigation officer PW13 in his cross examination though has initially admitted that when victim was admitted in Civil Hospital, Osmanabad for consumption of poison that time her age is disclosed before the Doctor as 22 years at Exhibit-22. However, he has explained that the age on medical paper of Govardhan PW2 is shown as 22 years and word Govardhan is scored and victim's name is mentioned there. The case paper is of victim. Perusal of case papers Exhibit-22 confirms this fact that initially name of Govardhan was written, which was scored and then victim's name is written. It is therefore probable that age of Govardhan was recorded as 22 years and same remained to be corrected after scoring his name. Benefit of inadvertent error cannot be given to the appellant in this case.

17. There is no merit in the appellant's argument that the evidence of victim and PW2 her brother is contradictory to each other. There are some minor contradictions in their evidence, but they do not go to the root of the case, so as to raise serious doubt about the prosecution case. The prosecution has proved its case against the appellant by leading cogent and reliable evidence. The Trial Court is justified in accepting the

prosecution evidence and convicting the appellant. There is no merit in the appeal, hence, appeal is dismissed.

18. Fees of learned advocate appointed to represent respondent No. 2 is quantified at Rs. 5,000/-. He has graciously offered to give it to the High Court Bar Association, Aurangabad. Legal Aid Services (Sub Committee) Aurangabad shall pay the said fees to learned advocate appointed for respondent No. 2, within four weeks.

[NITIN B. SURYAWANSHI, J.]