

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

**CRIMINAL APPEAL NO. 302 OF 2022
WITH
CRIMINAL APPLICATION NO. 1377 OF 2022**

Balasaheb S/o Paraji Jevnar,
Age : 39 Years, Occ. Agricultur,
R/o. Pedgaon, Tq and District Parbhani,
At present C-9478 Aurangabad Central Prison,
Aurangabad.

.. Appellant
(Original Accused)

VERSUS

The State of Maharashtra,
Through P.S.O. Police Station,
Pathri, District Parbhani.

.. Respondent

Ms. Manjusha S Jagtap-Ware, Advocate for Appellant;
Mr. K. S. Patil, APP for Respondent No.1;
Ms. Harsha R. Lomate, Advocate for respondent No.2 (appointed)

CORAM : S. G. MEHARE, J.

**Reserved on : 11.07.2023
Pronounced on : 21.09.2023**

JUDGMENT:

1. The present appellant-convict has impugned judgment and order of conviction of the learned Special Judge (POCSO) Parbhani, passed in Special Case No. 39 of 2019 dated 29.12.2021.
2. The appellant will be referred to as 'the accused', and the respondent will be referred to as "victim", from now on.

3. The brief facts of the case were that the accused is the father of the victim. The incident happened on 09.06.2019 in his house at about 8.00 p.m. The accused and victim were playing the Ludo game on the mobile phone. Her mother and one Renukabai were chanting Haripath in front of her house. Suddenly, they heard the screaming of the victim. They went inside the room and saw the accused and the victim were nude. The accused was having forceful sexual intercourse with the victim and was lying over her person. Then accused went to the courtyard. Her mother bet him by wood. The victim informed the mother that the accused removed his pants and her knickers and penetrated his penis into her vagina. She had suffered pain; hence, she screamed. On that night, she resided with the victim at the house of her relatives. In the morning, the accused disappeared with Rs. 35,000/- and the gold ornaments worth Rs. 30,000/- from the house. Then, she went to reside at the paternal house of her mother. Some days later, her cousin brother-in-law called her mother and assured her that the accused would not cause harm to them. Her mother returned with her young sister and left the victim at her paternal village. On 22.06.2019, the accused assaulted his wife, blaming her for defaming him. One Renuka rescued her. Then, on 24.06.2019, she lodged a report at about 2.00 p.m.

4. Based on the report of the victim, crime bearing No. 156 of 2019 was registered against the accused for the offences punishable under sections 376-AB, 323 and 506 of the Indian Penal Code and Sections 6,10 of the Protection of Children from Sexual Offences Act. (“POCSO Act”, for short) and Section 75 of the Juvenile Justice (Protection and Care of Children) Act.

5. The charges were framed against the accused for the offences punishable under Sections 376AB, 324 and 506 of the Indian Penal Code, Sections 5(m) and 9(n) punishable under Sections 6 and 10 of the POSCO Act and read over to him. The accused denied the charges and claimed the trial. The prosecution examined nine witnesses in all. The statement of the accused under Section 313 of the Code of Criminal Procedure was recorded. The accused did not enter the witness box nor examine any witness supporting his defence. The accused had a defence that he did not allow his wife to talk to one Manik Jevnar, but she did not listen. Hence, they implicated him in the crime falsely.

6. Heard the learned counsel for the accused, the learned A.P.P for the state and the learned counsel for the victim at length.

7. The following points arise for the determination of this Court, and findings thereon are recorded for the reasons to follow:-

Sr.No.	Points	Findings
(I)	Does the prosecution prove that on 9.6.2019, the victim was a child below 12 years?	Proved
(II)	Does the prosecution prove that on 09.06.2019 at about 8 p.m., the accused committed rape and penetrative sexual assault on the victim in his house?	Proved
(III)	Does the prosecution prove that the accused on the above date, time and place committed aggravated sexual assault on the victim?	Proved
(IV)	Does the prosecution prove that on 22.06.2019 at about 1.20 p.m. in the field Gat No. 218 of village Pedgaon, the accused voluntarily hurt his wife by means of an axe as a weapon likely to cause death?	
(V)	Does the prosecution prove that on the above date, time and place, the accused threatened to kill the mother of the victim?	In the affirmative
(VI)	What order?	Appeal dismissed

REASONS

As to Point No. 1 :-

8. P.W. No.1 victim testified that at the time of the incident, she was in 6th standard. Her date of birth was 22.11.2008.

9. P.W. No.7 Chandrabhaga Bobade testified that she served as Arogya Sevika in Primary Health Center, Zari, from November 2016. She maintained the official birth register. On 22.11.2008, the mother

of the victim delivered a baby girl in their sub-centre. Another Argoya Sevika took the entry of the baby in the official register. The birth certificate was issued below Exh.53.

10. P.W. No. 8 Sayyeda Mehmood, the Head Mistress in Zilla Parishad Central Girls Primary School, Pedgaon, deposed that as per the entry at Sr. No. 1285 of the School admission register and School leaving certificate, the victim was a student of their High School. She was admitted to the 1st standard on 17.05.2013. She studied there up to 4th standard. As per the entry in the register, her date of birth was 22.12.2007. She had produced the extract of the admission register and School leaving register below Exh. 55. She also produced the original application of admission, which reflects the same date of birth. The accused cross-examined both witnesses, but nothing adverse has been extracted from their cross-examination to disbelieve them.

11. In his statement under Section 313 of the Code of Criminal Procedure, the accused also admitted that the date of birth of the victim was 22.11.2008. The victim and P.W. No.7 testified on her date of birth. However, P.W. No.7 testified that, as per the School record, her date of birth was 22.12.2007.

12. The learned counsel for the accused would argue that there was a variance in the dates of birth of the victim. The learned counsel for

the victim would submit that if the date of birth as deposed by P.W. No.9 is believed, on the date of the incident, she was not below 12 years.

13. The learned A.PP would submit that the date of birth recorded in the School record will prevail over the other record.

14. Section 94 of the Juvenile Justice (Care and Protection of the Children) Act provides that the School leaving certificate shall prevail over the birth certificate issued by the birth and death officer and the ossification test. Therefore, the date of birth mentioned in her school record would prevail. As per the School record, her date of birth was 22.12.2007. Believing her date of birth as recorded in the School, she was 11 Years, 5 months and 15 days old on the date of the incident. Evaluating the evidence of P.W. No.7 and 8 on the age of the victim, the Court believes that the prosecution has proved that on the date of the incident, the victim was below 12 years. Hence, this point is answered as proved.

As to points No.2 and 3 together:-

15. The evidence of the victim is that on the date of the incident, she was living with her parents. After selling the onion of their master, they returned home in the evening. She and the accused were playing a Ludo game, and her mother/P.W. No.2, was chanting Haripath with

one lady in front of her house. The accused removed his pants and underwear and also removed her pants and knickers. The accused inserted his private organ in her urine organ. Due to pain, she screamed. Hearing her screams, her mother and one Renuka entered the home. Her mother beat the accused with a stick. Then, the accused came to the courtyard. She stayed that night in the house of one Jijabai, and on the next day they went to her maternal uncle's village.

16. P.W. No.2, the mother of the victim, deposed that on the date of the incident, she and Renukabai were chanting Hari Path in front of her house. Then they heard the screaming and went inside the room. She saw that the victim and the accused were covered with a blanket. She removed it. They were nude. The accused was lying on her person. The accused had committed penetrative sexual intercourse with the victim. He came out of the house and slept in the courtyard. The victim told her that the accused had forceful penetrative sex. Hence, she suffered pain. She then beat the accused.

17. P.W. No.6 Dr. Kazi Jaweria Nazmin Razioddin testified that on 24.06.2019, the police referred the victim for medical examination and brought her at about 10.55 p.m. In the examination, she did not find any physical injury on her person. However, her hymen was torn at 12' O clock position with a healed margin. She did not notice any redness

or fresh bleeding. Since the incident happened 15 days before the examination, she did not collect the samples. She opined that sexual violence can not be ruled out. She has confirmed her opinion, referring to the Chemical Analyzer reports Exh. 48 and 49. She proved the medical examination report below Exh. 47 and final opinion below Exh.50. The accused made a single-question cross-examination of this witness.

18. The Medical Examination Report of the victim reveals that she had narrated the same incident to the Medical Officer. However, there were no injuries on her person, except tearing of the hymen at 12' O clock position with a healed margin.

19. Blood was detected on the knicker of the victim as per the Chemical Analyzer Report Exh. 48. However, no blood was found on her top, Leggings of the victim, and Full open shirt, Jeans pants and underwear of the accused. No hair were found on their clothes. The blood group of the accused was 'O'.

20. Munja Zumade (PW. No.3) has proved the crime details form/spot panchnama (Exh.6). The victim and her mother testified that the incident happened in their house. The police seized one axe with a wooden handle and bangle pieces from the spot of the incident. Nothing material is extracted from the cross-examination of this

witness. The same witness proved the recovery panchnama of the clothes of the victim recovered from her mother below (Exh.27). The police seized a top of the victim having red and black checks, one almond colour pant and one red colour knicker. Again, the credibility of the witnesses was not shattered in his cross-examination.

21. He also proved the recovery panchnama of the clothes of the accused below (Exh.28), under which a white used shirt, blue colour jeans pant and sky blue colour underwear were seized. The seized clothes were not stained with blood or semen. However, nothing beneficial to the accused has been extracted in the cross-examination.

22. The evidence of the investigating Officer Shailesh Jadhav (P.W.9) is in pursuance of his investigation. He has reiterated the evidence of a crime, panchnamas and the investigation.

23. The learned counsel for the accused has vehemently argued that there was an inordinate delay in lodging the first information report, and there was no satisfactory explanation for the delay.

24. Per contra, the learned A.PP and the counsel for the victim would submit that the mother of the victim P.W. No.2 had testified that when she asked the victim why she did not tell the earlier incident to her, the victim explained to her that the accused had threatened her to kill if she would disclose the incident to anybody. She has also

deposed that on the next day morning of the incident, she went to the village Takali Kumbkarn to her paternal home with her daughters. She did not lodge the report at that time due to fear of the defamation of her husband, herself and daughter. Therefore, her explanation was satisfactory and acceptable.

25. The cross-examination on the explanation for the delay in lodging the report is totally silent. Her explanation for the delay has gone unchallenged.

26. The law is well settled that a mere delay in lodging the first information report is not fatal, but the delay must be explained satisfactorily and accounted for by the prosecution. The Court has to examine whether a plausible explanation is offered and if offered, whether it is satisfactory. The sequence of events till reaching the police station should also be considered.

27. The mother of the victim has given a candid explanation that on the next day of the incident, she immediately went to her parental home with the victim. She had apprehension of defamation of the accused (her husband) herself, and th. Hence, she kept silent. As far as the similar incident of the accused with the victim, the victim told her that the accused had threatened her to kill if she would disclose the incident to anybody. The delay in such cases happens typically due to

apprehension of defamation. The future of the victim is another consideration. She may have difficulties getting married. Society may look at her with suspicion and ill eyes, which is a continuous trauma throughout her life. Hence, normally, the women did not prefer to come forward forthwith. In such cases, the delay is natural. The delay explained by the mother of the victim, P.W. No.2 is plausible and satisfactory. Hence, the Court does not find force in the objection that the delay was not properly explained.

28. The learned counsel for the accused would submit that the medical evidence was not complete on the penetrative sexual assault. The opinion of Kazi Jaweria (P.W. No.6) was based on the material. The medical examination report Exh.47 of the victim does not disclose injury on her body, except for tearing of the hymen at 12'O clock, and margins were healed. Since she was not immediately examined, redness and bleeding could not be noted on her private part. The hymen is described with reference to a clock face, 12 O' clock being the most anterior aspect near the urethra and 6 o'clock being the most posterior aspect nearest the anus. The hymen crudely tears or reaps due to physical activity, hormones, using tampons or having sex. Tearing of the hymen can be caused by intercourse or other sexual activity, sports, and physical activities (like falling on the middle bar or

the bike head). The bleeding or due to any other hymen normally resolves after 24 hours, and tears appear at their heal. However, if someone has penetrative sex again before the tissue has completely healed, there may be a possibility of bleeding again.

29. The signs of tearing off the hymen clockwise indicate the sex. In the cross-examination of Dr. Kazi Jaweria P.W. No.6) no other possibilities of tearing the hymen were suggested. Due to a fifteen-day delay in the examination, the absence of redness and swelling on her private part and the healing of the margin was natural. However, the healing of margins means she had sex. Based on tearing the hymen at 12' O clock position and noticing the margin healed. P.W. No.6 appears to have formed an opinion that the possibility of sexual violence could not be ruled out.

30. Section 45 of the Indian Evidence Act 1872 speaks of the opinion of experts. Expert testimony aims to provide the trier of the fact with useful, relevant information. The function of the expert is to put before the Court all the materials, together with reasons that induce him to come to a conclusion so that the Court, although not an expert, may form its own judgment by its own observation of those materials. The related material shall be produced when the opinion is based on science.

31. As discussed above, Dr. Kazi Jaweria (P.W. No.6) has formed her opinion based upon the physical and clinical examination of the victim and noticed tearing of the hymen at 12' O clock position, and margins were healed. Medical science accepts that the tearing of the hymen is possible by sex.

32. The victim and her mother were consistent as regards the forceful sexual assault by the accused. When the accused penetrated the vagina of the victim, she screamed and on hearing her screaming, her mother and another lady sitting in front of the house entered the house and saw that the accused was having sex with the victim. The medical examination report corroborates their oral testimony.

33. The law is well settled that if the solitary evidence of the victim of a rape inspires confidence, it is sufficient to convict the accused. Here, in this case, the mother had witnessed the incident. The victim narrated her mother the alleged incident. Her hymen was torn, and her margins were healed. The victim is the daughter of the accused, and his wife witnessed the incident. The daughter and the wife had no reason to lie against the father and husband unless there was truth.

34. Evaluating the evidence as regards the penetrative sexual assault, the Court does not find any reason to disbelieve the victim and her mother. The prosecution has categorically proved that on the day

of the incident in the house of the accused, he did rape penetrative and aggravated sexual assault on his daughter; hence, points Nos.2 and 3 are answered as proved.

As to Point No. 4:-

35. Another incident happened on 22.06.2019 in the field. On that day, the mother of the victim assaulted with the axe deposed that after the incident of penetrative sexual assault, she went to her parents and again returned home. On 22.06.2019, when she went to the field of one Baba Deshmukh with the accused in the afternoon at about 1.30 p.m., the accused told her he would kill her as she had defamed him. He beat and injured her by the blunt side of the axe. She has received injuries to her right hand and right cheek due to an axe. One Renuka Jevnar saved her from the clutches of the accused. Then, she lodged the report.

36. The prosecution sent Rukhminibai (PW. No.2) for a medical examination. Dr. Akanksha (PW. No.4) examined her on 23rd June 2023 at 4.30 p.m. She noticed C.L.W. 2x0.1 cm x0.1 cm on the right forearm and an abrasion measuring 4x0.1 cm on her right cheek. The injuries were caused within 24 hours. She had opined that the injuries were possible by hard and blunt objects like the wooden handle of an axe. She proved the medical examination report Exh.35. A single

suggestion was put to her that the injuries may be possible by falling on a hard substance.

37. The learned counsel for the accused would submit that the prosecution deliberately did not examine Renuka Jivnar, who witnessed the incident and rescued the injured. Therefore, the prosecution case falls under the shadow of doubt.

36. Per contra, the learned A.P.P and counsel for the victim would submit that the injured is the best witness. The injured have to see the assailant. The assailant was her husband. The medical examination report corroborates her evidence. The weapon allegedly used in the crime was also recovered.

38. In the cross-examination of the injured P.W. No.2, it has been brought on record that when the incident of assault happened, she was sitting under the blueberry tree, and her husband was working in the turmeric field. Her husband and other women had lunch under that tree. Her cross-examination indicates that the incident happened in the field of Baba Deshmukh. She further denied that the accused did not assault her. There was no suggestion that the place where the incident happened was rough and stony. It has been suggested to her that while bringing water, she fell down and sustained the injuries. Again, it was not suggested that the place where she went to bring the water was

hard surface, stony and slippery. In the absence of material to believe the possibility of sustaining injury by fall, the bare suggestion does not make the defence probable. The medical evidence and recovery of the weapon support the testimony of the injured. Therefore, there is no reason to disbelieve her. Accordingly, this point is answered as proved.

As to point No.5:-

39. The victim narrated to her mother/P.W. No.2, that after the first incident, the accused had threatened to kill her if she would disclose the incident to anybody. Hence, she kept mum for a long period. In such offences, threats to kill are possible, particularly by a person who influences the other. The father, naturally, had influence over the victim, who is his daughter. There was nothing adverse to disbelieving the victim and the witness. Hence, this point is answered as proved.

40. So far as the appreciation of the evidence by the learned trial Court, there appears to be no error or illegality that requires interference at the hands of this Court. Regarding the quantum of the sentence, the learned trial Court has correctly imposed the term of the sentence as provided under the law.

41. The discussion made above leads this Court to conclude that the prosecution has proved the charges against the accused beyond the reasonable doubt. There was nothing to disbelieve the witnesses and

no grounds to interfere with the impugned judgment of the conviction passed by the learned Sessions Judge (POCSO). As a result, the appeal fails. Hence, the following order :-

ORDER

- (i) The appeal stands dismissed.
- (ii) The judgment and order of conviction of the learned Special Judge (POCSO) Parbhani, passed in Special Case No. 39 of 2019 dated 29.12.2021 is confirmed.
- (iii) Record and proceeding be returned to the learned trial Court.
- (iv) Pending Criminal Application No. 1377 of 2022 stands disposed of.
- (v) The Secretary, High Court Legal Services Sub-Committee Aurangabad, do pay the fees of the learned counsel appointed for the accused and the victim as per the schedule.
- (vi) Rule stands discharged.

(S. G. MEHARE)
JUDGE

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