

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

**CRIMINAL APPEAL NO.312 OF 2018 WITH
CRIMINAL APPLICATION NO.1217 OF 2013**

Pandit Dattu Ichke,
Age 38 years, Occu. Labour,
R/o Bawachi, Tq. Renapur,
District Latur.

... APPELLANT

VERSUS

1. The State of Maharashtra
Through Police Station,
Renapur, District Latur.
(Copy to be served on
Public Prosecutor, High Court
of Judicature of Bombay,
Bench at Aurangabad)

2. X Y Z

... RESPONDENTS

.....
Smt. Pratibha Bharad, Advocate for appellant
Smt. R.P. Gaur, A.P.P. for respondent No.1 – State
Shri D.S. Pawar, Advocate for respondent No.2.

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CORAM : R.G. AVACHAT, J.

DATE : 26th APRIL, 2023

J U D G M E N T :

The challenge in this appeal is to the judgment and order of conviction and consequential sentence passed by learned Special Judge, Latur on 11/4/2018 in Special Case (POCSO) No.21/2016. Vide impugned judgment and order, the

appellant herein was convicted as stated below :-

Sr. No.	Sections	Sentence
1.	5(m)(n) of POCSO Act	R.I. for 10 years and fine of Rs.10,000/-, in default, R.I. for 6 months
2.	323 of I.P.C.	R.I. for 1 year.
3.	506 of I.P.C.	R.I. for 2 years and fine of Rs.2000/-, in default S.I. for 2 years
		All the sentences have been directed to run concurrently.

2. The facts giving rise to the present appeal are as follows :

P.W.11 Kavita was a keep of the appellant. The victim, a girl in the age group of 6-8 years, is the daughter of Kavita's brother's son. Since the parents of the victim were not taking her care, she was residing with Kavita. The appellant, Kavita and the victim would reside together at Renapur. The appellant was married. His wife and children would reside at some other place. On the given day, the wife of the appellant had come to Renapur. The appellant had accompanied his wife

to see her off. It was 8.00 p.m. Those were the days of summer. The appellant returned by 10.00 p.m. He started beating up Kavita. The appellant was under influence of liquor. To save herself from further beating, Kavita left the house and stayed in the field overnight. The appellant and victim were the only persons in the house. Kavita returned by 5.00 in the morning. She questioned the appellant as to why did he beat her. The victim came running and related Kavita that the appellant committed penetrative sexual assault with her during the night. The appellant took both of them to his another house on the field whereat his parents were residing. He kept both, the victim and Kavita there. He asked his parents not to allow them to leave. The appellant left the house for his work. Kavita and the victim thereafter left the house and approached the police station. Kavita lodged F.I.R. (Exh.71) against the appellant. The victim was medically examined at Government Hospital, Renapur. Since there was pain in her private part, she did not co-operate for further medical screening. She was, therefore, referred to Government Hospital, Latur, whereat she was again medically screened.

3. Based on the F.I.R. (Exh.71), crime came to be registered. The appellant was arrested. The clothes on the

person of both, the appellant and the victim were seized. Scene of offence panchanama was drawn. Statements of persons acquainted with the facts and circumstances of the case were recorded. On completion of the investigation, the appellant was proceeded against by filing the charge sheet.

4. The trial Court framed the Charge (Exh.15). The appellant pleaded not guilty. It is his defence that, P.W.11 was a criminal. Once he had stood surety for her brother in a criminal case. After having realised her brother to be a criminal, he took search for him with a view to seek discharge from suretyship. Kavita and her friends would ask the appellant to pay him money. Kavita would force the victim to beg. She had given burns to the victim only with a view to earn alms. Kavita had even injured private part of the victim with an assault with a glass. While the appellant was in jail, Kavita met him thrice there and made a demand of Rs.5 Lakhs. In short, the case of the appellant is of having been falsely implicated only with a view to extort him.

5. The prosecution examined 13 witnesses and produced in evidence various documents. For deciding the present appeal, the relevant evidence would be that of P.W.11

Kavita, the victim (P.W.2) and the Medical Officer P.W.8 Dr. Swati Narwade.

6. Let us appreciate the evidence.

P.W.11 Kavita testified that she was married with one Anil Bhosle about 12 years before she gave evidence in the Court. Her marriage lasted only for two months. Since there were differences between her husband and herself, she came back to her parental house at Sugaon. She got acquainted with the appellant in 2017. She started living with him as his keep. She shifted her residence from Sugaon to Renapur. She was staying in a premises of one Pandhari, taken on rent. The victim (her niece) would stay with her. The victim was just 8 years of age. The appellant would also stay with them. It is further in her evidence that, on the given day, the wife of the appellant had come to their residence. By 8.00 p.m., the appellant left with her to see her off. He returned home drunk. It was 10.00 p.m. He started beating her. She left the house due to the beating and stayed in the field overnight. The victim and the appellant stayed in the house. She returned at 5.00 in the morning. The victim came to her crying and related her to have been sexually exploited by the appellant. She, therefore,

questioned the appellant as to why did he behave such a way. He again beat her up. He then took both of them to his house in the agricultural land at Niwada Phata. His parents would stay thereat. At the house of his parents, appellant asked them not to allow Kavita and the victim to go out. The appellant left the house for Pimpal Phata.

7. It is further in her evidence that, she left the house with the victim under the pretext of leaving for answering nature's call. She went to the S.P. Office, Latur. On the directions of police official there, she went to the Renapur Police Station. She narrated the incident to the police official at Renapur Police Station. As such, she lodged the F.I.R. (Exh.71). It is further in her evidence that, police sent them to Renapur Rural Hospital. Then they were referred to Government Hospital, Latur. The victim was in the hospital for four days. She then delivered the victim's clothes to the police. She identified those clothes before the Court.

8. During cross-examination, it has come on record that, she belonged to Pardhi community. She has three brothers. The victim was daughter of her brother's son. She admitted that, her brother, her father and even nephews would

indulge in criminal activities. They were, therefore, in jail many a time. It was suggested to her that the parents of the victim were not looking after her. She denied the questions put to her suggesting the defence of the appellant. Her evidence would further indicate that she was arrested in connection with some crime. She gave a slip to police from Court on 9/1/2017. She was thereafter again arrested and even prosecuted for the same. She denied to have attempted to extort money from the appellant. She denied to have lodged a false F.I.R. after causing injuries at a private part of the victim. She has, however, admitted to have met the appellant in jail 4-5 times. She, however, denied to have made a demand of money for settlement of the matter.

9. P.W.2 – victim testified that, Kavita (P.W.11) was her aunt. Both of them would reside along with the appellant. On the given night, the appellant assaulted her aunt. She (Kavita) therefore went to the field. The appellant and herself were the only persons in the house. The appellant removed her clothes and did sexual intercourse with her. On return of her aunt (Kavita), she related her what the appellant did. The appellant threatened them of dire consequences if they disclosed the incident to anyone. The appellant even took them to one

village. In the night time, Kavita and she left the house under the pretext of answering nature's call. Her aunt took her to a police station. Her aunt and herself narrated the incident. A lady police official was there. Her statement was recorded. She was then referred to hospital. She was given treatment thereat. Her statement was also recorded in Court. She identified her clothes before the Court.

10. During her cross-examination, it has come on record that she did not attend the school for long. When her father was in jail, the appellant had stood surety for him. Since then there was acquaintance between appellant and Kavita. She was brought to the Court from hostel (Children's Home). She denied to have conversed with police before she gave her evidence. She denied to have given her evidence as per the say of an Advocate and one lady. She, however, admitted that, P.W.11 Kavita would give her burns. The burn marks appearing on her face were the result thereof. She went on to state that, P.W.11 would compel her to beg on street. Kavita would indulge in thefts. It is further in her evidence that, Kavita gave a glass blow on her private part. According to her, there was a dispute between the appellant and Kavita. She denied that Kavita had once threatened the appellant of lodging a false report of rape.

She denied the incident to have not taken place.

11. P.W.9 Dr. Anita was serving as a Medical Officer with Renapur Rural Hospital. It is in her evidence that, on 8/4/2016, she examined the victim in Renapur Rural Hospital. It was a case of rape. The police had referred the victim for medical check up. It is further in her evidence that, age of the victim was between 6 and 8 years. On the victim's medical check-up, she found contusion on upper lip of the victim. She further noticed contusion on both the cheeks. She further noticed small abrasion on perianal region. The injuries were bright red colour. According to the doctor, the age of the injuries was within 24 hours. The lip injury was possible due to bite. In her opinion, the perianal injuries were possible only in sexual assault. Her evidence further indicates that, she had collected vaginal swab, anal swab, blood sample and nails. Those were sent to the office of Forensic Science Laboratory. It is further in her evidence that, she did not conduct internal (vaginal) examination since the victim had pain and due to same, she was not co-operating. She, therefore, referred the victim to Government Hospital, Latur for vaginal examination. Her medical examination report is at Exh.60. In her opinion, hymen tear at position of 6.00 o'clock occurs only in penetrative sexual

intercourse. The doctor went on to state that, the victim's medical check-up lead her to opine it to be a case of sexual assault.

12. In the cross-examination, the Medical Officer testified that, injuries at perianal region and to genital organ were simple in nature. She denied that such injuries were possible with a sharp weapon or due to cut by glass. She denied that, hymen tear at 6.00 o'clock position was possible by fingering or insertion of any other object.

13. P.W.8 Dr. Swati is a Medical Officer, who examined the victim at Government Medical College & Hospital, Latur. The victim was referred for examination of her hymen. The reason therefor was that the victim was not co-operating for internal examination due to pain. It is in her evidence that, general examination was conducted, multiple abrasions were present over both labia majora and labia minora with reddish brown scab in situ, abrasion present over perianal region, reddish brown in colour, external genitals inflammed, tender to touch and there was evidence of hymenal tear present between 6 to 7 o'clock position, margins irregular, inflammed and reddish tender to touch. The tears 6 to 7 o'clock was possible because

of forceful penetrative in sexual intercourse. Victim must have experienced pain due to forceful intercourse. It is further in her evidence that, simultaneously with the examination of the victim, she had taken notes in MLC register, indoor case paper and then prepared the report. All those original papers were brought before the Trial Court.

During her cross-examination, she testified that the injury to labia majora with a sharp glass or cutting weapon was least possible. She denied the suggestion that tears to hymen were possible because of sharp glass or weapon. The witness was categorical to state that the same was possible because of forceful penetration only. She denied to have issued a false certificate.

14. The learned counsel for the appellant would submit that, the surface injuries noticed on the person of the victim were possible by fall or beating. There is evidence to indicate the appellant and his wife were staying together. The landlord in whose premises the appellant and P.W.11 Kavita were residing along with the victim was not examined. According to learned counsel, the prosecution has first to establish the victim was subjected to penetrative sexual assault and then it has to

prove that author thereof was the appellant. According to her, the victim was a child. She was tutored. The victim gave material admission. C.A. report does not support the prosecution. No semen was detected in vaginal swab. The clothes of the appellant were given by his wife. P.W.11 Kavita was herself involved in various crimes. Her evidence was not reliable. She met the appellant 4-5 times in jail. The victim gave evidence as she was under control of P.W.11. The learned counsel relied on the judgment of this Court in case of **Dipak @ Kalwa Kisanlal Soni Vs. State of Maharashtra [2020(2) Mh.L.J. (Cri.) 520]**, wherein it has been observed :-

“DNA sample obtained from semen on clothes of victim not found to be belonging to accused, benefit of doubt thereof needs to be given.”

15. The learned A.P.P. and the learned counsel appointed to represent the victim would, on the other hand, submit that the medical evidence undoubtedly suggests the victim was deflowered. She has no reason to falsely implicate the appellant.

16. Admittedly, the appellant had stood surety for the brother of P.W.11 Kavita in a criminal case. It is true that,

Kavita appears to have criminal antecedents. She had met the appellant 4-5 times while he was in jail in connection with the present crime. The victim too admitted that Kavita had made her beg. She had even given her burns. Kavita even assaulted on her private part with a glass. No semen was detected in vaginal swab. The fact, however, remains that, the evidence of the victim and that of P.W.11 was not shaken in material particulars. It is reiterated that, both the Medical Officers P.W.8 Dr. Swati and P.W.9 Dr. Anita, who examined the victim, have in no uncertain terms, testified that the victim was subjected to forceful sexual intercourse. Medical evidence rules out injuries at the private part of the victim to have been caused for the reason other than forceful sexual intercourse. The victim was in the age group of 6-8 years. She did not have reason to falsely implicate the appellant, exonerating the real culprit. Post incident, the victim was admitted to Children Home. Until she gave evidence in the Court, she was staying in Children Home itself. The victim has flatly denied to have been influenced by police or the Prosecutor to give evidence against the appellant. Close scrutiny of the victim's evidence indicates she was neither tutored nor influenced to give evidence against the appellant. There is, therefore, no reason to interfere with the impugned order. The appeal, therefore, fails. The same is dismissed.

17. In view of disposal of the Criminal Appeal, Criminal Application No.1217/2023 stands disposed of.

18. Fees of Mr. D.S. Pawar, Advocate appointed for respondent No.2 is quantified at Rs.10,000/- (Rupees ten thousand).

(R.G. AVACHAT, J.)

fmp/-