

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 606 OF 2019

Gani Chandkhan Pathan
Age : 65 yrs, occ : Mason
R/o Shahanoorwadi, Near,
Kabrastan, Aurangabad

Appellant

Versus

1. The State of Maharashtra
Through Police Station Officer,
Police Station Satara,
Aurangabad.
2. Saira Begum w/o Abbas Khan
Age : 51 yrs, occ : household
R/o Rahul Nagar, Galli No.1,
Railway Station, Aurangabad

Respondents

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Mr. Kartik D. Mundhe, Advocate holding for Mr. Irfan D.
Maniyar, Advocate for the appellant
Mr. R.B. Bagul, A.P.P. for respondent No.1 – State.
Mr. V.M. Jaware, Advocate for respondent No.2.

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CORAM : SANDIPKUMAR C. MORE, J.

Judgment Reserved on : 4th September 2023

Judgment pronounced on : 10th October 2023

Judgment :

1. The appellant i.e. the original accused has challenged the judgment and order dated 22.04.2019 in Special Case (POCSO) No.4/2018 passed by the learned Additional Sessions Judge, Aurangabad (hereinafter referred to as “the learned trial Court”). Under the aforesaid judgment and order, the appellant has been convicted for the offence

punishable under Section 376 (2) (i) of the Indian Penal Code and sentenced to suffer Rigorous Imprisonment for 10 years and to pay fine of Rs. 5,000/-, in default to suffer Rigorous Imprisonment for 6 months. He is also convicted for the offence punishable under Section 506 of the Indian Penal Code and sentenced to suffer Rigorous Imprisonment for one year and to pay fine of Rs. 1000/-, in default to suffer Simple Imprisonment for one month. The appellant though convicted by the learned trial Court for the offences punishable under Section 354 of the Indian Penal Code and under Sections 4, 6 and 8 of the Protection of Children from Sexual Offences (POCSO) Act, 2012, but no separate sentence has been awarded to him.

2. The prosecution story as reflects from the complaint (Exh.14) lodged by the mother of victim i.e. PW-1 Saira Begum is as under :

On 16.10.2017 PW-1 Saira was at her home alongwith her daughter-in-law Rehana and the victim i.e. her daughter. At about 12.00 noon the appellant, who is also her brother-in-law i.e. the husband of her sister, had come to her house. After having tea at about 2.00 p.m. her daughter-in-law Rehana told the victim to go upstairs for bringing her

mobile handset from the bedroom. After about 10 minutes of that, the appellant had also followed the victim upstairs. Since the appellant did not return from the bedroom, the daughter-in-law Rehana had gone to the said bedroom to see the appellant. When she went in that bedroom, she found the appellant putting *Salwar* on the person of victim. He was also locking the zip of his trousers. Then Rehana brought the victim downstairs. However, since the appellant also came downstairs, the victim did not tell anything to her mother. Thereafter the appellant left after about one hour and then Rehana had told complainant Saira that she saw the appellant putting on *Salwar* on the person of victim and also locking the zip of his trousers.

3. Then on 23.10.2017 as the victim was having stomach-ache, Saira showed her to one Dr. Sangita Gawai in her Ashlesha Clinic at Rahul Nagar and at that time doctor had given the victim medicines of fever and stomach-ache. However, despite taking such medicines, the stomach-ache of the victim continued, and therefore, on 24.10.2017 Saira again showed the victim to the said doctor, who on examination of the victim, told Saira that private part of the victim was torn due to forcible sexual intercourse. The doctor

also advised Saira to lodge complaint in the Police Station. When Saira asked the victim about the incident dated 16.10.2017, the victim told her that the appellant had taken out her *Salwar* and after making her to lie down on the cot, he slept on her stomach. On hearing the same, it was confirmed that the appellant had committed forcible sexual intercourse with the victim on the day of the incident, and therefore, Saira lodged report against the appellant as per Exh.14.

4. As per the said report, the concerned Police Station registered required crime and started investigation. On completion of investigation, charge-sheet was filed and the learned trial Court conducted the trial and convicted the appellant as mentioned above.

5. Learned Counsel for the appellant/accused submits that the learned trial Court has definitely erred in convicting the appellant despite several contradictions, omissions and discrepancies in the evidence of prosecution witnesses. According to him, there was delay of 10 days in lodging the First Information Report by the complainant i.e. the mother of victim, which remained unexplained. He submitted that the fact of intercourse was first disclosed to

the victim's mother on 24.10.2017 by Dr. Sangita Gawai and it was also disclosed to her by her daughter-in-law Rehana just after the incident on 16.10.2017 that she had seen the appellant putting of *Salwar* on the person of victim and also found locking zip of his trousers. Thus, the learned Counsel for the appellant submitted that despite such disclosure by daughter-in-law, complainant did not care to ask the victim as to what happened with her on the day of the incident. The learned Counsel for the appellant also pointed out that the victim's mother had in fact admitted in her cross-examination that the relations between her daughter-in-law Rehana and the accused were strained and therefore, there was an opportunity for Rehana to settle the scores with the appellant/accused. He also pointed out that PW-2 Rehana i.e. the sister-in-law of the victim had also made several improvements in her story, and therefore, her evidence is not trustworthy. According to learned Counsel for the appellant, victim has specifically admitted in her cross-examination that PW-2 Rehana had in fact told her as to what was to be deposed. Thus, according to him, tutoring of the victim was very much there.

6. He also pointed out that PW-4 Dr. Sangita Gawai

had in fact not examined the victim internally, and therefore, how she could have told the complainant Saira that private part of the victim was torn. In fact, PW-4 Dr. Sangita Gawai also did not state so in her examination-in-chief. Learned Counsel for the appellant also submits that PW-5 Dr. Pratima from GHATI Hospital did not find private part of the victim was torn and this witness also did not care to confirm the truthness of the history given by mother of the victim, through the victim. She also specifically admitted that injury sustained by the victim to her private part in form of congestion was possible due to bicycle seat. Thus, the learned Counsel for the appellant vehemently argued that the learned trial Court convicted the accused only on assumptions and by ignoring various material aspects. According to him, there are so many discrepancies in the versions of prosecution witnesses indicating that no such incident as claimed by the victim or her sister-in-law had taken place in reality. He argued that no independent witness was examined by the prosecution and the appellant appears to be framed by the relatives of victim due to earlier strained relations. Learned Counsel for the appellant also relied on the judgment in the case of *Mohammed Farooq Abdul Rauf vs State of Maharashtra* reported in *2009 (3) Bom C R (Cri) 562*.

7. On the contrary, learned A.P.P. strongly supported the impugned judgment and according to him, the so called delay as alleged by the learned Counsel for the appellant, has been properly explained. He pointed out that there was no cross examination on behalf of the accused on the aspect of delay. He pointed out that the evidence of prosecution witnesses corroborates each other on material aspects whereby the incident of sexual assault on the victim has been established. According to him, though there are certain contradictions and omissions in the versions of the prosecution witnesses, but those are not on material aspects. He pointed out that there was no tutoring to the victim at all as she only admitted that her sister-in-law told her how to depose before the Court and not what to depose before the Court. Learned A.P.P. thus submitted that the prosecution proved the case beyond all reasonable doubts and considering the age of the victim at the time of incident, which was only 6 years, there was no possibility of framing of the appellant on the ground of alleged strained relations.

8. On the other hand, the learned Counsel for respondent No.2/victim also supported the impugned judgment and submitted a written chart. According to him,

the injury to the private part of the victim has been established by the medical evidence and contradictions in the versions of the prosecution witnesses are not so fatal, since those are not on material aspects. As such, learned A.P.P. as well as learned Counsel for the victim prayed for dismissal of the appeal. Learned Counsel for respondent No.2 relied on the following judgments :

- (i) Santhosh Moolya & ors vs State of Karnataka
AIR 2010 (SC) 2247*
- (ii) Fazal Mehmud Jilani Dafedar vs State of Maharashtra
AIR Online 2020 Bom 2768*
- (iii) Balaji Sarjerao Kamble vs State of Maharashtra
2017 All MR (Cri) 4232*
- (iv) Nawabuddin vs State of Uttarakhand
AIR Online 2022 SC 94*

9. Heard rival submissions. Also perused entire oral and documentary evidence on record alongwith the impugned judgment.

10. The record shows that prosecution has examined in all six witnesses out of them PW-1 Saira is the mother of victim, who lodged report (Exh.14). Her deposition is at Exh.13. PW-2 Rehana i.e. the sister-in-law of the victim, is examined at Exh.16 whereas victim being PW-3 is examined at Exh.19. The statements of these witnesses under Section

164 of the Code of Criminal Procedure (for short, "Cr.P.C.") are also recorded. Then comes the evidence of PW-4 Dr. Sangita Suresh Gawai at Exh.26. This witness has initially examined the victim and asked the informant to go to Police Station. Then the prosecution has examined PW-5 Pratima Gaikwad i.e. the Medical Officer of GHATI Hospital at Exh.30. Lastly there is evidence of Investigating Officer PW-6 Ratan Doiphode at Exh. 35. During the course of trial, the appellant/accused admitted certain documentary evidence namely spot panchnama (Exh.20), medical examination proforma of victim (Exh.21), house search and seizure panchnama (Exh.25), house search and seizure panchnama of the clothes of accused (Exh.22), admission extract of the victim (Exh.23) and arrest panchnama of accused (Exh.36). The defence from the statement of accused recorded under Section 313 of Cr.P.C. discloses that he had gone to the house of the informant to take back the amount which he had lent to her son. On that day the informant's son returned him an amount of Rs. 500/-, however, since he had no good relations with PW-2 Rehana, he was falsely implicated in this case.

11. According to PW-1 Saira i.e. the mother of victim, on the day of incident at about 12.00 noon the appellant had

come to her house. After having tea, her daughter-in-law Rehana had told the victim to go in a room on first floor for bringing her mobile phone. When the victim went in the said room, the appellant also told Rehana that he would go on the first floor for bringing the mobile phone and accordingly went upstairs. Then Rehana went upstairs and came down alongwith the victim. The appellant also came downstairs and when he left, Rehana told her that the appellant committed rape on the victim. When she asked the victim as to what happened, the victim replied that the appellant did bad work by removing her *Salwar*. It is further deposed by PW-1 Saira that after two days the victim complained stomach-ache, and therefore, when she took her to the hospital, Rehana told the doctor about the incident. Doctor told her that private part of the victim was torn, and therefore, on the next day she took victim to the Police Station and lodged report (Exh.14) against the appellant. Her statement under Section 164 of Cr.P.C. was also recorded at Exh.15.

12. Learned Counsel for the appellant submitted that PW-1 Saira has given certain admission in the cross-examination itself wherein she had admitted that her son

Rehman and PW-2 Rehana were angry with the appellant/accused as he was frequently demanding money from them. However, such admission is only on the aspect of making false accusation. That does not mean that the appellant is unnecessarily implicated only on the said reason. Moreover, it is also important to note that the appellant is close relative of the informant i.e. husband of her sister. Therefore, on only such reason of being angry it seems highly impossible that Rehana would implicate him in such a serious crime even by ignoring that what would happen to the future of the minor victim. Though it seems that the informant had taken victim to the doctor after about 8 to 10 days of the incident and while deposing before the Court she had stated that only after two days she had taken the victim to the doctor, but this type of contradiction is not on material aspect and the informant might have stated before the learned trial Court in a casual manner that after about two days the victim made complaint of stomach-ache. Further, the learned Counsel for the appellant also pointed out that in the report (Exh.14) itself it has been mentioned that PW-2 Rehana had disclosed to the informant that she saw accused putting on *Salwar* on the person of victim and also locking zip of his trousers when she went upstairs, but while deposing

before the Court she did not state so and on the contrary she stated that Rehana told her that appellant committed rape on the victim, and therefore, she changed clothes of victim and also asked the victim as to what appellant did with her whereupon victim replied that appellant did bad work with her by removing her *Salwar*. Admittedly, these facts do not find place in the F.I.R. (Exh.14), however, it is quite natural that even if the informant had aware of the incident of rape on the day of the incident itself, but she would have taken considerable time to lodge report, considering the future of the victim as well as her close relations with the appellant. Admittedly, there are certain additional improvements by the informant while deposing before the Court. However, the evidence of victim is also on record which is to be considered in the light of medical evidence.

13. Then comes the evidence of PW-2 Rehana who has deposed that on the day of incident at about 2.00 to 2.30 p.m. when her brother-in-law came to home for lunch, the appellant, who was already present there, demanded an amount of Rs. 500/- which was lent to him and brother-in-law thereafter told the appellant that he would bring money and left the house. According to her, as her brother-in-law

did not return, the appellant made phone call to him and when the appellant could not establish the contact, he demanded another mobile phone. Accordingly, Rehana told the appellant that her mobile phone is in the room of first floor and then sent the victim to bring that phone. Further, it is deposed by Rehana that when the victim went upstairs to bring her mobile phone, the appellant also went upstairs on the pretext that his phone had no coverage on the ground floor. Further, according to her, when she went upstairs to give phone number of her brother-in-law to the accused, she saw the appellant with his trousers halfly removed and he was putting *Salwar* on the person of the victim. She has specifically deposed that when she called the victim towards her, the appellant abused her and victim and also threatened not to say anything about the incident. This witness has further deposed that she alongwith victim came downstairs and before she could narrate about what she saw upstairs, the appellant came down. The victim then went outside to play and her brother-in-law came home and gave money to the appellant and thereafter appellant left. According to her, she came to know from the victim that the appellant removed his pant and her *Salwar* and slept on her person and also pressed nails on her person. According to this witness, they

did not lodge any report against the appellant due to fear of defamation.

14. Thus, from the evidence of informant and PW-2 Rehana it has been amply brought on record that both were knowing the incident on the day of incident itself. However, they did not lodge any complaint immediately. At the cost of repetition I must mention here that the appellant is close relative of the informant, and therefore, both these witnesses must have hesitated for taking such drastic action against him to save the relation between the appellant and sister of the informant i.e. Saira. Normally it is the tendency of common people to hide such incidents in the family to maintain relations. However, it has further come in the evidence of PW-2 Rehana that when the victim made complaint of body-ache and temperature, they had to take her to Dr. Sangita Gawai i.e. PW-4. Learned trial Court has made observation that Dr. Gawai examined the victim and told PW-1 and PW-2 that her private part was torn due to forcible sexual intercourse and that the doctor advised them to take the victim to GHATI Hospital. Though the learned trial Court has observed in the judgment itself, but on going through the evidence of PW-4 Dr. Sangita Gawai, she is silent on this

aspect. In fact, the evidence of PW-4 Dr. Sangita Gawai reveals that she had not examined the victim internally and only on getting knowledge of such forcible sexual intercourse from the informant, she had advised them to go to Police Station. However, though Dr. Sangita Gawai had not examined the victim internally, but PW-5 Dr. Pratima Gaikwad had examined the victim to ascertain whether any forcible sexual intercourse was committed with her.

15. The evidence of PW-5 Dr. Pratima Gaikwad is at Exh.30. According to her, the victim was referred to her by Satara Police Station on 25.10.2017. She noted down the history in respect of the victim through PW-1 Saira i.e. the mother of victim. Though the learned Counsel for the appellant argued that this witness did not confirm the history from the victim, but as per the medical examination done by Dr. Pratima Gaikwad, it was specifically found that there were signs of forcible penetration of the vagina and possibility of sexual intercourse could not be ruled out. The medical report (Exjh.32) is suggestive of the said fact. She also importantly stated that age of injury i.e. congestion in the vagina of the victim was approximately prior to 10 days. Thus, the medical report (Exh.32) which is report of medical examination of the

victim done by this witness, clearly indicates that there were signs of forcible penetration of vagina by penis. Admittedly, no torn injury was visible on the private part of the victim at the time of examination, but there was congestion in vagina of the victim approximately of half centimeter at the position of 9 O'Clock to 11 O'Clock around hymen. Further the evidence of this witness also shows that the history narrated by the mother of victim in respect of the incident was confirmed from the victim. Though this witness in her cross-examination has admitted that such type of congestion was also possible by bicycle seat, but in this regard the evidence of victim is utmost important. There may be possibility of such type of injury due to hitting of bicycle seat to private part while falling from the bicycle, but no such specific incident of falling has been brought on record in the cross-examination of either PW-1 Saira or PW-2 Rehana from the side of the appellant/accused. A mere suggestion has been given that the victim used to play bicycle at the time of incident. When the specific evidence about receiving such injury is coming from the victim, then such possibility is definitely ruled out. Therefore, when the medical evidence i.e. Exh. 32 clearly indicates that there were signs of forcible suggestive penetration of vagina, no significance can be given to such

possibility of sustaining this injury due to fall from the bicycle.

16. It is extremely important to note that the victim herself has deposed before the Court. She has specifically stated that when she went upstairs to bring mobile phone of PW-2 Rehana, all others were at downstairs and appellant then came to first floor. She specifically deposed that the appellant told her to sit on the cot and removed her nicker and after removing his pant, inserted his penis into her vagina. Learned Counsel for the appellant made reference to the admission of victim in the cross-examination where she has stated that PW-2 Rehana was taking her care and she used to listen her. Further, she has also admitted that PW-2 Rehana had told her how to talk to police in the police station. Learned Counsel for the appellant, by referring such admissions, vehemently submitted that the victim was tutored by her mother and sister-in-law, and therefore, her evidence needs to be discarded. However, the victim had only stated that Rehana told her how to talk to police. She has not stated that Rehana told her what to talk to police in the police station, and therefore, this admission is of no help to the appellant on the aspect of tutoring. On the contrary, the

medical examination of the victim itself shows that there was congestion in her vagina indicative of forceful attempt of penetration. Further, the possibility of sexual violence was also not ruled out by the concerned Medical Officer. Therefore, the evidence of victim on the point of main incident is duly corroborated by the medical evidence. Despit the aforesaid admissions, entire evidence of the victim remained unshattered in the cross-examination also.

17. Thus, considering all these aspects and evidence on record, it appears that the appellant / accused must have tried to exploit the victim sexually. Though there are certain aspects as regards delay and contradictions among the versions of the prosecution witnesses, but on the main incident there is trustworthy and reliable evidence suggestive of forcible sexual assault on the victim at the hands of the appellant. Further, considering the close relations of the appellant with prosecution witnesses, especially with PW-1 Saira and PW-2 Rehana, it is quite obvious that they should have thought for considerable period before lodging the complaint after about 10 days of the incident only to save the relations. Normally people tend to hide such incidents before reporting to police immediately to avoid defamation. However,

when the victim was firstly examined internally at the hands of PW-5 Dr. Pratima Gaikwad, the family members of the victim got confirmed about the heinous act of the appellant, and therefore, must have decided to go to police. As such, it appears that the delay in lodging F.I.R. has been sufficiently explained by the circumstances on record in the light of evidence of-course.

18. Learned Counsel for the appellant heavily relied on the judgment in the case of ***Mohammad Farooq Abdul Rauf vs State of Maharashtra*** (supra), wherein this Court had acquitted the accused therein mainly on the ground that there was reasonable doubt about the genuineness of the accusation of the appellant and evidence of prosecutrix and her mother when read as whole, was found untrustworthy. However, the facts of that case are different from the facts of the present case. Here in this case, the evidence of victim is fully corroborated by the medical evidence on record. Moreover, age of victim was of 6 years at the time of incident, and therefore, there was no possibility or reason for the victim to depose falsely against the appellant.

19. As per the substance of the various judgments as cited by the learned Counsel for respondent No.2/victim,

there cannot be any false implications of the appellant/accused at the hands of victim who was merely aged about 6 years and had given complete account of the incident. Further, the delay is properly explained and considering the object of POCSO Act, any act of sexual assault or sexual harassment to the children should be viewed very seriously and no leniency should be shown to the accused committing the same. In the instant case, the appellant was around 60 to 65 years of age at the time of commission of offence and medical evidence shows forcible penetration of vagina which resulted into congestion around hymen of the victim. Moreover, considering the age difference between the appellant and victim, it was expected from the appellant to protect the victim girl from vulnerability, but on the contrary the appellant/accused exploited her innocence and performed such condemnable act. Hon'ble Apex Court has repeatedly cautioned the Courts to consider the cases against women and female children regarding their sexual exploitation sensitively. Therefore, considering all the evidence on record, I am of the opinion that the prosecution has definitely established the guilt of the appellant/accused beyond all reasonable doubts. Moreover, the learned trial Court has rightly dealt with each and every aspect in proper perspective,

and therefore, I do not see any reason to interfere in the impugned judgment. In the result, the appeal stands dismissed.

(SANDIPKUMAR C. MORE, J.)