

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

CRIMINAL APPEAL NO.471 OF 2016

Raju S/o Dadu Suryawanshi,
Age-47 years, Occu:Labour, R/o-Hanga,
Tq-Parner, District-Ahmednagar,
At Present: Convict No.17246,
Yerwada Central Prison, Pune.

...APPELLANT

VERSUS

The State of Maharashtra

...RESPONDENT

...
Mr. Mukul S. Kulkarni Advocate appointed for Appellant.
Mr. A.V. Deshmukh, A.P.P. for Respondent – State.
...

**CORAM: SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

DATE : 21st JUNE, 2023

JUDGMENT [PER SMT. VIBHA KANKANWADI, J.] :

1. Present Appeal has been filed by the original accused challenging his conviction by the learned Special Judge under the Protection of Children from Sexual Offences Act and Additional Sessions Judge, Ahmednagar in Sessions Case No. 6 of 2015 on 6th April 2016 after holding him guilty of committing offence

under Section 3 punishable under Section 4, offence under Section 5 punishable under Section 6 of the Protection of Children from Sexual Offences Act (for short "the POCSO Act"). Though appellant has been held guilty of the offence under Section 376 of the Indian Penal Code, no separate sentence has been awarded.

2. Before proceeding to consider the facts in the case, we would like to say that we are aware about the provisions of Section 228-A of the Indian Penal Code and ratio laid down in ***Sangita Yeshwantrao Tanpure vs. State of Maharashtra and others, 2021 All M.R. Cri. 1131, Sajjan Hirachand Gusinge vs. State of Maharashtra and another, 2023(2) Bom.C.R.(Cri.) 282, State of Punjab vs. Ramdev Singh, (2004) 1 SCC 421, Nipun Saxena and another vs. Union of India and others (2019), 2 SCC, 703***, and so many other pronouncements on the same point that the identity of the rape victim should not be disclosed. So also there is specific provision in the POCSO Act i.e. Section 33(7) of the said Act which cast duty on the Courts that the identity of the victim should not be disclosed, however, there are certain cases in which ultimately somewhere the said identity gets disclosed from the point of view of relationship. This is one of the said case. Unless that

relationship is taken note of in writing in the Judgment, there cannot be better appreciation of the evidence. Therefore, we have taken utmost care of not disclosing the identity of the victim girl here but when it came to the relationship with the accused, we have made reference of the same.

3. The prosecutrix, minor girl aged 14 years, is the daughter of present appellant. She was taking education in 7th standard on the day of incident i.e. 11th October 2014. She was along with her elder sister and younger brother. The accused was working as a driver and was in habit of drinking liquor. He consumed liquor in the morning of 11th October 2014 and therefore, there was quarrel between him and his wife. Accused told his wife that he would take all the three children to his native place and therefore, he along with three children went in a auto rickshaw from Wadgaon Shinde to Yerwada and then in tempo from Yerwada to Mhasne Phata in Taluka-Parner, District-Ahmednagar. He purchased *Vada Pav* and liquor at that place and thereafter they started their journey by walk. After going for a distance, they stopped in a temple which was by the side of the road and the children ate *Vada Pav* there. At that time accused consumed liquor which he had brought. After taking halt for some time, they started to walk in the evening. After some distance it was

total dark and therefore the accused took the children in the nearby *Jowar* crop field and told that they would sleep in the said land on the earth. Therefore, all of them slept there. In the mid-night accused called the prosecutrix and asked her to accompany him. She was sleeping but she was then dragged by the father and taken to a distance. He asked her to take out her clothes. When she was resisting after getting feared, she was assaulted and accused disrobed her forcibly. The accused was fondling with her and she was crying, but he had forcible sexual intercourse with her. He gave threat to kill if she would disclose the fact to anybody. He brought her to the place where the brother and sister were sleeping. Though the brother and sister woke up, all of them were asked to sleep by the accused by giving threat. On the next day the sister of the prosecutrix told father that they should be taken to the mother and therefore, till afternoon the accused kept them there and then brought by walk to Mhasne Phata. They again boarded tempo and then reached to the house. They could not find their mother and upon inquiry it was told that the mother was searching for them. Mother came to house around 4.00 p.m. on the next day i.e. on 13th October 2014 along with her sister and then the prosecutrix disclosed the incident to the mother as well as aunt. The fact was informed to

the police and then police came, took the prosecutrix and others to police station and thereafter the First Information Report (in short "the FIR") was lodged.

4. After lodging of the FIR, the girl was sent for medical examination. The accused came to be arrested. He was also got medically examined. Panchnama of the spot was carried out with the help of two panchas. Statements of witnesses were recorded. Clothes were seized. After completion of the investigation, charge-sheet was filed.

5. After framing of the charge when accused pleaded not guilty, trial has been conducted. Prosecution has examined in all eleven witnesses to bring home the guilt of the accused. After considering the evidence on record and hearing both sides, the learned Special Judge has held the accused guilty and convicted the accused. The accused has been sentenced to undergo imprisonment for life and pay fine of Rs.5000/-, in default to suffer rigorous imprisonment for six months for committing the offence under Section 3 punishable under Section 4 of the POCSO Act. He has been further sentenced to undergo imprisonment for life and to pay fine of Rs.5000/-, in default to suffer rigorous imprisonment for six months for committing

offence under Section 5 punishable under Section 6 of the POCSO Act. As aforesaid, no separate sentence has been awarded for the offence under Section 376 of the Indian Penal Code. Both the sentences have been directed to run concurrently. Set off has been granted as the appellant was never released on bail from the time of his arrest. The present Appeal challenges this conviction.

6. It will not be out of place to mention here that the appellant had sought legal aid when the matter was before the learned Special Judge and accordingly Advocate was appointed to represent him. The said order of appointment of the Advocate is by the Secretary, District Legal Services Authority, Ahmednagar. When the present Appeal was filed, it was along with the application for condonation of delay. Legal aid was provided to the appellant at that time also. However, it was experienced that the learned Advocate appointed through legal aid committee was not attending the dates and therefore, his absence was noted on 14th March 2023. Thereafter, when the matter was on Board on 6th June 2023 it was informed that the learned Advocate, who was appointed through legal aid committee, has shifted to Mumbai for practice and therefore, he was unable to work out the matter. The accused appellant was in

jail and therefore learned Advocate Mr. Mukul Kulkarni was appointed to represent the appellant.

7. Heard learned Advocate Mr. Mukul Kulkarni appointed to represent the appellant and learned APP Mr. Deshmukh appearing for the State. Perused the record.

8. It has been vehemently submitted on behalf of the appellant that the entire record would show that though the legal aid was given to the appellant, the appellant was not properly represented. It is the duty of the legal aid committee to give quality legal aid. The appellant could not get a fair trial and therefore, by relying on the decision in ***Sunil vs. the State of Maharashtra, 2010 Cri.L.J. 740 : MANU/MH/1098/2009***, he submitted that the matter should be sent for a fresh trial.

9. It has been alternatively submitted on behalf of the appellant that the learned trial Judge has not appreciated the evidence properly. The prosecution has not examined the elder sister of the prosecutrix who was in a better position to answer and clear the picture, who is also stated to be with the prosecutrix. The prosecution has conveniently examined the younger brother as PW-11 who was then still a child witness. The

testimony of prosecutrix and PW-11 brother would show that there was quarrel between their mother and accused and therefore, possibility of implication also has not been ruled out. The prosecution has conveniently not examined mother but her sister i.e. maternal aunt of the prosecutrix has been examined. The evidence of vital witnesses is, therefore, withheld by the prosecution. The testimony of both children would further show that the story was built up. Till some distance, they say that, they had gone by tempo and thereafter they started walking. It has not been brought on record that there were no means of transport to the native place of the accused. It is hard to believe that with three minor children the father would start walking towards the native place. Further, it also appears that the girl had an opportunity to rescue herself and could not have been with the father till the next day afternoon. All the three children could have fled away from the spot, but none of them have done the said act. Therefore, the story itself is doubtful. No doubt the medical officer has given the opinion that possibility of sexual assault cannot be ruled out but the cross-examination to the witness cannot be said up to the mark. When there used to be quarrels between the parents and then the mother was using the prosecutrix as tool to implicate the father, then such kind of

story ought not to have been believed by the learned trial Judge. Learned Advocate for the appellant would then pray for setting aside the conviction and acquitting the accused from the charges.

10. Learned APP strongly supported the reasons given by the learned trial Judge and submitted that there was no reason for the daughter to speak against the father. Whatever quarrel there used to be, it was on account of the habit of the appellant to drink liquor. Under those circumstances, mother will not involve the daughter. The testimony of the girl and the contents of the FIR stood supported by her statement under Section 164 of the Code of Criminal Procedure, history to the medical officer and the testimony of PW-11 the brother. PW-8 ASI Pawar had taken down the FIR. The medical evidence is supporting the prosecutrix. Her age has been got proved through PW-5, the headmaster of the school where prosecutrix was taking education and also from PW-10, the Gramsevak of the village where she was born. The birth certificate has been got proved with the help of birth and death register maintained with the Gram Panchayat. The cross-examination of all these witnesses will not doubt the capacity of the Advocate who had represented the accused before the learned trial Court. It was a fair trial that

was given to the accused but it appears that the accused was arrogant, as the note below his statement under Section 313 of the Code of Criminal Procedure by the Special Judge would show that in spite of giving understanding the accused was arrogant and continued irrelevant talks. In her testimony, PW-2, the maternal aunt of the girl has stated that the accused has four wives and mother of the prosecutrix had only two children i.e. prosecutrix and PW-11 her brother, but the sister who was along with the prosecutrix appears to be the daughter of third wife of accused. But then the prosecutrix, in her cross-examination, has stated that said sister was residing with them. The dispute appears to be in respect of habit of accused of drinking liquor. The FIR is not the outcome of false implication at the behest of mother and therefore, for ravishing his own daughter which is one of the heinous crime, the conviction awarded is perfectly legal.

11. Before turning to the appreciation of evidence, we would like to deal with the point of quality legal aid to be given. In this respect, we may lay our hands on the decision in the case of ***Ramanand alias Nandlal Bharti vs. State of Uttar Pradesh, AIR 2022, S.C., 5273***, wherein in Paragraph Nos. 117, 118 and 119, it is observed thus:-

“ 117. Before parting with the case, we would like to place on record an observation of ours, touching an important aspect of the case. Without any hesitation and with disappointment, we state that the case on hand is one of most perfunctory investigation. It appears that the accused herein was provided with a legal aid. He might not have been able to afford a good and experienced trial side lawyer to defend himself. We have noticed that the cross-examination of each and every witness is below average. Questions, which the defence counsel was not supposed to put to the prosecution witnesses were put without realising or understanding the legal implications of the answers to such questions, more particularly, when they were not necessary. The defence counsel remained oblivious of the position of law that suggestions made to the witnesses by the defence the answers to those are binding to the accused.

118. Any defence counsel with a reasonable standing at the Bar is expected to know that cross-examination is not the only method of discrediting a witness. If the oral testimony of certain witnesses is contrary to the proved facts and if their testimony is on the face of it unacceptable, their evidence might well be discarded on that ground alone.

119. It is by far now well-settled for a legal proposition that it is the duty of the court to see and ensure that an accused put on a criminal trial is effectively represented by a defence counsel, and in the event on account of indigence, poverty or illiteracy or any other disabling factor, he is not able to engage a counsel of his choice, it becomes the duty of the court to provide him appropriate and meaningful legal aid at the State expense. What is meant by the duty of the State to ensure a fair defence to an accused is not the employment of a defence counsel for namesake. It has to be the provision of a counsel who defends the accused diligently to the best of his abilities. While the quality of the defence or the caliber of the counsel would not militate against the guarantee to a fair trial sanctioned by Articles 21 and 22 respily of the Constitution, a threshold level of competence and due diligence in the discharge of his duties as a defence counsel would certainly be the constitutional guaranteed expectation. The presence of counsel on record means effective, genuine and faithful presence and not a mere farcical, sham or a virtual presence that is illusory, if not fraudulent.”

12. We are also considering the ratio laid down in the authority which has been relied upon by the learned Advocate appointed for the appellant, referred above. However, before making it applicable to the present case, it is to be noted that the accused being in need of legal aid, had applied to the District Legal Services Authority through the Superintendent of Jail. Thereafter, as we presume that the learned Advocate who was then representing the accused, came to be appointed by order dated 25th February 2015 i.e. by the Secretary, District Legal Services Authority, Ahmednagar and it was as per the criteria that has been laid down. There is absolutely no record before us to presume that the concerned Advocate had no requisite eligibility. He has taken pains to cross-examine the witnesses at length. We agree that as per the above said decisions, it is the duty of the State, and in such cases, of the Chairman and Secretary of the District Legal Services Authority to provide quality legal aid to the accused as well as the needy persons and while providing it the necessary criteria will have to be fulfilled. As aforesaid, no other document has been produced or pointed out by the learned Advocate representing the appellant before us from the record that the quality legal aid was not provided to the appellant and therefore, we do not find this to be a fit case

either for sending it for re-trial or holding that it has violated the constitutional rights of the accused of getting a fair trial and then resulting the present appeal into acquittal of the appellant on this count.

13. Now turning towards the merits of the case, PW-1 is the prosecutrix and PW-11 is her brother. Both are the children of the accused and they are consistent in saying that the accused was in a habit of drinking liquor and there used to be quarrels between their mother and the accused. Such quarrel had taken place on 11th October 2014 and thereafter by saying that he would take the children along with him, the accused started to go to his native place. No doubt the prosecution has not examined the wife of the accused, who could have thrown further light, but her non examination cannot be said to be fatal as she was not posed as the eye witness or the person to whom the immediate disclosure was made. Definitely, she could have told as to when she met the prosecutrix after the alleged incident, but that fact has come on record through the evidence of children of the accused as well as PW-2 aunt. The prosecutrix has proved the prosecution story in her examination in chief i.e. FIR Exhibit-14. In the cross-examination it has been tried to be

brought on record that the accused had married another lady and have four daughters. Though the prosecutrix has said that she is unable to say that the elder sister who was with her on the day of incident is the daughter of the accused begotten from another lady, but then she says that said sister is residing with them. It was tried to be brought on record that the mother of the prosecutrix is doing labour work but prosecutrix claimed ignorance as to whether mother is working in the field of one Kakade. It has been rather extracted in the cross-examination also that there used to be quarrels between the accused and his wife, but prosecutrix has admitted that the quarrel was on account that the mother should not go for work. The rest is almost denials. But, at the same time it is to be noted that the girl was unable to tell the name of the temple or where exactly that temple was, but she was certain that it was the village which was prior to the native place of her father.

14. It appears that after accused and three children came back to the house, the prosecutrix had gone to the school and returned around 5.00 p.m. Prosecutrix then says that she had disclosed the incident to the mother. She was certain in saying that when they went back to home, the mother was not in the house. This situation rather supports the prosecution story that

when accused came along with three children, the mother was not at home and though prosecutrix resumed her daily pursuit, she disclosed the fact to her mother after she returned from the school. We do not find the conduct on the part of the prosecutrix unnatural. Unless the comfort is given to the girl, she will not disclose such facts to anybody. That comfort appears to have been given by the mother or after she saw mother, she became comfortable and then she disclosed the incident to her mother. As to how the girl had not fled away or had not raised any hue and cry, which are the questions now raised. We can find that no such question was asked to her in her cross-examination. Not putting those questions to the witness by the Advocate representing the accused will not drive us to conclude that he was not possessing professional qualities or in other words it will not amount to unfair trial of the accused. Here we are required to consider the relationship. The accused is a father and the girl might be under pressure. The psychology of such girls is required to be considered and also the fact that all the girls will not behave in the same fashion in such situation. It depends upon the temperament of the particular person to face a tough situation.

15. Another fact to be noted is that merely because there was quarrel between the husband and wife whether daughter can be asked to level such kind of allegations which will create an impact on her mind throughout her life. Same is the fact with the testimony of the son. He has supported his sister. If no such incident had taken place then accused could have examined the elder sister who was allegedly with prosecutrix and her brother. Accused has not done the said act. The contents of the FIR, the testimony of the prosecutrix and her statement under Section 164 of the Code of Criminal Procedure are all consistent.

16. The testimony of PW-6 Dr. Supriya Jagtap would show that she had examined the girl on 14th October 2014. She found three injuries on the back of the prosecutrix and age of the injury was within 48 hours. The examination of the genital area has been stated that the hymen was torn, allowed one finger, tenderness present, there was redness at the posterior fouchette. The girl was examined by the psychiatrist also ad it was found that she was under acute stress. The opinion was given that there is possibility of sexual assault on the girl and the certificate has been exhibited at Exhibit-30. In the cross-examination the medical officer has stated that the abrasions were minor in

nature and the opinion of the psychiatric is by another doctor. Rest is denial. Thus, it can be seen that the testimony of the informant prosecutrix stands corroborated by the medical evidence also.

17. The age of the girl has been proved by examining PW-5 headmaster and in fact when the accused himself is her father, he cannot challenge the birth date. He has not come with the case that the birth date of the prosecutrix is something else. No suggestion was given to the prosecutrix about the same. In other words, no other date was put to her being her birth date. Therefore, on the day of incident the girl was minor / child as defined under the provisions of POCSO Act. Even if for the sake of arguments it is accepted that the girl was major, yet the accused is not coming with the case that the sexual intercourse was by consent. The girl has specifically stated that when the accused was asking her to disrobe herself, she was refusing to do so. That means there was absolutely no consent at all. In that case offence under Section 376 of the Indian Penal Code would be then proved beyond reasonable doubt.

18. PW-2, the aunt has stated as to how she met the mother of the prosecutrix and when they were contacting the accused on

phone as to where he is with the children, the accused had given different places. The mother as well as PW-2 aunt had gone to those places but ultimately returned on 13th October 2014 to the house around 4.00 p.m. They found that the children had gone to the school and even at that time the accused had gone to the liquor shop. After return from the school the prosecutrix told the mother as well as the aunt as to what the father had done with her. In the cross-examination of the aunt, it was tried to be brought on record that the mother had some illicit relations and the accused was objecting. We do not find such specific defence in the statement under Section 313 of the Code of Criminal Procedure. It was told by the accused that due to relation between Kakade and his wife there used to be quarrel between him and her. The mother will not put the daughter in such situation just to take revenge and will not ask the daughter to stand against the father. There appears to be some improvement in the testimony of PW-2 aunt, however, even if we brush aside her entire testimony, yet considering the testimony of PW-1 prosecutrix and PW-11 brother, it can be certainly said that the offence was proved by the prosecution beyond reasonable doubt.

19. The other witnesses are the panchas to the spot panchnama, seizure panchnama and the police witnesses.

20. Thus, taking into consideration the scrutiny of entire evidence, we are of the opinion that there is no perversity or illegality committed by the learned trial Judge in holding the accused guilty and convicting him for the aforesaid offences. We do not find any merit in the present Appeal and it deserves to be dismissed.

21. The Appeal stands dismissed.

22. The fees of the learned Advocate Mr. Mukul Kulkarni, appointed to represent the appellant, is quantified at Rs.10,000/-.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE