

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 852 OF 2015

Arvind S/o Sarjerao Devkar,
Age : 38 Years, Occ. : Service,
R/o. Gambhirwadi, Tq. Kallam,
Dist. Osmanabad.

... **Appellant**
(Orig. Accused No.1)

Versus

The State of Maharashtra

... **Respondent**

WITH

CRIMINAL APPEAL NO. 914 OF 2015

The State of Maharashtra,
Through Police Station, Paranda,

... **Appellant**

Versus

Arvind Sarjerao Devkar,
Age : 38 Years, Occ. : Service,
R/o. Gambhirwadi, Tq. Kallam,
Dist. Osmanabad

... **Respondent**
(Orig. Accused No.1)

...

Mr. V. R. Dhorde, Advocate for Appellant in Appeal/852/2015 and Respondent
in Appeal/914/2015

Mr. A. M. Phule, APP for Respondent State in Appeal/852/2015 and Appellant
in Appeal/914/2015

...

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

DATE : 30th JANUARY 2023.

JUDGMENT (ABHAY S. WAGHWASE, J.) :

1. Both the above proceedings are directed against one judgment and order dated 14.10.2015 passed by learned Additional Sessions Judge, Bhoom in Special Case (Child Sex) No. 06 of 2014, thereby convicting the appellant accused for offence punishable under Sections 363 of the Indian Penal Code (IPC) and sentencing him to suffer R.I. for three years and to pay fine of Rs.5,000/- i/d R.I. for six months, under Section 366-A of IPC to suffer R.I. for five years and to pay fine of Rs.5,000/- i/d R.I. for six months, under Section 376 of IPC to suffer R.I. for ten years and to pay fine of Rs.20,000/- i/d R.I. for one year, under Sections 6 and 4 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) to suffer R.I. for ten years and to pay fine of Rs.20,000/- i/d R.I. for one year. As both the proceedings are heard and dealt together, they are decided by way of common judgment.

2. Before advertng to the merits of the case, it is necessary to clarify that Criminal Appeal No. 852 of 2015 is at the instance of appellant/convict questioning the legality and sustainability of above referred judgment of conviction passed by learned Special Judge, whereas Criminal Appeal No. 914 of 2015 is at the instance of State, which is not satisfied with the quantum of sentence awarded to the accused and is thereby praying enhancement of

sentence to imprisonment for life. In such backdrop, we proceed to deal with the above proceedings.

BRIEF ACCOUNT OF THE PROSECUTION CASE

3. State launched prosecution on the basis of the report given by PW2 father of victim, who informed police that his victim daughter was student of 7th standard in Zilla Parishad School. According to him, he, his daughter and other family members took dinner and went to sleep on 31.05.2014. On 01.06.2014 he woke up at 5.30 a.m. At that time, his daughter was not found in the house. That, in spite of search in the village, she was not found. Father claims that he received a phone call from accused, who was teacher of his daughter in the school, informing that he had travelled long distance along with informant's daughter and that they would return to village after three to four days. Therefore, father approached police station and lodged report.

4. On receipt of the same, police machinery registered crime bearing no. 72 of 2014 for the offence punishable under Section 363 of IPC. The investigating machinery carried out investigation, during which statements of all relevant witnesses were recorded. The victim girl and the accused were searched and traced at Trimbakeshwar, Nasik. Both of them were subjected to physical examination. Medical examination revealed that victim had been

sexually assaulted and therefore crime to that extent was added. For ascertainment of age of victim girl, the Investigating Officer gathered necessary documents from school. Seizure was caused and the same was sent for analysis and on receipt of its report, the same was made part of investigation papers. After completing investigation, accused came to be chargesheeted.

5. On committal of the case, learned Special Judge, Bhoom conducted trial and after appreciating oral and documentary evidence adduced by both the parties, reached to the conclusion that accused had committed offence for which he was charged and thereby sentenced him as stated in aforesaid para.

SUBMISSIONS ON BEHALF OF APPELLANT/CONVICT

6. Learned Advocate for the appellant would point out that the girl was not kidnapped and was not ravished as put forth by prosecution. He has pointed out that infact there was a quarrel between parents and the girl, who was his student, and as she had disclosed it to accused that she did not want to stay in the house and rather intended to commit suicide, accused gave her solace and took her with him as he had already planned to go out. Thus, it is submitted that there was no kidnapping as alleged and rather girl had come on her own.

7. It is next submitted that there is no full-proof case about girl victim to be minor. No ossification test has been carried out and rather unverified school record has been gathered and relied by the prosecution and unfortunately even taken into consideration by learned Judge. That, infact the girl had voluntarily accompanied accused-appellant at various places willingly and there was no force exercised on her by accused in any manner. However, evidence on behalf of prosecution has not been properly appreciated by trial Judge.

8. It is pointed out that even allegation of performing marriage is based on weak evidence. That, girl was never forced to wear mangalsutra. That, there is no proof of marriage being performed. However, learned trial Judge failed to consider and appreciate the evidence adduced by prosecution and recorded affirmative finding to that extent in absence of cogent and reliable evidence.

9. On the point of rape and penetrative assault, learned counsel submitted that medical evidence does not suggest any forcible sexual intercourse. That, infact doctor has opined that the girl was used to sexual intercourse. Therefore, with such quality of evidence and in absence of cogent evidence, blame ought not to have been shifted on appellant. Lastly it is submitted that prosecution evidence was without essential ingredients for bringing home the charge. However, in spite of it, learned trial judge has accepted the

prosecution case as proved and convicted the appellant. There are several major infirmities in the findings and reasons and hence he prays to allow the appeal by setting aside the impugned judgment and order.

SUBMISSIONS ON BEHALF OF STATE

10. On behalf of State, learned APP would submit that prosecution went to trial with strong, cogent, reliable evidence. Here, accused, who was a teacher of the victim, had taken disadvantage of his such position and had induced her to leave company of her parents on the pretext of performing marriage and that evidence reveals that he had induced her to run away from her house and to meet him at a fixed destination and from there he initially took her on motorcycle and subsequently took her in four wheeler to various places like Aurangabad, Manmad, Nashik, Trimbakeshwar, Saputara.

11. Learned APP pointed out that investigating machinery has gathered sufficient proof to show that on the day of incident, victim was minor and barely 13 to 14 years of age and was studying in 7th standard. Therefore, offence of kidnapping minor from lawful custody of parents has been established. That, father had lodged prompt report about his daughter being kidnapped. That, investigation further revealed that accused had taken her to various places by forcibly making her wear mangalsutra just to foist that she was his wife. That, girl was minor and was not in a position to understand the

consequences and repercussions of the deeds at the hands of accused. Thereby she has fallen pray to the ill intentions of accused.

12. Learned APP pointed out that investigating machinery has gathered evidence of accused performing marriage. The person from whom mangalsutra was purchased was also examined by prosecution. After taking her to lodge, he had forcible sexual intercourse with her. That, the girl has named the lodge where she was taken and she has testified to that extent. Her testimony is corroborated by medical evidence. According to learned APP, apart from committing forcible sexual intercourse, there was forcible penetrative sexual assault on her. Victim being minor, provisions of the POCSO Act are also attracted. It is pointed out that the girl in spite of facing cross-examination, has stood steadfast and as such her testimony has remained unshaken and therefore, learned trial Judge has rightly recorded guilt of the accused.

13. However, learned APP laid stress on the quantum of sentence awarded to the accused/appellant. According to him, taking into account the serious offence committed on a minor and taking into account the provisions of POCSO Act, it is his submission that learned trial Judge ought to have awarded imprisonment for life. However, undue leniency has been shown in awarding him merely 10 years' imprisonment under various sections and therefore, he submits that, State intends to question the same and is thereby

praying to enhance the said sentence.

ANALYSIS AND CONCLUSION

14. We have re-appreciated, re-examined and reanalyzed the evidence which has come on record before the trial Judge. It emerges that to establish their case in the trial court, prosecution has examined in all 10 witnesses. We would like to reiterate the status of each of the witnesses which is as under:

PW1 is Dr. Landge who examined victim.

PW2 is father of victim who has lodged the FIR.

PW3 is the victim.

PW4 Balasaheb is pancha to spot panchanama.

PW5 Shridhar seems to be pancha to seizure of clothes of victim as well as the clothes of accused.

PW6 Rajendra has acted as pancha to spot panchanama which is at Exhibit 49.

PW7 Chandrakant has acted as pancha to seizure of mangalsutra handed over by victim.

PW8 Balaji is the shop owner who sold gold mani mangalsutra to accused.

PW9 Rajendra is the driver of vehicle which was used by accused in

taking away the victim from Aurangabad towards Manmad.

PW10 API Metrewar is the Investigating Officer.

We have visited and scrutinized the substantive evidence of above discussed witnesses.

15. **PW1** Dr. Landge in his evidence at Exhibit 37 speaks about girl brought by LPC on 14.06.2014 while he was attached to PHC, Para as Medical Officer. He speaks of clinically examining the girl and he has narrated findings observed by him on physical examination and has finally opined that victim has had sexual intercourse. He has endorsed the age of victim as 13 years. Nothing fruitful has been brought in his cross-examination by defence in the trial court regarding the findings of medical expert.

16. **PW2** father of victim has testified about his victim daughter studying in 7th standard. According to him, on 31.05.2014 they all went to sleep but in the early hours of next day, his daughter was not found in the house. According to him, he received phone call from accused informing about his daughter to be with him and that they have travelled long distance and would be returning after four to five days to the village. Therefore, he approached Washi Police Station and lodged report. Though this witness is subjected to lengthy cross-examination, he was initially asked about his qualification, antecedents of his

brother, acquaintances and people known to him in the village. He has denied that he was knowing accused but he stated that he was aware that accused was serving as teacher in Zilla Parishad Primary School, Fakrabad. He was questioned about attendance of his daughter in school since March 2014 and in what all extra-curricular activities his daughter was participating. Beyond this, there is no effective cross-examination on the point of missing of the girl or about sexual exploitation. This witness has identified the report Exhibit 41 lodged at his instance on the strength of which crime was registered.

17. **PW3** victim was also examined in a in-camera proceeding and in her evidence at Exhibit 42, after informing the court about her education, she named accused to be teaching her English, History, Geography, Civics and Science. She clearly stated that accused was trying to develop intimacy with her. He also presented her a mobile handset for having conversation. She has stated that accused was proposing her that they should leave the village and go elsewhere. On 31.05.2014, accused telephoned her and told her that they should leave the village at night time and asked her to meet her at the bridge near their village at 12.30 a.m. As per his instructions she went there and, she narrated that, she was initially taken on a bike up to Gambhirwadi ST stand. An Indica car was waiting there in which co-accused Pandit and one driver were present. They all went to a Mahadev Temple at Kokni (Itkoor). She has further stated that accused told her that they will have to show themselves to

be husband and wife, otherwise they would be caught and in presence of one Baba at said Mahadev Temple accused forcibly tied mangalsutra and thereafter she was told to board the Indica car. The vehicle was directed initially to be taken to Kallam and from there to Beed, Aurangabad and then to Manmad. From there, the vehicle was sent back. She has named the driver of the vehicle and accused no.2 Pandit Godage. She has further stated that from Manmad they came to Aurangabad by another car and that time there was conversation with her father. Then she stated that they stayed at Aurangabad and on 02.06.2014 accused took her to Nashik and they halted at Trimbakeshwar, took *darshan* and went to Wani and from there went to Saputara (Gujarat) and halted at a lodge named "Hill Top" for two nights. She has stated that against her wish accused had sexual intercourse with her two times. Thereafter accused again took her to Trimbakeshwar and kept her in a lodge for four to five days. She has stated that during that stay also accused raped her twice. That, on 14.06.2014 while they were proceeding towards Mahadev Temple for taking breakfast, her uncle and Washi police came there and they were brought back. She speaks of handing over clothes over her person of which panchanama was drawn.

18. Victim was also subjected to cross-examination on the point of her education, about her participation in gathering and drama. She was unable to tell exactly when accused handed over mobile handset to her before the

incident. She denied about telling accused that there was quarrel between her and her parents and therefore she wanted to leave the house and spoke to accused about her intention to commit suicide and therefore accused asked her to accompany him. Rest of all suggestions put up by the defence were all flatly denied by her. There is virtually no serious cross-examination on the alleged events since she left the house till she was brought by police.

19. **PW4** Balasaheb, **PW5** Shridhar, **PW6** Rajendra and **PW7** Chandrakant are those witnesses who have acted as pancha to spot panchanama of house of the informant, seizure of clothes of victim and accused, running spot panchanama of various spots where accused took the victim and seizure of mangalsutra. Though they are cross-examined, nothing doubtful has been brought in their cross-examination and as such, these pancha witnesses have also supported the prosecution in all possible manner.

20. **PW8** Balaji is the jeweler and he in his evidence at Exhibit 54 stated that he knew accused because in May 2014 accused purchased a mani mangalsutra from his shop which was worth Rs.5,500/-, however, after giving discount, bill to the extent of Rs.5,000/- was issued. This witness has identified the black beads, mangalsutra and the cash memo.

21. **PW9** Rajendra is the vehicle owner who testified about receiving phone call from accused no.2 about passengers to be taken for *devdarshan* and therefore his vehicle was taken on hire. This witness has stated that accused no.1 and a woman traveled in the vehicle towards Aurangabad and from there towards Manmad. Therefore, this witness also supported prosecution regarding accused taking a woman.

22. **PW10** API Metrewar is the Investigating Officer who narrated all steps taken by him during investigation till filing of charge sheet, about bringing accused and girl from the vicinity of Mahadev Temple. He has identified the accused.

CONCLUSION

23. On careful examination of the above discussed evidence, firstly it is proved that the girl was minor at the time of incident. The Investigating Officer has gathered school record which carries date of birth of the girl i.e. 05.4.2000. Therefore, prosecution has successfully discharged its burden of proving that victim was a minor at the time of incident. Victim herself as well as her father have also testified about the class in which she was studying. Therefore, there is sufficient material regarding victim to be a minor. Accused being teacher of victim, we can safely presume that he had knowledge of her

age. He should be aware of what is the age group of the student studying in 7th standard. He had access to the school record also from which he could have confirmed the age of victim. In any circumstance, there is sufficient evidence on record to prove that victim was below 18 years of age on the day of incidence.

24. It is emerging that accused was the teacher of the victim. Surprisingly and unfortunately, teacher himself seems to have developed intimacy with his own student. In fact being teacher, he ought to have groomed his students to become responsible citizens of the Nation and was expected to educate his students from all angles and to make them good citizens of the society, but he seems to have victimized his own student, who infact, in our opinion, was her guardian while she was taking education in the school. He seems to have utterly failed in doing so and has rather created a blot on the student-teacher relationship which is considered to be pious. Here, evidence of victim clearly shows that he lured her from the guardianship and lawful custody of her parents and took her to various places with evil intention of ravishing her. The very act of taking away the minor without the consent of her parents, charge of Section 363 of IPC has been rightly applied and even brought home by prosecution at trial.

25. No attempt seems to have been taken by accused for refuting the allegations and case of prosecution by leading any sort of evidence to show that he had no ill intentions. It was necessary for him to do so because precisely his defence was that after quarreling with parents, victim had come to him expressing her desire to commit suicide and to deviate her from doing so, he took her away to various places. Infact, with such plea, in our opinion, he has accepted that he has taken away the girl with ulterior motive of developing intimacy with her. There is no plausible explanation regarding the incriminating material which was confronted to him while answering questions under Section 313 of Cr.P.C.. He failed to offer any explanation for his acts.

26. In fact, considering the facts and circumstances of the case, we are prompted to take recourse to the ruling of *Anversinh alias Kiransinh Fatesinh Zala v. State of Gujarat* reported in (2021) 3 SCC 12 wherein the three Judge Bench of the Hon'ble Apex Court has extensively dealt as to when provisions under Section 361 and 363 of IPC are squarely attracted.

27. Here, evidence of prosecution clearly suggests that accused had handed over victim a mobile phone to have conversations with her. This mode seems to have been adopted by him while asking her to leave her house and meet

him at a distinct place and to accompany him further. That, being teacher, he seems to have won over her affection. Therefore, evidence suggests that everything was planned and he seems to have induced her to meet him at a designated place. The above referred defence taken by him is false and afterthought.

28. Further, from the evidence of victim it is emerging that accused made her wear mangalsutra to show that she was married to him. She has also narrated where such event took place. The person from whom mangalsutra was purchased has also been examined by prosecution and he has supported prosecution. Victim has categorically stated in her evidence that he took her at various places and while at Saputara when she was put up in a lodge with him, he had sexual intercourse with her on two nights. The same was repeated at Trimbakeshwar also. In substantive evidence the girl has stated that said sexual relations were against her wish. With such version coming from minor, there is no further requirement of other evidence to hold that there was forcible sexual intercourse. Her sole testimony is sufficient to hold accused guilty. Therefore, the only inference that can be drawn is that accused had raped and forced himself upon the minor girl. Victim has described the act of accused which suggests that there was penetrative sexual assault and therefore, along with the provisions of IPC, the provisions of POCSO Act are also squarely attracted. Sexual assault has been substantiated by examining

PW1 Dr. Landge. Therefore, with such quality of evidence, there is no hesitation to hold that accused is culprit and he has committed all offences for which he has been charged. Learned trial Judge has considered the entire evidence of prosecution from both, legal angle as well as settled legal position and legal requirements. Required ingredients for attracting the charge are very much available in the evidence of prosecution. Therefore, here, there is no merit in the appeal at the instance of convict appellant. Therefore, in our opinion, the same deserves to be dismissed.

29. Here, State seems to be aggrieved by the quantum of sentence. We have considered the operative order passed by the learned trial Judge regarding sentence and fine for commission of each of the offences. Taking into consideration the nature of offence and the circumstances in which it has been committed, we are of the opinion that the quantum of sentence awarded by learned trial Judge would subserve the purpose of justice. Sentence awarded is not deviated one or against the sentencing policy. Therefore, we do not find any reason to enhance the sentence as prayed by learned APP for State. Resultantly, the appeal preferred by the State also deserves to be dismissed. Hence, we proceed to pass the following order :

ORDER

Both the appeals i.e. Criminal Appeal No. 852 of 2015 filed by the appellant-convict and Criminal Appeal No. 914 of 2015 preferred by the State, stand dismissed.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)

VRE