

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 345 OF 2018

Bharat Chhagan Yedke
Age- 23 years, Occ- Labour
R/o. Deolali, Taluka- Kallam,
District- Osmanabad.

...Appellant

Versus

1. The State of Maharashtra
Through Police Station Officer, Shiradhon,
Taluka- Kallam, District- Osmanabad.

2. X.Y.Z.

...Respondents

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Mr. S.J. Salunke, Advocate for the appellant.
Mrs. R.P. Gour, APP for respondent No. 1.
Smt. Rekha Ladda, appointed advocate for respondent No. 2.

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[CORAM : NITIN B. SURYAWANSHI, J.]

RESERVED ON : 20th JANUARY, 2023
PRONOUNCED ON: 2nd MARCH, 2023

JUDGMENT :

1. By this appeal, appellant challenges judgment and order dated 12.06.2017, passed by learned Special Judge, Osmanabad, in Special (POCSO) Case No. 13/2017, thereby convicting the appellant section 4 of Protection of Children From Sexual Offence Act, 2012 (for short 'said Act') and sentencing him to suffer rigorous imprisonment for 7 years and to pay a fine

of Rs. 20,000/- and under section 6 of said Act sentencing him to suffer rigorous imprisonment for 10 years and to pay a fine of Rs. 30,000/- .

2. Prosecution case in brief is that, Gawalan Jadhavar (PW3) has two daughters, victim aged 8 years and younger aged 6 years. On 11.03.2017, she and her husband Ashruba came home from field at around 7.00 pm. Shabnam Tamboli (PW2) came to their house and asked PW3 whereabouts of the victim. Victim entered the house and on seeing PW2 started weeping. On inquiry with victim, she told PW3 that accused called her to play in the hut nearby her house. She was in school uniform. Accused pulled down her undergarment, made her fall on the floor and sat on her. He inserted his penis into her vagina. Upon shout of the victim accused penetrated his penis into her mouth. After her cry, accused let her off. At that time PW2 on hearing victim's cry rushed to the hut of the accused and found that accused had put his penis into the mouth of victim. After seeing PW2 accused put his nicker on and victim ran away from there. PW2 asked accused as to why he did such act with victim. He told that '*Thaki La Kand Ala Hota, Ti Swatah Hovun Mazyakade Aali*'. PW2 then returned home. After hearing the incident from

PW2 and victim, PW3 called her husband and narrated the incident to him and then they went and lodged report (Exhibit-17) with the Police, on 11.03.2017, around 3.30 pm. Crime No. 60/2017 was registered with Shiradhon Police Station, for offence under sections 376(2)(i), 377 of IPC, under section 4, 5 (i) (l) (m) read with 6 of said Act. After completing the investigation, charge sheet was filed. Accused denied the charge. He claimed that he is falsely implicated due to caste barrier in the village.

3. In support of its case, prosecution has examined victim (PW1), Shabnam (PW2), Gawalan Jadhavar (PW3), Dr. Jyoti Kalyani (PW4), Anant Kumbhar (PW5), Sundar Karad (PW6), Amit Lomte (PW7), Vijay Ghodke (PW8), Dr. Nandkishor Ghadge (PW9) and Dr. Nitin Katekar (PW10). The Trial Court found him guilty and convicted him as aforesaid. Hence, the present appeal.

4. Heard the learned advocate for the appellant, learned Additional Public Prosecutor for the respondent and learned advocate for respondent No. 2. Perused the record.

5. The learned advocate for the appellant assailed the conviction on various grounds including that the charge is not properly framed against the appellant. In the charge age of the victim is mentioned as 12 years. He submits that the prosecution has failed to prove that at the time of incident victim was minor. Therefore, conviction of appellant under section 4 and 6 of said Act, is bad. He submits that PW3 is unreliable witness. Her evidence cannot be believed. She has not stated in her evidence that birth date of victim was recorded as per her say. He further submits that no person who gave birth date of victim is examined, therefore, prosecution as failed to prove that at the time of incident, victim was child. According to him, experts evidence has not corroborated to the evidence of PW1. PW2 is not trustworthy witness and her conduct is unnatural. Though, she had cell phone number of victim's father, she has not immediately informed about the incident to victim's father. She did not go to the house of victim's grandmother to inform about the incident. According to him, medical evidence does not support the prosecution case. There are no external injuries or injuries on private part of victim or the appellant. As per the medical evidence only mild redness was present on the private part of victim, there was no bleeding. Therefore, it cannot be

conclusively said that rape was committed. Medical Officer has given opinion that possibility of sexual assault cannot be ruled out. This also does not support the prosecution case. He further submitted that spot wherein alleged offence was committed is of only 3x4 feet. It is not possible in such a small place to commit sexual assault. According to him, prosecution has failed to prove offence beyond reasonable doubt and the appellant is entitled for acquittal.

6. In the alternate he submits that at the most appellant can be said to have attempted to commit offence under section 376 of IPC. So far, appellant has undergone 5 years 9 months, 30 days sentence and he may be released on sentence already undergone. In support of his submissions he relied on Ravi Anandrao Gulpude vs. State of Maharashtra, 2017 ALL MR (Cri) 1509, The State of Maharashtra vs. Patiram Gangaram Shelokar, AIR 2019 ALL MR (Cri.) 4961, Tameezuddin alias Tammu vs. State of (NCT) of Delhi, AIR 2009 SC (Supp.) 2519, Rahim Beg vs. The State of U.P., 1972 CRI. L.J. 1260, Navin Dhaniram Baraiye vs. State of Maharashtra, 2018 ALL MR (Cri.) 4919, State of Madhya Pradesh vs. Mahindra @ Golu, 2021, Cri.L.J. 4915, Pramod Dhananjay Jadhav vs. State of

Maharashtra, 2019(2) ABR (CRI) 315 and State of U.P. vs. Mohd. Iqram and Another, 2011 AIR SCW 3844.

7. Learned Additional Public Prosecutor submits that while framing charge word 'below' is remained to be typed before word '12 years'. The accused cannot take benefit of that as no prejudice is caused to the accused. She submits that in respect of age of victim it is brought on record that at the relevant time victim was in second standard and therefore, she was minor. There is absolutely no cross on the point of age of victim. Therefore, age can be said to be proved by the prosecution by leading cogent and reliable evidence of PW3. She further submits that PW4 has conducted ossification test of victim and has given her age as 7-8 years. She is not cross examined on the point of age of victim or on ossification test. By relying on Kundan Pendor vs. State of Maharashtra, 2017 All.M.R.(Cri) 1137, she submits that prosecution has proved that at the time of incident victim was minor.

8. She further submits that there may be minor exaggeration in the evidence of PW1, but her evidence is consistent on the point of commission of offence by accused. She

submits that as the accused put his penis in the mouth of victim case of prosecution falls under section 3(d) of said Act. The prosecution case on this point is supported by evidence of PW2. According to her, medical evidence supports the prosecution case. There is no effective/searching cross to any of the witness about accused inserting his penis in the mouth of victim. Therefore, accused is rightly convicted under the provisions of said Act. The evidence of PW2 is reliable and not informing father of victim cannot be said to be unnatural conduct. Evidence of PW4 supports prosecution case. PW 5, panch, has supported the spot panchnama and there is no suggestion to him that semen found on the floor of the hut was a planted evidence. Evidence of PW6 and PW7 also supports the prosecution case. She further submits that the accused is not important figure in the village and hence it is not acceptable that he is falsely implicated due to dispute in two castes. According to her, prosecution has proved foundational facts and the accused has failed to rebut the presumption under section 29 of said Act. Minor discrepancies may be there, but those can be overlooked. In support of her submissions, she relied on **Chandrashekar Ramdas Tabhane vs. State of Maharashtra**, 2021 All M.R. (Cri.) 4576.

9. Learned advocate for respondent No. 2 would submit that the prosecution has proved that heinous crime is committed by the accused. Medical evidence supports the prosecution case and history given at the time of medical examination corroborates the victim's version. She therefore submits that the Trial Court has rightly convicted the accused and there is no merit in the appeal and appeal may be dismissed. In support of her submissions, she relied on State of Maharashtra vs. Surajprasad @ Rakumar Shivcharan Roy, 2017 ALL.M.R.(Cri) 3553 and Vikas Yashwant Madavi vs. State of Maharashtra and others, 2021(4) Bom.C.R.(Cri) 587.

10. PW1 is victim. Her age is recorded as 8 years. The Trial Court after ascertaining that she is able to depose before the Court, has administered oath to her.

She has deposed that, she was taking education in second standard in Zilla Parishad school. Her school starts at about 10.00 am and ends at 4 p.m. On Saturday, school is from 7 am to 12.00 noon. On Saturday her school was over at about 12.00 noon. She came back home. The accused who is neighbor called her to play with him. He took her in his fodder shade. He removed her nicker. Then he inserted his penis into her mouth.

He inserted his penis into her private part. He made her sleep downward the earth and then touched/inserted his private part into her anus. He pressed her mouth. He kissed her. Shabnam, (PW2) came on the spot. She is her neighbor. She rescued her. Appellant ran away therefrom. She stated that appellant did such act with her once before the incident. At the time of incident her parents had gone to the field. They returned home at 7.00 pm. Police referred her to Civil Hospital, Osmanabad. Medical officer examined her. Judicial Magistrate First Class, Kallam, recorded her statement (Exhibit-11). Police seized her frock and nicker. She identified the accused in the Court.

11. In cross examination, she could not tell the present date and month. She admitted that house of accused is under construction. The hut is at some distance from new structure. On the day of occurrence accused had gone to factory and he returned at about 5 to 5.30 pm. She admitted that she is acquainted with (PW2) Shabnam and her house is at long distance from her house. She deposed that Shabnam (PW2) is married. But even after her marriage, she is leaving in her village. In the evening, after return of her mother from field, she narrated the incident to her mother. Shabnam (PW2) had already

come to her house. She admitted that in the police station when they went to lodge complaint, there was discussion in presence of her parents, Shabnam (PW2) and Sundar Karad (PW6). On the same day, police made inquiry with her. She was taken to police station to disclose about the occurrence. She was referred to Civil Hospital, Osmanabad on next day. She admitted that she did not sustain injury on her vagina and anus. She did not raise hue and cry when accused started removing her nicker. She raised hue and cry when accused started inserting his penis in vagina, anus and mouth. She volunteered that nobody was there. She admitted that her private part become reddish on the date of incident. But she denied that said reddishness was due to itching on her private part.

12. She admitted that she did not state before police that accused made her sleep downward and inserted his penis into her anus. She did not state before police that Shabnam came on the spot, rescued her and thereafter accused ran away. She admitted that police and Shabnam told her as to how statement is given before the Court. She, however, denied that she made statement before Magistrate as per say of Shabnam and police.

13. Shabnam (PW2) is the eye witness. She deposed that incident occurred on 11.03.2017, at about 3.30 pm, in the hut located near the house of accused. She was at her home, talking with her sister on mobile phone. She had seen victim was proceeding to the house of accused. Victim was in the hut for one hour. She heard sound of cry, so she rushed to the hut. A curtain was put inside the hut. She removed the same and saw inside. She saw accused Bharat removed his nicker as well as nicker of victim. She had seen accused put his penis in the mouth of victim. Accused insisted victim to allow him to put his penis inside her mouth. Accused has seen her and worn his clothes. Victim started crying after seeing her. Victim came out of hut and went to her house. She asked accused as to why he did such act with victim. In turn, accused replied that '*Thaki La Kand Ala Hota, Ti Swatah Hovun Mazyakade Aali*'. Then she came back to her house and waited for arrival of victim's parents. They came home about 7.00 pm. Then she went to their house. She made inquiry as to whereabouts of victim. Victim was outside the house. She immediately came inside home. Victim started crying on seeing her. Victim disclosed entire episode to her mother. Again victim's mother asked her to tell the truth. Victim's mother called her husband and narrated incident to him. Victim's parents

went to make inquiry with accused. He rushed on them. Thereafter, victim, her parents and herself went to police station and disclosed incident to the police.

14. In cross examination, she admitted that she had given evidence in rape case in Sessions Court, Osmanabad. She was victim in the said case. She compromised the matter with accused. She had been living with her parents since last six months. She admitted that since 2011 there was fighting amongst the people of Matang community and other caste in village on the ground of gairan land. People from Matang community and other community approximately 30 each were detained in jail for 2 to 3 months. She deposed that she did not have mobile number of victim's father. She did not try to pass message to the parents of victim by any other means. She further deposed that she made statement before police that victim was inside the hut for an hour. She made statement that she waited for parents of victim. When they approached to accused to inquire with him about occurrence, later started assailing on them. She could not explain as to why these statements were not referred in her police statement.

15. PW3 is the mother of victim. She deposed that the incident occurred on 11.03.2017, at about 3.30 pm., in the hut of accused. At the time of incident, she was in the field with her husband. They returned at about 7.00 pm. Shabnam (PW2) her neighbor, came to her home. Her husband was outside the house. PW2 asked her the whereabouts of victim. Victim was outside the house. Victim came inside the house later on and after seeing PW2 started crying. She made inquiry with the victim about her reason of crying. Victim told her that accused took her to hut, removed her nicker, inserted his penis into her vagina, anus and inside her mouth. Accused kissed her. When victim started crying accused pressed her mouth. After hearing her hue and cry, PW2 came on the spot. When PW2 asked accused as to why he did such act with victim, accused uttered words as '*Tila Kand Ala Hota*'. After some time, her husband came home and she disclosed incident to him. Thereafter, she, along with her husband, Sundar Karad (PW6) and victim went to the house of accused to inquire with him. Accused rushed on their person. Thereafter, they went to the police station along with Shabnam (PW2) and lodged complaint (Exhibit-17). On 12.03.2017, at dawn she produced wearing clothes of victim before police. Her statement under section 164 Cr.P.C. (Exhibit-

18) was recorded. Victim was referred to Civil Hospital, Osmanabad for examination.

16. In cross examination she has stated that she cannot tell day, date due to her illiteracy. She admitted that Shabnam (PW2) has mobile number of her husband. She did not make a phone call after alleged occurrence to her husband. Victim was playing outside the house when she returned from the field at 7.00 pm. Her mother-in-law stays 1000 feet away from her house. She denied that after school time is over victim used to go the house of mother-in-law. She admitted that police reduced to writing complaint after discussing with Shabnam PW2 and Sundar Karad PW6. She admitted that she did not disclose in her complaint that accused inserted his penis into anus of victim and that herself, her husband and Sundar Kadar had been to the house of accused to make inquiry with him. She has stated that police took custody of clothes worn by the victim at the time of incident at about 4.00 am. She denied suggestion that she is on cross terms with family of accused and that no such incident has taken place.

17. PW4, is the Medical Officer, Dr. Jyoti Kalyani. She has examined victim and issued medical certificate (Exhibit-22). She deposed that victim aged 8 years was brought to Civil Hospital, Osmanabad. She was accompanied by her mother. Victim's mother narrated history that while she and her husband went to the farm, victim came back from school and was playing outside the house. Neighboring boy called victim for playing and did sexual act with her. When victim shouted another neighbor came there and saw the act. When victim's mother came back home, neighbor lady told that, boy placed his private part into her mouth and inside pubic area of victim. She clinically examined the victim. On local examination, she found redness present on vaginal mucosa of the victim. She found no injury on any part of body of victim. She took blood sample for chemical analysis. She took vaginal and oral swab and sample of nails for DNA test. She had taken X-ray of victim for age determination and sought opinion of radiologist. The radiologist opined that victim is aged about 7-8 years old. She proved age history report (Exhibit-24) and medical certificate (Exhibit-25). According to her on clinical examination of victim she opined possibility of sexual assault on victim cannot be ruled out. She also proved on record provisional certificate (Exhibit-26) dated 12.03.2017. On perusal of CA

report (Exhibit-19) she has further stated that semen was detected on the clothes of victim's frock, jangya and on the pant and nicker of accused.

18. In cross examination, she agreed with the suggestion that injuries on the private part of girl of 8 years are possible if a person of 25 years of age commits sexual intercourse with her. She further agreed that mild redness on private part as shown in Exhibit-25, may be possible by bite of ant which resulted into itching. She denied the suggestion that there was no possibility of sexual assault on victim and mild redness as shown in the medical certificate may not be possible by penis.

19. PW5, Anant Kumbhar, is the panch to the spot panchnama (Exhibit-30). In cross examination he has stated that it is true that he narrated measurement of hut approximately.

20. PW6, Sundar Karad, panch to Panchnama (Exhibit-34) seizure of clothes of victim. He has deposed that frock and undergarments of victim was smeared with white stains. Those stains were marked by pen. Nothing material is brought in is cross examination.

21. PW7, Amit Lomte, is the panch to Panchnama (Exhibit-36) of seizure of clothes of accused. He has proved panchnama. He stated that nicker of accused was smeared with two white stains which were marked by marker pen. White stains on left side of pant were also marked by pen. Shirt, pant, baniyan and nicker of accused were seized during the panchnama. His evidence could not be shaken in the cross examination.

22. PW8, Vijay Ghodke, is the Police Constable who has carried muddemal articles to CA office.

23. PW9, Dr. Nandkishor Ghade, Medical Officer who examined the accused and took sample of nails clippings, pubic hair, blood and semen of accused and referred samples to CA, regional forensic lab Pune. He examined accused and issued provisional medical certificate Exhibit-46. He also proved DNA sample collection form (Exhibit-47). He deposed that on perusal of CA report (Exhibit-49) blood sample of accused is of blood group 'A'. On perusal of CA report Exhibit-48, semen detected on full pant, nicker and frock is human. Semen detected on plastic dabbi is of blood group A. He identified accused in the Court. Nothing material is brought on record in his cross examination.

24. PW10, Dr. Nitin Katekar, Dy.S.P. is the investigation officer. He has collected birth certificate of victim from Zilla Parishad School, Devlali, which shows that victim was born on 09.09.2009,. He also collected birth certificate of victim (Exhibit-58) from Gramsevak, Devlali.

25. In his cross examination, he admitted that he had not recorded statements of persons who are adjoining dwellers nearby alleged scene of offence. He admitted that accused was in his custody before his arrest. He stated that he did not remember that as to whether entry was made in the station diary in that regard. He admitted that seizure of clothes of accused was prepared before his arrest at 2.52 pm., on 12.03.2017.

26. On careful scrutiny of evidence on record it is clear that victim (PW1) in her evidence has categorically stated that accused took her in his fodder shade and removed her nicker. Then he inserted his penis into her mouth, he inserted his penis into her private part. He made her sleep downward on the earth and then touched/inserted his private part into her anus. He pressed her mouth. He kissed her. This evidence of victim is

corroborated by evidence of PW2 who had seen victim going towards hut of the accused. She has stated that victim was there for an hour. On hearing cry of victim PW2 rushed towards the hut and saw accused inserting his penis into mouth of victim. This evidence of victim and PW2 is not at all shaken in the cross examination. PW2 is the eye witness and her evidence inspires confidence. Nothing is brought in her cross examination to raise doubt about veracity of this witness. Her evidence therefore corroborates the victim's version. Further evidence of PW2 that when she asked as to why accused did said act, his reply that '*Thaki La Kand Ala Hota, Ti Swatah Hovun Mazyakade Aali*', inspires confidence and same is admissible under section 6 of Indian Evidence Act. The evidence of victim and PW2 is impeccable and it appears to be natural version without any remote possibility of tutoring. Except giving suggestion that no such incident has taken place, nothing is elicited in the cross examination of both these witnesses. Their evidence is corroborated by their statements recorded under section 164 Cr.P.C.

27. The history given by victim's mother (PW3) to the medical officer (PW4) further corroborates the prosecution case.

PW4 on clinical examination of victim has opined that possibility of sexual assault on victim cannot be ruled out.

28. Spot Panchnama (Exhibit-30) is proved by PW5. Semen stains were found on the earth on the spot of incident. Even clothes of victim were found stained with semen of accused. Scientific evidence in the form of DNA report (Exhibit-69), is to the following effect,

1) DNA profiles obtained from ex.1 Pubic hair, ex.2 Nil Clippings, ex.3 Penile Swab of Bharat Chhagan Yedke in DNAP-266/17, ex.3 Semen stain cuttings from frock and ex.4 Semen stain cuttings from Janya in DNAP-481/17 are **identical** and from one and same source of male origin and **matched** with DNA profile obtained from ex.7 Blood of Bharat Chhagan Yedke.

2) DNA profile obtained from ex.4 Vaginal Swab of victim in DNAP- 266/17 is of female origin and **matched** with DNA profile obtained from ex.8 Blood of Victim.

further corroborates the prosecution case.

29. There is no merit in the contention of the accused that prosecution has failed to prove that the victim was child at the time of incident.

30. PW3, mother has stated that victim's date of birth is 09.09.2009. No questions were put in her cross examination on

the birth date of victim. Only admission given by her is that she cannot tell day and date due to her illiteracy.

31. PW10, Investigation Officer has proved birth certificate of victim wherein her date of birth is recorded as 09.09.2009 and her parents names are recorded.

32. PW4, Medical Officer has proved ossification test report of victim which states age of victim is between 7-8 years. PW4 is not cross examined on the point of age of victim.

33. There is sufficient evidence on record to prove that at the time of incident victim's age was 8 years and she was taking education in second standard. Therefore, prosecution has proved that on the date of incident victim was child within the meaning of section 2(1)(d) of said Act. Therefore, ratio in Ravi Gulpude (supra) and Pramod Jadhav (supra), would not help the accused.

34. The prosecution has proved the foundational facts in the present case. Section 29 and 30 of said Act are an exception to the settled principles of criminal jurisprudence that the accused is presumed to be innocent unless proved guilty beyond reasonable doubt. The burden is on the accused to prove that he is innocent. Accused has failed to discharge this burden. The

prosecution has proved the incident through evidence of victim and PW2, which is reliable. Nothing is elicited in the cross examination of these two witnesses to doubt their veracity. The prosecution evidence is cogent, reliable and prosecution witnesses are trustworthy.

Section 375 of IPC defines rape. A man is said to commit rape if he penetrates his penis, to any extent into the vagina, mouth of anus of a woman or make her to do so with him or any other person. Thus, penetration of penis in the mouth of a woman constitutes an offence of rape. From the evidence brought on record the prosecution has proved that accused has committed offence of rape as well as aggravated penetrative sexual assault within the meaning of section 3 of the said Act. The accused has failed to discharge burden of proving his innocence.

35. Taking into consideration the evidence brought on record by the prosecution, it is proved beyond reasonable doubt that accused has committed offence under sections 4 and 6 of said Act.

36. Learned Additional Public Prosecutor is justified in relying on Division Bench judgment of this Court in Kundan

Pendor (supra), wherein it is held "*It is a settled position of law that if witness is not cross-examined on a particular portion of her deposition in her Examination-in-Chief, said statement is required to be accepted as the same is not challenged by the defence.*"

37. In Mahindra @ Golu (supra), the Apex Court has explained difference between attempt and preparation in rape. In that case accused lured a girl, stripped her and rubbed his genitals against those of victim. He was held guilty of attempting to commit rape.

38. In the case in hand, there is direct evidence of victim and PW2 proving the aggravated penetrative sexual assault and rape committed by the accused.

39. In State of UP Vs. Modh. Ikram (supra) it is held that '*Court has to seek explanation of accused on incriminating material that has surfaced against him in his examination under section 313 Cr.P.C.*'

40. Perusal of statement of accused under section 313 Cr.P.C., shows that entire incriminating material against him was put to him. In that view of the matter, ratio in Modh. Ikram

(supra) is not helpful to accused.

41. In view of aforementioned reasons, no merit is found in the appeal and appeal is therefore dismissed.

42. Fees of learned advocate for respondent No. 2 is quantified at Rs. 5,000/-. High Court Legal Aid Services Authority, Sub Committee, Aurangabad shall pay the said fees within four weeks from today.

[NITIN B. SURYAWANSHI, J.]