



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH AT NAGPUR.**

Criminal Appeal No. 166 of 2023

(1) Mr. Pramod Alias Pintu s/o Manikrao
Pawar, Aged about 35 years,
Occu. Labourer, R/o Shantinagar,
Akola.

(2) Mr. Vikram @ Vicky s/o Heeralal
Tayde, Aged about 35 years,
Occu. Labourer, R/o : Shantinagar,
Akola.
Tahsil & District : Akola.
Presently both are in Jail.

... Appellants

- Versus -

(1) The State of Maharashtra,
Through P.S.O., Police Station old city,
Akola, Tahasil & Distt. Akola.

(2) X. Y. Z. (Victim in Crime No. 246/2011)
PSO, Old City, Akola.

... Respondents

Amended as
per Court's
order dated
29-3-2023

Mr. R. R. Gour, Advocate for the appellants
Ms. Shamsi Haider, APP for the State/respondent no. 1
Mr. A. M. Kukde, Advocate for respondent no. 2 (appointed)

CORAM : ANIL L. PANSARE, J.

Date of reserving judgment : 06-10-2023

Date of pronouncing judgment : 10-10-2023

JUDGMENT

Appellant no. 1/original accused no. 1 has been convicted
for the offence punishable under Section 376 read with Section 511 of

the Indian Penal Code (IPC) and is sentenced to suffer rigorous imprisonment for five years and also fine of Rs. 5000/-, in default to suffer simple imprisonment for 30 days. Appellant no. 2/original accused no. 2 has been convicted for the offence punishable under Section 109 read with Section 376 of the IPC. He has been sentenced to suffer rigorous imprisonment for two years and to pay fine of Rs. 5000/-, in default to suffer further simple imprisonment for 30 days. This judgment of conviction dated 20-6-2022 passed by learned Additional Sessions Judge, Akola has been assailed by way of present appeal. Appellant nos. 1 and 2 shall be hereinafter referred to as accused nos. 1 and 2 respectively.

2. Briefly stated, the case of the prosecution is that on or about 5-11-2011, at about 14.00 Hrs., at Shantinagar, Akola, accused no. 1 made an attempt to commit rape on the victim girl, aged 4 years. Accused no. 2 has abetted the crime. Since the incident has occurred in November, 2011, the provisions of Protection of Children from Sexual Offences Act, which came into force in November, 2012, have not been invoked.

3. The accused did not plead guilty to the charges. The prosecution, therefore, has examined 9 witnesses to bring home the guilt of the accused. The following points arise for my consideration.

The arguments, evidence, documents etc. are being considered to the extent necessary to decide these points. I have, accordingly recorded my findings thereon for the reasons to follow.

<u>Points</u>	<u>Findings</u>
(1) Has the prosecution proved that on 5-11-2011 at about 14.00 Hours, at Shantinagar, Akola, accused no. 1 attempted to commit rape on the victim girl, aged 4 years ?	In affirmative.
(2) Has the prosecution further proved that on same date, time and place, accused no. 2 abetted accused no. 1 for commission of the aforesaid offence ?	In affirmative.
(3) Whether the interference is called for ?	In negative.
(4) What order ?	Appeal dismissed.

REASONS

As to Point Nos. 1 and 2 :

4. These points being interlinked, are being decided by common reasoning. Before I deal with the rival contentions, it will be appropriate to go through the evidence led by the prosecution.

5. P.W. 1 is mother of victim. She deposed that incident took place on 5-11-2011. The victim was 4 years old. The incident took place at about 2.00 p.m. The witness was washing the utensils in front of her house. Her daughter i.e. victim and her younger sister were playing in front of the house of accused no. 1. The nick name of accused no. 1 is Pintu. The husband of the witness has a tea shop. He had been to his shop. At that time, accused no. 2 came and said that he will draw *mehendi* on the hands of the victim and took her at the house of accused no. 1. She heard sound of crying of the victim daughter. The sound was coming from the house of accused no. 1. The witness went to his place. She saw that accused no. 1 was nude and accused no. 2, who was sitting behind him, was on knicker and baniyan. The witness asked the victim as to why is she crying to which she stated that accused no. 1 has removed her knicker and inserted his penis between her thighs. The witness noticed that private part of her daughter was reddish. She raised hue and cry. The people in the vicinity gathered. Some people assaulted the accused persons. The witness made a phone call to her husband. She narrated incident to her husband. Thereafter they went to the police station and lodged report. The victim was referred to medical examination. The First Information Report (FIR), Exhibit 50 came to be lodged.

6. In the cross-examination, an attempt has been made to put forth a theory of dispute between the parties but no material could be brought on record in this regard. The defence has brought on record that there are many houses in the vicinity and the lane between the houses is about 8 Feet wide. The house of accused is also located in the said vicinity. It is also brought on record that the activities in the house of accused no. 1 are visible from the neighbouring houses. The witness admits that house of Pramod is admeasuring 10 ft. x 10 ft. Similar such attempt has been made while cross-examining the victim.

7. The defence is that, many houses are located in the vicinity and the activities in the house of accused no. 1 are visible to the neighbourers and in absence of any independent witness, the prosecution failed to prove its case. I do not find any merit in the defence. There is absolutely nothing in the cross-examination to show that at the relevant time, either anyone passed by the lane or that any person was present in the neighbouring houses. Merely because the house of accused no. 1 is surrounded by many houses and merely because activities in the house of accused no. 1 are visible will not lead to an inference that at the time of incident, the neighbourers were either present in their houses or had seen the incident. The nature of incident is such that the person committing crime will ensure that the

activity is not noticed by anyone. Be that as it may, the defence put forth did not get support from any witness.

8. The victim's evidence is of utmost important. She has been examined as second witness. She has deposed that she knew both the accused, one is Pintya and another Vicky. She said that she was 4 years old when incident occurred and was studying in nursery. She was playing with her younger sister in front of house of accused no. 2. Accused no. 2 came and called her by saying that he will draw *mehendi*. He took her to the house of accused no. 1. Accused no. 1 removed her pant and touched his penis to her vagina. The act resulted into pain. She started crying. Therefore, her mother came. She told her mother about the incident. Her father was called. Thereafter they proceeded to the hospital. Her statement was recorded by police.

9. The houses of accused are situated near the house of victim. The victim's cross-examination would indicate that accused persons used to pamper her since her childhood. The victim admitted that prior to the incident, both the accused used to take her to their houses and used to pamper her. She further admitted that the accused had taken her to their houses on earlier occasions even when there was no one in their houses.

10. This cross-examination will only indicate that the mother of victim will not raise any doubt if the victim is taken by the accused persons to their houses being routine activity.

11. As regards incident, the victim withheld the cross-examination like a rock. Various attempts were made to test her veracity but she has stuck to her version. The suggestion was given that her father got angry and assaulted the accused, to which she deposed that her father got angry but denied the assault. She admitted that people, who had gathered, assaulted both the accused. She has denied the suggestion that the people gathered were telling her mother to lodge report. She has denied the suggestion that at the time of lodging report, many people of the locality were present. She volunteered that her father was present. She has denied the suggestion that her mother had tutored her. Thus the victim has firmly answered the question. It is then brought on record that her mother was washing utensils in the lane at the backside. This evidence would support the prosecution version that mother was nearby and thus could hear the crying sound of the victim.

12. The victim admits that she has not disclosed to anyone that accused has removed her knicker and touched his penis to her vagina and she did not show her private parts to anyone. This admission is

highlighted by the counsel for the accused to contend that the victim has not disclosed the aforesaid fact to anyone and has not shown her private part to anyone, which should include her mother. This argument does not carry any merit inasmuch as, once the victim has deposed that she has narrated her sufferings at the hands of the accused to her mother, the admissions given by her would only mean that except for her mother, she has not disclosed the aforesaid fact to any other person. This testimony relates to human behaviour. There is absolutely no reason why the victim should go to everyone and disclosed that accused has removed her knicker and touched his penis to her vagina and further there is no reason why should she go to everyone to show her private parts.

13. Her evidence if read, is self sufficient to prove the nexus of accused persons with the crime. Her evidence has proved that accused no. 2 has abetted the crime by taking victim to the house of accused no. 1. Accused no. 1 has removed her knicker and made an attempt to commit rape. In fact, if one goes through the definition of rape as provided under Section 375 of the IPC, penetration of penis to any extent into the vagina is sufficient to prove the ingredients of rape. However, the prosecution has charge-sheeted the accused no. 1 for an attempt to commit rape and that the Special Court has examined the

issue from that point of view and, therefore, the accused persons got benefit of the manner of narration of incident by the victim and further of recording the incident only to the extent of attempt to commit rape and not of committing rape. Nothing more is required to be said here except that the evidence of victim is not only trustworthy but is self-sufficient to bring home the guilt of both the accused.

14. P.W. 3 and P.W. 4 are panch witnesses to spot panchanama. I need not elaborately deal with their evidence as there is no serious dispute about the spot. P.W. 5 is a Medical Officer (Radiologist). He has opined that age of the victim was more than 3 years and less than 4 years. P.W. 6 is a Police Inspector. He has drawn spot panchanamas and arrested both the accused. He seized clothes of the accused. In the cross-examination, again an attempt has been made to show that the houses of the victim and accused are located in a thick locality and further that the dispute between the parties was also on the ground of belonging to different castes. No material has been brought on record to disbelieve the investigation.

15. P.W. 7 is a Medical Officer who has examined the victim. The medical report is marked Exhibit 96. She has deposed that there was no injury either on the body or on the private parts. The vital examination was normal. The hymen was intact and there was no

visible external injuries. She has denied the suggestion that in the medical report, there is no mention about redness of vagina of the victim.

16. P.W. 8 is a woman Head Constable. She has referred the victim to the medical examination. She is the one who has noted the FIR. She has deposed that the accused were brought to police station by some people. They were also referred to medical examination.

17. P.W. 9 is Police Inspector who has carried out further investigation. He has sent the muddemal for chemical analysis. He has recorded statement of victim. He has issued letter to Radiologist for ascertaining age of the victim.

18. This is how the prosecution has led the evidence before the trial Court.

19. Learned counsel for the accused persons has made an attempt to put forth theory of rivalry between the parties as also visibility of activities in the house of accused. This defence has been rightly found to be not plausible by the trial Court. Firstly, the rivalry is not proved and secondly, even if it is proved, it would strengthen the

case of prosecution of the possibility of accused persons committing the crime on account of rivalry.

20. The evidence as led before the trial Court would indicate that accused persons used to take victim to their house frequently, this could not be possible if there was rivalry between the two parties. This act will be helpful only to the prosecution to draw an inference that nobody has and nobody will object accused persons taking victim to their houses even when no one is present in their houses. It appears that accused persons have taken advantage of the situation and made an attempt to commit heinous crime. The evidence of victim is writ large as to the manner in which accused no. 2 abetted crime and the manner in which the accused no. 1 made an attempt to commit rape.

21. Learned counsel for the accused persons has argued that the Doctor's evidence does not support the prosecution case inasmuch as the Doctor, who has examined the victim, has not found any injury on the private parts of the victim. The evidence of victim shows that the accused removed the clothes of the victim as also of his own and touched his penis to her vagina. This act may not lead to any injury to the private parts of the victim.

22. Learned Additional Public Prosecutor and learned counsel for respondent no. 2 have rightly argued that the learned Additional Sessions Judge has rightly assessed the evidence and that the reasoning and findings rendered by the trial Court is consistent with the material on record.

23. The sum and substance of above discussion is that there is no merit in the appeal. Accordingly, the appeal is dismissed.

24. The fees of learned counsel appointed for respondent no. 2 be quantified and paid in accordance with law.

(Anil L. Pansare, J.)

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