



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

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CRIMINAL APPEAL NO. 186/2023

Sagar s/o Bharat Hiwrale
Aged 25 years, occu: Private
R/o Tatta Line Zopadpatti
Walni, Tah.Saoner, Dist. Nagpur.

..APPELLANT

v e r s u s

1) State of Maharashtra
Through Police Station Khaparkheda
Dist. Nagpur.

2) XYZ (victim) in Crime No.55/2016
Registered in Police Station
Khaparkheda, Dist. Nagpur.

..RESPONDENTS

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Mr. P.A.Nemade, Advocate for the appellant
Ms. Shamsi Haider, APP for Respondent no.1-State
Ms. Hemlata S.Dhande, Advocate (appointed) for Respondent No.2
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CORAM: ANIL L. PANSARE, J.
Date of Reserving : 03.10.2023
Date of Pronouncement: 10.10.2023

JUDGMENT :

At the outset, Mr. P.A. Nemade, the learned counsel for the appellant submits that he is not pressing for orders on Criminal Application (APPA) Nos. 316/2023 and 741/2023 and, as such, both the Applications are disposed of as not pressed.

2. Heard Mr. P.A. Nemade, the learned counsel for the appellant; Ms. Shamsi Haider, learned APP for the respondent no.1-State and Ms. Hemlata S. Dhande, the learned counsel (appointed) for the Respondent no.2-victim, at length, and perused the record.

3. The appellant/accused is aggrieved by the judgment and order dated 19.05.2022 passed by the learned Additional Sessions Judge, Nagpur in Special POCSO Case No.110/2016 convicting the appellant for the offences punishable under Sections 363, 376 (2)(i)(j) of the Indian Penal Code (in short "IPC") and Sections 4 and 8 of the Protection of Children from Sexual Offences Act (in short "POCSO"). The appellant has been sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.10,000/- for the offence punishable u/s. 376(2)(i)(j) of the IPC; and RI for a term of three years and to pay a fine of Rs.1,000/- for the offence punishable u/s. 363 of the IPC. So far as conviction u/ss. 4 and 8 of the POCSO is concerned, separate sentence has not been imposed for the obvious reason that the offence punishable u/s 376(2)(i)(j) of IPC provides for maximum punishment amongst the offences having identical ingredients. The learned Judge of the Court below has also directed to pay an amount of Rs. 10,000/- to the victim, out of the fine amount. The appellant has been acquitted for the offences punishable u/ss. 366A and 354A of the IPC. The prosecution has not assailed the judgment and therefore the challenge is restricted to the conviction of the appellant for the aforesaid offences. The appellant will be hereinafter referred to as 'the accused'.

4. Briefly stated, the facts of the case are that the accused and the victim are the neighbours and residents of same locality. The

allegation is that the accused has kidnapped the victim, aged 15-years, on the assurance of marriage and ravished her.

5. The accused did not plead guilty to the charges framed. The prosecution has examined eight witnesses to bring home the guilt of the accused. The defence of the accused is of total denial and false implication. The accused, however, has not examined himself or any other witness, in defence.

6. Having heard both sides and having gone through the impugned judgment and the material placed before me, the following points arise for my consideration. I have recorded my findings thereon for the reasons to follow :-

Sr.No	Points	Findings
i)	Has the prosecution proved that on or about 27.01.2016 the accused kidnapped the victim?	Not proved
ii)	Has the prosecution proved that on or about 27.01.2016 at the house of his relative in a village at District Nasik, the accused has committed rape upon the victim?	Not proved
iii)	Has the prosecution proved that the accused on that day, committed penetrative sexual assault upon the victim?	Not proved
iv)	Whether interference is called for in the impugned judgment?	Yes
v)	What order ?	As per final order

REASONS

7. As to Point Nos. (i) to (iii): These three points being interlinked, are decided by common reasoning :-

The star witness in the present case is the victim herself. It would be appropriate to mention here that the prosecution has heavily relied upon her version and the trial Court has believed the same.

8. Mr. P.A.Nemade, the learned counsel for the accused, however, vehemently argued that her testimony is full of exaggeration, omission and contradiction and, therefore, ought not to have been believed by the trial Court.

9. PW1 has deposed that her date of birth is 10.01.2002 and at the time of the incident, was prosecuting her studies in VIII standard. She knew the accused, who is her neighbour. The accused used to harass her and proposed to marry her. She had fear in her mind that the accused can commit any untoward incident and, therefore, she did not narrate the harassment to her parents at the hands of the accused. PW1 then deposed that the accused had given one mobile to her but she did not operate the same as she was not willing to talk to the accused. On 26.01.2016 on the said mobile, the accused called her and told that they have to marry each other. The victim spurned the proposal. She then states that on 27.01.2016 at about 7.00 am, she was proceeding to her school and there was no one in her house as her mother, father, had left the house for work and her brother for the school. At that time, the accused met her at *Mohalla* and forcefully took her to her house and said

that he wants to marry her. He committed forceful sexual intercourse with her. Then, he took her to Chankapur, by foot. Thereafter, they proceeded to Nagpur Railway Station, by Bus. From there they went by Railway to Nashik. She did not raise any hue and cry because the accused had threatened her of killing himself, as also the victim. The accused took her to a village at Nashik. They stayed at the house of the relative of the accused for a day on 28.01.2016. Her parents, father of victim, parents of the accused and one Masram, uncle, reached the said house and brought the accused and victim to the Police station Khaparkheda. The statement of the victim was recorded. The FIR (Exh.23) was registered and her signature was obtained. Thereafter she was sent for medical examination. She narrated the history. Thereafter her clothes were seized and further investigation was carried out.

10. In the cross-examination, PW1 deposed that the birth certificate (Exh.22) was not prepared in her presence and she does not know as to who has signed the document and who has put the seal. She admits that the certificate has been brought by her father, later on. She admits that the original certificate is required for admission but states that she had given a photocopy of the certificate to the school. The school leaving certificate is said to have been found in her school bag. It is then brought on record that she did not disclose to her parents about harassment, out of fear of the accused. She has also mentioned that while recording the FIR, the fact that the accused had committed forceful sexual intercourse, is not mentioned. According to her, she had given clarification in that regard stating therein that she was hesitant because of the presence of her father and mother. She then deposed that for the first time she stated in the Court that the accused had threatened

to kill her.

11. It is then elicited that on the date of the incident, she, while going to school, has kept in her school bag one dress. She admits that she had changed the clothes during travel. She further admits that the clothes which she wore at the time of incident, were changed by her in travel and those clothes remained at Nashik and were not brought back.

12. It is further brought on record that Walni village is a very small village. The villagers are acquainted with the victim and accused. She admits that since the villagers are so acquainted, she reached at the spot from a different route and thereafter she and the accused proceeded to Nagpur. PW1 has then deposed that she had a snapshot with the accused by going to a photo studio. She then denied the suggestion that her subsequent statement recorded by the police about the sexual intercourse is given by her at the instance of her parents.

13. This evidence has been found trustworthy by the trial Court which upon minute reading appears to me, to be the statement full of contradiction and exaggeration. PW1 states that the accused had given one mobile to her which she did not operate as she was not willing to talk to the accused. Despite such status, on 26.01.2016, she spoke with the accused on the same mobile. She states that on 26.01.2016, the accused informed her that they have to marry, to which the victim responded in negative. However, on the next day, i.e. 27.01.2016, she states that while she was going to her school, the accused met her, took her to her house and committed forceful sexual intercourse. This conduct coupled with the subsequent conduct vividly indicates that the victim was party to the incident, if any. The subsequent evidence indicates

that the accused had proposed her for marriage, to which she refused. The accused took her to Chankapur by foot, and thereafter to Nagpur Railway Station and then to Nashik. Thus, after rejecting proposal of marriage she accompanied the accused to Nashik. This conduct is contrary to her story of she unwilling to speak with accused or was not interested in him.

14. Further, in the entire journey, she did not raise an alarm. Prior thereto, she came to the spot by a different route to avoid gaze of the villagers in order to meet the accused at the spot and to proceed for Nagpur. They reached Nashik and stayed at the house of one of the relatives of the accused. She does not depose that at that place the accused committed forcible sexual intercourse which basically is the charge against the accused. Furthermore, while recording the FIR she did not disclose that the accused committed rape. The said fact has been disclosed only in her supplementary statement. The reason put forth is that when the FIR was registered, her parents were present and she was hesitant to speak in their presence. This statement/ reason is not acceptable for the reason that she has stated to the police that on 27.01.2016 the accused committed aforesaid sexual intercourse with her in her house. If this fact could be narrated in the presence of the parents, the subsequent identical fact could well be stated in their presence. This version is nothing but improvement in her story. The victim has also deposed that she had snapped a photograph with the accused.

15. With this version, it is highly unbelievable that the victim has travelled with accused unwillingly. Her conduct of having one dress in her school bag when she left for Nagpur, possessing mobile given by

the accused, her photograph with the accused, is writ large of consensual relationship.

16. The question is why should the victim blame the accused for committing rape. The answer appears to be obvious. The parents of the victim found her with the accused at Nashik. Once the relationship was exposed, the victim, either out of fear did not disclose the truth to her parents or has acted at the instance of her parents, to implicate the accused in the crime.

17. This is a case where consensual relation has been metamorphosed into forcible relationship. She appears to have omitted to state before the police that on 28.01.2016 the accused committed sexual intercourse with her. However, on 29.01.2016, before the Medical Officer-Dr. Nelson Kumar (PW 4), she has improvised her version and stated that on 28.01.2016 the accused has committed forcible sexual intercourse with her. The evidence of PW4 does not really corroborate her version. His evidence indicates that he did not find any injury on her person, the hymen was torn and on the edges there was small old tear. No bleeding was found. There was no edema. Minimal vulval white discharge was present. PW 4 opined that the sexual intercourse or assault cannot be ruled out. The final opinion, however, was pending till the receipt of Forensic Science Laboratory report. In the cross-examination, he admits that minimal vulval white discharge can be possible due to fungal infection. He further admits that no firm opinion has been given about sexual intercourse. He also admits that the presence of semen in the vagina was not found. Thus, the evidence of PW4 is also tentative as regards the penetrative sexual assault at the

hands of the accused. The Doctor does not testify that there occurred recent sexual intercourse with the victim. Therefore, the Doctor's evidence cannot be taken aid of to draw an inference that the accused has committed penetrative sexual assault on 28.01.2016.

18. Thus, the evidence of the victim appears to be far-fetched and sketchy. Her evidence does not inspire confidence at all. The Doctor's evidence is tentative. In the circumstances, on the basis of evidence of PW1 and PW4 , the accused cannot be held guilty for the offences punishable u/ss. 376(2)(i)(j) of the IPC or Section 4 and 8 of the POCSO.

19. So far as the evidence of other witnesses is concerned, PW 2-Shivprasad, is the father of the victim. His evidence on the point of sexual assault is hearsay and is therefore inadmissible. His evidence can be taken aid of only to the extent that accused left the house on 27.01.2016 and was found at the house of maternal aunt of the accused. PW3-Smt.Gayatri is the *panch* witness to the seizure of clothes of the victim. Her evidence will be immaterial inasmuch the victim herself has stated that the clothes which she wore at the time of the incident has been left at Nashik. PW4 Doctor's evidence has already been discussed.

20. PW5-Charulata Bijwe is the Head mistress of Walni High School, who has deposed that the victim was admitted in their school in VIII standard and that she had produced the original school leaving certificate (Exh.19) and her date of birth is 10.01.2002.

21. PW6-Mastam is the *panch* witness to the spot of the incident. He deposed that the spot of incident belongs to the father of the victim and the spot was shown by the victim girl. If the testimony of this witness is to be believed, the entire story of the prosecution has been diverted from the spot situated at Nashik to the spot at Walni village, District : Nagpur. This evidence would further dent the prosecution version.

22. PW7-Ramrao is the Headmaster of Zilla School Upper Primary School No.23, Walni. He deposed that the victim was admitted in 1st standard in their school and her date of birth, as per register, is 10.01.2002. He then deposed that said entry of birth is taken on the basis of *Jaccha Baccha Raksha Card* issued by the Rashtriya Tikakaran Mission of India. According to this witness, the birth date has been taken from this card. The victim studied in that School till VII standard.

23. Thus, the basic document of birth record is the *Jaccha Baccha Raksha Card*. The Headmaster has taken clue of birth of victim from the said card to record date of birth of the victim as 10.01.2002 in the admission register. The school leaving certificate accordingly issued by the Zilla Parishad School and on the basis thereof, the victim was admitted in VIII standard in the school at Walni, of which PW5-Charulata Bijwe is the Head mistress.

24. In the circumstances, the basic document will have to be examined, which is a *Jaccha Bacch Raksha Card*. This card has been issued by Rashtriya Tikakaran Mission of India, which the prosecution could not prove to be an authority to issue the birth certificate. That apart, in the cross-examination, this witness admitted that there is

overwriting and scoring in the date mentioned in the *Jaccha Baccha Raksha Card* and there is also an overwriting in the column meant for probable time of birth of the child. This witness also admits that the *Jaccha Baccha Raksha Card* (Exh.67) does not bear any seal of issuing authority. Thus, the foundational document as regards the date of birth of the victim does not bear the seal of issuing authority. The prosecution has not proved that the the said card is an authentic document or that the Rashtriya Tikakaran Mission of India is authorized to issue birth certificate. There is overwriting and scoring in the date mentioned in the card. This card is taken aid of by the Headmaster of the Zilla Parishad, to enter the birth date of the victim in the admission register. To my mind, it will be highly risky to believe such *Jaccha Baccha Raksha Card* as proof of birth date of the victim.

25. Once the foundational document of date of birth is found to be doubtful, the subsequent document viz. Entry register of Zilla Parishad School, Walni or the School Leaving certificate issued by the said school and the further certificate issued by the Walni High school can not be accepted as proof of the date of birth of the victim. The prosecution in the present case has, thus, miserably failed to prove the date of birth of the victim.

26. The evidence of PW 8-Sharad Barkhade, the Investigating Officer is on the point of manner in which the investigation was carried out, which includes referring the victim to the medical examination, collecting medical report, recording statement of witnesses, drawing *panchnamas*, collecting school leaving certificates, filing of charge-sheet etc. In the cross-examination, PW 8 admits that in the first statement,

the victim did not state about committing of rape by the accused.

27. Put all things together, despite the learned APP and the learned counsel for the non-applicant no.2 making an attempt to justify the conviction, they could not show from the evidence of PW1-victim or PW4 Doctor or the other witnesses, that there is cogent material to prove the ingredients of Section 376(2)(i) (j) of the IPC or Sections 4 and 8 of the POCSO as regards penetrative sexual assault.

28. The prosecution must be mindful of the fact that the charges against the accused were of serious nature which attract punishment upto imprisonment for life and, therefore, the proof as regards the age as also the penetrative sexual assault must be of a higher degree. The said evidence, unfortunately, is absent in the present case.

29. So far as Section 363 of IPC is concerned, the age of the victim having not been proved the ingredients thereof, will also not be attracted.

30. The learned Judge of the Court below has ignored these vital discrepancies and straightway believed the version of the victim, as also the school leaving certificate on the point of age. As regards failure of the victim to narrate to the police of forceful sexual intercourse at the hands of the accused at Nashik, the trial Court has observed that the FIR is not an encyclopedia. It is well-settled proposition of law that the informant, who is victim, may not give all details of the incident in FIR. However, the Court will always expect a victim to narrate the vital facts. The absence of narration of the forceful sexual intercourse is fatal to her

story and, therefore, her testimony would be labelled as exaggeration and improvisation.

31. As stated earlier, neither the testimony of the victim nor that of the Doctor is sufficient to bring home the guilt of the accused, under the provisions of Sec.376 (2)(i) (j) of IPC or Sections 4 and 8 of POCSO. The evidence of the school authorities on the point of birth certificate is also tentative inasmuch as the foundational document has not been issued by the competent authority and secondly the date on the document has been scored and, thus, cannot be taken aid of to form the basis of age of the victim. The benefit of doubt must go to the accused.

32. The learned trial Judge has thus committed a grave error in assessing the evidence and accordingly arrived at a perverse finding. The first three points framed by me are accordingly answered.

As regards Point Nos. (iv) and (v):

33. Having answered the first three points in the negative, the impugned judgment is unsustainable in the eyes of law and is liable to be quashed and set aside. In other words, it calls for interference. Hence, the following order:-

ORDER

- i) Criminal Appeal No.186/2023 is allowed.
- ii) The impugned judgment and order dated 19.05.2022 passed by the learned Additional Sessions Judge, Nagpur in Spl.POCSO Case No. 110/2016 is hereby set aside.
- iii) The accused-Sagar Bharat Hiwrale, is acquitted of the offence punishable under Sections 363, 376(2)(i)(j) of the IPC and Sections 4

and 8 of the POCSO

- iv) The accused-Sagar Bharat Hiwrale, be set at liberty forthwith if he is not required in any other case.
- v) Professional fees of Ms H.S.Dhande, learned Advocate (appointed) for the victim, be quantified and paid as per the Rules.

(ANIL L. PANSARE, J.)

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