

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

CRIMINAL APPEAL NO. 348/2021

Rama Vitthal Nandanwar,
aged about 35 years, Occ. Labour,
R/o. Indira Nagar, Sutala Bk.,
Tq. Khamgaon, Dist. Buldana.

APPELLANT
(In Jail)

VERSUS

State of Maharashtra,
through P.S.O., P.S. Shivajinagar,
Tq. Khamgaon, Dist. Buldana.

RESPONDENT

Mr. Sumit G. Joshi, Advocate (appointed) for appellant.
Mr. M.J.Khan, Additional Public Prosecutor (APP) for respondent/State.

CORAM : **VINAY JOSHI AND**
VALMIKI SA MENEZES JJ.

DATE OF JUDGMENT : **12TH JANUARY, 2023**

JUDGMENT (PER VINAY JOSHI, J.)

The appellant/accused is convicted for the offence punishable under Sections 376(2)(i) of the Indian Penal Code, Sections 3(1)(w)(ii), 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 ('Atrocities Act') and Section 6 of the Protection of Children from Sexual Offences Act, 2012 ('POCSO Act') by the learned Special Judge, Khamgaon, District Buldana on 17.08.2020 in

Spl. Child Case No. 10/2017. The Trial Court has sentenced the accused to undergo rigorous imprisonment for 10 years for the offence punishable under Section 376(2)(i) of the Indian Penal Code and Section 6 of the POCSO Act each. For the offence punishable under Section 3(1)(w)(ii) of the Atrocities Act, accused is sentenced to undergo rigorous imprisonment for six months and for the offence punishable under Section 3(2)(v) of the of the Atrocities Act, sentenced to undergo rigorous imprisonment for life. Besides that the Trial Court has imposed fine with default clause under each head.

2. The prosecution case as unfolded is about penetrative sexual assault amounting to rape on a school going girl aged 11 to 12 years. The informant is real elder brother of the victim girl. At the relevant time, victim was studying in 5th standard. On 23.12.2016, the victim girl remained in the house and slept. The informant asked her as to why she slept. On which she stated that she is suffering from stomach pain and her neck was also paining. On the following day in the morning i.e. on 24.12.2016 nearby lady Sakhubai conveyed to the informant that on the earlier day i.e. on 22.12.2016, in the afternoon accused – Rama came to their house, offered Rs. 10/- and asked her to accompany in the field for picking jujube fruits. When they went to nearby field, the accused removed her undergarments, slept on her person and had committed sexual intercourse. The victim also disclosed

that she started to raise alarm, however the accused pressed her mouth and threatened to not to disclose the things. After knowing the happenings from Sakhubai and her sister (victim), informant took his minor sister to nearby Medical Officer and brought the tablets.

3. On 25.12.2016, when the informant was at his working place, his uncle Ganesh telephonically informed that victim is badly unwell, therefore, he returned to the house and learnt that victim was suffering pains at her urinal place as well as it was bleeding. Thereafter, he went to the Police Station with minor victim aged 11 years and lodged oral report. It was reduced into writing as per her contention (Exh. 24). On the basis of said report, the Police Officer registered Crime No. 209/2016 for the offence punishable under Sections 376(2) (i) of the Indian Penal Code, Sections 4 and 8 of the POCSO Act and Section 3(1)(r)(s)(w) of the Atrocities Act. The printed First Information Report ('FIR') is at Exh. 25.

4. The Investigating Officer sent the victim to the General Hospital Khamgaon for medical examination. He has seized clothes of the victim from her house. The statement of minor victim was recorded as per her narration. The accused was apprehended. The Investigating Officer went to the house of accused and seized his clothes. The Panchanama of the scene of offence was drawn. Seized articles alongwith samples were sent for chemical analysis. The accused was

referred for medical examination to the General Hospital Khamgaon. The victim was admitted to the hospital from 25.01.2016 to 29.12.2016. The victim's statement was recorded under Section 164 of the Code of Criminal Procedure ('Code'). Caste certificate of victim was collected. After completion of investigation, charge-sheet has been filed in the Special Court. Birth certificate of victim was collected and tendered in the Court.

5. The learned Special Judge framed charges for aforesaid offences. In order to establish the levelled charges, the prosecution has examined as many as 11 witnesses and also banks upon certain documents. After full-dress trial, the learned Special Judge convicted the appellant/accused as aforementioned which is the subject matter of challenge in this appeal.

6. We have heard Mr. Joshi, learned appointed counsel for the appellant at length and Mr. Khan, learned APP for the State. The learned counsel appearing for the appellant straneously argued that the prosecution has utterly failed to prove the age of the victim girl. He would submit that since the accused is charged under the POCSO Act, it is incumbent on prosecution to establish her age. He would submit that there is delay in lodgment of FIR. He took us through certain inconsistencies to improbabilise the prosecution case. It is submitted that the prosecution utterly failed to establish that the accused was

knowing about the caste of victim and thus, conviction under the provisions of Atrocities Act is unsustainable in the eyes of law.

7. Per-contra, the learned APP submitted that the learned Special Judge has evaluated the prosecution case in proper perspective and has returned the correct finding about the guilt of accused. He took us through the victim's evidence to contend that minor girl has specifically stated the incident in detail which has not been shattered during cross-examination. Simultaneously, he took us through the medical evidence to state that it squarely corroborates the victim's evidence on the point of penetrative sexual assault. Besides that, he would submit that the Investigating Officer has produced the birth certificate of victim showing her date of birth as 16.07.2006 which is issued under the provisions of the Registration of Births and Deaths Act, 1969 ('Act of 1969'). He has also attracted our attention to the caste certificate issued in Form-6 by the competent authority showing that victim belongs to the Scheduled Caste. On the basis of said material, he prayed for dismissal of appeal.

8. We have given thoughtful consideration to rival submissions and gone through the entire record and proceeding. It is prosecution case that victim's date of birth is 16.07.2006, meaning thereby she was 11 years of age at the time of occurrence. Since the accused is charged under the provisions of POCSO Act, it is prerequisite to establish that the

victim was “child” within the meaning of Section 2(d) of the POCSO Act. No doubt the provisions of the Special Act are stringent having inbuilt statutory presumption, therefore the prosecution is under obligation to prove the age of the victim to the satisfaction of the Court. The burden lies on the prosecution to prove that the age of the victim on the date of occurrence was less than 18 years.

9. The learned counsel appearing for the appellant has primly submitted that the prosecution has failed to establish the age of victim which goes to the root of the case. He would submit that neither the victim nor the witnesses have stated about the date of birth of the victim. It is his submission that mere production of date of birth certificate is not enough to place reliance. In the light of these submissions, we have scrutinized the entire evidence. The victim do not specifically stated her date of birth. However she being a “child” witness, the Trial Court has asked the preliminary question and recorded that the victim disclosed her age as 13 years. The uncle of victim (PW-3) has stated that the date of birth of victim is 16.07.2006. Pertaining to note that the defence has not challenged the age of victim during cross-examination. In this regard, the learned counsel for appellant would submit that since the victim has not stated her date of birth, there is no occasion for defence to challenge her age. However, we are not in agreement with said submission because the Trial Court

has specifically recorded in evidence that the victim girl has disclosed her age as 13 years and therefore, the accused ought to have challenged the same. Moreover, since inception, accused was charged for the offence punishable under the POCSO Act, meaning thereby it was within his knowledge that the prosecution is coming with a case that victim is a “child” and therefore, absence of challenge to said aspect assumes significance.

10. The prosecution heavily banks upon the birth certificate (Exh. 90) issued by the competent Authority under the Act of 1969. As per said certificate, date of birth of victim (name mentioned) is 16.07.2006, meaning thereby she was 11 years of age at the time of occurrence. The defence has criticized the date of birth certificate contending that though as per certificate, victim born on 16.07.2006, however certificate was issued on 09.01.2020. We are not influenced by said submission because as per birth certificate, the relevant entry was registered on 30.07.2006 itself, i.e. within 15 days from the birth of child. In terms of Section 35 of the Indian Evidence Act, date of birth certificate being public document, carries preventive value. Therefore, unless a genuineness of birth certificate is doubted for substantial reason, it cannot be discarded.

11. The learned counsel appearing for the accused would submit that the birth certificate of victim was procured by the

Investigating Officer during the course of trial and therefore, it cannot be relied. In this regard, he relied on the decision of this Court in case of *Ravi Anandrao Gulpude Vs. State of Maharashtra, 2017 ALL MR (Cri) 1509*. True, in the said case birth certificate was produced by the Investigating Officer, on which the this Court did not rely. However, said decision was based on factual discrepancies. This Court took note that in the said certificate a nickname of child was recorded whilst the child was having three other sisters. Moreover, the birth certificate was issued prior to the requisition letter and thus, in view of those peculiar facts, this Court has not relied on said certificate. The case in hand materially differs as the birth certificate has been issued by the competent authority. There are no discrepancies nor anything has been pressed into service to discard the public document. The birth entry was registered within fortnight in-proximity which accentuates the genuineness of birth certificate. Therefore, we see no reason to discard the birth certificate which is primary document in proof of age.

12. Moreover, to impeach the evidence on the date of birth, the appellant relied on the another decision of this Court in case of *Deepak s/o. Jitendra Sawant Vs. The State of Maharashtra, 2017 ALL MR (Cri) 2058*. In the said case, there was no whisper about date of birth of victim, nor birth certificate was procured. The said decision is obviously distinguishable on facts as herein date of birth certificate is produced

and therefore, accused would not muster any strength on said decision. Though defence's counsel has shown some variances to contend that the age of victim was differently stated in between 11 to 13 years, however, that makes no difference. It is abundantly clear that victim was barely 11 years of age and therefore, we have no hesitation to hold that the victim was "child" within the meaning of Section 2(d) of the POCSO Act.

13. Once the aforesaid evidence in respect of the date of birth is accepted, the inquiry proceeds to the another vital aspect of the case. So far as offences punishable under Section 376 of the Indian Penal Code and POCSO Act are concerned, we have gone through the evidence of material witnesses. The prosecution has examined victim girl (PW-1) for that purpose. It is her evidence that, at the relevant time she was studying in 4th standard. On the date of occurrence, her friend Deepali along with her maternal uncle Rama (accused) came to her house. They asked her to accompany them to fetch jujube fruits. Accused offered her Rs. 10/- and took her in the field. At said place, accused made her to lie and forcibly removed her slack. He has also removed his clothes and slept on her body. Accused inserted his private part at her urinal place. She stated that it was bleeding from her urinal part, therefore she raised alarm. The accused gagged her mouth by his hand and threatened for not to disclose, otherwise she would be killed.

14. It is victim's evidence that after incident, she returned to her house and slept. She was paining at her stomach and throat. On the following day, she disclosed the things to nearby lady Sakhubai (PW-5) who in turn informed the same to informant (PW-2). The record indicates that the Trial Court took requisite precaution as contemplated under Section 36 of the POCSO Act while recording victim's evidence. She was put to searching cross-examination, but besides inconsequential things, nothing yielded.

15. The prosecution has examined informant (PW-2), who has consistently stated that on the following day of the occurrence, Sakhubai (PW-5) disclosed the things. It is his evidence that the victim girl was paining, therefore he extended medical help. He has asked the victim on which she disclosed the things as happened. Contextually, we have gone through another crucial witness PW-5, Sakhubai who was neighbouring lady. She has equally stated that on the following day of the incident, she found that victim girl was paining in her stomach, burning sensation in her vagina and it was bleeding. On inquiry, victim disclosed that the accused has committed forcible sexual intercourse in the field. The evidence of these three witnesses is consistent on the point of minor girl was suffering pain at her private part and her discloser about the atrocity committed by accused.

16. The next limb of prosecution case is about medical evidence. In this regard prosecution has examined PW-6, Dr. Neeta Lahariya, who has examined the victim on 25.12.2016. She has recorded the history of sexual assault as narrated by victim. On her examination, she noted that there was bleeding in victim's urine. She found that there was discharge in labia majora, abrasion in labia minora ad-measuring 1/4th cm vertical on both sides. Redness was present on fourchette and hymen edematous (swelling). She expressed that there was attempt of penetration upon her. We have also gone through the medico-legal-examination report (Exh.42). The report contains history pertaining to sexual assault by accused. The report specifically indicates the above injuries as stated by the Medical Officer in his evidence.

17. Though it is submitted that the Medical Officer has not given final opinion, however finding of injury on private part is indicator of sexual assault on the canvass of direct evidence of minor victim. In short, the evidence of minor victim coupled with scientific corroboration is worthy of credit. The evidence specifically indicates that the accused had penetrated his private part in her vagina amounting to rape as well as penetrative sexual assault.

18. The defence though criticized on the point of delay in lodgment of FIR, it is well accepted that in case of sexual offence, mere time gap cannot be termed as unexplained delay. The reason is obvious

that in our society, people are reluctant to immediately rush to the Police since it is affair of chastity and pride of the family. It has come in the informant's evidence that on the following day of the occurrence, he came to know about happening then on next day, his uncle (PW-3) has stated that minor victim is suffering badly and thus, on the following day, he went to the Police Station and lodged report. Evidence of uncle (PW-3) is also led to that extend. Pertinent to note that the victim girl lost her parents at her childhood. She was living alone with her brother (informant) and considering all these circumstances, time consumed by informant in lodging report cannot be treated as inordinate delay to raise a doubt. Therefore, submission in this regard is untenable. In short, the prosecution's evidence is credible and trustworthy to establish that the accused has committed penetrative sexual assault on minor victim.

19. The accused has also been charged for the offence under the Atrocities Act. It is prosecution case that the victim belongs to scheduled caste and therefore, it attracts the provisions of Section 3(1)(w)(ii) and Section 3(2)(v) of the Atrocities Act. The prosecution also led evidence of PW-11, Retired Sub-Divisional Officer who has issued caste certificate in the name of victim girl. The caste certificate (Exh.94) discloses that the victim belongs to scheduled caste. In this regard, the learned counsel appearing for the appellant would submit that merely

because victim belongs to scheduled caste that by itself is not suffice to attract the charged offences. It is his submission that unless knowledge attributes to the accused about the caste of victim, the offence is not complete. Re-look to above statutory provisions under Atrocities Act unequivocally conveys that knowledge of caste of the victim is one of the essential ingredient to constitute the offence. In this regard, we have gone through the entire material. The prosecution has submitted that since both victim and accused are resident of same village, one can very well assume that accused had knowledge about caste of victim.

20. Perusal of entire material though discloses that both belongs to one village and area, however they are not the neighbours. There is no evidence that both family knows each other or since long, they had acquaintance. As per prosecution case, accused was maternal uncle of victim's friend, therefore something more is necessary to hold that accused had conscious knowledge about the victim's caste. Merely because they belong to the same area, one cannot assume knowledge of caste on conjuncture and surmises. The criminal law must be strictly construed, therefore, we are reluctant to assume that accused had knowledge about the caste of victim and the offence was committed only because of the caste of victim. For this purpose, we may refer to the decision of the *Supreme Court in case of Hitesh Varma Vs. State of Uttarkhand, (2020) 10 SCC 710*.

21. We have re-appreciated the entire material on the anvil of rival submissions. We are of the considered opinion that the prosecution has convincingly and firmly established that the accused has committed offence of rape and penetrative sexual assault on the minor victim. The Trial Court has considered the evidence in this regard in proper perspective and thus, we uphold the conviction of accused for aforesaid offence. So far as the conviction under the Atrocities Act is concerned, for the reasons stated above, the accused is entitled for benefit of doubt and therefore, conviction under special statute is unsustainable in law.

22. In view of above, the appeal is partly allowed. We maintain the conviction of appellant/accused for the offence punishable under Section 376(2)(i) of the Indian Penal Code and Section 6 of the POCSO Act. However, we hereby set aside the conviction of accused for the offence punishable under Section 3(1)(w)(ii) and Section 3(2)(v) of the Atrocities Act. The rest of the operative part of the order remains as it is.

23. Appeal stand disposed of in above terms.

24. Fees for the learned appointed counsel for the appellant be paid as per Rules.

(VALMIKI SA MENEZES, J.)

Gohane

(VINAY JOSHI, J.)