



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 42 OF 2022

Punamchand Kachrusing Bahure
Age : 48 yrs, occ : labour
R/o Lane No.3, Near Ganesh Kirana
Shop, Shambhunagar, Garkheda
Parisar, Aurangabad

Appellant

Versus

1. The State of Maharashtra
Through Jawaharnagar Police
Station, Aurangabad

2. XYZ (victim)

Respondents

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Mr. U.L. Telgaonkar, Advocate for the appellant (appointed).
Mrs. D.S. Jape , A.P.P. for respondent No.1 - State.
Ms. Rani Tandale, Advocate for respondent No.2 (appointed).

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CORAM : **SANDIPKUMAR C. MORE, J.**

Judgment reserved on : 16 October 2023

Judgment pronounced on : 4 January 2024

JUDGMENT :

1. The appellant/accused who is in jail, has preferred this appeal challenging his conviction under Sections 376 (2) (f), 354, 354A and 354B of the Indian Penal Code and under Sections 4, 6, 8 of the Protection of Women from Sexual Offences (POCSO) Act, imposed upon him by the learned Special Judge (POCSO), Aurangabad (hereinafter referred to as “the learned trial Court”) under the judgment dated 02.01.2021 in Special Case No. 37/2018. The

appellant/accused has been convicted for the offences punishable under the aforesaid sections and sentenced to suffer imprisonments alongwith fine under these sections. The maximum sentence of imprisonment awarded to the appellant/accused is of 20 years alongwith fine.

2. The prosecution case, in brief, is as under :

On 26.01.2018 at about 11.00 p.m. the victim i.e. the daughter of the appellant/accused was sleeping on the cot in their house alongwith her mother and brother. At that time the appellant/accused had slept on the ground. However, in the night when the victim was asleep, the appellant/accused pressed her mouth and brought her on the ground. He pressed her mouth and pulled her Salwar and also removed her nicker. The appellant/accused had already removed his own clothes. Then he slept on victim and inserted his private part into the private part of the victim. Though the victim attempted to shout because of pains, but could not shout as her mouth was pressed by the appellant/accused. After committing forcible sexual intercourse, the appellant/accused threatened her not to tell the incident to anybody, otherwise he would kill her. In the morning victim told the incident to her mother i.e. PW-3 Aruna and then her mother alongwith neighbours took the

victim to police station and lodged report of the incident. Thereafter investigation started and PW-10 A.P.I. Wevhal, on completion of investigation, charge-sheeted the appellant/accused.

3. Learned trial Court, after conducting the trial, found the appellant/accused guilty for the offence under the aforesaid Sections and sentenced him to suffer imprisonment and fine as mentioned in the operative part of the judgment. Hence, this appeal.

4. The defence of appellant/accused before the learned trial Court as per the line of cross-examination appears to be of false implication. According to him, grandfather of the victim was in police who used to call the mother of victim frequently to his house for doing agricultural work and his wife i.e. the mother of victim used to act as per the advice of her father. He contended that since the relationship between himself and the mother of victim was not cordial, she used to demand share in his property which stood in the name of his mother. According to him, mother of the victim used to demand possession of two rooms out of six rooms which stood in the name of his mother. According to him, on these counts his own wife falsely implicated him in this crime.

5. Learned Counsel for the appellant/accused submits that the learned trial Court has not properly appreciated the evidence on record and wrongly convicted the appellant/accused. According to him, the learned trial Court should not have sentenced the appellant/accused to suffer imprisonment under the provisions of I.P.C. as well as under the provisions of POCSO Act simultaneously. He pointed out that there was no penetration at all found in the medical examination and there was no proper evidence on record which could have indicated that the victim was under the age of 18 years. He pointed out that there is no documentary evidence of age on record to show that the victim was 14 years old at the time of incident. He pointed out that xerox copy of birth certificate of victim was not admissible in the evidence and the learned trial Court did not even care to frame point in respect of minority of the victim. Thus, he submitted that the case of prosecution was entirely doubtful and hence prayed for acquittal of the appellant/accused. Besides submissions at bar, he relied on the judgment in the case of **Guda Mahender s/o Late Venugopal vs State of Telangana** in **Criminal Appeal No. 219 of 2021** delivered by Telangana High Court at Hyderabad.

6. On the contrary, learned A.P.P. strongly opposed

the submissions made on behalf of the appellant/accused. He pointed out that the prosecution has examined Principal of the School of victim namely Sudhakar Pawar as PW-9 according to whom birth date of victim was found to be 16.09.2002. He pointed out that on the copy of birth certificate which is in police papers, there is no overwriting in respect of the date of birth. He also pointed out that as per the evidence of Medical Officer PW-6 Dr. Pratima Gaikwad who had examined the victim, the possibility of sexual intercourse was not ruled out. According to him, the C.A. reports on record also support the case of prosecution and it was highly impossible to falsely implicate the appellant/accused by putting reputation of the family on stake. As such, the learned A.P.P. prayed for dismissal of the appeal.

7. On the other hand, learned Counsel for respondent No.2/victim also supported the impugned judgment as well as arguments advanced by the learned A.P.P. According to her, the evidence of victim is well supported by scientific and medical evidence on record. Moreover, the Medical Officer who had recorded history of the victim prior to examination, has also specifically stated that the possibility of sexual intercourse was not ruled out.

Besides her oral submissions, she relied on the following judgments :

- (i) *Krishan vs State of Haryana, 2014 AIR SCW 3612***
- (ii) *Ram Guru vs State (NCT of Delhi), 2022 SCC Online Del 3762***
- (iii) *Radhakrishna Nagesh vs State of Andhra Pradesh, 2013 All.M.R. (Cri.) 711***

8. Heard rival submissions. Also perused the entire oral and documentary evidence on record.

9. It appears that the learned trial Court has observed that the age of victim being of 14 years at the time of incident is not seriously disputed. However, learned Counsel for the appellant/accused while arguing before this Court has made submissions pointing out to the relevant part of evidence of victim that the age of victim was more than 18 years as the victim was in 8th Standard but remained idle for four years thereafter, and therefore, according to him, she must be more than 18 years. However, the prosecution has examined PW-9 Mr. Sudhakar Pawar who was the Principal of the School where the victim had taken education. The record shows that he had also brought original record pertaining to the admission of the victim. According to him, birth certificate of the victim was collected and as per the same her

date of birth was '16.09.2002'. He also produced extract of general register at Exh. 96 indicating the birth date of victim as aforesaid. Though an attempt was made on behalf of the appellant/accused by suggesting this witness that there was overwriting in the column of birth date, but on perusal of said extract (Exh.96), nothing of that sort has been found.

10. On perusal of the cross-examination of this witness, it was suggested on behalf of the appellant/accused that there was overwriting and scratches in the column of date of birth of the victim in her original birth certificate. Further, it was also suggested that the contents of the said birth certificate and signature thereon by the Village Development Officer were written in different ink. Though this witness has admitted these suggestions, but it appears that the original birth certificate referred to this witness is not on record. On the contrary, it's true copy which was referred to this witness, finds place in the record. It appears that by referring this true copy the concerned Advocate for the appellant/accused must have made the aforesaid suggestions to this witness. Thus, when this true copy was referred to the witness, the learned trial Court should have exhibited the same. Even though the said copy was not exhibited by the learned trial Court, but on perusal of the same, there is no

overwriting at least in respect of birth date of victim. On the contrary, it appears that the writer of the said birth certificate must have committed mistake by writing the word “Dongargaon” which he subsequently scratched out in the column of date of birth of victim. In the subsequent column of birth place he has thereafter mentioned the village “Dongargaon” which he had wrongly written in the birth date column. Thus, the scratching out the word “Dongargaon” in the column of birth date of victim is not at all significant. Thus, it appears that the birth date of victim being 16.09.2002 was rightly recorded, and therefore, the learned trial Court has rightly observed that the victim was under the age of 18 years at the time of incident. Thus, there is no force in the submission of the learned Counsel for the appellant/accused that the victim was over the age of 18 years at the time of incident.

11. Learned Counsel for the appellant/accused also submitted that the learned trial Court has made grave mistake in sentencing the appellant/accused for imprisonment simultaneously under the Sections of I.P.C. as well as Sections of POCSO Act. On going through Section 42 of the POCSO Act, it is only mentioned that when the accused is found guilty for the offence punishable under the Sections

of POCSO Act and also under Sections of other Penal Act, then the offender shall be liable to punishment under POCSO Act or under I.P.C. which is greater in degree. Here in this case, though the learned trial Court has sentenced the appellant/accused for imprisonment for the offences under I.P.C. as well as POCSO Act simultaneously, but punishment under the provisions of POCSO Act, which is greater in degree, is also imposed on the appellant/accused. It is significant to note that all the sentences of imprisonment under the provisions of both these Acts are to be run concurrently, and therefore, I do not find any force in the submission of the learned Counsel for the appellant/accused that the appellant/accused cannot be sentenced for the offence punishable under POCSO Act as well as I.P.C. simultaneously. By awarding the punishment of greater in degree under POCSO Act in addition to punishment under I.P.C. which was to be run concurrently, the learned trial Court has followed mandate of Section 42 of the POCSO Act.

12. Now coming to the evidence in respect of the main incident, it appears that as regards the main incident the evidence of victim is important as there is no other eye witness to the incident. The evidence of mother of victim i.e. PW-3 Aruna only indicates that the victim had narrated the

incident of night to her on next morning. Learned Counsel for the appellant/accused pointed out that the evidence of victim appears doubtful, and therefore, in absence of any corroboration it should not be believed. However, the Hon'ble Apex Court in the case of ***State of Punjab vs Gurmit Singh*** has observed that minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. Evidence of the victim of sexual assault is enough for conviction and does not require corroboration unless there are compelling reasons for seeking corroboration. The court may look for some assurances of her statement to satisfy judicial conscience. Similarly, the Hon'ble Apex Court in the case of ***Phool Singh vs State of Madhya Pradesh*** has also observed that even if the medical evidence did not support the prosecution and the entire case of prosecution rests on the sole deposition of the prosecutrix, while relying on multiple judgments, observed that as a general rule, if credible, conviction of the accused can be based on sole testimony, without corroboration and that sole testimony of prosecutrix should not be doubted by Court merely based on assumptions and surmises. Even in the case of ***Vijay vs State***, the Hon'ble Apex Court has dismissed the appeal against

conviction on the ground that child victim's testimony had been consistent and no contradictions were found in the victim's testimony. From these observations it has been made clear that conviction of the accused can be based on sole testimony of the prosecutrix if found reliable and trustworthy.

13. In the instant case, the victim has stated the incident as per the prosecution story and her version remained unshattered in the cross-examination also. Besides the incident, she also stated that same incident of forcible sexual intercourse had happened with her prior to marriage of her sister Rupali and at that time Rupali had seen the act of the appellant/accused and even beat the appellant/accused with stick blows. Though the evidence of mother of victim i.e. PW-3 Aruna is not so helpful to the prosecution case, but at least it indicates that the victim had immediately told her about the incident next day morning. Though the sole testimony of the prosecutrix is sufficient to convict the accused in rape cases, but court can go for other supporting evidence also. In the instant case, besides the evidence of victim, the evidence of Medical Officer i.e. PW-6 Pratima Gaikwad is also on record. This witness has stated that prior to medical examination of the victim, she had recorded the history wherein the victim told her about attempt of sexual

intercourse with her by her own father i.e. the appellant/accused. Though this witness has stated that there was no evidence of injury or mark on genital examination of victim and final opinion was reserved till availability of FSL report, but while giving opinion she had stated that the possibility of sexual intercourse with the victim could not be ruled out.

14. Learned Counsel for the appellant/accused vehemently argued that there were no signs of injury or mark on the private part of the victim, and therefore, the medical evidence had in fact supported defence of appellant/accused. He pointed out that there were no signs of tearing of hymen or penetration. However, learned Counsel for respondent No.2 heavily relied on the judgment of the Hon'ble Apex Court in the case of **Radhakrishna Nagesh vs State of Andhra Pradesh** (supra), wherein it has been observed that penetration may not always result in tearing of the hymen and the same will always depend upon the facts and circumstances of each case. It is also observed that if there was limited penetration then there may be probability of non rupture of hymen of victim girl. It has been clearly observed further that even if there is no penetration, it does not necessarily mean that there is no rape. As such, in absence of these facts still the evidence of Medical Officer indicates

that there was possibility of sexual intercourse. This Medical Officer PW-6 Pratima Gaikwad when shown C.A. report, recorded her final opinion that, sexual intercourse with the victim could not be ruled out. Therefore, the submission on behalf of the appellant/accused that no injuries were found or there were no signs of force as transpired to the Medical Officer, is not helpful to the appellant/accused.

15. Further, the evidence of PW-4 Umesh Kharat who is the panch witness and in whose presence clothes of victim girl were attached, indicates that police had seized clothes of victim and prepared spot panchnama in his presence. Further, though PW-5 Parmeshwar i.e. the panch on the seizure of clothes of accused did not support the prosecution, but in the cross-examination he has admitted that the clothes of the appellant/accused were attached in his presence under panchnama Exh.27. He also identified those clothes at Article E to G. It is significant to note that bed-sheet, top, Salvar and nicker of victim attached during the course of investigation were sent for chemical analysis and the report (Exh.109) regarding the same indicated that there was blood on the Leggings and Jangya and semen on the nicker of victim. These circumstances definitely indicate that there was sexual intercourse between the appellant/accused and

victim. Therefore, the circumstantial evidence also supports the testimony of victim.

16. The appellant/accused has raised defence that he has been falsely implicated because his relation with his own wife i.e. the mother of victim was strained due to his second marriage with one lady by name Meenabai and the mother of victim was also demanding two rooms or Rs. 25,00,000/- (Rupees Twenty Five Lakh) from the property of his mother. However, such type of defence appears completely improbable since in our society no mother can put self respect and dignity of her own daughter on stake to take revenge of her own husband due to his relations with another lady. Therefore, considering all the aforesaid aspects and entire material on record, it appears that the prosecution has established the guilt of appellant/accused beyond all reasonable doubts. This Court does not find any merit in the appeal, and therefore, it stands dismissed. The fees of the appointed Advocates for the appellant/accused as well as respondent No.2/victim is quantified to Rs. 7,000/- each. Appeal is accordingly disposed of.

(SANDIPKUMAR C. MORE, J.)