



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 74 OF 2022

. Sachin s/o Sanjay Giri
Age: 20 years, Occu.: Labourer,
R/o. Shenkud, Tq.Ahmedpur,
Dist.Latur.Appellant
(Orig. Accused)

Versus

1. The State Of Maharashtra
Through Police Station Officer,
Ahmedpur Police Station,
Tq.Ahmedpur, Dist.Latur.
2. XYZRespondents

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Advocate for Appellant : Mr. P. P. More
APP for Respondent no.1: Mr.S.M.Ganachari
Advocate for Respondent no.2 : Mr.Rahul A.Tambe

...
CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 04 JANUARY, 2024
PRONOUNCED ON : 08 JANUARY, 2024

JUDGMENT :-

1. Appellant, convict for offence punishable under Sections 376(3), 377, 506 of the Indian Penal Code (IPC) and under Sections 4 and 6 of the Protection of the Children from Sexual Offences Act (POCSO Act) is taking exception to the judgment and order passed by the Special Judge and Additional Sessions Judge, Ahmedpur, Dist.

Latur dated 05-01-2022 in Special (POCSO) Case No.4 of 2020 by invoking Section 374 of the Code of Criminal Procedure (Cr.P.C.)

CASE OF PROSECUTION IN BRIEF

2. In brief, Prosecution was launched by setting up a case that victim, a 6 years old girl, was sexually assaulted and ravished by appellant by luring her with chocolate and edibles on 13-01-2020 i.e. while she was put up with her old and infirm great grandfather. The victim informed her mother and she was thereafter taken for medical examination which revealed sexual assault. PW2 mother of victim lodged report with Ahmedpur Police Station on the strength of which crime was registered and it was duly investigated by PW8 Nagorao Jadhav (PSI), who on completion of investigation, chargesheeted appellant.

On committal of case before learned Special Judge, trial was conducted and concluded which culminated into conviction as stated above and the same judgment and order is now hereby questioned by filing instant appeal.

SUBMISSIONS

On behalf of appellant :

3. Learned Counsel for appellant would criticize the prosecution

case and evidence by pointing out that case has not been proved beyond reasonable doubt. According to him, firstly, there is immense delay in lodging FIR as according to him, alleged occurrence is of 13-01-2020 but reporting and lodgement of FIR is on 19-01-2020 i.e. almost after a week and further according to him, there being no explanation for the delay, it was fatal for the prosecution. He would question the story of prosecution by submitting that how findings of PW6 Dr.Madhusudan Cherekar after a week went unnoticed even from PW2 mother, who had travelled with the victim from one place to other. That versions of complainant mother and victim are not consistent. According to him, the victim has been tutored to implicate applicant with ulterior motive in the backdrop of dispute over a plot on which tea stall is being run by father of complainant and with sole intention of grabbing the premises, there is possibility of false implication. In support of such case, he seeks reliance on testimonies of defence witnesses DW1 Eknath Shrimangale, DW2 Rasikabai, DW3 Vandana Giri and DW4 Vinjod Giri.

4. He further pointed out that going by the spot panchanama, it is evident that great grandparents of victim were very much available in the adjoining room having no doors and thus, according to him, it is

impossible to commit sexual assault in their presence. On such count he doubts prosecution version.

5. He also attacked the prosecution case by submitting that, at the threshold prosecution had not adduced clear, cogent and clinching evidence to show that victim is a minor so as to attract offence under the POCSO Act.

6. According to learned Counsel for appellant, it has come on record in the evidence that PW6 Dr.Cherekar, who opined sexual assault, was acquainted with complainant mother, who happens to be a Nurse and therefore, certification and medical record is got fabricated and manufactured.

Resultantly, it is his submission that in the light of above crucial aspects and the fact that there is improper appreciation of evidence and various circumstances rendering prosecution case doubtful, he prays to allow the appeal by setting aside the impugned judgment and order of conviction.

On behalf of State :

7. In answer to above, learned APP while refuting the above submissions, would submit that a minor 6 years old girl has been

ravished. She has been examined in the trial Court and she has identified appellant convict, who was her relative and he had taken undue advantage of her loneliness. He pointed out that medical evidence corroborates and supports her testimony. According to him, available evidence has been correctly appreciated and only on satisfaction about availability of necessary ingredients in the evidence, charges have been held to be proved. There is no perversity and so he prays to dismiss the appeal.

8. Learned Counsel for victim seeks permission to adopt the arguments advanced by learned APP and he too prays to dismiss the appeal. Permission is granted.

EVIDENCE ON BEHALF OF PROSECUTION

9. At trial, prosecution has based its case on the evidence of eight witnesses.

PW1 Shaikh Mustafa Amirsab seems to be Pancha to spot panchanama, which he identified to be at Exh.40.

PW2 mother of victim deposed that she, her husband and victim daughter had been to see her grandfather. Accused, who is her cousin, had also come there for the same purpose. According to

her, on 15-01-2020 she went to Vaijapur alongwith her family members. While she and her husband were in the house on 18-01-2020, victim girl told about acts of appellant and about threats to kill and therefore, she lodged FIR on 19-01-2020 at Ahmedpur Police Station.

PW3 victim gave her age as seven years and in her testimony at Exh.45, after identifying appellant sitting in the dock, deposed that he disrobed her and raped her and thereafter, threatened to kill her, if she discloses it to anyone.

PW4 Dr.Jayprakash Anirudha Kendre is the Doctor, who examined the appellant and further certifying him to be potent.

PW5 Raju Balaji Kamble is Pancha to memorandum of disclosure under Section 27 of the Indian Evidence Act at the instance of accused regarding showing the spot.

PW6 Dr.Madhusudan Shrinivasrao Cherekar is the medical expert, who had occasion to physically examine victim and issue medical report.

PW7 Trimbak Dhondibarao Kamble an official of Municipal Council placed on record certified copy of date of birth register Exh.63, birth certificate Exh.64. Birth registration extract Exh.65.

PW8 Nagorao Vasantrao Jadhav (PSI) is Investigating Officer,

who narrated about all steps taken by him during investigation till filing of chargesheet.

ANALYSIS

10. Here appellant is held guilty for offence punishable under Sections 376(3), 377 and 506 of the IPC. Before advertng to the merits of the case, it would be apt to reproduce the essential ingredients for attracting the offence under these Sections :

“Section 376(3).

Accused committed one or more of the following acts:

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person: or

(b)

(c)

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person.

Section 377.

(1) Accused had carnal intercourse;

(2) Such intercourse was with any man, woman or animal;

(3) It was against the order of nature.

Section 506.

(1) the accused threatened some person;

(2) such threat consisted of some injury;
(i) to his person, reputation or property, or
(ii) to the person or reputation of any one in whom the
person threatened was interested;
(3) that the threat must be with intent;
(i) to cause alarm to that person, or
(ii) to cause that person to do any act which he is not
legally bound to do or omit to do any act which he was legally
entitled to do, as a means of avoiding the execution of such
threats.”

11. This being first appellate Court, in view of law laid down in the case of *Ishvarbhai Fujibhai Patni v. State of Gujarat; (1995) 1 SCC (Cri.) 222* and also in *Geeta Devi v. State of UP and others; 2022 SCC OnLine SC 57*, this Court is expected to re-appreciate, re-examine and re-analyze the entire evidence before the trial Court.

12. Here evidence of complainant mother PW2, victim PW3 and medical expert PW6 Dr.Cherekar is only crucial and of significance.

PW2 Mother, who set law into motion, has deposed that on 13-01-2020, she, her daughters and husband went to see her grandfather. Accused, who is her cousin, had also come to see her grandfather. She returned with her family to Vaijapur on

15-01-2020. She deposed that on 18-01-2020, her daughter informed her that when they had been to see grandfather, at that time appellant had offered her Chips and Chocolate, asked to play game on mobile and taken her to a room. She further deposed that her daughter also told that he removed her clothes, pressed her mouth, took out his own clothes, kissed on her back, stomach, cheek, licked her urine place and even slept over her and inserted something in the urine place. That she also told that he threatened to kill her, if she discloses it to anyone. According to her, the age of her daughter was six years at the time of incident. That accused committed rape on her daughter and therefore, on 19-01-2020, she lodged FIR.

This witness is subjective to extensive **cross-examination** and on carefully going through the same, it is emerging that questions are posed regarding her degree course, service, name of the institution, where she took education. Suggestion that PW6 Dr.Cherekar was working in the Government Hospital is admitted by her, but she denied whether Doctor has a private hospital at Ahmedpur. She flatly denied that PW6 Dr.Cherekar offered private job to her in the hospital. Then she is questioned about job of her husband. She has admitted that DW2 Rasikabai Madhav Giri is her grandmother. She further admitted that on 19-01-2020, she lodged FIR at Ahmedpur

Police Station when she was accompanied by paternal aunt's daughter. She expressed her unawareness about such paternal aunt's daughter lodging complaint of outraging modesty against one Surendra. Then she is questioned about education of accused. Regarding occurrence, cross-examination starts from paragraph no.11, wherein she admitted that the spot of incidence is a room, which is built in stone, having room adjacent to it, which was occupied by her grandfather. Surroundings and circumstances of spot are extracted from her. She is questioned about hotel run by her father, the land on which hotel is erected. She denied that the said land was owned by mother of accused and that inspite of request to vacate the land, her father did not vacate it and about incident of abuses taking place between her father and accused on 15-01-2020. Omission is brought in her statement under Section 164 of the Cr.P.C. to the extent "victim rushing towards her from front direction to tell the acts of accused, about victim telling about incident on 18-01-2020. Rest is all denial.

13. **PW3** is victim. Her evidence is at Exh.45. The victim girl gave her age as seven years and she seems to have answered preliminary questions put up by the leaned trial Court to decide her competence

to depose. Trial judge seems to have taken into account the answers and then opined that she is of sufficient intelligence and understood the duty to speak truth.

In paragraph no.2 she named accused sitting in the dock and then deposed that he gave her chocolate, Kurkure and took her in one room for playing game, he removed her clothes and his own clothes. She made gestures by pointing to her private part and stated that accused licked it and even inserted something having length at that place. She gesticulated even to that extent. She deposed that accused planted kiss on cheeks and stomach and when she cried, he pressed her mouth and told her that if she discloses it to anyone he would kill her. She deposed that when her family members had gone to Vaijapur, she informed about incident to her parents.

Even child is subjected to incisive **cross-examination** about the class and medium in which she studied. She answered that she had been given information by parents as to how she should speak in the Court but she denied that she was given information how to speak. She denied that she was tutored. She has answered that blood was not oozing when act was committed with her. She denied that her grandmother cooked meals in the first room and also denied that even prior to the incident, accused used to offer her chocolates and

toys.

In paragraph no.7 of the cross-examination, omission is brought that “accused kept cloth over her mouth”. She denied that mother came to call her at the spot and that when her mother came accused pushed her and ran away. Omission in her statement under Section 164 of the Cr.P.C. is brought to the extent that mother came to call her and thereafter accused ran away.

She admitted that on the day of incident, she has not informed the incident to her mother. She also denied that she was medically examined at Ahmedpur Government Hospital. Rest all are denial.

14. Now let us see whether medical evidence supports victim’s version as claimed by prosecution.

PW6 Dr.Cherekar, who examined her, has deposed at Exh.58 wherein he stated that while on duty at Rural Hospital at Ahmedpur, on 19-01-2020, he examined victim, who gave history of sexual assault. According to him, the child told that on 13-01-2019, her uncle took her out for offering chips and chocolates and took her in private room and penetrated penis in her vagina and anus. He claims to have noticed abrasions on knee, foot, left forearm, redness and bleeding to vagina, tear to the anus. In his opinion, the child

was subjected to rape. He identified examination report Exh.59 and medical certificate Exh.60.

In **cross-examination**, Doctor has denied that medical staff takes notes during examination. He admitted that he did not record history narrated by child in her own words. He admitted that as per medical jurisprudence he is expected to note history as narrated by victim. He claimed to be unaware that as per the POCSO Act, medical examination of victim girl has to be done by a lady Doctor. He also admitted that Exh.59 does not bear seal of Rural Hospital. He also admitted that redness could be a symptom of vaginal rash due to contact of dermatitis or laundry detergent. He denied knowing of mother of victim and denied knowing that mother of victim completed Nursing course. Rest is all denial.

15. On carefully examining evidence of PW2 mother, it has come on record that on relevant day i.e. on 13-01-2020, victim had accompanied her parents to the house of grandfather. Her evidence about accused, her cousin, also coming there to see grandfather has not been questioned or challenged during cross-examination and therefore, visit of appellant to the house of grandfather of complainant has virtually remained unchallenged. Victim in

unequivocal terms, after pointing to the accused in the dock, has narrated the acts done by him with her. Her testimony as regards sexual assault has also actually remained unshaken. Victim has made gestures by pointing to her private part and deposed about appellant indulging in oral sex and further indulging in penetrative sexual act in vagina as well as anus. Evidence of PW6 Dr.Cherekar, who examined victim, confirms rape i.e. both vaginal as well as anal sex. Such evidence of Doctor has also remained untouched inspite of extensive cross-examination.

16. Criticism made before this Court by learned Counsel is that regarding occurrence of 13-01-2020 FIR is lodged on 19-01-2020. It is true that FIR is lodged on 19-01-2020 but it is only on information being passed by victim to her parents after reaching to their own house at Vaijapur on 18-01-2020. Very next day i.e. on 19-01-2020, PW2 complainant mother has approached Police. It is fairly settled position that in cases of such nature, delay if any, is of no significance. Moreover, victim daughter being ravished by her own cousin brother - appellant, time must have been spent by mother in approaching Police. Therefore, delay so caused itself would not be sufficient to render prosecution version doubtful, more particularly,

when victim has categorically deposed the ordeal faced by her in clear terms.

17. The next criticism about inconsistency in statement of complainant mother and PW6 Dr.Cherekar, also needs to be discarded because both are consistent as regards actual act of sexual assault is concerned. There is bound to be variance in the opinion found by mother and opinion found by PW6 Dr.Cherekar / medical expert regarding nature, signs and impact of act on person of victim. Medical expert had no reason to issue false opinion. Mere coincidence of complainant and PW6 Dr.Cherekar to be posted at one place itself is no ground to presume that, at her instance, Doctor has manufactured evidence. Both PW2 complainant mother as well as PW6 Dr.Cherekar have denied previous acquaintance of each other during cross-examination.

18. As regards to the attack of learned Counsel for appellant that it is not possible to commit sexual assault on victim in the very house comprising of adjoining room having no doors and it to be occupied by grandparents but the act going unnoticed. There is no substance in such argument as victim has deposed about accused offering her edibles and keeping her busy in playing mobile game and thereafter,

disrobing her and committing sexual act after closing her mouth. Moreover, grandfather of complainant was bedridden, old age and being infirm, occurrence may have gone unnoticed by him. Hence, there is no force in above submission also.

19. As regards to ground of victim being tutored, also there is no merit as victim has categorically during cross-examination denied that she has been tutored to depose. Likewise there is no reason to implicate appellant, cousin brother of complainant merely on account of some dispute over the plot on which father of complainant was allegedly running a tea stall. Further there is no foundation on behalf of accused in support of above defence. There is apparently no reason for false implication.

SUMMATION

20. To sum up here victim's evidence finds support from medical evidence. Therefore, as ingredients for attracting above charges are very much available, charges are cogently brought home.

After going through the judgment under challenge, this Court is satisfied that findings are supported by sound reasons. The view taken by the learned trial Judge is the most possible view that could emerge on appreciation of prosecution evidence. No case being made out on merits, I proceed to pass following order :

ORDER

Criminal Appeal No.74 of 2022 is dismissed.

(ABHAY S. WAGHWASE)
JUDGE

SPT