



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

CRIMINAL APPEAL NO.432 OF 2022

Shivaji Sakharam Madhe,
Age 27 years, Occu. Nil,
R/o Chichondi Thakarwadi,
Taluka Akole, District Ahmednagar
At present residing at Bhorghoda,
Taluka Akole, District Ahmednagar

... APPELLANT

VERSUS

1. The State of Maharashtra
through Akola Police Station,
Taluka Akola, Dist. Ahmednagar

(Copy to be served on
Public Prosecutor, High Court of
Judicature of Bombay,
Bench at Aurangabad)

2. X Y Z (Victim)

... RESPONDENTS

.....
Mr. Chetan T. Jadhav, Advocate for appellant
Mrs. S.N. Deshmukh, A.P.P. for respondent No.1 – State
Mr. S.K. Shinde, Advocate for respondent No.2
.....

**CORAM : R.G. AVACHAT AND
NEERAJ P. DHOTE, JJ.**

Date of reserving judgment : 26th August, 2024.

Date of pronouncing judgment : 19th September, 2024.

JUDGMENT (PER R.G. AVACHAT, J.) :

The challenge in this appeal is to a judgment and
order of conviction and consequential sentence dated

19/7/2016, passed by the Court of Additional Sessions Judge, Sangamner in Sessions Case, No.3/2015. The relevant part of the operative order impugned herein reads as follows :-

“The accused Shivaji Sakharam Madhe is hereby convicted u/s. 235(2) of Criminal Procedure Code for the offence punishable under Section 5(m) of Protection of Children from Sexual Offences Act, 2012 punishable under Section 6 of the Act and sentenced to suffer imprisonment for life and to pay a fine of Rs.10,000/- (Rupees Ten Thousand only). In default to undergo rigorous imprisonment for six months. Out of said fine amount Rs.8,000/- (Rupees eight thousand only) be given to victim, after appeal period is over and inquiry be made u/s.357(a) of Cr.P.C. to grant the compensation to the victim.

In view of the above sentence no separate sentence is awarded for the offences u/s. 4 of Protection of Children from Sexual Offences Act, 2012 and Section 363 and 376 of Indian Penal Code, though he is convicted for the same.

2. Facts giving rise to the present appeal are as follows :-

P.W.1 “V” would reside along with her husband and two children at a village in Taluka Akola, District Ahmednagar. The house of her parents was in the close neighbourhood of her residence. The victim “S” was a younger sister of P.W.1. She was 4th Standard student at the relevant time and was about to complete 10 years of age.

3. On 7/11/2014, little past 9.00 p.m., the victim went to answer nature's call in an open field behind her residence. The appellant came from behind. Lifted her and took her on the bank of the river (other end of the field). He removed her legging and underwear as well. He also removed his pant and underpant. He made the victim lay. He then forced himself on her person and committed sexual intercourse. The victim raised shouts. The appellant thereupon fled away. The victim returned to her house crying. P.W.1 and the father of the victim took her into confidence. The victim related them what the appellant did with her. A search for the appellant was made. He was found at one place. It appears that, he was thrashed. The father of the victim then related the matter to Patilba Savant (P.W.6), Ex-Sarpanch of the village, who advised them to report the matter to the police. The victim, her father and P.W.1, therefore, went to the Police Station. P.W.1 lodged the First Information Report (F.I.R.- Exh.20) there. Statement of the victim was also recorded. The victim was medically screened. The appellant was arrested. Crime scene panchanama (Exh.22) was drawn. Statements of the persons acquainted with the facts and circumstances of the case were

recorded. A charge sheet was filed against the appellant on completion of the investigation.

4. The Trial Court framed the charge. The appellant pleaded not guilty. His defence was of false implication in view of dispute between the two families. The appellant was residing at the house of his grandparents. He was just 20 years of age at the material time.

5. To bring home the charge, prosecution examined 13 witnesses and adduced in evidence certain documents. On appreciation of the evidence in the case, the Trial Court convicted and consequently sentenced the appellant as stated above.

6. Heard. Learned Advocate for the appellant would submit that, the F.I.R. was lodged 24 hours after the incident. The C.A. reports do not further the prosecution case. he adverted our attention to the victim's statement recorded under Section 164 of the Cr.P.C., wherein she did not name the appellant as the culprit. He would further submit that, the medical screening report of the victim also does not further the prosecution case because the Medical Officer did not give firm

opinion in so many words. He reserved his opinion pending F.S.L. report. According to the learned Advocate, swelling and redness on private part of a girl may occur for very many reasons. He ultimately urged for allowing the appeal.

7. The learned A.P.P. and learned Advocate for the respondent No.2 – victim would, on the other hand, submit that, the victim was about 10 years of age. She had no reason to falsely implicate the appellant. The incident took place by 9.30 p.m. It was a remote village. It is but natural for the family members first to approach the family members of a culprit, think over twice before lodging of the F.I.R. taking into consideration the nature of offence. The fact that P.W.1 and her father immediately approached the Ex-Sarpanch of the village reinforces the prosecution case. Some suggestions were put to the prosecution witness indicating the prosecution case to have been reinforced. The medical screening report undoubtedly indicate it to be a case of sexual intercourse. The learned A.P.P. and learned Advocate for respondent No.2 - victim, therefore, urged for dismissal of the appeal.

8. Considered the submissions advanced. Perused the evidence on record. Also perused the judgment impugned

herein. Let us advert to the evidence on record and appreciate the same.

The incident took place in a remote village by little past 9.30 p.m. on 7/11/2014. P.W.1 was the elder sister of the victim. She was married and blessed with two children. Her residence and the residence of her parents abut each other. The victim was her 10 year old sister. The evidence of P.W.1 is to the effect that she was engaged in cooking. By 10.00 in the evening, she heard cries of her sister (victim). She, therefore, came out of the house. Her father too came out of his residence. Both of them took the victim into confidence. The victim related them that she had been to the open field back side of her residence for answering nature's call. Appellant took her to the other end of the field. A river runs by that side. The appellant lay her down, removed her legging and underwear. The appellant too removed his pant. The appellant forced himself on her person and committed sexual intercourse. It is further in her evidence that, then they approached P.W.6 Savant – Ex-Sarpanch of the village , who advised them to lodge the report with police. The family members thought over the matter and then she lodged the report with the police on the following day. The F.I.R. is at

Exh.20. P.W.8 Mahamad Rafik was the Police Station Officer at the relevant time, who recorded the F.I.R. lodged by P.W.1.

9. During cross-examination of P.W.1, it was suggested to her that her father was at his residence at the relevant time. It was further suggested to her that the victim related her about the incident. Both these suggestions go a long way to infer the incident to have taken place as stated by the victim in her evidence, to which we will refer a little later. P.W.1 was confronted with her F.I.R. to bring on record certain omissions therein. She testified to have informed the police that they took the victim into confidence. The family members usually go to sleep by 9.30 p.m. There was no electricity facility in their area. She admitted to have not remembered what she had related to the police as the contents of the F.I.R.

10. P.W.1 was referred to her F.I.R. (Exh.20). She testified the same to have been lodged by her. As such, her evidence before the Court gets corroborated by the F.I.R. True, P.W.1 is not an eye witness to the incident. The fact is, however, that the victim immediately related her what the appellant did with her would be admissible in evidence as a *res gestae* under Section 6 of the Evidence Act.

11. P.W.2 Shantaram is a witness to the crime scene panchanama (Exh.22). It was drawn on pointing out by the P.W.1 and not by the victim. The same, therefore, loses its efficacy. Then he is a witness to the panchanama (Exh.23) whereunder the P.W.1 delivered the clothes of the victim which were on the person of victim at the relevant time. The police seized those clothes under panchanama. The clothes were greenish colour top, sky-blue colour Salwar and a knicker. P.W.10 Dilip was the investigating officer who had drawn the crime scene panchanama (Exh.23) and seized the clothes of both, the appellant and the victim.

12. P.W.3 is a witness to the panchanama (Exh.25) whereunder police seized the clothes of the appellant delivered to the police by his father. There is nothing to indicate that the very clothes were on the person of the appellant at the relevant time. The clothes were – a black-white colour full shirt, underpant and a full pant as well.

13. Then comes the evidence of the victim. She testified that, on the given day i.e. on 7/11/2014, it was about 9.00 p.m. She had gone to attend nature's call, to the back

side of her Vasti. While she was returning back to her residence, the appellant came from behind. He covered her mouth with his hand. Asked her to keep silent. He lifted her and took to the nearby sugarcane field on the bank of river. He made her lay. He then forced himself on her person and committed sexual intercourse. It is further in her evidence that she shouted a loud. The appellant thereafter ran away. She returned home crying. On hearing the same, her elder sister (P.W.1) and her father came out of the house. They took her in the house. She related them what the appellant did with her. Her father, therefore, took search for the appellant. The appellant was found at one place. Her father assaulted him. Then they went to the Police Station. Her elder sister lodged the report. Her statement was also recorded. She underwent medical screening.

14. During her cross-examination, it has been brought on record that, both, the appellant and the victim belonged to Thakar community. She denied there was quarrel between her family and the grandfather of the appellant before the incident. She also denied a dispute to have taken place while the search for the appellant was made. She was confronted with her statement to the police which was silent to state that the

appellant laid her on the ground, removed her pant and knicker. He too removed his clothes and did sexual intercourse with her. Her statement, however, records the appellant to have committed, "*Jabri Sambhog*" (Marathi term). According to her, this word was related to the police by her elder sister (P.W.1). She admitted that there was no electricity. She was further suggested that, after the incident, the appellant was beaten up. Thereafter quarrel took place between the appellant's grandfather and her family members. This suggestion also goes a long way to infer the incident to have taken place. She denied to have given evidence on the say of her elder sister (P.W.1). She was further suggested that, her father related the incident to P.W.6 Patilba Savant, Ex-Sarpanch of the village. He (Patilba Savant) was examined as a witness to testify to have been informed by the father of the victim. As such, a suggestion further goes a long way the appellant to have admitted what he did with the victim was informed by the victim's father to the Ex-Sarpanch of the village P.W.6 Savant. She, however, denied that the Sarpanch of the village in turn informed the police about the incident the same day.

15. Learned Advocate for the appellant took is through the victim's statement recorded under Section 164 of the Cr.P.C., wherein no name of the appellant has been recorded as culprit.

Admittedly, victim was not confronted with her this previous statement. Needless to state, statement under Section 164 of the Cr.P.C. is not substantive piece of evidence. It can only be used for contradicting the maker thereof or for corroboration. Admittedly, prosecution did not refer the statement of the victim in her examination-in-chief for corroboration. We, therefore, cannot look into it.

16. P.W.5 Sanjay was Head Master of Zilla Parishad School. he produced in evidence the victim's School Leaving Certificate and Bonafide Certificate indicating her date of birth as 1/6/2005. Only one question was put to him in his cross-examination suggesting him that except the affidavit of the victim's father no document was supplied to the school in proof of date of birth of the victim. In view of the same, the evidence of this witness coupled with the evidence of P.W.1 proves the case of the victim to have been around 10 years of age at the relevant time.

17. P.W.6 Patilba Savant was the Ex-Sarpanch of the village. His evidence indicates that, P.W.1 and the father of the victim had been to him on 8 November i.e. on the following day of the incident and reported him what the appellant did with the victim. He advised to lodge the report with the police.

As already observed above, the factum of relating the incident to this witness has been impliedly admitted by the appellant while suggestions to that effect were given to the concerned witnesses referred to hereinabove.

18. The evidence of P.W.7 is of little consequence since the investigating officer had got drawn from him a sketch of the crime scene.

19. P.W.9 Vijay had carried the muddemal articles to Forensic Science Laboratory, Nasik. Those articles were the clothes of both, the victim and the appellant. Along with those articles, he had carried the articles given by the Medical Officer. The Forensic Science Laboratory, at the first instance, did not accept those articles since the container did not bear seal of Rural Hospital, Akole. He, therefore, came back with

that parcel. After having done the needful, he again carried it and delivered to the Forensic Science Laboratory, Nasik.

20. He was only cross-examined to the extent that his statement was silent to record that the Medical Officer had removed the irregularity.

21. Now the material evidence is that of P.W.11 Dr. Jayashri. Her evidence indicates that, she medically screened the victim by 11.00 p.m. on 8/11/2014. On examination of the genitals of the victim, she noticed white discharge on her posterior aspect of vagina on posterior aspect of vagina on per-speculum examination. Mild swelling was present over folds of labia minora. Redness was also noted on clitoris and vagina. On the basis of her examination, she found the victim was subjected to sexual assault. As per her examination, there was rape upon the victim.

22. The medical examination report finds place at Exh.46. While the case papers are at Exh.45.

During her cross-examination, she admitted to have not examined clothes of the victim. She offered

explanation thereto that it was reported that the victim had changed the clothes. She admitted that the gait of the victim was normal, according to her, it was not necessary that in case of forcible rape, there was red blood on vagina. According to her, as there was no proper facility at Rural Hospital for examination of vagina secretion by swabbing it, she did not obtain the same. She admitted that, such examination is one of the signs to corroborate the rape. She also admitted that, in case of rape, spermatozoa might be present or oozing. She went on to admit that, injuries noticed by her at the private part of the victim of the victim may be a case of sexual assault. She denied to have not report/ mentioned in her report that there was sexual intercourse with the victim.

23. The aforesaid was the evidence in the case. It is a remote village whereat both, the victim and the appellant would reside. The victim returned her house weeping/ crying. Her elder sister (P.W.1) and her father took her into confidence. She related them what the appellant did with her. This disclosure made by the victim to these two witnesses was within a few minutes or soon after the incident took place. The same would, therefore, be admissible as *res gestae* under Section 6 of the Evidence Act. As already referred to above,

the defence Advocate had put some suggestion indicating the incident to have taken place and even admitting the same. At the cost of repetition, it is reiterated that, it was suggested to the victim that the appellant was, therefore, caught hold of and thrashed by her father. Thereafter a quarrel took place between her father and the grandfather of the appellant. It was also suggested that the elder sister of the victim and her father had immediately approached the Ex-Sarpanch of the village P.W.6 Savant. His (Savant) evidence reinforce the said fact. He advised them to approach the Police Station. It is, therefore, but natural and particularly considering the nature of offence that the family members will think twice before lodging the F.I.R. Within 24 hours the F.I.R. was lodged by P.W.1. A statement of the victim was recorded immediately thereafter. True, the word "*Jabri Sambhog*" was recorded in the victim's statement. The same was stated by P.W.1 and not by the victim. The said fact, however, would in no way lead us to disbelieve the entire prosecution case. The victim's evidence corroborated by the evidence of her elder sister, father and Ex-Sarpanch of the village gets materially reinforced by her medical examination report. Column VI of the medical examination report records thus :

- a) Pubic hairs : Present, nonmatted with semen or blood
- b) Labia Majora : Redness present
- c) Labia Minora : Swelling over folds of labia minora noted.
- d) Clitoris : Redness noted
- e) Fourchette & Introitus/ Vagina : Redness noted
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- i) PS examination : White discharge noted on posterior aspect of vagina.

24. The Medical Officer gave her provisional opinion that her overall findings were consistent with sexual intercourse. True, final opinion was kept pending till receipt of FSL report. It is also true that the FSL report indicate that no semen was detected on urethral or vaginal swab. In our view, the same would be of little consequence.

25. It is reiterated that, the victim related the incident to her elder sister and father immediately, who, in turn, made a search for the appellant. The appellant was found. The victim's father beaten him up. A quarrel, therefore, ensued between him and the appellant's grandfather. The victim's elder sister and father immediately approached P.W.6 Savant - Ex-Sarpanch of the village. On his advice, F.I.R. was lodged

within 24 hours of the incident. The victim was medically screened immediately. The medical examination report indicate that the findings were consistent with sexual intercourse. It is not in dispute that the victim was about to complete the age of 10 years. As such, it's a case of offence to have been duly proved against the appellant. We find the Trial Court to have not erred in convicting the appellant therefor.

26. At the relevant time the appellant was just 20 years of age. During the relevant period, the offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 was thus :

“6. Punishment for aggravated penetrative sexual assault:- Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.”

27. The same indicates that the minimum sentence for the offence was not less than 10 years imprisonment. Considering the age of the appellant and the fact that he would be completing ten years imprisonment within a few months, we propose to reduce the quantum of sentence from life

imprisonment to a period of rigorous imprisonment for ten years. In case of **Bavo Alias Manubhai Ambalal Thakore Vs. State of Gujarat [AIR 2012 SC 979]**, the Apex Court, in para 11 of its judgment, observed thus :-

“11. Considering the fact that the victim, in the case on hand, was aged about 7 years on the date of the incident and the accused was in the age of 18/19 years and also of the fact that the incident occurred nearly 10 years ago, the award of life imprisonment which is maximum prescribed is not warranted and also in view of the mandate of Section 376(2)(f) IPC, we feel that the ends of justice would be met by imposing RI for 10 years. Learned counsel appearing for the appellant informed this Court that the appellant had already severed nearly 10 years.”

28. Since there is nothing to indicate the appellant was gainfully employed, and considering his age, the amount of fine imposed by the Trial Court appears to be excessive. We reduce the same to Rs.1000/- and in default of payment thereof, he shall undergo rigorous imprisonment for one month. With the aforesaid conclusion the appeal stands disposed of in terms of following order :

ORDER

- (i) The Criminal Appeal is partly allowed.
- (ii) Conviction of the appellant for offence punishable under Section 6 of the Protection of Children from Sexual Offences

Act, 2012, recorded by learned Additional Sessions Judge, Sangamner in Sessions Case No.3/2015, vide order dated 19/7/2016 is maintained. However, the sentence of life imprisonment with fine of Rs.10,000/- (Rupees ten thousand) and in default of payment of fine, rigorous imprisonment for six months is modified and the appellant is sentenced to suffer rigorous imprisonment for ten years and to pay a fine of Rs.1000/- (Rupees One thousand). In default of payment thereof, he shall undergo rigorous imprisonment for one month.

(iii) The clause directing the payment of Rs.8000/- from the amount of fine, if recovered, to the victim is, therefore, withdrawn.

(iv) The appellant is entitled for the benefit of set-off under Section 428 of the Cr.P.C.

(v) Rest of the part of clause (1) of the operative order of the impugned judgment to stand unaltered.

(NEERAJ P. DHOTE, J.)

(R.G. AVACHAT, J.)

fmp/-