



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

CRIMINAL APPEAL NO. 112 OF 2019

Minar Dilip Tribhuvan
Age: 31 years, Occu.: Private Service,
R/o Mhada Colony, H. No. 486,
L.I.G. in front of Dhoot Hospital,
Aurangabad

..APPELLANT

VERSUS

1. State of Maharashtra
2. XYZ

..RESPONDENTS

....
Mr. S.S. Jadhav, Advocate for appellant (appointed)
Mr. S.D. Ghayal, Add.P.P. for respondent no.1 – State
Ms. R.S. Kulkarni, Advocate for respondent no.2 (appointed)
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**CORAM : R.G. AVACHAT AND
NEERAJ P. DHOTE, JJ**
RESERVED ON : 04th MARCH, 2024
PRONOUNCED ON : 08th MARCH, 2024

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

1. The challenge in this appeal is to the judgment and order of conviction and consequential sentence dated 21st December, 2018 passed by Additional Sessions Judge, Aurangabad in Special Child Protection Case No. 175 of 2017. Vide the impugned judgment and order, the appellant has been convicted for the offence punishable under Section 376(2)(f)(n) of the Indian Penal Code ('I.P.C.') and under Section 3(a) read with Section 4 and Section 5 read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 ('POCSO'), and therefore, sentenced to suffer imprisonment for life and fine of Rs.5,000/-. He has been acquitted of the

offence punishable under Section 313 of I.P.C. Neither the State nor the victim has preferred appeal against acquittal.

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

The F.I.R. (Exh.20) was lodged by the victim herself on 05th September, 2017. According to the victim, she was sixteen years of age while the F.I.R. was lodged. It is her case that she alongwith her mother and two siblings would reside together at Aurangabad. Her father was alcoholic. Her mother was, therefore, residing separately from him for over four years next before lodging of the F.I.R. The victim was a student of eleventh standard. It is her case that the appellant got acquaintance with her mother. It was an acquaintance of not less than four years. The appellant would frequently visit her mother. He would occasionally stay overnight at her residence. The victim would treat the appellant like her father.

3. It is further her case that in the year 2014 while they were residing at Shri Krushna Nagar near T.V. Center, the appellant came her house. It was noon. The victim alone was at her residence. The appellant bolted entrance door of the house from inside. He removed clothes on the person of the victim and committed sexual intercourse without her consent and against her wish. The appellant threatened her of dire consequences, if she disclosed the incident to anyone else. It is further her case that the appellant continued to visit her residence in absence of her mother and would commit sexual intercourse with her. Such things happened until March 2017. It has

been averred in the F.I.R. that lastly on 04th September, 2017 the appellant came her residence and behaved with her improperly (*विविध गल्ले केले*). The victim did not like the same. She, therefore, related her mother of the past incidents. The mother then accompanied her to the police station on the following day. The victim lodged the F.I.R. (Exh.20).

4. Crime vide C.R. No. 559 of 2017 was registered with CIDCO Police Station, Dist. Aurangabad for the offences punishable under Sections 376(2)(f)(n), 313 and 506 of the I.P.C. and under Sections 3(a), 4 and 6 of the POCSO. Victim's supplementary statement was recorded. She was medically screened. Scene of offence panchanama (Exh.14) was drawn. The appellant was arrested. He too was medically screened. Documents relating to age of the victim were collected. Upon completion of investigation, the appellant was proceeded against by filing the charge-sheet before the Court constituted for trial for offences under the POCSO ('trial Court').

5. The trial Court framed charge (Exh.6). The appellant pleaded not guilty. His defence was of false implication at the behest of victim's mother.

6. The prosecution, to bring home the charge, examined six witnesses and produced in evidence certain documents. Trial Court, on appreciation of the evidence in the case, convicted the appellant and consequentially sentenced as stated above.

7. Learned counsel appointed to represent the appellant would submit that it is a case based on sole testimony of the victim. The victim was of the age of understanding. There is unexplained delay of not less than five months in lodging of the F.I.R. Relationship between the appellant and victim's mother had turned sour. She has not been examined. Medical examination of the victim does not support the prosecution. Although, seized articles were submitted to chemical analysis, reports thereof have not been received and placed before the trial Court. Our attention has been drawn to the non-cognizable case registered by wife of the appellant against the victim's mother a few months before lodging of the F.I.R. Learned counsel would ultimately submit that the prosecution evidence falls short to make out an offence beyond reasonable doubt. He, therefore, urged for allowing the appeal.

8. Learned Add.P.P. would, on the other hand, support the impugned judgment and order. According to him, the appellant's wife had lodged the report long before the F.I.R. was registered. Same has no bearing on the fate of the case. According to him, the victim in the age group of fifteen-sixteen years has no reason to falsely implicate the appellant. The appellant was like her father. He betrayed the trust reposed in him. Learned Add.P.P., therefore, urged for dismissal of the appeal.

9. Learned counsel appointed to represent Respondent No.2 – victim reiterated the submissions made by learned Add.P.P. She took us

through the medical examination report of the victim to submit that hymen of the victim had tears. According to her, the same indicates the victim to have been subjected to sexual intercourse many a time. The appellant would frequently visit her residence. Birth certificate (Exh.19) of the victim indicates that she was fifteen years of age at the relevant time. According to learned counsel, the evidence on record undoubtedly made out the offence, and therefore, there is no reason to interfere with the impugned judgment and order.

10. Considered the submissions advanced. Perused the evidence on record. Let us advert thereto and appreciate the same.

11. P.W.1 – victim produced her birth certificate (Exh.19). P.W.6 – Dr. Rajendra was a practicing gynecologist. He would run clinic, “Janki Hospital”. He produced in evidence the original record of births of children taken place in his hospital in the month of August 2001. It is at Exhibit 48. At Sr.No.19 there is entry relating to mother of the victim. She gave birth to a female child on 28th August, 2001. The college record of the victim also indicates the same date of birth. We, therefore, do not find any reason to disbelieve the prosecution case as to the victim to have been below eighteen years of age at the relevant time.

12. It is in evidence of the victim that she alongwith her siblings and their mother would reside together away from her father for over four years, since the father was alcoholic. It is further in her evidence that acquaintance

was developed between the appellant and her mother. It is nothing short of emotional relationship. They would even reside in live-in-relationship. The appellant frequently visited her residence. It is further in her evidence that way back in 2014 (no time, date and month is given) the appellant visited her residence. She was alone home. The appellant bolted entrance door of the house from inside. He forcibly committed sexual intercourse with her. The appellant then gave her threats of dire consequences, if she went public with the incident. She, therefore, did not share the same to her mother or anyone else. It is further in her evidence that the appellant thereafter continued to visit her house in absence of her mother. He did sexual intercourse with her many a time. Appellant's such behaviour continued up to March 2017. It is further in her evidence that on 04th September, 2017 the appellant again visited her residence. He had sexual intercourse with her that time. She fell ill. She threw up. Her mother was also not keeping well. The appellant, therefore, took her to a private clinic, "Dhanvantari Hospital". Doctor there gave her certain tablets. Her urine was tested. The appellant gave her some tablets. She, however suffered severe bleeding. It is further in her evidence that again she was taken to the very clinic. She was administered injection and saline as well. Doctor told her that percentage of hemoglobin was reduced. Her evidence further indicates that the appellant told her that she conceived. She, therefore, related everything to her mother on 04th September, 2017. Her evidence further indicates that on the following day i.e. on 05th September her mother accompanied her to the police station. The victim lodged F.I.R. (Exh.20).

13. Victim's statement was also recorded under Section 164 of the Code of Criminal Procedure ('Cr.P.C.'). She was subjected to a searching cross-examination. The victim admitted to have his own house near Dhoot Hospital at Aurangabad. Dr. Sawai, who runs Dhanvantari Hospital, was their family doctor. It is further in her evidence that her mother had accompanied her to Court on the day on which her evidence was recorded.

14. The victim was medically screened. P.W.3 – Dr. Naresh examined her. The victim's medical examination report is at Exhibit 30. History given by the victim to P.W.3 – Dr. Naresh before her medical screening reads thus :-

"As history narrated by survivor's own vernacular language, assailant named Minar Dilip Tribhuvan is her step father and survivor is staying with him since last 5 years. Initially assailant behaved well with her then after 5-6 months, assailant started touching her private parts when assailant was alone at home. Then one day when survivor was alone at at home he forcibly had vaginal sexual intercourse with her. Assailant then threatened her not to speak about this to her mother or anyone else otherwise he will kill her and her brother. Survivor was frightened and did not speak about assailant to anyone. Then assailant had repeated sexual intercourse with survivor 2-3 times a week when nobody was at home. Assailant used to drink alcohol frequently and abused survivor physically. 4-5 months ago she missed her periods for which assailant took her to some private clinic and gave her some pills after which she had heavy vaginal bleeding for which she was admitted to private hospital and got treatment. Lastly assailant had vaginal sexual intercourse with her two days

ago. After this survivor narrated all this incidence to her uncle (Mama) who lodged police complaint against assailant.”

Evidence of P.W.3 – Dr. Naresh indicates that victim’s labia mejora, labia minora, fourchette and introitus, her external urethral meatus examination was normal. There was evidence of old healed hymenal tears, no bleeding, congestion was present. Her anus and rectum examination was normal. After clinical examination, he sent victim through LPC for other test to concern department. He had taken blood sample i.e. nail clipping, blood in edta bulb, blood in plain bulb, vaginal swab, pubic hairs and vaginal smear. He sealed it and handed-over to LPC for forwarding to forensic laboratory.

In his opinion there were no signs of use of force. He reserved his opinion pending receipt of C.A. reports. In his opinion, possibility of sexual intercourse could not be ruled out. Same indicates P.W.3 – Dr. Naresh to have not given a firm opinion. He reserved his opinion pending receipt of C.A. reports. Admittedly, no C.A. reports were received until conclusion of trial.

15. If we compare evidence of the victim before the Court with that of history given by her, there is inconsistency between the two. Admittedly, the appellant was living with his wife and mother in his own house, whereas in the history the victim stated the appellant to have been residing with them for five years next before her medical examination. Same is incorrect. She further related the doctor that the appellant continued to have sexual

intercourse with her two-three times a week when nobody was in the house. Same is also grossly inconsistent with her evidence before the Court.

16. For the reasons best known to the prosecution, mother of the victim has not been examined. As per the prosecution case, the appellant and victim's mother had illicit relationship *inter se*. the appellant examined his wife - Maya (D.W.1) as defence witness. It is in her evidence that on 25th February, 2017, mother of the victim had come to her residence. She assaulted the appellant and even appellant's mother. It is further in her evidence that victim's mother developed intimate relationship with one another person viz. Navnath Teja. Her evidence would further indicate that she, therefore, lodged a report with police. It was registered as non-cognizable case. A copy thereof finds place at Exhibit 58. Same indicates that relationship between the appellant and mother of the victim had turned sour about five months before lodging of the F.I.R. It is reiterated that the mother has not been examined. The appellant has, therefore, every reason to contend that to take revenge, F.I.R. was lodged by the victim at the instance of her mother. The victim's testimony has not been corroborated either by medical or any other evidence. F.I.R. has been lodged about six months after last alleged sexual assault. Hymen tears can occur for any reason including sexual intercourse. In this factual backdrop, we find evidence of the victim to have fallen short to sustain conviction of the appellant and consequential sentence of life imprisonment. We are, therefore, not at one with the findings recorded by the trial Court.

17. We highly appreciate the able assistance given by both the learned counsel appointed to represent the appellant as well as Respondent No.2 – victim.

18. In the result, appeal succeeds. We, therefore, pass the following order :-

ORDER

- (i) Criminal appeal is allowed.
- (ii) Judgment and order of conviction and sentence dated 21st December, 2018, passed by Additional Sessions Judge, Aurangabad in Special Child Protection Case No. 175 of 2017 is hereby set aside.
- (iii) The appellant is acquitted of the offence punishable under Section 376(2)(f)(n) of the Indian Penal Code and under Section 3(a) read with Section 4 and Section 5 read with Section 6 of the Protection of Children from Sexual Offences Act, 2012.
- (iv) The appellant be set at liberty forthwith, if not required in any other case.
- (v) Fine amount paid, if any, be refunded to the appellant.

(NEERAJ P. DHOTE, J.)

(R.G. AVACHAT, J.)

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