



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 925 OF 2019
WITH
CRIMINAL APPLICATION NO. 937 OF 2022
IN CRIMINAL APPEAL NO. 925 OF 2019

Ananda s/o Mahadu Sawant,
Age - 33 years, Occu – Agril.,
R/o Gortha, Taluka Umri,
District Nanded.

... Appellant
[Orig. Accused No.1]

Versus

1. The State of Maharashtra
Through Umri Police Station,
Taluka Umri, District Nanded.

2. XYZ

... Respondents

WITH
CRIMINAL APPEAL NO. 844 OF 2019
WITH
CRIMINAL APPLICATION NO. 375 OF 2021
IN CRIMINAL APPEAL NO. 844 OF 2019

Kunal @ Khandu s/o Pandurang Gaikwad,
Age : 21 years, Occ : Painter,
R/o Venkatesh Nagar, Umri,
Taluka Umri, District Nanded.

... Appellant
[Orig. Accused No.2]

Versus

1. The State of Maharashtra
Through the Police Station Officer,
Umri Police Station,
District Nanded.

2. XYZ

... Respondent

.....

Mr. A. M. Gaikwad, Advocate for the Appellant in Criminal Appeal No. 925 of 2019.

Ms. Rekha Choudhari h/f Mr. S. S. Choudhari, Advocate for the Appellant in Criminal Appeal No. 844 of 2019.

Mr. S. M. Ganachari, Advocate for Respondent No.1-State in both appeals.

Ms. Namita P. Thole, Advocate (appointed) for Respondent No.2 in both appeals.

.....

CORAM : ABHAY S. WAGHWASE, J.

Reserved on : 12.01.2024

Pronounced on : 17.01.2024

JUDGMENT :

1. Feeling aggrieved by the judgment and order of conviction passed by learned Additional Sessions Judge, Bhokar in Special Case [POCSO] No. 3/2019 recording guilt for commission of offence punishable under Sections 376(2)(i), 376-D, 452, 506 r/w 34 of the Indian Penal Code [IPC], Section 6 of the Protection of Children from Sexual Offences Act, 2012 [POCSO Act], both convicts have preferred above two separate appeals.

As both the appeals have been heard by this court and answered by learned APP on the same day, they are decided by this common judgment.

2. Umri police station registered crime bearing no. 195/2018 on the strength of report filed by victim PW1 alleging that she resides with her mother. That, on 26.11.2018 when she and her mother were sleeping in their house, around 1.00 a.m. there was knock on their door. The door was forcibly pushed thereby breaking the chain. Three persons entered the house, one of them placed knife on the neck of her mother and took her in another room and accused no.1 Ananda after making her fall on the bed, forcibly raped her. Then he went towards her mother and other one i.e. accused no.2 came and after him accused no.3 came and raped her. Around 4.00 a.m. those persons went out of the house. Victim and her mother approached police and victim lodged report Exhibit 15.

3. Investigation was entrusted to PW7 SDPO Deshpande who took all steps like arresting accused, drawing various panchanamas; victim was subjected to medical examination; medical papers were gathered and made of part of chargesheet. After gathering sufficient evidence, challan was filed and all three accused were tried by learned Additional Sessions Judge, who held case of prosecution as proved as against accused nos. 1 and 2, i.e. present appellants, and recorded guilt as stated above.

Said judgment is now taken exception to by filing instant appeals by invoking Section 374 of the Code of Criminal Procedure [Cr.P.C.].

4. Mr. A. M. Gaikwad, learned counsel representing accused no.1 Ananda would submit that at the outset prosecution had failed to establish that victim was child as per the definition under the POCSO Act. That, though it was claimed that victim was 16 years of age, he would submit that the proof adduced by prosecution in support of age was mere school extract which was prepared on the strength of Transfer Certificate [TC] of earlier school. According to him, such document has no evidentiary value. According to him, the Hon'ble Apex Court in the case of *P. Yuvaprakash v. State* 2023 LiveLaw (SC) 538 held that prosecution has to establish the age by adducing, firstly, 'date of birth certificate from the school', or 'matriculation or equivalent certificate from concerned examination board', if available, and in absence of it, 'birth certificate issued by corporation, municipal authority or Panchayat' and only in absence of above modes, age has to be determined by subjecting victim to ossification test. Here, according to him, none of the above requirements were fulfilled and

therefore, it is his submission that, prosecution has utterly failed to establish that victim was minor and hence it is his submission that there cannot be conviction under the provisions of POCSO Act.

5 He next submitted that though prosecution examined in all 8 witnesses, evidence of victim, her mother and the school Headmaster was relevant. He pointed out that both, victim and her mother, are inconsistent and not corroborating each other. Further according to him, there is no proper identification. Investigating machinery has confronted photograph of arrested accused. He pointed out that accusations are made that there was forced entry by breaking chain of the door but there is no evidence to that extent and spot panchanama is silent in that regard. He further pointed out that in spite of alleged incident taking place between 1.00 a.m. to 4.00 a.m., complaint is lodged after almost 5 to 6 hours and the so called delay is not explained. He further pointed out that there is evidence suggesting mother of victim to be involved in prostitution and therefore possibility of false implication cannot be ruled out. Further he pointed out that in spite of rape being committed by three persons, there are no injuries and even medical expert has not issued final opinion. Therefore, such crucial aspects were fatal for prosecution. CA report is also negative and resultantly it is his submission that learned trial

court ought not to have accepted the case of prosecution and further convicted the appellants.

6. Learned counsel Mr. Rekha Choudhari h/f Mr. S. S. Choudhari for appellant Kunal adopted the above submissions advanced by learned counsel Mr. A. M. Gaikwad.

7. Per contra, learned APP for State pointed out that victim was a minor. School authority was examined who had carried original register and had placed on record its extract. Therefore victim was proved to be a minor. Further according to him, after forced entry, by use of knife, threats were issued to mother and in her presence her daughter was raped by three men including present accused. That, it was a serious and heinous crime committed on a minor. Both, victim as well as her mother have deposed accordingly and they are consistent and corroborating each other on material count. Their evidence has remained unshaken on the actual act of rape. Learned APP pointed out that there was no possibility of injury as rape was committed on knife point and victim was made helpless. Further according to him, mere absence of injuries on the person of victim would not negate the fact of rape. He lastly submitted that available evidence has been rightly appreciated by learned trial Judge and

conviction has been correctly recorded. Hence, for want of merits, he prays to dismiss the appeal.

8. Learned counsel appointed to represent the victim would also resist the appeal by pointing out that there is cogent, reliable evidence of victim to be minor; she was raped in the house and she named and identified both appellants. Therefore, according to her, they are rightly convicted and even she prays to dismiss the appeal.

9. It seems that prosecution in trial court has adduced evidence of following 8 witnesses:

PW1 Victim.

PW2 Jagdish acted as pancha to spot panchanama Exhibit 21 and seizure of clothes of accused vide panchanama Exhibits 22, 23 and 24. He also acted as pancha to memorandum of disclosure and recovery of knife (Exhibits 25 and 26) at the instance of accused no.1 Ananda

PW3 Mother of victim.

PW4 Dr. Chavan, who examined victim as well as all three accused.

PW5 Police Naik Wanole acted as carrier.

PW6 Bhimrao is pancha to seizure of clothes of victim vide Exhibit 43.

PW7 SDPO Deshpande is the Investigating Officer [IO].

PW8 Headmaster.

10. On hearing above submissions, at the threshold this court is required to deal with the issue of age raised before this court. It seems that such issue was not at all raised in the trial court and there is no suggestion even for the namesake regarding minority of the victim. Be it so. Here, admittedly school authority i.e. the Headmaster has been examined as PW8. He claimed that on request from police, he was carrying admission register and its extract in the court. He stated that as per the register of admission, date of birth of victim is 08.01.2014. He further stated that date of birth of victim on admission register extract and the copy of school admission extract reflects the same age.

In cross, to a suggestion he has answered and admitted that they use to take entry of date of birth of any child after perusing the date of birth recorded by Grampanchayat or Nagar Parishad. He further deposed that date of birth of victim is mentioned in their

register on the basis of date of birth mentioned in the TC of other school.

11. On analyzing above testimony, it is emerging that this witness has brought only original admission register wherein date of birth was noted as 08.01.2014. His testimony shows that he was not called upon to produce birth certificate tendered in the school. Investigating machinery is therefore to be blamed for not asking this witness to bring the birth certificate. Even Investigating Officer himself, on he own, does not seem to have gathered the birth certificate issued by Grampanchayat. It is to be noted that in cross on being questioned by accused, PW8 Headmaster has admitted that there is practice of taking entry of date of birth on perusing date of birth recorded by the Grampanchayat. Therefore, with such answer, it can safely be inferred that date of birth was noted on the basis of certificate issued by Grampanchayat. However, the same has not been brought because this witness has carried only school register as requested by police machinery. Therefore, above submission by learned counsel for the appellants cannot be straightway accepted that there is no evidence about date of birth and that documents as spelt out by Hon'ble Apex Court in the above ruling *P. Yuvaprakash* (supra) not being available, it cannot be said that age of victim has been proved.

12. On carefully going through the evidence of victim PW1 at Exhibit 14, it is emerging that on the night when she was sleeping with her mother, around 1.00 a.m., on hearing knock on the door she and her mother woke up. She speaks about door being pushed open by breaking the chain. She has categorically stated that three persons entered. That, when she and her mother made attempt to shout, at that time accused kept knife on the throat of her mother and was taken in another room and thereafter accused Ananda pushed her on the cot, disrobed her and committed rape on her. Thereafter accused Kunal and third accused took turns to rape her. She identified the accused Ananda and Kunal in court.

In initial cross, she is questioned about her father, maternal uncles and that they were insisting them to come and stay at their village Narwat after she lost her father. Then she is questioned about locality and surrounding houses. There are questions about railway track passing near their house. She flatly denied that if one talks in her house then the talk is easily heard in the neighbourhood. Omission is brought only to the extent that accused Ananda slept on her person and committed rape; that thereafter Kunal had come; and lastly, Ananda had gone out of the house.

13. PW3 mother has also stated that at mid night around 1.00 a.m. there was knock on the door and they woke up. That, their house door was broke open by applying pressure and entry was forced by three persons. Further she stated that accused Ananda kept knife on her neck and took her to another room; thereafter accused Kunal came and kept knife on on her throad and thereafter Ananda, by removing clothes of her daughter, committed sexual intercourse; then Ananda came to her room and accused Kunal went in the adjoining room and he also committed sexual intercourse; thereafter third person also committed sexual intercourse with her daughter; accused threatened to kill them if they report it to anyone; and those three persons left their house around 04.00 a.m. She further stated that she contacted her brother on phone. Thereafter they approached police. Even she identified accused Ananda and Kunal sitting in the court.

On carefully going through the above cross faced by this witness, omission is brought to the extent that accused Ananda, Kunal and Shubham committed forceful sexual intercourse with victim one after the other. Then she is questioned about locality, her acquaintances and she flatly denied about complaint being made to

the Collector that she is running prostitution business. She admitted that since 4.00 a.m. to 9.00 a.m., she did not disclose the incident to anybody. In cross at the hands of learned counsel for accused no.2, she has answered that there is police colony in front of her house and Tahsil office and Court are situated at a short distance. That, there use to be traffic on the road. That, all the families in the vicinity were having visiting terms with her house. Further, omissions are brought regarding accused breaking chain of the door, Kunal keeping knife on her throat and accused Ananda coming and accused Kunal going to commit sexual intercourse. She admitted that alleged incident of rape was committed in another room and she was present in different room and that she had not actually seen the incident with her own eyes.

14. Medical expert who had occasion to examine the victim is PW4 (Dr. Dhavan) and this doctor has stated that history was given about three persons entering the house around 01.00 a.m. on 26.11.2018 and by issuing threat to life with sharp object, there was demand of sexual intercourse. This witness stated that after examination of victim, his overall findings are consistent with sexual intercourse/assault. He further deposed that final report was kept pending for receipt of CA report. He also examined three accused on

27.11.2018 and opined that it cannot be refuted nor confirmed that accused persons were unable to perform sexual intercourse.

In cross, medical expert has admitted that ossification test of victim was not done. That, names of accused were not disclosed during recording history and that he did not notice injury on the body of victim. He admitted that final report was kept pending till receipt of CA report and after receiving CA report, final report has not been obtained by IO till date and he has not issued the final report.

15. On re-analyzing the above evidence of victim and her mother, it is noticed that both, victim and her mother, are lending support to each other. They were together sleeping when entry was forced by accused. They both are consistent about knife being used to threaten them. PW3 mother seems to have been taken in another room and victim was raped by all three whom she has named. Both, victim and her mother have identified accused-appellants in the court for taking turns in raping victim. Though they are subjected to cross, their evidence to the extent of commission of rape has remained untouched and unshaken.

16. No doubt medical expert has not noticed any injuries, but it is fairly settled legal position that in case of rape, non-appearance of injury is insignificant. Law to this extent has been dealt and discussed in numerous judgments including *Gurucharan Singh v. State of Haryana*, AIR 1972 SC 2661 ; *Krishan Lal v. State of Haryana*, AIR 1980 SC 1252 ; *State of Rajasthan v. N.K.*, (2000) 5 SCC 30 ; *Narayanamma (Kum) v. State of Karnataka and Others*, 1994 (5) SCC 728 ; *State of Rajasthan v. Shri Narayan*, (1992) 3 SCC 615 and *Devinder Singh and others v. State of Himachal Pradesh*, (2003) 11 SCC 488. In *Gurucharan Singh* (supra) the Hon'ble Apex Court has observed that "absence of injury or mark of violence on the private parts or elsewhere on the person of the prosecutrix is of no consequence when the prosecutrix is minor and would merely suggest want of violent resistance on the part of the prosecutrix."

Moreover, in the instant case when victim and her mother both are categorical about knife being used to threaten and terrorize, there is least possibility of resistance being put. Further, it is pertinent to note that medical expert has very categorically stated in his examination-in-chief itself that on examination of the victim his overall findings were consistent with sexual intercourse/assault. Therefore, taking into consideration such evidence of medical expert

coupled with evidence of victim and her mother as discussed above, there is no hesitation to hold that prosecution has established that victim was a minor and was sexually ravished.

17. Therefore there is overwhelming evidence against appellants. Such evidence has been rightly appreciated and guilt has been correctly recorded. No case is made out on merits. No perversity is brought to the notice of this court so as to interfere. Hence, I proceed to pass the following order:

ORDER

- I. Both the appeals are hereby dismissed.
- II. Pending applications does not survive and the same also stand disposed off.
- III. Fees of the counsel appointed to represent respondent no.2 is quantified at Rs.10,000/- to be paid by the High Court Legal Services Sub-Committee, Aurangabad.

[ABHAY S. WAGHWASE, J.]

vre