



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

CRIMINAL APPEAL NO. 179 OF 2023

. Ganpati Shankar Kage
Age: 40 years, Occu.: Labour work,
R/o. Ashta-Kasar, Tq.Lohara,
Dist.Osmanabad.
(At present in Jail)Appellant

Versus

1. The State of Maharashtra
Through Murum Police Station,
Tq.Umerga, Dist.Osmanabad.
2. X Y ZRespondents

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Advocate for Appellant : Ms. Ranjana D. Reddy
APP for Respondent no.1 : Mr.N.D.Batule
Advocate for Respondent no.2 : Mr. Kailash Vitthal Pawar
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CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 22 FEBRUARY, 2024

PRONOUNCED ON : 29 FEBRUARY, 2024

JUDGMENT :-

1. Judgment and order dated 30-11-2022 passed by the learned Additional Sessions Judge, Omerga in Special Case No.18 of 2021 convicting appellant for offence under Sections 376, 323, 504, 506 and under Sections 4, 6, 8, 12 of the Protection of Children from Sexual Offences (POCSO) Act, is taken exception to by the convict by filing instant appeal.

FACTS IN BRIEF LEADING TO TRIAL

2. Victim, aged 15 years, studying in 9th Standard, lodged report on 29-04-2021 at Murum Police Station, Tq.Omerga, alleging that in the night of 28-04-2021 her father, under influence of liquor, called her in the room, threatening to kill her by use of axe, disrobed her and forced himself on her. She immediately rushed out and reached her uncle's place and there she informed her grandparents and on the next day, she and her uncle went to Police Station and lodged report, on the strength of which, crime bearing no.93 of 2021 was registered. Investigation was carried out by PW9 Kawade, who after completion of investigation, chargesheeted accused and was tried before Additional Sessions Judge, Omerga and finally held guilty by judgment and order dated 30-11-2022 holding appellant guilty for above offences, hence the appeal.

SUBMISSIONS

On behalf of appellant :

3. Learned Counsel for the appellant pointed out that there is false implication. That testimony of victim does not inspire confidence. That because of strained relations with mother, victim has been made to lodge false FIR and even tutored to depose falsely. According to learned Counsel for the appellant, even age of victim

has not been conclusively proved. That even medical evidence is not conclusive about rape as Doctor himself admitted that he is not sure about the opinion. It is pointed out that, according to the complainant, only she and her brother were in the house, however, her brother was not examined and only evidence of victim has been adduced. Therefore, learned trial Court ought not to have accepted the sole testimony of victim and in absence of medical evidence, further ought not to have been recorded guilt. That there is improper appreciation of evidence and law and hence, she seeks indulgence at the hands of this Court by allowing the appeal.

On behalf of State :

4. Learned APP pointed out that prosecution had established its case by examining as many as ten witnesses. That sole testimony of victim itself is inspiring confidence. That date of birth of victim has come on record. That she is proved to be a minor. That accused is very father of victim and therefore, there is no reason for false implication. That medical evidence is positive. According to learned APP, testimony of PW7 Sadnyanbai and PW8 Rajiya is lending support to the testimony of victim. That they are also star witnesses like victim. Further learned APP pointed out that while recording

statement under Section 313 of the Code of Criminal Procedure, there is virtually admission by accused and therefore, with such quality of evidence, he submits that findings of the learned trial Court cannot be faulted and he prays to dismiss the appeal.

On behalf of victim :

5. Learned Counsel for the victim also took objection to the appeal pointing out that victim is of 15 years of age. That accused raped his own daughter after consuming liquor and threatening her. That medical evidence supports victim's testimony. That she is shown to be a minor. That there is overwhelming evidence and therefore, learned trial Court committed no error whatsoever in holding accused guilty and he too prays to dismiss the appeal for wants of merits.

6. This Court, being first appellate Court and last fact finding Court is expected to re-appreciate, re-analyze and re-examine the entire oral and documentary evidence adduced by prosecution.

7. In support of its case, prosecution has adduced evidence of as many as ten witnesses. Their status and role is as under :

PROSECUTION WITNESSES

PW1 Dr.Basavraj Sidramppa Danaie is the Medical Officer, who examined victim. His evidence is at exh.17.

PW2 is victim. Her evidence is at exh.21.

PW3 is mother of victim. Her evidence is at exh.26.

PW4 Govind Shivram Kajale is Headmaster of Ashta High School, where victim was taking education. He has brought general register of school. His evidence is at exh.27.

PW5 Padmakar Shrimant Madane is pancha to spot panchanama exh.32. His evidence is at exh.31.

PW6 Satish Shrimant Mote is pancha to seizure panchanama.

PW7 Sadnyanbai Annappa Dudhbhate is neighbour of accused. Her evidence is at exh.41.

PW8 Rajiya Babu Patel is another neighbour of accused. Her evidence is at exh.44.

PW9 Samadhan Baliram Kawade is the Investigating Officer. His evidence is at exh.50.

PW10 Dr.Rukmini Shivaji Mane is Medical Officer, who examined accused.

ANALYSIS

8. This is one of the most unfortunate incidence, wherein protector, guardian and biological father is accused of raping his own daughter. Victim is examined as PW2. Prosecution is also relying on evidence of PW7 Sadnyanbai and PW8 Rajiya, who are immediate neighbours. Equally prosecution is also relying on medical evidence.

9. The two fundamental objections raised by learned Counsel for appellant are **firstly** victim is not shown to be a minor and was rather married and **secondly**, medical evidence negates rape.

10. In the background of such objections, evidence is re-examined and re-appreciated.

Evidence of **PW2** victim is at exh.21 wherein she gave her age as 16 years and date of birth to be 14-08-2006. She claim to be studying in 9th Standard at the time of incident. She also deposed that she was married to one Nitin Parmeshwar Surwase on 03-01-2021. According to her, after marriage, she came to reside at her matrimonial home for 15 days and thereafter, returned back to parents and at such time, she was staying with her uncle, aunt and their children. According to her, her uncle Navnath, who worked on

brick kiln and stayed at Shiroda, Tq.Sawantwadi, whereas her mother, father, sister and brother were residing at Shiroda.

Regarding occurrence, she deposed that on 28-04-2021, while she was at her uncle's place, her father and brother came. After bath, her father went out alongwith gold ornaments and returned at 04:00 p.m., but under influence of liquor. He gave her Rs.2,500/- and left saying that he is going to Kolhapur. However, at around 08:00 p.m., he returned back home informing that he would go a day after. After taking dinner, he went to sleep, whereas she and her brother went to sleep at around 09:00 p.m.– 09.30 p.m. in the front courtyard. She deposed that she wanted to go to stay at her uncle's place, but her father prevented her.

At around 09.30 p.m. her father called and asked her to sleep near him. She refused, upon which, he assured to look after her and thereafter, by threatening to kill her by use of axe, made her sleep on the cot and then had forcible sexual intercourse with her inspite of her resistance. Thereafter, she managed to run and informed her uncle and grandparents. Her grandfather informed about the incident to others in the villages. Thereafter, victim and other persons reached Police Station.

On visiting her **cross-examination**, one find question being put

regarding strength of siblings, age of her uncle, loan obtained by her father for her marriage. She denied about knowing illicit relations of her mother with her uncle Navnath. She admitted that her mother and uncle stayed together and so her father was under depression, he was taking liquor, and he was upset with her mother as well as her uncle. She admitted quarrel between her father, uncle and mother on 27-04-2021. She flatly denied that at the time of incidence, she was of 18 years age. She further flatly denied that she lodged complaint at the instance of her mother and uncle.

11. Apart from above testimony of prosecutrix, prosecution has examined and heavily relied on evidence of PW7 Sadnyanbai and PW8 Rajiya, who are examined at exh.41 and exh.44.

On going through testimony of **PW7** Sadnyanbai and **PW8** Rajiya, we find both of them deposing regarding hearing shouts in the night, coming out and finding victim crying and reporting that her father came in the night, forced her to sleep near him by assuring to take care of her and by issuing threats to kill by use of axe, she was disrobed and raped.

So much of their testimony has not disturbed or shaken by defence in the cross-examination.

12. Prosecution has also examined PW1 Dr.Danaie, who conducted physical examination of victim and his testimony is at exh.17. Defence is equally seeking reliance on medical expert's evidence by submitting that medical evidence does not support prosecution version. Therefore, said evidence put to minute scrutiny and on doing so it is emerging that **PW1** Dr.Danaie, while was posted at Rural Hospital, Murum, PW2 victim was produced for examination on 29-04-2021 i.e. the next morning. According to this witness, victim gave history of sexual intercourse by force by Ganpati Shankar Kage at 9.30 p.m. On general examination, he did not notice external injuries. He collected samples and on the basis of examination, his finding is that "possibility of sexual intercourse cannot be ruled out" but he kept final opinion pending till receipt of C.A. report.

Initial **cross-examination** of medical expert is on the letter carried by Lady Police Constable, necessity of examination by lady medical officer in presence of lady medical staff. He answered that he conducted medical examination of victim in presence of Lady Police Constable - Pawar, who brought the victim to the hospital. He admitted that he cannot state as to whether there was sexual intercourse or not. Doctor has issued and identified exh.19 Forensic

Medical Examination Report containing history of forceful sexual intercourse by appellant on 28-4-2021 at 9.30 p.m.

13. Pointing out to above testimony and exh.19, more particularly, cross of PW1 Dr.Danaie, learned Counsel for appellant would submit that there is no medical corroboration to the version of prosecutrix. It is specifically argued that victim herself had admitted that relations between mother and father were strained and at the instance of mother and uncle Navnath, there is false implication.

14. As regards, objection about medical evidence not supporting, such submission cannot be entertained for the simple reason that it is fairly settled position that in cases of such nature, law does not make it imperative for prosecution to corroborate its version always by way of medical evidence. It is mere opinion evidence. Here the special features, which are emanating from the version of prosecutrix is that, her own father is the perpetrator. She is categorical about he threatening to kill her by axe and forcibly raping her. There is clear resistance by her by refusing to even go near him when he called her inside his room. She has deposed about questioning him about calling her near him and rather refusing to go near him. She has also

deposed that he assured to take care of her for three years and further questioning her as to why she is shy and does she not go near her husband. Her such conduct and immediately informing uncle and grandparents same night clearly shows that she has been forced upon against her will and wish. Finding abnormal behaviour of her father, who had come under influence of liquor, she may have become disorganized and must have suffered shock. She deposed about he banging her head on the wall when she resisted while he was disrobing her. Once victim speaks about forcibly being raped, it amounts to rape. She deposed about he made to sleep her on the bed. Taking such circumstances into consideration about threatening to kill by axe and committing rape on cot, there is least possibility of external injuries on her person.

15. Even law is fairly settled that mere absence of external or internal injuries is itself not sufficient to rule out or negate rape. In umpteen judgments, the Hon'ble Apex Court has time and again reiterated that non-availability of injuries would itself not be a reason to cast doubt on the version of prosecutrix. There are several circumstances where there may not be injuries but still rape can be said to be committed. Following cases can be taken recourse to in

support of above observations :

In *Karnel Singh v. State of Madhya Pradesh* (1995) SCC (5)

18, it has been held that :

“... absence of marks of external injuries on the person of the prosecutrix cannot be adopted as a formula for inferring consent on the part of the prosecutrix and holding that she was a willing party to the act of sexual intercourse. It will all depend on the facts and circumstances of each case. In this case, evidence showed that the victim was laid on minute sand, which was lying on the floor, it was held that there were no marks of injuries because of this and because she may have been incapable of offering resistance.”

In *State of Rajasthan v. Noore Khan* 2000 (3) Supreme 70, the

Hon'ble Apex Court noted that :

“Absence of injuries on the person of prosecutrix has weighed with the High Court for inferring consent on the part of the prosecutrix. We are not at all convinced. We have already noticed that the delay in medical examination of the prosecutrix was occasioned by the factum of the lodging of the FIR having been delayed. The prosecutrix was in her teens. The perpetrator of the crime was an able-bodied youth bustling with energy

and determined to fulfill his lust armed with a knife in his hand and having succeeded in forcefully removing the victim to a secluded place where there was none around to help the prosecutrix in her defence. The injuries which the prosecutrix suffered or might have suffered in defending herself and offering resistance to the accused were abrasions or bruises which would heal up in the ordinary course of nature within 2 to 3 days of the incident. The absence of visible marks of injuries on the person of the prosecutrix on the date of her medical examination would not necessarily mean that she had not suffered any injuries or that she had offered no resistance at the time of commission of the crime. Absence of injuries on the person of prosecutrix is not necessarily an evidence of falsity of the allegation or an evidence of consent on the part of the prosecutrix. It will all depend on the facts and circumstances of each case.”

In *State of Tamil Nadu v. Raju @ Nehru* (2006) 10 SCC 534, the Hon’ble Apex Court ruled that :

“Rape is a crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether rape has

occurred or not is a legal conclusion, not a medical one.” That is the reason why, even the opinion of the doctor that there was no evidence of sexual intercourse or rape is at times held to be not sufficient to disbelieve the accusation of rape by victim.

In ***B. C. Deva v. State of Karnataka*** (2007) 12 SCC 122, it was held that :

“The plea that no marks or injuries were found either on the person of the accused or the person of the prosecutrix, does not lead to any inference that the accused has not committed forcible sexual intercourse on the prosecutrix. Though, the report of the Gynaecologist pertaining to the medical examination of the prosecutrix does not disclose any evidence of sexual intercourse, yet even in the absence of any corroboration of medical evidence, the oral testimony of the prosecutrix, which is found to be cogent, reliable, convincing and trustworthy has to be accepted.”

16. In the light of above discussion, here allegations are by daughter against her father. There is no reason for false implication. Mere strained relations between parents is no good ground for false implication. Infact on the day of occurrence, mother and uncle were not around to prompt her to lodge false complaint. It is to be borne

in mind that victim was married and after spending few days at her matrimonial house, she had come to stay with her uncle, grandparents and brother. There is usual custom of bride returning to parents' house after few days of marriage and as such she has come to stay with her uncle, grandparents and brother and the above unfortunate incident has fallen upon her. She has mustered courage to immediately rush to uncle and grandparents and inform about the occurrence. Independent witnesses like PW7 Sadnyanbai and PW8 Rajiya have deposed about conduct of accused and they have heard victim narrating ordeal faced by her at the hands of her own father. Therefore, by no means, it is open for defence to agitate false implication on tutoring.

17. As regards age of victim is concerned, PW4 Govind has placed on record school extract reflecting date of birth and it is the same which is given by victim in the witness box. Such evidence clearly shows that on the date of occurrence, victim is not 18 years of age. Submission by learned Counsel for accused that victim has been married while she was minor does not come to the rescue of accused as it is not the point under consideration. Evidence of victim is inspiring confidence. Her sole testimony is found to be truthful and

therefore, infact there is no need of any corroboration. Under such circumstances, in view of law settled in following cases, her version can safely be relied and accepted too.

In ***State of Punjab v. Gurmeet Singh*** (1996) 2 SCC 384, the Hon'ble Apex Court made the following observations :

“The Court must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not unless the discrepancies are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable.”

In *Radhu v. State of Madhya Pradesh* 2007 CRI.L.J. 4704, the Hon'ble Apex Court has not only reiterated the well settled legal position that finding of guilt in a case of rape can be based on uncorroborated evidence of prosecutrix, but has gone a step ahead and held that the opinion of a doctor that, "There was no evidence of any sexual intercourse or rape", may not be sufficient to disbelieve the accusation of rape made by the victim.

18. Applying above settled law, when sole testimony of PW2 victim inspires confidence, it can safely be held that guilt is firmly and cogently proved.

19. No good ground is made in appeal nor any perversity is brought to the notice of this Court in the judgment impugned herein. Consequently, following order is passed :

ORDER

Criminal Appeal No.179 of 2023 stands dismissed.

(ABHAY S. WAGHWASE)
JUDGE