



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**CRIMINAL APPEAL NO. 619 OF 2021
WITH
CRIMINAL APPLICATION NO. 760 OF 2022**

Raju S/o. Vishwanath Sable,
Age : 54 years, Occu. : Labour,
R/o. Near Ambedkar Statue,
Satara Village, Tq. Aurangabad,
District Aurangabad.

... Appellant
(Orig. Accused)

Versus

The State of Maharashtra,
Through Police Station Officer,
Police Station Satara,
Tq. and Dist. Aurangabad.

... Respondent.
(Orig. Complainant)

...

Mr. P. S. Paranjape, Advocate for Appellant (Appointed through Legal Aid).

Mr. N. D. Batule, APP for Respondent - State.

Mr. Vivek M. Lomte, Advocate for Respondent No.2 (Appointed through Legal Aid).

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CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 16th JANUARY, 2024

PRONOUNCED ON : 24th JANUARY, 2024

JUDGMENT :

1. A convict for offence under sections 376(1), 323 of Indian Penal Code (IPC) and for offence under sections 4 and 8 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act), is hereby questioning the judgment and order passed by learned Additional Sessions Judge, Aurangabad dated 25.10.2018 in Special Case (POCSO) No. 46 of 2015.

2. In brief, prosecution was launched against present appellant, alleging that, informant had granddaughter aged 4 years. On 09.03.2015, around 2:30 p.m., she had left her granddaughter victim with neighbour and she went to railway station. Around 3:45 p.m., she received phone call and she was urgently called by another neighbour Kantabai. When informant reached, she learnt that, accused took her in a wada, offered one Rupee and on the pretext of playing some game, took her to a toilet, removed her undergarment, he inserted his finger in her vagina and thereafter, he inserted male organ. When the child cried, he closed her mouth. On hearing the occurrence, police was approached and grandmother set law into motion vide report at Exh.38, on the strength of which FIR was drawn vide Exh.39.

After investigation carried out by PW9 API Pushpa Patil, accused was challaned and charge-sheeted. On explanation of charge, he denied and so trial was undertaken. During which, prosecution has adduced oral and documentary evidence. After appreciating the evidence and on hearing submissions advanced by both sides, learned trial Judge recorded conviction for above offence and awarded sentence accordingly as spelt out in the operative order. Hence the appeal.

SUBMISSIONS

On behalf of appellant :

3. Learned counsel for appellant would point out that at the outset, there is no trustworthy, reliable account of any of the witness so as to accept the case of prosecution as proved. According to him, here prosecution has deliberately not examined material and crucial witnesses, like the immediate neighbour Chandrabhan, the person namely Janardhan who allegedly telephoned and called complainant. Informant has apparently lodged complaint on hearsay information. He further submitted that, considering the age of the victim, it is difficult to believe that she could know the phraseology and words used regarding commission of offence. Thus, he submits that it is a clear case of tutoring. According to him, only immediate neighbours, who were friends of informant are examined. Thus, except interested witnesses, there is no other independent evidence regarding the occurrence. Learned advocate submits that, there is false implication and according to him medical evidence itself is inconsistent. He questions the sustainability of the judgment as according to him there is improper appreciation of evidence and law.

On behalf of State :

4. In answer to above, learned APP would strenuously

submit that, accused had ravished a minor of about four years of age. He took her to the washroom on the pretext of playing some game. But, in fact it was a dirty game. He has committed sexual offence and victim has narrated the acts and he indulged into by leveling her. Victim is examined. There is prompt reporting by the informant - grandmother. Immediate neighbours, who had seen accused, called informant and she rushed home. That, after hearing from the victim, police authority has been promptly approached and matter is reported. He pointed out that, medical examination was got done. Examining Medical experts have stepped into the witness box and has confirmed the assault and rape. Therefore, there is convincing and reliable evidence. All charges are proved through victim, informant, her grandmother, immediate neighbours and they have all withstood extensive cross without getting shaken and resultantly learned trial court has rightly convicted the appellant. According to him, there is correct appreciation of oral and documentary evidence and that no fault could be found in the findings reached at and consequently he prays to dismiss the appeal for want of merits.

5. In support of its case, prosecution has examined following witnesses:-

PW1 Informant; **PW2** Victim; **PW3** Deepali, panch to seizure of clothes of victim; **PW4** Navnath, pancha to seizure of clothes of accused; **PW5** Dr. Daksha Bilagi, who examined noted history and conducted medical examination and issued opinion/report at Exh.61 and 62, respectively; **PW6** and **PW7** Kantabai, neighbours of informant and victim; **PW8** Santosh, panch to spot panchanama (Exh.77); **PW9** API Pushpa Patil, Investigating Officer, who took victim to the hospital and in whose presence statement of victim was recorded; **PW10** Dr. Sushin Waghmare another doctor, who examined victim, conducted ossification test and issued opinion at Exh.102.

6. As this is first appellate court, which exercises powers under section 374 of Cr.P.C., it is incumbent upon this court to re-examine, re-appreciate and re-analyze the evidence adduced by the prosecution in its entirety to ascertain whether prosecution established its case beyond reasonable doubt and whether judgment of trial court is legally maintainable and sustainable or not.

7. Here, the record shows that, appellant was made to face charge (Exh.8) for commission of offence under sections 376(1), 323 of IPC and for offence under sections 8 read with 7

and section 4 read with 3 of POCSO Act. The provisions under these sections are as under :-

"Section 376(1) of IPC :

376. Punishment for rape.

(1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description 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].

Section 4 and 8 of POCSO Act :

4. Punishment for penetrative sexual assault

[(1)] Whoever commits penetrative sexual assault shall be punished with imprisonment of either description 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.

[(2) Whoever commits penetrative sexual assault on a child below sixteen years of age shall be punished with imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine.

(3) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.]

8. Punishment for sexual assault.-

Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine."

8. Going by the story of the prosecution, admittedly, it revolves entirely around the evidence of informant-grandmother (PW1) and victim (PW2), who was reported to be around 4 years of age. Testimony of informant her grandmother shows that, victim lost her father, who was her nephew. Wife of his nephew i.e. mother of victim seems to have abandon victim barely at the age of 9 months and since then she was cared and looked after by PW1 grandmother.

9. This witness PW1 in her testimony, at Exh.26 in paragraph 2 has stated that, on 09.03.2015 around 2:30 p.m. as she was go to railway station, she handed over custody of the victim to her neighbour Chandrabhan Salve. She claims that, around 3:45 p.m., she received phone call from one Janardhan, asking her to return urgently and also her immediate neighbour Kantabai informed her on phone call that, victim granddaughter was found in the company of accused in a toilet. Therefore, when she returned home and interacted with victim, she found to be scared and on being asked, victim allegedly told her "*baba ala ani vicharle tuzi aai kuthe geli*". She replied "*mazi aai kamala geli*". She further told this witness that accused offered her one rupee and thereafter accused told her to enter the wada from beneath the gate. He again offered her one rupee and said to her that they

should play game of ***** and she told her that he took her to the toilet, made her lie down, removed her undergarment and inserted his finger in her vagina. Thereafter, he again inserted his penis. When she cried out of pain, he closed her mouth causing injury to her lips.

10. According to informant, one Alkabai, who was standing on the terrace of the adjacent house had witnessed the incident and has raised alarm and people gathered and assaulted accused. She further deposed that, Chandrabhan is her neighbour and he had kept a cot near the gate when accused had came there. Chandrabhan asked the accused, who disclosed his name as Raju Sable. There was conversation between Chandrabhan and accused, who sat on the cot and this witness left victim with Chandrabhan. Thereafter she took the victim to hospital along with the Gaikwad madam. Doctor conducted medical examination and thereafter she approached police station lodged report (Exh.38) and caused signature on FIR at Exh.39.

11. Thereafter, she handed over clothes of victim to the police on 10.03.2015. She again gave supplementary statement on 11.03.2015, handed over death certificate of father and family photo. According to her, at the time of incident, victim was four years of age. Her statement was recorded in the court. Witness has

identified accused in the court.

12. While under cross, initially there are questions about her native, legal heirs. Relevant cross in para 2, wherein she was asked at what time she proceeded towards railway station and how much time to reach back and at what time she went to police. She flatly denied that, Chandrabhan narrated the incident to police. Suggestions to her that accused had brought her to Aurangabad, 25 years back, accused conducting Jagaran for his livelihood, she borrowing loan of Rs 10,000/- for construction and on second time there was demanding further loan of Rs.5,000/- and about accused a victim of cancer and having no source of income, are all denied by her.

13. The crucial witness victim is also examined at Exh.45. After preliminary verification about competence to be deposed, learned trial court seems to have recorded testimony. On going through the same, she is found to have deposed that, accused Baba is present in the court. When she was playing with brother Langada baba was sitting on the cot. He had inquired about her mother and according to her, she told him that her mother is out of station. He told her that he would give her money, took her to their toilet, took out his penis and her pantee and inserted his finger in

her genitals. When she cried he pressed her mouth, as a result of which she suffered injury on her lips. Hearing her cries, people gathered there. She narrated incident to her mother (informant) and police made inquiry with her.

In her cross, she answered that, she was studying in Balwadi and she attended school on the day of incident. She replied that, she was taught counting and Marathi alphabets. She also counted from 1 to 10. She answered that, there are in all 10 children and that she is the most intelligent amongst them and to learn whatever is taught. She denied being taught by police aunty. She answered that whatever had taken place, she has been narrated accordingly. She further flatly denied that she was tutored by mother and APP. In further cross she answered that, accused baba was residing behind her house and she had seen him many times, but she cannot named him. She is also unable to give the name of the lady, who took her after the incident. Rest are all denial.

14. Now, it is necessary to be seen as to whether as claimed by prosecution in the trial court and learned APP before this court that, there is medical evidence also lending support to the version of victim.

15. PW5 Dr. Daksha Bilagi seems to be the doctor, who is examined at Exh.59, who had occasion to examine victim on being brought by Gaikwad. After completing the formalities of getting consent from grandmother, this medical expert deposed that, she noted the history narrated by the victim herself, whereas time and place told by grandmother. Doctor deposed about reducing history in writing and conducted medical examination of the victim, during which she claims to have noticed mucosal injury on lower lip admeasuring 3 mm and on examination of genitals, she noticed old healed tear at 6:00 'O' clock position. Dr. further deposed that from the history and clinical examinations, findings are suggestive of vaginal penetration. She collected samples and issued a report and certificate (Exh.61 and 62).

16. Medical expert is also subjected to cross examination, wherein she given the timing of examination of victim and named the staff accompanying her. She flatly denied history to be given and narrated by grandmother. She answered that, such type of injuries are possible on account of fall on stone and injuries on the person of the victim like abrasions are also possible on account of fall on stone. She denied having issued report and opinion on the basis of history and false report being prepared.

17. Prosecution also seems to have come with a case of availability of direct eye witness i.e. immediate neighbour. Said witness is **PW6**, who in her evidence at Exh.74 testified that informant resides behind her house and that victim was her granddaughter. According to her, on that day, she had been to the terrace to collect wheat and that time she saw accused taking victim by bending below the gate and he himself entered the house of informant by climbing over the gate. He took her to the toilet. Witness claims that, she went ahead and saw accused sexually assaulted victim and therefore, she raised alarm. That time, Kantabai, Janardhan, Manisha and public gathered there and accused and victim were taken out of the toilet. Accused was beaten, but he managed to escape. She further deposed that, informant was not present. Kantabai called and informed her about the incident.

Above witness is also subjected to cross, wherein she answered that, there is wall between house of complainant and her sister. That, house were adjacent to each other. House of informant is constructed with slab and mud. There is slab over the toilet of informant, but there is no door and the toilet was facing towards south. Rest are all denials.

18. Similarly **PW7** Kantabai also a neighbour deposed about hearing shouts of PW6 and they all going to the house of informant. Accused had sexually assaulted victim in the toilet and they were taken out from the toilet. People assaulted accused. According to her she told one Kiran More to inform informant and he connected phone call and she herself talked, narrated the incident, when she reached she also identified accused.

In cross, she is also questioned about her literacy, residence, its geographical direction of house of informant, toilet, age of victim. She answered that accused was residing 1 to 2 lane from her house. Rest is all denial.

19. PW3 Deepali and PW4 Navnath are panchas to seizure of clothes of victim and accused respectively; PW8 Santosh is panch to spot panchanama; PW9 API Pushpa Patil is the Investigating Officer; PW10 Dr. Sushin Waghmare is the forensic expert, who conducted ossification test and issued report (Exh.101), opined that, victim was between 2 to 4 years of age including margin.

ANALYSIS

20. On re-examination, re-appreciation and on critical

analysis of above discussed evidence, victim is reported to be four and half years of age at the time of incident. Victim is a student and she herself in her evidence stated about studying in Balwadi. Admittedly, having lost her parents and being looked after by grandmother, there are reasons for non availability of information about date of birth of victim. However, by examining PW10 Dr.Sushin Waghmare, who conducted ossification test, age of victim is in the range of 2 to 4 years including margin permissible under law. Trial court, who recorded evidence also got itself satisfied and recorded her version. There is absolutely no serious cross regarding age and not attempts are made to render it doubtful.

On the contrary, submissions advanced before this court by learned counsel for appellant that considering the age of the victim, it is difficult to accept that she could use the words regarding sexual act to which she was subjected to by accused. Suggestions are also given in the trial court about she being tutored. Therefore, taking such material into consideration, there does not seem to be any challenge that victim was not around 4 years of age and hence, it can safely be held that at the time of incident, victim was a child below 12 years of age.

21. As regards to occurrence is concerned, here, prosecution has adduced evidence of informant, who is grandmother of victim. Her evidence is about she leaving house to go to the railway station on that day, by handing over custody of her granddaughter victim to one Chandrabhan i.e. her neighbour. No doubt, Chandrabhan has not been examined, but in the light of evidence of grandmother, very victim herself, non examination of Chandrabhan cannot be termed as fatal. PW6 and PW7 Kantabai, who are immediate neighbours are also lending support about informant PW1 to be out of the house.

Victim has in her testimony categorically narrated the acts indulged into by accused, who took her in her own toilet, removed his male organ, removed her undergarment, made her lie down and inserted both finger as well as his male organ.

PW6 immediate neighbour has deposed about seeing accused taking victim towards the toilet and indulging into committing sexual assault and she has raised alarm attracting others. PW7 Kantabai also claims about hearing shouts of PW6 and then going out and seeing accused with the victim in the toilet and they being taken out and accused being beaten by public. Accused after giving thrashing was required to be admitted and there is medical evidence to that extent also.

22. Therefore, taking above discussed evidence of PW1 informant, PW2 victim, PW5 doctor, who examined victim and issued report and injury certificate giving clearly deposing about history being narrated by victim herself, and on examination issuing opinion about accused putting his finger inside vagina and took his penis towards her vagina and therefore, she has deposed about clinical examination finding suggestive of vaginal penetration, clearly suggests that offence as alleged has been committed.

23. Criticism made before this court that, material witnesses like Chandrabhan and Janardhan, who are named by informant are not examined. There is no force in above submission. In the opinion of this court, prosecution is entitled to adduce evidence of only those witnesses, to whom prosecution feels to be necessary. It is the discretion of the prosecution to lead only as much evidence as is necessary in proving the charge. When occurrence is getting unfolded from examined witnesses, prosecution is not bound to examine all witnesses, whose names are appearing in statements and testimonies of witnesses. It is the quality that matters and not quantity. Law is fairly settled that, the time honoured principle is that evidence has to be weighed and not counted. Law to that extent has been expounded in the case of

Amar Singh v. The State (NCT of Delhi) and Inderjeet Singh v. The State (NCT of Delhi), (2020) 19 SCC 165.

Very recently also, law to that extent is propounded in the judgment of ***Ajai @ Aju v. State of U.P., (Criminal Appeal 598-600 of 2013), MANU/SC/0127/2023.***

Here, in the light of nature of accusations, evidence of PW1 informant, PW2 victim, PW5 medical expert is of significance. Moreover, PW6 and PW7 independent witnesses, who are neighbours have lend support to the prosecution story. Therefore, there is corroboration from independent corners. There is no reason for false implication as both informant as well as victim have flatly denied suggestions regarding annoyance of informant for loan amount not being extended and victim too flatly denied that she was tutored by informant and APP. Therefore, no substance in above submissions.

24. Another criticism made before this court is that, there is old tear of hymen as per doctor. Even such submission would not come to the rescue of accused to get himself exonerated as medical expert has noticed fresh injury to the lip. Victim categorically stated that when she raised cries, accused forcibly shut her mouth. The injury is within 24 hours. Doctor has noticed abrasions. Such injuries are relatable to the occurrence. Victim categorically stated

about he inserting finger in her vagina and even penetrating his penis. Law is fairly settled that even partial penetration amounts to commission of rape. There is insertion of finger as well as male organ and therefore, offence is complete in legal parlance.

25. Learned counsel also questioned the credibility of PW6 by pointing out that, it is doubtful whether she had any visibility to see the occurrence. This witness has categorically stated about she too be on the terrace and he has narrated the sequence about accused taking victim and asking her to bend beneath the gate and he himself climbing over the gate and taking victim to the toilet and seeing his acts, she has raised alarm. In cross, she has categorically given the exact location of her house, distance of house of informant, its geographical direction and geographical directions of the toilet, which is a spot. Witness speaks about toilet having no door and there is no serious challenge. Taking all such circumstances into consideration, there should not be any issue about visibility or doubt about any occasion for witness to see accused taking victim to the toilet.

26. Learned counsel for victim raised a concern about quantum of sentence awarded by trial Judge, according to him, once offence was made out, higher sentence ought to have been

inflicted. Such submissions were objected by learned counsel for the appellant by pointing out that neither State nor victim has preferred distinct proceedings for enhancing sentence. Therefore there is no force in such submission. No such distinct proceedings are apparently initiated, and therefore, it is not open for this court to deal with such submission.

27. Learned counsel for victim also impressed upon this court that, the learned trial Judge has not granted any compensation under section 357-A of Cr.P.C. On going through the impugned judgment under challenge, more particularly the operative part as pointed out, apparently there are no directions or order to compensate victim by invoking section 357-A of Cr.P.C.

28. In a case *Suresh and another v. State of Haryana ; (2015) 2 SCC 227*, the Hon'ble Apex Court has expected scrupulous compliance of granting compensation under Section 357-A of Cr.P.C. in deserving cases, even including in cases of acquittal.

29. For above reasons, we find it a fit case to compensate victim herein as she has been deprived from the compensation. Therefore, directions to that extent are required to be issued to the

District Legal Services Authority (DLSA), Aurangabad to conduct thorough enquiry of the current status of the victim, her family background and on due satisfaction take steps to grant adequate compensation as permissible under the rules. Hence, I proceed to pass the following order:-

ORDER

(i) The criminal appeal is dismissed.

(ii) The District Legal Services Authority, Aurangabad to undertake enquiry as directed in para 29 and take effective steps to grant adequate compensation to victim as permissible under the rules and law.

(iii) Registrar (Judicial) to send copy of this judgment and record and proceeding immediately to District Legal Services Authority, Aurangabad.

(iv) In view of disposal of the appeal itself, Criminal Application No.760 of 2022 does not survive and it is accordingly disposed of.

(ABHAY S. WAGHWASE, J.)