



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 734 OF 2019

Dattatraya Arjun Auti

Age: 40 years, Occu: Nil,

R/o: Ralegan-Siddi, Tq. Parner,

District Ahmednagar

... Appellant

Versus

1. The State of Maharashtra

2. XYZ

... Respondents

...

Mr. Rahul A. Tambe, Advocate for the Appellant

Mr. S. D. Ghayal, Addl. P.P. for Respondent No.1 - State

Mr. Sachin S. Deshmukh, Advocate for Respondent No.2

...

CORAM : R. G. AVACHAT &

NEERAJ P. DHOTE, JJ.

Decided on : 15th February, 2024

JUDGMENT : [PER NEERAJ P. DHOTE, J.]

1. This is an Appeal under Section 374 (2) of the Code of Criminal Procedure [for short 'Cr.PC'] against the conviction of the Appellant for the offence punishable under Sections 376(2)(f)(i) and Section 506 of the Indian Penal Code [for short 'IPC'] and Sections 5, 6, 9 and 10 of the Protection of Children from Sexual Offences Act, 2012 [for short 'POCSO Act'] recorded by the learned Additional Sessions Judge, Ahmednagar, in Sessions Case No.247/2016 arising out of the Crime No.I-93 of 2016 registered with Parner Police Station on the report lodged by the Informant / Victim - Asmita Dattatraya Auti - (PW-4).

2. Prosecution's case as revealed from the Police Report is as under : -

2.1 The Victim is the Informant, who is 13 years old minor girl. She was studying in 6th Standard in Santh Niolba Rai Vidyalaya, Ralegan-Siddhi and residing with her father [Appellant], one younger sister and paternal grand-mother at village Ralegan-Siddhi, Taluka Parner, District Ahmednagar. For the holidays in the month of April, on 11/04/2016, the Appellant dropped her to the house of her maternal grand-mother at village Loni-Haveli, Taluka Parner, District Ahmednagar. On 26/04/2016, the Appellant came and took her with him. On that day at about 10:00 am when she went with the Appellant at the hilly place for grazing the cattle, she told the Appellant that she was hungry and wanted to go home, however, he did not allow her to go home by telling her that he alone cannot manage the cattles. Thereafter, the Appellant asked her whether she was wearing the panty and said that she goes to her maternal uncle's village and indulge in immoral acts with the boys. After saying so, the Appellant pushed her down and raped her three times between 11.30 am to 3:00 pm. The Appellant threatened her not to disclose the said incident to anyone. After the Appellant and the Victim returned home, the Victim disclosed the incident to her paternal grand-mother. The paternal grand-mother gave bath to the Victim and told her to go to her maternal grand-mother's home and lodge the Report. On the next day i.e. 27/04/2016 at about 2:00 pm, the Victim went to Loni-Haveli by a bus and narrated the incident to her maternal grand-mother. Thereafter, they approached the Police

Station and lodged the Report. The crime came to be registered against the Appellant for the offences punishable under Sections 376(2)(f)(i) and Section 506 of IPC and Sections 5, 6, 9 and 10 of POCSO Act.

2.2 The Victim was sent for medical examination, the Appellant came to be arrested and was sent for medical examination, the spot panchnama came to be drawn, the statements of the witnesses came to be recorded, the clothes of the Victim and Appellant came to be seized and on completion of investigation, the Appellant came to be Charge-sheeted.

3. The learned Trial Court framed the Charge against the Appellant for the offences punishable under Sections 376(2)(f)(i) and Section 506 of IPC and Sections 5, 6, 9 and 10 of POCSO Act vide Exhibit - 10, to which, the Appellant pleaded not guilty and claimed to be tried. To prove the Charge, the Prosecution examined the following witnesses :

- (i) PW - 1, namely, Bandu Appa Gore who acted as panch for the spot panchnama.
- (ii) PW - 2, namely, Tarachand Shrirang Kolhe, who was the maternal uncle of the Victim.
- (iii) PW - 3, namely, Tarabi Shrirang Kolhe, who was the maternal grand-mother of the Victim.
- (iv) PW - 4 - Victim.
- (v) PW - 5, namely, Dr. Manisha Pralhad Undre, who medically examined the Victim and Appellant.

(vi) PW - 6, namely, Somnath Tukaram Wakchaure, who was the Head Master of the School at village Ralegan-Siddhi where the Victim was taking education.

(vii) PW - 7, namely, Rajendra Dashrath Pawar, who investigated the Crime.

4. In the evidence of above referred witnesses, the relevant documents are brought on record. After the Prosecution closed its evidence, the Appellant's statement came to be recorded under Section 313(1)(b) of Cr.PC. The Appellant denied the Prosecution's case and evidence.

5. Heard the learned Advocate for the Appellant, learned Additional P.P. for Respondent No.1 - State and the learned Advocate for Respondent No.2 - Victim. Perused the evidence available on record.

6. It is submitted by the learned Advocate for the Appellant that the Victim's version itself is unacceptable and her version of rape is not corroborated by the medical evidence. He submitted that the medical evidence do not show any sign of rape on the Victim. He submitted that there was quarrel between the Appellant on one side and the maternal grand-mother, mother and aunt of the Victim on the other side when he had gone to receive the Victim. He submitted that the evidence on record show that the Victim did not want to accompany her father. He submitted that concocted story has been prepared and the Appellant is falsely implicated. He submitted that the Appeal be allowed by quashing and setting aside the impugned

Judgment and Order.

7. It is submitted by the learned Additional P.P. that there is no reason to discard the testimony of Victim. He submitted that there is no reason why the Victim will falsely implicate her father. He submitted that though the medical evidence is not supporting the Victim's version, it cannot be the ground to disbelieve the Prosecution's case. He submitted that the CA Reports show the stains of semen on the clothes of Victim. He submitted that the learned Trial Court has rightly convicted and sentenced the Appellant and the Appeal be dismissed.

8. The learned Advocate for Respondent No.2 - Victim supports the arguments of the learned Additional P.P.

9. What is clear from the evidence available on record, is that:

- (a) The Victim was minor.
- (b) The Victim is the daughter of the Appellant.
- (c) The Appellant's wife is residing with her mother at Village Loni-Haveli due to her ailment.
- (d) The Victim resides with the Appellant, one sister and paternal grand-mother at Village Ralegan-Siddhi.
- (e) For holidays, the Victim had gone to her maternal grand-mother's house on 11/04/2016 and stayed till 25/04/2016.
- (f) The Appellant went to Loni-Haveli on 26/04/2016 in the morning and brought the Victim to their village.

10. In her testimony, before the learned Trial Court, the Victim deposed that since last five (05) years her mother was staying with her maternal grand-mother. Before the incident, she was taking education in 6th Standard and the Appellant dropped her to maternal grand-mother's house at Loni-Haveli on 11/04/2016 and brought her back to their Village at Ralegan-Siddhi on 26/04/2016. Thereafter, the Appellant took the cattle for grazing and she accompanied the Appellant till the Government hill, to assist him. The Appellant told her that he was unable to control the cattle and insisted her to accompany him. She told the Appellant that she was hungry and wanted to go back home. The Appellant got angry and told her not to insist for meal and asked her to stay with him. She started crying. At about 11:00 am, the Appellant came near her and asked whether she was wearing the nicker. She moved from her father and went to the Neem tree. The Appellant went near her and said that she always wanted to go to the place of her maternal uncle and wanted to have intercourse with boys. He pushed her down. She started shouting. The Appellant threatened her not to shout, otherwise he will beat her. The Victim stopped shouting. The Appellant removed her clothes, also his clothes and committed forceful intercourse with her. The Victim experienced pain in her private part. The Appellant left that place and put on his clothes. The Victim was crying and put on her clothes.

11. The Victim further deposed that thereafter, she went near hill to provide water to cattle near K.T. canal and returned to the field of

onion. She was below the tree and it was 01:00 pm. Again the Appellant committed forceful intercourse with her and she suffered pains to her private part. Thereafter, while grazing cattle, they came ahead of hill. It was 03:00 pm and again near Neem tree, the Appellant committed forceful intercourse with her. The Appellant threatened her not to disclose the incident to anybody.

12. The Victim further deposed that at about 5:00 pm, they returned home. She reported the incident to her paternal grand-mother, who gave her bath and dinner and asked to sleep. Her paternal grand-mother told her that she should go to Loni-Haveli and ask her maternal grand-mother to lodge report. On the next day, the paternal grand-mother gave Rs.10/- to the Victim. The Victim went to Loni-Haveli by the bus and reached at 5:00 pm. When her maternal grand-mother reached home after grazing the cattle at about 6:00 pm, she narrated the incident of forceful intercourse by the Appellant to her maternal grand-mother. On the next day, the Victim's maternal grand-mother took her to the Police Station and lodged the Report, which was at Exhibit - 21.

13. The Victim further deposed that articles 1 to 3 i.e. Salwar, Kurta and slip were her clothes, which were on her person at the time of incident. The articles 4 to 6 were clothes of the Appellant, which he was wearing. She took the Police to the spot of incident. She was referred for medical examination at Parner Hospital.

14. The Victim's cross-examination show that on 26/04/2016, the

quarrel took place between the Appellant on one side and her maternal grand-mother, mother and aunt on the other side. To the Court question, she deposed that the quarrel took place due to her and she was not ready to return with the Appellant, however, the Appellant was insisting for the same. In her cross-examination, she deposed that she returned to Loni-Haveli without informing anybody.

15. Evaluation of evidence of the Victim does not give the required assurance about her version in respect of rape. On suffering forceful intercourse for three (03) time within a span of four hours, it is strange that she was able to walk-down to her house in the evening with the Appellant and thereafter alone goes to her maternal grand-mother's village by Bus. Further, she was reluctant to come with the Appellant from the house of her maternal grand-mother. There was quarrel between the Appellant and maternal grand-mother of the Victim. The places at which according to her she was raped was an open place. Under such circumstances, the testimony of Victim cannot be relied with corroboration.

16. The evidence of PW - 5 [Dr. Manisha Pralhad Undre] show that she was the Medical Officer at Rural Hospital, Parner and on 28/04/2016, the Victim was brought to her for medical examination. Her evidence show that on examination of Victim, she found her to be stable. No injury to her local genital region was noticed. The history given by the Victim to her was that the Appellant removed clothes and tried to do intercourse, but there was no penetration at all. Her evidence show that the vaginal swab and nails of Victim were

taken and forwarded the same to chemical analysis and reserved her opinion about the sexual assault.

17. This medical evidence on record falsifies the version of Victim of forceful intercourse. She was a minor girl. If real forceful intercourse would have taken place for three (03) times, there would have been injuries on her person. The medical evidence do not corroborate the Victim's version. From the above discussed evidence on record i.e. Victim's and Medical Officer's testimony, it becomes clear that the Victim was an unreliable witness.

18. What is further seen from the evidence of PW - 5 [Dr. Manisha Pralhad Undre], is that she also examined the Appellant and found abrasions or scratches on his back, abdomen and both arms. Though in her evidence, she deposed that the said abrasions or scratches might have caused due to resistance by the girl, in her cross-examination, she deposed that the said abrasions or scratches could be possible while working in agricultural field. Therefore, the said injuries on the Appellant do not further the Prosecution's case in proving the Charge.

19. The other evidence on record is that of PW - 1 [Bandu Appa Gore] who acted as the Panch for the spot panchnama at Exhibit - 16. Nothing incriminating has been seized under the said panchnama. The other evidence is that of PW - 2 [Tarachand Shrirang Kolhe] who was the maternal uncle of the Victim and PW - 3 [Tarabai Shrirang Kolhe] who was the maternal grand-mother of

the Victim. The evidence of maternal uncle and maternal grand-mother of the Victim is hearsay in nature. The other evidence is that of PW - 6 [Somnath Tukaram Wakchaure] who was the Head Master of the School where the Victim was taking education. There is no serious challenge to the evidence of this witness as the age of Victim is not in dispute.

20. The other evidence is that of PW - 7 [Rajendra Dashtrath Pawar], who carried the investigation in the Crime. What is seen from his evidence, is that he referred the muddemal articles for chemical analysis vide letter dated 02/06/2016. The evidence on record show that the clothes of the Victim and the Appellant were seized on 28/04/2016. It is thus clear that the clothes were sent to the Laboratory after a period of more than a month. There is no evidence on record to show that the said articles were properly sealed and the seal was intact till it was sent to the Laboratory. It is necessary to have the evidence in that regard to rule out the possibility of tampering with the articles. Thus, the CA report which show the presence of semen of blood group of the Appellant on the Salwar and Kurta and human blood on Kurta and full Pant is kept out of consideration.

21. Evaluation of the evidence on record show that the Victim's testimony does not inspire confidence. It is not possible to believe and rely on the testimony of the Victim. She is an unreliable witness. The medical evidence do not corroborate the testimony of Victim. There was quarrel between the Appellant and maternal grand-mother

of the Victim and the Victim was reluctant to come with the Appellant to her house. Thus, the possibility of false implication cannot be ruled out. Going further, the testimony of PW - 5 [Dr. Manisha Pralhad Undre] by itself cannot be sufficient to come to the conclusion that there was an attempt of rape. The CA report even if considered, by itself will not be sufficient to hold that the Charge was proved. Thus, the Appeal is required to be allowed. Hence, the following order:

ORDER

- (i) The Criminal Appeal is allowed.
- (ii) The Judgment and Order dated 15/04/2017 passed by the learned Additional Sessions Judge, Ahmednagar, in Sessions Case No.247/2016 convicting and sentencing the Appellant for the offences punishable under Sections 376(2)(f)(i) and Section 506 of IPC and Sections 5, 6, 9 and 10 of POCSO Act, is quashed and set aside.
- (iii) The Appellant stands acquitted for the offences punishable under Sections 376(2)(f)(i) and Section 506 of IPC and Sections 5, 6, 9 and 10 of POCSO Act.
- (iv) The Record and Proceedings be sent back to the learned Trial Court.
- (v) The fees of appointed Advocate Mr. S. S. Deshmukh for Respondent No.2 is quantified at Rs.5000/- [Rupees Five Thousand Only], which is to be paid by the High Court Legal Services Sub-Committee, Aurangabad.

[NEERAJ P. DHOTE, J.]

[R.G. AVACHAT, J.]