



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

CRIMINAL APPEAL NO.463 OF 2022

Raju Ramesh Nikam @ Kailash Asru Bankar,
Age : 41 years, Occ. Nil,
r/o. House No.49, Om Nagar,
Bagsevniya, Bhopal (M.P.),
At present residing at Plot No.34,
Renuka Nagar, Mehrun,
Jalgaon

..Appellant

Vs.

1. The State of Maharashtra
(Through PSO, MIDC Police Station,
Jalgaon, Dist.Jalgaon)

2. X Y Z

..Respondents

Mr.P.P.Shahane, Advocate (appointed) for appellant
Mr.S.D.Ghayal, APP for respondent no.1
Mrs.Bharti Gunjal, Advocate (appointed) for respondent no.2

**CORAM : R.G.AVACHAT AND
NEERAJ P. DHOTE, JJ.
DATE : FEBRUARY 15, 2024**

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

The challenge in this appeal is to the judgment of conviction and order of consequential sentence passed by learned Special Judge (POCSO Act)/Addl. Sessions Judge, Jalgaon, in Special Case (POCSO) No.43 of 2016 on 12.01.2018. Vide the impugned judgment and order, the appellant was convicted for the offence

punishable under Sections 376(2)(i) and 450 of Indian Penal Code and therefore, sentenced to suffer rigorous imprisonment for life till his natural death and for five years, respectively, The appellant was also convicted for the offence under Section 5(m) punishable under Section 6 of the Protection of Children from Sexual Offences Act ("POCSO Act", for short). No separate sentence has, however, been imposed therefor.

2. The facts, giving rise to the present appeal, are as follows:-

The victim (PW 1) would reside along with her grandmother and two younger siblings at Jalgaon. The grandmother was little over 70 years of age. She was hard of hearing and even had blurred vision. The victim would beg to earn living of the family members. Her mother had passed away a month before 16.07.2016. Her father went missing. It was one-room premises wherein the victim along with her family members was residing. Considering their financial status, the landlady would not charge them rent.

3. The appellant was residing in the neighborhood. He was auto-rickshaw driver by profession. It was rainy season and the month of July, 2016. The victim and all her family members were

asleep. The walls of their room were of wooden planks. The bolt of the entrance door was not in order. Even with a gentle push, the door could get opened. The victim woke up realising someone to have touched her person. She realised that it was the appellant sitting by her side. He offered her Rs.100/- and asked to allow him to have sexual intercourse with her. He then made her lie, removed her pant and covered her mouth. He then forced himself on her person and committed sexual intercourse. He then fled away. The victim did not inform her grandmother immediately. After having woke up in the morning, she related the same to her grandmother and her neighbour namely, *Avada Akka*. Her maternal uncle brought her to police station. She lodged the First Information Report (Exh.28). Based on her report, crime vide C.R. No.214 of 2016 was registered. Her statement under Section 164 of the Code of Criminal Procedure was recorded. The appellant was arrested. The victim was medically screened. Clothes on her person were seized. During her medical examination, samples of certain things were obtained for F.S.L. and D.N.A. profiling. Upon completion of the investigation, the appellant was proceeded against by filing charge sheet.

4. The court constituted for trial of the offences under POCSO Act, framed Charge (Exh.11). The appellant pleaded not

guilty. It is his defence that he had lent Rs.5,000/- to the maternal uncle of the victim. He was repeatedly demanding the same. Only with a view to avoid repayment of the amount, a false case was lodged.

5. To establish the Charge, the prosecution examined twelve witnesses and produced in evidence certain documents. On appreciation of the same, the trial court convicted the appellant and consequently, sentenced as stated above.

6. Heard learned counsel for the parties.

7. Learned counsel appointed to represent the appellant would submit that the medical examination report besides the C.A. and D.N.A. reports, would run counter to the prosecution case. The radiological examination indicates that the victim was in the age group of 13-14 years. The trial court, still, held her to be below 12 years of age. According to him, there is no evidence, except bare testimony of the victim. He would submit that when the medical evidence runs counter to the prosecution case, the trial court ought not to have relied on the victim's evidence for convicting the appellant for serious offence. He, therefore, urged for allowing the appeal.

8. Learned APP and learned counsel appointed to represent the victim would, on the other hand, submit that the suggestions given to the victim in the cross-examination, indicate the appellant to have admitted his presence in the room, wherein the victim was residing. Even if the medical evidence does not support, the child-victim gave details as to how the appellant committed the crime. The trial court has rightly believed her testimony. Both of them would submit that the medical examination of the victim took place little late. Both learned counsel, ultimately, urged for dismissal of the appeal.

9. Considered the submissions advanced. Perused the evidence on record.

10. Although twelve witnesses have been examined by the prosecution, the evidence relied on and necessary for deciding the present appeal is only referred to.

11. PW 1 - victim was, admittedly, residing along with her 70 years old grandmother and two younger siblings. The premises they were residing in, was a single room. The walls thereof were of wooden planks. The grandmother was deaf and even weak in her vision/eyesight. The mother of the victim passed away a month

before the alleged incident. The father was absconding. The maternal uncle of the victim was alcoholic. The victim would beg to feed herself and the family members. Such was the plight of the family. True, the landlady, in whose premises they were residing in, would not charge them for rent. It, however, appeared that it was not a good locality. In the neighborhood, there was illicit liquor den. In the house of another woman residing in the neighborhood, there used to be male visitors overnight. Be that as it may.

12. The incident took place on the intervening night of 16th and 17th of July, 2016. It was raining. The victim and her family members were asleep. She got awake as someone touched her person. She recognised the person to be the appellant, a rickshaw-driver residing in the neighborhood. It is in her evidence that the door of her house could be opened with a gentle push, since its bolt was not in order. The appellant laid himself on her person. He offered the victim a sum of Rs.100/- and asked her to allow him to have sexual intercourse with her. She raised shouts. The appellant pressed her mouth with his hand. He removed his pant and that of the victim. The appellant then committed penovaginal intercourse with her. He then ran away. On the following morning, the victim related her grandmother and neighbor - *Avada Akka* the happenings.

Her material uncle took her to the police station. She lodged the FIR (Exh.28).

13. The victim was subjected to searching cross-examination. It has come on record that the vicinity wherein she was residing, was not good. In the neighborhood, there was illicit liquor den. In the house of the woman residing in another neighborhood, there used to be visitors until late night. The questions suggesting the appellant's defence have stoutly been denied. It was suggested to the victim that while she woke up, she saw the appellant sitting by her side. She thereby got frightened and raised shouts. This suggestion goes a long way to infer the appellant to have admitted his presence at the relevant time in the victim's house.

14. Post-registration of the FIR, the victim was medically screened. She was also subjected to radiological examination to ascertain her age. The radiologist who examined the victim, opined her to have been in the age group of 13-14 years. The trial court, therefore, ought not to have held the victim to have been below 12 years of age at the relevant time. The evidence of the witness (PW 3) to the scene of offence panchnama (Exh.40), is not that much relevant.

15. Dr.Sandipkumar Patil (PW 5) medically screened the victim to find, whether she was subjected to sexual assault. His evidence indicates that the victim gave him history of the incident as under :-

“ Alleged h/o. sexual assault, history narrated by victim herself and Vishal, her maternal uncle that – she was sleeping in her house with her grandmother and two younger brothers. Raju, their neighbour came to her withdraw her inner and slept on her body and as she made noise, he ran away.”

The victim did not allow PW 5 to examine her urethra, PS examination, anus and oral cavity. PW 5 collected vaginal/cervical swab. The victim's blood was also obtained. On examination, PW 5 opined it to be a case of attempt to commit rape. His evidence, however, indicates that no injuries were noticed on the victim's person. The C.A. and D.N.A. reports (Exhs.119 to 122) indicate that no male DNA was detected in the blood of the victim and her vaginal swab.

16. PW 7 is the Medical Officer, who examined the appellant for his potency test. The appellant does not deny his potency.

17. As such, we have evidence of the victim alone coupled with her medical examination report. The history was given by the

victim herself. The same ruled out the appellant to have committed sexual intercourse with her. The C.A. and D.N.A. reports too run counter to the prosecution case.

18. The appellant has been sentenced to suffer life imprisonment. The offence being serious, the proof thereof has to be strict. The history given by the prosecutrix indicate it to be an offence of sexual assault within the meaning of Section 7 of the POCSO Act. The said offence is punishable under Section 8 of the very Act. Same is also offence under Section 354 of Indian Penal Code. On appreciation of the entire evidence on record, we find it to be not the case of rape but of sexual assault, punishable under Section 8 of the POCSO Act and under Section 354 of Indian Penal Code.

19. The appellant is behind the bars for little over eight years.

20. In view of the above, we are inclined to allow the appeal partly. Hence, the following order:-

(i) The appeal is partly allowed.

(ii) The order dated 12.01.2018, passed by learned Special Judge (POCSO Act)/Addl. Sessions Judge, Jalgaon, in Special Case

(POCSO) No.43 of 2016, convicting the appellant for the offences punishable under Section 376(2)(i) of Indian Penal Code and Section 5(m) punishable under Section 6 of POCSO Act and consequently, sentencing him to suffer rigorous imprisonment for life till his natural death and to pay fine of Rs.10,000/- with default stipulation, is hereby set aside. The appellant is acquitted thereof.

(iii) Instead, the appellant is hereby convicted for the offence punishable under Section 354 of Indian Penal Code and Section 7 punishable under Section 8 of the Protection of Children from Sexual Offences Act and therefore, sentenced to suffer rigorous imprisonment for five years, on both counts.

The appellant shall pay a fine of Rs.10,000/- (Rupees Ten Thousand), in default to suffer simple imprisonment for six months for the offence under Section 7 punishable under Section 8 of the Protection of Children from Sexual Offences Act.

(iv) The order of conviction and sentence for the offence punishable under Section 450 of Indian Penal Code, is maintained.

(v) All the substantive sentences to run concurrently.

(vi) Clause (g) of the impugned order to stand as it is.

(vii) The appeal stands disposed of accordingly.

(viii) Fee of learned counsel appointed to represent the appellant is quantified at Rs.12,000/- (Rupees Twelve Thousand).

(ix) Fee of learned counsel appointed to represent respondent no.2 - victim is quantified at Rs.10,000/- (Rupees Ten Thousand).

[NEERAJ P. DHOTE, J.]

[R.G. AVACHAT, J.]

KBP