



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 644 OF 2018
WITH
CRIMINAL APPLICATION NO. 1634 OF 2023
IN CRIMINAL APPEAL NO. 644 OF 2018

Rupchand s/o Tekchand Tirchhe
Age: 32, Occ : Labour,
R/o. Tisgaon, Aurangabad. ... Appellant

versus

1. The State of Maharashtra
2. XYZ ... Respondents

WITH
CRIMINAL APPEAL NO. 619 OF 2018
WITH
CRIMINAL APPLICATION NO. 1635 OF 2023
IN CRIMINAL APPEAL NO. 619 OF 2018

Machindra Gulab Gaikwad
Age 27 years, Occ : Labour,
R/o. Tisgaon,
Taluka and District Aurangabad. ... Appellant

versus

1. The State of Maharashtra
2. XYZ ... Respondents

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Mr. Shaikh Kayyum Najir, Advocate for the Appellant in Criminal Appeal No. 644 of 2018
Mr. M. P. Bhaskar, Advocate h/f Mr. Ravindra B. Wankhede, Advocate for the Appellant in Criminal Appeal No. 619 of 2018
Mr. N. D. Batule, APP for Respondent No.1-State in both appeals.
Mr. Ujwal S. Patil, Advocate for Respondent No.2 in both appeals.

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CORAM : ABHAY S. WAGHWASE, J.

Reserved on : 16.01.2024

Pronounced on : 23.01.2024

JUDGMENT :

1. Vide both above appeals, convicts i.e. accused no.1 Rupchand and accused no.3 Machindra are taking exception to the judgment and order passed by learned Additional Sessions Judge, Aurangabad dated 17.07.2018 in Special POCSO Case No. 119 of 2015 thereby questioning its legality and maintainability.

PROSECUTION CASE IN BRIEF

2. Chawani Police Station registered crime and chargesheeted accused Rupchand, Baban (since deceased), Machindra and Shaikh Sattar for offence punishable under Sections 376-D, 323, 504, 506, 394, 201 r/w 34 of the Indian Penal Code [IPC] and Section 4 of the Protection of Children from Sexual Offences Act, 2012 [POCSO Act] alleging that on 21.09.2015 when victim PW1 was having talks with her friend PW6 on Tisgaon road, around 6.30 to 6.45 p.m., accused persons approached them. One of them caught hold of victim and dragged her and remaining two started beating PW6. Accused no.1 raped victim during which she raised shouts which invited attention of a passer by. So all accused persons took to heels. Victim and her

friend approached police and lodged report on the strength of which crime bearing no. I 307/2015 was registered and investigated and all four accused were duly chargesheeted.

3. During trial before learned Additional Sessions Judge, prosecution adduced evidence of in all 10 witnesses and also adduced documentary evidence various panchanamas, reports etc. After appreciating the evidence on record, learned trial Judge convicted present appellants and hence the appeals assailing above judgment and findings reached at by learned trial Judge.

SUBMISSIONS

4. Learned counsel Mr. Shaikh Kayyum Najir, Advocate for the Appellant in Criminal Appeal No. 644 of 2018 would submit that implication is false. That, victim was caught red handed having become intimate with her friend PW6 and therefore, to save themselves, there is false implication by leveling false allegations. He further submitted that behaviour of victim herself was doubtful. That, even otherwise prosecution evidence, more particularly answers given by prosecution witnesses in cross, renders case of prosecution doubtful. He submitted that considering the very evidence of victim, she can be said to be consenting party. According to him, there were

no injuries or marks of forceful sexual assault. That, accused were strangers and victim could not identify them beyond reasonable doubt. Even age of victim has not been proved by prosecution and for all above counts, he submits that, the findings and conclusion reached at by learned trial Judge is either in absence of cogent and reliable evidence or based on assumptions and presumptions. That, in fact prosecution has not proved charges beyond reasonable doubt.

Learned counsel has placed reliance on *Vilas Namdeo Roundal v. The State of Maharashtra* 2015 All MR (Cri) 1596; *Lalliram and another v. State of Madhya Pradesh* (2008) 10 SCC 69; *State of Maharashtra v. Mahadu Dagdu Shinde* 2021 SCC OnLine Bom 336; *Anish Rai s/o Sunil Rai v. State of Sikkim* 2018 SCC OnLine Sikk 141; *Smt. Firoja @ Puja Maihjur Shaikh v. The State of Maharashtra* (with connected appeal) 2017 SCC OnLine Bom 9084; *State of Madhya Pradesh v. Muna @ Shambhoo Nath* 2015 DGLS (SC) 917; *Rajak Mohammad v. State of Himachal Pradesh* (2018) 9 SCC 248 and *Surjan and others v. State of M.P.* (2002) 10 SCC 214.

5. Learned counsel Mr. M. P. Bhaskar appearing for the Appellant in Criminal Appeal No. 619 of 2018 at the outset submits that his client was not properly represented by any legal professional in the

trial court. Therefore there was no proper defence. According to him, victim was already having affair with her friend. That, they were spotted together and therefore false case of rape has been set up. Even according to him, neither age nor occurrence of rape is proved and corroborated. Therefore, according to him also, there is no appreciation of evidence and therefore findings reached at by learned trial Judge cannot be allowed to be sustained.

6. Learned APP pointed out that prosecution had established victim to be minor. That, while she was with PW6 i.e. her friend, accused had together approached them and accused no.1 raped victim while rest of the accused beat PW6. Both, PW1 and PW6, have stuck to their version and their testimony has remained unshaken during cross. Medical evidence confirms occurrence of rape as well as minority of the victim. Even other charges are proved by prosecution by adducing evidence of independent witnesses and panchas, whose testimony is also reliable and trustworthy. That, therefore all necessary ingredients for attracting the charges being available, learned trial Judge has rightly recorded the guilt and convicted the accused and that there is no merit in the appeals and so he prays to dismiss the same.

EVIDENCE BEFORE THE TRIAL COURT

7. After hearing submissions of both sides and on appreciation of evidence adduced in the trial court, it seems that case of prosecution is rested on the testimony of in all 10 witnesses and their status is as under:

PW1 Victim

PW2 Milind is pancha to spot panchanama and seizure of articles vide Exhibit 34. This witness is also examined as **PW5** at Exhibit 48 where he deposed about acting as pancha to seizure of clothes of victim and PW6 vide panchanama Exhibits 49 and 50 respectively.

PW3 Kunalsingh is pancha to seizure of clothes of all accused vide Exhibits 40 to 43.

PW4 Ganesh is pancha to memorandum of disclosure Exhibit 45 at the instance of deceased accused Baban and recovery of wallet of PW6 along with articles found in it, i.e. aadhar card and passport size photographs of PW6, visiting cards and three currency notes of Rs.100/- each, vide Exhibits 46.

PW6 Friend of victim.

PW7 Dr. Vinayak Nanekar who, on radiological test of bone of victim, assessed her age to be 16 to 17 years and issued report to that extent vide Exhibit 61.

PW8 Dr. Sk. Mohiyoddin examined all four accused on 02.10.2015.

PW9 Dr. Shweta Gajabhiye, Gynecologist, who examined victim on 22.09.2015 and issued report Exhibit 84.

PW10 PI Sable is the Investigating Officer [IO].

8. Taking into account the nature of accusations, in the considered opinion of this court, at the outset it needs to be seen whether prosecution has established victim to be below 18 years of age. To ascertain this legal aspect, on visiting evidence of victim herself at Exhibit 25, she seems to have given her age at 17 years and her parents seem to be labours. However she has not given her date of birth. In cross, she stated that she was born in village Bhira and shifted to village Sajapur when she was 8 to 10 years old. Resultantly, from her evidence her date of birth is not coming on record. Unfortunately her biological parents are not examined. She being daughter of labours, apparently she did not undertake education and therefore there may not be record to that extent.

In the judgment of *Jarnail Singh v. State of haryana* 2013 Cri.L.J. 3976; *State of Uttar Pradesh v. Chhoteylal* LEX (SC) 2011 p. 697 and very recent case of *P Yuvaprakash v. State* 2023 LiveLaw

(SC) 538, the Hon'ble Apex Court has reiterated the nature of evidence that would be necessary for determination of age. Here, first two contingencies spelt out in para 13 of *P Yuvaprakash* (supra) are admittedly not available and therefore, under such circumstances, this court can shift to the last mode of ascertainment of age i.e. ossification test.

9. Here, PW7 Dr. Vinayak Nanekar, who claims to have conducted X-ray examination and who was working in the very Radiology Department, has opined that on the basis of his assessment of bone, age of victim is around 16 to 17 years. On visiting his cross, except suggestion that age depends upon geographical circumstances and it depends upon family history and body structure of their parents, there is nothing adverse as regards the ossification test is concerned. Taking the evidence of PW7 into consideration, there is no hurdle to accept that victim was around 16 to 17 years of age and taking the same into consideration, she can be said to be below 18 years of age. Therefore, here, prosecution has succeeded in establishing that victim was minor at the time of occurrence. Resultantly, the first contention of both the learned counsel that prosecution failed to establish that victim was a child or below 18 years of age has no merits and is required to be discarded forthwith.

OCULAR EVIDENCE [VICTIM PW1 AND HER FRIEND PW6]

10. Now let us see whether there is evidence suggesting offence as alleged. Again evidence of victim PW1 and her friend PW6 is crucial and assumes significance and is therefore required to be carefully assessed and re-examined.

11. Victim who has deposed in the capacity of PW1 has given the date of occurrence and about PW6 calling and meeting her and they both going on his motorcycle firstly to Sidharth garden and leaving said place around 6.00 p.m. and going in the vicinity of Tisgaon. According to her, around 6.15 to 6.30 p.m., three persons came, one of them hold her by her hair whereas other two started beating PW6. She stated that the person who held her by her hair also slapped her. She gave his description to be in the age group of 30 to 35 years, fat, normal in colour, was wearing khaki colour shirt and white colour pant. According to her, he dragged her to some distance and even she tried to resist by biting on his forearm. He again assaulted her and then he forcibly made her lie on the ground, removed her clothes and his own clothes and raped her. She further deposed that she was crying and shouting and at that time one person came on motorcycle and on hearing her cries the person approached them and that time,

she put on her clothes. That time she saw two persons who were beating PW6 had come and alerted the accused. They all were talking to her in Hindi but among themselves they were talking in Marathi. They fled from the spot. She further deposed that PW6 informed his friend as well as police on phone. Thereafter police reached the spot and took victim to police station where she lodged report Exhibit 26. In para 5 and 6 she deposed that after 7 days of the incident, she was taken to court and her statement under Section 164 was recorded and 2-3 days thereafter, she was again called at Harsool jail and there, amongst 25-26 persons who were standing in queue, she identified four persons. She deposed that she could identify the person who had caught her by hair that day and she pointed towards accused who turned out to be Rupchand. She also identified rest of the three accused in court.

12. PW6 friend of victim, who is examined at Exhibit 51 also supported victim by stating that on 21.09.2015, he called victim and they both met and reached Sidharth garden on his motorcycle and from there they started to go towards Aurangabad-Ahmednagar Road and they stopped at a *kachha* road in Tisgaon Shivar. While victim was sitting on the motorcycle and he was standing in front of motorcycle, at that time three persons came. One of them extorted

mobile from him and gave blow on his back and two of them caught hold of him, whereas one held victim by her hair and they all started beating them. When victim requested not to beat, she was given blow on her mouth and was dragged towards remote place. He also gave description of the person who dragged as he to be healthy, in the age group of 30 to 35 year having long mustache. He also stated that two persons were beating him. They took out wallet and belt from him. At that time, he had Rs.300/-, aadhar card, passport size photograph and document of his vehicle. According to him, they said that they would commit sexual assault on victim. He also claims to have tried to escape and after reaching main road, he claims to have informed his friend about the incident. He claims that he was obstructing vehicles. Four to five vehicles stopped and he narrated the incident to them and took all those persons towards the spot. When they reached the spot, they found victim lying on the ground and she was crying and she allegedly told him that one of those persons committed forceful act of rape on her.

13. Therefore, as regards the occurrence is concerned, both, PW1 and PW6, are found to be lending support to each other and are consistent about they meeting, going to the garden, returning towards road leading to Tisgaon and they being approached by three persons,

one of them dragging victim and other two beating PW6. Victim is categorical about she being made to lie down and forced upon. Both of them have given description of all three persons.

MEDICAL EVIDENCE

14. Evidence of PW9 at Exhibit 83, who is a gynecologist, shows that on 22.09.20015, i.e. on the very next day, victim was produced by LPC for medical examination and this witness PW9 deposed about noting history and coming across blood stains on her clothes. She found abrasions of 0.5 x 0.5 at 6 O'clock position over posterior hymen. She deposed that hymen was ruptured. She opined that as per history given old healed hymen tear present, but further stated that there is possibility of penetrative and forcible intercourse. She has identified medical report Exhibit 84.

While under cross, there are questions about not noting number of ward and that most of the doctors refer medical jurisprudence authored by Parikh and Modi. She further answered and admitted that during her examination, she did not notice abrasions on victim's thighs and hips. She also admitted that if forceful sexual assault is done on a victim on hard and blunt surface, then there is possibility that victim will have abrasions over her back, hips and thighs.

15. On analysis of medical evidence discussed above, it is clear that victim was examined by this doctor on the very next day of the occurrence. She has noted history. Though doctor has noticed old hymen tear, she has come across abrasion over posterior hymen and she gave its measurement. She has expressly answered that there is possibility of penetrative forcible intercourse and abrasion to be possible in case there is forcible intercourse. Even in report, she has opined that penetrative vaginal intercourse could not be ruled out. Taking into consideration evidence of doctor and the manner of her cross, it is evident that on 21.09.2015 there was forceful sexual assault on victim. There was no reason for victim to falsely depose. Therefore, medical evidence corroborates the testimony of PW1 victim.

16. Though all four accused are shown to be subjected to medical examination, unfortunately they seem to be produced before PW8 Dr. Sk. Mohiyoddin on 02.10.2015. Therefore, doctor on examination did not notice any kind of violence marks on their body.

17. Much hue and cry is made by both learned counsel by submitting that accused persons were unknown to the victim as well as PW6. They had merely given description and therefore identification of accused is not proved beyond reasonable doubt.

On minute scrutiny of evidence of PW10 IO, we find him stating in his examination-in-chief about making communication to the Tahsildar for getting Test Identification parade conducted. Victim PW1 also in her examination-in-chief stated about participating in TI parade at Harsool Jail and identifying all accused persons standing in a queue and she has also identified accused persons in court. Nothing has been brought during cross of any of the witnesses suggesting confrontation of accused prior to being made to face TI parade. Even otherwise, identification parade is mere corroborative piece of evidence and it is the substantive evidence that would prevail. Here, victim has identified accused to be present in the court and therefore, above submissions regarding identification is rendered valueless. Moreover, in the instant case, learned trial court has marked and got the TI parade panchanama exhibited. No objection to that was raised during appeal or even before this court.

Above view of this court gets fortified from the observations of the Hon'ble Supreme Court in a landmark case of ***Vijay @ Chinee v. State of Madhya Pradesh*** (Criminal Appeal No. 660 of 2008 decided on 27.07.2010), wherein, in para 17 to 19, by referring the rulings of ***Malkhan Singh v. State of M.P.*** AIR 2003 SC 2669 and ***Mulla & Anr. v. State of Uttar Pradesh*** (2010) 3 SCC 508, it is held as under:

*“17. In **Malkhan Singh Vs. State of M.P.** AIR 2003 SC 2669, this Court has observed as under:*

“It is well settled that the substantive evidence is the evidence of identification in court and the test identification parade provides corroboration to the identification of the witness in court, if required. However, what weight must be attached to the evidence of identification in court, which is not preceded by a test identification parade, is a matter for the courts of fact to examine.”

*18. In **Mulla & Anr. Vs. State of Uttar Pradesh** (2010) 3 SCC 508, this court (one of us, Hon’ble P. Sathasivam, J.) placed reliance on **Matru @ Girish Chandra Vs. The State of Uttar Pradesh** AIR 1971 SC 1050; and **Santokh Singh Vs. Izhar Hussain & Anr.** AIR 1973 SC 2190, wherein it had been held that the Tests Identification Parades do not constitute substantive evidence. They are primarily meant for the purpose of providing the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on right lines. The Test Identification Parade can only be used as corroboration of the statement in Court. The necessity for holding the Test Identification Parade can arise only when the accused persons are not previously known to the witnesses. The test is done to check the veracity of the witnesses. The court further observed as under :-*

“The evidence of test identification is admissible under Section 9 of the Indian Evidence Act. The

Identification parade belongs to the stage of investigation by the police. The question whether a witness has or has not identified the accused during the investigation is not one which is in itself relevant at the trial. The actual evidence regarding identification is that which is given by witnesses in Court. There is no provision in the Cr.P.C. entitling the accused to demand that an identification parade should be held at or before the inquiry of the trial. The fact that a particular witness has been able to identify the accused at an identification parade is only a circumstance corroborative of the identification in Court.”

19. Thus, it is evident from the above, that the Test Identification is a part of the investigation and is very useful in a case where the accused are not known before hand to the witnesses. It is used only to corroborate the evidence recorded in the court. Therefore, it is not substantive evidence. The actual evidence is what is given by the witnesses in the court.”

18. Prosecution has also adduced evidence of pancha witness PW4 Ganesh who claims that in his presence memorandum was given by deceased accused Baban and in pursuance to the memorandum, seizure of wallet, aadhar card of PW6 and money was caused and therefore it is also a value addition. Nothing doubtful has been brought in cross of this pancha witness.

19. Therefore, in the totality of above discussed oral and documentary evidence, in the considered opinion of this court, prosecution has established beyond reasonable doubt that on the day of occurrence, victim was below 18 years of age. While she was in the company of PW6, accused approached them. Medical evidence corroborates testimony of victim regarding the offence of rape. On the strength of evidence of all ten witnesses, charges can be said to be proved.

20. Perused the rulings relied. Facts in the case in hand and in those cases are distinct and therefore, same cannot be taken aid of by the appellants.

21. I have gone through the impugned judgment. Learned trial Judge has correctly appreciated the evidence adduced by prosecution. Required law has been applied and only on satisfaction about case being made out, charges are held to be proved. Nothing has been brought to the notice of this court during appeal about any perversity or failure to appreciate the evidence. Resultantly, there being no merits, I proceed to pass the following order:

ORDER

- I. Both the appeals are hereby dismissed.
- II. The applications in both appeals do not survive and the same stand disposed of.

[ABHAY S. WAGHWASE, J.]

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