



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

CRIMINAL APPEAL NO. 430 OF 2023

Vijay s/o Shankar Poul,
Age 21 years, Occ. Labour,
R/o Phule Nagar, Kaij,
Tal. Kaij, Dist. Beed.

... Appellant
[Original accused]

Versus

1. The State of Maharashtra
Through Police Sub-Inspector,
Police Station, Kaij,
Taluka Kaij, District Beed.

2. XYZ

... Respondents

.....

Mr. S. B. Solanke, Advocate for the Appellant.

Mr. N. D. Batule, APP for Respondent No.1-State.

Ms. Nima R. Suryawanshi, Advocate for Respondent No.2 [appointed through Legal Aid]

.....

CORAM : ABHAY S. WAGHWASE, J.

Reserved on : 23.01.2024

Pronounced on : 31.01.2024

JUDGMENT :

1. Appellant is assailing the conviction recorded by Special Judge, Ambajogai in Special (Child) Case No. 50 of 2022 dated 19.04.2023, recording guilt for offence punishable under Sections 376(2)(n), 354-B, 363 of the Indian Penal Code [IPC] and Sections 4(2), 6 and 8 of the Protection of Children from Sexual Offences Act, 2012 [POCSO Act].

2. In brief, case launched by prosecution was that on 06.04.2022 around 9.00 p.m., victim, who was playing outside the house, went missing and was therefore searched for but was not found. Girl was traced on the next day at 1.30 a.m. but she was in terrified condition and so she was made to sleep. In the morning about 9.00 a.m., on inquiry, victim told that while she was playing, accused Vijay called her. One friend was also accompanying him. They forcibly carried her, removed her clothes, pressed her mouth and accused Vijay pressed her breast. He moved his hand on her private part. Friend also pressed her breast and when she tried to raise shouts, her mouth was pressed.

On such information, police was approached by mother and on her report, crime was registered bearing no. 112 of 2022 for commission of offence punishable under Sections 354, 354-A, 354-B, 354-D r/w 34 of IPC. During investigation, I.O. came to know about accused forcibly committing sexual intercourse twice with the minor victim. After completion of investigation, I.O. filed chargesheet against accused for offence under Sections 376(2)(n), 354-A, 354-B, 354-D of IPC and Sections 4(2), 6, 7, 8 and 12 of the POCSO Act.

Appellant was tried by learned Additional Sessions Judge, who, on appreciation of oral and documentary evidence, accepted the case of prosecution as proved and handed down conviction for sentence as spelt out in the operative part and the same judgment is now assailed before this court on various grounds raised in the appeal memo.

SUBMISSIONS

3. Advancing case of false implication, learned counsel for the appellant would submit that there is inordinate delay in lodging FIR. Alleged occurrence is of 06.04.2022 and report is of 08.04.2022. Report by mother is on hearsay information. Learned counsel submitted that there were no allegations of rape as regards first episode is concerned. He pointed out that here, doctor who examined victim has not been made a witness and therefore, it is his submission that, medical evidence is lacking. He further pointed out that even forensic evidence does not support prosecution. He invited attention of this court to the written opinion issued by medical expert at Exhibit 39. He further pointed out that in view of testimony of PW5, there was no fresh injury, rather there was old hymeneal tear. He further submitted that learned trial court has not properly appreciated the evidence adduced by prosecution and mere evidence is reproduced

but there is no proper analysis and findings are not supported by sound reasons. Case of defence has been totally overlooked. Even citations relied by defence are not taken into account. Resultantly, it is his submission that, when there was sufficiently long delay in lodging complaint and when testimony of victim, her mother, contents of FIR and statements under Section 164 of the Code of Criminal Procedure [Cr.P.C.] are totally inconsistent, guilt ought not to have been recorded. However, that not having been done, he prays for re-appreciation of evidence and to allow the appeal.

Learned counsel for the appellant has placed reliance on the following rulings:

1. ***The State of Maharashtra v. XYZ*** MANU/MH/0053/2022 ; 2022 AllMR (Cri) 708.
2. ***Ram Swaroop and others v. State of Rajasthan*** MANU/SC 0224/2004 ; (2004) 13 SCC 134.
3. ***Suraj Mal v. State (Delhi Administration)*** MANU/SC/ 0268/1979 ; (1979) 4 SCC 725.
4. ***Narra Peddi Raju v. State of A.P.*** MANU/SCOR/ 37992/2019.
5. ***Dilip and others v. State of M.P.*** MANU/SC/0678/2001 ; (2001) 9 SCC 452.

6. ***State of U.P. v. Mangal Singh and Others*** MANU/SC/0681/2009 ; (2009) 12 SCC 306.

4. In answer to above submissions, learned APP submitted that apparently, victim is 12 years of age. School authorities have been examined. Medical evidence is about rupture to the private part. He submitted that there is no reason for false implication. Further, according to him, victim has reported late and therefore complaint was not lodged immediately. Further according to him, in fact informant and accused are relatives. Accused has committed grave offence. There is clinching evidence of both, victim and her mother, as well as medical evidence. Therefore, according to him, no fault can be found in the manner of appreciation or the conclusion drawn by the learned trial Judge.

5. Learned counsel for the victim also, in support of the judgment of conviction, pointed out that victim is minor. Medical evidence is supporting prosecution. That, accused is not only named but he is also identified in the court. Independent witnesses like panchas, medical experts have withstood cross and their evidence has remained intact. According to her, as offence is clearly made out, conviction has rightly been recorded and so she prays to dismiss the appeal.

EVIDENCE ON BEHALF OF PROSECUTION

6. **PW1** Bhim Shinde is pancha to spot panchanamas Exhibits 18 and 19 as well as seizure of clothes of victim on 25.04.2022.

7. **PW2** victim aged 12 years deposed that incident took place two months back and two times. Regarding first incident, she deposed that at that time she was playing in front of the house. At that time, accused came and asked her to bring Rajnivas supari and then caught hold of her hand and carried her towards *bandhara*. According to her, she tried to shout but he pressed her mouth, then removed her clothes and his own clothes, slept over her, entered his urinal part in her urinal part and he inserted penis. She again stated that she tried to shout but he pressed her mouth. According to her, she suffered abdominal problem, there was bleeding from her private part and she tried to get up but again he committed sexual intercourse with her. She further deposed that accused took her towards her house and he left her near a tin shed and then she was taken home by one Atul. According to her, incident had happened at night time about 1.30 a.m.

In para 2 she deposed that her parents came to the spot to look for her and at that time friend of accused told him that her parents had come and to leave her. Then she deposed that prior to it, she was taken towards a tamarind tree. Then she deposed that very firstly she was called towards *bandhara* and second time she was carried under the tamarind tree. Under the tree, he removed her clothes and his own clothes, slept on her and inserted his penis in her vagina. He threatened to kill her and throw her body in the well water and therefore she did not tell the incident to anybody due to fear. After 15 days, she narrated the incident to her parents. She claims that she went to police station, to the doctor and her statement to be recorded before the court twice under Section 164 of Cr.P.C.

Victim is subjected to extensive cross and in para 4, omissions are brought regarding *“he slept on me, he inserted his private part into my private part, then friend of accused reached on the spot, he narrated accused that her parents are coming to the spot and you leave her, then he carried me towards tamarind tree and also slept on me and he inserted his urinal part into my urinal part”*.

In further cross she answered that she had narrated it to police but the same is not appearing in her first statement recorded before the Court under Section 164 Cr.P.C., rather it is appearing in her

supplementary statement. Then she answered that there is ten feet cement road in front of her house and there are houses to both side. She admitted that there are three lanes and that said tamarind tree is in front of her uncle's house and there to be electric poles having lights. She further admitted in para 5 that while going towards *mondha*, there are houses on both sides of the lane. She admitted that it takes 20 to 25 minutes to walk from her house to the *bandhara* and on the way there are houses on both sides and even houses near *bandhara*. She answered that when first time accused came towards her house, at that time her friends were present. Omission is brought in her statement to police regarding she playing with her friends and at that time accused carrying her from the front side of school, she purchasing Rajnivas sugandhi supari from the shop of one Suman. Rest is all denial.

8. It seems that statement of victim was recorded first time on 19.04.2022 and second time on 02.05.2022. In Exhibit 26, she has narrated as under:

“That day when I came back home from school, I was playing with Chiu and Piu. Vijya came at night time and asked me to bring Rajvilas pouch. I refused but he insisted.

Then I brought the pouch from shop and gave it to him. He dragged me. He was accompanied with his Muslim friend. They took me from near the school. Up to school, Vijay dragged me and from there his friend dragged me up to *Bandhara*. They made me sit there. I got up but was pushed down. Vijay removed my pant. His friend removed shirt. Vijay moved his hand over my urinal part. His friend pressed my chest. When I shouted, my mouth was pressed.”

Whereas in her second statement recorded under Section 164 of Cr.P.C. on 02.05.2022, her narration is as under:

“Last month when I was playing with my neighbours Chiu and Piu, at that time Vijya alias Vijay Poul came there. He asked me to bring supari from shop. I brought supari from the shop and gave it to him. He asked me to come towards *modha*. I refused. His friend came near water tank. That time electricity was discontinued. Vijya pressed my mouth. That time I shouted and they both dragged me towards *Bandhara*. At that time a woman had come there to drop the thrash. She asked as to who was there. That time both of them hide me in the field. After that woman left, they both removed my clothes and made me lie down. Friend of Vijya caught my hands. Vijya removed his underwear. He inserted his urinal part in my urinal part and he also inserted his finger in my urinal part. His friend pressed my chest. Then Vijya committed same act beneath the *aakda*. I

did not tell about the incident to my mother due to fear. Vijay threatened to beat me and kill me if I tell the incident to anyone. After the first incident, son of my aunt took me to my home, gave me water to drink and made me sleep. Vijya was called at my house and my parents inquired him about the incident. Thereafter my parents approached police station and reported the incident to police. Then I was medically examined. Vijya and his friend forced themselves on me. I have nothing more to say.”

9. If we sift the evidence of mother **PW3**, we find her giving age of her daughter as 12 years, to be born in 2009. Her testimony is that incident took place in the month of April 2022 at around 9.00 p.m. near the water tank. She claims that she was cooking in the house and when she went out to call her daughter for dinner, she was not available and therefore she was searched for till 1.30 a.m. Around 1.30 a.m., accused Vijay brought her daughter home but according to her, her daughter was in frightened condition. Then wife of brother of her husband, i.e. her sister-in-law, gave water to her daughter and she was made to sleep. She further stated that on the next morning parents of accused were called and incident was narrated to them. Then again on 3rd day, accused came in front of her house and he was making gestures to her daughter. She further deposed that next day, prior to calling parents of accused, she had made inquiries with her

daughter and she narrated about being taken towards water tank, clothes being removed, accused removing his clothes and he inserting his penis in the vagina of her daughter and therefore they approached police. In examination-in-chief itself she stated that after 15 days of lodging complaint, her daughter narrated her the incident which had taken place 15 days back i.e. beneath the tamarind tree where her daughter's clothes were removed and accused had inserted his urinal part in her daughter's urinal part and therefore she narrated the occurrence to Koli madam [I.O.] and her daughter was referred to hospital as well as court.

While under cross, she admitted about not stating before police regarding her daughter informing that accused inserted his urinal part into her urinal part. She admitted that at the time of recording statement under Section 164 Cr.P.C. for the first time, she did not state that daughter narrated to her about accused inserting his urinal part into her urinal part. Then she is questioned about location and surroundings of the house. There are suggestions about one Mhaske being defeated in election against Bansode bai. She admitted that Bansode bai came to their house and thereafter they approached police and told about what her daughter had informed. Rest is all denial.

10. Apparently, from above discussion and record, it is emerging that FIR is lodged by mother on 08.04.2022. On close scrutiny of testimony of victim, though she has spoken about two instances taking place, first one near the water tank and second one near the tamarind tree, exactly on which day those incidents took place has not been established by prosecution. Evidence of informant mother clearly shows that on night around 9.00 p.m., her daughter was not found up to 1.30 a.m. and it is accused who had brought victim home. Victim admittedly did not inform her anything that night. Mother's evidence shows that next day her daughter narrated about she being carried towards the water tank. Second episode which allegedly took place beneath the tamarind tree is admittedly, according to the complainant, informed to her by her own daughter after 15 days of lodgement of complaint dated 08.04.2022. Victim in her initial part of evidence in the witness box spoke about abdominal pain and bleeding to her private part, however, mother does not speak about it and even medical expert has not noticed any bleeding or signs of tenderness when victim was examined on 24.04.2022.

Therefore, from the available evidence and evidence of victim, apparently there is delay in lodging FIR. Specific dates when alleged incident took place has not come on record. Two episodes are

reported but regarding second episode, there seems to be a supplementary statement which is apparently recorded 13 days after the first statement.

11. If we visit the medical evidence, **PW5** Dr. Aishwarya Shinde has categorically stated about examining victim on 24.04.2022 i.e. almost after more than two weeks of lodgement of FIR dated 08.04.2022. Doctor gave findings to be normal and no fresh external injuries found but claims to have noticed old hymen rupture. Resultantly, evidence of doctor shows that only on the basis of history, she deposed about it to be true and correct. In examination-in-chief itself this doctor has admitted that if hymen is ruptured 12 days back, then also it can be said to be old tear. Be it so.

12. Firstly, exact date of occurrence has not been proved. It is alleged that there are two episodes of alleged sexual assault but there is no prompt examination in spite of FIR being lodged on 08.04.2022. Medical expert has candidly answered in cross that she personally did not examine the hymeneal tear and that she did not find any report about sexual intercourse with minor. She admitted that if there is sexual assault on minor below 12 years of age, there may be tenderness and inflammation and that hymeneal tear can occur for various reasons like riding cycle, playing, falling etc.

Therefore, the testimony of doctor and the report is also about old hymen tear. There is no conclusive opinion about victim being forcibly raped or penetrative sexual assault being made on her. There are material omissions in the evidence of victim as well as her mother, which have come while they were under cross.

13. The Investigating officer **PW6** PSI Seemali Koli, while under cross, also admitted that in the first statement, victim had not narrated about insertion of private part by accused in her private part after making her fall.

Even in statement under Section 164 Cr.P.C., victim did not inform court about penetrative sexual assault while it was recorded for the first time i.e. on 19.04.2022.

14. Therefore, on sifting the evidence of victim, which is crucial, though child is of 12 years of age, apart from several ambiguities, there are material omissions and inconsistent versions in substantive evidence as well as statements under Section 164 Cr.P.C.. Hence, it is unsafe to place complete reliance on her evidence alone. Mother has lodged report on 08.04.2022 i.e. after almost two days of her daughter going missing for some time and in spite of claiming to have

learnt from the victim on the very next day morning. Surprisingly, medical examination is got done after almost more than two weeks and medical evidence also is not completely supporting testimony of victim.

Therefore, apart from testimony of victim which is failing to inspire confidence, there is no corroborative piece of evidence. Resultantly, such quality of sole testimony cannot be applied for proving serious charges.

15. It is trite law that graver the offence, stricter is the proof expected to be brought by prosecution. It is cardinal principle that prosecution has to prove the case beyond reasonable doubt. Though law is settled that sole testimony of victim is sufficient to record guilt, but the rider is that her such testimony should, at the first place, inspire confidence. Here, it is not so for the reasons stated above.

16. I have gone through the impugned judgment. Learned trial court has not appreciated the evidence in correct spirit and as required by law. Straightway testimony of victim and her mother is accepted as truthful version. The material omissions and answers given in cross are totally lost sight of. Medical evidence is also not

taken into account. Merely finding the victim to be minor, her testimony has been straightway accepted without assigning proper reasons for its acceptance. Therefore, findings are bereft of evidence and not in consonance with the same. Such findings cannot be allowed to be sustained, necessitating interference at the hands of this court. Hence, I proceed to pass the following order:

ORDER

- I. The appeal is allowed.
- II. The conviction awarded to the appellant Vijay s/o Shankar Poul by learned Special Judge, Ambajogai in Special (Child) Case No. 50 of 2022 on 19.04.2023 under Sections 376(2)(n), 354-B, 363 of IPC and Sections 4(2), 6 and 8 of POCSO Act stands quashed and set aside.
- III. Appellant stands acquitted of the offence punishable under Sections 376(2)(n), 354-B, 363 of IPC and Sections 4(2), 6 and 8 of POCSO Act.
- IV. The appellant be set at liberty, if not required in any other case.
- V. Fine amount deposited, if any, be refunded to the appellant after the statutory period.

VI. It is clarified that there is no change as regards the order regarding disposal of muddemal.

VII. The High Court Legal Services Sub-Committee, Aurangabad to pay the fees to the learned counsel appointed to represent the cause of respondent no.2 as per the schedule.

[ABHAY S. WAGHWASE, J.]

vre