



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

**CRIMINAL APPEAL NO.524 OF 2020**

Sopan s/o. Vitthal Kajalkar,  
Age : 22 years, Occ. Labour,  
r/o. Ghotan, Tq. Badnapur,  
Dist. Jalna

..Appellant

Vs.

1. The State of Maharashtra,  
Through Police Inspector,  
Badnapur Police Station,  
Tq. Badnapur, Dist. Jalna

2. X Y Z

..Respondent

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Mr.P.P.More, Advocate for appellant  
Mr.B.B.Bhise, APP for respondent no.1  
Mr.V.P.Sawant, Advocate for respondent no.2 (appointed)  
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**CORAM : R.G.AVACHAT AND  
NEERAJ P. DHOTE, JJ.  
RESERVED ON : APRIL 05, 2024  
PRONOUNCED ON : APRIL 12, 2024**

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

The appellant, vide the judgment and order dated 11.08.2020, passed by learned Judge, Special Court, Jalna, in Special Case (Child) No.26 of 2019, has been convicted for the offences punishable under Sections 376(2)(i), 341 and 452 of Indian Penal Code and Section 4 of the Protection of Children from Sexual Offences Act

and therefore, sentenced to various terms of imprisonment as detailed below :-

| Sections                    | Punishment                                                                                                                                                  |
|-----------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Section 376(2)(i) of I.P.C. | Imprisonment for life which shall mean imprisonment for the remainder of his natural life and to pay fine of Rs.10,000/-, in default, R.I. for three years. |
| Section 341 of I.P.C.       | S.I. for one month and to fine of Rs.500/-, in default, S.I. for 10 days                                                                                    |
| Section 452 of I.P.C.       | S.I. for five years and to pay fine of Rs.5,000/-, in default, S.I. for 01 year                                                                             |
| Section 4 of POCSO Act      | No separate sentence                                                                                                                                        |

The substantntive sentences were directed to run concurrently.

**FACTS:-**

02. The First Information Report (Exh.26) was lodged by the victim herself on 06.02.2019. It has been alleged therein that on 02.02.2019, she was alone home. It was little past 07.00 p.m. She was doing study. The appellant, residing in the neighbourhood, entered her home and bolted the door from inside. He then removed clothes on her person and committed rape of her. It is further her case that the appellant used to intercept her whenever she was on way to school. He had expressed love for her. She had related the same to her father (PW1 Sanjay). The father, in turn, had reprimanded him. The FIR is said to have been lodged four days

after the incident since the victim was not in mental frame to lodge it immediately.

03. The crime, vice C.R. No.37 of 2019, came to be registered at Police Station, Badnapur, Dist. Jalna, for the offences punishable under Sections 376(2)(i), 341 and 452 of Indian Penal Code and Sections 3 and 4 of the Protection of Children from Sexual Offences Act (POCSO). The victim was medically screened. During her medical screening, samples of certain things were obtained and forwarded to F.S.L. for chemical analysis. Documents in relation to the age of the victim were collected. The appellant was arrested. He too was medically examined. Statements of the persons acquainted with the facts and circumstances of the case were recorded. Upon completion of the investigation, the appellant was proceeded against by filing charge sheet before the court constituted for the trial of offences under POCSO Act. The trial Court framed Charge (Exh.10). The appellant pleaded not guilty and claimed to be tried. His defence was of false implication. According to him, he has been falsely implicated on account of a dispute over boundary intervening the lands of the victim's father and himself.

04. To bring home the charge, the prosecution examined five witnesses and produced in evidence certain documents. The trial

court, on appreciation of the evidence in the case, convicted and consequently sentenced the appellant, as stated above.

05. Learned counsel for the appellant would submit that the victim's father and the father of the appellant were real cousins. There is dispute over boundary of the respective lands. FIR has been lodged about four days after the alleged incident. There is no evidence in relation to the victim to have been 13 years of age at the relevant time. According to him, the prosecution failed to bring home the charge beyond reasonable doubt. The trial court still convicted the appellant. He, therefore, urged for allowing the appeal.

06. Learned APP and learned counsel representing the victim would, on the other hand, submit that the birth certificate (Exh.34) of the victim has been placed on record. Same indicates that the birth of the victim was registered within hours in the birth register maintained by the local authority. This is a public document. Same is admissible under Section 35 of the Evidence Act. According to them, the sole testimony of the victim can form foundation for conviction for commission of offence of rape. The victim was of 13 years of age. No evidence was brought on record to disbelieve her evidence. The delay in lodging the FIR occurred as the family

members of the victim were not home. They were apprehensive of the reputation of the victim, if they went public. After having gathered courage, the FIR was lodged. Our attention has been drawn to the medical screening report of the victim. Both learned counsel would submit that the victim's hymen was found ruptured. The C.A. report pertaining to her knicker was also adverted to, to indicate the same to have been stained with blood. According to both learned counsel, the trial court has rightly convicted the appellant and consequently, sentenced him. They, therefore, urged for dismissal of the appeal.

07. Considered the submissions advanced. Perused the evidence on record. Also gone through the judgment impugned herein. Let us advert to the evidence on record and appreciate the same.

08. PW 3 - victim testified that her date of birth was 09.04.2005. She was student of 8<sup>th</sup> standard at the relevant time. It is further in her evidence that it was little past 07.00 p.m. of 02.02.2019. She was alone home. Her grandparents had gone to Ahmednagar. The father (PW1) was away at Jalna. Her mother had gone to her parental home. She was studying at home. The appellant came her home and bolted the door from inside. She told

him that she will tell her father. He, in turn, said that he (her father) will do nothing to him. It is further in her evidence that the appellant fell her down. He removed clothes on her person. She shouted "*Pappa Pappa*". The appellant pressed her mouth and committed rape of her. It is further in her evidence that blood oozed from her private part. The appellant after committing rape, left her home. She put the clothes on and came out of the house. She was weeping. She called to the mother of the appellant. She related her the incident. She (mother of appellant), in turn, slapped the appellant. He then ran away.

09. It is further in her evidence that her father returned home by little past 09.00 p.m. She related him about the incident. On the next day, her grandparents returned home. They too were informed. Her evidence further indicates that her father accompanied her to the police station. On 06.02.2019, she lodged FIR (Exh.26) at the police station. Her evidence further indicates that she was medically screened. The Magistrate recorded her statement under Section 164 of the Code of Criminal Procedure. Her evidence further indicates that the appellant was after her since one month before the incident. He would intervene her way and express his love for her. She had even related the same to her father, who, in

turn, had reprimanded him. She identified her knicker (Article A') shown to her during her evidence.

10. The victim was subjected to searching cross-examination. It has been in the evidence that her house was located in a thickly populated area. Even the happenings in her house could be watched by the persons in the adjoining houses. By little past 7:00 p.m., children in the vicinity would play outside their residence. She denied that a few days before the incident, there was quarrel between her father and the father of the appellant on account of fetching of water of bore-well. She also denied that there was dispute over boundary of the lands. Her evidence further indicates that it was first of such incident that the appellant came her home. What he did with her was first such experience. When the appellant came her home, she did not give call to her neighbours. According to her, she raised shouts when the appellant tried to exert force. It is further in her evidence that in response to her shouts, nobody came to her home. She was confronted with her FIR to bring on record omissions about the date of birth therein.

11. PW 2 - Jalinder is witness to the scene of offence panchnama (Exh.19) and seizure of the victim's knicker. PW 1 - Sanjay is father of the victim. His evidence indicates that on the

given day, he had gone to Jalna. He has three daughters. The victim was elder among three. He returned home by 09.00 p.m. The victim related him what the appellant did with her. Then, he informed the same to his parents who had gone to Ahmednagar. They returned home on the following day. It is further in his evidence that he also called his wife. She too returned. It is further in his evidence that they were confused, whether to report the matter to police or not, as they were apprehensive of reputation of the victim. According to him, then they decided to lodge report and therefore, the victim lodged the FIR (Exh.26) on 06.02.2019.

12. The cross-examination of PW 1 (father of the victim) indicates that the appellant is son of his real cousin. His land and the land of his another brother - Bhanudas adjoin each other. The land of Bhanudas was being cultivated by the father of the appellant. He, however, denied that there was dispute over common bundh/boundary, separating both the lands. His evidence further indicates that since he returned home on the fateful day, until the FIR was lodged, he did his daily chores. He did not approach village-Sarpanch/Police-Patil. He would make use of cell phone. He denied to have been to the house of the appellant and picked up quarrel with him and his mother. His evidence further indicates that on the

following day, he regularly visited his field and did agricultural operations. Deliberations between the family ensued over lodging of the FIR. His evidence further indicates that he accompanied the victim to lodge the report. The police recorded his statement on 11.02.2019, i.e., nine days after the incident. He could not give the date of birth of the victim. His police statement is also silent to state that the victim was 13 years of age at the relevant time.

13. PW 4 – Dr. Smita’s evidence indicates that she medically screened the victim on 06.02.2019. The victim gave history of sexual assault by the appellant. It is in her evidence that on medical examination, she did not find any sort of visible injuries on her person. On examination of the victim’s private part, she noticed the victim’s hymen was ruptured (old). It is further in her evidence that she issued medical examination report (Exh.32). In her opinion, except old hymen rupture, there were no other symptoms to show that the victim was recently subjected to forcible sexual intercourse. She admitted in her cross-examination that hymen could be ruptured for more than one reason. The reasons were like cycling, jumping, sports activities, etc. Her evidence further indicates that the victim was subjected to radiological examination to determine her age.

14. The C.A. report (Exh.49) indicates that knicker of the victim bore blood stains. It, however, did not bear any semen stains. The C.A. reports (Exh.49 and 50) pertaining to other articles namely, vaginal swab, etc., were not supporting the prosecution. The reason would be obvious that the victim was medically screened after five days of the incident.

15. In relation to the age of the victim, PW 5 – Savita was examined. Her evidence indicates that she was having additional charge of village-Secretary of village Ghotan Gram Panchayat. She tendered in evidence a certified copy of the extract from the birth register. The extract is said to have pertained to entry regarding birth of the victim. The certificate is at Exh.34. The date of birth recorded therein is 9<sup>th</sup> April, 2005. Perusal of the certificate indicates that the entry was made on the following day, i.e. on 10<sup>th</sup> April, 2005.

16. The victim claimed to have been 13 years of age at the relevant time. Her evidence as regards her date of birth is necessarily hearsay. Her father (PW 1) did not give the victim's date of birth. Although the birth certificate (Exh.34) is a public document and relevant under Section 35 of Evidence Act, the probative value of the contents therein needs to be proved independently. PW 5 – Savita, who tendered the same in evidence, testified that the entries

in the original register were not made by her. She was categorical to state that in the original register, there was no stamp regarding designation of the person who made entry in the register. Her evidence further indicates that in the original register, the place of birth has not been recorded. Close reading of the certificate would indicate that it bears nobody's name or at least, designation of the person on whose report, the entry was made relating to the birth of victim. Entry was said to have been made within hours of birth of the victim. Even the name of the victim has been recorded. There is no evidence to indicate that within hours of birth of the victim, her naming ceremony was held. In our view, such birth certificate is of little consequence to hold the victim to have born on 09.04.2005. Admittedly, the victim was subjected to radiological examination to ascertain her age. The Investigating Officer (PW 6) testified that the radiological examination report was not received and therefore, could not be placed before the trial court. As such, we do not have exact evidence about age of the victim.

17. As regards the offence in question, we have only evidence of the victim. It is true that in case of rape, if the evidence of victim is found to be reliable and cogent, the same can form basis of conviction. Here, the case is of the incident took place while the

victim was alone home. The appellant was from her close relations. He was residing in the neighbourhood. He entered her home and allegedly bolted the door from inside. The victim's home is located in a thickly populated area. It does not sound reasonable that inspite of she having raised shouts, none from the neighbourhood came to her residence in response thereto. Within hours of the incident, her father (PW 1) returned home. She related him the incident. On the following day, her grandparents came. They too were informed. Still, the FIR was lodged after four days of the incident. During cross-examination of the father of the victim (PW 1), it has been brought on record that his land and the land of his brother (Bhanudas) adjoin each other. The adjoining land is cultivated by the father of the appellant. He denied that there was dispute over the boundary between him and father of the appellant. His statement was recorded by police on 11.02.2019, i.e. nine days after the incident, although he had accompanied the victim to lodge the FIR. His evidence further indicates that the family members had deliberations and then, the FIR was lodged. It is already observed that the medical evidence does not further the prosecution case since the victim was examined four days after the incident.

18. The C.A. report relating to the victim's knicker would be of little consequence. Although, according to the victim, the appellant had deflowered her, the medical evidence indicates that old hymen and tear were noticed. The Medical Officer testified that there were very many reasons for causing rupture of hymen. As such, it is the case of sole testimony of the victim. The appellant has been sentenced to suffer life imprisonment. It needs no mention that serious is the offence, stricter shall be the proof. The sole testimony of the victim, who lodged the FIR four days after the incident, lead us to conclude that the incident might have happened. What prosecution was required to prove is that the incident did, in fact, take place. The prosecution could not travel the distance from "may" to "must". In our view, therefore, benefit of doubt deserves to be extended to the appellant. We are, therefore, not at one with the findings recorded by the trial court. Interference with the impugned order of conviction and consequential sentence is warranted. The appeal, thus, succeeds.

19. Hence, the following order :-

- (i) The Criminal Appeal is allowed
- (ii) The judgment and order dated 11.08.2020, passed by learned Judge, Special Court, Jalna, in Special Case (Child) No.26 of

2019, convicting and sentencing the appellant for the offences punishable under Sections 376(2)(i), 341 and 452 of Indian Penal Code and Section 4 of the Protection of Children from Sexual Offences Act, is set aside. The appellant stands acquitted thereof.

(iii) He be released forthwith, if not required in any other case.

(iv) Fine amount paid by the appellant, if any, be refunded to him.

**[NEERAJ P. DHOTE, J.]**

**[R.G. AVACHAT, J.]**

KBP