



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

CRIMINAL APPEAL NO. 592 OF 2020

. Rajaram S/o. Kishanrao Satwadhar
Age: 40 years, Occu.: Labour,
R/o. Zari, Taluka – Pathri,
Dist.Parbhani.Appellant

Versus

1. The State Of Maharashtra
Through Station Officer/Police Inspector,
Manwat Police Station,
Dist.Parbhani.
2. XYZRespondents

.....
Advocate for Appellant : Mr. Sayyed Tauseef Yaseen
APP for Respondent no.1 : Mr.N.D.Batule
Advocate for Respondent no.2 : Mr. Pratibha R. Jamdhade
(appointed)
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CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 29 JANUARY, 2024

PRONOUNCED ON : 07 FEBRUARY, 2024

JUDGMENT :-

1. Original accused in Special (POCSO) Case No.54 of 2017 is hereby assailing the judgment and order passed by the Special Judge (POCSO), Parbhani dated 13-10-2020 by which conviction has been recorded for the offence under Section 354-A, 376(2)(i) and 506 of

the Indian Penal Code (IPC) alongwith Sections 6, 8 and 10 of the Protection of Children from Sexual Offences Act (POCSO Act) and thereby sentenced to suffer imprisonment as spelt out in the operative part of the impugned judgment.

CASE OF PROSECUTION IN BRIEF

2. PW2 mother of victim approached Manwat Police Station alleging that her victim daughter aged nine years was raped by accused, who was father of friend of her daughter, by taking her in bathroom of Dhoracha Wada. That daughter developed itching complaint to private part and was taken to various Doctors. When she took victim daughter in confidence, her daughter told that accused used to show her obscene material in his mobile and he had taken her to the above spot and had sexual intercourse with her. Hence, the complaint of offence under Sections 354-A, 376(2)(i) and 506 of IPC alongwith Sections 6, 8, 10, 12 of the POCSO Act.

Investigation was carried out by PW9 Shivshankar Manale and on its completion, accused was chargesheeted and tried before Special Judge (POCSO), Parbhani, who on appreciating evidence adduced by the prosecution, accepted the case as proved and recorded guilt as spelt out in the operative part of the judgment

dated 13-10-2020, which is now taken exception to by convict by filing instant appeal.

SUBMISSIONS

On behalf of Appellant :

3. Learned Counsel for the appellant would submit that prosecution had miserably failed to prove the case beyond reasonable doubt. That evidence of prosecution is weak and moreover, full of material contradictions, omissions and discrepancies. According to him, there is inordinate delay in reporting the occurrence. He pointed out that material witnesses are not examined. According to him, inspite of victim being examined by several Doctors, there is no concrete opinion about sexual assault. He invited attention of this Court to the testimony of PW4 Dr.Manisha as well as answers given by her in cross-examination. According to him, there is no independent corroboration to the testimony of victim or her mother, who has lodged FIR on the basis of hearsay information. He further submitted that learned trial Judge has not invited attention of the accused to the incriminating material as is required under Section 313 of the Code of Criminal Procedure, but is held proved. He pointed out that infact Legislature had already repealed Section

376(2)(i) of the IPC, but conviction is recorded for the same. Resultantly, it is his submission that there is total non-application of mind and non-appreciation of evidence as well as law and so he seeks indulgence of this Court in setting aside the impugned judgment. He seeks reliance on the following judgments passed by the Hon'ble Apex Court and Delhi High Court.

- (i) *State of Uttar Pradesh v. Mohd. Iqram and Another*, (2011) 8 SCC 80.
- (ii) *Radhu v. State of Madhya Pradesh*, (2007) 12 SCC 57.
- (iii) *Judgment of the High Court of Delhi dated 06-11-2023 in CRL.A.160 of 2021 and CRL.M.(Bail) 121 of 2023 in the case of Shantanu v. The State.*

On behalf of State :

4. In answer to above, learned APP pointed out that victim is barely nine years of age. That accused was father of her friend and he had committed serious offence by showing obscene material. That victim had contracted with some disease and therefore, was taken to medical experts and on taking in confidence, victim has narrated the acts of accused to PW4 Dr.Manisha. That mother of victim has thereafter, lodged complaint and so he submits that there is no delay as such and if at all it is, then it is for the above stated reason. He further pointed out that medical experts have clearly opined about

sexual assault. That evidence of victim, her mother and that of medical expert has remained intact. That offence is cogently established. That learned trial Court has correctly appreciated available evidence and there is no perversity or illegality and hence, he prayed to dismiss the appeal.

On behalf of Victim :

5. Learned Counsel for the victim, as like learned APP, also strongly opposed appeal pointing out that offence is serious, victim is only of nine years of age. That accused had initially shown victim obscene material in his mobile and had taken her in bathroom of cattle shed and had sexual intercourse with her. Victim has categorically stated to that extent. Medical evidence is clear. Evidence of victim, informant mother, PW4 Dr.Manisha has remained unshaken and intact. Therefore, there being cogent, reliable and overwhelming evidence, appeal is sought to be dismissed.

6. After considering the respective submissions, this Court, being first appellate Court and last fact finding Court is expected to re-appreciate, re-analyze and re-examine the entire oral and documentary evidence adduced by prosecution.

On doing so, it is revealed that case of prosecution is rested on evidence of in all nine witnesses. Their status and sum and substance of their testimonies is as under :

PROSECUTION EVIDENCE

7. **PW1** is complainant and mother of the victim. In her evidence at exh.40, she deposed that her daughter, who was taking education in 5th standard, was taken to Doctor on 17-06-2017 due to irritation to private part. In spite of administering prescribed medicines, there was no improvement and therefore, she was taken to another Doctor, but finding no improvement, she was taken to third Doctor, who advised certain tests. When she was finally taken to PW4 Dr.Manisha Narayan Dagdu at Manwat, the Doctor suggested that child was hiding something and to pay attention and therefore, after staying for three days at her parents' house, when PW1 mother asked victim, her daughter told that father of her friend used to show porn clips on mobile in his house and further stated that 10-15 days back, accused took her to cattle shed (*Dhoracha Wada*) and had intercourse with her. She further stated that he touched his hand to her front and back portion. Therefore, such disclosure was reported to her parents-in-law and brother-in-law and then Manwat Police Station was

approached on 15-07-2017 and report was lodged.

8. **PW2** is victim. In her evidence at exh.45, she stated that she was taking education in 6th standard. She named her friend as well as named father of her friend. She stated that accused showed her porn clips on mobile in his house and 10-15 days prior to opening of school, he had taken her to cattle shed and had sexual intercourse in the evening after picking her from open space in front of his house. She narrated number of bathrooms and she further deposed that accused told her not to disclose said acts to anyone otherwise, he would kill her. She disclosed that accused touched her front and back side again and again. She stated that she narrated the incident to father and thereafter, Police was approached to whom again she narrated incident. Her statement was recorded in Manwat Court. She identified the photographs of the spot.

9. **PW3** Tejaswani Madhukar Kamble seems to be Team Member of Child Line and she deposed that on receipt of letter from Manwat Police regarding recording of statement of victim, she went to the house of the victim alongwith Police, met the victim and her parents, during which victim disclosed name of school, her friend and named

accused. Witness spoke about victim telling that while she was playing with her friend, father of her friend showed obscene pictures on mobile and one day accused took her in a Gotha and in the latrine of Gotha he committed intercourse with her. Lady Police Constable recorded statement of victim in presence of this witness.

10. **PW4** Dr.Manisha Narayan Dagdu is the Doctor, who claims to have medically examined the victim on 15-07-2017. She claims that she took victim in confidence and enquired during which victim told that her friend's father had inserted fingers in her vagina and therefore, she was admitted and treated from 18-07-2017 to 21-07-2017. She further deposed that she also examined accused.

11. **PW5** Satish Sharangdhar Patange is the Incharge Head Master of School, who placed on record *विद्यार्थी प्रवेश निर्गम* (Student Admission Exit) at exh.67.

PW6 Abdul Kalim Abdul Karim Ansari is the Pancha to spot panchanama and he deposed about panchanama being drawn.

PW7 Suhas Madhukarrao Potdar is the Official of Panchayat Samiti, Manwat, who has acted as Pancha to seizure of mobile of accused on disclosure.

PW8 Manisha Bhanudas Rathod is Lady Police Constable, who recorded statement of victim.

PW9 Shivshankar Vishawanath Manale (PSI) is the Investigating Officer.

ANALYSIS

12. Learned trial Judge seems to have convicted appellant for charge under Sections 354-A, 376(2)(i) of the IPC and under Sections 6, 8 and 10 of the POCSO Act and the essential ingredients to establish the offence under these Sections are reproduced for the sake of convenience.

Section 354-A of the IPC :

“(a) that the assault must be on woman;
(b) that the accused must have used criminal force on her; and
(c) that the criminal force must have been used on the woman intending thereby to outrage her modesty or knowing that his acts would likely to outrage her modesty.”

Sections 6 of the POCSO Act

“6. Punishment for aggravated penetrative sexual assault.-- (1) Whoever commits aggravated penetrative sexual assault shall

be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine, or with death.

(2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.]”

Sections 8 of the POCSO Act

“8. Punishment for sexual assault.-

Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine.”

Sections 10 of the POCSO Act

“Section 10. Punishment for aggravated sexual assault.-

Whoever, commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.”

13. At the outset, it would be necessary to deal with the objection and submission advanced before this Court by the learned Counsel for appellant regarding Section 376(2)(i) being omitted by virtue of

amendment and therefore, so much part of the judgment is improper and liable to be set aside.

In the light of above submission, this Court has laid hands on the amendment made vide The Criminal Law (Amendment) Act, 2018 No.22 of 2018, by Ministry of Law and Justice on 11-08-2018. After taking into account aforesaid amendment, this Court is of the opinion that here occurrence is for 2017. Though Section 376(2)(i) of the IPC stands omitted, the amendment being of 2018 and occurrence being of 2017, that Section was in force at the relevant time and hence, that should apply. Therefore, there is no substance in the submission of the learned Counsel on this point.

14. Now, keeping into consideration the above legal requirements for attracting offence under the aforesaid Sections, in the considered opinion of this court, it would be desirable to first get satisfied as to whether victim is a “child” as defined in the POCSO Act.

PW1 mother of the victim gave date of birth of her victim daughter as 06-11-2007 and she to be taking education in 5th standard. In FIR, she has reported age of victim as 9 years. It is pertinent to note that while under cross, there is virtually no cross of mother on date of birth of victim nor there is any suggestion to doubt

her testimony to that extent.

PW2 Victim deposed regarding taking education in 6th standard in Z.P. Primary School, Zari.

In **cross-examination** she is merely asked name of the school and the standard of education provided in the school. There is nothing as regards to her date of birth.

Birth certificate issued by Tirupati Hospital and Maternity Home is gathered by the **PW9** Shivshankar Manale, Investigating Officer, which shows victim's date of birth as 06-11-2007 and the same is marked as exh.65.

PW5 Satish Sharangdhar Patange, Incharge Head Master placed on record *विद्यार्थी प्रवेश निर्गम* (Student Admission Exit) at exh.67 and the same carries date of birth of victim as 06-11-2007.

15. On analyzing the above available material, it would be fruitful to deal with settled legal position while appreciating or determining age of victim.

In case of *Ashwani Kumar Saxena v. State of Madhya Pradesh*, (2012) 9 SCC 750, in paragraph 43, the Hon'ble Apex Court has observed as under :

“43. We are of the view that admission register in the school in which

the candidate first attended is a relevant piece of evidence of the date of birth. The reasoning that the parents could have entered a wrong date of birth in the admission register hence not a correct date of birth is equal to thinking that parents would do so in anticipation that child would commit a crime in future and, in that situation, they could successfully raise a claim of juvenility.”

In the case of ***Jarnail Singh v. State of Haryana***, (2013) 7 SCC 263 the Hon’ble Apex Court has held that age of the prosecutrix should be determined on the following grounds :

“a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of juvenile or child. In case exact assessment of the age cannot be done, the Court or the board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, given benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.”

Very recently in the case of ***P. Yuvaprakash v. State Rep. By Inspector of Police***, AIR 2023 Supreme Court 3525, as regards to computation of age, Section 34 of the POCSO Act is discussed and following nature of evidence is considered relevant for determination

of age;

“13. It is evident from conjoint reading of the above provisions that wherever the dispute with respect to the age of a person arises in the context of her or him being a victim under the POCSO Act, the courts have to take recourse to the steps indicated in Section 94 of the JJ Act. The three documents in order of which the Juvenile Justice Act requires consideration is that the concerned court has to determine the age by considering the following documents:

“(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board”.

In view of the above discussed settled position and taking into consideration law on the aspect of determination of age, here it can safely be held that the victim was a “child” on the date of incident and her age was around nine years and six months only.

16. Age having being determined, it is now further to be seen whether offence as alleged is at all proved to be committed. Again evidence of PW2 victim and medical expert PW4 Dr.Manisha is of relevance. PW1 Mother of victim, who has admittedly lodged report

has received information from victim daughter.

17. **PW2** victim, who is examined at exh.45, named her friend and named her friend's father i.e. accused. According to her, accused used to show her porn clips in his mobile in his house. She deposed that 10-15 days prior to the opening of the school, accused took her to the bathroom of Dhoracha Wada and had sexual intercourse with her in the evening after picking up her from the courtyard. He threatened to kill her, if she discloses it to anyone and then she deposed that he touched her front and back side again and again. Learned trial Court has noted the demeanor of the witness as "witness is sobbing, so short break is given". She further deposed that trouble increased and was taken to hospital.

While under **cross-examination** initially she is questioned on the point of strength of her class, strength of teachers, name of head master, commencement of academic year, school timings, intervals, location of washroom, residents of her uncle, surroundings of their house, she is questioned about some religious *Bhajan* conducted in the village.

Paragraph 6 onward there is cross-examination regarding the occurrence and she admitted that she did not inform parents and

grandmother about accused showing her obscene material. She admitted that when she was taken to the cattle shed, she did not cry. She answered that her mother washed her clothes and answered that she used to scratch at the time of itching and she being questioned by her parents for the same and she admitted that she did not tell them about the incident. She also admitted that she did not disclose the incident to Dr.Ikkar. Paragraph 8 is all denial.

18. Medical evidence is also required to be put to minute scrutiny.

Prosecution does not seem to have examined Dr.Ikkar, Dr.Kale, Dr.Salwe to whom victim was taken by her mother on complaint of itching to private part.

PW4 Dr.Manisha is the Doctor, who was posted at Rural Hospital Manwat and in the capacity of private practitioner also she had treated victim by admitting her in the hospital.

Said Doctor deposed that on 15-07-2017 she was attached to Manwat Rural Hospital. According to her, she was also attached to Manwat Multi-speciality Hospital (Private), Manwat. On aforesaid date, victim was brought for treatment to her private hospital. She medically examined victim and found infection to the private parts. According to her, infection was abnormal as child was unmarried.

Doctor stated that child has come with her father and so she asked to send victim with her mother for treatment after 4-5 days. She has further deposed that as instructed, victim was brought by her mother for further treatment, but there was no improvement and she again medically examined and realized that there was no mucous discharge and redness. In spite of that, her mother told that victim had itching on her private part.

Doctor deposed that on that date, she asked parents of victim to stay outside and further claims to have taken victim in confidence and made enquiry with her and ultimately victim disclosed **that her friend's father had inserted finger in her vagina**. Doctor states that she accordingly told about this to victim's mother and that child was admitted and treated from 18-07-2017 to 21-07-2017. Doctor identified hospital papers and bills at exhibits 51, 52, 53, 54, 55, 56, 57, 58, 59 and 60. Doctor further deposed that while acting as Medical Officer, she had also examined victim on 15-07-2017 at Rural Hospital. On that date, victim was brought by Police with allegations of sexual assault. She medically examined her and prepared medical report exh.61. Exh.61 seems to be issued on 15-07-2017 wherein PW4 Dr.Manisha has noted following history.

“As stated by victim, she was called by accused in his toilet

and forcefully removed her undercloth and forcefully tried to penetrate his penis in her vagina but unsucceeded that's why he was just rubbing his penis on her labia and inserted his fingers in her vagina, she had severe pain at that time”

19. Above witness in **cross-examination** admitted that victim was brought to her private hospital on 10-07-2017 and on that day there was no complaint of sexual assault. She admitted that vaginal infection is possible because of nail itching. She admitted that endorsement over case papers dated 18-07-2017 did not reveal history about sexual assault. She further categorically answered that infection was not due to sexually transmission and laboratory report was negative. She further admitted that infection was possible because of lack of hygiene.

20. The sum and substance of mother's evidence is that, she took her daughter to various Doctors on account of complaint of itching and scratching to private part. She deposed that while she was in her own parents' house, she took victim in confidence upon which victim daughter told that 10-15 days ago accused took her in Dhoracha wada and had **sexual intercourse and he even touched his hand on her front and back.**

In **cross-examination**, this witness has admitted that victim never narrated occurrence at the hands of accused to her and she even did not disclose cause of itching to Doctor to whom she has taken. She flatly denied that there was quarrel between her husband and accused on account of construction of road and that her brother-in-law told her that if case of such nature is filed against accused, he may not dare to quarrel.

21. On critical analysis of testimony of PW2 victim, it is emerging that she has named accused, who is father of her friend for showing her obscene material on mobile. She also categorically deposed about being taken in cattle shed (Dhoracha Wada), threatened to kill and having sexual intercourse with her in the evening. It seems that there is threat to kill and that is why the child has not reported immediately, rather only on being taken in confidence by mother and PW4 Dr.Manisha, she has narrated the occurrence. True it is that there is no disclosure by the child to previous Doctors and even they are not examined, but mother of victim speaks of taking child in confidence, while she was at her parents' place and at such time, child has disclosed acts of accused. It is equally true that during initial visits to PW4 Dr.Manisha, also there is no reporting about any

sexual act, however, this independent witness has also deposed about taking the child in confidence and at such time, child informed about sexual assault.

22. It needs to be appreciated that PW4 Dr.Manisha was a stranger and therefore, child might have hesitated to inform Doctor but mother speaks of being informed about sexual intercourse by accused on victim. It is also worth noting that there is no reason for false implication. No defence or suggestion is given to that extent. Accused is father of friend of victim. She has categorically named him. Therefore, here there is no reason to disbelieve version of the victim. Even there is no suggestion for namesake that she was tutored to depose against him.

23. Taking above discussed material into consideration, more particularly, testimony of child victim, her mother and even medical expert, there is no reason to disbelieve prosecution version.

24. This Court has already reproduced essential ingredients in paragraph no.12 for attracting the charges for which guilt has been recorded i.e. Section 354-A of the IPC and Sections 6, 8 and 10 of the

IPC. On reanalyzing and re-appreciating entire evidence of PW2 victim and PW4 Dr.Manisha, in the considered opinion of this Court, essential requirements for attracting the charges are patently available in the prosecution evidence.

GROUND / OBJECTIONS RAISED BEFORE THIS COURT

25. Learned Counsel for appellant laid heavy stress in finding fault on the appreciation of evidence and findings reached at by the learned trial Court. It is tried to be submitted that observations and findings are in absence of evidence, more particularly, about any sexually transmitted disease contracted by accused.

However, paragraph 3 of PW4 Dr.Manisha's evidence is categorical about accused, on examination, found to be suffering from "mucopurulent discharge from last 10 years and it so developed because sexually transmitted disease". Therefore, findings of the learned trial Judge in paragraph 35 of the impugned judgment to that extent cannot be said to be off the record.

26. On same lines, another objection that is raised is that material to that extent was not brought to the accused while answering questions under Section 313 of the Cr.P.C. He sought reliance on

ruling of Hon'ble Apex Court in the case of *Mohd. Iqram and Another* (supra).

Even such submissions are devoid of merits as specific question to that extent is apparently posed by way of question no.92, which is as under :

“Q.92: It has further come in her evidence that this mucopurulent develops because of sexually transmitted disease (STD). What have you to say about it ?

Ans. : False”

For the said reason, there is no merit in the above submission also.

27. The next ground of challenge is delayed reporting of FIR.

No doubt taking into account the evidence of victim, where she had stated that prior to reopening of school, the incident had occurred and only on suffering itching to the private part, when she was taken for medical examination, the occurrence has come to light. It is fairly settled legal position, that in cases of such nature, delay is for several reasons and cannot be made a ground to discard prosecution evidence which is found to be trustworthy. As stated above, evidence clearly suggests that victim was studying in 5th/6th

standard. She is apparently below 12 years of age. Accused is father of her friend and moreover, child categorically speaks about she being threatened to kill, whatever delay has occurred has therefore, plausible explanation. Hence, delay though occurred, cannot come in the way of prosecution case, more particularly, as evidence of victim is inspiring confidence and is getting fortified from independent witness like PW4 Dr.Manisha.

28. Last objection which needs to be addressed is regarding material witnesses i.e. brother-in-law and parents-in-law of victim's mother not being examined.

Prosecution has right to adduce best possible evidence. It is the quality of the evidence and not quantity. When occurrence is getting established from crucial witnesses like victim and PW4 Dr.Manisha, mere non-examination of other witnesses is no good ground at all to discard the entire prosecution version.

CONCLUSION

29. To sum up, evidence of victim does inspire confidence. She has identified accused, who is father of her own friend. There is no denial to that extent in his statement under Section 313 of the Cr.P.C.

Medical evidence supports her private part to be in abnormal condition. Delay has been explained as due to threats to kill. Nothing adverse has been brought in the cross-examination to disbelieve prosecution version.

30. On going through the judgment under challenge, no perversity or illegality is brought to the notice of the Court so as to cause interference. Hence, judgment and finding need not be overturned. Accordingly, I proceed to pass following order :

ORDER

(i) Criminal Appeal No.592 of 2020 stands dismissed.

(ii) Fees of the learned Advocate appointed to represent respondent no.2 is quantified @ Rs.10,000/- to be paid through the High Court Legal Services Sub-Committee Aurangabad.

(ABHAY S. WAGHWASE)
JUDGE