



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

CRIMINAL APPEAL NO. 746 OF 2015

. Kisan S/o Dattu Bhand
Age: 50 years, Occu.: Agri.,
R/o. Dhotre (Bk),
Tq.Parner, Dist.Aurangabad.Appellant

Versus

1. The State of Maharashtra
through Parner Police Station,
Ahmednagar.

2. X.Y.Z. ..Respondents

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Advocate for Appellant : Mr.P S.Shinde

APP for Respondent no.1 State : Mrs.Chaitali – Choudhari Kutti

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CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 13 JUNE, 2024

PRONOUNCED ON : 21 JUNE, 2024

JUDGMENT :-

1. Judgment and order passed by the learned Additional Sessions Judge, Ahmednagar dated 08-05-2015 in Sessions Case No.348 of 2013 is taken exception to by appellant by filing instant appeal on account of his conviction for offence under Section 5(g)(j)(ii) and (q) read with Section 6 of the Protection of Children from Sexual Offences (POCSO) Act and Section 376 of the Indian Penal Code (IPC).

PROSECUTION STORY IN TRIAL COURT

2. Victim, a 15 years old girl studying in 9th Standard, 7-8 months prior to the complaint, had been to collect wood for domestic use. Her classmate Savleram and his cousin brother i.e. present appellant Kisan, who are resident of the same village, spotted her near a streamlet in the vicinity of field popularly known as "10 Bige". Appellant Kisan caught her hand, forcibly dragged her towards the stream and on knife point, he raped her. She raised shouts. She was threatened by Kisan to cut her into pieces. After him, Savleram also raped her in similar manner. Thereafter, they used to repeatedly force themselves on her i.e. in the months of February, March and April 2013. Only because of threat and fear, she did not report the incident to anyone. Due to repeated forcible sexual intercourse, she conceived and thereafter, out of fear, she left house, went to Baramati and from there to Nagar, where PW7 Manjabapu enquired with her, took her home and on next day, produced her before Remand Home and finally, she was taken to Kotwali Police Station, who got in touch with Parner Police Station, where she was sent. Her father was called and thereafter, her statement was recorded, on the strength of which crime was registered.

PW12 Maruti Namdeo Muluk, API, who was then posted at

Parner Police Station, was entrusted with the investigation.

After gathering sufficient evidence, he chargesheeted accused appellant, whereas accused Savleram being a juvenile, was referred to Juvenile Board and appellant Kisan was tried by learned Additional Sessions Judge, Ahmednagar, who on appreciating the evidence adduced by the prosecution, held appellant guilty as stated above.

The above conviction is now assailed by appellant by filing instant appeal.

SUBMISSIONS

On behalf of appellant :

3. Learned Counsel appearing on behalf of appellant would point out that at the threshold, prosecution has not established victim to be a minor. That there is no convincing evidence about her age. Secondly, he pointed out that implication is apparently false. He would submit that there are allegations of repeated sexual intercourse at an isolated spot. He would submit that why inspite of being forcibly raped, she repeatedly visited said spot but never reported. That there was no resistance at any point of time. He pointed out that only when pregnancy was revealed, there is false

implication. He strenuously submitted that there is no medical evidence to corroborate the testimony and moreover, DNA report has negated and excluded present appellant to be father of the child given birth by prosecutrix. Thus, according to learned Counsel, appellant ought not to have been convicted. Resultantly, he submits that for above reasons, judgment and findings of trial Court are erroneous.

Lastly, he submitted that by now appellant has already suffered almost ten years of imprisonment. That offence is prior to amendment of 2019 by which imprisonment has been enhanced. He sought reliance on judgment of this Court in *Criminal Appeal 246 of 2018 in case of Vijay S/o Vilasrao Sutare v. The State of Maharashtra and Another dated 03-04-2023* and prays to release him on sentence already undergone or by bringing the sentence down from 15 years to 10 years.

On behalf of State :

4. Resisting the above appeal and submissions, learned APP would submit that serious offence is committed and proved. That there were repeated rapes on the minor by threatening to kill her. Learned APP pointed out that victim was studying in 9th standard.

She was barely 15 years of age. That school record to that extent is brought on record by examining school authority. Learned APP pointed out that even otherwise, sole testimony of prosecutrix, a minor, as is inspiring confidence and her testimony having remained unshaken, deserves to be accepted and it is so rightly done by learned trial Judge. She pointed out that mere negative DNA report will not wipe out her convincing, truthful evidence in the witness box. According to her, there is no need of corroboration when her testimony is convincing and trustworthy. Consequently, she prays to sustain the judgment and order of conviction by dismissing the appeal.

EVIDENCE ON BEHALF OF PROSECUTION IN TRIAL COURT

5. Prosecution has adduced evidence of in all 12 witnesses in support of its case. Sum and substance of their evidence is as under :

PW1 is victim. Her evidence is at exh.16. She gave her age as 15 years and to be studying in 9th standard. That her parents were labour and she belong to poor family. According to her, she was assigned work of gathering wood for domestic use. Therefore, she used to go to the field in the evening known as “10 Bige”. According

to her, there is a streamlet in that vicinity. She deposed that once, she does not remember the date and time but Kisan Dattu Band and Savleram saw her proceeding towards the field. That present appellant Kisan caught her hand and forcibly dragged her to the streamlet and on knife point, she claims that he had forcible sexual intercourse with her. That when she shouted, he threatened to kill her and cut her into pieces. That her classmate Savleram had also committed sexual intercourse with her. She further deposed that they used to commit similar act from time to time i.e. in the months of February, March, April of 2013. Out of fear, she did not report to anyone. She stated that because of sexual assault by both, she became pregnant and therefore, out of fear, she initially went to her friend's place at Baramati, spent a day there, and from there went to Nagar and proceeded towards one Bhalwani. In the evening, owner of agricultural field namely Manjabapu made enquiry with her and she did not narrate truth. That he took her to his home. That his wife was there. That after spending a night, said person took her to Kotwali Police Station. She deposed that Police of Parner was informed. That she went to Parner Police Station. That her father was called there. That she narrated the incident to Police and father. That she was referred for medical examination and thereafter, sent to

child care institution. To Court question, she gave her date of birth as 01-06-1999.

PW2 is father of victim. His evidence is at exh.22. He deposed that on 25-09-2013 his daughter victim did not return from school. That his younger daughter told that victim had gone towards Baramati to her friend. That he went to Baramati in her search. That he took his grandson alongwith him. That he received call from Kotwali Police Station and he was asked to attend Parner Police Station. That he met his daughter there. That Police made enquiry with her in his presence, she informed that present appellant and Savleram committed forcible intercourse with her showing knife and that they used to threaten her that they would cut her into pieces. That she became pregnant and because of fear, she went to Baramati. He lodged complaint exh.23.

PW3 Raju Nakharam Bhand is pancha witness to spot panchanama. His evidence is at exh.24. He did not support prosecution.

PW4 Goraksh Laxman Dere is another pancha to seizure panchanama. His evidence is at exh.28. He did not support

prosecution.

PW5 Kalyani Mohanrao Garud is witness from Childline. Her evidence is at exh.34. She is staff from childcare.

PW6 Dr.Shrikant Chandrakant Pathak is the Medical Officer, who conducted medical examination. He deposed that Gynecology examination, Psychiatrist test and Radiology examination of the victim were conducted by the Specialists. His evidence is at exh.35.

PW7 Manjabapu Balaji Auti, who spotted the girl in frightened condition at Bhalwani S.T. Stand, deposed that he took her at his house where he stayed with his wife. That both made enquiry with victim but she was not informing and she once told that she was from Baramati and that next moment she told that she is from Ahmednagar. That finding her lying, he took her to remand home, approached a madam and she instructed him to take her to Kotwali Police Station.

PW8 Bhaskar Yadav Labade is Police Naik. His evidence is at exh.40.

PW9 Lata Chhaburao Purane is Police Constable, who after medical examination, admitted her at Snehalay. Her evidence is at exh.41.

PW10 Ashok Deoram Jadhav is Headmaster in New English Schook, Dhotre BK., who placed on record certificate at exh.43 and school register extract exh.44. His evidence is at exh.42. He deposed that as per school record, date of birth of victim is 01-06-1999.

PW11 Dr.Anandkumar Kishore Bhangе is the Medical Officer, who conducted medical examination of accused. His evidence is at exh.46.

PW12 Maruti Namdeo Muluk is the Investigating Officer. His evidence is at exh.52.

ANALYSIS

6. Accused was convicted for commission of offence under Section 5 (g)(j)(ii) and (q) read with Section 6 of the POCSO Act and under Section 376 of the IPC.

For proper comprehension and understanding Section 5 (g)(j)

(ii) and (q) and Section 6 of the POCSO Act are reproduced as under :

“Section 5. Aggravated penetrative sexual assault. -

(g) whoever commits gang penetrative sexual assault on a child.

(j) whoever commits penetrative sexual assault on a child, which -

(i)

(ii) in the case of female child, makes the child pregnant as a consequence of sexual assault.

(q) whoever commits penetrative sexual assault on a child knowing the child is pregnant.”

“Section 6. Punishment for aggravated penetrative sexual assault. -

(1) Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a terms 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 medial expenses and rehabilitation of such victim.”

7. Here at the outset, there being objection regarding age of victim to be not established, said issue is required to be dealt at threshold.

Victim while examined in Court, gave her age as 15 years. In testimony, she said that at the time of incident, she was studying in 9th standard in New English School, Dhotre, BK. To a Court question, she gave her date of birth as 01-06-1999. Admittedly, father inspite of being examined, did not give her dater of birth. PW10 Jadhav, Head Master of New English School, Dhotre Bk, at exh.42, deposed that as per school record, date of birth of victim is 01-06-1999. PW10 had carried school register to the Court. After verification of General Register, its extract was taken and placed on record and marked by the Court as exh.44. In the said school record, her date of birth is reflected as 01-06-1999. Taking such date of birth into consideration, in 2013 i.e. when the incident took place, she was apparently seems to be around 14-15 years of age. No doubt birth certificate is not on record, but it is pertinent to note that defence has not seriously questioned or doubted her date of birth, rather there is no effective cross-examination of the victim or her father while they were under examination in the Court on the point of age. It is also further seen that defence gave up cross-examination of PW10 Jadhav,

Head Master and the same is evident from exh.42. Learned trial Court has noted that initially accused and his Advocate were present. At around 03:15 p.m. cross-examination was declined by learned Advocate Mr.Tawale. Therefore, now it is not open for learned Counsel for accused to question prosecution version on the point of age of prosecutrix.

8. Apart from that, the Hon'ble Apex Court in the case of ***Jarnail Singh v. State of Haryana, (2013) 7 SCC 263*** 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”.

Both above referred rulings have spelt out and prioritized nature of evidence that should be preferred while determining age.

9. Here in the present case prosecution has adduced evidence of PW10 Jadhav, Head Master of New English School, Dhotre Bk. He carried school record with him and stated that as per school record,

date of birth of victim is 01-06-1999.

Taking the above into consideration, here it is demonstrated by the prosecution that victim was a “minor” on the date of incident.

10. As regards to offence under Section 376(2)(g) of the IPC and under Section 5(g)(j)(ii) and (q) of the POCSO ACT are concerned, testimony of victim is of relevance and significance.

On carefully analyzing her evidence, it is noticed that she has categorically stated that at the time of first incident, when she went to collect wood in the evening, appellant, cousin brother of her classmate / original accused no.2, met her near streamlet. She is very categorical that present appellant caught her hand and dragged her to the streamlet and she specifically deposed that on knife point, he had forcible sexual intercourse with her. She deposed about being threatened to be cut into pieces when she raised shouts. Then she deposed that her classmate took turn to forcibly rape her. She further deposed that in the months of February, March and April 2013, they used to force themselves on her and out of fear, she did not report. Because of being raped by both accused, she conceived and thereafter, she asserted that she left the house out of fear. Initially went to Baramati, then to Nagar, from where PW10 Manjabapu

brought her to remand home and through staff, she was taken to Kotwali Police Station and thereafter, she was medically examined and found to be 32 weeks pregnant.

11. On going through the cross-examination faced by her, it is noticed that her above testimony has not been rendered doubtful. Questions are merely put about surroundings, distance, neighbourhood of the spot. There is no suggestion about false implication. Taking the above nature of cross-examination and the answers given therein, in the considered opinion of this Court, aspect of first forceful rape on knife point and subsequent rapes has remained intact. She has deposed that thereafter, again thrice, she was forcibly raped. She is already shown to be a minor. She is very categorical about being forced upon and therefore, submissions advanced that there was no resistance and no reporting, itself would not be sufficient to render her entire testimony doubtful. Once she deposed that, out of fear she did not report, there is no reason to doubt her version.

12. It is vehemently submitted that there is no medical evidence. Here pregnancy itself is the result of forcible rape. Her DNA samples,

which were subjected to analysis, no doubt, excludes present appellant to be father of the child delivered by her, but he is the one, who has forcibly raped her for the first time followed that of by juvenile and thereafter, there were 2 to 3 episodes of forcible rapes. Even otherwise, it is fairly settled that scientific evidence is mere corroborative piece of evidence. It is further settled that law does not mandate evidence of prosecutrix to be supported and corroborated in every case. Once testimony of prosecutrix inspires confidence, the same can be relied. Here in the case in hand, her testimony does inspire confidence. There is no reason for false implication.

Law is fairly settled that once testimony of prosecutrix inspires confidence, her sole testimony can be made the basis of conviction. Such proposition has been laid down in the cases *State of Maharashtra v. Chandrapraksh Kewalchand Jain*, AIR 1990 SC 658; *State of U.P. v. Pappu alias Yunus and another*, AIR 2005 SC 1248; *State of Punjab v. Gurmit Singh and others*, AIR 1996 SC 1393 and *Vijay @ Chinee v. State of Madhya Pradesh*, (2010) 8 SCC 191.

In the above cases, it has been reiterated that there is no need or legal compulsion to look for corroboration or other evidence to accept the case of prosecutrix for recording conviction. Only condition is that the testimony of the victim should be worthy of

credence and further reliable.

Here her version does inspire confidence.

SUMMATION

13. To sum up, here victim is shown to be a “minor”. Her testimony is found to be worthy of credence. She has named and identified accused appellant. Therefore, guilt of appellant recorded by trial Court needs to be affirmed. No case is made out for interference as regards to guilt and conviction is concerned.

14. Though learned counsel for appellant attempted to consider previous judgment of this Court in Criminal Appeal No.246 of 2018, this Court is not inclined to rely and extend similar relief by showing any leniency. In referred case, accused was married and had daughters and by assigning such reason, this Court had brought down the sentence from 15 years to 10 years.

Here facts in case in hand are distinct. A minor of age 15 years is victimized. She was ravished repeatedly on knife point and threats. Hence, no leniency can be extended as prayed.

15. For all above reasons, appeal deserves to be dismissed.

Accordingly, I proceed to pass following order :

ORDER

Criminal Appeal No.746 of 2015 is dismissed.

(ABHAY S. WAGHWASE)
JUDGE