



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

CRIMINAL APPEAL NO. 652 OF 2020

. Devidas Baban Sarode
Age: 32 years, Occu.: Labour,
R/o.Kukana, Tq.Newasa,
Dist.Ahmednagar.Appellant

Versus

1. The State Of Maharashtra
Through : The Police Inspector,
Newasa Police Station,
Tq.Newasa, Dist.Ahmednagar.

2. XYZRespondents

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Advocate for Appellant : Mr. Sanjay D. Kotkar
APP for Respondent no.1 : Mr.N.D.Batule
Advocate for Respondent no.2 : Mr.Pradeep G. Tambade (appointed)
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CORAM : ABHAY S. WAGHWASE, J.

**RESERVED ON : 22 JANUARY, 2024
PRONOUNCED ON : 31 JANUARY, 2024**

JUDGMENT :-

1. Appellant original accused hereby questions the legality and maintainability of judgment dated 31-10-2020 passed by learned Additional Sessions Judge, Newasa, Dist.Ahmednagar in Special (POCSO) Case No.80 of 2018 recording guilt for offence under Section 5(n) r/w 6 of the Protection of Children from Sexual

Offences Act (the POCSO Act) and sentencing appellant to suffer rigorous imprisonment for 10 years and to pay fine.

CASE OF PROSECUTION IN BRIEF

2. Report was lodged with Newasa Police Station by PW1 brother of the victim alleging that, 2-3 days prior to the incident, he and his family members had been to a fair and they had returned to Kukana on 06-04-2018. His sister i.e. victim stayed back with their grandparents, whereas his other family members returned back to home at village Kukana. It was informed that accused had taken victim on the pretext that guests have arrived with marriage proposal and he took her on motorcycle. While on way, he forcibly raped her. Victim rushed back to her grandparents and informed them, who in turn informed to the informant, who came along with his mother and thereafter, report exh.18 was lodged, which was made basis for registration of crime by Newasa Police Station and after investigation, accused was made to face trial for offence under Section 376(2)(f) of the Indian Penal Code (IPC) and Section 5(n) r/w 6 of the POCSO Act.

SUBMISSIONS

On behalf of appellant :

3. Learned Counsel for the appellant claimed of false implication. According to him, story is fabricated and concocted. That even alleged occurrence has taken place on 07-04-2018 but there is no prompt reporting and rather FIR is lodged after delay of one day. According to him, there are two distinct spots and as per prosecution witnesses i.e. victim, who narrated about being raped in the field and one Bhagwat but spot panchanama exh.30 does not show such spot. According to him, FIR is on the basis of hearsay information. That testimony of victim in witness box is contrary to what is reported in the FIR. According to him, there are several material omissions apart from contradictions. He pointed out that age of the victim is also not conclusively proved. Moreover, according to him, even when mother of victim claimed to have handed over birth certificate, investigation machinery had not made it part of investigation papers. He also questions the panchanama and seizure of clothes of both accused and victim. He also questions panchanama of seizure of vehicle. According to him, victim gave place of education as Kukana but documents show it otherwise. He would submit that there is clear

possibility of fabricated story being narrated. For all above reasons, learned Counsel for the appellant prays for setting aside the impugned judgment by allowing the appeal.

On behalf of State :

4. In answer to above, learned APP pointed out that prosecution case was full-proof in the trial Court. Victim, a minor, was taken by accused, who happens to be her paternal uncle. However, he misused the trust and raped her forcibly. Victim has deposed to that extent. That she promptly reported occurrence to her grandparents. According to the learned APP, brother and mother of victim resides at other place and therefore, they reached at a later point of time and hence, there is delay of one day in lodging FIR but according to him, it is not fatal in view of nature of offence. He further submitted that prosecution has established that victim is a minor. Evidence of victim and medical expert confirms occurrence of rape. Medical expert has issued positive opinion. Taking such evidence into consideration, learned trial Judge has correctly appreciated evidence adduced by prosecution and has correctly accepted the case. According to him, there is no merit in the appeal and therefore, he prays to dismiss the appeal.

Learned Counsel for the victim, who was appointed, took exception to the appeal pointing out that victim is a minor, her testimony is categorical about she being forced upon. That her evidence is corroborated by medical witness and therefore, offence and charges are brought home and hence, he also prays to dismiss the appeal.

5. In support of its case, prosecution has examined in all nine witnesses and has also sought reliance on documentary evidence.

PROSECUTION WITNESSES

PW1 is brother of victim.

PW2 is mother of victim.

PW3 is victim.

PW4 Bhalbhim Arjun Gavhane is Pancha to spot panchanama.

PW5 Mohan Dayanand Chauhan is Kotwal of village Newasa Kh. He is Pancha to seizure panchanama of apparels of victim exh.26 and seizure panchanama of apparels of accused exh.34.

PW6 Santosh Bhagirath Ghungase is pancha to seizure of Motorcycle exh.37.

PW7 Dr.Bhagwan Mohammad is the Medical Officer, who examined

accused.

PW8 Pramod Rangnath Bhingare is the Investigating Officer.

PW9 Dr.Supriya Shankarrao Jagtap is the Medical Officer, who examined victim.

6. While exercising powers under Section 374 of the Code of Criminal Procedure, this Court is called upon to re-examine, re-appreciate, re-analysis the entire evidence adduced by prosecution in the trial Court to ascertain the legality of the impugned judgment.

ANALYSIS

7. After considering the submissions advanced by each of the side, this Court is, at the threshold, required to deal with objection of learned Counsel for the appellant. According to him, prosecution has not established that victim is a minor.

In the light of such objection, it is required to be seen whether it is so.

PW1 Informant / brother of victim in FIR reported age of his sister as 16 years.

PW2 mother of victim in her testimony at exh.21 addressed her as child daughter but she has not given her date of birth.

It is to be noted that mother of victim is a labourer, but in cross-examination of mother, she is questioned about age of victim, wherein she has answered that birth of children took place at Erandgaon and that victim was admitted in School at Erandgaon for education and at that time her birth certificate was availed. She claims that she has supplied birth certificate to Police. She further deposed that her daughter studied up to 3rd standard at Erandgaon but further education was completed in village Kukana. She flatly denied that at the time of admissions date was given as July 1998. In further cross, it has come on record by way of answer of mother of victim that at the time of incident, victim child was studied up to 6th standard and thereafter, she did not complete the education.

PW3 victim, who is examined at exh.24 is unable to give date of birth but she answered that she was studied up to 5th standard. She has given her age as 16 years i.e. on 10-04-2018 when her statement under Section 164 was recorded.

While under cross-examination, victim has answered that she took admission in 1st standard in the School at village Kukana and she studied there till 3rd standard, thereafter she took admission in the School at Erandgaon and there she studied up to 4th Standard. She took gap in education i.e. between School at Kukana and

Erandgaon. The gap was of two years.

Prosecution in the trial Court seems to have relied on the evidence of medical expert as well as Investigating Officer on the aspect of age of victim.

PW9 Dr.Supriya Shankarrao Jagtap, in her evidence at exh.78 para 3, deposed that all necessary tests were conducted. That in view of age determination of victim, radiological test was done and further, the dentist opinion in view of age determination was also obtained. The conclusion reached at by dentist is that dental age of victim is approximately below 17 years. However, neither the Doctor, who conducted ossification test nor the dentist, who opined about dental age, have been examined by the prosecution for the reasons best known to them.

8. However, on record there is School Leaving Certificate and that is got proved through Investigating Officer and is marked as exh.67. In the said Leave Certificate, the date of birth of victim is reported as 03-07-2001.

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”.”

Here, therefore, going by leaving certificate, which is gathered by the Investigating Officer, date of birth of victim is 03-07-2001. Alleged occurrence of sexual assault had taken place on 07-04-2018. Resultantly, on such date age of victim was 16 years and 8 months.

9. Now, it is to be seen whether offence as alleged has been committed by the appellant. Again we have to fallback on the testimony of PW1 brother of victim, PW2 mother of victim, PW

victim herself and PW9 Dr.Supriya medical expert.

Admittedly **PW1** brother and **PW2** mother of the victim were residing at a distinct village and on getting message from grandfather they had returned back to the village where incident took place and interacted with the victim and learnt about occurrence from her.

10. In her testimony, **PW3** victim has categorically stated that on 07-04-2018, present appellant came and told that guests of Sainath Nagar has come and therefore, her mother had called her and took her on his Motorcycle. She stated that while travelling on Motorcycle, when they reached near the canal, he halted Motorcycle near the field on the pretext of urination, there he came back, gagged her mouth, lifted her, took her to sugarcane field and committed sexual assault. She stated that she attempted to raise hue and cry but her mouth was gagged and therefore she could not raise shouts. She stated that the said place was muddy and therefore her clothes got soaked in mud. She stated that he threatened her that if she narrates it to anyone, he would obstruct her marriage and further suggested to her that if anyone asked her about mud soaked clothes, she should inform that she fallen from Motorcycle near the canal. He left her at Bus Stand. She further deposed in paragraph no.3 that out of fright,

she directly ran to house and narrated occurrence to grandparents. Then her grandfather contacted her brother and mother on phone and after their arrival, she narrated occurrence to them and thereafter Police and medical authorities were approached.

In **cross-examination**, she narrated that prior to occurrence, they used to visit each others house. In paragraph no.9, there are questions about occurrence wherein she has answered that it takes 10 minutes to remove and wear apparels. She stated that her entire body was soaked with mud. She answered that her apparels were kept at a distance of 10 to 15 feet from the alleged spot of incident. She stated that there was traffic on the road. She answered that when she returned home, after the incident, at that time, she was not wearing footwear and she further answered that she had lost it at the spot. She is questioned about exact distance between the place where motorcycle was parked and the place where her clothes were kept. Thereafter, she is questioned about information being passed to family members after reaching home and then informing Police. Then she is questioned as to when she took bath to which she answered that she had not taken bath for three days. Then she is questioned about taking dinner, having tea and snacks and whether she served meal to all. She is asked when she changed her apparels to which

she answered that the same were changed after two days. To a question, she answered that she is unable to give ownership of the spot and that Motorcycle was also soaked with mud. Omission is brought to the extent that her mouth being gagged. Rest all is denial.

11. **PW9** Dr.Supriya, who had occasion to conduct medical examination of victim on 09-04-2018, deposed about noting history and conducting medical examination of the victim. According to her, hymen was torn but there was no redness or discharge. Clothes were found to be changed. On physical examination, she noticed scab injury over right elbow, abrasion over right side of neck and multiple linear abrasions over left fore arm on bolar posterior aspect and according to her, age of injuries were more than 24 hours. In paragraph no.5, Doctor deposed that conclusion was made on the basis of history and recent injuries on the person of the victim. Doctor concluded that on clinical examination, there were signs of recent forced sexual violence and about possibility of sexual intercourse.

Above witness is initially **cross-examined** about conclusion of ossification test and age differences. She answered that in the case in hand, observed injuries were not caused within 24 hours and that

scab can remain for 5 to 7 days. She admitted that abrasion injuries are simple injuries and same can be sustained by etching and nail scratches and that such injuries can also be self-inflicted. She admitted that hymen can be torn due to long jumping, horse riding, bicycle riding etc. She denied that after wash, commission of sexual intercourse cannot be formulated. Then she is questioned about types of abrasions. She admitted that in case of recent sexual intercourse, there could be redness and swelling. She admitted that in the report exh.80, colour of injuries is not reflected. She flatly denied that there were no marks of sexual violence.

12. On analyzing evidence of PW3 victim,, who is shown to be below 18 years of age, it appears that she has categorically narrated about accused taking her away from her grandparents house on Motorcycle and while on the way, he halted the Motorcycle under the garb of urination and thereafter, he lifted her and had forcible sexual intercourse with her. In spite of being cross-examined, there is no serious cross about actual forcible sexual act and that much act has not been rendered doubtful. Victim has promptly rushed home and reported it to her grandparents and thereafter, to her brother, who was at Kukana, who then came to Warkhad and thereafter, they

had approached Police.

Therefore, taking such circumstances into consideration, though there is some delay in lodging FIR, however, considering the nature of offence and above circumstances, it cannot be said that there is inordinate delay and same to be fatal for prosecution.

As discussed above, medical evidence is categorical and conclusion given by medical expert is about coming across signs of forcible sexual assault and possibility of sexual intercourse. Doctor has also noted history and narrated that the name of appellant was provided. Therefore, taking into consideration the testimony of PW3 victim and PW9 Dr. Supriya Jagtap, medical expert, offence is established.

CONCLUSION

13. After considering the submissions advanced by learned Counsel for appellant, this Court has not come across any point so worthy so as to doubt the prosecution evidence. No convincing ground is raised to doubt the prosecution version.

14. After going through the impugned judgment, it is noticed that learned trial Judge has correctly appreciated both evidence as well as law. Findings reached at are supported by sound reasons. It is the

only view and conclusion that could emerge even on re-appreciation of evidence. No case being made out on merits, appeal deserves to be dismissed. Accordingly, I proceed to pass following order :

ORDER

(i) Criminal Appeal No.652 of 2020 is dismissed.

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

(**ABHAY S. WAGHWASE**)
JUDGE