



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 709 OF 2022

Amol @ Ratnakar S/o. Baburao Prayag
Age: 50 years, Occupation : Labourer,
Working in Sugare Provisions Store /
Sugare Kirana Stores,
Resident of Somwanshi Nagar,
Near Hanuman Mandir, Ambajogai Road,
Latur. Tal & Dist.Latur,
Maharashtra 431 512.
Aadhaar No.7220 1550 7868
(Presently lodged at Harsool Central Jail,
A'bad)

..Appellant
(Ori. Accused)

Versus

1) The State of Maharashtra
Through : the Police Inspector,
Investigating Officer, M.I.D.C. Police Station,
Tal. & District : Latur.
(C.R.No.33/2017, M.I.D.C. Police Station,
Dist.Latur)

2) XYZ

..Respondents

.....

Advocate for Appellant : Mr. Abhaykumar Dilip Ostwal

APP for Respondent no.1 : Mr.S.M.Ganachari

Advocate for Respondent no.2 : Mr.Vinod D. Godbharle

.....

CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 30 APRIL, 2024

PRONOUNCED ON : 08 MAY, 2024

JUDGMENT :-

1. Aggrieved by the judgment and order passed by the learned

Extra Joint District Judge and Additional Sessions Judge Latur, in Special Case (POCSO) No.11 of 2017 dated 05-08-2022, thereby convicting appellant herein for offence under Sections 376 (i) and (j) of the Indian Penal Code (IPC) read with Sections 4 and 6 of the Protection of Children from Sexual Offences Act (POCSO Act), original accused / convict has preferred instant appeal.

FACTS LEADING TO THE TRIAL

2. Victim, aged three and half years, went to play at her friend's house. Accused, father of her such friend, lifted victim, took her to a room, made her lie on the cot. He removed her clothes. Initially, he inserted finger in her private part and then himself got undressed and then inserted his male organ in her vagina.

Victim came home and complained informant, her mother, regarding pain at urinal place and further informed the above act of accused. After arrival of husband of informant late night, he was also informed and next day mother lodged report.

Investigation of crime was entrusted to PW7 Suvarna Umap (PSI), who after gathering evidence, chargesheeted accused for commission of offence under Sections 376(i) and (j) of the IPC and under Sections 4, 5(m) and 6 of the POCSO Act.

On trial, learned Extra Joint District Judge and Additional Sessions Judge, Latur held charges proved under Section 376(i) and (j) of the IPC read with Sections 4 and 6 of the POCSO Act and by judgment and order dated 05-08-2022, sentenced accused to suffer rigorous imprisonment for ten years and to pay fine.

Correctness, legality and maintainability of said judgment is now questioned before this Court by filing instant appeal.

SUBMISSIONS

On behalf of appellant :

3. Pleading innocence and false implication due to previous animosity, learned counsel for the appellant submitted that prosecution has also miserably failed to establish charges beyond reasonable doubt. According to him, there is no convincing or legally acceptable evidence about very visit of victim to the house of accused. That, similarly, there is no independent evidence corroborating version of PW2 mother of victim, who according to him, has allegedly received information from child. According to him, father of victim has not been examined by prosecution. Even neighbours of both informant as well as accused are not examined to substantiate the charges and hence, according to him, there is no

corroboration from independent corners.

4. He forcefully submitted that version of victim in substantive evidence does not tally with the version of informant mother. He pointed out that child merely speaks of insertion of finger but informant, according to him, went overboard and deposed about penetration of male organ, which was never deposed by victim herself. Consequently, he submits that informant has apparently improvized her version and her testimony is therefore unsafe for reliance. He also pointed out that evidence of informant is full of material omissions and material contradictions.

5. He next submitted that exactly at what time incident took place has also not proved by prosecution. He pointed out that, inspite of informant claiming to have learnt from her daughter in the day time itself, there is no immediate reporting or even in the night after immediate arrival of father of victim. He submits that rather complaint is lodged on next day and so he alleges false implication on afterthought delayed complaint. He also pointed out that there is no immediate medical examination.

6. According to learned Counsel for accused, in view of charges

under the POCSO Act, it was incumbent upon prosecution to first establish age of the victim. He submitted that here neither mother gave date of birth of victim nor there is any documentary evidence in support of age of victim and therefore, he submits that charges under the POCSO Act are without any foundation.

7. It is his further submission that even scene of occurrence is not proved. He pointed out that spot panchanama is drawn at the instance of father of victim, who himself was not in the house till late night and had only received information from his wife informant. Moreover, father is not made to step in the witness box and therefore, learned Counsel doubted the very spot panchanama also. He invited attention of the Court to testimony of PW1 Nagnath, panch witness and would submit that house was in locked condition and if spot is said to be shown by father of victim, according to learned Counsel, how father had keys to open house of appellant. He also pointed out that panch witness in cross-examination admitted to be unaware of ownership of house and regarding not seeing documents of ownership of the house. For all above reasons, learned Counsel questions the credibility and veracity of the prosecution version about occurrence taking place in the house of appellant.

8. Attacking prosecution version and findings recorded by learned trial Court, he would submit that medical findings though are about injuries, the age of injuries are reported to be four days old and so according to him, the same cannot be connected with incident in question. He pointed out that there were no fresh injuries or any signs of bleeding or even inflammation, thereby creating doubt about inserting finger or male organ. According to him, infact prosecution claims that victim was examined very next day morning but medical witness has not categorically connected findings to the occurrence of previous day. He would strenuously submit that immediately after examination, opinion was reserved and opinion is issued after several months by the medical expert and is apparently brought at the time of deposition.

Therefore, according to him, creation of medical papers to suit the prosecution cannot also be ruled out. He also emphasized that medical opinion, not being concrete about rape, benefit has to be given to the accused, as according to him, medical evidence, which is crucial in cases of such nature, is itself not fully supporting prosecution version.

9. He also invited attention of the Court to the forensic evidence and submitted that the same is negative. That even Medical Expert categorically admitted in cross-examination about CA report to be not supporting and for all above reasons, he submits that even scientific evidence belies the prosecution story.

10. Lastly, he submitted that material witnesses are not examined by prosecution like lady to whose house informant went that day, Ghorpade, another lady, whom informant claim to have met immediately, very Doctor, who actually examined victim, neighbours and other siblings of the victim. On the contrary, he pointed out that accused had put up a plea of *alibi* and same is substantiated and proved by adducing four defence witnesses including very daughter of appellant.

For all above reasons, he prays to allow the appeal by setting aside the impugned judgment.

On behalf of State and Informant :

11. In answer to above and staunchly opposing the appeal, learned APP as well as learned Counsel for informant submitted that prosecution has proved its case beyond reasonable doubt and that too by adducing overwhelming and quality evidence. It is pointed

out that victim, a three and half years old girl, herself stepped in the witness box and narrated the deeds of appellant, who is father of her friend, to whose house child went to play. It is pointed out that victim returned home and made complaint to informant mother. That her maternal aunt was also available there. That they both had heard complaint made by the child. It is pointed out that father of victim was not in the house and informant was waiting for his arrival. That he reached late night and was duly informed. It being night time, they did not approach Police immediately. Learned APP submitted that in cases of such nature, parents hesitate to report immediately. But according to him, very next day morning, they had approached Police and reported the occurrence. That mother of the victim has lodged report. She has deposed what was informed by her daughter and her evidence has remained unshaken on crucial aspects. That victim was referred for medical examination. Learned APP submitted that in trial Court, there was no dispute raised regarding age of victim. He pointed out that, when medical evidence suggested sexual assault, considering the age of the victim, provisions of the POCSO Act were automatically attracted and accused was accordingly indicted for said provisions also.

12. Learned APP as well as learned Counsel for victim took this Court through the testimonies of victim and her mother i.e. informant and they would point out that act of accused has been consistently stated by both of them. It is further pointed out that maternal aunt, who was present, has also deposed in witness box. That medical expert, who examined victim, has issued clear opinion. That medical expert noticed injuries and the same are recorded and noted along with history. Therefore, according to them, there is sufficient corroboration from medical evidence. Consequently, charges are cogently and firmly proved. According to them, learned trial Court correctly appreciated the evidence. Both learned APP as well as learned Counsel representing victim supported the findings and conclusion of the trial Court. It is submitted that there is no illegality or perversity in the impugned Judgment and order and so it is prayed that there being no merit in the appeal, same deserves to be dismissed.

EVIDENCE ON BEHALF OF PROSECUTION IN TRIAL COURT

13. In support of its case, prosecution has adduced evidence of in all seven witnesses and sum and substance of their evidence is as under :

PW1 Nagnath Janardhan Panchal, Pancha to spot panchanama narrated about accompanying MIDC Police to the house of appellant. He gave description of the room and stated about seizure of bed sheet. He identified panchanama exh.38.

PW2 is the mother of victim and informant. Sum and substance of her evidence is that when she returned after attending social function, victim, her daughter told that she is unable to pass urine. She examined her private part and noticed swelling as well as white discharge. Her daughter told that she went to the house of accused to play with girls. Her victim daughter told that accused lifted her, took her into the house, made her lie on the cot, removed her pant, inserted finger in private part, then removed his pant, pressed her mouth and inserted his penis in the vagina of victim. Her husband returned around at around 10:30 p.m. to 11:00 p.m. and in the morning of next day, they approached Police.

PW3 Maternal aunt of victim stated that she knew accused. That day at 05:00 p.m., victim came to the house and complained about pain in stomach and in private part. Mother of victim had been to attend function. After arrival of mother, victim told that accused removed her knicker, inserted finger in vagina, made victim

lie on the cot, removed his clothes, pressed her mouth and inserted his private part in her private part.

PW4 Gangasagar Ramkisan Bandre is LPC, who took victim for medical examination.

PW5 Dr.Rahul Bhagwan Umbare is Medical Officer, who in the company of two other Doctors, examined victim, noted findings of injuries, collected samples and issued opinion exh.62.

PW6 is Victim, who deposed at exh.65 that she was eating coconut dry fruits on steps in front of house of father of her friend. Her friend's father lifted and took her in the house, asked her to remove pant. When she shouted, he shut her mouth, inserted his finger. Trial Court noted "she has shown place where he inserted his finger". She further deposed that he inserted his finger in the place of passing urine. She came home, asked her mother to see her private part. Mother saw it. Her maternal aunt came. She told same facts to her.

PW7 Suvarna Shrawan Umap (PSI) is the Investigating Officer.

14. Accused has also adduced evidence of four witnesses in support of his defence.

DW1 Rajesh Maheshwar Sugare is Kirana shop owner where accused was working.

DW2 Avantika Ratnakar Prayag is daughter of accused.

DW3 Ashwini Amol Prayag is wife of accused.

DW4 Narsing Adinath Kasale is Supervisor of Matoshri Vradhashram where DW3 wife of accused is working.

ANALYSIS

Question 1 : Whether prosecution established victim to be a 'minor' ?

15. Though learned Counsel for the appellant tried to question prosecution evidence on age of victim, apparently and evidently PW2 mother of victim / informant deposed that victim daughter was born in 2013, but she is unable to give exact date of birth. In cross-examination, she answered that other daughters, whose names are given in paragraph 14 were of 8 and 7 years respectively. There is no suggestion to informant mother in cross-examination, for namesake, that victim is not three and half years of age. Resultantly, there is no serious cross-examination of prosecution witnesses like PW2 mother of victim on the point of age. PW5 Dr.Umbare, who is examined at

exh.55 and is an independent witness, deposed that he examined victim, who is three and half years old. On meticulous analysis of medical expert's cross-examination, it appears that there is no suggestion that the age given in examination-in-chief is false. Entire cross-examination of medical expert is on medical findings on examination and resultantly, there is no effective cross-examination even of medical expert on the point of age of victim. Taking above material into consideration, there is no force in the argument advanced before this Court that prosecution is unsuccessful in establishing that victim was a 'minor'.

Trial Court, which recorded evidence, has categorically put up preliminary questions to the victim to ascertain her competence to understand questions and give answers. On the strength of such material, there is no hesitation to hold that victim is definitely shown to be 'minor'.

Question 2 : Whether prosecution has proved the charges beyond reasonable doubt ?

16. Charge at exh.9 is for commission of offence under Sections 376(i) and (j) of the IPC and under Section 4, 5(m) and 6 of the POCSO Act.

Therefore, in the light of above charge, admittedly, crucial evidence is that of PW6 victim, PW2 mother of victim / informant and PW5 Dr.Umbare, Medical Expert. Fate of the prosecution story entirely rests on above witnesses and their testimonies.

PW2 Mother of victim / informant's testimony :

17. **PW2** mother of victim / informant, in her evidence at exh.42 deposed that accused is their neighbour. Incident took place on 29-01-2017. She gave name of daughter of accused and stated that her daughters went to the house of accused to play with his daughter and they were playing outside the house near the stairs. Her daughter told her that accused lifted victim, took in the house, made her lie on the cot, removed her garments and inserted finger into her private part. Then he removed his pant and pressed mouth of child. Then accused entered his penis into vagina of victim.

In paragraph 4, she further stated that she had been to attend the function to the house of Tandale. When she returned home, victim told incident to her and complained that she is unable to pass urine. That time victim informed about above incident happened with her. Then, when husband of this witness reached home at 10:30 p.m., she informed him and on the next day, they approached Police.

Informant is subjected to extensive **cross-examination** wherein she has admitted that she is illiterate. There are questions about geographical directions and surroundings of the house. She has given names of friends of her daughter. In paragraph 15, she answered that daughters of accused did not visit their house but she denied that there was any quarrel between herself and mother of friend of her daughter. In further cross-examination, she gave name of elder daughter of accused and stated that she used to talk with her. She denied that a boy namely Pappu used to come to her house and elder daughter of accused was married to said boy. Rest is all denial.

PW6 Victim's testimony :

18. She is examined at exh.65. Substantive evidence of the victim in the trial Court is as under :

“On the day of incident, I was eating coconut dry fruits on steps in front of house of father of Radhika. Father of Radhika lifted and took me in house. He said me to remove my pant. I shouted as “Mummi-Mummi”. At that time, he shut my mouth. He has inserted his finger. She has shown place where he inserted his finger.”

Her evidence recorded at exh.65 shows that learned trial Court has noted that the victim was pointing her finger to the private part

and stating that accused inserted his finger. She further deposed that he inserted his finger in the place of passing urine. She came home and asked her mother to see her private part. Mother saw it. Her maternal aunt also came. Fact was also told to her.

Child is also subjected to extensive **cross-examination**. Relevant cross-examination is in paragraph 4, because in paragraph 3 she is questioned about school, its timing, friends, games loved and played by her, by what name she was addressed by her mother. In paragraph 4, the child flatly denied that she is deposing as her mother told her to give evidence. She specifically answered that on that day there was "*Haldi-Kunku*". She answered that when she went to her home, at that time, her mother was present for some time. She answered that aunt was also residing there. She has denied that she suffered injuries to leg and hand while playing. That there was no scolding to her or other friend. She flatly denied that she did not go to the house of her friend. She has specifically stated that there are two rooms in the house of her friend and house of accused is facing towards the road whereas bed room and kitchen are in the backside. In paragraph 6, there is denial. In paragraph 7, she admitted that six months prior to the incident, her mother and mother of her friend stopped visiting and talking with each other.

Rest is all denial.

Medical Expert's evidence :

19. If we visit evidence of **PW5** Dr.Umbare, who had occasion to physically examine victim, he is found to be deposing that on that day victim was referred for examination. He and two other Doctors conducted examination. He stated that victim was unable to state history and therefore, history was narrated by her parents. They told that on 29-01-2017 victim was playing in the house of accused with her sisters and other friends and accused took victim forcefully to another room, when victim started crying, he forcefully closed her mouth and removed victim's clothes, he started kissing over her face and chest and started fingering and fondling over face, chest and genital region, he then inserted his fingers into genitals of the victim, then he removed his clothes and tried inserting his male genital organ into victims genital region, then victim started urging him that she is getting pain in the genital region then accused left her, victim came to her house and she narrated the incident to her mother.

In paragraph 2, PW5 Dr.Umbare, deposed that significant observation was that accused had forcibly shut her mouth and inserted his penis and fingers into genital region of victim.

In paragraph 3, PW5 Dr.Umbare reproduced the findings and

gave age of injuries to be within four days. Final opinion is at exh.60 that “Considering the age of victim, physical and genital findings and laboratory reports, it is very less likely that her hymen is torn by any other means than sexual intercourse, concluding more possibility of sexual assault in this instant case.”

While in **cross-examination**, PW5 Dr.Umbare has admitted that injury, which is caused within 12 hours is called as fresh injury. He admitted that he did not find any fresh injury to hymen perineum. Questions are posed to him on medical jurisprudence i.e. Modi’s Jurisprudence in paragraph 8. Again in cross-examination in paragraph 12, Dr.Umbare has admitted that there is possibility of sexual assault. Further cross-examination is by posing question which is as under :

“Q. : In final opinion there mention as the more possibility of sexual assault and it is not concluded as due to sexual assault.

Ans. : We have concluding more possibility of sexual assault. As per the medical science we only mention possibility of sexual assault.”

SUMMATION ON ABOVE EVIDENCE

20. On comparative study of evidence of informant and victim, it can safely be held that victim had been to the house of accused on

the day of incident. The very manner of cross-examination of victim, more particularly, paragraph 4 confirms that victim went to the house of accused. Victim has narrated act of accused in her substantive evidence. She has reported her mother same evening and made complaint of pain at her private parts. She speaks repeatedly about insertion of finger in private part.

As pointed out, child's evidence is silent about penetration of male organ as is testified by informant mother as well as medical expert. However, it is to be borne in mind that victim is a child of barely three and half years of age. She is made to depose in the witness box. A child of tender age may not have narrated what she informed her mother about penetration of male organ. It is not expected of victim of such tender age to reiterate the incident in verbatim repeatedly in the same manner. Therefore, mere failure of child to depose about penetration of penis, itself would not be sufficient to doubt informant mother's testimony and immediately branding it to be improvised version. Child has reported mother on her arrival after attending social function. Her maternal aunt, who was there, also informed and has deposed by stepping in the witness box. Therefore, there is credible account of victim as well as mother. There is no reason for false implication on account of no talks

between informant and wife of accused that too about six months back. No mother would at the cost of dignity of her own child, levels false allegation. There is no reason here to disbelieve child's testimony, which is crucial and had remained intact about act of accused.

21. PW5 Dr.Umbare, Medical expert, who is also an independent witness, has testified about noting the history and on examination, issuing finding about possibility of sexual assault. Even when examined by way of putting questions, medical expert has reiterated that there is more possibility of sexual assault and medical experts usually issue opinion in such manner. Resultantly, victim's account, informant mother's account is finding support even from medical account.

GROUND IN APPEAL

22. Now let us distinctly deal with the grounds pressed into service.

The fundamental ground and objection regarding failure of prosecution to establish age is already dealt and discussed in aforesaid paragraph.

It is reiterated that taking into account, testimony of informant

mother, birth of victim is of 2013. She is a illiterate lady. She is merely unable to give exact date. Occurrence is of 2017. Therefore, there is evidence about victim to be below twelve years of age.

23. **Second ground** is that medical expert has merely expressed possibility of sexual assault and there is no concrete finding and hence, accused to be entitled for benefit of doubt.

In the considered view of this court, Medical Expert's evidence are always opinion evidence. Here on examination at the hands' of three medical experts, opinion has been issued confirming sexual assault. It is practice of Doctors to use the word "possibility" and PW5 Dr.Umbare has elaborated and clarified to that extent. Hence, above challenge has no force.

24. In above ground, it is also tried to be submitted that final opinion was not issued immediately, rather it is at a belated stage.

Merely Medical Expert carrying final opinion at the time of deposition would not be sufficient to cast doubt on the findings recorded upon examination of victim at the hands of not one but three Doctors. Therefore, failure to issue final opinion at the end of medical examination itself, is no good ground to discard entire expert's evidence.

25. **Third ground** of challenge is that there is no distinct evidence regarding visit of victim to the house of accused.

Such objection needs to be discarded outrightly for the simple reason that, while cross-examining victim, in paragraph 4, visit of the victim is got confirmed by defence itself. She is asked questions about number of rooms, geographical location of house, location of distinct rooms and child has categorically answered that there are two rooms, house to be facing towards road and kitchen and bed room to be at the rear side. What more is required to confirm visit of victim to the house of accused. Above all, very defence witness i.e. DW2 elder daughter of accused herself has also confirmed visit of victim at their house while she was studying. With such material on record, it is surprising to find objection of above nature to be raised. Defence itself has confirmed visit of victim to the house of accused.

Very recently, the Hon'ble Apex Court in the case of ***Balu Sudam Khalde and Another v. The State of Maharashtra***, 2023 *LiveLaw (SC)* 279 has observed in paragraph 38 that “*if the suggestion is made by defence counsel to a witness in cross-examination, if found to be incriminating in nature in any manner, would definitely bind the accused and he cannot get away on the*

plea that his counsel had no authority to make suggestions in the nature of admissions against his client". Further in paragraph 42, it is observed that "Suggestions made to the witness by the defence counsel and the reply to such suggestions would definitely form part of the evidence and can be relied upon by the Court along with other evidence on record to determine guilt of the accused".

Here applying above law, the manner and nature of defence raised in the trial Court itself confirms the visit and occurrence.

26. **Fourth ground** of challenge is on account of implication due to previous animosity.

PW2 Informant / mother of victim, while under cross-examination, has flatly denied any quarrel with wife of accused. Victim has in cross-examination admitted that her mother and mother of her friend were not on talking terms. Even taking such material into account, there is no animosity with accused father to falsely implicate him. Merely two ladies to be not in talking terms, is no reason to imply enmity to such extent so as to implicate accused on grave and serious accusations. Said defence cannot be digested and further cannot be taken recourse too for holding false implication.

Forensic Evidence :

27. **Fifth ground** of challenge is that forensic evidence does not support prosecution.

It is true that scientific evidence is not positive, but exh.3 bed sheet seized from the house of accused, carries blood stains. On analysis, blood group is shown to be “O”. Appellant’s blood group is also “O”. Therefore, it cannot be said that scientific evidence is entirely negative.

28. It is also tried to be submitted that prosecution has not proved the spot panchanama.

On visiting evidence of PW1 Nagnath, it is clear that panchanama exh.38 is cogently proved. It is the house of accused. Pancha is an independent witness and therefore, there is no substance in above ground.

29. **Last ground** about non-examination of neighbour or the lady to whose house informant had been for social function, is also of not much significance, more particularly, when crucial evidence like that of victim and that of medical expert is worthy of credence. Here both are lending support to each other. Therefore, above ground also has

no merit.

30. No doubt attempt has been made by accused to adduce evidence of four witness in support of plea of *alibi*. But there is no trustworthy and convincing evidence. Defence to that extent has not been probalilized. Having taken plea of *alibi*, burden was on accused to prove it, but he failed to do so.

SUMMATION

31. To sum up here, victim has categorically stated about act of accused. Though in substantive evidence, she failed to mention insertion of male organ and is categorical and specific only as regards to insertion of finger in private part, offence under Section 375(b) of the IPC also gets gravitated. Equally, insertion of finger in private part of a minor attracts Section 3(b) of the POCSO Act further gravitating penal action under Section 4 of the POCSO Act. Child is shown to be below twelve years of age, therefore, Section 5(m) of the POCSO also gets invoked. Hence, charges are squarely brought home.

32. Studied the judgment under challenge. In the opinion of this Court, there is correct appreciation of both evidence as well as law.

No illegality or perversity is brought to the notice of this Court so as to interfere.

33. Learned Counsel for appellant made a faint and feeble attempt to seek leniency and reduce the sentence on the ground that accused has daughter of marriageable age and other daughters.

Taking into consideration the nature of act of accused to be proved beyond reasonable doubt and having victimized a child, who was friend and of almost similar age of his own daughter, no sympathy or leniency can be extended. There being no merits in the appeal, the same deserves to be dismissed. Accordingly, I proceed to pass following order :

ORDER

Criminal Appeal No.709 of 2022 is dismissed.

(ABHAY S. WAGHWASE)
JUDGE