



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

CRIMINAL APPEAL NO. 872 OF 2022

. Vilas Kondiba Galande
Age: 44 years, Occu.: Driver,
R/o. Pulkoti, Tq.Man,
Dist.Satara.

....Appellant
(Original Accused)

Versus

1. The State Of Maharashtra

2. X

....Respondents

.....
Advocate for Appellant : Mr. Sudarshan J. Salunke

APP for Respondent no.1 : Mr.N.D.Batule

Advocate for Respondent no.2 : Ms.Namita P Thole (appointed)

.....
CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 09 JANUARY, 2024

PRONOUNCED ON : 15 JANUARY, 2024

JUDGMENT :-

1. Instant appeal arises out of judgment and order of conviction passed by the learned Ext.Jt. Additional Sessions Judge, Osmanabad dated 04-06-2022 holding appellant convict guilty for offences under Section 376(3) of the Indian Penal Code (IPC), under Section 323 of the IPC and sentencing to suffer rigorous imprisonment of 20 years and rigorous imprisonment for two months respectively. Appellant has also been held guilty for offence under Section 3(a)

of the Protection of Children from Sexual Assault Act (POCSO Act) but no separate punishment is awarded.

CASE OF PROSECUTION IN BRIEF

2. Appellant was chargesheeted by Tamalwadi Police Station, Tq.Tuljapur, Dist.Osmanabad on accusation that victim, a minor, who had been to answer call of nature, there, one unknown person caught-hold of her, dragged her in Sugarcane crop, disrobed her and sexually ravished her. She rushed to her grandmother and informed the incident to her. Her grandparents, other relatives took her to the hospital and thereafter, FIR was lodged for above offence. Accused was apprehended and chargesheeted and duly tried by the learned Ext.Jt.Additional Sessions Judge, Osmanabad, who on appreciation of evidence, accepted the case of prosecution to be proved to the above extent and hence, instant appeal.

SUBMISSIONS

On behalf of appellant :

3. Learned Counsel for the appellant would submit that there is no convincing, cogent, reliable evidence about appellant to be real culprit. He pointed out that according to victim herself, she was

sexually abused by an unknown person. Therefore, identification of real culprit ought to have been established cogently and firmly and prosecution had failed to do so. He took us through the testimony of victim and would submit that her evidence does not show that there is penetrative sexual assault. According to him, even there were no injuries on the private part of the victim and further medical expert, who examined victim had not made observations in that regard. Further according to him, even CA report being negative, it falsifies case of prosecution. He further submitted that apparently version of victim shows that, there was at the most mere attempt to commit rape or outraging modesty or sexual assault and nothing beyond that. According to him, there is no reliable, cogent and direct evidence. That conduct of prosecution witnesses is unnatural as no attempt has been made by them to go to the rescue of the victim inspite of claiming to be present there. That even there were no injuries on the accused and according to him, had it been a forcible sexual assault, then taking the situation at scene of occurrence into consideration, there ought to have been injuries on the person of accused also, but the same were missing. Further according to him, even there was no mud to the clothes of either victim or accused. Therefore, by all means, it is his submission that evidence of prosecution is very weak.

That learned trial Court ought not to have held appellant guilty directly for grave offence of Section 376 when ingredients of rape are patently missing from the evidence. In the alternative, it is his submission that if at all the case of prosecution is accepted, then at the most guilt of appellant can be recorded for sexual assault or outraging modesty and sentence suffered by him till date be considered as sufficient sentence and his appeal be allowed by setting aside impugned judgment.

On behalf of State :

4. Per contra, learned APP as well as learned Counsel for the victim both strongly opposed the appeal on the ground that there is convincing evidence of victim. She had identified accused in T.I.Prade as well as before the Court. According to them, mere no injuries on the person of victim is no ground to disbelieve prosecution evidence, which is otherwise convincing and victim's evidence is surrounded by ring of truth. Both of them submitted that there is independent account in the form of PW5 and PW13. There is eye witness account. Prosecution witnesses have seen accused fleeing in a vehicle in which he had come and its details were noted and on the basis of same, accused was apprehended and therefore, his identity has been proved

beyond reasonable doubt. Medical evidence clearly suggests offence of forcible rape. Therefore, when age of victim has not been disputed, it is submitted that learned trial Court has not erred at all while accepting the case of prosecution and holding accused guilty and resultantly, they prayed to dismiss the appeal for want of merits.

PROSECUTION WITNESSES

5. In support of its case, prosecution has adduced evidence of following witnesses.

PW1 is victim. Her evidence is at exh.6.

PW2 Umesh Gawandi is pancha to seizure of vehicle exh.14 and clothes of accused.

PW3 Anand Deshmukh is pancha to spot panchanama exh.17.

PW4 Sagar Gate is Pan shop owner, who had seen appellant fleeing and he had noted details of vehicle and had identified appellant in the CCTV footages.

PW5 is grandmother of victim.

PW6 Dr.Chandrakant Vithalrao Kshirsagar, who examined victim and issued opinion that in view of the signs of struggle and multiple abrasions and history suggest that there could be sexual assault.

PW7 Rameshwar Rodge, S.D.O., who had issued caste certificate of

the victim exh.34.

PW8 Bharat Digambar Salunke, Office Superintendent, Municipal Council, Tuljapur, who placed on record certified copy of birth certificate of victim exh.39.

PW9 Sandip Shankar Bhutekar is Police Constable, who carried out shooting of spot and seizure of clothes and issued certificate under Section-65B of the Indian Evidence Act.

PW10 Chandrakant Ambadas Gorse, a labour, who claimed that he had seen accused entering sugarcane cop and had seen victim being dragged by accused in the crop.

PW11 Dr.Vinod Vithalrao Barve is Doctor, who physically examined accused.

PW12 Dadasaheb Bansode is P.S.I., who arrested accused alongwith vehicle.

PW13 Prashant Dattatray Gorse, is the Electrician, who had also seen accused in the company of victim girl. He gave description of the clothes of the girl and had seen accused leaving the spot in the vehicle.

PW14 Shital Mahadeo Kanhere, is Naib Tahsildar who conducted T.I. parade and drew panchanama.

PW15 Sandip Bhagwanrao Ghuge is Investigating Officer, who

carried out investigation and chargesheeted accused.

PW16 Mandar Bhupendra Godambe is Nodal Officer of Bharati Airtel, Pune.

PW17 Rajendra Sidrappa Bhokade is the Investigatin Officer.

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 adduce by prosecution in the trial Court.

EVIDENCE ON BEHALF OF PROSECUTION

7. On visiting the **PW1** victim's evidence at exh.6, it is emerging that victim is of 13 years of the age. Neither before trial Court nor before this Court there is challenge to the age of victim. Evidence of **PW8** Salunke, Officer of the Municipal Council, Tuljapur, at exh.38 shows that birth date of the victim as per record of the Municipal Council is 31-10-2005.

Considering the date of occurrence, apparently on the said date, victim is minor.

8. The sum and substance of victim's evidence is that, incident occurred on 25-06-2018 and at that time, she was in 8th

standard and returning from School at 04:30 p.m. She claimed to have asked her maternal aunt to join her to answer call of nature, but on hearing her maternal aunt that she had eased herself, she alone went near the agricultural field of Ravi Kapse wherein there was sugarcane crop. It is her testimony that when she was returning back after easing herself, suddenly one person came from backside, caught-hold of her right hand and dragged her in the sugarcane field, after making her fall down, he slapped her, removed her clothes, undressed himself and thereafter, he placed his urinal place on her urinal place, pressed her breasts and when she raised shouts, he slapped her, pressed her neck and issued threats and thereafter, he ran away. She claims that she got dressed, and while running from sugarcane crop, she suffered scratches. She had also suffered scratching on account of nail of accused on her eye, leg and neck. She came home and told her grandmother about the incident and was thereafter taken to Tuljapur Rural Hospital and thereafter, to the Police Station, where she narrated occurrence to Police. She identified complaint exh.7. She further elaborated that she had narrated description of that person as dark in complexion with big eyes, long nose, fat belly, smelling of alcohol. She also described that he was wearing yellow “T” shirt and black pant and that she can

identify him, if person is shown to him. She stated that she had identified that person in jail at the time of identification parade. She also spoke about narrating the occurrence to Doctor.

ISSUE OF IDENTIFICATION

9. Issue of identification being raised, this Court intends to deal with this issue at the outset. Admittedly victim's evidence clearly suggests that she was sexually assaulted by an unknown person. It seems that she has given description of the physical characters as well as clothes on the person of the said person and that was noted by the investigating machinery.

10. **PW4** Sagar, a Pan Shop owner, who is examined at exh.20, has testified that at around 05:00 to 05:15 p.m. on 25-06-2018, while he was opening shop, he saw one person came running from agricultural land of one Maske and that person passed by his side and then he boarded in Mahindra pick-up, which was parked 50 feet away from his shop. This witness has given description of the vehicle and stated that there was no registration number plate on the backside of the vehicle. He claims that one member of Shinde family had given chase to the vehicle. He heard discussion of the people

about driver of the pick-up taking the girl into sugarcane crop and raping her. He further deposed that on the same day, Police had came to his Pan shop and enquired with him and he gave description of that person as well as of the vehicle. This witness was called to Police Station to watch CCTV footages and according to him, the vehicle spotted by him was seen in the CCTV footages near Shivaji statue. He identified accused present in the Court to be the same person, who he had seen at the relevant time.

Above witness in **cross-examination**, initially admitted that at the beginning, he could not identify accused but then he volunteered that initially face of the accused was not properly visible, therefore, he could not identify him, but after seeing properly, he identified him. There is omission in his statement, but only to the extent that he had seen person passing from him. Omission in his statement under Section 164 to the extent of seeing the colour of the vehicle to be white is brought on record, which apparently are not material one.

11. **PW13** Prashant, who is Electrician, deposed that on 25-06-2018 at around 05:00 p.m. when he was rendering labour work, he saw white Pick-up vehicle parked near the hotel and he

claims that driver alighted and went to answer call of nature in the sugarcane crop. He also claims that after five minutes, a small girl also went to call of nature and that he saw the person catching hold of the girl from waist and being taken into the sugarcane crop and he saw girl making gestures towards them. He claims that he informed his companion Chandrakant, who suggested that they are from other village, there may be some affair and they should not interfere in it and therefore, they do not go to rescue her. That after 10 to 15 minutes, the person came out and went towards the Pick-up vehicle and drove it towards Solapur side. He gave description of the vehicle and clothes of the person and he also gave its number. After two days, he was called for enquiry and taken to the Court where he gave statement. He also identified accused in the Court. He has virtually denied all the suggestions put to him in paragraph nos.8, 9, 10 and 11.

12. **PW14** Shital is Naib Tahsildar, who was requested by the Investigating Officer to conduct T.I. parade and in her evidence, she deposed that accordingly on 13-07-2018 she conducted T.I. parade and victim identified appellant. She drew panchanama, which she identified to be at exh.75.

In **cross-examination**, she is questioned about her knowledge regarding conducting T.I. parade. She denied coming across any news item with photograph of accused and on the date of visit to Court, she has not carried out any order to act as Executive Magistrate. She has denied all the suggestions put to her in paragraph nos.8, 9 and 10.

MEDICAL EVIDENCE

13. **PW6** Dr.Kshirsagar, Medical Officer, who had occasion to physically examine the victim, in his evidence at exh.29 has deposed that on 25-06-2018, victim was brought by Lady Police Constable and the victim gave history that when she had been for defecation in the sugarcane field, an unknown person approached her and requested her to allow him to have intercourse and pulled her in the sugarcane crop and tried to insert his private part in her private part, touched her private part and fled from the spot after threatening to kill her.

Doctor speaks that on examination, he had noticed injuries to the left eye, behind right ear, abrasion on both breasts. On external examination, He has noticed evidence of whitish discharge, hymen was intact, no evidence of any local injury. He collected samples of vaginal swab, pubic hair, scalp hair, nail and blood. He kept said

samples in a container, sealed it and handed over the same to Lady Police Constable. He noticed multiple abrasion on breast and other parts of body. He reserved his opinion till CA report is received. Finally Doctor has opined that in view of signs of struggle, multiple abrasions on breast and history there could be sexual violence.

14. **PW12** Bansode (P.S.I.) is the Police Officer, who had apprehended accused from Bhogaon Toll Naka on Solapur-Barshi road while driving vehicle. Both accused and vehicle being taken to Police Station and vehicle came to be seized.

Nothing adverse has been brought in cross-examination of above witness.

ANALYSIS

15. On reanalyzing above discussed evidence, it can be safely inferred that victim is shown to be of around 14 years of age and there is documentary evidence to that extent, which has apparently not been questioned or rendered doubtful. Further it appears from the evidence of victim that when she had been to answer call of nature, she was caught-hold of by an unknown person and taken in the sugarcane crop field, made her fall down and thereafter sexually ravished her. She has reported the incident to her relatives and

thereafter, she was immediately taken to hospital and was subjected to medical examination. The Doctor, who conducted examination is also examined and said Doctor has noted and noticed injuries on her person and has also opined about possibility of rape. No doubt in paragraph no.5 of his testimony, medical expert has deposed about not coming across any injury to the private part, but it is fairly settled that injuries to private part are not *sine qua non* for establishing the charge of rape.

Law on above proposition is settled by the Hon'ble Apex Court in numerous cases viz.

- (i) The Hon'ble Apex Court in the case of ***Gurucharan Singh v. State of Haryana***, AIR 1972 SC 2661 observed that “*absence of injury or mark of violence on the private parts or elsewhere on the person of the prosecutrix is of no consequence when the prosecutrix is minor and would merely suggest want of violent resistance on the part of the prosecutrix.*”
- (ii) ***Krishan Lal v. State of Haryana***, AIR 1980 SC 1252.
- (iii) ***State of Rajasthan v. N.K.***, (2000) 5 SCC 30.
- (iv) ***Narayanamma (Kum) v. State of Karnataka and Others***, 1994 (5) SCC 728.
- (v) ***State of Rajasthan v. Shri Narayan***, (1992) 3 SCC 615.
- (vi) ***Devinder Singh and others v. State of Himachal Pradesh***, (2003) 11 SCC 488.

16. Learned Counsel for the appellant has also strenuously submitted that in her statement in English version, victim has merely deposed about the perpetrator placing his male private part over her female private part and therefore, there was no penetration and hence, not at all a case of rape.

However, her statement in Marathi version (which infact would prevail) clearly suggests that there is penetration. In all cases, there may not be impact or injury on penetration. Therefore, as testimony in Marathi version would prevail, taking into account material therein about penetration of his private part in her private part, offence of rape has been clearly made out. That apart, medical expert has noticed injuries like abrasions on her breast, neck and other parts of the body, which is indicative of fact of being forcibly ravished. Victim has identified accused in T.I. parade as well as in the Court. Independent witness PW4 Sagar, a Pan shop owner has also seen accused fleeing from the spot and he has identified him the CCTV footage. Even PW10 Chandrakant, a labour and electrician, who had seen victim being taken into sugarcane field by accused, has given description of accused as well as clothes on the person of accused and seized clothes are matching.

Therefore, there is no hesitation as regards identification of

accused is concerned, there is overwhelming evidence, and same cannot be discarded on flimsy grounds. There is no reason for false implication. Consequently, on all counts, case of prosecution has been proved.

17. Learned Counsel for the appellant made a submission that it is not a case of rape but at the most it is a case of sexual assault or attempt to commit rape.

This Court does not agree with this submission, because of unshaken evidence of victim as well as medical findings supporting her version about she to be raped. Mere forensic and scientific evidence coming out to be negative would itself cannot be a good ground to discard the entire evidence of prosecution, more particularly, the trustworthy evidence of victim girl. Therefore, there is no merit in the appeal and accordingly, following order is passed :

ORDER

- I) Criminal Appeal No.872 of 2022 stands dismissed.
- II) Fees of the learned Counsel appointed to represent respondent no.2, is quantified at Rs.10,000/- to be paid through the High Court Legal Services Sub-Committee, Aurangabad.

(**ABHAY S. WAGHWASE**)
JUDGE