



IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 832 OF 2018

Ram s/o. Dashrath Korde,  
Age- 28 years, Occ.- Nil,  
R/o – Navnath Wasti, Mochipimplagaon,  
Taluka and District Beed.

... Appellant

Versus

1. The State of Maharashtra

2. XYZ

... Respondents

.....

Mr. Ravindra S. Shinde, Advocate for the Appellant.

Mr. N. D. Batule, APP for Respondent No.1-State.

Mrs. Rashmi S. Kulkarni, Advocate for Respondent No.2 [appointed].

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

**DATED : 02.01.2024**

**JUDGMENT :**

1. Instant appeal is directed against the judgment and order of conviction passed by learned Special Judge, Beed dated 24.09.2018 in Special (POCSO) Case No. 28 of 2016 tried for the offences punishable under Sections 363, 366-A, 376(2)(i)(j) of the Indian Penal Code [IPC] and Sections 4 and 6 of the Protection of Children from Sexual Offences Act, 2012 [POCSO Act] thereby sentencing the appellant to suffer imprisonment as spelt out in the operative part of the order.

2. In nutshell, case of prosecution is that victim, a minor studying in 9<sup>th</sup> standard, went missing from the house on 31.05.2016. As in spite of search she was not found, mother PW3 lodged report Exhibit 73 on 01.06.2016. Minor was found on 03.06.2016 and on inquiry with her, she narrated that she got acquainted with one Juvenile and they came close to each other. Noticing her such conduct, mother started seeing suitable groom and therefore, on 31.05.2016 around 10.00 a.m., minor left the house. Present appellant developed contact with her and informed that her mother had lodged complaint and made her accompany him to the house of his grand mother at village Dhekanmoha. In the night he disrobed her and, according to her, had forcible sexual intercourse with her that night and even on the next day and finally dropped her near Barshi Naka.

3. Victim was spotted by police at the bus stand and was brought back after which her statement under Section 161 as well as Section 164 of Cr.P.C. was got recorded. Police machinery registered crime on the complaint lodged by mother with is at Exhibit 73. PW11 API Jadhav carried out investigation and on gathering sufficient evidence, accused appellant was chargesheeted and in view of the charge, was tried and held guilty by learned Special Court.

Precisely said judgment and order of conviction is now taken exception to by filing instant appeal by invoking Section 374 of the Code of Criminal Procedure [Cr.P.C.].

### **SUBMISSIONS**

4. Learned counsel for the appellant would submit that it is apparently false implication. There is no cogent, reliable, trustworthy account including that of said victim. He took this court through the statement given by victim to police, her statement recorded by learned Judicial Magistrate First Class and even her substantive evidence in witness box and would strenuously submit that victim apparently went on changing her versions and each time new story is set up and as such, according to him, her version/testimony is not credible and reliable.

5. He would point out that even going by the story of prosecution, it is evident that the girl had herself left her place. That, she had herself stated and deposed about her relations with a juvenile and that she had several sexual encounters with him. That, subsequently she has, probably at the instance of her mother who was on cross terms with the father of accused, deliberately roped appellant with ulterior motive. Further according to him, here, material witnesses

like very sister of victim, the landlady whose room she allegedly occupied or the alleged grand mother of accused at whose house she claimed to have been forced upon are not examined by prosecution. That, pancha to spot panchanama has also not supported. For said reasons also he doubts the prosecution version. He lastly submitted that even medical evidence does not clearly establish offence of forceful rape and thus, according to him, with such weak type of evidence, learned trial Judge ought not to have accepted the prosecution version. For all above reasons, he prays to interfere and set aside the judgment under challenge by allowing the appeal.

To buttress his contention, learned counsel for the appellant has placed reliance on the decisions in ***Suresh Govinda Nagdeve and Another v. State of Maharashtra*** ; 2008 Cri.L.J. 2943 and ***Narender Kumar v. State (NCT of Delhi)*** ; AIR 2012 SC 2281.

6. Per contra, learned APP would point out that in trial court prosecution has firmly and cogently established that victim was minor. That, her testimony regarding forceful sexual acts with her by appellant has remained intact. Her sole testimony is inspiring confidence. Further according to him, even medical evidence and forensic evidence fortifies the prosecution case. Evidence has rightly

been appreciated and correct conclusion has been drawn and so he prays to dismiss the appeal for want of merits.

7. Learned counsel appointed on behalf of victim would also strenuously submit that there is no challenge about victim to be a minor. She also led emphasis on the substantive evidence of victim and would submit that the very manner of cross of the victim clearly shows that there is also no serious dispute about the sexual assault on her by appellant more than once. That, she remained steadfast in spite of incisive cross-examination. Further according to her, in cases of such nature it is fairly settled position that sole testimony of a victim of sexual assault, if it inspires confidence, can be made the basis of conviction. According to her, case in hand is of similar type wherein evidence of PW2 victim is having ring of truth and her testimony has remained intact and unshaken. Further according to her, scientific evidence fortifies and confirms involvement of appellant as blood of victim is found on his clothes for which there is no explanation.

8. Learned counsel representing victim would add that futile attempt has been made by adducing defence witness that too of very father of appellant himself who happens to be maternal uncle of

victim and the further attempt of showing false implication on the ground of partition of property not being supported with any foundation, is of no avail and has been rightly discarded by trial court.

While summing up, she would submit that prosecution has firmly and cogently established the charges and therefore, learned trial court committed no error whatsoever in accepting the case of prosecution as proved. Resultantly she prays to dismiss the appeal.

9. Here, in support of its case prosecution has examined 11 witnesses and their status/role could be summarized as under;

**PW1** Paternal uncle of victim has hearsay information.

**PW2** Victim.

**PW3** Mother of victim.

**PW4** Baliram and **PW5** Nitin are panchas but they have not supported.

**PW6** PC Kanade is the carried who took muddemal to the laboratory.

**PW7** Headmaster of the school where victim was taking education.

**PW8** Dr. Shinde who medically examined victim and issued report Exhibit 68.

**PW9** Head Constable Bombale who recorded complaint Exhibit 73.

**PW10** Ravindra is pancha to seizure of documents, however he has not supported prosecution.

**PW11** API Jadhav is the Investigating Officer [IO].

10. On re-appreciation, re-analysis and re-examination of entire prosecution evidence, in my considered opinion, testimony of PW7 Headmaster, PW2 victim and her mother PW3 as well as evidence of PW8 medical expert is of significance.

### **ANALYSIS**

11. Though here no issue is raised regarding age of victim, this court deems it fit to get satisfied that victim is a minor.

12. I have carefully gone through the testimony of **PW7** Headmaster at Exhibit 60. He deposed that victim was student of their school, who had taken admission in 9<sup>th</sup> standard. According to him, as per school record, ie. T.C. of earlier school filed at the time of admission, reflects date of birth of victim as 07.08.2001. He also

placed on record admission form along with T.C. and the same are marked as Exhibits 62 and 63. There is no effective cross of PW7. Even otherwise during hearing of the appeal, learned counsel for the appellant at the outset on court query conceded that he has no issues about victim to be not a minor. Going by the date of birth and the testimony of PW7 Headmaster, it is established by prosecution that on 31.05.2016, victim was around 15 years old and hence a minor.

13. Once having established that victim PW2 was a minor, now it is to be further seen on re-appreciation of evidence whether, as claimed by prosecution and as affirmed by learned trial judge, offences for which appellant was charged are established. As stated above, evidence of PW3 mother and PW2 victim as well as that of medical expert PW8 is crucial i.e. on the point of forceful sexual assault.

14. Mother **PW3** at exhibit 48 has deposed that she went for labour work. Her son had been to Pune whereas her both daughters were at home and when she returned in the evening, her differently abled daughter informed that victim received call and she went away saying that she would not return. At that time victim was 14 years old and studying in 9<sup>th</sup> standard. Mother PW3 has further deposed that after waiting for a day she lodged complaint at Pimpalner Police Station.

That, her daughter was found after four days by Shivaji Nagar Police. She further deposed that in front of her house, appellant resided and he assured victim daughter of marriage and had physical relations with her after taking her to Dhekanmoha.

15. She is subjected to extensive cross on the point as to whether victim was receiving calls from juvenile, for how many hours they talked. She admitted that getting fed up of victim's behaviour she decided to perform her marriage. After again questioning her about the standard in which victim took education, she was asked about victim's age but she was unable to give her date of birth and name of the teacher. After questioning her about other daughter, suggestions are given regarding financial crisis, but she flatly denied about demanding any partition from her brother or any quarrel with him. On re-examination by APP, mother answered that she can file birth certificate after collecting it from hospital.

16. Star witness of prosecution is **PW2** victim. In her initial examination-in-chief, she stated about her acquaintance with a juvenile, about her mother inviting guests after deciding to perform her marriage. Regarding the offence, she stated that on 31.05.2016, she received call from juvenile informing her that he was ill and to

come and meet him and therefore, she claims that, she carried cash of Rs.3000/- from the house and informed her sister that she would not return and came to Beed. She and juvenile stayed in a room at Telgaon Naka. After some time, juvenile went back to his house. In the next day morning she visited Jijamata Chowk to buy articles and at that time she received call from appellant informing her about lodgement of complaint by her mother and that she should not wander. He asked her to accompany him to the house of his grandmother and accordingly, they went at 6.00 pm on motorcycle to village Dekanmoha. She testified that when his old aged grandmother went to sleep, at night appellant disrobed her and had forcible sexual intercourse. That, she pushed him but he again tried to disrobe her and so she went outside, hired a rickshaw and came to Beed but appellant followed her, made her get down and accompany him on motorcycle behind oil mill. According to her, there he again had sexual intercourse with her and then dropped her at Barshi Naka. Thereafter she spent night in a temple and on 02.06.2016 she received phone call from daughter-in-law of her paternal aunt and so she went and stayed there. But same night, she went to bus stand. She deposed that seeing her, police took her in custody.

17. Learned defence counsel cross-examined victim by questioning her when she lost her father, cause of his death, about house of juvenile, its distance from her house and names of friends of juvenile. She admitted that police recorded her statement as per her say on 04.06.2016. She identified portion marked "A". Then she was questioned about her mother leaving the house for labour work on 31.05.2016. Omissions are brought about she taking Rs.3000/- cash and clothes, about staying in the room of landlady Abu by taking it on rent at Rs.800/-, about appellant attempting to establish physical relations again in the night and in anger she leaving the house in auto rickshaw and appellant following her and stopping the rickshaw and about she pushing accused when he tried to have sexual intercourse. She was unable to give the names of the hotel and the lady whom she met at parlor. She admitted that she narrated the incident dated 01.06.2016 to police for the first time on 04.06.2016. However, she clarified by stating that she did not disclose to anyone till 04.06.2016 as she was scared. She admitted that juvenile used to assure her of marriage and so she became intimate with him. Then she is questioned about her academics, mode of attending school. Rest is all denial.

18. **PW8** a doctor who has occasion to subject victim to physical examination, deposed about LPC bringing victim to the hospital for age estimation and forensic medical examination regarding sexual assault. She deposed that on medical examination, she did not find any physical injuries on the body of the victim but she noticed hymen to be torn and it was an old tear.

In cross, she admitted that final opinion is issued after receiving CA report which she claimed to be carrying in the court. As per her opinion, sexual assault could not be ruled out.

19. On carefully analyzing testimony of mother and victim, it is clear that victim left the house on the morning of 31.05.2016. Though victim deposed about leaving the house on being called by a juvenile, as regards to present appellant is concerned, she categorically deposed that he contacted her and took her to Dhekanmoha on motorcycle. She is very categorical about she being disrobed in the night. She specifically deposed that he had forcible sexual intercourse with her and when he attempted it again, she seems to have left the house but again she stated that he made her sit on his motorcycle after alighting from the rickshaw and had sexual intercourse with her

second time. It is pertinent to note that though victim is incisively cross-examined, there is virtually no cross regarding the above deposition about appellant developing contact with her on phone, taking her on motorcycle and having sexual intercourse in the house of grandmother. The victim has stated about forceful sexual intercourse and she pushing him. She was second time made to have sexual intercourse. So much part of her testimony has remained untouched and therefore not disputed. This court has already affirmed the finding of learned trial court regarding victim to be a minor.

20. Before this court, prosecution case and conclusion reached by learned trial court is criticized firstly on the ground of delay by submitting that alleged occurrence is of 01.06.2016 and the statement of victim is recorded on 04.06.2016. It needs to be noted that PW3 mother had already lodged report on 01.06.2016. Only when the girl was located by police, events came to light on inquiry with her. Even otherwise, in cases of such nature, delay is not of much significance. It may affect the merits if there is no explanation at all for the said delay. However, in the case in hand, victim has answered in her cross that she did not report because she was scared. Hence, there is a plausible explanation for the delay.

Second ground of attack is that material witnesses are not examined. It is true that grandmother of appellant, to whose house appellant took victim, is not examined but learned counsel representing victim has pointed to the testimony of Investigating Officer wherein he has assigned reason for not recording statement of grandmother because of her impaired auditory and speaking capacity. Even otherwise, sole testimony of victim, if truthful, is sufficient to record conviction and when it inspires confidence, corroboration need not be insisted upon.

Learned counsel for the appellant also tried to make a hue and cry by submitting that there are material omissions in the testimony of very victim and that she went on changing her versions and hence unreliable. In the light of such submission, this court has carefully gone through the testimony of victim and this court does not find the so called omissions to be too material which would render the entire case of prosecution itself doubtful. She is a minor and victim of forceful sexual assault who had suffered the atrocity on having left the company of her mother and therefore there are bound to be slight variations in her statements and substantive evidence. In the considered opinion of this court, the so called omissions cannot be

termed as material so as to have impact on her very testimony, the core of which having remained unshaken.

21. Consequently, to sum up, evidence adduced by prosecution cogently proved that PW2 victim on 31.05.2016 was a minor. She was forced upon by appellant not once but twice. PW8 Dr. Shinde, who subjected victim to physical examination has opined that possibility of forceful sexual intercourse cannot be ruled out. Therefore, apparently, victim was taken away without consent of PW3 mother and as such, initially offence under Section 363 of IPC has been committed. Medical evidence and forensic evidence fortifies charge of forceful sexual rape. Appellant could not point any infirmity or infraction in the appreciation at the hands of learned trial court.

22. Resultantly, required ingredients for attracting the charges being available on record, no fault can be found in the conclusion arrived at by learned trial Judge. Citations relied by learned counsel for the appellant cannot be taken aid of as the facts in those cases are distinct than the facts in the case in hand. Finding no merits, I proceed to pass the following order :

ORDER

- I. The appeal is hereby dismissed.
- II. Fees of the learned Advocate appointed to represent the cause of respondent no.2 is quantified at Rs.10,000/- [Rupees ten thousand only] to be paid by the High Court Legal Services Sub-Committee, Aurangabad.

[ABHAY S. WAGHWASE, J.]

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