



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 796 OF 2019

Malhari s/o Sakharam Umap,
Age : 25 years, Occu: Nil.,
R/o Nandgaon,
Taluka and District Ahmednagar.

... Appellant
[Accused]

Versus

1. The State of Maharashtra

2. X Y Z

... Respondents.

.....

Mr. Narendra B. Patekar, Advocate for the Appellant.
Mr. S. M. Ganachari, APP for Respondent No.1-State.
Mr. Harshal P. Randhir, Advocate for Respondent No.2 (appointed)

.....

CORAM : ABHAY S. WAGHWASE, J.

Reserved on : 06.05.2024

Pronounced on : 09.05.2024

JUDGMENT :

1. In this appeal, there is challenge to the judgment and order of conviction recorded for offence under Section 376 (2)(i) of the Indian Penal Code [IPC] and Section 4 of Protection of Children from Sexual Offences Act, 2012 [POCSO Act] by learned Additional Sessions Judge, Special Court [POCSO Act] in Session Case No. 334 of 2016.

PROSECUTION CASE IN TRIAL COURT IN BRIEF IS AS UNDER :

2. Victim, a minor, left the house at 5.00 p.m. on 30.07.2016 to ease herself while her parents were labouring for wages. While she was returning back, her cousin Vasant called her to his house on the pretext of cleaning utensils as his mother and sister were not in the house. While she reached the house of Vasant, it is alleged that, present appellant arrived there, he dragged victim in the house, latched the door, kissed her, spread a mat on the floor and twice committed forceful intercourse in spite of she pleading to spare her. She had bleeding. Accused appellant gave her Rs.100/- for purchasing sanitary napkin and threatened her not to disclose the incident to any one and also pleaded that his wife would not cohabit if she learns about it. She returned home. Her mother also returned in the evening around 6.00 p.m. Finding the victim crying, mother asked the reason and victim narrated the ordeal faced by her. Therefore, they approached MIDC Police Station, who entertained the report Exhibit 16. She also handed over the currency as well as clothes which were on her person at the time of incident.

3. PW9, the then Investigating Officer, conducted investigation and on gathering sufficient evidence, chargesheeted accused, who

was finally tried by learned Additional Sessions Judge, Special Court vide Session Case No. 334 of 2016 and on analyzing and appreciating the evidence adduced by the prosecution, charges for commission of offence under Sections 376(2)(i) of IPC and Section 4 of POCSO Act were held proved and established.

Instant appeal is an offshoot of above conviction.

SUBMISSIONS

On behalf of the appellant :

4. Learned counsel for the appellant, alleging false implication, would submit that case has not been proved beyond reasonable doubt as is expected by law. According to him, there is no independent witness seeing victim being dragged and raped. He pointed out that there is no evidence about victim to be below 18 years of age so as to attract rigors of POCSO Act.

5. It is next submission that very medical witness did not notice external injuries thereby falsifying the case of prosecution about forceful rape. According to him, house spot is situated in a thickly populated locality and is surrounded by various houses, but there is

no witness seeing victim being taken in the house and raped. He pointed out that mother and victim are not consistent.

6. It is next submitted that PW5 medical expert opined radiological age of victim to be 17 years and that by applying two years margin rule, victim is above 18 years and therefore, does not fall in the definition of child so as to attract provisions under POCSO Act. That forensic evidence also does not lend support to the prosecution version. He would submit that in spite of such weak evidence, learned trial Judge has erred in accepting the case of prosecution and so he prays to set aside such findings and judgment by allowing the appeal.

On behalf of the State as well as victim:

7. Strongly opposing the above submissions, learned APP as well as learned counsel for victim would point out that victim has categorically deposed about she being dragged and forced, not once but twice. According to both of them, medical evidence is also supporting her version. They robustly submitted that here, there is prompt reporting to mother and police is approached immediately. That, victim has also handed over the currency given by accused for

purchasing sanitary napkin. That, DNA evidence confirms culpability and complicity of accused and as such, according to them, there is overwhelming and incriminating evidence apart from testimony of victim which inspires confidence. According to both of them, there is correct appreciation of evidence as well as law and so there is no need to interfere in such findings which are based on sound reasons. Consequently, they both prayed to dismiss the appeal.

EVIDENCE IN TRIAL COURT

8. Prosecution has adduced evidence of following 10 witnesses in order to establish its case:

PW1 victim narrated that on 30.07.2016, in the evening around 5.00 p.m., while she was returning after easing herself near the river, her cousin called her to his house to wash utensils. When she went there, accused arrived, dragged her in the house and forced himself on her against her wish. She reported the occurrence to mother same evening and they approached police.

PW2 mother stated that when she returned that day, she noticed daughter crying and on inquiry, she learnt from her that Vasant took her to the house for cleaning utensils and accused arrived there, closed the door and committed sexual assault on her and so they approached MIDC Police.

- PW3** Rajkumar, pancha to spot panchanama, narrated about being called to the spot which was house made of tin sheets. Police drew panchanama Exhibit 19. In his presence, clothes of prosecutrix were also seized vide panchanama Exhibit 20.
- PW4** aunt who also acted as pancha to seizure of mat, towel, deposited about handing over clothes and its seizure.
- PW5** Dr. Gawali, medical expert, on examining victim on 31.07.2016, noted the history of sexual assault given by victim and on examination by gynecologist, he claims to have received report suggesting overall finding to be consistent with sexual assault.
- PW6** Dr. Smt. Khan, another doctor, who collected DNA samples of victim and handed it over to police.
- PW7** Dr. Smt. Tupe, the gynecologist, who conducted medical examination of victim and narrated about the medical findings and issuing case paper Exhibit 36.
- PW8** Nagwe is the PSO who noted complaint and registered crime bearing Crime No. 178 of 2016 and also seized currency produced by the prosecutrix and drew its panchanama.
- PW9** PSI Smt. Devadkar is the Investigating Officer.

PW10 is the Headmaster and she placed on record Exhibits 71 and 72.

ANALYSIS

9. In view of the objection raised by defence/appellant that age of victim is not cogently proved, first, said issue is required to be addressed.

10. PW1 victim stated that her parents are labours. Admittedly, she has not given her date of birth. In cross para 12, she answered that marriage of her parents was solemnized 30 to 35 years back. She has a married elder sister. She answered that at the time of marriage of her sister, she was four to five years of age. She answered that she studied up to 7th standard in Zilla Parishad School. She answered that mother informed her date of birth while admitting her in school. In para 13, she answered that she is unable to give exact age of her brother.

11. PW2 mother, who is examined at Exhibit 17, also has not stated date of birth of victim. Mother has not been crossed examined on the age of her daughter. However, there is no suggestion for namesake also that she is not minor. PW4 aunt has also not given date of birth

of victim. PW5 medical expert claims that victim aged 15 years was referred for medical examination. He deposed that as per radiologist's opinion, victim's age was more than 16 years but less than 18 years. PW10 Headmaster, at Exhibit 70 deposed that she issued school leaving certificate to Investigating Officer on the strength of register maintained by school carrying entry at Sr. No. 713 in register no.6. She identified said School Leaving Certificate as Exhibit 71 and the verified copy of register carrying above entry marked as Exhibit 72. She also placed on record original birth certificate produced by father along with application and the same are marked as Exhibits 73 and 74 respectively. Such documents carry date of birth of victim as 17.08.2000.

In cross this witness PW10 is unable to state exactly when Shri Kale was Headmaster. That, there is no signature of the person who took entries and that name of the child is not reflected in the birth certificate Exhibit 73.

12. On carefully analyzing the above evidence, though victim and mother did not give date of birth, investigating machinery has taken care to gather school record. PW10, whose testimony is discussed above, has carried school register reflecting entries of admission. Said

witness, apart from extract, also placed on record original birth certificate showing date of birth of victim as 17.08.2000, i.e. Exhibits 71 and 72 . Therefore, here, there is very birth certificate on record. Comparing the date of birth with date of occurrence, i.e. 30.07.2016, victim is established to be below 18 years of age and hence, she was child in view of definition provided under POCSO Act. Consequently, there is conclusive proof about age.

13. Now, it is required to be further satisfied that other offences for which appellant was impleaded, are also firmly and cogently proved.

Substance of victim's evidence is that on 30.07.2016, while she was returning after easing herself, her cousin Vasant called her to his house for washing utensils. She deposed that accused reached there and he dragged her in the house of Vasant and she categorically stated that he committed forcible intercourse with her twice, resulting into bleeding. He gave her Rs.100/- to buy sanitary pad and threatened not to disclose the incident.

Para 10 to 14 of her cross are on other aspects. Relevant cross is in para 15 and she is found to have answered that when she went to answer of nature's call, no one was with her. She denied people

standing near the house or road of accused. She admitted that there are front and back doors and they were open. She denied house to be having wooden planks. She is surprisingly asked measurement of the room, which obviously she is unable to state. Remaining cross is on the family of Vasant. She admitted that when she was inside that house, she was not apprehended by accused. That, she was inside the house for half an hour and that time she was shouting for help. In para 18, she volunteered that Vasant who accompanied her from the river side, was standing outside the house. Mere suggestion is given that there were disputes between her family and family of accused since long, without elaborating on what count.

Consequently, the residue of substantive evidence of victim is that, when she went to the house of her cousin Vasant for washing utensils, accused had forcible intercourse with her. So much part of her testimony has not been disturbed or rendered doubtful.

14. PW5 claims that victim was referred for examination. He did not notice external injuries on her body, but noted external injuries on genital part. He referred victim to expert gynecologist from whom report was received regarding finding following injuries :

- i. Small tear of forchette with multiple abrasions on intriotus.
- ii. Hymen tear 6 O'clock position.
- iii. Fresh bleeding from injuries.

Age of injuries less than 24 hours and more than 12 hours.
Gynecologist's opinion overall findings were consistent with sexual assault.

Above witness is not cross examined on medical report received from gynecologist, but in cross para 7 witness has answered that when he was conducting medical examination, gynecologist also arrived and gynecologist only can explained about examinations conducted.

15. PW7 is the gynecologist and in her evidence at Exhibit 35 para 3, she narrated the nature and size of injury as under:

"1 x 1 small tear on forchette with multiple abrasion on intriotus, hymen tear at 6 O'clock position, fresh bleeding from injury. Age of injury less than 24 hours."

Above witness in cross admitted that no medical certificate was issued. She admitted that there is difference between menstrual bleeding and bleeding due to injury. She denied that injuries noted in

MLC are said to have inflicted injuries and also flatly denied that there was no sexual assault.

16. It is tried to be vehemently argued that there is no corroboration to the victim's testimony about she being dragged and forced upon. It is fairly settled position that corroboration is not a necessity and conviction can be founded on sole testimony of victim, provided it inspires confidence. Only when there are compelling reasons and for satisfaction of judicial conscience, as an abundant precaution, corroboration is sometimes insisted for. But it further depends on case to case.

Law to above extent has been lucidly and explicitly made loud and clear in the case of *State of Punjab v. Gurmit Singh and others* (1996) 2 SCC 384.

17. Here also, victim is a village girl. Her parents are labours. Disadvantage has been taken when she went to render domestic work on request of cousin. Moreover, accused gave her Rs.100/- to buy sanitary pad when she started bleeding and pleaded to spare her. Victim has promptly reported incident with her to her mother and there is prompt reporting to police as well as handing over of said

currency. Her testimony reproduced above is inspiring confidence. She is shown to be minor. There is DNA report at Exhibits 57 and 58 confirming involvement of appellant. This was the last nail to the coffin. Testimony of victim, on comparing it with above medical experts' evidence, establishes sexual assault and medical evidence lends credence to victim's testimony. Doctor has attributed tear to the hymen and fresh bleeding injury. Therefore, forceful act is proved. The moment the victim spoke about having forcible intercourse, offence gets gravitated. Therefore, when there is both, trustworthy and reliable oral account of victim, getting fortified from medical evidence, the above submissions hold no substance.

18. As discussed above, victim is shown to be a minor. Taking above testimony of victim and medical experts into consideration, charges of 376(2)(i) of IPC and Section 4 POCSO Act are also squarely made out. To sum up, required ingredients for attracting each of the charge with which appellant was chargesheeted are available.

19. Studied the judgment. Learned trial court has rightly appreciated available evidence and committed no error whatsoever in reaching to a finding that victim is proved to be a minor and offence

under Section 376(2)(i) of IPC and Section 4 of POCSO Act to be made out. There is no reason to interfere and there being no merits in the appeal, I proceed to pass the following order:

ORDER

- I. Appeal is dismissed.
- II. Fees of the counsel appointed to represent respondent no.2 is quantified at Rs.10,000/- to be paid by High Court Legal Services Sub Committee, Aurangabad.

[ABHAY S. WAGHWASE, J.]

vre