



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

CRIMINAL APPEAL NO. 32 OF 2020

. Pandurang S/o. Vithal Kamble
Age: 33 years, Occu.: Agril.,
R/o. Mangural, Tal.Kallamb,
Dist.Osmanabad.Appellant
(Org. accused)

Versus

1. The State of Maharashtra
Through the Police Station Officer,
Shiradhon Police Station,
Tq.Kallamb, Dist.Osmanabad.
2. X.Y.Z.Respondents

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Advocate for Appellant : Mr. P.B.Jadhav
APP for Respondent no.1 : Mr.N.D.Batule
Advocate for Respondent no.2: Mr. Abhijit G. Choudhari

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CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 18 MARCH, 2024

PRONOUNCED ON : 03 APRIL, 2024

JUDGMENT :-

1. Appellant herein is questioning the judgment and order passed by learned Special Judge Osmanabad dated 29-08-2018 holding him guilty for offence under Sections 377 and 506 of the Indian Penal Code (IPC) and under Sections 4 and 6 of the Protection of Children from Sexual Offences Act (POCSO Act).

FACTS OF PROSECUTION CASE IN BRIEF

2. This is an unfortunate case of pederasty i.e. male committing carnal intercourse with a male child.

PW1 Victim, a boy aged 11 years, was studying in 5th Standard. On 12-12-2017 at around 3:00 p.m. while he was playing near a Samaj Mandir of his village, appellant went there and gave call to the victim. When victim refused, he dragged him towards a ditch, himself got undress, removed clothes of victim and he committed carnal intercourse by threatening to slit his throat. Out of fear, child did not disclose said act to anyone. Even his parents were at the field for agricultural work. After taking dinner, he disclosed the incident to his father. In the morning, he also informed his mother, because he was suffering pain to his anus. Father took him to Police Station and thereafter, before learned Magistrate, where his statements are recorded. PW2 father of victim lodged report exh.10 on the basis of which crime no.269 of 2017 was registered for offence under Sections 377, 506 of the IPC and Section 4, 6 of the POCSO Act.

Said crime was investigated by PW10 Mane (PSI), who after its completion and gathering sufficient evidence, chargesheeted accused. Case being triable by Special Court, it was assigned to Special Judge,

who conducted trial and finally after appreciating evidence on record, recorded guilt as stated above.

Said judgment is impugned herein by filing instant appeal on various grounds mentioned in appeal memo.

SUBMISSIONS

On behalf of Appellant :

3. Challenging the conviction, learned Counsel for the appellant would point out that testimony of victim is not inspiring confidence. He is a child, who has been tutored to falsely implicate appellant because of dispute and quarrel for letting away sewage water and dispute over purchase of land. That law is fairly settled that testimony of child witness should not be acted upon without corroboration. Here there is no corroboration. According to him, no body has seen accused in company of victim.

4. He next submitted that inspite of alleged occurrence taking place in the afternoon at 3:00 p.m. on 12-12-2017, report is lodged on 14-12-2017. There is no plausible explanation for delay. Neighbours of the spot are not examined. According to him, even medical evidence does not support prosecution as examining Doctor

has not noticed any injuries either on the person or private parts of the victim. He also pointed out that Doctor has also not collected sample of semen of the accused. That prosecution case is rested on interested witnesses. That Panchanamas are not proved. However, still learned trial Court has accepted case of prosecution as proved without assigning satisfactory reasons and for all above reasons, he prays to set aside the judgment by allowing the appeal.

On behalf of State as well as victim :

5. Strongly opposing the appeal, learned APP as well as learned Counsel for victim would strenuously submit that appellant is pervert. That crimes of similar nature are shown to be committed by him. That victim, a 11 years boy has been sodomized. They pointed out that there was threat to kill and therefore, child did not raise alarm. Moreover, his parents were out of the house for working and only after returning in the night, he has disclosed act of accused to them. Therefore, there is some delay in lodging complaint. As such there is no reason to hold that there is deliberate delay. It is further added by both that considering nature of crime, delay, if any, is insignificant.

6. Refuting false implication, they would submit that there is no reason for the child to falsely depose. Moreover, there is nothing to show that there was any quarrel or dispute and as such false defence has been taken. Learned APP pointed out statements of victim and his father recorded before learned Magistrate and he submitted that versions are consistent throughout. That accused is resident of same village and therefore, was known to the victim. That victim has named accused and therefore, there is no reason to disbelieve such quality of evidence.

7. They also invited attention of this Court to medical evidence and submitted that Doctor has clear opinion. That in cases of such nature, there may not be injuries, more particularly, when act is committed by threat to kill. According them, victim's evidence inspires confidence. That he has withstood entire cross without getting shaken. Therefore, learned trial Court has correctly appreciated evidence and has committed no error whatsoever in returning the guilt. According to them, there is no illegality or perversity in the findings of the learned trial Court so as to interfere and hence, they pray to dismiss the appeal.

EVIDENCE ON BEHALF OF PROSECUTION IN TRIAL COURT

8. **PW1** victim deposed that he is unable to give date of birth. He is studying in 5th Standard. He knew accused, who he identified as fellow villager. About the incident, he deposed that occurrence took place on 12-12-2017 at around 3:00 p.m. in a ditch near Samaj Mandir of village, while he was playing, accused came, called him but he denied to go. He deposed that he was gagged and dragged in a ditch. He removed his own pant, undergarments as well as pant and undergarment of victim and inserted his penis into victim's anus.

9. Accused threatened to slit his neck by katti (dagger), if he discloses the act to anyone. He went home but did not disclose it to his grandmother. His parents returned from the field at around 5:00 p.m. to 6:00 p.m. After dinner, he informed to his father. In the morning, as he was suffering pain in anus, he told his mother. Thereafter, his father took him to Police Station and his statement was recorded there as well as before learned Magistrate. He identified the same at exh.8.

10. **PW2** father of victim, in his evidence at exh.9, stated that occurrence took place in the noon of 12-12-2017. At relevant time,

he and his wife were in the field. He came at 6 p.m. and after dinner, his son told that accused inserted his penis into his anus at noon time near Samaj Mandir. That his son further told that accused threatened him that if he discloses it to anybody else, he would kill him by katti. In the morning, his son told his wife about pain in the anus. With a view to protecting his regard, he immediately did not rush to Police Station. On 14-12-2017 he approached Police and registered complaint and even gave statement before Magistrate.

11. **PW3** Dr.Sudhir Trimbaklal Jogdand deposed about 11 years boy brought to PHC by Police on 14-12-2017 and on examination, he noticed black colour skin rash region over right and left tibial region. He also examined accused and noticed abrasion on abdomen of accused and injury was fresh and oozing with blood.

In further examination-in-chief, Doctor deposed that after going through CA reports exh.28 to 30, blood group of accused and victim was "B". Semen stains were depicted on articles underwear of victim, full pant and underwear of accused. He further deposed that a boy of 11 years does not ejaculate semen and in his opinion, there was contact and attempt of sexual act on victim as there was no anal injury.

12. **PW4** Vandana Ramesh Misal, resident of village Mangrul, deposed that she knew both accused and victim as they are from same village. Accused to be married having children. His wife has abandoned him. He was jobless and loitering in the village and he had molested a minor girl.

13. **PW5** Ramling Shrimant Kadam, who was working as Gramsevak placed on record birth certificate exh.23 and 25.

14. **PW6** Rahul Nanasaheb Kamble, Pancha of seizure of clothes of accused has not supported prosecution.

15. **PW7** mother of victim, stated that on that day she and her husband were at field. After dinner, her son told that at noon accused had dragged him in a ditch near Samaj Mandir, removed underwear of her son, his own and thereafter committed sodomy. That her son told that accused threatened to behead him by katti. Next day morning, her son complained of swelling to anus. They did not disclose to anyone to protect spoiling of their image. Her husband lodged complaint next day. Police and Magistrate recorded her statement.

PW8 Vijay Baban Pawar is Pancha to spot, seizure of soil

samples and clothes of victim.

PW9 Narhari Dnyanoba Munde is Carrier.

PW10 Subhash Gokul Mane (PSI) is Investigating Officer.

ANALYSIS

16. Case of prosecution here primarily and fundamentally rests on testimony of **PW1** victim. Entire examination-in-chief of the victim is reproduced in aforesaid paragraph. The gist of his evidence is that on relevant day while he was playing near a ditch, accused dragged him in the ditch, removed clothes of victim, himself got undressed and inserted his penis in child's anus. According to victim, he did it after issuing threat to slit his neck by dagger.

On going through the **cross-examination** faced by the victim, there seems to be questions pertaining to location of the Samaj Mandir, circumstances around said spot, residential houses of villagers, road for passage and distance of the spot. Child flatly denied that any of his friends were playing with him at the time of incident or any villagers passing thereby. Again he is questioned about surroundings to the location, about slope of gutter near the house of Shahaji and flow of sewage discharge, but the child has categorically denied that 5-6 months prior to the incident, there was any quarrel between his father and accused about discharging the

sewage into the gutter water. He further flatly denied that his father threatened accused to falsely drag him in the case. Rest is all denial.

17. Admittedly, parents of victim i.e. PW2 and PW7 have received information after they returned in the evening. They both are speaking about complain of pain in the anus by the victim. It is pertinent to note that both parents are speaking about protecting their image and reputation. Consequently, they divulged from promptly approaching Police. In tradition bound society, parents of victim of such offences are extremely reluctant to disclose to avoid attention of society. Such instances have serious reflections on their image. Moreover, they are illiterate labours. Therefore, there is reason for approaching Police Station on 14-12-2017 regarding occurrence of 12-12-2017.

18. Learned Counsel for the appellant would strenuously and forcefully submitted that victim, a child, has been tutored to falsely implicate in the background of some quarrel between accused and father of victim resulting out of letting out sewage water in the gutter.

Such submission apparently is nothing but a desperate attempt

to create doubt. There is no distinct evidence in support of such evidence. Even attempt of suggesting such defence to the very victim child has gone futile as the child having flatly denied any quarrel with his father on that count.

19. Much stress is also laid by learned counsel for appellant on the point that there is no supporting medical evidence. There are no injuries noticed by medical expert and even semen of the victim has not been gathered by Doctor.

In the light of above submissions, evidence of PW3 Dr.Jogdand is put to minute scrutiny upon which it is revealed that Doctor on examination, noticed a mere black colour skin rash legion over right and left side tibial region and the same is computed to be 7 to 8 months back. Apparently, Doctor though has issued exh.15 stating that there is no injury found on the body or near anal region, pennis region, peri-anal region, pubic region, but it is pertinent to note that said examination has been carried out on 14-12-2017 i.e. after two days of alleged occurrence. Resultantly, it is possible that Doctor may not have noticed any injuries on the anus. Child has reported pain to the anus in the morning of 13-12-2017 and apparently medical examination is done on 14-12-2017 i.e. after child being referred for

medical examination on registration of crime. Both parents claim to have heard their child making complain of pain to the anus. They have stuck up to such version both in statement under Sections 164 of the Code of Criminal Procedure before learned Magistrate as well as are consistent on this count in witness box. Mere omission on the part of father that his son told his wife that he suffered pain in anus is not material omission.

20. Here evidence of child is of prime importance and victim child has, categorically stated about the act indulged by the accused with him. As stated above, mere absence of visible external injuries on the private part of victim, itself is not a good ground to either doubt the version of a innocent child, who has stood steadfast and firm in the witness box both in examination-in-chief as well as while under cross-examination as regards to actual act is concerned. Even otherwise, medical evidence is mere opinion evidence. Law is fairly settled that in cases of sexual violence, it is not imperative for prosecution to substantiate the charge by adducing medical evidence. Infact in cases of such nature, evidence of victim of sexual violence is entitled to great weight unless it is patently shown to be unworthy of credence. Consequently, plea of lack of corroboration raised before this Court has no substance or force. The Hon'ble Apex Court in the

case of *Bhupinder Sharma v. State of Himachal Pradesh* [(2003) 8 SCC 551] observed “11. Rule regarding non-requirement of corroboration is equally applicable in the cases of nature relating to Section 377 of the IPC.”

21. As regards to submission about semen of accused not gathered by Doctor is concerned, it is true that PW3 Dr.Jogdand unfortunately in paragraph no.7 of examination-in-chief stated that he did not collect semen of accused because of refusal, but that itself would not be beneficial to the accused. Here issue is whether carnal or unnatural sexual offence is committed by appellant on victim, who is a child, who is vulnerable. There is no question of potency also under consideration. Only it is to be seen whether there is act of sodomy. Child's evidence here is inspiring confidence. Here on further examination-in-chief, Doctor has, on perusal of CA report, confirmed availability of semen stains on the garments of both victim as well as accused and they both are said to be of 'B' blood group. In further examination--in-chief in paragraph 17, Doctor has confirmed that he had taken sample of semen of accused and also had handed it over to Police for CA. Even otherwise mere absence of semen itself is not sufficient to rule out offence under Section 377 of the IPC.

22. Testimony of PW4 Vandana brings to light involvement of appellant in similar pervert acts. Copy of FIR to that extent has also been gathered by investigating machinery. This can be said to be a value addition throwing light on the pervert nature of appellant, which also cannot be lightly brushed aside.

SUMMATION

23. To sum up, here evidence of victim child, which is crucial, is inspiring confidence. Though there is delay in reporting to Police, child has promptly reported incident to his parents. Delay in approaching Police is at their end for the reasons discussed in aforesaid paragraphs. Mere absence of injury marks on the private part upon medical examination, which is apparently done after delayed period, is also no good ground to discard victim's evidence. Defence of false implication has not been probalilized by any means.

24. Learned trial Court has, in the view of this Court, correctly appreciated the oral and documentary evidence. There is no infirmity, perversity in appreciation of available evidence so as to interfere in the impugned judgment. Appeal fails and judgment passed by the learned trial Court is required to be sustained. Accordingly, I pass following order :

ORDER

Criminal Appeal No.32 of 2020 stands dismissed.

(ABHAY S. WAGHWASE)
JUDGE

SPT