

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO.149 OF 2023
WITH
CRIMINAL APPLICATION NO.2073 OF 2023
WITH
INTERIM APPLICATION NO.1960 OF 2023**

Ekknath Yashwant Mude ..Appellant
Versus
The State of Maharashtra & Anr. ..Respondents

Ms. J. S. Karnik, Appointed Advocate for the Appellant.
Mrs. M. R. Tidke, APP for the Respondent/State.
Ms. Priyanka Chavan, for the Respondent No.2.

CORAM : KISHORE C. SANT, J.

**RESERVED ON : 18th JANUARY, 2024
PRONOUNCED ON : 30th JANUARY, 2024**

PC.

1. This Appeal arises out of judgment and order dated 14th January, 2020. The Appellant/Org. Accused is held guilty for the offences punishable under Section 376 of the IPC and Sections, 4, 5(1)(m)(n) of the POCSO Act and is sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs.5000/-, in default to suffer further rigorous imprisonment of six months. For offence under Section 506, he is sentenced to suffer rigorous imprisonment for one year in Special Case No.225 of 2016.

2. The case of the prosecution in short is that the present Applicant/Accused committed rape on his 11 years old daughter on 18th April, 2016. It is alleged that even prior to that on 2 – 3 occasions, he had committed such acts. As per the prosecution story, the mother of the prosecutrix came to know about this on 18.04.2016. On that day, after coming to home in the late hours in the evening, the accused asked her to go to pay the amount of Bhisi. When she came back at around 11.00 p.m., she did not find the victim girl in the house. On asking the accused told her that he has beaten her and therefore she went out of house. The mother therefore went in search of the victim. The victim was hiding herself in one dilapidated house near her house. On looking at mother, she came out and hugged her mother and started weeping. She told mother that she do not want to come back to home. For that reason, mother asked her to go to house of one Zarina and stay there for night. In the morning on 19.04.2016, she went to fetch victim from the house of Zarina. There Zarina told the informant that on the previous night father of the victim girl committed rape on the victim. However, after that the accused ran away and was not found.

3. On 17th June, 2016, for the first time she lodged complaint with the Police Station. The Police thereafter conducted investigation and arrested the accused and prosecuted him. After trial, the Trial Court held the accused guilty for the offences and awarded sentence as above

4. In the Appeal, it is submitted that there is no evidence to connect the accused with the incident. The incident of rape itself is not proved. There is delay of more than two months in lodging FIR. No sufficient reason is given for such a long delay. The evidence of the mother and PW-4/Zarina is only hearsay. There are contradictions in the statement under Section 164 of CrPC of the victim recorded by the Magistrate and her statement before the Court. The medical evidence does not support prosecution's case. The mother of the victim for ulterior motive lodged the complaint against the accused. It is submitted thus that the conviction is wrongly recorded. A prayer is therefore made to allow appeal and to acquit the accused.

5. Learned APP vehemently opposed the Appeal. It is submitted that there is ample evidence on record to prove the guilt of the accused. The Trial Court has rightly held the accused guilty of the offence. No interference is required in the Appeal.

6 Learned appointed advocate for the Respondent No.2 submits that this crime is a heinous crime. The father is supposed to be protector of the victim, however, he has turned to be predator. There is no reason for the victim and her mother to falsely implicate the accused in the crime. She ultimately prays for rejection of the Appeal.

7. During the course of argument, this Court has gone

through the record, depositions and other evidence. In the deposition of the victim, she stated her date of birth as 24.05.2005. About the alleged incident, she stated that her mother went to pay the amount of Bhisu at about 10.00 p.m. with her brother. Her other brother and sister slept in one room and the accused slept in another room. After food the accused asked her to prepare the bed. The accused told her to remove her clothes and lie on bed. By removing his pant, he slept on her and committed rape. He threatened not to disclose the said incident to anyone, otherwise he would kill all the family members. He had committed such acts earlier also on two three occasions. Thereafter the mother returned at about 10:30 p.m. to 11:00 p.m. Because of fear, she did not tell this incident to anyone. She was again called by father in his room, however, she did not go there and hide herself in another nearby house. When her mother started searching for her, on listening her voice, she came out of the house and told that she do not want to come to the house. The mother took her to the nearby house of one Zarina. On next day, when mother came to house of Zarina, the victim told about her story. The mother and Zarina deposed on the similar lines. Zarina was examined as PW-4.

8. So far as medical evidence is concerned, prosecution examined PW-5/Dr. Jayashree Sanjay Mhaske, who deposed that she had examined the victim. In the examination-in-chief, she stated that as per the history of the victim, the accused raped her on five occasions. On examination, she found labia majora and minora was

normal, vajjan non-patulous, hymen showed old tear and there were no external injuries. Thereafter she issued certificate. It bears signature of Dr. Sneha Patel. So far as medical evidence is concerned, there is only one medical certificate. Though the clothes of the victim and the accused were sent for CA, there is no report placed on record.

9. PW-6 was an Investigating Officer viz. Devyani Tryambak Gaikwad. PW-3 is not material witness. Considering this case and in view of the submissions, this Court has to see whether the prosecution has proved the offence. As stated FIR is lodged on 17.06.2016 about the alleged incident of 18.04.2016. It has come in the evidence of PW-2, mother of victim that immediately on 19.04.2016 this witness had been to lodge a complaint, however, the said complaint was not taken by the Police. On 17.06.2016, she lodged the FIR. It is her case that after the incident, the accused was absconding and therefore, she did not file complaint. She thought of filing the complaint after the accused was found after he returned to locality. In the cross-examination of victim, her statement under Section 164 of CrPC was recorded in the presence of Police and her mother. She specifically denied paragraph 3 of her statement recorded under Section 164 of CrPC, where it is recorded about the incident. In the statement recorded under Section 164 of CrPC, she could not give the date of incident. She only stated that contents of paragraph 3 of 164 statement is not true and correct. Submissions of the advocate for the accused is thus that there is no specific

incident given.

10. From the cross-examination of PW-1 and PW-2, it is clearly taken on record that the clothes of the victim were burnt by the mother/PW-2. The quilt on which the alleged rape was committed, was also burnt by PW-2. The burning of the quilt and the clothes of the victim is also stated by the Investigating Officer. The Investigating Officer in her evidence clearly admitted that because the quilt and clothes were burnt, she could not collect that evidence.

11. Thus now only evidence then remains is in the form of deposition before the Court. In the examination-in-chief itself, PW-2 has stated that though she had been to the Police Station to lodge the complaint, but the same was not accepted by the Police as accused was not traced out. This Court finds it difficult to accept this story. What is seen is that the mother did not immediately lodge the complaint. This creates doubt in view of further cross-examination of PW-2 that she had quarrel with the husband on account of giving their one daughter in adoption to sister of PW-2. The accused had refused to give their daughter in adoption.

12. Coming to the medical certificate, it is seen that there is mere opinion there was opinion about rape. The victim was examined much after the alleged incident. The doctor opined that the rape occurred on 16.04.2016 as narrated by the victim. In the

cross-examination, she stated that the incident took place at morning at the residence, whereas the story of the prosecution is that the incident occurred at late hours on 18.04.2016. Except this evidence, there is no CA report to connect the accused with the so called incident. In this case, even the alleged incident is doubtful. It cannot be believed that the mother of the victim keeps quiet for two months and would lodge complaint only after the husband came back.

13. I find substance in the submissions made by learned advocate for the Appellant/accused that in statement recorded under Section 164 of CrPC. No date of offence is given by the victim in the deposition recorded after four years. There is no specific opinion given in the medical certificate about the rape. The doctor who gave certificate is not examined and therefore the accused could not get opportunity to cross-examine the doctor. In so far as Panchanama is concerned, no spot Panch is examined. When the accused was arrested, no Panchanama was also prepared. Learned advocate for the Appellant relies on the judgment of ***Gauhati High Court in CRL.A(J)/24/2019 (Balin Chetia Vs. The State of Assam)*** in somewhat similar circumstances the High Court considered in the said case that the doctor in that case did not find any injury on the private parts of the victim but her hymen was only found torn. The provisions of Section 29 of the POCSO Act mandates the Court to draw the presumption unless the contrary is proved. Considering the facts in that case, the accused came to be acquitted for want of

corroboration of evidence and other material on record. There was no medical evidence to corroborate sexual assault on the victim and that creates doubt about the veracity of the statement made by the child witness. Finding that it was not safe to rely on the sole testimony of the victim, the accused came to be acquitted.

14. Learned advocate for the Respondent No.2 relied on the following judgments :-

(i) *State of Uttar Pradesh Vs. Krishna Master & Ors.*¹

(ii) *State of M.P Vs. Dayal Sahu*²

(iii) *State of H. P Vs. Shree Kant Shekari*³

(iv) *Visveswaran Vs. State*⁴

15. In case of *Krishna Master (cited supra)*, the Hon'ble Apex Court has held that while appreciating the evidence, Court should ignore minor discrepancies and inconsistencies in the evidence etc. and to consider the evidence a whole. In case of *Dayal Sahu (cited supra)*, it is held that non-examination of doctor and non-production of the medical report is not fatal to the prosecution case. It is further held that when benefit of doubt is to be given to the accused, the Court has to carefully see that the said doubt is reasonable. The Court should not reverse the findings of the guilt on the basis of irrelevant circumstances or technicalities. In case of

1 (2010) 12 SCC 324.

2 (2005) 8 SCC 122.

3 (2004) 8 SCC 153.

4 (2003) 6 SCC 73.

Shree Kant Shekari (cited supra), it is held that the testimony of the victim when reliable, the delay in recording trial would not be fatal. When the Prosecution has explained the reasons for delay and also led cogent evidence to substantiate the stand as to why there was delay. In case of ***Visveswaran (cited supra)***, the Hon'ble Apex Court held that when there is defective investigation, the only requirement is to take extra caution by Courts while evaluating evidence. It would not be just to acquit the accused solely as a result of defective investigation. Any deficiency or irregularity in investigation need not necessarily lead to rejection of the case of the prosecution when it is otherwise proved. This Court finds that in the present case, the basic facts itself are not proved and therefore, judgments relied upon by the Respondent No.2 will not be applicable.

16. In the present case, this Court finds that there is no evidence on any of the points except oral testimony of the witnesses. The testimony of the witnesses does not inspire confidence. Looking to the fact that there is a reason to falsely implicate the accused. The conduct of the victim and mother of the victim is suspicious, as the informant didn't lodge FIR immediately, but has submitted that though she had approached the Police Station, her complaint was not taken, as the accused was absconding. This can hardly be accepted in sensitive cases like POCSO. For all these reasons, this Court finds that the prosecution has failed to prove the offence.

17. While parting with the judgment, this Court finds it

necessary to note that though the Hon'ble Apex Court time and again has cautioned the Courts that they should not disclose the identity of the victim. In this case, it is found that the learned Trial Judge has referred the name of the victim at various places in the judgment. Even in the statement, her name is clearly written. In the judgment of the Hon'ble Apex Court, in the case of ***Nipun Saxena & Anr. Vs. Union of India & Ors.***⁵ the Hon'ble Apex Court has elaborately considered this aspect. In paragraphs 50.1 to 50.9, the Hon'ble Apex Court has given certain directions, which read as under :-

- “50.1. No person can print or publish in print, electronic, social media, etc. the name of the victim or even in a remote manner disclose any facts which can lead to the victim being identified and which should make her identity known to the public at large.
- 50.2. In cases where the victim is dead or of unsound mind the name of the victim or her identity should not be disclosed even under the authorization of the next of kin, unless circumstances justifying the disclosure of her identity exist, which shall be decided by the competent authority, which at present is the Sessions Judge.
- 50.3. FIRs relating to offences under Sections 376, 376-A, 376-AB, 376-B, 376-C, 376-D, 376-DA, 376-DB or 376-E of **IPC** and offences under POCSO shall not be put in the public domain.
- 50.4. In case a victim files an appeal under **Section 372 CrPC**, it is not necessary for the victim to disclose his/her identity and the appeal shall be dealt with in the manner **laid down by law**.
- 50.5. The police officials should keep all the documents in which the name of the victim is disclosed, as far as possible, in a

⁵ (2019) 2 SCC 703.

sealed cover and replace these documents by identical documents in which the name of the victim is removed in all records which may be scrutinised in the public domain.

- 50.6. All the authorities to which the name of the victim is disclosed by the investigating agency or the court are also duty bound to keep the name and identity of the victim secret and not disclose it in any manner except in the report which should only be sent in a sealed cover to the investigating agency or the court.
- 50.7. An application by the next of kin to authorise disclosure of identity of a dead victim or of a victim of unsound mind under [Section 228-A\(2\)\(c\)](#) of IPC should be made only to the Sessions Judge concerned until the Government acts under Section 228-A(1)(c) and lays down criteria as per our directions for identifying such social welfare institutions or organisations.
- 50.8. In case of minor victims under POCSO, disclosure of their identity can only be permitted by the Special Court, if such disclosure is in the interest of the child.
- 50.9. All the States/Union Territories are requested to set up at least one 'One Stop Centre' in every district within one year from today."

In paragraph 51, the Hon'ble Apex Court has also directed to send copy of the judgment to the Registrars General of all the High Courts for necessary action. This Court thus finds that it is necessary to bring it to the notice of the learned Judge to follow the directions given in aforesaid paragraphs.

18. Learned Trial Judge to note the above paragraphs and take proper care in future.

19. The Appeal as such stands allowed.

20. Bail bonds stand cancelled. Fine amount, if deposited, be refunded to the Appellant.

21. In view of disposal of Appeal, pending Applications, stand disposed of.

[KISHORE C. SANT, J.]