



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL APPEAL NO. 64 OF 2023

Syed Iqbal Syed Gafur

Aged about 24 years,

Occ: Labourer,

R/o Devurwadi

Rehabilitated

Tq. Arni, District : Yavatmal

(Presently in Prison of Amravati,

District Amravati)

.... APPELLANT

// VERSUS //

1. **The State of Maharashtra,**
Through Officer Incharge,
Police Station, Wadgaon Road,
Yavatmal, District: Yavatmal
2. XYZ in Crime No.320/2017
Dt. 31/03/2017 Police Station
Wadgaon Road, Yavatmal,
District: Yavatmal

.. RESPONDENTS

Mr A.S. Londhe, Advocate for the appellant.

Mr. Piyush Pendke, APP for respondent No.1/State.

Ms Falguni Badani, Advocate (appointed) for respondent No.2.

CORAM : G. A. SANAP, J.

DATE: 20/12/2024

ORAL JUDGMENT :

1. In this appeal, challenge is to the Judgment and
order, dated 18.11.2022, passed by the learned Additional

Sessions Judge, Yavatmal, whereby the learned Judge convicted the appellant for the offences punishable under Sections 363, 506 and 376(2)(n) of the Indian Penal Code (for short, 'the I.P.C.') and also for the offence punishable under Section 6 of the Protection of Children from Sexual Offences Act (for short, 'the POCSO Act'). He is sentenced to suffer rigorous imprisonment for 3 years and to pay a fine of Rs.5,000/-, in default to suffer further rigorous imprisonment for six months for the offence punishable under Section 363 of the IPC, rigorous imprisonment for 3 years and to pay a fine of Rs.5000/-, in default to suffer rigorous imprisonment for six months for the offence punishable under Section 506 of the I.P.C., rigorous imprisonment for 10 years and to pay a fine of Rs.10,000/-, in default to suffer simple imprisonment for six months for the offence punishable under Section 6 of the POCSO Act. No separate sentence is awarded for the commission of offence punishable under Section 376(2)(n) of the I.P.C.

2. Background facts:

PW-1 is the victim girl. PW-2, informant is her father. The case of the prosecution, which can be culled out from the report and other materials, is that in the year 2017, the victim girl was studying in the 9th standard at Ramabai Ambedkar Girls School at Yavatmal. She was staying in the hostel. Due to vacation, she had gone to her village. On 31.03.2017, at about 1.00 p.m. her father brought her back to Yavatmal and dropped her at the hostel. The victim went out of the hostel on the pretext of taking money from her father. By this time the father had left the said place. It is stated that when the victim was standing in front of the hostel gate, the appellant came there in the auto rickshaw. The appellant gagged the mouth of the victim and dragged her in the auto rickshaw. He carried the victim in the field in auto rickshaw on the side of Pandharkawada road. The auto rickshaw driver dropped the appellant and the victim in the field and went away. The appellant took the victim in the agricultural field and committed repetitive sexual intercourse with her. Next day

morning, he brought the victim back to the hostel and dropped her near the hostel.

3. The father of the victim girl, before leaving for his native place, came back to the hostel at about 4.00 p.m. to meet the victim. He did not find the victim at the hostel. The watchman of the hostel informed the father that soon after he dropped the victim at hostel, she had followed him under the pretext of taking money from him. The informant made an inquiry with Shalini Madam, the in-charge of the hostel. Shalini Madam also informed him that the victim left the hostel as soon as he left the said place. The informant took the search of the victim. She was not found. Therefore, on the same day, he lodged the report at Police Station Wadgaon Road. It was a missing complaint. He suspected that some unknown person might have kidnapped his daughter. On the basis of this report, crime bearing No.320/2017 was registered.

4. On 01.04.2017 in the morning the victim came back to the hostel. The hostel in-charge Shalini Madam made an inquiry with her. The victim told her that she had gone to the house of her maternal uncle. The in-charge of the hostel made phone call to her father and informed him about the arrival of the victim at hostel. The parents of the victim and maternal uncle of the victim came to the hostel. They took the victim to the house of her maternal uncle. They made an inquiry with the victim about the incident. The victim narrated the incident of penetrative sexual assault on her by the appellant. The statement of the victim was recorded by the police officer. On the basis of the statement further offences were added in the crime.

5. Initially the investigation was conducted by P.S.I. Jaybhaye. He forwarded the victim for medical examination. He arrested the appellant. The crime under the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 was registered against the appellant. Further, investigation was

conducted by Dy.S.P. Piyush Jagtap (PW-4). PW-4 drew the spot panchanama. He collected the documents with regard to the birth date of the victim from the school. The samples collected by the medical officer had been sent for examination to R.F.S.L, Amravati. The statement of the victim was recorded under Section 164 of the Cr.P.C. by the Judicial Magistrate First Class, Yavatmal. On completion of the investigation, PW-4 filed the charge-sheet against the appellant.

6. Learned Judge framed the charge against the appellant. The appellant pleaded not guilty. His defence is of a false implication on account of love affair between him and the victim girl. Family members of the victim girl did not like his love affair with the victim girl and therefore, a false report was lodged against him. The prosecution, in order to bring home the guilt of the appellant, examined four witnesses. Learned Judge, on consideration of the evidence, held the appellant guilty of the above offences and sentenced him as above. The appellant is before this Court in appeal against the judgment

and order.

7. I have heard Mr. A.S. Londhe, learned Advocate for the appellant and Mr. Piyush Pendke, learned APP for the respondent No.1/State. I have also heard Ms Falguni Badani, learned appointed Advocate to represent the victim girl. Perused the record and proceedings.

8. Learned Advocate for the appellant submitted that the prosecution has failed to prove the birth date of the victim. The birth certificate produced on record was not part of the charge-sheet. It was produced for the first time at the time of evidence of the victim girl. Other documentary evidence collected from the school has not been proved. The evidence of the victim and her father with regard to the birth date of the victim cannot be accepted. It is submitted that the learned Judge has come to a wrong conclusion as to the age of the victim.

9. Learned APP submitted that the prosecution, by adducing cogent and reliable oral and documentary evidence, has proved that on the date of the incident, the victim was hardly 14 years of age. Learned APP submitted that the appellant has not challenged the oral and documentary evidence adduced by the prosecution to prove the birth date of the victim. There was no denial in the cross-examination with regard to the birth date of the victim. Learned APP submitted that the investigating officer during the course of investigation had collected the school record to substantiate the charge that the victim was below 18 years of age. Learned APP submitted that the documents with regard to the birth date of the victim girl are already on record and therefore, it cannot be said that the birth certificate was introduced for the first time as evidence. Learned APP submitted that it is a certified copy of the public record. It has a presumptive value.

10. Ms Falguni Badani, learned Advocate appointed to represent respondent No.2 adopted the submissions advanced

by learned APP for the State.

11. I have minutely perused the evidence and record. It is apparent on perusal of the record that the investigating officer had collected the certified copy of the school admission register. The certified copy of the school admission register is part of the record. It was filed with the charge sheet. This document was collected to show the birth date of the victim girl. This document has not been proved because the prosecution, after the production of the certified copy of the birth certificate, did not summon the witness from the school. The school record clearly shows that the birth date of the victim recorded in the school register was 24.03.2003. In my view, therefore, the submission of the learned Advocate for the appellant that the document with regard to the birth date of the victim was introduced for the first time cannot be sustained. It needs to be mentioned that if the birth certificate had been produced to prove the birth date, without production of the record of the birth date of the victim with the charge-sheet,

then this birth certificate would have to be eschewed from consideration.

12. PW-1 the victim girl, in her evidence has stated that her birth date is 24.03.2003. The victim in the year 2017 was studying in the 9th standard at Ramabai Ambedkar Girls School at Yavatmal. She was staying at the hostel of the said school. PW-2, her father, has stated that the birth date of the victim is 24.03.2003. Perusal of the cross-examination of the PW-1 and PW-2 would show that this evidence has not been challenged. There is no suggestion on this count either to PW-1 or to PW-2. The victim girl, at that time of her evidence, produced the certified copy of her birth certificate. It is marked as Exh.25. Perusal of the cross-examination of PW-1 would show that this document was not challenged. Similarly, the production of this document was not objected. Perusal of this certified copy of the birth certificate would show that it was issued on 09.06.2006. The crime in this case was registered in March 2017. It therefore, cannot be said that this birth

certificate was obtained at the stage of the evidence to fill up the lacuna. This birth certificate was with the victim when the crime was registered. It was not collected by the Investigating Officer. Perusal of this certificate would show that the birth of the victim girl was registered at Gram Panchayat Arni District Yavatmal on 09.06.2006. The registration Number of the entry is 3/17/D/68/2006. The names of the parents of the victim have been stated in the certificate. It is to be noted that the certificate produced on record is extract of the public document. As per Section 77 of the Indian Evidence Act, 1872, the public document can be proved by production of the certificate extract or certified copy of the same. Perusal of this document would show that this certificate was issued on 09.06.2006. The certified copy of the birth certificate was subjected to outward number. The person who had signed this certificate is the Registrar under the Registration of Births and Deaths Act, 1969 (for short, 'the Act of 1969'). This document has presumptive value as provided under Section 35 of the Indian Evidence Act, 1872. The registration of birth was made

in compliance with the provisions of Section 12 of the Act, 1969.

13. In the facts and circumstances, I conclude that the prosecution has proved that the victim on the date of the incident was 14 years of age. The accused, neither in his cross-examination of PW-1 and PW-2 nor at the stage of his 313 statement, has denied this fact. There is no challenge to this part of the evidence. Besides, the documentary evidence which has been produced on record is sufficient to prove the birth date of the victim. In view of this, the finding recorded by the learned Judge that the victim on the date of the incident was 14 years of age and as such a child as defined under Section 2 (1) (d) of the POCSO Act is sustainable. No interference is warranted in this finding.

14. Learned Advocate for the appellant submitted that the prosecution has failed to examine the chaukidar as well as Shalini Madam, who was the in-charge of the hostel, to

corroborate the evidence of the victim girl. The victim girl and her father are interested witnesses. There are major inconsistencies in their evidence. The account of the incident narrated by the victim girl cannot be believed at all. There are major inconsistencies in her evidence. Learned Advocate submitted that the evidence of the father would show that no such incident had occurred on the given date. Learned Advocate submitted that the defence of the appellant that on account of his love affair with the victim girl he was falsely implicated in this case deserves acceptance. Learned Advocate submitted that the evidence of the medical officer does not corroborate the version of the victim girl with regard to the penetrative sexual assault.

15. Learned APP took me through the oral and documentary evidence and submitted that the victim girl has narrated the first hand account of the incident. Learned APP submitted that since the victim girl was 14 years of age on the date of the offence, the defence of consensual sex with the

victim girl, sought to be advanced, cannot be accepted. The consent of the child is hardly of any significance and as such, it could not be a defence in a case filed under the POCSO Act. Learned APP submitted that the victim girl has consistently narrated the incident before the learned Magistrate, when her statement under Section 164 was recorded, as well as before the Court on oath. Learned APP submitted that the evidence of father on material aspect corroborates the evidence of the victim girl. The father on 31.03.2017 had dropped the victim girl at the hostel and left the said place. It is submitted that father after attending to his work went back to the hostel. There he found that the victim was missing. He therefore, went to the Wadgaon Road Police Station and lodged the missing report. Learned APP submitted that in the medical examination of the victim the fresh injuries to the genitals of the victim were found. Doctor has categorically opined that the victim was subjected to penetrative sexual assault. Learned APP submitted that the learned Judge has recorded cogent and concrete reasons in support of his findings.

16. PW-2 is the informant and father of the victim girl. He lodged the missing report of the victim on 31.03.2017 at about 23.41 hours. He has stated that when he went back to the hostel of the victim girl, he found that the victim was not there. He took the search of the victim girl. The victim girl could not be traced out and therefore, he went to the police Station and lodged the missing report. He has stated that on 01.04.2017, in the morning he received a call from Shalini Madam, a hostel in-charge and she informed him that the victim had come to the hostel. PW-2 therefore, went to the hostel. He took the victim to her maternal uncle's house. His wife was also with him. He has stated that at the house of her maternal uncle, the victim girl narrated the entire incident to them. She has stated that after dropping her at the hostel she realized that she had to take money from PW-2 and therefore, she came out of the hostel, but by that time, PW-2 had left the said place. PW-2 has stated that she told that at that time the accused came there in auto rickshaw and gagged her mouth forcibly, carried her in auto rickshaw and then committed rape

on her. The statement of PW-2 was recorded after words. PW-2 was subjected to cross-examination. It appears that except one minor omission, no other material has been elicited in his cross-examination. The perusal of his cross-examination would show that he has consistently reiterated the relevant facts in his cross-examination. He and the victim girl came back to Yavatmal from their village and he dropped the victim at the hostel. It was suggested to him that there was a love affair between the victim and the appellant and therefore, he falsely implicated the appellant. PW-2 has denied this suggestion. It was suggested to him that he pressurized the victim to give a false statement against the appellant before the police and before the Magistrate. He has denied this suggestion. In his cross-examination he has reiterated that after going back to the hostel at 4.00 p.m. he made an inquiry with watchman Maroti. He has stated that there he met Shalini Madam. Perusal of his cross-examination would show that his presence at the hostel on that day has not been denied.

17. The most important witness in this case is the victim girl. The victim girl, was 14 years of age on the date of the incident. She was studying in the 9th standard. In her evidence she has stated that on 31.03.2017 she was brought to the hostel by her father and thereafter her father left the hostel. She has stated that after some time she realized that she had to take money from her father. Therefore, she went out to call her father. She called her father, but he was unable to hear her and went away. She has identified the appellant before the Court. The appellant is residing near the house of the victim. She has stated that when she was standing near the gate of the hostel, the appellant came there in auto rickshaw. He directed her to sit in auto rickshaw otherwise, he would kill her. She has stated that the appellant gagged her mouth and pushed her in the auto rickshaw and took her by Pandharkawada road. She has stated that he took her in the land situated by the side of the road. She has stated that she requested the appellant to let her go, but he did not allow her to leave. She has stated that the whole night the appellant detained her in the field and in the night two

times he committed sexual intercourse with her against her will and consent. She has stated that the appellant used force. She has stated that she tried to resist, but after some time she felt helpless. She has stated that at about 5.00 a.m. the appellant brought her back to the hostel. He threatened to kill her in case the incident was disclosed to her parents. The appellant thereafter went away. She has stated that Shalini Madam made an inquiry with her about her whereabouts. She was frightened. She did not narrate the incident to her. She told her that she had gone to her maternal uncle's house. Shalini Madam thereafter made a phone call to her father. Her parents and maternal uncle came to the hostel and took to the house of the maternal uncle. She has stated that at the house of maternal uncle, she narrated the entire incident to her parents and her maternal uncle. She has stated that at the time of her examination of the doctor, she narrated the history of assault to the doctor.

18. Perusal of her cross-examination would show that it was suggested to her that she had a love affair with the appellant and on her own she accompanied the accused. In her cross-examination she has reiterated the majority of the facts stated by her in her examination-in-chief. She has stated that at about 2.00 p.m. she was taken to the field by the appellant. She has stated that she returned back to the hostel by wearing the same clothes. She has stated that she did not disclose the incident to Shalini Madam, though she trusted her. Perusal of her cross-examination would show that no dent has been caused to her evidence with regard to the occurrence of the incident and involvement of the appellant in the incident. She has stated that when she was brought back to the hostel in auto rickshaw, the appellant was alone with her in the auto rickshaw. The victim girl in her evidence has narrated the first hand account of the incident. The perusal of cross-examination does not show that any material of significance has been brought on record to discard and disbelieve her evidence. Her evidence is consistent with the evidence of her father. The appellant is not

a stranger to her. It appears that the appellant on 31.03.2017 followed the victim to Yavatmal and after getting an opportunity, kidnapped her and took her to an isolated place and committed sexual intercourse with her. The statement of the victim girl was recorded by the Judicial Magistrate First Class, Yavatmal. In her statement she disclosed all the facts stated by her before the Court on oath. On perusal of her evidence, it cannot be said that the account of the incident narrated by the victim is imaginary or concocted.

19. The next important witness is the medical officer (PW-3). Dr. Punam Kulsange, Medical Officer had examined the victim girl on 01.04.2017. The victim girl narrated the history of the assault to the doctor. The history of the assault has been recorded at Exh.44 (Medical certificate). The history of the assault narrated by the victim to the Medical Officer is consistent with the account of the incident narrated by her on oath before the Court and before the Magistrate. Medical Officer has deposed that on examination of the private part of

the victim, she noticed fresh hymen tear at the 7 O' clock position. She has deposed that the injury was fresh and was having radish colour. She has stated that this injury was caused within a period of 24 hours. The doctor was cross-examined on behalf of the appellant. Perusal of the cross-examination would show that the evidence of the medical officer about the presence of the fresh injuries to the hymen of the victim has not been demolished. The evidence of the medical officer corroborates the version of the victim on material aspects. The appellant has stated in his defence that he had love affair with the victim girl. The appellant, as can be seen from his defence put to all the witnesses in the cross-examination, has contended that the intercourse with the victim girl was consensual. This defence cannot be accepted. Fresh hymen tear at 7.00 O clock position is indicative of the fact that the victim was subjected to sexual intercourse. The doctor has stated that the injury was caused within 24 hours of the examination. The evidence of the medical officer on material past corroborates the evidence of the victim girl.

20. It is submitted that there is no independent witness and therefore, the interested evidence of PW-1 and PW-2 cannot be accepted. In my view, this submission cannot be accepted for more than one reason. It is a settled position in law that there is no need of corroboration to the testimony of the victim of rape. The solitary testimony of the victim of rape is sufficient to base the conviction. It is a settled position that the victim of offence of rape can be equated with the injured witness or rather on a higher pedestal than the injured witness. The law therefore, does not mandate that there should be corroboration to the testimony of the victim of rape like the testimony of an accomplice. The Court has to carefully appreciate the evidence of the victim of rape when the case of prosecution is resting on the sole testimony of the victim. The Court must be satisfied on appreciation of the evidence of the victim of rape that it is credible and trustworthy. If it is found that the evidence is credible and trustworthy, then it can be made the basis of conviction. There is no need of corroboration. In this case, the evidence of the victim girl is of stellar quality.

Her testimony has not been shaken in the cross-examination. Her evidence has been corroborated by the evidence of medical officer.

21. In view of the above, I conclude that learned Judge has properly appreciated the evidence. Learned Judge has recorded the cogent and concrete reasons in support of his findings. In this case, the provisions of Section 29 of the POCSO Act would apply with equal force. The prosecution has established the foundational facts vis-a-vis the charge by leading cogent and concrete evidence. The presumption got triggered against the appellant as provided under Section 29 of the POCSO Act. The appellant has failed to rebut the said presumption by leading any evidence. The appellant has failed to satisfy on the basis of available material on record that it is sufficient to rebut the presumption.

22. In view of this, I conclude that there is no substance in appeal. The appeal therefore, deserves to be

dismissed.

23. The High Court Legal Services Sub-Committee, Nagpur shall pay the fees to the learned Advocate appointed to represent the victim, as per rules.

24. Criminal Appeal stands disposed of. Pending application, if any stands disposed of.

(G. A. SANAP, J.)

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