



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

CRIMINAL APPEAL NO. 278 OF 2022

APPELLANT : Ganesh Vitthal Shedmake, Aged
about 20 Years, Occ.: Labour, R/o.
Kurli, Tah. Ghatanjee, District :
Yavatmal.

//VERSUS//

RESPONDENTS : 1. State of Maharashtra, through Police
Station Officer, Parwa, Tah.
Ghatanjee, District Yavatmal.
2. XYZ (Victim), in Crime
No.58/2020, through Police Station
Officer, Parwa, Tah. Ghatanjee,
District Yavatmal.

Ms. Parita Lakhani, Advocate for the Appellant.
Ms. Sonia Thakur, APP for Respondent No.1/State.
Ms. Seema P. Dhotre, Advocate (appointed) for Respondent
No.2.

CORAM : G. A. SANAP, J.
DATED : 11th NOVEMBER, 2024.

ORAL JUDGMENT

. In this appeal, challenge is to the judgment and order
dated 02.12.2021, passed by the learned Additional Sessions Judge/

Special Judge (POCSO Act), Yavatmal, whereby the learned Judge convicted the appellant of the offences punishable under Section 376(2)(n) of the Indian Penal Code, 1860 (for short, “IPC”) and under Sections 4 and 6 of the Protection of Children from Sexual Offences Act, 2012 (for short, “POCSO Act”), and sentenced him to suffer rigorous imprisonment for 20 years and to pay a fine of Rs.20,000/- and in default to suffer further simple imprisonment for six months for the offence punishable under Section 6 of the POCSO Act. No separate sentence has been awarded for the offences punishable under Section 376(2)(n) of the IPC and under Section 4 of the POCSO Act.

02] BACKGROUND FACTS:

The victim-girl (PW-1) is the informant. On her report, a crime was registered at Police Station, Parwa. The case of the prosecution, which can be unfolded from the report and the materials on record, is that the incident in question occurred on 8th February, 2020, in the noon. The victim, on the date of the incident, was about 17 years old. The appellant is her distant relative. In the year 2020, the victim was studying in 10th Standard at village Dattapur. On 8th February, 2020, the victim, after

attending her morning school, came back to her house at about 11:00 a.m. Her mother and brother had gone to the agricultural field. The victim took her meal and, at about 12:00 noon, left her house for the field along with Ashutosh, aged about 4 years, who is the son of her cousin. On the way, the appellant met them. The appellant instructed Ashutosh to go to the field, and therefore Ashutosh went ahead. The appellant, all of a sudden, gagged the mouth of the victim and took her in the forest beside Nala (brooklet). The appellant removed her leggings and knickers. The appellant tied her mouth with handkerchief and forcibly pushed her on the ground. The appellant committed forcible sexual intercourse with her. It is stated that the appellant committed sexual intercourse with the victim in the forest three times. At about 7:00 p.m., the victim saw that one person was passing by the road. The victim raised shouts, and therefore the appellant ran away from the spot. The victim came back to her house and narrated the incident to her mother and brother. The mother of the victim called her uncle and conveyed the incident to him. The victim, along with her uncle and brother, went to Parwa Police Station and lodged the report.

03] On the basis of this report, a crime bearing No.58/2020

was registered against the appellant. PW-5 carried out the investigation. After registration of the First Information Report (FIR), PW-5 referred the victim for medical examination. The samples collected by the Medical Officer and the cloths of the victim were seized. The appellant was arrested. He was also referred for medical examination. The statement of the victim was recorded by the learned Judicial Magistrate First Class, Ghatanji. The samples had been sent to the Regional Forensic Science Laboratory, Amravati. On completion of the investigation, the charge-sheet was filed against the appellant.

04] The learned Judge framed the charge against the appellant. The appellant pleaded not guilty. His defence is of false implication in this crime at the instance of the parents of the victim. The parents of the victim had doubt about his love affair with the victim. The prosecution, in order to bring home the guilt of the appellant, examined 5 witnesses. The learned Judge, on consideration of the evidence, held the appellant guilty and sentenced him as above. The appellant, being aggrieved by this judgment and order, has come before this Court in appeal.

05] I have heard Ms. Parita Lakhani, learned advocate for the

appellant, Ms. Sonia Thakur, learned APP for respondent No.1/State, and Ms. Seema P. Dhotre, learned advocate appointed to represent respondent No.2/victim. Perused the record and proceedings.

06] Learned advocate Ms. Parita Lakhani for the appellant submitted that the evidence of the victim is not trustworthy and reliable. The evidence of the victim is not sufficient to prove the incident of sexual assault. The evidence of the victim is highly unbelievable. It is submitted that there is no iota of corroborative evidence to substantiate the oral testimony of the victim. Learned advocate submitted that the version of the victim that she was forcibly dragged by the appellant in the forest and there he committed repetitive sexual assault on her three times is not probable. The victim would have suffered injuries if it was forcible intercourse. There were no injuries on the person of the victim. There were no injuries to her genitals. Similarly, the semen was not detected in the vaginal swab and the pubic hairs. Learned advocate submitted that the victim was examined by the Medical Officer (PW-3) on 9th February, 2020, at 3:00 a.m., and therefore the semen ought to have been detected in the vaginal swab if she was subjected to sexual intercourse three times. Learned advocate

submitted that, on the basis of the evidence of the victim, the incident of penetrative sexual assault on 8th February, 2020, has not been proved. Learned advocate submitted that the learned Judge has failed to consider the evidence in proper perspective and has come to a wrong conclusion.

07] Learned APP Ms. Sonia Thakur submitted that in case of sexual assault, there is no need of corroboration to the testimony of the victim. It is submitted that even in such a case, the corroboration from the direct evidence is not possible. Learned APP submitted that the absence of the injuries on the person of the victim and to her private part *ipso facto* would not be a ground to disbelieve her evidence as to the penetrative sexual assault. Learned APP further submitted that the absence of semen in the biological sample could not be a circumstance in favour of the appellant. There could be number of reasons for non-detection of the semen or blood in the samples. Learned APP submitted that the victim, on the date of the incident, was about 17 years old and therefore was quite mature to understand the consequences of false reporting of such a matter to the police. In the ordinary circumstances, the victim would not have taken a risk to report such a matter to the police unless she was subjected to penetrative sexual assault.

Learned APP further submitted that the appellant was the distant relative of the victim, and therefore the possibility of his false implication has been completely ruled out. Learned APP, in short, supported the judgment and order passed by the learned Judge.

08] Learned advocate Ms. Seema P. Dhotre for the victim has adopted the arguments advanced by the learned APP.

09] Learned advocate for the appellant took me through the oral and documentary evidence adduced by the prosecution. I have perused the judgment and order passed by the learned Judge. I am conscious of the fact that the conviction can be based on the sole testimony of the victim of a crime of rape. There is no need of corroboration. The victim in a crime of rape is akin to an injured witness. She cannot be equated with an accomplice so as to insist for corroboration to her testimony in material particulars. It is equally important to note that the evidence of the victim has to be appreciated very carefully to come to a just and proper conclusion. The evidence of the victim cannot be accepted as a gospel truth. The evidence must be of stellar quality to inspire confidence. The quality of the evidence must be such to place implicit reliance on the same without looking for any further corroboration. The

prosecution can rely upon other circumstantial evidence to seek corroboration to the testimony of the victim. In case of rape, the medical evidence is the most vital evidence to corroborate the testimony of the victim. Similarly, the evidence of the medical examination of the accused could also be used as a corroborative piece of evidence. The scientific evidence with regard to the analysis of the biological samples could also be used as a corroborative piece of evidence to fortify the case of the prosecution.

10] In this case, the uncle of the victim has not been examined. Similarly, her mother and brother have not been examined. The prosecution has relied upon the sole testimony of the victim to prove the charge against the appellant. Ashutosh, who according to the victim had accompanied her on the way to the field, when the accused met her, has also not been examined. It needs to be further stated that the person, who had seen the victim and accused together at 7:00 p.m., has neither been named anywhere in the case nor examined. In this case, the evidence of the victim deserves minute scrutiny in the backdrop of the above stated undisputed facts.

11] It is the defence of the appellant that the parents of the victim suspected his love affair with the victim, and therefore they prevailed upon the victim to lodge a false report against him. In this case, there was no delay in reporting the matter to the police. The Court, in this case, on the basis of the available evidence, has to decide the principal issue as to whether the evidence on record is sufficient to prove the incident of rape on the victim on 8th February, 2020. If the evidence is not sufficient to prove the incident of rape on the victim, then the appellant deserves to be given the benefit of doubt.

12] The victim has deposed before the Court consistent with the facts stated in her report. The victim, in her evidence, has stated that, after returning from the school, she took meal. Thereafter, in the noon, she proceeded with Ashutosh to her field. She has further stated that, on the way, the appellant met them, and he instructed Ashutosh to go ahead. She has stated that when Ashutosh went ahead, the appellant forcibly gagged her mouth and dragged her in the forest. The victim has also stated in her evidence that the appellant tied her hands while committing the sexual intercourse. However, this part of the evidence has been proved to

be an omission. The victim, on this count, has improved her version. She has stated that the appellant, despite her resistance, committed forcible sexual intercourse with her. She has stated that, after the first sexual intercourse, the appellant again committed sexual intercourse with her two times. Her evidence would show that from 12:00 noon to 7:00 p.m., the appellant and the victim were together in the forest. The victim is silent about the events occurred between the first sexual intercourse and the subsequent intercourse. It is not her case that after the first sexual intercourse, she tried to run away from the spot, but the appellant did not allow her to run away. It is her case that she resisted the appellant. She has stated that the appellant dragged her to the spot in the forest, which is at a distance of about 200 feet from the road. The victim, in her cross-examination, has stated that there was human and vehicular traffic on the road. She has stated that at about 7:00 p.m., after seeing one person on the road, she raised shouts, and therefore the appellant ran away. In my view, the occurrence of the incident and the manner of the occurrence of the incident during the period of 7 hours is the doubtful circumstance. The other circumstantial evidence does not corroborate the version of the victim with regard to the occurrence of the incident.

13] It is not the case of the victim that, after going back to home and before narrating the incident to her mother, she had changed her cloths or took a bath. She has stated that, after going back to home, she narrated the incident to her mother, and her mother called her uncle and brother. She has stated that thereafter she directly went to the Police Station and reported the matter to the police. It has come on record that she was referred to the Medical Officer for medical examination. It is not the case of the victim that, after the incident till her examination by the doctor, she had changed her cloths. In this case, the evidence of the victim as to the incident is highly improbable. The medical evidence is the most important piece of evidence to arrive at this conclusion.

14] The Medical Officer (PW-3) had examined the victim on 9th February, 2020, at 3:00 a.m. The history of the assault narrated by the victim was recorded by her. The medical examination report is at Exh.44. The doctor, on examination of the victim, did not notice any injury on her body. The Medical Officer did not notice any injury to her private part. The appellant, on the date of the incident, was about 19 years old. It is the case of the prosecution that, three times during the span of 7 hours, she was subjected to sexual intercourse. It is the case of the victim that she

was forcibly dragged to the spot in the forest, which is at a distance of about 200 feet from the road, and there the sexual intercourse was committed with her. It is to be noted that if she was forcibly dragged by the appellant as stated by her, then she would have sustained number of visible injuries on her body. It is her case that she had resisted the appellant from dragging her in the forest. It is her case that she was forcibly pushed on the ground, and by gagging her mouth, the rape was committed on her three times. If the victim had resisted the appellant, then there ought to have been some injuries on her body as well as on the body of the appellant. The appellant was examined on 11th February, 2020. Not a single visible injury was noticed on his body by the Medical Officer. The doctor has stated that she did not notice any injury to the private part of the victim. The victim was examined within 10 to 12 hours of the sexual assault. The doctor would have noticed swelling as well as redness on her genitals. Her hymen was intact. There was no injury to labia minora as well as labia majora. In my view, this is a very important circumstance to create doubt about the occurrence of the incident. In the ordinary circumstances, if the girl of 17 years is ravished in this manner, then there ought to have been injuries all over her body as well as the body of the accused. Similarly, there ought to have been fresh injuries to her private

part. The absence of the injuries creates doubt about the occurrence of the incident as narrated by the victim.

15] The Medical Officer had collected the blood sample, vaginal swab, vulval swab, pubic hairs, and vaginal smear on a glass slide of the victim. It is not the case of the prosecution that the victim took a bath before going to the hospital. It is also not the case of the prosecution that the victim changed her cloths. The semen was not detected on the cloths of the victim and particularly on her knickers. Similarly, the semen was not detected on the vaginal smear, vaginal swab, vulval swab, and pubic hairs. The victim, as per her contention, was subjected to sexual intercourse three times between 12:00 noon and 7:00 p.m. by the appellant. She was examined within 12 hours of the occurrence of the incident. If she was subjected to penetrative sexual assault as stated by her, then the semen ought to have been detected in some of the samples. In my view, this is another circumstance, which makes the evidence of the victim with regard to the occurrence of the incident and the manner of the incident highly improbable.

16] I am conscious of the fact that the absence of the injury by itself could not be the circumstance to reject the evidence of the

victim. However, all other circumstances have to be read together, and the Court has to consider the cumulative effect of the same. In the ordinary circumstances, there ought to have been injuries on the person of the victim as well as to her private part. There ought to have been multiple scratch injuries and bruises on the person of the appellant, when the victim forcibly resisted the appellant against the commission of the rape. In my view, it is very difficult to conclude that the prosecution has proved the guilt of the appellant beyond reasonable doubt. The evidence of the victim, in my view, is not of stellar quality to accept her sole testimony as a gospel truth.

17] It is evident that the learned Judge has failed to take note of the material circumstances and the evidence on record. The learned Judge has failed to properly appreciate the circumstances, as discussed above, in juxtaposition with the oral testimony of the victim. The learned Judge has observed that, in Indian societal setting, a girl would not lodge a false report to prejudice her own future. It is true that such an offence, if brought in public domain, invites stigmatic consequences. The girl and her parents are normally reluctant to report such a matter. However, mere reporting of such a matter to the police, could not be the sole

circumstance in favour of the case of the prosecution. There is no other independent evidence. In my view, therefore, it is not safe to rely on the evidence of the victim alone to convict and sentence the appellant. The evidence of the victim, if appreciated in juxtaposition with the medical and scientific evidence, would show that it does not inspire confidence.

18] The learned Judge, while seeking support to his findings, has observed that the presumption under Section 29 of the POCSO Act would get triggered in this case. In my view, the very edifice of the above finding would collapse, the moment a conclusion is arrived at that the evidence on record is not sufficient to prove the guilt of the appellant beyond reasonable doubt. The presumption under Section 29 of the POCSO Act is not an absolute presumption. It is a rebuttable presumption. The presumption gets triggered only when the foundational facts are established by the prosecution beyond reasonable doubt. The evidence on record must be sufficient to believe the case of the prosecution and thereby support the very foundation of the case of the prosecution. In this case, the very foundation of the case of the prosecution viz-a-viz the charge against the appellant has been shaken. In my view, therefore, the presumption under Section 29

of the POCSO Act would not trigger automatically.

19] The prosecution was duty bound to prove that the victim girl on the date of the incident was below 18 years of age. The victim in her evidence has stated that her birth date is 09.11.2003. The incident in question occurred on 08.02.2020. The evidence of the victim with regard to her birth date and age has not been challenged by the appellant in the cross-examination. There is no denial to this part of the evidence of the victim. Exh. 29 is the birth certificate of the victim issued by the Secretary of the Gram Panchayat, Rahati. The investigative officer has deposed that as per the requisition letter at Exh. 54, the birth certificate at Exh. 29 was issued by the Secretary of the Gram Panchayat. This part of the evidence of the investigating officer has also not been challenged. The birth date of the victim was mentioned in the First Information Report.

20] The birth certificate at Exh. 29 is the public document. The secretary of the Gram Panchayat is the Registrar under the Registration of Births and Deaths Act, 1969 (for short, 'the Act of 1969'). The document at Exh. 29 is the certified copy of a public document. Perusal of this certificate would show that the entry of

birth registration is at serial No.11. The registration date is 13.11.2003. The entry of the birth by the Secretary of the Gram Panchayat was taken while discharging his official duties under Section 12 of the Act of 1969. This documentary evidence has presumptive value under Section 17 of the Act of 1969. The public document has to be proved by production of its certified copy in terms of Section 77 of the Indian Evidence Act, 1872 (for short 'the Evidence Act'). The birth certificate was issued by the competent authority. It is admissible in evidence by mere production. No formal proof of birth certificate issued by the competent authority under the provisions of the Act of 1969 and the Rules framed thereunder is required. Section 35 of the Evidence Act provides for relevancy of entry in public record or an electronic record made in performance of duty, such a document being produced from the custody of the public officer. In view of the provisions of Sections 12 and 17 of the Act of 1969 and provisions of Rule 9 of the Maharashtra Registration of Birth and Death Rules, the birth certificate is admissible in evidence. It is to be noted that this document has a presumptive value. It is not the case of the appellant that the entry in the record of the Gram Panchayat was made after the registration of the crime to suit the purpose of the prosecution. The document shows that this entry

was taken on 13.11.2003. The secretary of the Gram Panchayat, who is the public officer, had no reason to make a false entry. The submission that the document does not disclose the source of information cannot be accepted in view of the very nature of the document. The prosecution, by adducing cogent and reliable evidence, has proved that the victim on the date of the incident was 16 years 2 months and 29 days old and as such, a 'child' as understood by Section 2(1)(d) of the POCSO Act.

21] In view of the above, I conclude that the prosecution has miserably failed to prove the charge against the appellant. Learned Judge has failed to consider all these aspects in proper perspective and has come to a wrong conclusion. The appeal deserves to be allowed. Hence, I proceed to pass the following order:

ORDER

i] The Criminal Appeal is **allowed**.

ii] The judgment and order of conviction and sentence passed against the appellant by the learned Additional Sessions Judge/Special Judge (POCSO Act), Yavatmal, dated 02.12.2021, in

Special (Child) Case No.37/2020, is quashed and set aside.

iii] The appellant/accused – Ganesh Vitthal Shedmake is acquitted of the offences punishable under Section 376(2)(n) of the IPC and under Sections 4 and 6 of the POCSO Act.

iv] The appellant/accused - Ganesh Vitthal Shedmake is in jail. He be released forthwith, if not required in any other case/crime.

v] The High Court Legal Services Sub-Committee, Nagpur, shall pay the fees to the learned advocate appointed to represent respondent No.2, as per Rules.

vi] The Criminal Appeal stands disposed of in the above terms.

(G. A. SANAP, J.)

Vijay