



Judgment

211 appeal 882.22

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY :
NAGPUR BENCH : NAGPUR.
CRIMINAL APPEAL NO. 882/2022

Surendra s/o Dayaram Bobde,
Aged 40 yrs., Occ. Labour,
R/o. At Adgaon, Tq. Morshi,
Dist. Amravati.

... **APPELLANT**
(Accused in Jail)

VERSUS

The State of Maharashtra,
R/Through the officer Incharge of Police
Station, Shirkhed, Crime No.16/2019,
Dist. Amravati.

... **RESPONDENT**

Mr. A.D. Tote, Advocate (appointed) for appellant.
Ms. Soniya Thakur, Addl. Public Prosecutor ('APP') for respondent.

CORAM : **G.A. SANAP, J.**
DATE : **05.12.2024.**

ORAL JUDGMENT

Heard.

2. In this appeal, challenge is to the judgment and order dated 23.02.2021 passed by the learned Additional Sessions Judge and

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Special Judge, Amravait, in Spl. Case No.57/2019, whereby the learned Judge convicted the appellant for the offences punishable under Sections 376(2)(i)(f)(j)(n), 323 and 506 of the Indian Penal Code and under Sections 4, 8, and 12 of the Protection of Children from Sexual Offences Act, 2012 (in short “POCSO Act”). The learned Judge sentenced the appellant to suffer rigorous imprisonment for ten years and to pay a fine of Rs. 5,000/- and, in default, to suffer rigorous imprisonment of six months for the offence punishable under Section 376(2)(i)(f)(j) of the Indian Penal Code. No separate sentence has been awarded for the other proved offences.

3. Background facts:-

4. The victim girl is a daughter of the appellant. The crime was registered on the report of the victim girl. The case of the prosecution, which can be unfolded from the report and other material is that the victim girl, the appellant-father, the younger brother and the mother of the appellant used to reside together. The victim girl on the date of the incident was 14 years of age. It is stated that the victim studied

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upto 9th Std. Her mother left the appellant permanently when she was a child. Seven years prior to the incident, the mother had performed marriage with her uncle. It is stated that the appellant is addicted to liquor. It is stated that when the victim was studying in 3rd standard, the appellant for the first time removed her clothes and committed intercourse with her. The appellant thereafter continued to sexually abuse the victim. He would beat the victim. The appellant had threatened the victim not to disclose the sexual assault on her to anyone, otherwise, he would kill her. The victim, therefore, could not dare to disclose the repetitive sexual intercourse with her by the appellant.

5. It is further stated that when victim was studying in 6th Std., the appellant had established a physical relations with her. The appellant lastly committed sexual intercourse with the victim one month prior to the lodging of the report. After this incident, the victim made a phone call to the maternal aunt of the appellant by name Sunanda Waghmare (PW2), a resident of Rahatgaon, and called her to her village to take her to her house. On the next day, the

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maternal aunt of the appellant, ('maternal grandmother of the victim') came to their house at about 07.00 a.m. and at about 02.30 p.m. she went to Rahtgaon with her maternal grandmother. On 19.01.2019, the appellant went to Rahatgaon to bring the victim back to his house. The victim refused to accompany him. The appellant mercilessly beat the victim. The maternal grandmother inquired with the victim as to why she was reluctant to accompany her father. The victim girl at that time, disclosed about the repetitive sexual intercourse with her by the appellant for last four to five years. The maternal grandmother of the victim was shocked. Therefore, she took the victim girl to the Shirkhed Police Station. The victim girl lodged a report against the appellant.

6. On the basis of the report of the victim, a crime bearing No. 16/2019 was registered against the appellant. The investigation in the crime was carried out by PW-6 Reena Korde, PSI. The Investigating Officer referred the victim for medical examination. The Investigating Officer arrested the appellant and forwarded him for medical examination. The biological and other samples were collected

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and forwarded for the chemical analysis. The Investigating Officer collected the birth certificate of the victim from the village Grampanchayat. On completion of the investigation, a charge-sheet was filed against the appellant in the Court.

7. The learned Judge framed the charge against the appellant. The appellant pleaded not guilty. The defence of the appellant is of false implication. According to the appellant, the victim girl wanted to marry a boy named Devanand Meshram who was a very close relative of her maternal grandmother PW-2 Sunanda Waghmare. He did not like the said boy and therefore, he objected for the said marriage. The said boy was proposed for marriage by PW-2 Sunanda Waghmare. In order to remove his obstruction in the marriage, the victim and her maternal grandmother lodged a false report and falsely involved him in the case. The prosecution, in order to bring home the guilt of the appellant, examined six witnesses. The learned Judge, on consideration of the evidence, held the appellant guilty of the charge and sentenced him as above. The appellant is before this Court against this judgment and order by way of this appeal.

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8. I heard Mr. A.D. Tote, the learned Advocate appointed to represent the appellant and, Ms. Soniya Thakur, the learned APP for the State. Perused record and proceedings.

9. Learned Advocate for the appellant submitted that the prosecution has miserably failed to prove, by leading cogent and concurrent evidence, that the victim girl on the date of lodging of the report, was below 18 years of age. The evidence adduced is not credible. No independent witness has been examined to prove the birth certificate. The learned Advocate submitted that the learned Judge has failed to properly appreciate the evidence and attending circumstances. Learned Advocate submitted that PW-2 Sunanda Waghmare has principally accepted the defence of the appellant. The learned Advocate submitted that the case put forth by the victim girl is highly unbelievable. If the appellant had committed sexual intercourse with her as stated by her for four to five years, she would have disclosed the same to her parental grandmother (mother of the accused), who was residing with them under the same roof. Her younger brother was also residing with her. The parental grandmother

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and the younger brother would have at least noticed such an act of the appellant at any time. Learned Advocate submitted that when the wife of the appellant deserted him and married his own brother, he did not perform second marriage. It is pointed out that the appellant looked after the well being of the victim, her brother and grandmother in the absence of her mother. The victim was studying in 9th Std in the year 2019. The learned Advocate submitted that the victim girl denied the suggestion put to her consistent with the defence of the appellant. The learned Advocate submitted that the medical evidence in the facts and circumstances is not sufficient to corroborate the evidence of the victim with regard to the penetrative sexual assault on her by the appellant. Learned Advocate submitted that there was an inordinate delay in lodging the report. In the facts and circumstances, the delay is fatal to the case of the prosecution. The learned Advocate submitted that the occurrence of the incident narrated before the Court by the victim is doubtful, and therefore, the benefit of doubt deserves to be given to the appellant.

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10. Learned APP submitted that the birth certificate produced on record was duly certified by the Secretary of the Grampanchayat. The certified copy of the birth certificate is a public document. There was no need to examine the Secretary of the Grampanchayat. The Secretary of the Grampanchayat, being a government servant, was authorized to issue a certified copy. Learned APP submitted that evidence of the victim girl is of sterling quality. There is no reason to discard and disbelieve the evidence of the victim girl. The evidence of the victim girl has been corroborated by the independent evidence of her maternal grandmother. Learned APP submitted that the victim girl had no support of any elder person from the family, and therefore, the appellant, being in a dominant position, took advantage of situation. The victim has categorically stated the reasons for not disclosing the repetitive act committed by her father. Learned APP submitted that on examination of the victim, the Doctor noticed an old healed hymen torn at the 4 O'clock position. Learned APP also submitted that the learned Judge has thoroughly considered the evidence, and as such, the findings do not warrant interference.

11. The appellant is the father of the victim girl. The prosecution has adduced oral and documentary evidence to prove the age of the victim girl. Perusal of the cross-examination of the victim would show that the evidence of the victim with regard to her birth date and the birth certificate has not been challenged. The appellant, being the father of the victim would be aware of the date of birth of the victim. The appellant, in the absence of his wife, looked after the victim and his son. Therefore, he did not challenge this evidence. According to the victim, her birth date is 12.07.2005. In the school record, the same birth date of the victim has been recorded. Similarly, in the Grampanchayat record, the same birth date has been recorded. Exh.12 is the birth certificate issued by the Secretary of the Grampanchayat Adgaon. The Secretary of the Grampanchayat is the Registrar of Birth and Death under the provisions of the Registration of Birth and Death Act, 1969. The entry of birth of a child is taken in terms of the provisions of Section 12 of the Registration of Birth and Death Act, 1969. This entry of the birth date has presumptive value under Section 35 of the Indian Evidence Act. Perusal of the certificate

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at Exh.12 would show that the birth of the victim was registered at Sr. No. 11 of the birth register on 13.07.2005. The Investigating Officer obtained a certified copy of birth certificate on 06.02.2019. It is to be noted that the birth certificate, being a public document, has presumptive value. The public document has to be proved in terms of Section 77 of the Evidence Act by producing the certified extract. In view of the above, I concluded that the prosecution, on the basis of this evidence, has proved that in the year 2019, the victim was 14 years old and, as such, a child as understood by the provisions of Section 2(1)(d) of the POCSO Act.

12. The next important aspect is with regard to the principal charge against the appellant. Before proceeding to appreciate the evidence, the relevant undisputed facts are required to be stated at the outset. The wife of the appellant deserted him seven years prior to the date of lodging of the report. The appellant, his mother, and his two children were residing together under one roof. The statement of the mother of the appellant was not recorded by the Investigating Officer. It is not a case of the victim that she was not close to her paternal

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grandmother. The victim girl did not disclose any incident to her paternal grandmother and her younger brother. The appellant looked after the well-being of the victim and her younger brother. He did not perform the marriage even after desertion by his first wife. The first wife of the appellant married his brother. It is not a case of the victim that she was not in contact with her mother. The appellant in absence of his wife would cook food for the children. The appellant admitted his children in the school. The victim studied upto 9th Std. As compared to a paternal grandmother who was residing with the victim, the maternal grandmother, PW-2 Sunanda Waghmare, was more trusted by the victim girl. Prior to the lodging of the report by the victim, on the same day, PW-2 Sunanda Waghmare had lodged a report against the appellant at Nandgaonpeth Police Station. On the basis of this report, the NC was registered against the appellant. It is at Exh.61. All the above stated and disputed facts are required to be borne in mind while appreciating the evidence of the victim girl.

13. At the outset, before proceeding to scrutinize and appreciate evidence of the PW-1 victim and her maternal grandmother PW-2,

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Sunanda Waghmare, it would be appropriate to consider the contentions raised by the learned Advocate for the appellant. It is stated that when the victim was in 3rd Std., the first sexual assault at the behest of the appellant occurred on the victim. It continued for four to five years. The victim did not disclose the deplorable acts committed by her father to anybody. Neither the family members nor others noticed any such instance of sexual assault on the victim girl. The paternal grandmother of the victim was residing with her. The mother of the victim had deserted her father and had married her uncle. The victim, in the ordinary circumstances, would have disclosed such an incident to her grandmother. The statement of the grandmother was not recorded by the Police. The appellant who is involved in this crime is the father of the victim girl. The victim girl, on the day of lodging the report, was 14 years of age. In the backdrop of above, the Court has to minutely scrutinize the evidence and separate the grains of truth from the chaff.

14. It is true that in ordinary circumstances, a daughter would not level such an allegation against her own father. Similarly, in the

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ordinary circumstances, the father would also not sexually assault his own daughter. However, considering human psychology and tendency, mistakes can occur, even in the case of the father, who is ordinary saviour of the children. The appellant, according to the victim, was addicted to liquor. Except the bare words of the victim, there is no other evidence. Father had shouldered the responsibility of maintaining the family and well-being of his children in all respects. Even if it is assumed that the father was addicted to liquor, it would not weigh in favour of the prosecution. The victim has nowhere stated that the appellant did not look after their well-being and maintain them. It was suggested that the victim girl lodged a false report against her father because the father did not give green signal to her marriage with the boy to whom she wanted to marry and proposed by PW-2, Sunanda Waghmare. The victim denied this suggestion. It was suggested to her that PW-2 Sunanda Waghmare had proposed said boy for marriage with victim, but the victim has denied the said suggestion.

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15. In this context for proper appreciation of this defence of the appellant, it would be necessary to scrutinize the evidence of PW-2 Sunanda Waghmare, who is the maternal grandmother of the victim. In cross-examination of PW-2 Sunanda Waghmare, she has admitted that she knows one Devanand Meshram. She admitted that Devanand Meshram has married the victim. She has further admitted that she likes Devanand Meshram, therefore, she performed the marriage of the victim with him. She has categorically admitted that the appellant did not like Devanand Meshram. He opposed the marriage of the victim girl with said boy. It has been suggested to this witness that since the appellant was thorn in their flesh, she and the victim together lodged a false report against the appellant to remove him from their way. The categorical admission given by PW-2 Sunanda Waghmare proves that the victim girl has married Devanand Meshram. It is very crucial. She has admitted that the father of the victim did not like the said boy and therefore, he opposed the said marriage. In my view, this is the crux of this case.

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16. It is evident that the victim girl was under complete control of the maternal grandmother. The victim in her evidence has denied this suggestion. In my view, the victim cautiously denied this suggestion and avoided being exposed. It is necessary to state that if the evidence of PW-1 Victim and PW-2 Suananda Waghmare is appreciated in totality, it would show that there is scope to doubt occurrence of the incident in the manner stated by PW-1 Victim and PW-2 Sunanda Waghmare. The father who looked after the victim in the absence of her mother, would not commit such an act with his daughter. When the wife of the appellant left him, he was hardly 25 years of age. On the date of lodging the report, he was 35 years of age. He did not perform second marriage. The appellant single-handedly looked after the well- being of the children and his old aged mother. The appellant was the only earning member of the family. The appellant must have toiled hard to earn and sustain the family. This is another vital circumstance.

17. In this context, a reference can be made to a document at Exh. 61. Fortunately, for the appellant, this document was compiled

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in the charge-sheet by the Investigating Officer. This document was referred in the cross-examination of PW-2 Sunanda Waghmare and therefore, it was exhibited. It is photocopy of non-cognizable offence information register. The case was registered on the basis of the report of PW-2 Sunanda Waghmare. This report was lodged by PW-2 Sunanda Waghmare, the grandmother of the victim, at 02.00 p.m. on 19.01.2019 at Nandgaonpeth Police Station. On the very same day, the victim lodged a report at Shirkhed Police Station at 23.05 hours. In order to recapitulate the facts, it is necessary to state that on this day, according to the victim, her father had come to the grandmother's house at Rahatgaon to take her back. The appellant/father, according to the victim, beat her, and therefore, PW-2 Sundanda Waghmare made inquiry with the victim as to why she was reluctant to go back to her house with her father, and then the victim narrated the entire incident to her. On perusal of the NC report, it would show that the incident of beating at the house of PW-2 Sunanda Waghmare to the victim by the appellant was reported. It is to be noted that if the victim girl had disclosed the incident as reported by her to the PW-2

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Sunanda Waghmare then she would have stated about the same in her report. This is another circumstance against the case of the prosecution. PW-2 Sunanda Waghmare first went to Nandgaonpeth Police Station and lodged the report against the appellant. She was the only person from the relations to accompany the victim to Shirkhed Police Station. It shows that she was instrumental in lodging the report against the appellant at Police Station. In my opinion, all these attending circumstances are sufficient to create a doubt about the incident narrated by the victim and, as such, a pointer to probablize the defence of the appellant. On minutely scrutinizing the evidence, I am not convinced to conclude that whatever has been stated before the Court by the victim and PW-2 is a credible and trustworthy account of the incident. If the evidence of the victim is appreciated in juxtaposition with the undisputed facts noted above, it would show that the occurrence of the incident is doubtful.

18. In this background, the delay in filing the report needs appreciation. I am conscious of the fact that the delay *per se* cannot be the ground to discard and disbelieve the otherwise credible and

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trustworthy evidence of the prosecution witness. If the prosecution is able to prove the charge against the accused by cogent and concrete evidence, then the delay does not assume significance and must take a back seat. The delay becomes relevant when the evidence adduced by the prosecution creates a doubt about the credibility and trustworthiness of the evidence adduced by the prosecution and also about the occurrence of the incident. In this context, it would be appropriate to make a useful reference to the decision of the Hon'ble Apex Court in the case of *State of Rajasthan Vs. Om Prakash, (2002) 5 SCC 745*, wherein the Apex Court has observed that the object of insisting upon prompt lodging of a report to the police in respect of the commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as the names of eye-witnesses present at the scene of occurrence. It is observed that the delay in lodging FIR quite often results in embellishment, which is a creature of an afterthought. It is further observed that on account of delay, the report not only gets bereft of the advantage of spontaneity,

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danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is settled legal position that delay per se is not the ground to throw the case of the prosecution over board.

19. The victim has stated that the father ravished her for the first time when she was in 3rd Std. She has stated that the father continued to sexually abuse her for 5 years. She has stated that one month prior to the lodging of the report i.e. on 19.01.2019, she was subjected to penetrative sexual assault by the appellant. It means that for one month prior to 19.01.2019 as per her own version, she was subjected to sexual intercourse by her father. It is not her case that the father, one or two days prior to the report, insisted for sexual intercourse. It is also not her case that when she did not allow him to establish sexual relations with her, he beat her black and blue. In my view, in this context, the defence of the appellant, principally admitted by the PW-2 Sunanda Waghmare, assumes significance. It makes the case of the prosecution doubtful. In my opinion therefore, the evidence of PW-1 victim and PW2 Sunanda Waghmare is not credible and

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trustworthy. The defence of the appellant, principally accepted by PW-2 Sunanda Waghmare has caused innumerable cracks to the very core of the case of the prosecution.

20. In the above backdrop, the evidence of the Medical Officer which has been relied upon as a corroborative piece of evidence, needs appreciation. The Medical Officer on examination of the victim, did not notice injury on her body. Similarly, the Doctor did not notice an injury to her genitals, except an old healed hymen torn at 4 o'clock position. The question is whether this injury in the form of an old healed hymen torn could be attributed to the appellant. In my view, on this ground also, the balance tilts in favour of the appellant. The categorical admission by PW-1, victim girl in her evidence would fortify the defence of the appellant. The victim after lodging report, has married Devanand Meshram. PW-2 Sunanda Waghmare has admitted that the appellant had opposed the marriage of Devanand Meshram with the victim. It means that the victim and Devanand Meshram prior to the incident had a liking for each other. The victim was ready for the marriage. In this backdrop, the possibility of the

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victim girl indulging in sexual relations with Devanand Meshram could not be ruled out. The appellant, being a caring father, did not accept the proposal of marriage of Devanand Meshram with his daughter. In my view, it seems to be the cause for the prosecution against the appellant. It shows that the victim and Devanand Meshram had intimacy. The victim liked him. In my view, the strong opposition to the marriage by the appellant, seems to be the cause of his misery. It seems that his approach was proper. He was not wrong when he suggested that the boy was not the proper match for the victim. The appellant being guardian of the victim, was the proper person to find a suitable match for his daughter. The victim-daughter had another ideas and plans in her mind. The daughter was under the control of PW-2, grandmother.

21. On minute scrutiny and appreciation of the evidence, I am satisfied that the case of the prosecution is not above board. The material on record and particularly the acceptance of defence of the appellant is sufficient to create a doubt. The appellant is, therefore,

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entitled to get benefit of the doubt. The presumption under Section 29 of the POCSO Act cannot be invoked in this case, inasmuch as the prosecution has failed to establish the foundational facts vis-a-vis the charge framed against the appellant. I, therefore, conclude that the appeal deserves to be allowed. Hence the following order:-

- I. The criminal appeal is allowed.
- II. The judgment and order of conviction and sentence of the appellant/accused dated 23.02.2021 passed by the learned District-4 and Special Judge under POCSO Act, Amravati in Special Case No. 57 of 2019 is quashed and set aside.
- III. The appellant/accused- Surendra S/o Dayaram Bobde is acquitted of the offences punishable under Sections 376(2)(i)(f)(j)(n), 323 and 506 of Indian Penal Code.
- IV. The appellant, who is in jail, shall be released forthwith, if not required in any other case/crime.
- V. The criminal appeal stands disposed of, accordingly.

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22. Fees of learned Advocate appointed to represent the appellant be paid as per Rule.

(G.A. SANAP, J)

Gohane