



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

CRIMINAL APPEAL NO. 768 OF 2022

Sachin Ramesh Athawale

Aged about 33 years, Occu. Labour,
R/o Chikhalgaon, Tq. Patur,
District: Akola

...APPELLANT

// V E R S U S //

1. **The State of Maharashtra,**
Through Police Station Officer,
Police Station Patur, Tq. Patur,
District : Akola

2. **Name of complainant ABC,**
Police Station, Patur, Tq. Patur,
District : Akola

... RESPONDENTS

Crime No. 105/2019 for the offence
punishable under Sections.376(2) (j)(n),
452, 506 of the I.P.C. r/w Sections 3, 4, 5
6 of the POCSO Act.

Mr C.N. Wankhade, Advocate for appellant.
Mr. Ganesh Umale, APP for the respondent No.1/State.
Ms F. N. Haideri, Advocate (appointed) for respondent No.2

CORAM : G. A. SANAP, J.
DATE : 19/11/2024

ORAL JUDGMENT :

1. In this appeal, challenge is to the Judgment and
order, dated 20.08.2022, passed by the learned Extra Joint

District Judge and Additional Sessions Judge, Akola, whereby the learned Judge convicted the appellant/ accused for the offences punishable under Sections 376(2)(n), 452 and 506 of the Indian Penal Code (for short, 'the I.P.C.'). He is sentenced to suffer rigorous imprisonment for a period of 10 years and to pay a fine of Rs.5,000/-, in default to suffer further simple imprisonment for six months for the offence punishable under Section 376(2)(n) of the I.P.C., rigorous imprisonment for two years and to pay a fine of Rs.3,000/-, in default to suffer further simple imprisonment for three months for the offence punishable under Section 452 of the I.P.C., rigorous imprisonment for one year and to pay a fine of Rs.1000/-, in default of payment of fine to suffer further simple imprisonment for one month for the offence punishable under Section 506 of the I.P.C.

2. Background facts:

PW-1 is the victim and the informant. The crime was registered on her report dated 19.03.2019. The case of the

prosecution, which can be unfolded from the report and other materials, is that on 23.02.2019, the appellant pelted stones on the tin roof of the house of the victim. The parents of the victim had been to Bharuch for labour work. Her brother Jignesh was not at home. Other family members of the appellant had also gone to Gujarat for labour work. The victim after hearing the sounds of stone pelting came out of the house. The appellant threw his mobile handset at the victim and warned her to receive his calls. She did not respond. In the midnight, the victim again heard the sound of pelting of stones on the tin roof. She came out of the house to see as to who was playing mischief. She saw that the appellant was standing outside. The appellant, all of a sudden, caught hold of the victim, gagged her mouth and dragged her to his nearby house. The brother of the victim, by name Jignesh at that time, was sleeping in another room. It is stated that the accused committed forcible sexual intercourse with the victim. The appellant did not pay any heed to the resistance offered by the victim. In the said night, two times he committed sexual

intercourse with her. The victim was frightened. The appellant threatened her of dire consequences in case she disclosed the incident to anybody.

3. On the next day, i.e. 24.02.2019 her brother had gone to the house of his maternal uncle at village Babhulgaon. In the night of 24.02.2019, the victim was alone in the house. The appellant, in the night, secured the entry in the house by opening the latch. The appellant removed the clothes of the victim and committed forcible intercourse with her. On the next day, her brother came back from Babhulgaon. The victim was weeping. On inquiry by her brother, she narrated the entire incident to him. Brother Jignesh then made a call to his parents, who were at Bharuch and informed them that the victim was continuously crying and they should return back to their village, Chikhalgaon. The parents came back to their village on the next day. The victim narrated the incident of rape on her to her parents. The victim told her parents to lodge the report against the appellant. The mother was reluctant to

lodge the report. The mother told them that reporting of incident to the police would defame the victim and family. It would be difficult to find a match for the victim in future. It would be very difficult to find a match for her for the marriage. The parents therefore, took the victim with them to Bharuch. After returning back to Bharuch, the parents of the victim met the father of the appellant and brought to his notice the incident. The parents of the victim suggested the father of the appellant to perform the marriage of the appellant with the victim. The father of the appellant did not agree to this suggestion. On the contrary, he told the parents of the victim that they were free to do anything against the appellant. It is stated that thereafter the parents returned back with the victim to their village, Chikhalgaon. They went to Patur Police Station and lodged the report.

4. On the basis of the report, crime bearing No.105/2019 was registered against the appellant. Initially, the investigation was carried out by Vijay Mahale (PW-6). After

his transfer, further investigation was carried out by Ganesh Navkar (PW-8). The victim was referred for medical examination. The appellant was arrested. He was also referred for medical examination. The statement of the victim was recorded by the Judicial Magistrate First Class, Patur, under Section 164 of the Cr.P.C. The Investigating Officer collected the school record and the school leaving certificate as evidence to prove the birth date of the victim. The samples and the articles seized during the investigation had been sent for chemical analysis. After completion of the investigation, the Investigating Officer filed the charge sheet against the appellant.

5. Learned Judge framed the charge against the appellant. The appellant abjured the guilt. The defence of the appellant is of false implication on account of his refusal to marry with the victim. The prosecution, in order to bring home the guilt of the appellant, examined eight witnesses. Learned Judge on consideration of the evidence recorded a

finding that the victim was not below 18 years of age. However, the learned Judge believed the evidence of the victim as far as the incident of rape on the victim is concerned and as such, convicted and sentenced the appellant as above. The appellant, being aggrieved by this judgment and order, has come before this Court in appeal.

6. I have heard Mr. C.N. Wankhade, learned Advocate for the appellant, Mr. Ganesh Umale, learned APP for the State and Ms F.N. Haideri, learned appointed Advocate to represent the respondent No.2/victim. I have perused the record and proceedings.

7. At the outset it is necessary to note that the appellant was acquitted of the offences punishable under Sections 4 and 6 of the POCSO Act. Learned Judge held that the evidence adduced by the prosecution to prove the age of the victim girl was not reliable. The prosecution has not challenged the acquittal of the appellant for the Sections 4 and 6 of the

POCSO Act. This acquittal has therefore attend the finality. Learned Judge has held that the prosecution has miserably failed to prove that the victim was below 18 years of age and as such, a child as understood by Section 2(1)(d) of the POCSO Act.

8. Learned Advocate for the appellant submitted that the evidence of the victim and the evidence of her mother as to the occurrence of the incident has not been corroborated by other independent evidence. The medical examination report of the victim does not corroborate the case of the prosecution and ultimately the version of the victim with regard to the penetrative sexual assault with her by the appellant. Learned Advocate submitted that the appellant and the victim are residing in the same locality. It is submitted that the evidence of the victim and the evidence of her mother does not inspire confidence. There are major inconsistencies and discrepancies in their evidence. Learned Advocate further submitted that there is 24 days' delay in lodging the report. Learned Advocate

took me through the record and pointed out that delay has not at all been explained. No reason is stated in the report for delay in lodging the report. Learned Advocate submitted that therefore, the conduct of the victim and her mother in lodging the report after 24 days of the incident creates a doubt about the occurrence of the incident. It is submitted that the evidence of the victim, her mother and inordinate delay in lodging the report create a doubt about the case of the prosecution. In the submission of learned Advocate for the appellant the evidence of the medical officer and some of the admissions given by the victim and her mother in their evidence, make the defence of the appellant probable and acceptable.

9. Learned APP submitted that as far as the finding recorded by the Court with regard to the age of the victim is concerned, the same has not been challenged. Learned APP submitted that there is ample evidence on record to prove that the birth date of the victim is 15.06.2001. Learned APP submitted that the evidence of the victim is cogent, concrete

and reliable. The delay has been properly explained. There is no reason to discard and disbelieve the evidence. The mother has categorically stated that in order to save the victim from the stigmatic consequences of the offence, she prevailed upon the victim and therefore, the report was not lodged immediately. It is submitted that this conduct is consistent with the conduct of a man of ordinary prudence placed in a similar situation. Learned APP submitted that evidence of the victim has been corroborated by her mother Kaushalya Dahade (PW-3). Learned APP submitted that the well reasoned judgment and order passed by the learned Judge does not warrant interference.

10. Ms. F.N. Haideri, learned appointed Advocate to represent the victim has adopted the arguments advanced by learned APP for the State.

11. I have minutely perused the oral and documentary evidence. As far as the medical evidence is concerned, it does

not corroborate the version of the victim. It has come on record in the evidence of the victim that in the night of 23.02.2019, two times she was subjected to forcible intercourse. It has come on record, in her evidence, that in the night of 24.02.2019, she was again subjected to forcible intercourse. It is undisputed that the report of the incident was lodged on 19.03.2019, after about 24 days of the occurrence of the first incident. It was, therefore, not possible to notice fresh injuries to her genitals. However, in case of such forcible intercourse on a girl of 16 years of age, there ought to have been signs or old injuries to the private part. If she was subjected to repetitive sexual intercourse, then the doctor would have noticed old healed injuries to the hymen. The absence of old healed injuries to the genitals or hymen is the strong circumstance in favour of the appellant. This circumstance, in my view, would reflect, by and large, on the point of delay in lodging the report. The absence of injury to the hymen is the vital circumstance in favour of the appellant. It is the defence of the appellant that the parents of the victim wanted to perform the marriage of the victim with

him. It seems that the parents of the victim suspected that there was a love affair between the appellant and the victim and therefore, they gave a proposal of marriage of victim with the appellant. In my view, this defence of the appellant is required to be appreciated in juxtaposition with the evidence and undisputed facts and circumstance.

12. It is not the contention of the mother of the victim that on being apprised of the incident by the victim a thought to give a proposal of a marriage of the victim with appellant occurred to her. She did not even feel necessary to contact the father of the appellant. She has stated that immediately after the incident, when she came back to Chikhalgaon, she told the victim that lodging a report of the incident would defame the victim and the family and therefore, the report was not lodged. It is the case of the mother that when she went back to Gujarat, she met the father of the appellant and narrated the incident to him. She has stated that she told the father of the appellant that the appellant should marry with the victim. She has stated in

her evidence that the father of the appellant rejected this proposal and told them to do whatever they feel appropriate. It has come on record that thereafter the mother alongwith the victim, came back to Chikhalgaon and went to Patur Police Station and lodged the report. The mother of the victim has categorically stated in her report that she suggested to the father of the appellant to perform the marriage of the appellant and the victim. The victim has also stated in her evidence that after returning back to Bharuch, her mother met the father of the appellant and apprised him about the incident. She has also stated that her mother told the father of the appellant to perform the marriage of the appellant with the her. In my view, this is a very important fact which cannot be glossed over while appreciating the evidence of the victim and her mother. It is to be noted that in this context, the medical examination report assumes significance. The mother could have immediately reported the matter to the police and then bargained with the father of the appellant for the marriage of the victim and the appellant. If the incident, as narrated, had occurred, then the

parents would have lodged the report without wasting any time.

13. It has come on record in the evidence of the victim and mother that they had decided not to lodge the report with a view to save the victim from stigmatic consequences. It is to be noted that there was no reason for them to change this opinion, rather the decision. It is not clear that after how many days of the incident the father of the appellant was apprised about the incident. In the ordinary circumstances, the parents of the victim would have immediately contacted the father of the appellant and apprised him about the incident. It is not the case of the prosecution that 4 to 5 days prior to the lodging of the report they met the father of the appellant and apprised him. In the ordinary circumstances, when they got a negative answer from the father of the appellant they could have returned back to their village and reported the matter. In this context, this delay in lodging the report assumes significance. The Hon'ble Apex Court in the case of *State of Rajasthan Vs. Om prakash (2002) 5 SCC 745* has considered this aspect. It

would be appropriate to make useful reference to this decision. 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, 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.

14. The evidence of the victim and her mother need to be appreciated, keeping the above stated facts in mind. The

evidence of the medical officer does not corroborate the version of the victim. It was expected of the prosecution to bring on record some material in the evidence of medical officer to suggest the penetrative sexual assault. The absence of injury to the hymen, in the backdrop of repetitive sexual assault, is a very vital circumstance. In my opinion, this vital circumstance makes the defence of the appellant probable. The over all evidence of the penetrative sexual assault has been dented. The prosecution has not examined Jignesh, the brother of the victim. Jignesh was the most important witness in this case. The victim has narrated this incident to Jignesh on 25.02.2019. The defence Advocate at the time of cross-examination of the victim, had shown her photograph with the appellant to the victim. The victim had admitted the said photograph. Perusal of the photograph would show that the proximity between the victim and the appellant. This fact further creates a doubt about the occurrence of the incident. The prosecution in this case has miserably failed to prove by adducing the cogent evidence that the victim was below 18 years of age.

15. The victim has stated that on 23.02.2019, in the night the appellant pelted stones on tin roof of the house and therefore, she came out of the house. She stated that her brother was also sleeping in another room of the house. The brother could not hear the sound. Brother did not wake up. She has stated that on 23.02.2019, the accused gagged her mouth and dragged her in his house. She has stated that two times in the night of 23.02.2019, the appellant committed forcible sexual intercourse with her. This statement of the victim is not believable for more than one reason. The victim would have made hue and cry, if she was forcibly dragged by the appellant into his house. Secondly, after coming back to house after the incident, she would have reported the incident to her brother. She has stated that on the next day, her brother went to her maternal uncle at Babhulgaon. In the night, she was alone and the appellant, taking advantage of the situation, opened the latch of the door by putting his hand inside and entered into the house. She has stated that the appellant again committed sexual intercourse with her. On the next day, she did not

narrate this incident to her brother on her own. It has come on record that when her brother found her weeping, he asked her about the same and thereafter narrated the incident to him. It is to be noted that if she was threatened of the dire consequences as stated by her, then she would not at all have disclosed the incident to her brother on 25.02.2019. In my view, this conduct of the victim therefore, creates doubt about the occurrence of the incident in the manner stated by the victim. It has come on record that in the locality there are other houses, but not a single person from the neighbourhood could rescue the victim. The brother, who was sleeping inside the room in the night on 23.02.2019, had no inkling of any such incident. The victim has admitted the photograph where the appellant and the victim is shown together. In my view, therefore, this evidence of the victim creates a doubt about the occurrence of the incident. The difficulties of the prosecution have further been compounded on account of delay in lodging the report.

16. The mother was not an eye witness to the incident. She has deposed on the basis of the information she got from the victim about the incident. The conduct of the mother, as noted above, is also not consistent. The mother initially made up her mind not to report the matter to the police with a view to save her daughter from the stigmatic consequences. The mother narrated the incident to the father of the appellant and when the father declined to perform the marriage of the victim and the appellant, she changed her mind. In my view, this is a very important circumstance in this case. The report was lodged when the father of the appellant declined to perform the marriage of the appellant with victim. This fact would show that the mother of the victim was ready and willing to perform the marriage of the victim with the appellant. But the father of the appellant was not ready. If the mother wanted to save her daughter from the consequences, she would not have reported the matter to the police despite refusal of the proposal of the marriage of the appellant with the victim by the father of the appellant. In my view, these are the important doubtful

circumstances in this case. The doubtful circumstances with certainty have dented the credibility of the victim and her mother. The medical report does not corroborate her version. It is therefore, not possible to conclude that the prosecution has proved beyond reasonable doubt the charge against the appellant. Learned Judge has failed to properly appreciate the evidence and has come to a wrong conclusion.

17. In the facts and circumstances I am of the view that this appeal deserves to be allowed. Accordingly, I pass the following order:-

- (i) The Criminal Appeal is **allowed**.
- (ii) The judgment and order of conviction and sentence dated 20.08.2022 passed against the appellant by the learned Extra Joint District Judge and Additional Sessions Judge, Akola in Special Case (Child Protection) No.137/2019, is quashed and set aside.
- (iii) Appellant/accused – Sachin Ramesh Athawale is

acquitted of the offences punishable under Sections 376(2)(n), 452 and 506 of the Indian Penal Code, 1860.

(iv) The appellant/accused is in jail. He be released forthwith, if not required in any other case/crime.

18. Ms F.N. Haideri, learned Advocate appointed to represent respondent No.2, in this appeal is entitled to receive the fee. The High Court Legal Services Sub Committee, Nagpur is directed to pay the fee of the learned appointed Advocate as per rules.

19. The Criminal Appeal stands disposed of in the above terms.

(G. A. SANAP, J.)