



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

CRIMINAL APPEAL NO. 885 OF 2022

APPELLANT : Dolchand S/o. Yadavrao Chauhan,
Aged about 55 Years, Occ. Labour,
R/o. Plot No.1, Near Dudhdhari
Shitala Mata Mandir, Vijay Nagar,
Kalamana, Nagpur.

//VERSUS//

RESPONDENT : The State of Maharashtra, through
Police Station Officer, Kalamana,
Nagpur.

Mr. Madhur A. Deo, Advocate appointed to represent the
Appellant.
Mr. P.P. Pendke, APP for the Respondent/State.

CORAM : G. A. SANAP, J.
DATED : 20th DECEMBER, 2024.

JUDGMENT

. In this appeal, challenge is to the judgment and order dated 15.09.2022, passed by the learned Extra Joint Additional Sessions Judge/Special Judge, Nagpur, whereby the learned Judge convicted the appellant for the offences punishable under Sections 376(3) and 342 of the Indian Penal Code, 1860 (for short, "IPC")

and under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short, “POCSO Act”), and sentenced him to suffer rigorous imprisonment for 3 months and to pay a fine of Rs.1,000/- and in default to suffer further rigorous imprisonment for 10 days for the offence punishable under Section 342 of the IPC, and rigorous imprisonment for 20 years and to pay a fine of Rs.10,000/- and in default to suffer further rigorous imprisonment for 1 year for the offence punishable under Section 6 of the POCSO Act. No separate sentence has been awarded for the offence punishable under Section 376(3) of the IPC.

02] Background Facts:

The informant (PW-2) is the mother of the victim-girl, who on the date of the incident was about 12 years of age. The prosecution case, which can be unfolded from the report and other materials, is that the informant has one son and one daughter (victim). The informant and her husband, on the date of the incident, had gone to attend the work in the field at about 9:00 a.m. The victim and her son were at the house. Around 5:00 p.m., she received a phone call of one Kalu Bhaiyya, who is the resident of the same locality. The said Kalu Bhaiyya informed her that the

victim had gone to the railway track to commit suicide. The informant and her husband immediately came back to the house. She made enquiry with the victim. She came to know through the victim that at about 2:00 p.m., the victim was playing with her friend (PW-3). The appellant, who is their neighbour, called them into his hut, having roof of tin sheet, on the pretext of playing the 'Judwa' game. The appellant then closed the door of the hut. He blindfolded them. He tied their hands. He made them lie on the ground. Thereafter, the appellant removed her cloths. She sensed that the appellant removed her knickers. He slept on her body. He inserted his penis in her vagina. She felt severe pain. She raised shouts. After some time, someone knocked on the door of the hut. One Rajendra Bhagat broke open the door and came inside. Rajendra saw that the appellant was sleeping on her person. The appellant was taken aback after seeing Rajendra and other people. Rajendra took the victim and her friend out. It is stated that the victim, after this incident, was frightened, and therefore she decided to commit suicide and then went towards the railway track. The people of the locality brought her back. The informant, along with the victim, went to Kalamana Police Station and lodged the report.

03] On the basis of this report, a crime bearing No.329/2021 was registered against the appellant. PW-9 carried out the investigation. After medical examination of the victim, the FIR was registered. PW-9 drew the spot panchanama. PW-9 arrested the appellant. The appellant was referred for medical examination. The statements of the victim and her friend were recorded by the learned Magistrate under Section 164 of the Code of Criminal Procedure, 1973 (for short, "Cr.PC"). The biological samples had been sent to R.F.S.L., Nagpur. On completion of the investigation, the Investigating Officer filed the charge-sheet against the appellant.

04] The learned Judge framed the charge against the appellant. The appellant pleaded not guilty. His defence is of false implication on account of a dispute between him and his neighbours. The neighbours of the appellant had a grievance about unauthorized construction of the hut on the Government land. The prosecution, in order to bring home the guilt of the appellant, examined 9 witnesses. The learned Judge, on consideration of the evidence, held the appellant guilty of the charge and sentenced him as above. The appellant has come before this Court in appeal against the said judgment and order.

05] I have heard Mr. Madhur A. Deo, learned advocate appointed to represent the appellant and Mr. P.P. Pendke, learned APP for the respondent/State. Perused the record and proceedings.

06] Learned advocate for the appellant submitted that the prosecution has miserably failed to prove the principal charge of rape against the appellant. The evidence is not cogent and concrete. There are material omissions and improvements in the evidence of the witnesses. It is submitted that the material inconsistencies and discrepancies suggest that the appellant was falsely implicated by the neighbours of the appellant. The evidence of the victim-girl is not sufficient to prove the offence of sexual intercourse with her by the appellant. The incident narrated by the victim-girl and her friend (PW-3) is not at all probable. It is submitted that even if the account of the incident narrated by the victim-girl is considered at its face value, it would show that it is unbelievable, inasmuch as the appellant could not have committed the sexual intercourse with the victim-girl in the presence of her friend (PW-3). PW-3 has nowhere stated that the appellant committed any wrong act with the victim-girl. Learned advocate submitted that the evidence of PW-6 Rajendra Bhagat does not corroborate the evidence of the victim-girl and PW-3 on material

aspects. PW-6 is totally silent about witnessing any act of rape by the appellant with the victim-girl. Similarly, the evidence of PW-7 Ujwala Gedam is also not reliable. There are contradictions on the material aspect in the evidence of PW-6 and PW-7.

07] Learned advocate submitted that the evidence of the Medical Officer with regard to the penetrative sexual assault on the victim-girl cannot be believed. The evidence of the Medical Officer does not corroborate the evidence of the victim that she was subjected to penetrative sexual assault. It is submitted that there are inherent improbabilities in the case of prosecution and in the evidence of the material witnesses, and therefore the said evidence is not sufficient to prove the charge against the appellant beyond reasonable doubt. Learned advocate submitted that, except hymen tear, there was no injury to either labia majora or labia minora. The absence of injury to labia majora and labia minora indicates that there was no penetration. Learned advocate submitted that the learned Judge has failed to properly appreciate the above-stated facts and has come to a wrong conclusion.

08] Learned APP submitted that the defence of the appellant was rightly rejected by the learned Judge. It is not the defence of

the appellant that the mother of the victim had enmity or any quarrel with the appellant. The informant would not have involved her daughter in such a deplorable incident to take revenge against the appellant on behalf of the people of the locality. Learned APP submitted that the evidence of the victim-girl is consistent with her conduct. After coming out of the hut, she went towards the railway track to commit suicide due to stress and frustration over the incident. Her parents were not at home. She tried to end her life before arrival of her parents. Learned APP submitted that the evidence of the victim-girl has been corroborated on material aspects by PW-3, her friend, PW-6 Rajendra, and PW-7 Ujwala. Learned APP submitted that the evidence of the Medical Officer is the most important corroborative piece of evidence. The Medical Officer, at the time of the examination of the victim-girl, found that her hymen was torn. There were tears to the hymen. The injuries were fresh. It is submitted that the mother of the victim promptly reported the matter to the police. It is submitted that the mother of the victim-girl would not have involved her girl even for taking revenge against the appellant for public cause in such an offence, which invites serious stigmatic consequences. It is submitted that the prosecution, by leading cogent evidence, has proved that the victim-girl was below 13 years of age. Learned APP

submitted that the well-reasoned judgment and order passed by the learned Judge does not warrant interference.

09] I have minutely perused the oral and documentary evidence. The evidence of the victim-girl and the evidence of her friend (PW-3) is very vital and important. Similarly, the evidence of PW-6 and PW-7, who were the eyewitnesses to the part of the incident, is also very important. The victim-girl, in her evidence, has stated that her birth date is 27th October, 2008. PW-2 informant is the mother of the victim. She has also stated that the birth date of the victim is 27th October, 2008. Undisputedly, on the date of the incident, the victim-girl was studying in 7th standard. The Investigating Officer, during the course of the investigation, collected the school admission record of the victim. The prosecution, at the stage of the evidence, summoned PW-5 to prove the contents of the documents. PW-5 is the Headmaster of the Bramhanand Vidyalala, Kalamana Market, Nagpur. As per the summons of the Court, he produced the original admission form, the admission entry register, and the copy of the school leaving certificate. He has stated that the victim was admitted in 1st Standard on 25th June, 2014. He has categorically stated that along with the application for admission, the birth certificate of the

victim was submitted. The copy of the admission application form is at Exh.35. The relevant entry related to the victim from the admission register at Sr. No.4007 is at Exh.36. The copy of the school leaving certificate is at Exh.37. PW-5 has categorically stated that, as per the school record, her birth date is 27th October, 2008.

10] Perusal of the cross-examination of PW-5 would show that the admission and the date of the admission of the victim in the school has not been challenged. This witness has stated that he could not tell whether the photocopy of the birth certificate submitted in 2014 was correct or not. He has stated that the entry in admission register is taken on the basis of the document submitted at the time of admission. This witness had produced the original register, which is the primary evidence. The record shows that the learned Judge verified the original record. Learned Judge did not take the admission register on record and marked the original entry from the register. However, the production of the original record before Court is not in dispute. In view of this, the mistake committed by the learned Judge could be said to be a procedural error. It would have become a procedural illegality, if the original record had not been produced at all. The prosecution, on the basis of the evidence of the victim-girl, the evidence of her

mother and the evidence of PW-5, has proved that the victim was below 13 years of age. The evidence of the mother of the victim and the evidence of the victim with regard to her birth date has not been challenged at all. The evidence is sufficient to prove that the victim was below 13 years of age and as such a child as defined under Section 2(1)(d) of the POCSO Act.

11] In the backdrop of the above, it would be necessary to consider the evidence of the victim-girl and other witnesses. At the outset, it is necessary to mention that the appellant, on the date of the incident, was 55 years of age. He is the neighbour of the victim-girl. The victim-girl and PW-3, the friend of the victim, used to play outside her house. They had acquaintance with the appellant. The victim-girl and PW-3 had no dispute or quarrel with the appellant. Similarly, the existence of the tin sheet roof hut on the backside of the house of the appellant is also not in dispute. It is the case of prosecution that this offence was committed in that tin sheet roof hut by the appellant. The two girls had been taken inside the hut by the appellant on the pretext of playing the 'Judwa' game with them. The Judwa game requires a pair of two persons. The victim has stated that the appellant called them in the hut to play the 'Judwa' game. He tied the handkerchiefs on their

eyes. He also tied their hands and made them sleep. It shows that the appellant initially blindfolded them and then tied their hands. The victim-girl and her friend (PW-3) were of tender age of 12-13 years. They believed the appellant. The victim has stated that, after sleeping on the ground, she felt that the appellant removed his cloths. She has stated that the appellant removed her cloths and slept on her person. She has stated that the appellant inserted his penis in her vagina. She has stated that thereafter one Mamaji came there and knocked on the door (said Mamaji is PW-6 Rajendra Bhagat). She has stated that thereafter the hands of PW-3 were untied. PW-3 untied her hands. She has stated that thereafter they started crying and went out. The public gathered on the spot. She narrated the incident to her father. She has stated that, after this incident, she was frightened and went to railway track to commit suicide. She was brought back from the railway track. She has stated that, after this incident, her parents came back to the house. She narrated the incident to them. Thereafter, they went to Kalamana Police Station and lodged the report. She was referred for medical examination to Mayo Hospital, Nagpur. The victim was subjected to searching cross-examination.

12] Perusal of her cross-examination would show that the

efforts of the cross-examiner have not fructified in any manner. Perusal of the cross-examination would show that the victim has reiterated major part of the incident in her cross-examination. She has stated that they were plucking tomatoes near the hut of the appellant. She has stated that the godown can be approached from the side lane of the house of PW-3. The children used to play in the godown. She knows the articles, namely the cycle and oil tins, are kept in the godown. They used to take the key of the godown. She has stated that there is a dispute between the appellant and the neighbours with regard to the said godown/hut. It was suggested to her that she and PW-3 entered the godown in order to commit theft. It was suggested to them that the appellant had driven them out of the hut. It was suggested that while the appellant was holding them, the Mamaji came there. The question put by the cross-examiner admits the presence of the appellant, the presence of the victim-girl, the presence of PW-3, and the presence of Mamaji at the spot. The statement of the victim-girl was recorded under Section 164 of the Cr.PC. On perusal of the 164 statement of the victim, it is apparent that only one improvement has been established. The improvement is with regard to tying their mouth with the handkerchief by the appellant. In my opinion, this discrepancy, if considered in the totality of the evidence, will not

believe the incident narrated by the victim-girl. The victim-girl had no reason to falsely implicate the appellant. The possibility of tutoring the victim-girl has been completely ruled out. It is not possible to believe that the mother of the victim-girl, in the absence of the occurrence of such a serious incident, would have subjected her 13-year-old daughter to undergo such an ordeal. It is highly improbable that the mother, for the sake of redressal of collective grievance of the people of the locality on account of the unauthorized construction of the hut, would have involved her daughter in such a humiliating incident. In my opinion, this fact would be another circumstance to fortify the occurrence of the incident. The victim-girl has consistently narrated the incident and the involvement of the appellant. The victim-girl would have been caught unaware, if she had been tutored to place before Court a concocted and imaginary version of the incident. On perusal of the evidence of the victim-girl, I do not see any reason to discard and disbelieve her evidence. The evidence of the victim-girl would show that the appellant, under the pretext of playing 'Judwa' game with the victim and PW-3, committed sexual assault on the victim-girl.

13] PW-3 is the friend of the victim-girl. PW-3 has not

narrated the incident of sexual assault on the victim in detail. In my view, it was also not expected of PW-3 to narrate the account of the said incident. PW-3 was not subjected to sexual assault. She was blindfolded on the pretext of playing the 'Judwa' game. She has stated that they were called in a tin sheet roof hut by the appellant. The appellant tied their hands and legs. He blindfolded them. She has stated that she got her hands untied. She removed the cloth from her eyes, and thereafter they both went out of the hut. She has stated that her statement was recorded before the learned Magistrate. In her cross-examination, her presence in the tin sheet roof hut with the victim-girl has been admitted. She has stated that they used to play and go to the tin sheet roof hut. She has shown ignorance about the quarrel between the neighbours and the appellant on account of the construction of an unauthorized hut. She has denied the suggestion that her parents had quarrel with the appellant on that count. She has denied other suggestions consistent with the defence of the appellant. Her 164 Cr.PC statement is at Exh.26. It corroborates her substantive evidence on the material aspects.

14] PW-6 and PW-7 are another important witnesses, examined by the prosecution to prove the part of the incident. It is

evident that PW-6, who was instrumental in rescuing the girls from the clutches of the appellant, was also made a panch witness by the Investigating Officer. It was the mistake of the Investigating Officer. PW-6 could not be held in any manner responsible for such a mistake committed by the Investigating Officer. His evidence, relevant to prove the incident, needs minute scrutiny. It is the case of the prosecution that PW-6 heard some sound from the hut and therefore he peeped through the window and saw the appellant indulging in a dirty act with the girl. He has stated that the appellant did filthy act with the victim-girl. He went to urinate by the side of the hut. He heard the sound of girls. He has stated that the women from the locality were sitting on the platform of the house. He called them. They opened the door of the hut and rescued the girls. The appellant was there. He has stated that thereafter they called the family members of the girls. In his cross-examination, he was asked about the reason as to why he had gone to the spot. He has stated that he had gone there to urinate and while urinating, he suspected that someone was in the hut. He has stated that when he peeped inside the hut, he noticed that the appellant was doing wrong act with the girls. It was suggested to him that on account of his cordial relations with the mother of the victim, he has deposed falsely. PW-6 is 45 years old. He had no

reason to falsely implicate the appellant. It was not suggested to him that he had personal grudge against the appellant on account of construction of the hut. It was suggested to him that on account of the construction of the hut, the appellant had quarrel with the neighbours. He has denied this suggestion. He has further reiterated in his cross-examination that the men and women were present while breaking open the door of the hut. He has stated that, in the evening, the parents of the girls came and took search of the appellant and beat him.

15] PW-7 Ujwala Gedam is a neighbour of the victim. She has stated that, on the date of the incident, she was sitting along with Champabai and Mayabai in front of the house of Rajendra Bhagat (PW-6). She has stated that Rajendra had gone to urinate. He heard the sound from the hut. She has stated that he peeped inside the hut and saw the filthy act by the appellant. She has stated that he came back and informed them. They went there and broke open the door of the hut. She has stated that thereafter the appellant went away to his house and the victim-girl also went away from the spot. In her cross-examination, she has stated that when the door of the hut was broken open, Rajendra Bhagat was not with them. He was standing outside. She has stated that the

door of the hut was broken open by women and men together. She has stated that the incident narrated by Rajendra Bhagat was found truthful and therefore they broke open the door of the hut. In her cross-examination, her presence on the spot has not been denied. Similarly, the presence of Rajendra Bhagat on the spot has not been challenged. PW-6 and PW-7 have not in any manner exaggerated the incident. They had no reason to depose falsely against the appellant. PW-6 and PW-7 are the neighbours of the appellant. Perusal of the evidence of PW-6 and PW-7, who are the independent witnesses residing nearby the spot, would show that they had no reason to falsely implicate the appellant. They have not exaggerated the incident. They have narrated the facts which they saw on the spot. The presence of the girls on the spot noticed by them has also not been challenged.

16] PW-2 is the mother of the victim-girl. She was not an eyewitness to the incident. The incident was narrated to her by the victim-girl. She has reiterated the incident narrated by the victim-girl while lodging the report as well as before the Court. She has stated that the victim-girl, under the stress of the incident, went to railway track to commit suicide, but she was fortunately brought back by the villagers. The conduct of PW-2, the mother of the

victim, is very important. The incident occurred in the afternoon. She came back to her house at 5:30 p.m. She went along with the victim to the police station without wasting any time. It was suggested to her that on account of the enmity of the appellant with the neighbours, a false report was lodged against the appellant. She has denied this suggestion. In my view, this defence is not at all probable. It was not a case of an attempt to commit rape or sexual assault. It was a case of penetrative sexual assault on the victim-girl, who was below 13 years of age on the date of the incident. The informant has one son and one daughter. The informant would not have involved her daughter on such a trifle reason in such a serious incident. It is common knowledge that the parents or the family members are reluctant to report such a matter to the police to save the reputation of the family and the girl. Reporting of such a matter to the police with certainty invites stigmatic consequences for the girl as well as for the family. Reporting of such a matter to the police with certainty can prejudice the future of the girl. It is, therefore, highly improbable that the parents would involve their daughter of 13 years of age in such an incident to wreak vengeance against the appellant to satisfy collective grievance of the neighbours. The conduct of the informant is, therefore, consistent. There was no delay in lodging

the report. The evidence of the informant and her conduct is consistent. Similarly, the evidence of the victim-girl on the material part has been corroborated by the evidence of PW-3, PW-6 and PW-7. PW-6 and PW-7 have corroborated the part of the incident. It is to be noted that the girls had acquaintance with the appellant. They trusted the appellant when he told them to accompany him in the hut for playing the 'Judwa' game. The appellant blindfolded them. He tied their hands and thereafter did this deplorable act with the victim-girl. I do not see any reason to discard and disbelieve the evidence of the victim-girl and other corroborative evidence. The evidence of the victim-girl is credible and trustworthy. Similarly, the evidence of other witnesses, who have corroborated the evidence of the victim-girl, is also credible and trustworthy.

17] The next important witness is the Medical Officer (PW-4). In my view, the evidence of the Medical Officer is the most vital and important piece of evidence in this case. It has come on record that before registration of the FIR, the Investigating Officer referred the victim-girl for medical examination to IGM, Nagpur. PW-4 Dr. Ankita Paunikar examined the victim. The history of the assault was narrated by the mother of the victim. The

history of assault has been recorded in the medical examination report, which is at Exh.29. It is consistent with the version of the victim-girl. PW-4 has stated that the victim did not attain menstruation. She has stated that in local examination, she found that her hymen was torn. There were tears as well. She has stated that, therefore, she gave the opinion that there was sexual violence with the victim-girl. Exh.29 is the medical certificate. She was cross-examined. She has admitted that the vaginal tears are possible by insertion of any object. It was suggested to her that there was no sexual assault on the victim. She denied this suggestion. It is to be noted that the Medical Officer is an independent witness. She had no grudge against the appellant. Similarly, she had no reason to favour the informant and the victim-girl. The medical evidence has not been challenged. The hymen is the inner part of the vagina. It is submitted that there was no injury to labia majora and labia minora, and therefore the case of penetration or partial penetration cannot be accepted.

18] It is to be noted that the doctor was not questioned on this aspect. There was injury to the hymen. The doctor has recorded that it was a fresh injury. In my opinion, the evidence of the Medical Officer cannot be discarded. It is the most important

corroborative piece of evidence. The evidence of the Medical Officer is sufficient to lend an assurance to the credibility and trustworthiness of the victim. The mother could not be held responsible for this injury to the hymen of the victim. The mother, in the ordinary circumstances, would not have gone to this extent and involved her daughter in such an incident to satisfy the collective grievance of the neighbours on account of the illegal construction of the hut by the appellant. It is not the case of the appellant that the hut constructed by him was in front of the house of the informant. The evidence shows that in front of the house of the informant, there is a house of the appellant. The hut constructed by the appellant was not directly obstructing the access or way of the informant. It has come on record that this hut was constructed on the backside of the house of the appellant. Therefore, I do not see any substance in the defence of the appellant. I do not see any reason to discard and disbelieve the evidence of the victim-girl and other witnesses. The evidence is sufficient to prove the complicity of the appellant in this crime. The crime committed by him is a serious crime. In this case, the prosecution has proved the foundational facts vis-a-vis the charge. Therefore, in this case, the presumption under Section 29 of the POCSO Act would trigger against the appellant. The learned Judge

has rightly invoked the said presumption against the appellant. The appellant has not adduced any evidence to rebut this presumption. The crime committed by the appellant is deplorable. The learned Judge was right in awarding a minimum sentence of 20 years for the proved offence under Section 376(3) of the IPC.

19] In view of this, I do not see any substance in this appeal. The appeal is devoid of any substance and merits. It is accordingly **dismissed**.

20] Before parting with the matter, it is necessary to acknowledge the able assistance rendered by learned advocate Mr. Madhur A. Deo. This Court appreciates the assistance rendered by him for disposal of the case.

21] The High Court Legal Services Sub-Committee, Nagpur, shall pay the fees to the learned advocate appointed to represent the appellant, as per Rules.

(G. A. SANAP, J.)

Vijay