



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD.

CRIMINAL APPEAL NO. 149 OF 2021

Afsar Latif Sayyed,

Age : 24 years, Occu : Labor,

R/o. House No. 52/53, Bharad Galli,

Near Mirawali Baba Dargah, Topkhana,

Ahmednagar, Tq. & Dist. Ahmednagar.

...Appellant

Versus

1. The State of Maharashtra,
Through Topkhana Police Station,
Dist. Ahmednagar.

2. XYZ

...Respondents

.....
Mr. G. R. Syed – Advocate for the Appellant

Mrs. M. L. Sangit – APP for State

Mr. S. S. Munot a/w Mr. K. S. Ostwal h/f Mr. A. D. Ostwal – Advocate for
Respondent No. 2

.....

WITH
CRIMINAL APPLICATION NO. 2879 OF 2025

.....

CORAM : NEERAJ P DHOTE, J.

RESERVED ON : 11TH NOVEMBER, 2025

PRONOUNCED ON : 24TH NOVEMBER, 2025

JUDGMENT : -

1. This is an Appeal under Section 374(2) of the Code of Criminal Procedure [hereinafter referred to as 'Cr.P.C.'] against the Judgment and Order dated 05.12.2020 passed by learned Special Judge, Under Protection of Children from Sexual Offences Act, Ahmednagar, in

Special Case No. 397 of 2018, convicting the Appellant for the offences punishable under Sections 376-AB, 354-B, 323 of the Indian Penal Code [for short 'IPC'] and Section 5(m) punishable under Section 6, 8 and 10 of the Protection of Children from Sexual Offences Act, [for the sake of brevity 'POCSO'] and sentenced to suffer rigorous imprisonment for 20 (twenty) years and to pay a fine of Rs. 50,000/-, in default, to undergo Rigorous Imprisonment for one year for offence punishable under Section 376-AB of IPC, and no separate sentence is awarded for the other offences under which Conviction is recorded.

2. The Prosecution's case as revealed from the Police Report is as under : -

2.1. Victim, aged 10 years, was residing with her parents and siblings in Tophkhana area in Bharad Galli, Ahmednagar. Three to four (3-4) days prior to 15.09.2018, when the Victim was playing, the Appellant came near her, lifted the Victim and took her on the terrace of one house, removed her clothes, slapped her on the cheeks and thigh and outraged her modesty. The Victim raised alarm due to which the Appellant's Mother came on the spot and she threatened the Victim not to disclose the incident to anybody and sent the Victim to her house. On the next day, in the night around 08:00 pm, when the Victim was riding bicycle in Bharad Galli, the Appellant came, lifted her and took her on the terrace of the same house, beat her and raped her. As the Victim

experienced stomach ache, she started crying. The Victim's Mother called her sister. They inquired with the Victim and the Victim disclosed the incident to them. They went to the Police Station and lodged the report against the Appellant and his Mother and Crime bearing No. I-456/2018 for offence under Sections 376AB, 354, 323, 506 r/w. 34 of the IPC and Sec.5(m), 6 & 17 of the POCSO Act came to be registered.

3. The Investigating Officer sent the Victim for the medical examination, conducted the spot *panchanama*, recorded the statement of witnesses, arrested the accused persons, seized the clothes of the Appellant and the Victim, collected the necessary documents and on completion of investigation, filed Charge-sheet against both the persons. On committal, the learned Trial Court framed the Charge against the Appellant for the offence punishable under Sections 4, 6, 8 and 10 of the POCSO Act and 354(B), 376(2)(i), 376(A), 323, against the Mother of the Appellant for the offence punishable under Sections 17 and 21 of the POCSO Act, and against the Appellant and his Mother for the offence punishable under Section 506 r/w 34 of the IPC. The Appellant and his Mother did not plead guilty and claimed to be tried. To establish the Charge, the Prosecution examined the following witnesses: -

[i] Victim's Mother as PW1.

[ii] Victim as PW2.

[iii] The Medical Officer, who examined the Victim, as PW3.

- [iv] The Panch for the spot as PW4.
- [v] The first Investigating Officer as PW5.
- [vi] The second Investigating Officer as PW6.

3.1. In the evidence of the above referred witnesses, several documents are brought on record by the Prosecution. After the Prosecution filed the 'Evidence Closure *Pursis*', the statement of the Appellant and his Mother came to be recorded under Section 313(1)(b) of the Cr.P.C. Thereafter, the impugned Judgment and Order came to be passed.

4. Though the Mother of the Appellant who was Accused No. 2, was also convicted, it is reported that she died and, therefore, no Appeal was preferred by her.

5. Heard both the sides. Scrutinised the evidence on record.

6. As the Conviction is for the offence punishable under POCSO Act, it is necessary for the Prosecution to establish that the Victim was a Child as defined under Section 2(d) of the POCSO Act, which reads as: 2(d) "*child*" means any person below the age of eighteen years.

7. Undisputedly, the Prosecution did not examine the authorities of the School where the Victim was studying. However, the birth certificate issued by Ahmednagar Municipal Corporation and the *Bonafide* Certificate issued by Kai. Vishwas Laxman Kulkarni Primary School, which are at Exh. 47 and 48, respectively, are admitted by the defence as seen from the endorsement on both the documents. Both the documents / certificates record the date of birth of the Victim as 06.06.2008. Further, the Prosecution relied on the testimony of PW1 who is the Mother of the Victim. PW1 in her evidence deposed the date of birth of the Victim as 06.06.2008. In the cross-examination, nowhere the date of birth is challenged. There is no dispute that PW1 was the biological Mother of the Victim. The date of birth deposed by PW1 and the date of birth recorded in Exh. 47 and 48 is identical/same. The date of incident as per the evidence of PW1 was three (3) days prior to 15.09.2018. The evidence on record show that the report was lodged on 15.09.2018. It is thus clearly established that, at the time of incident, the Victim was ten (10) years and little over three (3) months old. The evidence on record established that the Victim was a Child.

8. It is submitted by the learned Advocate for the Appellant that, though the Victim's Mother was not an eye-witness to the incident, the spot of incident was shown by her and not by the Victim. The spot of incident is shown to be the terrace without parapet wall. The spot of

incident was located in a crowded area and it is highly improbable that such an incident would be committed at such a place. The statement of the Victim's friends were not recorded. In the entire evidence led by the Prosecution, the exact time of the incident has not come on record. There was delay of five (5) days in lodging the report with the Police. No injuries were found on the Victim in the medical examination. The report of the Chemical Analyser do not support the case of the Prosecution. The clothes were seized after eight (8) days. The learned Trial Court failed to appreciate the evidence in proper manner, and has wrongly convicted the Appellant. The evidence on record do not inspire the confidence and the Appeal be allowed by setting aside the impugned Judgment and Order. In support of his submissions, he relied on the following judgments:

- [i] State of Karnataka Versus Basavaraj, Criminal Appeal No. 100426 of 2019 (A), decided by Karnataka High Court, on 26.05.2023.*
- [ii] Upendra Singh and others Versus The State of Bihar and others, Criminal Appeal (DB) No. 708 of 2022, decided by Patna High Court, on 21.04.2025.*

9. It is submitted by the learned APP that, the medical evidence brought on record corroborate the testimony of the Victim. The suggestions given by the defence are denied by the Prosecution witnesses. The FIR is not an encyclopedia and the Prosecution led sufficient evidence on record to prove the Charge and the learned Trial Court has rightly convicted and sentenced the Appellant. The Appeal be

dismissed. In support of her evidence, she relied on the following judgments:

[i] Wahid Khan versus State of Madhya Pradesh, 2009 7 Supreme 584

[ii] Mangesh s/o Damodhar Chandankhede Versus The State of Maharashtra, 2017 0 Supreme(Bom) 1940

10. It is submitted by the learned Advocate for Respondent No.2 / Victim that, he adopts the submissions made by the learned APP. The Medical Officer had recorded the history given by the Victim, which was consistent with her testimony. Though the spot was not shown by the Victim, the Victim deposed about the spot of incident. The Appellant could not prove their defence. No interference is called for in the impugned Judgment and Order and the Appeal be dismissed.

11. In the judgments cited by the learned Advocate for the Appellant, the testimony of the witnesses was found to be inconsistent, the medical evidence did not corroborate the Victim's evidence and the Prosecution's case was not found to be credible. The findings and the observations in both the said cases were recorded on the basis of the evidence available in those cases. In the judgments relied upon by the learned APP, the settled principle that, FIR is not an encyclopaedia, and absence of injury or mark of violence on the private part on the person of prosecutrix is of no consequence when the evidence of the Prosecutrix is found to be reliable, are reiterated.

12. The evidence of the Victim PW2 show that, she was a school-going girl, she used to play bicycle in front of her house in Bharad Galli and she knew the Appellant. The Appellant took her to the terrace of the house adjoining to his house where he disrobed her, beat her on the hands, legs and cheeks and when she shouted, he gagged her mouth and again assaulted on her hands, thighs and cheeks. At that point of time, the Appellant's mother came and asked the Victim to go home and told her not to disclose the incident to anybody and she took the Appellant with her. As the Victim was frightened, she did not disclose the incident to anybody. In the evening of the next day, while she was playing bicycle near her house, the Appellant again came and forcefully took her to the terrace of the house adjoining to his house, made her lie down, removed her clothes, removed his clothes and entered his penis in her vagina. The Appellant beat her on hands, legs, and cheeks and threatened her not to disclose the incident to anybody otherwise he will kill her. Thereafter, the Victim went to her house. As the Appellant gave threat, she did not disclose the incident to anybody. After three to four (3-4) days, when the Victim experienced pain in her abdomen, she informed her mother about the pain. Her mother called her sister i.e. maternal aunt of the Victim. The Victim disclosed the incident to her maternal aunt and thereafter the Victim, her mother and her maternal aunt went to the Police Station. The Police referred the

Victim for medical examination to the Civil Hospital at Ahmednagar. She was given medical treatment for which she was hospitalised for three (3) days. Thereafter, she was admitted in the private hospital.

13. The evidence of PW1, who is the Mother of the Victim, show that, three (3) days prior to 15.09.2018, the Victim complained of stomach ache. When she asked the Victim to go to the Hospital, the Victim cried. She phoned her sister i.e. Sunita, maternal aunt of the Victim, and called her at her home. Her sister Sunita enquired with the Victim and the Victim narrated the incident to her. Sunita then narrated the incident to PW1. Victim's Mother disclosed the same to her husband. On 15.09.2018, she with her sister and Victim went to the Police Station and she lodged the Report against the Appellant below Exh. 26.

14. The evidence of Victim show that, prior to the incident of rape, she was taken by the Appellant on the terrace of the house where she was beaten. However, Victim's evidence show that, she did not disclose both the incidents for 3 to 4 days and only after experiencing stomach-ache, she disclosed the incidents to her maternal aunt. It is clear from the above evidence of the Victim and her Mother that, the Mother took the Victim to the Police Station and they were accompanied by Victim's Maternal Aunt Sunita and the Victim's Mother lodged the Report. However, from the cross-examination of the Victim it is clear

that, the Police did not enquire with the Victim on the day when the Report was lodged by her Mother. Suggestion is given that, Victim was tutored by her parents and her statement was not recorded as per her narration. It is clear that there was delay in making inquiry with the Victim and delay in recording her statement. It is needless to state that the Child is susceptible to tutoring. Therefore, the evidence of the Child witness is to be evaluated with great care and caution. Undisputedly, the Victim's maternal aunt, i.e. sister of the Informant, is not examined by the Prosecution. Under such circumstances, corroboration to the Victim's testimony is required.

15. Prosecution has brought on record the medical evidence. The medical evidence in the nature of testimony of PW3 Medical Officer show that, he examined the Victim on 15.09.2018 after recording her history. Though the Victim disclosed about blunt trauma on face and thigh, the Medical Officer did not notice any apparent external injuries anywhere on the body. However, the Medical Certificate at Exh. 39, which is brought on record in the evidence of the Medical Officer show the injuries on the Victim in the nature of *"blunt trauma to face on right side – hard and blunt object – simple, and blunt trauma to left thigh – knee – hard and blunt object – simple"*. The further evidence of Medical Officer show that, on genital examination, he found *diffuse redness on both the sides of hymen laterally. The hymen was found intact.* He

found *tenderness present on separation of Labia majora / folds*. The Medical Officer deposed that, as per medical opinion, *there was recent forceful penetration of vagina on the Victim*. The cross-examination of Medical Officer got the recent forceful penetration explained, wherein it has come that forceful penetration means between three to five [3-5] days prior to examination. Suggestions that, as the hymen was intact, there was no forceful penetration and after every penetration the hymen would not remain intact, are denied by the Medical Officer. Nothing has come in the cross-examination to show that, the diffuse redness on both the sides of hymen laterally and tenderness on separation of labia majora / folds can be caused due to any other reason. The evidence of Medical Officer is corroborated by the medical papers. Nothing has come on record to discard the medical evidence.

16. The Victim's testimony about the sexual acts on her by the Appellant get corroboration from the medical evidence. The redness and tenderness to the hymen and labia majora / folds respectively, lend complete corroboration to the Victim's evidence in respect of insertion in the vagina. The Victim has in clear words deposed the sexual act by the Appellant on her in the nature of penetration of penis in her vagina. The penetration to any extent in the vagina attracts the offence of rape as defined under Section 375 of the IPC. There is note in the evidence of the Victim after paragraph no. 9 which reads as – "*Victim started*

weeping and said that she has fear of accused Afsar. Therefore, further cross-examination is deferred till next date.” This reaction or demeanor of the Victim is significant. It indicates the trauma felt or caused to the Victim. Undisputedly, the Appellant was known to her. The Victim getting fearful of Appellant and weeping is a pointer in itself. Had it been a concocted story, as is the defence of the Appellant, such a reaction or trauma felt behaviour would not have been there. Nothing is there to show that her testimony was inconsistent on the material aspect to her statement given to the Police.

17. There is medical examination Certificate of the Appellant at Exh. 44. The endorsement on the same show that it was admitted by the Appellant. This Certificate records the finding that, the Appellant was medically examined on 18.09.2018 and he was found to be able to perform sex, the external genitals and secondary sexual characters were well developed. It further speak of some injuries on the Appellant.

18. I do not feel it necessary to discuss the evidence of the Spot Panch and the Investigating Officer, who deposed about performing the spot *panchanama* of the terrace and the investigation done, respectively. The above discussed evidence on record proved the Crime against the Appellant. Though the evidence on record show that the place of incident was the residential area and there was no parapet wall on the terrace, the evidence of Victim show that, the incident happened in the

evening and terrace of a house is such a place which is a lonely place or the place where the possibility of the presence of third person is negligible. The essential ingredients of the Sections under which the Conviction is recorded are present in the above discussed Prosecution's evidence. Section 29 of the POCSO Act provides the presumption as to certain offences under Sections 3, 5, 7 and 9 of the Act. The Appellant, except the suggestion that he was falsely implicated due to the property dispute with the parents of the Victim, brought nothing on record to rebut the presumption. The Appellant failed to rebut the presumption which operates against him in the light of the above discussed evidence on record. On re-appreciation of the above referred evidence, the Conviction recorded by the learned Trial Court needs no interference. As regards the substantive sentence of imprisonment imposed by the learned Trial Court is concerned, it is in consonance with law. However, the punishment of a fine of Rs. 50,000/-, and default Rigorous Imprisonment for one (1) year, appears to be too harsh, considering the status of the Appellant. The evidence on record show that, the Appellant cannot be called a financially well-off person. Therefore, the fine amount is reduced to Rs. 1,000/- [Rupees One Thousand], and default sentence to 7 (seven days). In view of the above, the following order is passed:

ORDER

[i] The Appeal is partly allowed.

- [ii] The Conviction and the Substantive Sentence of Imprisonment recorded by the learned Trial Court by the impugned Judgment and Order against the Appellant, is maintained.
- [iii] The sentence in the nature of fine is modified to Rs. 1,000/- [Rupees One Thousand], in default, to undergo Rigorous Imprisonment for 7 (seven days).
- [iv] Rest of the operative order is maintained.
- [v] The muddemal be dealt with as per the operative order of the impugned Judgment and Order.
- [vi] The copy of the Judgment be provided to the Appellant free of cost.
- [vii] R&P be sent back to the learned Trial Court.
- [viii] Criminal Application No. 2879 of 2025 stands disposed off.

[NEERAJ P. DHOTE]
JUDGE

SG Punde