



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.999 OF 2023

Siddharth Ashok Tupe,
Age : 28 years, Occu. : Agri.,
R/o. Malunja, Tq. Gangapur,
Dist. Aurangabad.

... Appellant

Versus

1. The State of Maharashtra
2. X.Y.Z.

... Respondents.

.....
Mr. Satej S. Jadhav, Advocate for Appellant.
Mr. S. B. Narwade, APP for Respondent – State.
Ms. Tejshree K. Nalawade, Advocate for Respondent (Appointed)

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CORAM : ABHAY S. WAGHWASE, J.
RESERVED ON : 18th FEBRUARY, 2025
PRONOUNCED ON : 5th MARCH, 2025

JUDGMENT :

1. In this appeal, there is challenge to the judgment and order of conviction passed by Sessions Judge, Vaijapur, Dist. Aurangabad dated 04.10.2023 in Special Case Child Protection No. 01 of 2018 recording guilt of appellant for offence punishable under sections 376(n) and 506 of Indian Penal Code (IPC).

FACTUAL MATRIX

2. Informant's cousin, alleged minor, went missing from the house on the evening of 08.10.2017. After due search, report was

lodged by PW1 cousin for kidnapping the minor by unknown person, resulting into registration of Crime bearing No.394 of 2017 for offence punishable under section 363 of IPC. Subsequently, police parties succeeded in finding victim in the company of accused from Wadala Shivar. On her statement, further crime was added for commission of offence under sections 366A, 376(i)(n) of IPC and under sections 4, 6 and 17 of POCSO Act.

3. PW11 PHC Karale, PW12 PSI Muthal and PW13 PSI Ingale, who participated in the investigation at respective times and gathered evidence and charge-sheeted accused before learned Additional Sessions Judge, Vaijapur, who conducted Special Case Child Protection No.1 of 2018 for commission of above offences. Prosecution case rested on oral evidence of in all 13 witnesses and panch of documentary evidence, primarily including school extract, medical papers of both, victim and accused, and various panchanamas and CA reports. Defence did not adduce any evidence.

4. On appreciating the above evidence, learned trial Judge reached to a finding that present appellant i.e. accused no.1 Siddharth alone is held guilty for commission of offence under sections 376(n) and 506 of IPC and thereby acquitted other accused.

Precisely the above judgment is subject matter of present appeal.

SUBMISSIONS

On behalf of Appellant :-

5. Learned counsel for appellant at the threshold pointed out that, here, prosecution had miserably failed to prove victim to be a minor, and therefore, learned trial court rightly acquitted accused from the charges of POCSO Act. Thus, according to him, here, age of victim, who was alleged to be a minor, has not been demonstrated and further substantiated. According to him, there was acquaintance between accused and victim. That, there was stay of victim with accused for days together without any resistance or raising alarm or registering any protest. That, testimony of victim carries material omissions of forcible sexual intercourse. He further submitted that, her version in the statement and that before the court are not consistent. That, answers given by her in cross-examination renders her testimony unworthy of credence.

6. He further criticized the medical evidence adduced by prosecution and would specifically emphasized on the answers given by medical expert, who allegedly examined victim, that opinion reached is mere probability and it could be otherwise also. Thus, according to him, essential ingredients of section 376 of IPC are not

available. That, alleged bleeding is attributed to other natural biological phenomena. Hence, learned counsel put-forth that there is no convincing, cogent and reliable evidence on the charge of section 376 of IPC. Lastly, he would submit that, applicant a young boy and 24 years of age, is languishing in jail since October 2017 and is thus behind bars for more than 7 years. According to him, going by alleged date of occurrence to be of 2017 and the enhanced punishment by virtue of amendment carried out in 2018, i.e. subsequently the quantum of sentence pre-amendment would come into play and thus now applicant has already undergone almost the entire sentence inflicted upon him by trial court and considering the age, he prays for reducing the sentence to already undergone.

On behalf of Respondents :-

7. Strongly opposing the above submissions, learned APP submitted that, though appellant is acquitted of charges under the provisions of POCSO Act, he submitted that guilt is proved beyond reasonable doubt for commission of offence punishable under section 376 of IPC. According to him, though medical evidence in such cases is merely corroborative, he emphasizes that, here, as required by law victim's evidence itself being inspiring confidence, is rightly taken into account by relied to by learned trial Judge. He also refuted the submissions about pre-amendment sentence could be made

applicable and on this count, he took this court through the provisions itself. According to learned APP, charges are substantiated and there being no merits in the appeal, he seeks dismissal of the same.

8. Learned appointed counsel to espouse the cause and interest of victim, too strongly opposed pointing out that, sole evidence of prosecutrix is inspiring confidence. She pointed out that victim has categorically stated that she was threatened and forced upon. Thus, offence of rape is clearly made out, hence she opposes the appeal and rather supports the impugned judgment.

EVIDENCE ON RECORD

9. Prosecution has adduced evidence of in all 13 witnesses in support of its case. Role and status of prosecution witnesses are as under :

PW1 is the informant.

PW2 is the victim;

PW3 Suresh, **PW4** Pawan, **PW5** Jaya, **PW6** Sumer are the panch witness.

PW7 Dr. Rawlani is the Medical Officer.

PW8 Borude is the panch witness.

PW9 Dr. Katrina is also a Medical Officer.

PW10 Gitabharti is the Headmistress of School of Victim.

PW11 PHC Karale, **PW12** PSI Muthal and **PW13** PSI Ingale are the Investigating Officers.

10. For proper appreciation and comprehension, it would be fruitful to reproduce the very testimonies of relevant witnesses i.e. **PW1** informant; **PW2** victim; **PW7** Dr. Rawlani and **PW9** Dr. Katrina

11. **PW1** informant is the cousin of victim. He deposed as under:-

1. *I am residing in a house constructed in Gat No.11 in Ambewadi Shivar. My uncle Sanjay also resides adjacent to my house. XYZ, Urmila, and Akash are children of my uncle Sanjay. On 08.10.2017 I was at my house throughout the day. My cousin XYZ was also at the house. At that time age of XYZ was 15 years. Date of birth of XYZ is 02.01.2002.*

2. *On that day, we were taking our dinner at 07.15 p.m. and XYZ was sitting on the platform. After finishing my dinner I came out of the house and found XYZ was not present on the platform. We searched for XYZ in the house as well as in the surrounding area. We also searched XYZ in Ambewadi village but did not find her. We also searched XYZ in Gangapur city but did not find her. We inquired with our relatives but did not find XYZ.*

3. *Thereafter, at about 01.45 a.m. we went to Gangapur Police Station and I lodged F.I.R. against unknown person that he kidnapped XYZ. I have put my signature on the F.I.R. The F.I.R. now shown to me. It bears my signature and its contents are true and correct. It is marked at Exh.26.*

4. *On 13.10.2017 police have taken my supplementary*

statement. From 09.10.2017 till 13.10.2017 we were searching XYZ. During that we learnt that Sidharth Ashok Tupe has taken away my sister XYZ. Sidharth Tupe was taking small children to school in Omni Car. I am knowing Sidharth Tupe. (Accused Sidharth Tupe is under trial and till this time is not produced in Court from Jail. His learned advocate has conducted the trial in his absence by passing pursis at Exh.24 without challenging the identity of Sidharth Tupe.”

12. **PW2** is the victim. In her testimony at Exh.33 she deposed as under :-

“1. I reside at village Ambewadi along with my parents. The incident was occurred when I was studying in 9th standard. My birth date is 02.01.2002. At the time of incident, I was studying in Dhoot Kanya School, Gangapur. I used to go to the school by a bicycle. One Ashwini Dolas was my friend. On 02.01.2017 there were sports competition of our school at Aurangabad. On 02.01.2017, I along with other students and madam had been to Aurangabad to participate in the sports competition. The school had provided a one vehicle to us to go to Aurangabad. The said vehicle was from village Malunja. In the said vehicle myself, other girls and Dhas Madam were proceeded to Aurangabad. One man from village Malunja was driving the said vehicle. Ashwini Dolas acquainted me with the said driver.

2. One a one day Ashwini Dolas gave me a one phone number. The said number was 9604932143. Ashwini Dolas told me that the said number is of her house. She told me to make a phone call on the said number. On the next day, I made phone call on the said number. There was voice of male person on the

phone. I cut the said phone call. I received phone call from the said number on my phone. I picked up the phone call. The person from the other end told me that he is Siddharth. The said person told me that he intends to have friendship with me. I again cut the said phone call due to fear.

3. *On the next day the said person met me in the school. He told me that he is brother of Ashwini Dolas. Therefore, I supposed that the said person is brother of Ashwini hence I started talks with him. Thereafter, I and said person talked with each other on phone calls many times.*

4. *On a one day he told me that he likes me. He asked me to marry with him. Thereafter, we were talking with each other. On 08.10.2017, my father was out of house. My mother was cooking food in the house. At that time, the said person made phone call to me. We talked with each other on phone for long time. He told me that he intends to meet me and I should come on a road. There was none in the house, hence I came on the road. Siddharth had brought one white omni on the road. There were other two persons in the omni vehicle. Siddharth dragged me and made me seat in the omni van. The persons sitting in the van pressed my mouth and therefore, I could not raise shout. The said persons threatened me that if I raise shout they will kill my father. The said persons took the omni van towards Aurangabad. At that time, Siddharth was driving the vehicle. The said persons took vehicle towards Newasa via Bhendala Phata. From the talks of the said persons I came to know their names as Sambha and Anil. They were talking to keep the omni van at garage at Newasa. The said persons stopped the omni van near a one village across Ahmednagar Highway. The said persons dropped*

me and Siddharth at the said place. Thereafter, the said two persons went with omni van. Siddharth took me by a Kaccha road towards one house. There was one woman at the said house.

(The witness is giving answers after taking time). I came to know that the name of said woman was Ashwini Gawali. The said woman took me in the house and made me seat in a one room. At that time one unknown person came there. The said three persons were talking with each other. From their talks, I came to know the name of said person as Sonna Mote. Thereafter, the two persons who were in omni van came at the said house. The woman present at the said house cooked food. The said persons eat food. They also provided food to me. We all stayed at the said house.

5. *On 09.10.2017, all the said persons confined me in the said house and left the house. In the noon at about 03.00 p.m. the said persons returned to the said place. We all stayed at the said house.*

6. *On 10.10.2017, in the morning Anil left the said house. Siddharth and Sambha were talking that they have no guarantee of Anil and we should went to another place. Thereafter, Siddharth and Sambha confined me in the house by putting lock and went away. At about 04.00 p.m. Siddharth, Sambha and Ashwini Gawali returned to the house. We all stayed at the said house.*

7. *On 12.10.2017 also we stayed at the said house. On 11.10.2017 at about 07.00 a.m. Siddharth, Sambha and Ashwini took me by walk to one village. They took me in a one house*

situate in a one field. We reached there at about 04.00 p.m. All took a lunch at the said place. All persons from the said house left the house and went somewhere. Siddharth was present in the said house. Siddharth took me in the room and removed my all clothes. Siddharth made forcible sexual intercourse with me. Siddharth threatened me if I disclose the incident, he will kill my father and sister. We stayed at the said house. On 12.10.2017 1, Siddharth, Sambha and Ashwini stayed at the said house.

8. *On 13.10.2017 at 07.00 a.m. Siddharth, Sambha and Ashwini took me to a one temple. I came to know that the said temple was of goddess Ghodeshwari. Sambha and Ashwini threatened me that I should marry with Siddharth else they will kill me. Siddharth forcibly put gol en string (mangalsutra) in my neck. The said persons again took me at the said house situate in field. Siddharth forcibly committed sexual intercourse with me on two occasions.*

9. *On 14.10.2017, the said persons took me to one ghat by rickshaw. They were searching a room on rent at the said place. The said persons did not get room and hence they again brought me to the one house of relative of Ashwini. The police came at the said place. The police brought me, Siddharth, Sambha and Ashwini at police station. The police recorded my statement on 15.10.2017. The police sent me for medical examination to Civil Hospital, Aurangabad.*

10. *At the time of recording my statement, the police seized my nicker. I can identify the said nicker if shown to me. (The sealed envelope is opened in the presence of APP and advocate for the accused). There is one nicker in the said envelope. The*

said nicker now shown to me is the same. It is marked as article A. My statement was recorded before Judge in a Gangapur court. (There is one envelope in the file having signature of JMFC, Gangapur. It is opened in the presence of APP and advocate for the accused). The said statement now shown to me is the same. It bears my signature. The contents thereof are true and correct. It is marked as Exh.42.

11. I can identify Siddharth, Sambha, Anil and Ashwini. The witness has pointed out a finger to a person sitting in the dock with police and said that he is Siddharth. (The said person has been asked his name, he told that he is Siddharth). The witness has pointed out a finger to a person with mask sitting in the dock with police and said that he is Sambha. (The said person has been asked his name, he told that he is Sambha). Anil is not present in the court. (The advocate for accused Anil has filed application for exemption of Anil and it has been granted on the condition and not to dispute the identity of Anil). I can identify Ashwini Gawali.”

13. **PW7** Dr. Rawlani is the Medical Officer, who examined PW2 victim. In his testimony, he deposed as under :-

“On 15.10.2017, I was resident Medical Officer at Government Medical College, Aurangabad. On the said date the police gave letter to Medical Officer, GMCH for medical examination of the victim girl. (The witness has stated the name of the victim girl, but it is not mentioned to maintain privacy). The said letter now shown to me is the same. It is marked as Exh. 69. I called my female colleague Dr. Ashwini Torage to assist me. I asked the victim girl the history in vernacular language. The victim girl

narrated the history to me in vernacular language. I noted down the said history in the report in English language. The said history as mentioned in the report now read over to me is the same. The gist of the history was that the victim girl was acquainted with assailant and they had talks with each other and that on 13 & 14.10.2017 the assailant committed forcible sexual intercourse with the victim girl.

2. *Thereafter, I with the assistance of Dr. Ashwini Torage medically examined the victim girl. On her general examination no external injuries were found on her body. We have conducted gentle examination of the victim girl. I found that there were tears to hymen. There was spotting and presence of minimal bleeding in the vagina. I did not perform her per speculum and per vaginal examination of the victim girl. I have taken the vagina sample of the victim girl. Upon medical examination of the victim girl I formed the following opinion*

- There are signs of forceful penetration of vagina and possibility of sexual intercourse cannot be ruled out.

3. *I accordingly prepared the medical examination report. The said report now shown to me is the same. It is in my handwriting. It bears my signature and seal of GMC Hospital, Aurangabad. The contents of the medical examination report are true and correct. It is marked as Exh.70. The victim girl's consent form is attached with the medical examination report. It bears the signature of victim girl and mine signature."*

14. **PW9** Dr. Katrina is the Medical Officer, who examined accused. In her testimony, she deposed as under :-

“1. On 15.10.2017, I was working as Medical Officer, at sub District Hospital, Gangapur. On the said date, the police had referred Siddharth Ashok Tupe to Sub District Hospital Gangapur for medical examination. I medically examined him with reference to allegation against him about sexual assault. In the said examination I noticed the following aspect and injuries.

The patient was well nourished.

There was fresh abrasion 1 c.m., red in colour and age of injury within 6 hours. The said injury was on neck. However, I forgot to mention it in the register and certificate.

I had taken blood sample of the said person for blood grouping.

There was no evidence suggestive of that the person is not capable of doing sexual intercourse. He can very well perform the sexual intercourse.

2. I accordingly prepared the medical certificate. It is no shown to me is the same. It bears my signature. The contents are true and correct. It is marked as Exh.84.”

ANALYSIS

15. Before advertng to the evidence on the point of charges which are said to be proved, it is also required to be ascertain this court being first appellate court, whether prosecution is indeed at all failed to prove that victim was minor in view of definition provided under section 2(d) of POCSO Act. On re-appreciating the evidence of informant, it is emerging that, he is a cousin. Biological parents of victim are not examined on the point of date of birth of victim.

Though victim and her cousin i.e. informant have given date of birth and evidence of PW10 Headmistress, is of no avail to the prosecution, because firstly she is not carrying the original record, on the strength of which entry is taken in the extract Exh.86 tendered by her in the court. Her cross goes to show that, he is not in a position to satisfy on the point of source of said date incorporated in the record. It is imperative for the prosecution to substantiate the date of birth when provisions of POCSO Act are attracted. Here, the manner of cross of PW10 Headmistress gives scope for doubt about the exact date of birth appearing in the school record. Therefore, learned trial court has correctly discarded such evidence on the point of age and answered point to that extent in negative.

On the aspect of sexual assault, after appreciating the substantive evidence reproduced above and also on meticulously going through the cross of above witnesses, it is noticed that, evidence of victim, more particularly has remained unshaken. Her evidence shows that she did get acquainted with accused through her friend and acquaintance grew further. She has deposed that he expressed his desire to marry her. On 08.10.2017, she claims that, he called her, asking her to meet outside and then claims that she forced into a vehicle by associates of accused and taken to Aurangabad while appellant was behind the wheels. She deposed of

being threatened, if she raises voice. She has given the route of vehicle being taken from Newasa to Ahmednagar, taken to house of a lady, then confined in the house. Again further taken to one village and there she claims that on 11.10.2017, applicant disrobed her and had sexually intercourse with her. She also deposed being taken to a temple and golden string tied to her neck and again committing sexual intercourse on two to three occasions.

16. Learned counsel for appellant would hotly contest the above testimony on the ground that there was no resistance, objection or raising alarm during almost a week stay and in spite of moving to various places. That, there are no injuries of struggle on her person and that there was rather active submission. Learned counsel also invited attention of this court through the evidence of both medical experts and would submit that, answers given by them in cross renders the act of forceful sexual intercourse itself doubtful. This court finds no substance in the above submissions. Once, the victim testifies or deposes the act to be forceful, no contrary stand like passive submission about not raising alarm, not resisting is open for a person, who is accused of committing rape. Here, victim has categorically and repeatedly testified about being forced upon. Therefore, it is not open for anyone to give a different complexion to the story narrated by the victim. Here, medical expert has deposed

about receiving history from the mouth of victim herself. Thus, there is no further need for other independent corroboration. There is no reason for medical experts to issue false opinion. It is to be noted that, it is fairly accepted position that, medical evidence is opinion evidence, but when it is consistent with witness account, accusations get reinforced and fortified.

17. Perused the judgment under challenge. Learned trial Judge has apparently entertained each and every defence raised by accused. Evidence on record adduced by prosecution has been put to minute scrutiny. Answers given by victim and doctor while under cross are also correctly appreciated. Judgment rendered is well reasoned and after taking recourse to settled legal precedents. Consequently, there is no reason to over turn the judgment or find any fault or infirmity in the judgment.

18. Contention put-forth at the end that appellant had suffered almost 7 years out of 10 years and that he is of young age, he be let off on already undergone sentence also cannot be considered in the light of gravity of the offence.

19. There being no merits, appeal stands dismissed.

20. Fees of learned Advocate, who is appointed to represent the cause of respondent No.2 is to be paid by the High Court Legal Services Sub-Committee, Aurangabad as per rules.

(ABHAY S. WAGHWASE, J.)