



Judgment

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

CRIMINAL APPEAL No. 48 OF 2020.

Prashant @ Guddu Shankarrao
@ Vijay Ingle, Age 28 years,
Occupation – Labourer, resident of
Murtizapur, District Akola. ... **APPELLANT.**

VERSUS

The State of Maharashtra,
through PSO of Police Station
Murtizapur, District Akola. ... **RESPONDENT.**

Mr. S.S. Das, Advocate (Appointed) for the Appellant.
Ms M. Deshmukh, A.P.P. for the Respondent/State.

CORAM : NITIN B. SURYAWANSHI AND
PRAVIN S. PATIL, JJ.

DATE : MARCH 18, 2025.

ORAL JUDGMENT (Per N.B. Suryawanshi, J.) :

The appellant is convicted by the learned Sessions

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Court/Special Court, Akola vide judgment and order dated 01.08.2019 in Sessions Case No.81/2013 for offence under Sections 354, 448, 450, 376[i][j] of the Indian Penal Code read with Sections 3 and 4 of the Protection of Children from Sexual Offences Act, 2012 (POCSO) and is sentenced to suffer imprisonment for life, to pay a fine of Rs.50,000/- and in default to undergo rigorous imprisonment for one year. The appellant by this appeal challenges his conviction.

2. Prosecution case is that, Nita Gawai lodged a report on 08.02.2013 with Murtizapur Police Station alleging that on that day at about 8 p.m. she was at her house along with her two children. Her husband had gone to market. At that time Guddu Shankar Ingle came to her house. She enquired from him as to why he came, on that he did not answer. Therefore, she went to the house of her sister-in-law and told her that Guddu had come to her house and he is not going back. When she returned home, she saw that the appellant was doing bad acts with her daughter. She snatched the victim, who is aged 1 ½ years from the appellant. The appellant/accused caught hold her right

hand and told her that “घरात ये कोणाला माहित होत नाही ”, and thereby outraged her modesty, and therefore she shouted on which the accused ran away.

On the basis of this report, Crime No.35/2013 was registered against the accused for the offence under Sections 354, 449, 323 of the Indian Penal Code. On completion of investigation, charge sheet was filed. Trial Court framed charge against the accused under Sections 354, 376[i][j] read with Sections 511, 448, 450 of the Indian Penal Code and Section 8 of the POCSO Act. Thereafter on the application filed by the learned A.P.P. at Exh.56, additional charge was framed against the accused under Section 376[i][j] of the Indian Penal Code and under Section 3, punishable under Section 4 of the POCSO Act.

Accused denied the charge and his defence, as can be made out from the cross-examination is, that he had lent Rs.30,000/- to the husband of the informant and he was not returning it, so as to avoid repayment of said amount, he has been falsely implicated in a false case. The prosecution has examined 5 witnesses. The trial Court

found the appellant/accused guilty and convicted him, hence, this appeal.

3. Heard learned Counsel appointed for the appellant and learned A.P.P. for the respondent.

4. Learned Counsel for the appellant assailed the conviction stating that informant – PW 1, who claims to be an eye witness to the alleged incident, has improved her version. There are material variations and omissions in her evidence. She has deposed in the Court contrary to the allegations made by her in the first information report, therefore, her evidence should not be relied upon. She has not deposed about penetration at the hands of the accused, and has only stated that she saw the accused touching private part of the victim. This cannot be said to be an attempt on the part of the accused. The trial Court has failed to properly appreciate the evidence of P.W.1 and therefore, the conviction recorded by the trial Court is unsustainable. The trial Court has erred in relying on the testimony of P.W.1 while convicting the appellant.

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5. He further submits that though P.W.5 Dr. Vivek Karale, has proved the injury certificate, he has admitted that he has not mentioned age of the injury suffered by the victim, hence, it cannot be positively said that the injury which was caused during commission of crime was by the accused. Further submission is that if there was penetration, then there should have been swelling, bleeding or scratches. None of these are mentioned in the injury certificate, and therefore, the prosecution case is liable to be disbelieved. He submits that the evidence of medical expert is secondary evidence and not a substantive evidence and it can only be relied upon for the purpose of corroboration. In absence of any substantive evidence of penetration, the evidence of medical officer cannot be relied upon. He submits that after framing of the additional charge under Section 376[i][j] of the Indian Penal Code and Sections 3 and 4 of the POCSO Act, no opportunity of cross-examination was given, and thus, this has vitiated the trial. According to him, the prosecution case is liable to be disbelieved in view of the glaring omissions in the evidence of P.W.1 about touching private part of the child.

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6. By relying on the judgment of this Court in case of **State of Maharashtra .vrs. Devappa Sidappa Kamble @ Muniv and others – 2004 All MR (Cri) 2716**, he submits that benefit of doubt be given to the appellant. He further submits that though the spot of incident is in hutments, and all the huts are abutting to each other, nobody has witnessed the incident. On this ground also for non examining independent witness, the prosecution case is liable to be disbelieved. He therefore, submits that the trial Court has ignored these material aspects and deficiencies in the prosecution evidence, hence, the conviction recorded by the trial Court is liable to be quashed and set aside, and the appellant is entitled for acquittal.

7. Learned A.P.P. on the other hand supported the impugned judgment of trial Court. She submitted that merely because there are few omissions in the evidence of P.W.1, her evidence is not liable to be rejected in its entirety.

8. There is presumption against the appellant under Section

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29 and 30 of the POCSO Act, which the appellant has failed to discharge. The evidence of P.W.1 is corroborated by medical evidence and evidence of PW 2 and PW 3. She therefore submits that the trial Court has rightly convicted the appellant, and there is no merit in the appeal, hence the same may be rejected.

9. The trial Court while recording conviction of the appellant has relied on the evidence of P.W.1 and medical evidence. P.W.1 informant is an eye witness to the alleged incident. She has deposed that on 08.02.2013 at about 8 p.m. she was present at her home along with her children and her husband had gone to market. At that time the victim was aged about 14 months and son was aged about 3 years old. At that time accused entered her house, she asked as to why he has come to her house, on which he asked whereabouts of her husband. She told her husband is not present at home. Then the accused sat at the door of her house. In spite of her asking, the accused did not leave, hence, she went to the house of her sister-in-law namely Arti and Komal and narrated the incident to them. Then she returned to her house and heard shouts of cries of her daughter [victim]. She

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saw that the accused made the victim to sit on his lap and he was touching her private part with his finger. Accused had unzipped his pant and taken out his private part. She raised objection, upon which the accused caught hold her hand and asked her “दोन मिनिटाचा काम आहे घरात चाल ”.

She raised shouts upon which her sister-in-law in law Arti and Komal rushed to her house. That time accused ran away. Then she went to the police station and lodged report [Exh.24]. Pursuant to her report, the first information report [Exh.25], was registered.

10. In cross-examination she stated that in the lane in which her hut is situated, houses are adjacent to each other. She admitted that she has not stated in her police statement that “the accused made my daughter to sit on his lap and he was touching her private part with his finger”. Omission to the effect that, “after the inception I started shouting and in pursuance of my shout people gathered there”, was brought on record in her cross. She also admitted that when accused entered her house, she was frightened and therefore, she went

to call Arti. She denied the suggestion that since her husband did not want to return Rs.30,000/-, which was borrowed from the accused for purchasing goats, therefore, she implicated the accused in false case.

11. P.W.2 Komal is sister-in-law of P.W.1. She deposed that she resides near the house of P.W.1. On 08.02.2013 at about 8 p.m. her sister-in-law – P.W.1 had been to her house and narrated that accused Prashant has come to her house under influence of liquor and inspite of asking, he is not leaving the house. She asked P.W.1 to narrate the incident to her sister-in-law Arti. Accordingly P.W.1 left her house, and after some time she heard shout of P.W.1, she and Arti both rushed to the house of P.W.1 and saw accused Prashant running away from the house of P.W.1. When she asked P.W.1 as to what has happened, she narrated the act committed by the accused.

In cross-examination she admitted that P.W.1 told her about the incident, therefore, she came to know about it, and she has not witnessed the incident.

12. P.W.3 Siddharth Khandare is resident of same locality in

which P.W.1 resides. He deposed that on 08.03.2013 he was present on a road abutting to Panchshilwadi, Murtizapur. At that time he saw accused Prashant coming out of the lane. He was in hurry. He was frightened. He asked him as to where he was going, however, he did not reply and went towards Morarji Square. Then he went to the house of Pramod Gawai and saw some women were present and P.W.1 was shouting that accused Prashant has misbehaved with her daughter.

In cross-examination, he admitted that on 08.02.2013 till 9 p.m. in the night he was at his work. He has also admitted that at 8 p.m. on that date, he was not present at home and he was at work. Therefore, his evidence is of no help to the prosecution.

13. P.W.4 – Vasanta Ingle is the Investigating Officer, who has reduced the report of informant [Exh.24] in writing and registered first information report [Exh.25]. He proved the spot panchnama [Exh.31].

14. P.W.5 Dr. Vivek Karale has examined the victim on

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09.02.2013 and has issued injury certificate [Exh.38]. He deposed that he examined the victim, who was brought by her parents. There was alleged history of inserting finger in the vagina at about 8.30 p.m. with slight bleeding after the incident. On examination of victim, he found that there was redness around peri-urethral region and labia minora. There was hymeneal tear at 12.00 O'clock and 6.00 O'clock position with edges inflamed and vaginal mucosa was congested. No other injury mark or stains was seen. History and finding was suggestive of penetration. If a finger is inserted into the vagina such type of injury may be sustained.

In cross, he stated that history was given by the mother of the victim. He denied that without the injury there cannot be pain in labia major minora. He admitted that redness of labia minora can be caused due to various reasons. He volunteered that it can be caused by trauma. He admitted that redness of libia minora can be caused due to fungal infection or urinal infection or bacterial infection. He denied the suggestion that in case of child between 0 to 8 years on hymen tear there has to be bleeding. He stated that it is correct to say

that hymen can be torn due to various reasons. He stated that to know the exact reason for infection and redness in labia minora, he suggested vaginal swab. He admitted that in small children, rashes can be caused because of napkin. He admitted that he has not mentioned the age of injury in the injury certificate [Exh.38].

15. On careful scrutiny of the prosecution evidence, we are of the view that the prosecution has proved its case beyond reasonable doubt. Evidence of P.W.1 in support of the incident is cogent and reliable, though there are few improvements in her evidence, those are not of such magnitude to render her entire evidence doubtful. Improvement in her evidence, in respect of incident as alleged by the appellant though is there, it can be said that she has explained the exact bad things done by the appellant to the victim, and therefore, it cannot be said that she has materially improved her version in the evidence. The omissions brought in the evidence of P.W.1 are not proved from the investigating officer, so the defence cannot rely on those omissions.

16. Presence of appellant on the spot is confirmed by P.W.2 in her evidence. P.W.2 has reached to the spot of incident immediately after the incident was over, and P.W.1 narrated the incident to her.

17. Medical evidence further corroborates the evidence of P.W.1. Victim was examined immediately on the next day of the incident. The incident had taken place at about 8 p.m. on 08.02.2013 and the victim was examined on 09.02.2013 at about 1 p.m. P.W.5 Dr. Vivek has stated that P.W.1 has given history of insertion of finger in the vagina of victim at 8.30 p.m. with slight bleeding after the incident. On examination of victim, P.W.5 found that there was redness around peri-urethral region and labia minora, and there was hymeneal tear at 12.00 O'clock and 6.00 O'clock position with edges inflamed and vaginal mucosa was congested. He therefore opined that history and finding was suggestive of penetration, and if a finger is inserted into vagina, such type of injury can be sustained. This further corroborates the prosecution case that the appellant has done penetrative sexual assault on the victim due to which she suffered the

injuries mentioned in Exh.38.

18. We do not agree with the submission of the learned Counsel for the appellant that there was no evidence of penetration and the evidence of medical officer is not a substantive piece of evidence and it can be only used for corroboration. In the light of evidence of P.W.1, it can be said that the appellant has committed penetrative sexual assault on the victim and the said fact is corroborated by the medical evidence.

19. The trial Court has properly appreciated the evidence on record and has rightly convicted the appellant. No merit is found in the appeal filed by the appellant.

20. However, we find that the sentence imposed on the appellant is harsh and excessive. In the facts of present case, we are of the opinion that sentence of 10 years rigorous imprisonment would meet the ends of justice. In the result, Criminal Appeal is partly allowed. The conviction of appellant by the Sessions Court/Special

Rgd.

Court, Akola vide judgment and order dated 01.08.2019 in Sessions Case No.81/2013 under Sections 354, 448, 450, 376[i][j] of the Indian Penal Code read with Sections 3 and 4 of the Protection of Children from Sexual Offences Act, 2012 is maintained. However, the appellant is directed to undergo rigorous imprisonment for 10 years.

Sentence of imposition of fine is maintained.

21. The learned Counsel appointed to represent the appellant be paid his professional fees as per Rules, within a period of four weeks of the date of uploading of this judgment.

JUDGE

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