IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO.584 OF 2016

Dilip s/o Sambhaji Gajbhare
Age: 46 years, Occu.: Labour,
R/o. At post Bodhadi,
Taluka Kinwat,District Nanded .. Appellant

Versus

The State of Maharashtra
Through Police Inspector,
Police Station Kinwat,
Taluka Kinwat, District Nanded. .. Respondent

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Mr. M. A. Tandale, Advocate for the appellant.
Mrs. V. S. Choudhari, APP for the respondent – State.

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CORAM : SMT. VIBHA KANKANWADI AND
S. G. CHAPALGAONKAR, JJ.

DATE : 26th June, 2023

JUDGMENT :- (Per Smt. Vibha Kankanwadi, J.)

. Present appeal has been filed by the original accused challenging his conviction by the learned Special Judge, under the POCSO Act/Sessions Judge, Nanded in Special Case No.35 of 2014 dated 16.05.2016, whereby the accused was held guilty of committing offence punishable under Section 376(1) of Indian Penal Code and Section 5(m) punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012

(hereinafter referred to as the “POCSO Act”).

2. The prosecution story in short is that informant is the mother of the victim. Victim was aged 6 years and she has one sister and brother aged 3 and 1 years respectively. The father of the victim was a labour. The grandmother (mother’s mother) of the victim resides adjacent to the house of the victim. Accused resides behind the house of the victim and the informant used to go to his house for fetching drinking water.

3. The prosecution story further is that the informant lodged report with Kinwat Police Station, District Nanded on 09.09.2014 disclosing that she had gone to the weekly Bazar around 2.00 p.m. on 08.09.2014. The children were at home. After purchasing necessary articles, she came back to the house and she found that the victim was in frightened condition. Informant asked her as to what has happened, then the victim pointed out towards her private part and told that it is paining. The mother checked the daughter and found that blood was oozing from the private part and it was swollen. Therefore, she asked as to what has happened, then the victim told her in her language i.e. *Lamhani* that the accused had offered one rupee when she was playing in front of the house and took her with him. Her mouth was gagged and he has committed rape on her. The informant told the said fact to her mother and then they went to the house of the sister of the accused and told her the said fact. After returning to house,

informant informed the said fact to the Police Patil and Deputy Sarpanch. The father of the victim had not returned early. Therefore, she went to police station on the next day and lodged the report.

4. After the report was lodged, the victim was referred for medical examination. Panchanama of the spot was carried out. The clothes of the victim were seized. Accused came to be arrested. His clothes were seized. He gave memorandum and discovered mattress which he had led at the time of act. Statements of witnesses were recorded. Accused was got medically examined. The medical report of the victim was collected and after completion of investigation, charge-sheet was filed.

5. The accused was not released on bail. Upon his production before the learned Special Court, charge was framed. When he pleaded not guilty, the trial has been conducted. Prosecution has examined in all twelve witnesses to bring home the guilt of the accused. After hearing both sides and perusing the evidence, the learned Sessions Judge held the accused guilty. He has been sentenced to suffer imprisonment for life and to pay fine of Rs.1,000/- in default to suffer rigorous imprisonment for three months for the offence punishable under Section 5(m) punishable under Section 6 of the POCSO Act. In view of Section 42 of the POCSO Act, no separate punishment was awarded for the offence punishable under Section 376(1) of the Indian Penal Code, though he has been held guilty.

Recommendation was also made by the learned Sessions Judge to the District Legal Services Authority under Section 357(A)(2) of the Code of Criminal Procedure for deciding the quantum of compensation to be awarded to the victim.

6. Heard learned Advocate Mr. M. A. Tandale for the appellant and learned APP Mrs. V. S. Choudhari for the respondent – State.

7. It has been vehemently submitted on behalf of the appellant that the learned Trial Judge has not appreciated the evidence properly. The major lacunas though pointed out have not been dealt with. As per the FIR and the testimony of P.W.1, the incident has taken place around 2.00 p.m. on 08.09.2014, whereas the FIR has been registered at 17.00 hours on 09.09.2014. This huge delay has not been explained by the informant. Any neighbour of the house of the accused has not been examined to prove that the accused was the person who was taking the girl along with him in the house. The offence was committed in the afternoon and, therefore, definitely, there would have been witnesses to witness that the accused was taking the victim to his house. Though the victim has been examined in this case, she had not stated that she had raised alarm so that she could be rescued. Testimony of the informant would show that whatever she has stated was on the basis of information given to her by her minor daughter. Same is the case with P.W.5 – the grandmother of the victim. There are

contradictions and omissions and improvements in their testimonies. The testimony of the victim P.W.9 would show that she has given her age as six years, but it can be seen that she was tutored by the grandmother, as she admits that the grandmother had told her what to say before the Court. The testimony of P.W.8 – the medical officer would show that the history was narrated by the mother. There was no external injury to the victim. Though P.W.1 deposes that the blood had oozed from the private part of the girl, but testimony of P.W.9 Dr. Santosh would show that the said statement of P.W.1 is not supported by the observation and examination by the medical officer. Therefore, when the medical officer admits that there was no penetrative sexual assault, then question of proving the ingredients of offence under the POCSO Act does not arise. The accused had come with the case that the water tap is near his house and he was collecting amount of Rs.15/- for the said water supply, which the informant wanted to avoid to pay and, therefore, there is false implication. When the Trial Court has not considered all these aspects, the conviction awarded cannot be allowed to be sustained. Learned Advocate for the appellant would canvass for setting aside the conviction and letting the accused set at large.

8. Per contra, the learned APP supported the reasons given by the learned Trial Judge. The victim is six years old girl and, therefore, it could not have been the fact that she is not the child as defined under the POCSO

Act. There was no reason for her to have any grudge or *mala fides* against the accused. The only possibility is that of tutoring, but the cross-examination of the victim cannot be so interpreted to come to the conclusion that the girl was tutored. The testimony of P.W.1, P.W.5, P.W.9 and P.W.10 find support with each other and, therefore, the conviction that is awarded is perfectly correct.

9. It is to be noted that the prosecution has come with a clear case that the victim in this case is six years old girl. This fact is not challenged by the accused in any manner. A six years old girl cannot have an intention to implicate anybody. Therefore, it is required to be seen as to whether there was tutoring of the victim by anybody. The suggestion that was given to P.W.9 is that she was tutored by the grandmother. Though she has answered yes at the beginning, the subsequent suggestion has been denied by her. She denied that she was deposing at the instance of her grandmother. If we consider the testimony of P.W.5 – the grandmother, we can get that in the cross it has not been asked as to what was the reason for which she could have implicated the accused. In the FIR itself P.W.1 had stated that occasionally, they used to go the the house of the accused for fetching drinking water. Now, it has been tried to be brought on record that the accused was collecting amount of Rs.15/- from those family members, who were taking the water at their residence. It is absolutely not brought on

record by the accused as to who had appointed him to collect the water tax. He could have definitely examined the Grampanchayat authorities to support his contention. If he was collecting the said amount without any authorization, then he should not get annoyed or disheartened when such amount is not paid. Therefore, the said reason appears to be not convincing at all.

10. The testimony of P.W.1, P.W.5 and P.W.9 clearly establishes that P.W.1 was not at home and the victim was playing outside the house. Accused came and offered her one rupee. He had taken her in his house and he had then placed mattress on the floor, by disrobing the girl, he had committed rape on her. Before proceeding to see the medical evidence, testimony of P.W.9 is also important. After asking the preliminary questions, the learned Special Judge had found that the girl can understand the questions put to her in Marathi and also can give answers to those questions. The evidence is taken down in question and answer form. She has narrated the same facts in her examination-in-chief. In her cross-examination, she has told that she understands Marathi alphabets. She can also understand numbers with figures. As regards day of incident is concerned, she has categorically stated that mother was not at home and father had gone for labour work. She was offered one rupee by the accused when she was playing outside the house. She went along with accused to his house and she has stated

that she had narrated the said incident to her mother and grandmother, but then she was clear in saying that the mother and grandmother are not staying together. On the day of incident, she says that she had come along with grandmother. Though she has stated that grandmother had told her what she should state before the Court, but then she has denied that she is deposing the same thing at the insistence of her grandmother. Only on the basis of a stray statement, it cannot be stated that her testimony is the outcome of tutoring. P.W.10 is the social worker, who was working on Dakshata Samiti of the police station. She had also even seen the girl and examined her when she was called on 09.09.2014. The girl had stated the same facts even before her. Therefore, there is consistency in the evidence of the girl as well as her mother and grandmother. Even if for the sake of arguments, we take that there was some dispute in respect of collection of amount in respect of the drinking water, yet it is unbelievable that, for that purpose, the reputation of the girl would be put to stake by making such kind of allegations.

11. P.W.8 Dr. Santosh Bhosle is the medical officer, who had examined the girl on 10.09.2014. The learned Advocate appearing for the appellant has pointed out that when the incident had taken place on 08.09.2014, the FIR was lodged on 09.09.2014, then why the examination should be on 10.09.2014. The belated examination of rape victim is required to be

considered and still, if the positive report is given, then it requires to be viewed with doubt. It is to be noted that the informant is residing in a village. From there she had gone to the place of Taluka, where the police station was situated and it appears that the rural hospital or Sub District Hospital was not equipped with the expertise and, therefore, the girl was taken to the District Hospital for medical examination on the next date. P.W.7 Balaji, who is police constable, has been examined to prove that he along with one lady police constable had taken the victim to Sub District Hospital and the doctor there informed them that they will have to take the girl to Civil Hospital. It is then stated by him that they had left at late night with reference letter. Thus, there is explanation to the belated medical examination by the prosecution. It is unfortunate scenario that even after independence, health services are not available in many remote areas. The basic medical facilities are also not available there and, therefore, we cannot expect that expert medical officers would be available at such Sub District Hospitals or Rural Hospitals. Those victims will have to be brought to the District Hospitals for the examination. No doubt, the loss is that even services of private practitioners having requisite expertise can also be taken for the examination of such victims and necessary provisions have been made in the law. The purpose behind those provisions is that the rape victim should be taken to the nearest medical expert so that the evidence should not get lapsed or destroyed. Unfortunately, either police do not

approach those private medical practitioners or sometimes they do not get cooperation from the private practitioners. This reality will have to be considered in this case also. Therefore, the belated examination of the victim cannot be a point for the accused to give benefit.

12. P.W.8 Dr. Bhosle has stated that when he examined the victim she was not able to understand Marathi language and, therefore, the history was given by the mother. To this also, learned Advocate for the appellant has objection. It appears that the girl usually speaks *Lamhani* and at that time, she was not able to understand Marathi was the fact. Taking into consideration her age, if her mother discloses that history to the medical expert then there is absolutely no wrong in the same. The physical examination of the girl showed that there was evidence of whitish discharge around urethra. There was mucosal laceration on right side of labia minora near junction with hymen, size 0.5 c.m. x 0.2 c.m x subcutaneous deep, reddish in colour and inflamed. There was evidence of guarding and tenderness on right side of libia mijora and minora. Hymen was intact. The age of the injury was 1-2 days and, therefore, over all opinion was that the findings were consistent with sexual assault, however, the opinion was kept pending till receipt of FSL report. He saw the report at the time of his testimony. The CA report showed that no semen or blood on vaginal swab, yet still he was consistent with his finding as to sexual

assault on examination of victim recorded by him in his report Exhibit-34. He has also explained that as per the history given by the mother, the genitals were washed and, therefore, it may be the reason as to why the CA report was negative. In the cross-examination he admitted that word deceased has been written by him mistakenly. He admitted that there was no vaginal penetration. There was no perennial tear or injury to urethra or anus. Except the said admission, there is nothing in the cross which would destroy his finding. He denied the suggestion that the injuries shown in the examination report are possible by fall from cycle or by falling on the road or hard and blunt substance. Therefore, the medical evidence supports the testimony of the victim. Section 5(m) of the POCSO Act prescribes punishment, "Whoever commits penetrative sexual assault on the child below twelve years". The medical officer though in cross-examination has admitted that there was no vaginal penetration from the medical point of view, yet we are required to consider the penetrative sexual assault from legal point of view. Section 3 of the POCSO Act defines penetrative sexual assault and the present case would definitely fall in Section 3(b) or (c) of the POCSO Act when it is the observation that there was mucosal laceration on the right side of labia minora. There was also evidence of guarding and tenderness on right side of labia mijora and minora. It amounts to manipulation to the part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of the body of the child and when

such penetrative sexual assault is made on the child below 12 years of age, then definitely the offence under Section 5(m) punishable under Section 6 of the POCSO Act is said to have been proved.

13. The prosecution has also examined the panch to the spot panchanama, panch to the memorandum and discovery panchanama. They have supported the prosecution story, however, there is no necessity to refer to their testimony as even on the basis of the other material as discussed above, the offence is proved beyond reasonable doubt.

14. Learned Advocate for the appellant has relied on the decision in ***Hanuman Govind, Nargundkar and Another Vs. State of M. P, (AIR 1952 Supreme Court 343),*** wherein it has been held that, the opinion on typed document does not fall within the ambit of Section 45 of the Evidence Act and is inadmissible. It is to be noted that in this case, P.W.8 the medical officer has referred the format and it is not a typed document and, therefore, the said ratio is not applicable here. He has further relied this authority for appreciation of circumstantial evidence also, but in this case there is direct evidence in the nature of the girl. Therefore, on this point also, the said authority is not useful for the appellant. He further relied on the decision in ***Ananda Kirti Jamatia Vs. State of Tripura, (2019 Cri.L.J. 880).*** It is on the point of non explanation of delay in lodging the report. We would like to say that the delay depends upon the nature of the

allegations. Here, in this case, the delay has been explained if at all there is delay. We cannot also forget that the informant is an illiterate lady from a tribe and a remote area. Taking help of the Sarpanch, Up-sarpanch or Police Patil by her to lodge report with the police also cannot be viewed with suspicion. An illiterate person would definitely depend on somebody. There was no serious dispute between P.W.4 Balaji – the Police Patil and the accused. Further, the prosecution has also proved the birth date of the girl by examining the Gramsewak and bringing the birth register. Therefore, the cumulative effect of the entire evidence is the proof of the guilt of the accused beyond reasonable doubt.

15. We do not find any merit in the present appeal. The appellant was aged 46 when the offence was committed and it has come in the evidence that he was residing with his wife and children. Still, he has ravished a small child aged six years and, therefore, no leniency can be shown as against him. Hence, the appeal stands dismissed.

[S. G. CHAPALGAONKAR]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm