



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CRIMINAL APPEAL NO. 489/2023

Mr. Shekhar s/o Laxman Dhakate,
Aged 52 yrs., Occ. Labour,
R/o. Pivali Nadi, near Ganesh Park,
Nagpur.
(At Central Jail, Nagpur)

..... **APPELLANT**

VERSUS

1. State of Maharashtra,
through its Police Station Officer,
Police Station, Yashodhara Nagar,
Nagpur, Dist. Nagpur.
2. XYZ (victim)
Spl. POCSO Case No.156/2018,
Crime No.100/2018, registered
by the Police Station Officer,
Yashodhara Police Station,
Nagpur, Dist. Nagpur.

.....**RESPONDENTS**

Mr. Ananta Ramteke, Advocate (appointed) for appellant.
Mr. S.S. Doifode, APP for respondent No.1/State.

CORAM : **VINAY JOSHI AND**
VALMIKI SA MENEZES JJ.

DATE OF JUDGMENT : **04.10.2023**

JUDGMENT : (PER VINAY JOSHI, J.)

Challenge in this appeal is to the conviction of sole accused in Special Case No.156/2018 for the offence punishable under Sections 376(2)(f)(k), 354(A)(i) of the Indian Penal Code ('IPC') and Sectoins 4,

6, 12 of the Protection of Children from Sexual Offences Act ('POCSO'). The Trial Court has imposed maximum punishment for the offence punishable under Section 6 of the POCSO Act, to suffer imprisonment for life along with fine.

2. The appellant accused has assailed the said judgment and order of conviction on the ground that the Trial Court failed in error in convicting accused on the basis of sole testimony of the victim girl. There is considerable delay in lodgment of First Information Report ('FIR'). The victim's evidence is not supported by her own sister and mother. The incident as narrated by victim is improbable, hence seeks for reversal of the judgment and order of conviction.

3. It is a case of rape/penetrative sexual assault by a father against his own minor daughter. The informant (victim) was residing with her parents and brother. Victim was a college going girl. The accused was father of victim who was liquor addict. The accused was not doing any work for gain. Victim's mother and elder brother used to do labour work during day hours. Always in absence of other family members, accused used to touch inappropriately to the victim during the period of one and half years preceding to the occurrence. The victim requested accused (her own father) for not to do such ugly things, however by giving threats, he continued his indecent act.

4. As usual on 06.04.2018 , victim returned from college around 02.30 p.m.. At that time, accused was alone at their house. While victim was changing clothes, accused asked her to change the clothes in his presence, but she went to the bathroom. No sooner she came out of the bathroom, the accused closed the outer door and dragged her into the kitchen. He took out waist belt and beat her. On the point of knife, he compelled victim to undress and had forcibly sexual intercourse with her. Accused also threatened her for not to disclose the incident to anyone. In the evening, victim girl disclosed the happening to her mother as well as her married sister. Since the culprit was the head of family, under fear of defamation, the matter was not immediately reported to the Police. However, on 11.04.2018, victim gathered courage, went to the Police Station with her mother and lodged report.

5. On registration of crime, victim was sent for medical examination. On completion of investigation, charge-sheet has been filed. On denial of guilt, the prosecution has examined as many as eight witnesses to establish the guilt. The defence of accused is of total denial and false implication. Moreover, accused stated that the victim was in love with one boy, for which he scolded, therefore, out of anger, victim has lodged false report. Believing sole testimony of victim coupled with medical evidence, the Trial Court held that the prosecution succeeded in proving the guilt and accordingly punished him.

6. The prosecution has examined victim, her sister, mother, Medical Officer, Panch witness and the Police Officer. Obviously, having regard to the nature of incident, the victim's evidence is crucial. Victim girl has stated that for the period of one and half year preceding to the occurrence, her father (accused) was touching her chest and private part. She expressed her displeasure, however accused gave threats for not to disclose. She deposed that on 06.04.2018, in the afternoon, she returned from the college and was about to change her clothes. Accused asked her to change the clothes in his presence, but she went to the bathroom for changing clothes. Her father closed the door, dragged her into the kitchen and caused her to fall on the ground. Accused took out his waist belt and beat her. He compelled her to remove the clothes on the point of knife, had forcibly sexual intercourse with her. She has disclosed the things to her mother in the evening, but out of fear, they did not immediately lodged report.

7. The victim is cross-examined at length. Besides general denial, story narrated by victim has not been specifically challenged. It is suggested that, as victim her mother and brother were fed up with accused, they have filed false case. However, to substantiate said suggestion, nothing has been brought on record. During statement under Section 313 of the Code of Criminal Procedure ('Code') line of

defence is totally changed.

8. The prosecution has examined victim's sister Smt. Chhaya Meshram (PW-4) to whom victim has disclosed the incident on the same evening, however she turned hostile. Likewise is the case of victim's mother (PW-5). She also did not support the prosecution case. The defence extracted some admissions from the cross-examination of hostile witnesses, but it does not carry any meaning as they have already exposed the hostility. One must understand that they found it hard to depose against their own father and husband. Therefore, that cannot be taken adverse to the prosecution case.

9. The prosecution has examined PW-3 Dr. Madhavi Patil, who has examined the victim on the point of rape. It is her evidence that she took down the history narrated by victim which was specifically about the rape committed by father. She stated that there were no injury on her person, however, hymen was torn with old healed tear. Medical examination report (Exh.33) is placed on record. The report indicates that hymen was torn with old healed tear. Medical officer opined that sexual intercourse might have occurred as hymen was torn. Learned defence counsel has submitted that the medical report does not support the prosecution case. However, it is to be noted that alleged incident occurred on 06.04.2018 whilst victim was medically examined after five

days i.e. on 11.04.2018. Therefore, it is not possible to find traces of violence or of sexual assault after gap of five days.

10. In order to establish minority of victim, the prosecution has produced victim's birth certificate issued by Nagpur Municipal Corporation. As per birth certificate, her date of birth is 10.09.2001. There is no challenge to the birth certificate which carries presumptive value. Moreover, the date of birth of victim has not been challenged during the course of evidence. Therefore, it is evident that the victim was minor i.e. a "child" within the meaning of Section 2(d) of the POCSO Act, at the relevant time. The defence has also criticized the delay in lodgment of FIR. True, though the alleged incident occurred on 06.04.2018, however report has been lodged on 11.04.2018 i.e. after five days. It is to be born in mind that it is a case of rape of minor by her own father. FIR itself bears explanation that out of fear of defamation, initially report was not lodged. One should imagine the mental condition of the victim, when the protector and head of the family itself is a culprit. In our conservative society, the people remain back footed to loge report of sexual assault which has many repercussions. Therefore merely on the ground of delay, the reliable testimony of the victim cannot be discarded.

11. The medical examination report Exh.33 bears a specific history of sexual abuse by father which assumes significance. The prosecution has proved FIR (Exh.13) which corroborates the version of victim. It has come in the evidence of PW-8 Head Constable Smt. Asha Aglawe that at the time of lodgment of report, victim was accompanied by her mother and social worker. FIR (Exh.13) bears thumb impression of mother as well as signature of the social worker. Pertinent to note that though the mother did not support the prosecution case, however her presence with victim at the Police Station assumes significance. Since the culprit is her own husband, she may not have gathered courage to give evidence. It is well settled that if the victim's testimony inspires full confidence, the Court can safely base conviction. There is no reason to discard the testimony of victim who has been sexually abused at her own house. Though the accused took defence about the affair of the victim, and the scolding by father on said count, however the same was not put to the victim. The evidence of victim coupled with medical evidence inspires full confidence. The victim has no reason to falsely implicate her own father at her detriment. The Trial Court has properly analyzed the evidence which calls no interference. We are of the considered view that the prosecution has duly established the alleged offence.

12. On the point of sentence, learned defence counsel would

submit that the punishment imposed by the Trial Court is harsh one. The accused is convicted mainly for the offence punishable under Section 376(2) of the Indian Penal Code as well as Section 4 read with Section 6 of the POCSO Act. In terms of Section 42 of the POCSO Act, the accused is liable for the punishment which is greater in degree. The occurrence took place on 06.04.2018, meaning thereby prior to the amendment to Section 6 of the POCSO Act, enhancing the quantum of minimum rider. The then prevailing Section 6 of the POCSO Act provides punishment for penetrative sexual assault of rigorous imprisonment for a term which shall not be less than 10 years, but which may extend to the imprisonment for life along with fine. Section 376(2) of the IPC equally provides punishment of rigorous imprisonment for a term which shall not be less than 10 years, but which may extend to the imprisonment for life. Thus, under both provisions the then prevailing punishment was having minimum rider of 10 years rigorous imprisonment.

13. The Trial Court has imposed punishment under Section 6 of the POCSO Act to undergo imprisonment for life along with fine. While seeking leniency, it is contended that the accused is the only breadwinner of the family on which entire family is dependent. The accused belongs to poor strata of the society, and till date he has undergone imprisonment for near about 5 years. Though the statue

prescribes minimum punishment for 10 years, however it is not a case to show leniency. Always a right balance has to be maintained while imposing punishment which is a delicate task of the Court. It is to be noted that the accused-father has committed rape on his own daughter. The punishment should be appropriate to teach the lesson to the accused as well as pass appropriate message. Having regard to the peculiar facts of the case, the term of 14 years of rigorous imprisonment with fine would be appropriate quantum of sentence to meet the ends of justice.

14. In view of above, by maintaining the finding of guilt, we hereby alter the extend of sentence for the offence punishable under Section 6 of the POCSO Act. Accordingly, we modify the punishment for Section 6 of the POCSO Act by directing accused to suffer rigorous imprisonment for 14 years along with fine of Rs. 5000/- in-default to suffer further rigorous imprisonment for six months. The rest of the order of the Trial Court is maintained as it is.

15. Appeal stands partly allowed and disposed of in above terms.

(VALMIKI SA MENEZES, J.)

(VINAY JOSHI, J.)